



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 1644 OF 1999**

**B.P NDEGE SERVICE STATION ..... PLAINTIFF**

**VERSUS**

**B.P KENYA LIMITED .....DEFENDANT**

**J U D G E M E N T**

By a plaint filed in court on 18th August, 1999, the plaintiff B.P Ndege Service Station Ltd sued the defendant, B.P Kenya Ltd seeking an order for damages for the take over of a service station. Other prayers are as appear in the plaint.

The defendant denied the plaintiff's claim and in the reply to the defence, the plaintiff stated that the defendant breached the terms of the agreement.

In court during the hearing of the suit, the plaintiff's Managing Director one Joseph Stephen Muriu testified that the plaintiff's company was running a business at Wilson Airport on Langata Road, under the style and name "Wilson Airport Services station". The service station had been in operation for a long time. The station had a contract with the defendant who issued it with an operations license commencing from 16.5.89 and was renewed from time to time. A copy of such license was produced as Ex.1 in court. It was signed by Joseph and a co-director.

The petrol station sold various petroleum products ie. Fuel, cooking gas, engine oils and motor vehicle spares. They also services motor vehicles i.e washing and cleaning and mechanical repairs. The license required that products were bought from B.P Shell Company Limited. The plaintiff bought products both in cash and cheques. The defendant does not give credit facilities.

On the system used, the plaintiff explained that they deposited several blank signed cheques in the name of Kenya Shell. When the plaintiff placed an order the total amount of supply was calculated and the amount endorsed on the cheque and banked. If the cheque was honoured the product was delivered. The second system was that payment was effected by cheque, and the products was then delivered.

If the blank cheques issued were not met for any reason, the plaintiff paid cash instead. The plaintiff testified further that the system of payment of blank cheques went on for many years, and as at 10.7.98 the plaintiff had an amount of Kshs.2.2 million available for the supply of fuel which one Titus Gathua was to purchase.

The plaintiff complained that the defendant ejected him from the petrol station on 10th July, 1998, without any prior notice.

Joseph, the Managing Director was not at the station that morning, but the accountant one Mr. Kamau was. He recalled, however, that the station had ordered stocks, oil, gas, spare parts which had not been delivered.

The plaintiff gave the defendant a Notice to restore him back to the petrol station by a letter dated 6th November, 1998, but the defendant refused prompting the plaintiff to file this suit.

The defendant denied breaching any terms of the operator's license. The plaintiff produced accounts for the year 1977 and 1978, showing the financial status of his company.

He complained further that the defendant carried away their computer before they retrieved any information from it. He complained further that the defendant has not explained to him what happened to the stocks taken from the petrol station. That the petrol station was "financially healthy", i.e it had adequate capital and facilities.

The plaintiff complained further that he was not given the one month notice he is entitled to under the contract. He termed the take over of the station wrongful and prayed for damages.

The plaintiff denied having seen a letter dated 10th July, 1998, addressed to Titus Gathua by the defendant company. The letter is headed "Termination of Dealership" and asks the plaintiff to "immediately vacate the site".

The plaintiff was not aware that his company owed the defendant a sum of Kshs.2.1 million.

George Kamau Gichane had worked for the plaintiff 1½ weeks as an accountant, when the station was taken over by the defendant on 10th July, 1998.

His duties included collecting bank statements and bringing them to the office. He had just began to familiarize himself with the books of accounts, and was also trying to develop a system of accounting.

Gichane was at the petrol station on 10th July, 1998, when officials from the defendant company came to the petrol station and ordered them to vacate. One David Akilora was in charge of the operations. That they ordered all the staff out, except one clerk called Mweri who remained behind to carry out stocktaking exercise.

The witness had worked at the petrol station for only 10 days. His immediate boss was Titus Gathua. The witness explained that there was fuel the day he reported but this ran out soon thereafter and Titus was organizing to get some more.

Looking at the documents in court, he said they showed that a cheque of Kshs.2.2 million was being prepared.

