REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 22 OF 2003

(From the ruling in Civil Suit No. 2555 of 2002 of the Chief Magistrate's Court at NAKURU –N. O. ATEYA, ESQ.

KENYA SHELL LIMITED……..
……..APPELLANT

VERSUS

ELIZABETH WANGUI NJENGA

T/A MOLO FARMERS SERVICE STATION……..…
RESPONDENT

JUDGMENT

The appellant was the Defendant in Nakuru CMCC No. 2555 of 2002 filed by the respondent seeking a permanent injunction to restrain the Defendant from interfering with the Plaintiff's possession, control and management of BP Molo Farmers Service Station. The Plaintiff also filed an application by way of a Chamber Summons seeking an interlocutory injunction as above pending the hearing and determination of the suit. The trial court granted the orders as sought on 20th December, 2002. The appellant appealed against the said ruling and raised three grounds of appeal as follows:-

1. The learned magistrate erred in law and in fact in granting an interlocutory injunction when the respondent had not satisfied the requisite conditions for the grant of the same.

2. The learned magistrate erred in law and in fact in failing to appreciate that the respondent herein was a mere licencee and not entitled to an injunction at all.

3. The learned magistrate erred in law and in fact in failing to appreciate the terms and conditions of the contract between the parties which the grant of an injunction would have been contrary to.

The appellant therefore prayed that the injunction granted be discharged and the application dated 4th December, 2002 be dismissed with costs.

The respondent had in her plaint stated that as a Dealer Licence Holder, the licence which she had could only be determined on specific instances set out in clause 20 of the Agreement between herself and the appellant. She claimed that by a letter dated 27th November, 2002, the appellant's Retail Territory Manager purported to terminate the said Agreement allegedly because she had no sufficient stocks of any type or grade of fuel for at least three consecutive days contrary to clause 20.3(1) of the Agreement. She

stated that the said allegation was false and merely calculated to terminate the said contract because the said Retail Territory Manager did not visit the station to ascertain stock levels at the relevant time and that she had sufficient stock at the time and that the days when the stock was allegedly insufficient were not specified. She further stated that the Defendant's attempts to terminate the dealership licence was void because the termination was subject to prior notice which was not given.

Mr. Majanja submitted that the learned magistrate erred in law in granting the injunction when the applicant had failed to satisfy the conditions for grant of an injunction.

Quoting **MBOGO VS SHAH [1978] E.A. 93 at Pg 96** he submitted that the learned magistrate in the lower court, in exercising his discretion to grant the orders sought had misdirected himself and as a result had arrived at a wrong decision and was clearly wrong in the exercise of his discretion.

He also submitted that the conditions for grant of an interlocutory injunction as stated in **GIELLA VS CASSMAN BROWN & CO. LTD [1973] E.A. 358** had not been met. The respondent had failed to establish a prima facie case with a likelihood of success and that even if such a case existed, damages would have been adequate remedy, he submitted.

He further stated that the trial magistrate had erred in law in failing to realise that the respondent was a mere licensee and could not be entitled to an injunction at all and granting the injunction was to force the appellant to continue having the respondent in its premises contrary to its wish.

Mr. Omae for the respondent opposed the appeal saying that the termination of the Agreement was contrary to the contract. He submitted that the respondent as a licensee deserved protection of the court and the lower court had acted properly in granting the injunction. He said that the appellant had wilfully surrendered its rights to the property and given it to the respondent on clear terms and conditions which the latter had not breached and she altered her financial position by taking a loan to finance the business and so the Agreement could not be terminated whimsically, he submitted.

Counsel further submitted that the respondent had shown that she had a prima facie case with a likelihood of success and that damages would have been insufficient and cited the case of **NATIONAL BANK OF KENYA LTD VS DUNCAN OWUOR SHAKALI & ANOTHER** Civil Appeal No. 9 of 1997 (unreported). He also submitted that the balance of convenience was in favour of the respondent as she was in occupation of the station, having invested a considerable amount of money therein.

