



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 689 OF 2000.

ONESMUS KIMANI NGUNJIRI.....PLAINTIFF

VERSUS

CALTEX OIL (KENYA) LIMITED.....DEFENDANT

J U D G M E N T

The Plaintiff owned a property known as L.R. Number 209/11618 (the suit premises) which he demised to the Defendant by a Lease dated the 15.10.1992 for a period of 30 years from the 20.10.92. The Lease gave the Defendant the right and obligation to erect on the suit premises a petrol filling and service station on the terms therein. The Lease reserved a rent and made the Defendant responsible to pay Land Rent Site Value tax (rates) telephone electricity and water charges. The lease also gave the Defendant the right to demolish and remove all buildings structures and other things agreed to in Clause 2(d) of the Lease at the expiration thereof.

On the 27 September 1995 the Plaintiff and Defendant entered into an Operations Agreement which entitled the plaintiff to the right to run the filling and service station (known as Coral Service Station) by way of a licence for 5 years and one month from the 1 September 1995. The Plaintiff agreed to pay a monthly service fee calculated on the basis of so many shillings per litre of refined petroleum products sold. The copy of the agreement in the Defendant's bundle is blank so far as the shillings are concerned but there was no dispute as to the sum which was to be charged by the Defendant to the Plaintiff.

The Agreement provided that only the Defendant's products were to be sold at the station but absolved the Defendant from the obligations of supplying such products to the Plaintiff if the plaintiff did not comply with the terms of the agreement. The Agreement made the Plaintiff responsible for all direct operating, expenses incurred by the Plaintiff in connection with the premises but not limited to all deposits and charges for telephone (including telephone, rentals,) water, sewerage, electricity, gas and other services or utilities. The Defendant was given the right to recover the charges or any increase in rates if the plaintiff failed to pay the same.

The Plaintiff submitted that the terms of the Lease prevailed over the Operations Agreement as the Lease was a registered document and its terms could only be altered by another registered document. I will deal with this submission later in my judgment.

It is not in dispute that the suit premises were charged to Barclays Bank against borrowing by the Plaintiff from it and that as a result of default by the Plaintiff the Bank exercised its statutory power of sale and sold the suit premises at Public Auction for Shs.18.6million to a Mr. Mbira on the 27.1.2000.

The Plaintiff has filed this suit to recover the sums set out in the prayer to the plaint, an injunction to

restrain the Defendant from taking possession of the Coral Service Station a declaration that the Operators Agreement is of no legal effect and for interest and costs in the sums claimed.

The Plaintiff gave evidence that he had credit from the Defendant for petrol supplied which was supported by a Bank Guarantee for 2million. It appears from the letter of the 25.10.95 from the Kenya Commercial bank Limited to the Defendant that the guarantee was for Shs.2.5million. On the 21.8.97 the Bank recalled the Guarantee and on the 24.3.97 Barclays Bank of Kenya Limited issued a guarantee to the Defendant in respect of fuel supplied on credit for Shs.2.5million increased to 3 million. The Plaintiff was indebted to Barclays Bank which had a charge over the suit premises for loans made to the Plaintiff on which he defaulted leading to his property being sold by public auction.

The Plaintiff attributed his woes to the actions of the Defendant in a number of matters of which he complained which I will deal with as follows;-

1. Payment of Shs.8,378,119.80 alleged by the Plaintiff to have been paid to the Defendant in respect of which the Defendant failed to either give credit or supply fuel that had been ordered. The Plaintiff wrote to the Defendant on the 8.4.2001 (page 87 in the Plaintiff's bundle) and set out how the Plaintiff calculated this amount which appears on page 3 as follows;-

Ref. allegation No. 2(a) - 2,627,083=00

No. 2(b) - 1,106,138=00

No.2(c) - 13,000=00

No.2(d) - 1,186,259=00

No.2(e) - 2,954,355=20

No.2(f) - 501,284=50

Total - 8,378,119=80

The details of these amounts are set out in the letter and I will consider that under the headings given by the Plaintiff.

2(a) These are cheques which are shown as debited to the Plaintiff's bank statements as appears on pages 80 to 85 in the Plaintiff's bundle. In his evidence Mr. Mariera for the Defendant being the Manager Retail Marketing stated that these cheques had in fact been credited in the statements which appear at page 44 of the Defendant's bundle being the Defendant's Further Supplementary List of Documents where the cheques are highlighted with boxes. However cheques Nos. 000211 and 000213 were never received by the Defendant and the Plaintiff did not give details although requested to do so.

