



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
Civil Case 193 of 2003**

**STEPHEN KARIUKI MAHUGU.....PLAINTIFF  
VERSUS  
CALTEX OIL (KENYA) LTD.....DEFENDANT**

**RULING**

This is an application by Section 3A of the Civil procedure Act and Order 50 rule 1 of the Civil Procedure Rules. The Applicant is the Defendant and seeks a mandatory Injunction ordering the Plaintiff to give up vacant possession of L.R. No. Aguthi/Gatitu/1400.

The Application is supported by the Affidavit of one Daniel Minda Mayieka, who is the Retails Operation's Manager of the Defendant company. On 20<sup>th</sup> February, 2004 this court dismissed the Plaintiff's application for Injunction, dated 16<sup>th</sup> April 2003. The Plaintiff's application sought the following Orders:-

***“1. That a temporary Order of an injunction be issued to restrain the Defendants its servants and/or agents from evicting taking over from the Plaintiff the defendants petrol station known as Ruruma Service Station or in any way interfering with the Plaintiffs such business situated in Nyeri.***

***2. A mandatory Injunction to compel the Defendant to supply and sell to the Plaintiff its petroleum products at prices agreed upon by the parties herein pursuant to the operators Agreement dated 1/1/2000,”***

As indicated earlier, this court dismissed the said Application. At the material time the Defendant had filed a Defence and counterclaim but had not pleaded any prayer of vacant possession of the suit property known as Aguthi/Gatitu/1400. In the Ruling the court found that the suit premises and the equipment on it belong to the Defendant and that the Plaintiff had no proprietary rights and was only a licensee.

On the date of the Ruling the Defendant had not terminated the operator's Agreement dated 25<sup>th</sup> July, 1996. The Plaintiff in the Agreement by giving 3 months Notice in the event of certain situations or circumstances.

After the Ruling was delivered, the Plaintiff wrote a letter dated 24<sup>th</sup> February,

2004 in which it purported terminated the operator Agreement. The grounds for termination were alleged breach of the Agreement including:

**“Stocks outs in violation of clause (K) (ii)**

**Dishonoured cheques issued by the yourselves to Caltex amounting to Kshs.2,084,000/= in violation of clause 14 (a) (iv)**

**Selling adulterated fuel in violation to clause 8 (d).”**

The Notice was given in terms of Clause 14 (a) (1) of the Operators

Agreement. The Plaintiff upon failing to obtain possession of the suit properly Applied to this court on 18<sup>th</sup> march, 2004 for leave to amend its Defendant and Counterclaim. The main purpose was to introduce a plea for vacant possession of the said property in the Counterclaim. The court granted the leave to amend by consent of the parties. It is after filing the Amended Defence and counterclaim that the Plaintiff filed the present application for mandatory Injunction is set out above.

The Application is opposed by the Plaintiff who filed a Replying Affidavit sworn by 3<sup>rd</sup> June, 2004.

The plaintiff raised an objection that in the Application for leave to Amend the Defence and Counterclaim filed on 18<sup>th</sup> March, 2004 the Plaintiff had also sought the same orders of mandatory injunction. That there was a consent recorded in the respect of the said matter and therefore the question of mandatory injunction had been determined. That the matters raised in this application are therefore Res Judicata.

I have looked at the record and I do confirm that the advocates recorded a consent only in respect of the leave to Amend and the Defence and counterclaim and the issue of costs. There is total silence in respect of prayer 3 which related to Mandatory Injunction. There is no withdrawal of the said prayer neither is there any determination in respect thereof. In my view, considering absence of an order in respect of the said prayer, then the said prayer must have been abandoned by the Applicant. It was not prosecuted, heard or settled. Is it barred from bring a fresh application to seek the said order? I do not think so. The terms of the consent order are clear. If there was allowed in consideration of total abandonment of right to prosecute future applications as such a prayer, the Order would have said so. In the absence of a determination or order of the court, I hold that the question of mandatory Injunction is not Res Judicata.

I am fortified in this view because the prayer for mandatory Injunction was premature and could not be granted until leave was granted the counterclaim amended, the Amended Defence and Counterclaimed served, and pleadings closed again. I think the Plaintiff was entitled to tactically abandon he said prayer at the said stage:

Another issue raised by the Plaintiff is that the Ruling of this court delivered by me on 20<sup>th</sup> February, 2004 dealt with all the facts and matters being raised now. That the Applicant is re-litigating the earlier application and the same are Res judicata.

I have considered this point, and I do hold that while the parties, and facts are substantially the same, the question of Order for Mandatory Injunction was not in the pleadings and was not an issue before the court. The said issue was only introduced by the consent order granting leave to amend the Defence and counterclaim. The issue was neither in the previous application neither was it considered and determined by the court. The application is not Res Judicata on this ground.

The Plaintiff asserts that the Applicant is precluded under Order II, Rule 1 of the Civil Procedure from seeking the present Orders. I do not think that Order II Rule 2 applies. In any case, the Plaintiff by conceding to the amendment permitted the new cause of action and the Applicant is entitled to prosecute any issue arising from it.

The Plaintiff in opposition to the application also informed the court that after the Ruling of this court on 20.12.2004 being aggrieved with the said decision, he filed a Notice of Appeal on 26<sup>th</sup> February, 2004 and there is therefore an appeal pending in the court of Appeal. The Plaintiff annexed a copy of his Draft Grounds of Appeal to his Replying Affidavit. In his submissions, counsel for the Plaintiff informed the court from the bar that the Record of Appeal has subsequently been filed and served and is Civil Appeal No. 82 of 2004. The Plaintiff contends that the Appeal should be heard first otherwise to allow this application to proceed or to grant the orders sought would render the pending Appeal nugatory. The Plaintiff's Counsel indicated to the court that they have not elected to file any application in the court of

Appeal for a stay of execution or an injunction pending the hearing of the said Appeal.

