



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)
COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.53 OF 2003

MOBILE OIL (K) LTD.....PLAINTIFF

VERSUS

NEWTON MUNENE NJIRU.....DEFENDANT

JUDGMENT

1. The plaintiff through a plaint dated 30th January 2003 and filed on 31st January 2003 sued the defendant seeking judgment for.

a) Kshs.5,865,079/35

b) Interest at 20% per annum from the date of filing suit until payment in full.

c) Costs.

2. The defendant filed a statement of defence dated 17th September 2003 and filed on 19th September 2003 denying the plaintiff's claim and praying the suit be dismissed with costs.

3. The plaintiff filed a reply to the defence dated 16th October 2003 seeking judgment be entered as paid in the plaint.

Background

4. The plaintiff, an oil marketing Company licenced and authorized to import and distribute petroleum products entered into agreements with the defendant herein dated 1st February 2002 and 1st April 2002 for a licence to operate service stations on the plaintiff's property; Nairobi **Block 77/2 and Ruiru Town/132 and Ruiru Town/133** respectively; which agreements **PW1** produced as exhibit **P1** and **P2**.

5. The agreements had express terms:-

(a) *That they would remain in force for a period of 1 year unless terminated by either party giving the other a three (3) months' notice in writing of the intention to terminate the Agreements as per clause 2 reflected in each of the agreement.*

(b) *The defendant would purchase petroleum products for sale at service stations exclusively from the plaintiff on the plaintiff's current listed or applicable prices.*

(c) *That the defendant would sell exclusively at the service stations, the plaintiff's petroleum products.*

6. The defendant terminated both Agreements by a letter dated 13th August 2002 and ceased to operate the said service stations.

7. The plaintiff claims from the defendant the total amount of Kshs. 345,000 being the amount due to the plaintiff in respect of licence fee payable under the said Agreements in lieu of notice under paragraph 8 of the plaint; further sum of Kshs.5, 520,079/35, being amount due on account of petroleum products sold and delivered to the defendant by the plaintiff during the period of July and August 2002 as pleaded under paragraph 9 of the plaint. The total claim under paragraph 8 and 9 of the plaint being Kshs.5, 865,079/35.

8. The defendant denies the plaintiff's claim in total.

9. The matter commenced hearing on 26th February 2008 before Hon. Lad Justice Okwengu, as she then was; who heard one witness; **PW1** Mark Musembi, who produced the list of documents and bundle of documents filed on 4/4/2006, and who was partly cross-examined. On 19th July 2018, when I took over this matter, **PW1** Mark Musembi, was recalled cross-examined further. After hearing **PW1**, the plaintiff closed its case.

10. The defence called one witness **DW1**, Njiru Munene, who gave evidence but did not file nor produced any documents.

11. I have carefully considered the pleadings; the parties evidence, exhibits produced and submissions filed in this matter. The issues that has arisen for determination in this matter can be summed up as follows:-

- a) *Whether the defendant owes the plaintiff the sum of Kshs.5, 865,079/35?*
- b) *Whether the plaintiff is entitled to payment of interest on the amount claimed?*
- c) *Whether the defendant was subjected to unfair, oppressive and unconscionable business practices?*
- d) *Whether there was under delivery of fuel by the plaintiff to the defendant?*
- e) *Whether the introduction of unleaded fuel caused any loss to the defendant?*

A) Whether the defendant owes the plaintiff the sum of Kshs.5, 865,079/35?

12. The plaintiff under paragraphs 8 and 9 of the plaint claims Kshs.5,865,079/35 broken up as follows:-

- i) *Buru Buru Service Station Kshs. 3,895,998.10*
- ii) *Ruiru Service Station Kshs. 1,624,081.25*

Kshs. 5,520,079.35

13. **PW1**. Mark Musembi, in his evidence testified that in August 2002, the defendant issued the plaintiff with cheques that were dishonoured on presentation to the bank; he personally approached the defendant, who agreed to a meeting to discuss the issue on 12th August 2002 but the defendant failed to turn up for the meeting of 12th August 2002; however he showed up on 13th August 2002. The copies of claims were produced at page 85 of the plaintiff's list of document as exhibit.