2(b) The Plaintiff claims that the amount is in respect of invoices posted to the account which have got no clarification. Mr. Mariera stated that they checked these invoices and found that the same were for products supplied for which they had signatures.

2(c) This refers to an alleged error in the invoices showing a difference of Shs.13,000=00.

2(d) This sum is made up of three amounts debited to the Plaintiff's account. Mr. Mariera stated that these amounts were in respect of returned cheques which were still in the Defendant's possession.

2(e) This sum is in respect of sums debited to the Plaintiff's account in respect of the use by the Plaintiff of the Star Shop which was part of the development on the Plaintiff's land. The plaintiff denies any liability for these sums but I will deal with this matter later in my judgment.

2(f) The sum claimed is for amounts which the Plaintiff claims were not credited arising out of the special arrangement which the Plaintiff had with General Cargo Services. This is also considered later in my judgment.

The first prayer in the plaint is for a sum of Shs.37,535,600=00 claimed as damages for the breach by the Defendant of the Lease and Operations Agreement which led the Plaintiff being unable to service his debt with Barclays Bank which sold the suit premises as a result of the plaintiff default. A claim for Shs.5,000,000.00 loss of profit is also claimed for. The Defendant denies having breached either the Lease or the Operations Agreement and does not consider itself liable for this loss. The Plaintiff also claimed a sum of Shs.6,059,283.45 in respect of Land Rent, Rates, Water, Electricity, telephone, standing and conservancy charges.

The Defendant denied this claim and states that these are the Plaintiff's liability under the Operations Agreement. Having heard the witness, I am strongly of the view that the Plaintiff and his manager Mr. Kamande 'Kamande had deliberately set out to falsify the accounts and their evidence to be able to make claims which they have. It seems to me that the Plaintiff created the debit with Barclays Bank as a result of using a great deal of the money borrowed for his own purposes and was thus the author of his own downfall.

I accept that under the lease the Defendant was responsible in the first place for the outgoings stated therein. however the Operations Agreement transferred this liability to the operator who happened to be the plaintiff. Thus the first liability to pay outgoing fell on the Defendant but the liability then shifted to the Plaintiff. The net result was that the Plaintiff ended up being responsible for the payment of the rates and other charges he claims for in the plaint. The Plaintiff says the Operations Agreement is invalid and that the Lease being a registered document prevails. I do not agree. The lease was granted by the Plaintiff in his capacity as the owner of the suit premises. The Operation Agreement was given by the Defendant to the Plaintiff in the Plaintiff's capacity as a dealer and operator of Coral Service Station. Indeed the Operator need not necessarily have been the Plaintiff.

With regard to the arrangement with the General Cargo Services I accept the evidence of Mr. Mariera who I found to be a truthful witness that the arrangement originated from the Plaintiff. The arrangement was that fuel would be supplied to General Cargo Service on the basis that the Plaintiff would prepare an invoice at the time of delivery which General cargo Service would sign together with an LPO see letter of the 30.7.1996 on page 89 in the Plaintiff's bundle.

A dispute arose whereby the Plaintiff claimed the sums set out under 2(f) referred to above being sums which he claimed General Cargo had received fuel for. However, General Cargo disputed this and thus no credits were given. The Plaintiff wrote to the Defendant on the 25.11.98 reminding the Defendant that the sums of Shs.501,289.50 was unpaid and the Defendant replied on the 11.1.99 stating they had no details of the amount not credited and asked for details. I find that no fuel was supplied to General Cargo to support the sum claimed and that the Plaintiff is not entitled to this credit asked fro.

The Plaintiff alleges that if he is not bound to pay anything for the star shop, which he admitted he carried on business in as there was no agreement in this respect.

The Defendant wrote to the Plaintiff stating it intended to put the plaintiff on what it called a support fee programme with effect from the 1 March 1996 at the rate of Shs.18,927 per month debited quarterly subject to review.

On the 31.1.97 the Defendant again wrote to the Plaintiff stating it had worked out the gross sales for the year 1995/96 and that it would charge 5% of the gross sales. This amounted to Shs.84,410.15 per month.

