

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 168 OF 2001

DELTA PETROLEUM (MSA) LTD PLAINTIFF

VERSUS

SHELL & B.P (MALINDI) KENYA LTD DEFENDANT

RULING

On 23rd May, 2001 I dismissed an Application made by the plaintiff (DPL) in the main suit for an injunction to issue against the defendant (Shell). I found on the material before me that DPL did not have a prima facie case with a probability of success as it was a mere licensee in the defendant's premises. I also found that the loss likely to be suffered by DPL was compensable in damages and further that the Application did not lie under O 39 r 1 Civil Procedure Rules.

"DPL filed a Notice of Appeal on 25th May, 2001 to challenge those findings. Four days later on 29th May, 2001 they filed a Notice of Motion seeking an order for stay of execution under O 41 r 4 Civil Procedure Rules or in the alternative the maintenance of the status quo under S. 3 A of the Act. That is the application argued and the subject matter of this Ruling.

Before this Application was argued, it was disclosed by learned counsel for Shell Ms Mwanza that DPL instructed a different Advocate who went before the Lower Court and sued Shell impleading the same cause of action and seeking the same relief's. It enjoined another defendant who had been put in possession of the suit premises (the station) by Shell. That was done on 7th June, 2001 barely one week after the filing of this application. I called for the Lower Court file and confirmed it was so. Apparently it was filed without consultation with or knowledge of the Advocate on record in this suit, Mr. Khatib. He pleaded ignorance of that matter and at one point sought to withdraw from acting for DPL in this suit but withdrew the Application.

Upon filing that suit DPL went before a Senior Resident Magistrate and sought both mandatory and prohibitory injunctions against Shell and its Agent, the co-defendant in that suit. The orders were granted ex parte and with the help of the Police the station was handed over to DPL. These facts were not disputed by DPL and on that premise I am deeply concerned and perturbed at the conduct of DPL. On the face of it there would appear to have been a gross abuse of the court process and I am not inclined as a court of equity to exercise favourable discretion to a party who conducts himself thus.

The order sought by DPL in the Application before this court was a prohibitory injunction restraining not only Shell but also its Agents from interfering with the station. That is the Application that was dismissed. Adding another defendant and instructing another Advocate on the pretext that the suit would be different and capable of adjudication by a Subordinate court seems to me to be the height of hypocrisy. For all intents and purposes, DPL has succeeded in reversing an order made by this Honourable Court through an order of a Subordinate court. It is a perversion of the pecking order of courts as we know it!

At best there are now two conflicting and parallel court orders which again would be an abuse of court process even assuming the subordinate court had the Jurisdiction to make such orders, which is doubtful.

As I am not seized of the subordinate court matter or any application to decide on it, I can only express my dismay at such state of affairs and decline to grant the orders sought in the Application dated 28th May, 2001. I see no reason for the Applicant to seek such orders from this court if the orders of the Subordinate court where it sought refuge were properly obtained. The Applicant has not come before this court with clean hands.

Application is dismissed with costs.

Dated this 16th day of August, 2001.

P. N. WAKI

JUDGE