



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E157 OF 2020

BETWEEN

OBAMANA TRAVELLERS SACCO.....PLAINTIFF

AND

KENOL KOBIL PLC.....1ST DEFENDANT

RUBIS ENERGY KENYA PLC.....2ND DEFENDANT

RULING NO. 2

1. In the application dated 7th October 2020 made under **Order 40 rule 3** of the **Civil Procedure Rules**, the Plaintiff has moved the court for the following reliefs:

[1] Spent

[2] *THAT a temporary injunction be and is hereby issued by this Honourable Court restraining the Respondents/Defendants from charting away, disposing, auctioning, removal and dealing in any way (with) the goods of the Applicant/Plaintiff as per the annexed inventory marked "OTS" at Kobil Njiru Station pending the hearing and determination of this application.*

[3] *In the alternative the 1st and 2nd Respondents/Defendants are hereby ordered to give the Applicant/Plaintiff 14 days to arrange and chart away the goods of the Applicant Plaintiff at Kobil Njiru Station as per the annexed inventory marked "OTS".*

2. The application is supported by the affidavit of Josephat Akweli Oyoya, the Plaintiff's Secretary General, sworn on 7th October 2020. It is opposed by the affidavit of Fred Patta, the Defendant's retail manager, sworn on 26th October 2020. Before I deal with the issues raised in the application, a brief background of the application will suffice as this is the second ruling in the matter.

3. The Plaintiff and the 1st Defendant, which was succeeded by the 2nd Defendant ("the Defendant"), entered into a Dealership Agreement ("the Licence") dated 18th April 2020. Under the Licence, the Plaintiff was entitled to use the Defendant's name, equipment, furniture and other chattels, fixtures and fittings to sell petroleum products supplied by the Defendant on terms set out in the Licence at the premises known as Njiru Petrol Station Station ("the Petrol Station").

4. In due course, the Defendant terminated the Licence causing the Plaintiff to file this suit. Together with the suit, the Plaintiff's applied for an injunction by the Notice of Motion dated 19th May 2020 made *inter alia*, under **Order 40 rule 2** of the **Civil Procedure Rules** seeking a temporary injunction restraining the Defendant from interfering with its business and operation of the Petrol Station pending the hearing and determination of the suit. I heard the application and dismissed it by the ruling dated 14th August 2020 on the following terms:

[10] *Since the Licence was terminated by the letter dated 14th May 2020, the termination was completed once the Defendant took over the premises. The parties' relationship cannot be restored by a mandatory injunction as it would require the supervision of the court to ensure that the parties are meeting their obligations on a day to day basis. The termination, in this case, cannot constitute special circumstances as termination is a matter contemplated by the Licence. Under Clause 4, the Licence may be terminated by*

either party giving notice or immediately by the Defendant for certain breaches by the Plaintiff.

[11] While the process and manner of termination is contested and will be the subject of resolution by the court hearing evidence from both sides, what is clear is that any loss arising from wrongful or irregular termination would be remedied by an award of damages. In fact, the Plaintiff has claimed Kshs. 23,000,000/- in the plaint being the projected profit lost for the contractual period and security deposit banked by the Defendant.

5. The facts emerging in support of the current application is that the Plaintiff's advocates received a letter dated 29th September 2020 from the Defendant requesting the Plaintiff to remove its items from the Petrol Station within 7 days. The letter requested the advocates to furnish the Plaintiff's bank account where it would deposit the credit balance of Kshs. 436,299.52. The Plaintiff disagrees with the credit balance and that it is necessary that the any amount due be reconciled. It also avers that it had invested heavily in the Petrol Station by installing CCTV cameras, service pumps and had subcontracted third parties to offer ancillary services.

6. The thrust of the Defendant's deposition is that the application is misguided in view of the previous orders. It avers the Plaintiff is seeking the same order that amounts to the same request the Defendant made to it in the letter dated 29th September 2020 hence the application is a waste of the court's time.

7. At the time of giving directions for the hearing of the parties, I requested the parties to resolve the matter amicably but counsel for the Plaintiff rebuffed my entreaties and demanded that the application be heard on merits. In that regard, I have considered the parties written submissions and I now take the following view of the matter.

8. Since there is no dispute that the Licence has been terminated, there is no basis for the grant of any injunction. In any case the issue of whether I should grant an injunction pending the hearing and determination of the suit was resolved in the previous ruling. As no new facts have emerged, the issue of injunction is now *res judicata*.

9. The Defendant's letter dated 29th September 2020 requesting the Plaintiff to remove its property from the Petrol Station is a consequence of termination of the Licence. Once the Licence was terminated, the Plaintiff has not right to remain in the Petrol Station. The Plaintiff recognises this fact in prayer 3 of the application in which it seeks an order for time to collect its items. In this regard, the Plaintiff has had a month to collect its items from the Petrol Station even without an order to that effect.

10. It must be clear that the Notice of Motion dated 7th October 2020 is for dismissal. It is dismissed with costs to the Defendant.

DATED and DELIVERED at NAIROBI this 6TH day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Osewe instructed by Odero Osiero and Company Advocates for the Plaintiff.

Mr Njoroge by Igeria and Ngugi Advocates for the Defendants.