The Plaintiff in his evidence said "they build a Star Shop at the same time as the lease. We did not enter into any agreement with regard to the shop. The Defendant charged us rent by debiting my account although there was no agreement for rent. They debited Shs.84,410.15 per month as rent for the shop.

They were debiting in the fuel account. It brought a lot of problems. The problem was the fuel I was selling was not sufficient to cover in the Defendant fuel account. I could not service my overdraft at the bank, Barclays Bank Moi Avenue. I had a loss in the sum of Shs.16million. I could not pay my workers or maintain myself ”

On the 29.4.1997 the Plaintiff wrote to the Defendant objecting to the debits being made in the fuel account and asked that his fuel account be treated as a separate account independent from the shop account. In that letter he said that he was surprised to note that the support fee for the Star shop, ‘which by the way we have never agreed on had been debited to my fuel account’

The Plaintiff therefore appeared not to be denying the Defendant the right to charge for the use of the star shop but was concerned that the debits for it should be included in a separate account. His only comment on the method of charging was only “by the way but he did not state he did not accept it and indeed I am of the view that by his continuing to carry on the Star Shop business with full knowledge of how the charges were made up he is estopped from denying the method of charging and must be deemed to have accepted it.

From the passage I quoted from the Plaintiff’s evidence it is clear that the charges for the Star Shop had nothing to do with his Shs.16million overdraft at the Bank as the yearly charges at the most came to no more than 1million shillings for the star shop against which he was making profits. I regret I can see no merit in the Plaintiff’s claim for a refund of the sums debited for the Star Shop as states in 2(e) above.

There were three other issues which required to be dealt with. The first is the Plaintiff’s allegation that he terminated the lease. The Notice was alleged to have been hand delivered but the Defendant through Mr. Mariera denied having received it. I can find no evidence that such a notice was served and as Mr. Njoga pointed out the suit premises had been sold when the notice was alleged to have been given and as such the Plaintiff was no longer the owner and had no legal right to give such a notice. Finally, I must come to the question of the termination by the Defendant of the Operations Agreement. The Defendant served notice on the Plaintiff dated the 7.4.2000 terminating the Agreement under Clause 14(a) (I) of the Operations Agreement on the grounds that;-

1. That you have continued to sell products at the station not supplied by Caltex Oil Kenya Limited.
2. That you have been unable to pay for products supplied worth Kshs.3,882,514/-.

The first reason stems from an allegation by the Defendant that after the Plaintiff was put on a cash basis the Plaintiff did not sell its products as required by Clause 6A (I). The Plaintiff denied he had breached this clause and claimed that after the Defendant stopped supplying him with fuel he bought the sums from Inland Petroleum which was an agent of the Plaintiff selling the Plaintiff’s products. Mr. Joseph Mwangi Wachiuri the Managing Director of Inland Petroleum gave evidence that he was a distributor of the Defendant’s products. He was shown the documents at page 117 t131 of the Defendant’s bundle which he stated were prepared by Caltex in respect of products sold to his company. He denied dealing with Coral Service Station as it would have breached his agreement with Caltex. He further stated that he word ‘East’ written on the documents showed that the products had been sold to Eastleigh Kerosene one of its customers. I accept Mr. Wachiuri’s evidence in its entirety the result of which is that the Plaintiff must have obtained these documents from a third party and altered them to show that he was the person supplied.

As a result, I find that the Plaintiff did not purchase fuel from Inland Petroleum Company limited and as such did not sell the Defendant’s products at the Service station as alleged or if he did so then he obtained the same by unlawful means. Even if I accept that the Defendant has not proved this breach I find that the Plaintiff is indebted to the Defendant in the sum of Shs.3,883,514.00. Having rejected the claims made by the Plaintiff. I accept that the Defendant’s accounts are a true reflection of the dealings between the parties and that the sum claimed to be outstanding is infact due. I find that the Plaintiff has not proved that the Defendant breached the terms of the lease as alleged in the plaint and that his claim for the value for the petroleum station fails.

I therefore dismiss the Plaintiff's claim with costs and award judgment to the Defendant in the sum of Shs.3,882,514/- as claimed in the counterclaim with costs to the Defendant. In the circumstances of the case, I will not award any general damages to the Defendant in respect of trespass.

Dated and delivered at Nairobi this 16th day of May, 2001.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.