To determine this matter, it is imperative that I examine some important provisions of the Dealer Licence Agreement that the parties herein entered into. The appellant granted to the respondent a non exclusive right and licence to enter upon its station to use in common with the appellant for the purpose of conducting thereon the business of a filing/service station. A licence is defined as a permission to enter upon land and it makes lawful what would otherwise be a trespass and, in the absence of special circumstances, is revocable at the will of the licensor. This is a definition which was given by Vaughan CJ, in **THOMAS VS SORREL** way back in 1673 but it has stood over the years but there are many ways in which a licence has progressed from this simplistic form, see ***"LAND LAW, CASES AND MATERIALS" by*** R. H. Maudsley & E. H. Burn, 4th Edition Pg 434.

Clause No. 20 of the said Agreement specified the circumstances under which the licence could be suspended or terminated by the licensor (the appellant). Clause 20.1 stipulated that the appellant reserved the right at any time to review the licensee's performance if it was of the opinion that the licensee had not performed its obligations to the licensor's satisfaction or standards and in that case, it had the right to suspend or terminate the Agreement and take over the station but in terms of clause 20.2, before exercising that right it had to serve on the licensee a written notice detailing the specific concerns of the appellant.

However, according to clause 20.3, without prejudice to any other remedies which the licensor may have had against the licensee, the former had the right at any time by giving notice in writing to the licensee to terminate the Agreement forthwith if any of the events listed thereunder occurred. One of them was:-

"If the lic ensee does not have sufficient stock of any type of grade of fuels for at least three (3) consecutive days due to the licensee's negligence or default under the terms of this Agreement."

On 27th November, 2002, Mr. Eugene Kisuya, Retail Territory Manager of the appellant wrote to the respondent a letter worded as follows:-

"Dear Sir,

RE: TERMINATION OF DEALERSHIP

It has come to our notice that BP MOLO FARMERS Service Station, currently under your management is out of stock for the main product grades namely PMS, RMS, AGO and IK.

This is in breach of our contractual Agreement as per Section 20.3(1) stated below and as such we have no choice but to terminate your dealership.

"**20.3(1) If the licensee does not have sufficient stock**

of any type or grad e of fuels for at least three (3) consecutive

days due to the licensee's negligence or default under the terms of this Agreement."

You are therefore required to deliver the possession of the station and all the company property at the station forthwith."

The said Mr. Kisuya did not state in his letter how he got the above information, whether he went there in person and became aware of the situation or whether the station's customers informed him or in any other way became aware of the alleged situation.

He did not also indicate for how long the station was without the said products. This was very important because under the Agreement, the termination could only be effected if the station did not have sufficient stock for three consecutive days.

It is instructive to note that in opposing the application for an injunction that was filed by the respondent, Mr. Kisuya or any other appropriate employee of the appellant did not swear any affidavit in reply to the respondent's affidavit. If a party chooses not to swear an affidavit to challenge allegations made against it by its adversary in litigation, then it is assumed that it is not challenging the factual depositions therein. The appellant filed only grounds of opposition to the respondent's application. The respondent denied that she ever lacked stocks in the station and stated that the allegation was false and malicious and was merely intended to lay the ground for the termination of the Agreement. That was not controverted by the appellant.

Unless the appellant could prove that the respondent violated clause 20.3(1) then it was wrong for it to purport to terminate the Agreement without any notice. He who alleges must prove and the least that Mr. Kisuya could have done was to swear an affidavit and state therein how he came to learn that the respondent was without sufficient stocks. In the absence of such proof and in the absence of any denial of the respondent's depositions as aforesaid, it can safely be assumed that the appellant's stated reason for terminating the Agreement was without any basis.

The appellant's argument as stated in ground number one of its grounds of objection is that the respondent is a mere licensee of the appellant who does not deserve court protection by way of an injunction. I do not entirely agree with the appellant. In **WINTER GARDEN THEATRE (LONDON) LTD VS MILLENIUM PRODUCTIONS LTD [1947] 2 ALL ER 331** , Lord Uthwatt stated as follows:-

"The settled practice of the courts of equity is to do what they can by an injunction to preserve

the sanctity of a bargain. To my mind, as at present advised, a licensee who has refused to accept the wrongful repudiation of the bargain which is involved in an unauthorized revocation of the licence is as much entitled to the protection of an injunction as a licensee who has not received any notice of revocation; and, if the remedy of injunction is properly available in the latter case against unauthorised interference by the licensor, it is also available in the former case. In a court of equity, wrongful acts are no passport to favour."