One Samuel Williamson Njuguna Githito prepared accounts for the plaintiff company for the year 1997 and 1996. He gave a figure of the profit made by the plaintiff in 1996 and 1997. He also gave a figure for the debts owed to the plaintiff by his own creditors.

The witness said that he found from the books that the plaintiff used to buy petroleum products by cheque. He found some dishonoured cheques which were later honoured.

Titus Ndoka Gathua used to be a Director of B.P Ndege Service Station. He managed the station from 1989 to 1998.

He identified the operator's license which had been issued to them by the defendant, and was renewed from year to year.

He described the station as having been small in 1989, but subsequently grew and in 1997 Kenya was

affected by El Nino rains. This affected the running of the station in that the debtors were not paying their bills, however, the situation improved and in May, June 1998, the station operated normally.

Gathua recalled that in July 1998 the defendant directed that the plaintiff buys stock in cash because some of their cheques had bounced.

He identified a cheque which was signed by him and another director for the purchase of a banker's cheque worth Kshs.2.2 million, addressed to Nairobi Depot, for the supply of products.

Gathua said that this cheque was not accepted by the defendant, and by 10.7.98, there was no fuel at the station except oil.

The witness was at the station upto 11.30 a.m. on 10.7.98 and left for other duties. He returned in the evening and found that the station had been taken over by one Mr. David Akilora, of the defendant company who refused to talk to him. He found the pump attendants on duty.

The plaintiff had not received any notice, prior to the station being taken over.

Gathua testified further that prior to 10.7.98 some of the plaintiff's cheques had bounced but they were replaced before the take over of the station which victimized him as nobody handed over to him. When shown the letter of notice dated 10.7.98, he denied having seen it before.

Gathua explained that the stock they had in the station amounted to about Kshs.5 million. This consisted of tyres, batteries etc.

Several cheques which had bounced were shown to Gathua and he explained their positions one by one and said most of them were rejected by the bank for minor reasons.

David Alvin Akelora is a Retail Territory Manager with the defendant company, he is based in Kisumu.

In 1998, he was working in Nairobi South retail area. The plaintiff company fell within the retail area of Mr. Akelora and he knew one of their Directors Titus Gathua. The petrol station was at Wilson Airport. He recalled closing it down in July 1998, for "non – performance based on financial constraints". This means that the dealer was having financial problems evidenced by the bouncing of several of their cheques and this made them unable to purchase products from the defendant at the required levels. He produced 6 dishonoured cheques saying that some of the cheques bounced because they were signed by only one signatory instead of two, and the plaintiff knew this. The other cheques bounced because of "insufficient funds".

When the cheques bounced, Akelora took the 1st step of placing the plaintiff on Bankers cheques for a while, until he was satisfied that the balances were normal, to enable them to run the station.

According to Akelora, the plaintiff dealer was unable to comply with these new terms because the bankers cheques were coming late which led to no sufficient stock to sell. Akelora discussed the issue with the plaintiff's director Githua, but the situation did not improve as the plaintiff cited "financial frustration". Akelora said,

***"In July when I took over the station I did not consider that it was being efficiently managed. The take over was inevitable".***

Titus talked of a report received from the supervisor of the plaintiff's site to the effect that Titus Gathua had not been seen at the petrol station for about 6 days. He (Akelora) considered the site abandoned.

The defendant complained that they were owed Kshs.2.1 million shillings when the station was taken over. This was by way of bounced cheques and there were no fuel products in the station.

Akelora wrote a letter to Gathua on 10th July, 1998 to vacate the station forthwith. The take over of the station was fully authorized by B.P Kenya Ltd. As the plaintiff was not complying with the sale of the minimum quantity expected at the petrol station. There was not products in the tanks and this had gone on for 5 days. The regulations require that there must be a “stock out” i.e a dealer must receive order before drying out. Akelora denied taking any of the plaintiff’s property.