14. That it was in the meeting of 13th August 2002, when the defendant indicated that he wanted to terminate the agreements and hand back the stations; and he was advised to put his proposal down in writing; leading to his writing a letter dated 13th August 2002 (*see page 90-91 of plaintiff's list of documents*). There is no evidence of coercion to the defendant to write the aforesaid letter. The plaintiff accepted his termination but did not grant waiver. The plaintiff subsequently took over the two service stations after carrying out a stock taking before hand over. The value of goods at Buru buru service station on hand over was Kshs. 1,014,619/00; which according to **PW1's** evidence were credited to the defendant's account (*see page 95-96 being list of items at Buruburu service station as of hand over and credit note on page 99*) of the plaintiff's list of documents.

15. The products at the time of hand over as per **PW1's** evidence at Ruiru Service Station was valued at Kshs.761, 960; some of which were owned by the defendant and out of that the value of the product that was taken over by the plaintiff; being fuel lubricants and **LPG** Gas was valued at Kshs.682, 947/90. The defendant proceeded to sign the hand over form stating that the value of "**PMS; RMS, ADO, & 1K & LPG GAS & CYLINDERS was Kshs.684, 947/04**".

16. The copy of the list of items at Ruiru Station at the time of hand over is at page 92-94 of plaintiff's documents and the credit note is at page 101 of the plaintiff's list of documents. **PW1** testified the defendant was indebted to the plaintiff in respect of amount not paid for supply of products to both stations in the sum of Kshs.5,520,079/35 being as follows:-

- a) *Buru buru Service Station Kshs.3,895,998/10*
- b) *Ruiru Service Station Kshs.1,624,081/25*

Total Kshs.5,520,079/35

(*See page 87-89 of the plaintiff's list of documents*) and invoices in support of the suit as set out in the statement at page 71-86 of the plaintiff's list of documents.

17. There is unchallenged evidence that the defendant did not pay this amount at the time of hand over of the stations on 2nd September 2002 but only made a proposal to repay the amount due to the plaintiff through a letter dated 2nd September 2012 (*see page 97-98*) of the plaintiff's list of documents. The proposal was to pay Kshs. 3 million on or before 30th September 2002 and the balance thereafter. The letter in which the offer was made as per **PW1**, though on the letter head of Royce Motors Limited, it was made by the defendant and at any event the defendant has not denied the letter was made by him.

18. Having considered the above evidence, I find it is not controverted in anyway by the defendant. He admitted by his conduct and in writing he was indebted to the plaintiff as of the issue of hand over, when he witnessed take over and admitted the indebtedness, offered to pay but failed to do so. I am therefore satisfied that the plaintiff has proved that the defendant was under an obligation to pay for all products supplied to his petrol service stations at Buru buru and Ruiru and that he owes the plaintiff the sum of Kshs.5,520,079/35. In addition to this amount, the plaintiff claims three months licence fees in lieu of notice for each of the service station as follows:-

a) Buru buru Service Station Ksh 65,000 X3=Ksh.195,000

b) Ruiru Service Station Ksh 50,000 X = Ksh.150,000

Total Ksh 345, 000

19. I have perused the Agreement under clause 2, where it clearly provided; that either party can terminate the agreement by giving the other three months' notice of the intention to terminate and in lieu thereof pay three months' licence fees. The defendant instead giving three months' notice issued a letter on 13th August 2002 terminating both agreements and requested for a waiver of the notice period requested for termination of each of the agreement. The defendant by requesting for a waiver, he was very much aware of the terms and conditions of the agreement and notice period. He cannot plead ignorance. The plaintiff declined to grant waiver of the notice period requested by the defendant; who went ahead and ceased operating the service station; in breach of the operators Agreement. I find the plaintiff's claim to be squarely within the four corners of the parties Agreements. I find the plaintiff is justified in seeking this claim. I accordingly find and hold that the defendant owes the plaintiff the sum of Kshs.5, 865,079/35 as claimed.

B. Whether the plaintiff is entitled to payment of interest on the amount claimed?

20. The plaintiff has ably demonstrated that the defendant failed to pay the amount deemed payable to the plaintiff being all in all Kshs.5, 865,079/35 in complete breach of the two agreements which he terminated on 13th August 2002. The amounts due to the plaintiff remains outstanding todate.