In my view, the appellant was the one who was acting in breach of the Agreement by purporting to terminate the same unfairly. There was no indication that it had ever written to the respondent to complain about any breach of the terms and conditions of the Agreement. This court has the power to grant an injunction to restrain a breach of a contract.

If the appellant had terminated the Agreement pursuant to clause 22, then it would have been inappropriate to grant an injunction. That clause provided that either party could on its discretion and without assigning any reason whatsoever terminate the Agreement by giving sixty (60) days' notice in writing to the other or in lieu of such notice by paying some money as shown therein.

Mr. Majanja for the appellant cited the Court of Appeal decision in **JOHN NJOROGE MICHUKI VS KENYA SHELL LTD** Civil Appeal No. 227 of 1999 where their Lordships stated as follows:-

"As regards contracts between persons not under a d isability or at arms length, the courts of law should maintain the performance of contracts according to the intention of the parties and should not overrule any clearly expressed intention on the basis that the judges know the business of the parties bett er than the parties themselves".

They were restating a holding in ***WALLIS VS SMITH*** [1882] 21 Ch. D 243 at Page 266.

Their Lordships further emphasised that a document must be construed according to the plain meaning of the words and sentences contained therein.

Drawing from the above, my understanding of the Agreement between the parties herein is that they set out the terms and conditions upon which the licence could be determined and in bringing the same to an end strict adherence to the said terms and conditions had to be ensured. Though the trial magistrate in his highly condensed ruling did not state the exact reasons which made him conclude that the respondent had satisfied the principles laid down in ***GIELLA VS CASSMAN BROWN & CO. LTD*** (supra), I am satisfied that the respondent had established a prima facie case with a likelihood of success.

In ***KENYA COMMERCIAL FINANCE COMPANY LIMITED VS AFRAHA EDUCATION SOCIETY & OTHERS*** Civil Appeal No. 142 of 1999 the Court of Appeal stated that the conditions for granting interlocutory injunctions as stated in GIELLA VS ***CASSMAN BROWN & CO. LTD*** were sequential so that the second condition could only be addressed if the first one was satisfied and when the court was in doubt then the third condition could be addressed. I will therefore proceed to consider the second condition.

The respondent had in the lower court stated that an award of damages could not be sufficient compensation for the damage which she was likely to suffer if the injunction was not granted. The appellant disputed that and submitted that the damages payable if it was found that the Agreement had been terminated unlawfully were easily quantifiable as per clause 22 therein. However, that clause related to a situation where either of the parties terminated the Agreement having given to the other sixty (60) days' notice.

In the present case, the appellant did not seek to terminate the Agreement in terms of the aforesaid clause in which case payment of damages would have been the only remedy the respondent would have claimed. Under the other clauses pursuant to which the Agreement could lawfully be terminated, there was no provision for payment of any damages. This court cannot rewrite the Agreement for the parties nor insert a clause to provide for payment of damages other than as stated in clause No.22.

While it is not desirable to compel parties to remain in contract if one of them has decided to opt out, a court of law will not allow a party to adopt a flippant attitude and flagrantly breach a binding Agreement in an arbitrary manner in the guise of being able to pay damages. If that were to be allowed then contracts would not be worth the paper they are written on particularly where one of the parties thereto is financially much more endowed than the other. I have already found that the appellant did not have any basis in terms of the said Agreement to terminate the same and if at all it was true that the respondent did not maintain sufficient stocks in the station for at least three consecutive days, then the appellant's Retail Territory Manager should have provided to the court such evidence.

In the event that I am wrong on my aforesaid postulation, I believe the balance of convenience tilted in favour of the respondent who was in occupation, having invested a considerable amount of money into the business as a result of the Agreement as opposed to the appellant who I presume has many stations in different parts of the country.

For these reasons, I dismiss the appeal with costs.

DATED, SIGNED & DELIVERED at Nakuru this 27th day of October, 2004.

DANIEL MUSINGA

AG. JUDGE

27/10/2004