



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 261 of 1986

RAZIA SHERALLY.....PLAINTIFF

Versus

ESSO KENYA LTD & ANOTHER.....DEFENDANT

JUDGMENT

In this suit the plaintiff seeks:

- (1) An order requiring the first defendant to provide to the plaintiff an inventory of *certain property* at the New Sotik Esso Service
- (2) A restraining order against defendant number two trading and using the plaintiff's property at the a station and
- (3) A restitution of certain goods to the plaintiff said to be hers and if *not then* a payment to her- of their monetary assessed of Shs. 1,106,348.10.

There are. Of course the usual prayers for interest and costs. The PLEADED STORY OF THE PLAINTIFF, in nutshell, is that the plaintiff after being a licensee of the first defendant to operate a petrol station, was given four days' notice to vacate the station premises, and while she was away in Nairobi protesting the action of the first defendant in unilaterally and oppressively evicting her, the first defendant, under an ex-parte court order and in breach of contract, broke into the station in the plaintiffs absence and during the lifetime of the licensee, and took possession of the station in the plaintiffs absence and during the lifetime of the licence, and took possession of the station and a large quantity of fuel and accessories there. The second defendant, fully aware of the dispute between the plaintiff and the first defendant over the petrol station took over the station and the plaintiff's property and used it as his own without the consent or authority of the plaintiff. Those are the basic grievances of the plaintiff.

In its defence the first defendant admitted that the plaintiff was its licence at the service station, and me eviction of me plaintiff; but it denied any breach of any contract. Its side of the story is that the licence had come to an end: notice of intention to take over possession at the end of the contract period was given in sufficient time to enable the plaintiff to make adequate arrangements to vacate the station and hand over to the first defendant, but at the expiry of the contract period the plaintiff refused, or neglected to vacate or hand over the station, thereby forcing the first defendant to invoke the law to get back the station, and when it got possession of the station, it made and gave an inventory of the property found there. The inventory was given to the plaintiff and she was accorded an opportunity to collect all her belongings from the service station, in short that is what the first defendant pleaded, in so far as it is material.

As for the second defendant, he pleaded in his defense, that he was not liable for anything in this matter; that he- did not know of any dispute between the first defendant and the plaintiff about the station when he took it over, that he did not take the plaintiffs property at the station. What he did when he took over the petrol station, he says, is that he was informed by the first defendant that some property at the station belonged to the plaintiff who would go for them. She did, in fact, go for the property, sold some of it to the second defendant, but failed to collect the remaining property which the second defendant did not want to buy. Again, in essence that is the pleaded position of the second defendant.

The plaintiff filed separate replies to the separate defenses of the two defendants, and joined issue on each material allegation of each defendant. But she admitted that her goods were sold to the second defendant and that she "only did so in order to minimize her loss". She adds, however, that she continues to hold both the first and second defendants liable "for the remaining goods".

In view of the admitted existence of the agreement between the first defendant and the plaintiff' regarding the operation of the petrol station, and in the light of the three main reliefs' sought in the suit by the plaintiff, nothing of substance turns upon the effective contractual date. Similarly, it is agreed that the first defendant terminated the agreement, took possession of the station and later gave it to the second defendant. The plaintiff also concedes that she did not intend to resist the termination of the agreement; but what she only needed was, to quote her own evidence, "time within which to prepare to wind up my operation and leave a request that was turned down by the first defendant.

The plaintiff had some of her property on the premises, but she says in her evidence that she could not get into the station because there was a court order

Prohibiting her from entering. So she kept away. She asked for an inventory of her property to be furnished to her by the first defendant and, she testified in her evidence

"They did so", as per the 1st she produced as her 3rd exhibit. According to the plaintiff the list was not complete because it did not include some of her property at the petrol site.

The plaintiff had her own list of the property which she says was at the station, and she produced it as her 2nd exhibit. While she agrees with the valuation of some of the items on the first defendant's list she disagrees with the valuation on some others and she said that the value was as per what appears on her own list she candidly admitted in her evidence in chief that and I quote her evidence - in - Chief some of the items appearing on my list were either returned to me or paid for She said that what was returned to her was a bicycle; while the first defendant paid her for the fuel still unsold at the petrol station and the second defendant paid her for the items set out in 4th exhibit produced by her. (It is a long list of some 42 items on a 3-page document).

The plaintiff continued to state in her evidence that after the filling of the suit the two defendants paid me for some of the goods and not for others", so., she concluded," I ask the court for an order for payment for the balance" She also asked for general damages for the unexpired period; but this prayer does not appear in her plaint, and I shall not consider it, because it was not prayed for in the plaint.

Regarding her own list of the property prepared by *her*, the plaintiff said in the course of her answers to questions asked during cross-examination, that she did not prepare the inventory exhibit 2 produced by her by physically verifying what stock was actually at the station. She said, and I quote her answer, "I prepared it from my memory and by comparing it 'with the list furnished by the first defendant " she added

"The values I put against each item in my list were what I could remember were the purchase prices for each item." Apart from the motor vehicle and a refrigerator, none of the items on her list was valued by a valuer.

The plaintiff said in evidence on oath, that three motor vehicles namely. the Ford Austin, and a Mazda Pick-up, were not her motor cars. The pick-up was returned to its owner by the first defendant; the truck

was repossessed and sold by a bank to realize its security for a loan advanced. All these vehicles had been a part of the items found at the petrol station when the first defendant ejected the plaintiff and took possession of the station.