21. The plaintiff claim for interest is pursuant to **section 26(1) of the Civil Procedure Act** which provides:-

"(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the CAP. 21 Civil Procedure [Rev. 2012] C17 - 18 decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

22. The plaintiff in the plaint prayed for interest at 20% from the date of filing suit until payment in full.

23. It is contended by the plaintiff that the defendant has not shown any justifiable reasons for failing to pay the amount due and as such the plaintiff is justified for an award of interest at 20 per cent as pleaded in the plaint.

24. In the instant suit, the parties did not in the two operators Agreements entered into an agreement on the rate of interest nor did the plaintiff in its evidence show sufficient reasons for the court to award the interest as sought in the plaint. There are no sufficient mitigating factors for the court to consider awarding interest above what is provided for under section 26(2) of Civil Procedure Act. The awarding of interest is purely discretionary and where interest has not previously been agreed upon by the parties, the court in granting interest would grant interest at court rates. In view of the above, I am satisfied as the plaintiff has succeed in this matter, it should not be awarded interest at 20% or any other rate of interest above the court rates (see the case of **Kenindia Assurance Co. Ltd Vs Alpha Knits Limited Civil Appeal No.330 of 2001**). I accordingly amend interest at court rates.

C. Whether the defendant was subjected to unfair, oppressive and unconscionable business practices?

25. In this suit it is contended by the defendant that the plaintiff engaged in unfair, oppressive and unconscionable business practices, all of which assertions the plaintiff denies.

26. In the instant suit there is evidence on record that the defendant freely signed the two operator's agreements and freely terminated the same. That the defendant through a letter of 2nd September 2002 freely offered to pay all the amounts due; without coercion and also during the subsistence of the agreement, and hand over the defendant did not raise the issue of unfair treatment. I find if such treatments were in existence, and as there was nothing stopping the defendant from raising them, he would have done so at such a time. The allegations being raised therefore are nothing but an afterthought to enable the defendant negate on his obligation.

27. The defendant is bound by the contract he voluntarily entered into and the court after parties have executed their contract cannot interfere with the terms and conditions of their contract or charge the same to suit one of the party's interest. The parties to an agreement are bound by the terms and conditions set out in their agreement and the said terms and conditions are not open to be challenged or set aside unless there is proof of fraud, or coercion or undue influence which is duly pleaded and proved. Having considered the pleadings and the defendant's evidence I find that the defendant has failed to demonstrate any prejudice that he suffered as a result of his allegation which allegations were not also proved.

28. In the case of **LTI Kisii Safari Inns Ltd & 2 others Vs Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR, Civil Appeal 72 of 2008** the court held:-

"There are at least three prerequisites to the application of the doctrine of unconscionable bargain, firstly, that the bargain must be oppressive to the extent that the very terms of the bargain reveals conduct which shocks the conscience of the court. Secondly, that the victim must have been suffering from certain types of bargaining weakness, and, thirdly, the stronger party must have acted unconscionably in the sense of having knowingly taken advantage of the victim to the extent that behaviour of the stronger party is morally reprehensible."

29. In this suit, I did not find any evidence to the effect that the defendant did not have equal bargaining rights as the plaintiff, nor has he shown any coercion or undue influence at the time of entering into any of the two operator's agreements. He cannot in my view now be heard to allege that the two agreements are oppressive in absence of any evidence to support the same. That if such situation existed there was nothing barring the defendant from saying so in his letters of 13th August 2002 and 2nd September 2002, when he was relinquishing his interest in the service stations and committing himself to pay the amount outstanding and even during the hand over. I find the defendant allegation *"he was unable to operate the service stations in a manner that was satisfactory for "reasons beyond the contract"*, to imply that there was nothing wrong with the contract and terms thereby. In view of the foregoing, and without deviating from the maxim that "Equity aids the vigilant", the defendant would be wrong to urge the plaintiff subjected him to unfair, oppressive and unconscionable business practices when he undertook to perform his obligations before terminating the Agreements.