It is trite law that the filing of an Appeal by itself does not operate as a stay of any execution or proceedings. The Appellant would have to obtain from the court which made the decision an order of stay of execution or proceedings or such other appropriate order. The Plaintiff's oral application for stay of the court's orders was dismissed by me on the ground that there was nothing to be stayed as there was no executable order which could emanate from the said Ruling. The Plaintiff did not file any formal application in the High Court or in the Court of Appeal.

In the premises, I do hold that the court is perfectly entitled to hear the present application. The case of **ASEA BROWN BOVERI LTD – V – BAWAZIR GLASS WORKS LIMITED (20010 2 EA** which was referred to is not relevant to the present application. That case involved an abuse of the court process which does not exist in this case considering the material before. What I see here is a process in which a party is seeking to attain orders from the court using legitimate procedures and using any available lawful procedures or weapon in our adversarial system to do so. The question that this court must decide is whether it ought to be granted the said orders.

Is the Defendant entitled to an order of Mandatory Injunction which is sought herein considering all circumstances and facts and the law? As indicated above, the court found that the suit premises belong to the Defendant. I held as follows:-

***“As the Plaintiff has no proprietary rights over the suit premises, and the equipment there including the pumps, tanks etc, his only interest is the business of Ruruma Services Station. This is a financial enterprise. The Operators Agreement and Licence was to run for a period of 5 years from 1<sup>st</sup> January, 2000. Two years have gone leaving a balance of three years. The Agreement is terminable as contracted by the parties. Any loss on the part of the Plaintiff can be ascertained.***

***The loss if any is financial and can be paid in monetary form. Any loss of profits, income, and opportunities can be ascertained and assessed by a court of law. The Plaintiff's prayer in the Plaint include Special damages and general damages for breach of contract. The nature of the agreement, is such that the dealer can sue for damages if the License is wrongfully terminated. As therein no aspect of any reversionary interest or permanency, any damages arising from wrongful termination cannot be said to be irreparable.”***

The position now is that the Defendant issued a Notice of Termination of the operator's Agreement under the provisions of Clause 14 (a) (i). Both parties referred to the previous affidavits which contained a copy of the said Agreement. The Plaintiff in this Defence to counterclaim denies that the Defendant lawfully or otherwise the Agreement. In the aforesaid Ruling, the court found that the Defendant no longer supplies and fuel or fuel products. For at least 2 years or more since this dispute arose on business for supply and sale of fuel and fuel products under the operator's Agreement has taken place. The premises belongs to the Defendant and its core use is as a petrol station. The court has declined to grant the Plaintiff the orders to compel the Defendant to supply fuel. In the circumstances neither the Plaintiff nor the Defendant is receiving any benefits or advantage from the status quo. The Plaintiff claims that he runs a retail shop on the premises. In my view the operators Agreement is a composite agreement and is not divisible. It has purportedly been terminated. The Plaintiff claims that this is wrongful. In the Amended Plaint, quite rightly, the Plaintiff has pleaded Special damages and General Damages for breach of contract. He still has the opportunity to Further amend the Plaint to include any other consequential damages or other remedy resulting from the alleged wrongful termination.

This court when considering the rights of the parties and their remedies will not ignore important considerations of the practical situation on the grounds and the special relationships of the parties, the nature of the business and commercial undertakings in question, and the financial and economic implications of the disputes and the orders of the court.

In Halbury's laws of England (4<sup>th</sup> Edn.) para 948, it is stated:-

***“A mandatory Injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and which the court thinks ought to be decided at once, or if the act done is simple and summary one which can be remedied, or if the Defendant attempted to steal a match on the Plaintiff .... a mandatory Injunction will be granted on an interlocutory application.”***

In my view, there are special circumstances which exist in this case and which I have set out above but can be summarized herein.:-

1. The Defendant is the owner of the suit premises and all the equipment thereon.
2. The Defendant cannot be compelled to supply fuel and fuel products
3. The Plaintiff is a Licensee.
4. The Defendant has purported terminated the Operator’s Agreement .
5. **Damages** Any loss or damages etc. which the Plaintiff herein may suffer as a result of the termination suffer as a result of the termination the Agreement is capable of quantification in terms of money or pecuniary damage.
6. The economic activities on the premises has been paralysed for over 2 years and the court must unlock the dead-lock so that the property is put to good use, and create employment.
7. The ultimate rights and remedies of the Plaintiff are secured by the Amended Plaint which substantially survives even if orders are given for delivery of vacant possession.

I hold that this a clear and certain case which the court thinks ought to be decided forthwith as far as the question of vacant possession and delivery thereof is concerned.

Before, conclusion, I do hold that Order of Mandatory Injunction cannot strictly be granted under this provisions of Order 39 of the Civil Procedure Rules. This court can grant orders of Mandatory Injunction under its inherent and original jurisdiction and invoking the principles of common law and equity. The Applicant was entitled to invoke the provisions of Section 3A of the Civil procedure Act.

As a result of all the foregoing, I hereby do grant prayer 2 of the Notice of Motion dated 19<sup>th</sup> May, 2004. The costs shall abide the outcome of the suit. Orders accordingly.

Dated and delivered at Nairobi this 4<sup>th</sup> day of February 2005

MOHAMMED K. IBRAHIM

JUDGE