Taken through her own list (exhibit 2) in cross-examination, she gave up her claim in relation to some of the items appearing in the inventory prepared by herself. For instance, she said in her evidence, that she no longer claims the petrol and diesel items listed at Nos 26-28 in her inventory, while what she listed at items 49-54 turned out to be not her assets at the petrol station, but her own "personal debts to third parties" and not items left at the petrol station. Further, although she listed a fringe and tagged thereto a value of Shs. 15,000 and included it in the things she claims from the testimony, she "sold almost all the items at the station, to the second defendant. All those items in exhibit No. P4 were sold by me to the second defendant, and were paid for by him". She enumerated 28 things as not sold. But in the enumerated list, there again appear the cars and pick-up already spoken of as having been repossessed or otherwise disposed of by none of the defendants.

She said that at the time when she sold some of her property, she had access to the entire lot of her property, and if the second defendant had wanted to buy everything she would have sold them to him, but he did not want to buy everything. She said that she was not prevented by anybody from selling off the rest of her property.

When questioned by the second defendant the plaintiff expressly announced to the court that when the second defendant took over the station he paid her for her stock there and then she took away others of her property. This is how she put it.

"When you took over the station you paid me for the stock of all the station. You also purchased from me all the furniture there. After you paid me I also came and took away old cash books and golf sticks".

She said that the second defendant did not ask her to go and collect "the rest of the things" which the second defendant did not require. He did not tell her to collect them, but told her that he would sort out with the first defendant regarding those things he did not want.

For the first defendant the evidence was that indeed there was an agreement between the plaintiff and the first defendant under which the plaintiff was to run the petrol station, terminable after three months. The agreement expired and another three months were given under agreement. Before the expiry of the second set of three months, the first defendant gave notice to the plaintiff, stating that at the end of the three months the contract would not be renewed. By that letter, of notice exhibited in evidence, the plaintiff was required to hand over the station to the first defendant at the end of the three months, and that she should attend at the station for stock-taking on a stated date. A representative of the first defendant (DW 1) attended at the station on the due date for stock taking handing and taking over the station. The plaintiff did not show up. A court order was obtained to authorize the first defendant to break into the station and to take stock thereon under the supervision of a state authority. That was done in the presence of a police officer, after which the first defendant handed over the station to the second defendant, some two or so months later. Stock was again taken with the second defendant, the new dealer.

The first defendant never prevented the plaintiff taking her goods from the premises. In fact, a representative for the first defendant made a lot of particular efforts to get the plaintiff go to collect her property, but she flatly refused to collect them and she has continued to refuse to take her goods. Nobody has prevented her from collecting what is hers. In answer to Questions put to him in cross-examination, however, the witness for the first defendant said that the plaintiff went and collected her property during which time she took everything inventoried. The first defendant had handed over everything to the second defendant, and the latter was to consult with the plaintiff over the plaintiff's goods at the station..The second defendant agreed with the first defendant.

I have looked at all the evidence on both sides and the exhibits produced in the evidence. I am satisfied on a balance of probability, that there was no breach of contract by the first defendant proper notice of termination was given. The plaintiff accepted the termination except that she pleaded for extended time

for the purpose only, of enabling her to collect debts not for the purpose for trading. On the expiry of the notice the plaintiff was rightfully removed from the petrol station by the first defendant.

It is also found as a fact that initially the plaintiff left her goods lying at the station; but she eventually sold a bulk of them to the second defendant who was the new dealer. She left an unascertained quantity and variety of goods at the station, which the second defendant did not need. By her own free choice she did not collect him.. Nobody has stopped her from taking them. She did not tell the court any reason why she did not go to take what the second defendant did not want to buy from her.

The claim of the plaintiff for restitution of those goods was based on her original belief that either of the defendants detained or held on to her goods. But as the evidence shows, it is the plaintiff herself who has either refused or failed to collect and remove her property from the petrol station, without any hindrance from any defendant.

Her valuation of the goods was not based on any independent assessment of the goods. She based it on what she believed to be her memory of the purchase price of the goods. There were no records of what the prices of any of the items. You can see she would even mix up her own debts owed to third person and mistaking them for assets lying at the station. A lot of what she sold to the second defendant still remains a part of what she claims for in this suit. There is no way shown on how one can verify her valuation or the existence of what she listed as property.

The first defendant provided the plaintiff with an inventory of what was found at the petrol station; she did not adduce evidence to discredit that list.

The second defendant was innocent in all these things; and it was not shown that he had prior notice of any dispute between the first defendant and the plaintiff. No fault is found against him. One does not see how an injunction can, in justice, be issued against him to stop him from trading. And a search through all the evidence

Does not reveal anything showing that the second defendant used or uses any of the property of the plaintiff prior to his purchasing it from the plaintiff.

Whilst the second defendant admitted in his written statement of defence that he bought some only of the plaintiffs property and that there was left some more which he did not want to buy, for some strange reason the plaintiff has failed to collect the remainder of her property. The second defendant was not under a legal obligation to purchase all of the plaintiffs property at the petrol station. He cannot be compelled to purchase goods he does not want. He has no legal obligation to deliver the plaintiffs property at her door-steps or whenever she may direct. Nor is the first defendant under any such obligation.

Looked at fairly in the light of everything, said by and for both sides, the plaintiff's case capsizes under the weight of her own admissions of adverse testimony and under the full weight of all the evidence. There is no evidential backing, for any of her claims, and the suit must fail.

Accordingly the suit is dismissed with costs. I so order.

Signed and dated by me at Nairobi, this 19th day of February, 1998.

R. KILOBA JUDGE

19th February 1998

Coram: R. Kuloba, J

Mr. Adere for plaintiff

Miss Sijeny holding brief for Mr Mutungi for 1st defendant

Court-clerk; Mr. Mulinge in attendance.

Court: Judgement read out and delivered by me on this 19th day of February. 1998 in

The presence of the advocates for above parties.

R. KULOBA JUDGE

19/2/98