30. In the case of **Finna Bank Ltd Vs Spares and Industries Ltd (2000) 1 EA 52**, it was held:-

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain."

31. In view of the above the defendant has failed to demonstrate that the plaintiff subjected him to unfair, oppressive and unconscionable business practices and that it acted contrary to the terms of the two agreements. I find that the defendant is bound by the terms of the two agreements and that there is no proof of him having been subjected to a bad bargain hence I find it hard for him to escape from fulfilling his part of the bargain.

D. Whether there was under delivery of fuel by the plaintiff to the defendant?

32. It is defendant's contention that he was under supplied in respect of the unleaded fuel as a result the amount claimed by the plaintiff is not true. The plaintiff in response relies on **clause 26(iii) and 26(v)** of the two agreements both of which stated:-

"The parties hereby agree that Mobil's weights and measures shall be accepted as conclusive evidence of any quantities delivered but the Operator may if he so desires check such weights and measurements at the time of such delivery of supply."

33. These undenied evidence on record that on receipt of the unleaded fuel the defendant/his agents/servants signed the invoices in respect of the fuel as per plaintiff's exhibits on pages 71, 80 and 83, which related to the unleaded fuel in respect of the amount claimed by the plaintiff. The defendant received and acknowledged receipt of goods by stamping and signing the invoices. Further at the time of terminating the contract and hand over the defendant did not challenge the amount of fuel supplied or raise any complaint on the alleged under delivery of fuel by the plaintiff. The defendant had the opportunity to raise the complaint then, and having failed to do so at the appropriate time; I find that he is estopped from doing so now. He did not ask for exclusion of the alleged unsupplied fuel in his letter of 2nd September 2002 while undertaking to pay the outstanding amount due to the plaintiff. In the defendant's evidence he did not produces any evidence of the amount of un-delivered unleaded fuel or any that he was wrongfully be asked to pay for. The plaintiff called evidence confirming that the invoicing was done at the point of delivery and conversion undertaken to take care of the difference in temperatures between the point of loading of the product and offloading of the two stations. The defendant and/or his employees did not challenge the plaintiff's evidence on the delivery. I find the defendant has failed to demonstrate that there was under delivery of fuel by the plaintiff to the defendant at any given time. The allegation is just but an afterthought.

E. Whether the introduction of unleaded fuel caused any loss to the defendant?

34. The defendant contends that the plaintiff upon introduction of the unleaded fuel used the defendant as a guinea pig to its Buruburu service station as a result of which he suffered losses. The plaintiff asserts the introduction of unleaded fuel in Buruburu service station was implemented with full knowledge, understanding and consent of the defendant. The defendant however, in this suit has not quantified the loss and has not put forward a counterclaim for the loss. The defendant has not substantiated on the loss due to the introduction of the unleaded fuel. No evidence was produced on alleged reduction in sales; nor evidence adduced on the quantities of fuel sold prior to the introduction of the unleaded fuel and/or sales subsequent in proof of the defendant's allegation that the unleaded fuel was not sealable and guide the court on his claim of loss.

35. It is further contended by the defendant that there was delay in supply of the unleaded fuel as a result whereby the defendant suffered losses. At the hearing there was however no evidence of how often the delay occurred, duration of such delay, no documents produced or quantum arising from such delay. There was further no counterclaim in this matter. The plaintiff denied there being delay or any discussion having occurred on the same or making of any promise of compensation. The plaintiff denied then being any waiver.

36. In the case of **Gatobu M'Ibuutu Karatho Vs Christopher Muriithi Kubai [2014] eKLR Civil Appeal 78 of 2006** the court stated:-

"The parties to an Agreement in writing are bound by its terms and conditions and cannot rely on oral Agreement if the Agreement in writing is in existence."

37. The upshot is that the plaintiff's suit is meritorious. I enter judgment for the plaintiff and I accordingly proceed to make the following orders:-

a) Judgment is **HEREBY** entered in favour of the plaintiff for Kshs. 5,865,079/35 with interest at court rate from the date of filling suit till payment in full.

b) Costs of the suit to the plaintiff.

Dated, signed and delivered at Nairobi this 15th day of **November, 2018**.

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J .A. MAKAU

JUDGE