Akelora prepared a list when he took over and the person he found in the station signed it. The books of accounts and receipts were all taken by Grace Mumbi, the Secretary who was present in the office. I considered the oral evidence of both the plaintiff and the defendant.

I also considered the pleadings generally, as well as the submissions made by both learned counsel.

From the evidence which I have considered and beginning with the agreement, which is Ex.1, I find that the agreement provided 3 methods of termination – i.e Clause 10 (a), Clause 10 (b), and Clause 10(3). In this way therefore, I find that the agreement between the plaintiff and defendant was capable of being revoked following any one of the 3 methods. I have gone into above.

The issue of lack of notice came out quite prominently in the plaintiff’s case that the service station was taken over without any prior notices. Here again we go back to the 3 methods I have referred to already and examine the mode of giving notice. Together with this I have to examine the evidence of both parties of how the station was running or being run and whether this warranted the action by the defendant.

The evidence of Titus Gathua a Director is relevant. He was the man running the station and his evidence at some point was that in July, 1998, the defendant directed the plaintiff to buy stock in cash because some of the plaintiff’s cheques had bounced. Six of such cheques were produced in court, and the plaintiff gave his explanation as to why the cheques bounced.

This evidence was corroborated by the evidence of the defendant’s witness who said that when the plaintiff’s cheques bounced, the defendant took the 1st step by placing the plaintiff on bankers cheques for a while hoping that things would improve but things did not actually improve as the bankers cheques started coming late, and this led to “no sufficient stock to sell”. The defendant’s witness further confirmed that the plaintiff dealer was unable to purchase products from the defendant “at the required levels”.

Gathua, a Director of the plaintiff confirmed that as at 10.7.98, there was no fuel at the station except oil. Gathua and one other Director had signed a cheque for Kshs.2.2 million to enable them to purchase a bankers cheque to be addressed to Nairobi Depot for the supply of fuel products. This did not happen as at the time of the take over of the station. A bankers cheque had not been purchased so petroleum products had not been bought.

Gichane who was new at the petrol station, having worked for only ten days confirmed that there was no petroleum products at the station, and that arrangements were being made to get some.

Even the evidence of the Managing Director Joseph Stephen Muriu (PW1) was that the plaintiff had an amount of Kshs.2.2 million for purchase of fuel. However, a bankers cheque had not been purchased to enable the plaintiff to get petroleum products from the defendant.

From the evidence I have just considered above, I find that the plaintiff did not purchase from the defendant the required levels of petroleum products. Such minimum levels of petroleum products not having been purchased was not therefore available at the station.

One of the “obligations of the licensee” as shown in Clause 6(a)(iv) of the agreement was to “***purchase from the company at least the minimum quantities of petroleum products .....***”

The evidence on record shows that this obligation was breached by the licensee, who was the plaintiff and that is what made the company (defendant) take over the station.

In a situation such as this was 3 months or any period of Notice necessary? Article 10(c)(I) of the agreement is relevant here. It reads,

***“Notwithstanding the foregoing, the company may terminate the license forthwith at any time without notice on advising the licensee in writing to that effect in any of the following events. If the licensee commits any breach of the obligations on the licensee’s part herein contained”.***

I am satisfied from the evidence which I have analysed that the circumstances existed to warrant the company to terminate the licensee’s license without notice, but advising him in writing as was done by the letter of 10.7.98, which was left at the station on the morning of the termination of the license.

The company’s act of entering the service station and taking it as was done in this station is covered by Article II of the license. There was a breach on the part of the licensee, so the company was entitled to terminate the license and enter and take over the service station.

I have gone through and considered the list of issues agreed upon by the parties for determination. The answers appear in this Judgement, and from my consideration of the evidence on record, I find that the plaintiff is not entitled to the relief’s sought as its case has not been proved on a balance of probabilities. I proceed to dismiss the plaintiff’s case and order the plaintiff to pay costs of the suit to the defendant.

Dated at Nairobi this 28th day of February, 2002.

**JOYCE ALUOCH**

**HIGH COURT JUDGE**