REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 643 OF 1998

CHARLES MIGUI MARANGA

& ANOTHER...PLAINTIFF

versus

KENYA SHELL LIMITED..DEFENDANT

R U L I N G

Until 15th March, 1988 the plaintiffs herein were running a defendant's Petrol station known as High View Service Station on L.R. 209/8258 in Nairobi. It is the plaintiff's case that the said station was being run under conditions contained in a written Operator's Licence dated May, 1, 1988 granted to them by the defendant.

It is further pleaded on behalf of the plaintiffs that in May, 1996 the defendant sought to have the operators Licence dated 1st May, 1988 replaced with another undated operators Licence whose commencement date was to be 1st June, 1995. The plaintiffs made a written protest and forwarded the said undated operators license to the defendant. The defendants never responded.

It is the plaintiffs contention that they made a counter-offer to the defendant which the defendant rejected and that their relationship is governed by the operator's licence dated 1st May, 1988. It is averred that the plaintiffs have discharged their obligations under the said operators licence dated 1st May, 1988.

In 1997 the defendant is said to have appointed one D.A. Akelola its sales representative. In December, 1997 the said Mr Akelola verbally claimed that the plaintiff's sales were below expectations. The sales target had not been set, were undefined and unspecified.

On 16th February, 1998 the defendant through the said Mr. Akelola wrote to the effect that there was a continuous decline in the plaintiffs' sale volumes as per an attached document which was not in fact attached and that the first plaintiff was allegedly an absentee dealer found at the site occasionally.

The defendant requested the plaintiffs to show cause why their license should not be terminated. A detailed explanation was given by the plaintiffs showing that the sales target set on 17th April, 1996 was missed by about 8% which was a small figure and not in breach of any term; the 1997 sales marked a 16% increase compared with those of 1996; the plaintiffs' market had been reduced by illegal petroleum depots which had strung up in Kibera in the neighbourhood of High View Petrol Station.These offered lower prices particularly of diesel; and other factors including the power geographical location of the petrol station made the attainment of target difficult.

On 14th March, 1998 the defendant terminated the plaintiffs' license and took possession of the petrol station. It is the plaintiffs case that their ouster/eviction was in breach of the defendant's obligations under both the 1st May, 1988 and the purported 1996 Operator's License and is a trespass to land. They aver

therefore that they are entitled to

(a) a mandatory injunction compelling the defendant to restore the plaintiffs into possession and

(b) a permanent injunction to restrain the defendant form Interfering with the plaintiffs' enjoyment of the suit premises.

Through the eviction of the plaintiffs from the suit premises the plaintiffs say they have been denied a chance to make profits from running of the said Petrol Station.

If, which is denied, the defendants' undated Operators Licence is deemed to have come into operation on 1st June, 1995, the purported termination of it is null and void and the plaintiffs' are entitled to run the station. The plaintiffs further contend that on 14th March, 1998, the defendant could not in law refuse to renew the operator's Licence since the defendant deemed that it was automatically renewed for 24 months on 1st June, 1997, 24 months form the alleged commencement date 1st June, 1995. The orders sought in the plaint are:

(a) a declaration that the purported termination of the licence dated 1st May 1988 is null and void.

(b) a declaration that if, which is denied, the 1996 operator's licence is in force the purported termination on 14th march, 1998 of the licence is null and void.

(c) an order that the plaintiffs be restored to the possession of L.R. no 209/8258 forthwith

(d) general damages

(e) costs of the suit.

Alongside the plaint, the plaintiffs filed an application by way of Chamber Summons seeking orders that the plaintiffs be restored by way of a mandatory injunction into possession of L.R. 209/8258 forthwith, that the defendant be restrained from interfering with the plaintiffs' enjoyment of the suit property until this suit is heard and determined, that the defendants be restrained from interfering with the running of the plaintiffs business on L.R. No. 209/8258 until the suit is heard and finalised and that the defendant be restrained from granting to any person a licence to run a petrol station business on the suit property until the suit is heard and determined.

The said application is supported by affidavits sworn by Mr Charles Mungui Maranga. The application is opposed and there are affidavits to that effect, sworn by Mr Akelola. Both learned counsel have also made their respective submissions and cited several authorities.

The thrust of the defendants opposition to the application is that the plaintiffs have not made out a prima facie case; the defendant is entitled to terminate the licence as the plaintiffs have never achieved their targets save for a brief period in 1997; A caretaker dealer, Mr Nizar Hussein, was appointed following the termination of the operator's licence to run the petrol station and the balance of convenience is therefore against the grant of an injunction; The defendant by its letter of 14th march, 1998 offered to compensate the plaintiffs for any stock on the premises purchase from it. This is the level of damages they are entitled to. Damages would therefore be an adequate remedy.

I bear in mind that as at this stage the only evidence I have is by way of affidavits and annextures. This evidence has not been subjected to crossexamination. I also know that if I were to grant the orders sought by the plaintiffs at this stage, a substantial part of the main suit will have been disposed of. And the law in this regard is that, temporary mandatory injunctions will only be granted exceptionally and in the clearest cases - see C.A. No. 186 of 1992 Kamau Mucuha -v- The Ripples Ltd.

I have looked at the two contested operators licenses one dated May, 1988 and the other 1996. They relate to the same parties herein and both provide for the mode of termination. There is no evidence on record that the operators licence of 1st May, 1988 was ever terminated in the manner provided therein.

It is not clear as to why the operators licence of 1996 had to be drawn. It is clear however that the same was forwarded to the plaintiffs who signed it. This is borne out in the letter written by Mr C.M. Maranga on 15th May, 1996 addressed to the Retail Manager of the defendant. However, it would appear that the signing thereof was not voluntary. The licence terms were one sided and on Maranga said as much. For example he says in the said letter:

> ***" I herewith enclose both copies of the Operators License duly signed. It has taken me such long to sign this document because of my feelings about some clauses in the said document. However I have finally reluctantly agreed to sign it due to constant pressure from your sales representative..............................This document has been written by the company for the operator to sign without question. Most of the clauses are one sided in favour of the company especially those falling under main clause 9 - TERMINATION**."*

There are other fears expressed in the said letter but the defendant elected not to respond thereto. A contract is a reflection of the consensus of minds. If another party is placed in a disadvantage as a result of the mighty position of the other then the contract becomes voidable. With respect that appears to be what the plaintiffs are saying herein.

During the year 1996, representatives of the defendant visited the station. Some entries in the visitors book are very favourable and how Mr Maranga was present at the station. I have seen no such entries during Mr Akelolas visits and one is bound to conclude that any observations were verbal.

The defendant was aware of illegal oil deposits. Indeed on 19th March, 1998 the company was reported in the Daily Nation to have issued a statement that it will co-operate with the government to stamp out the practice. The statement added that:

> ***" A number of licensed dealers have closed down business as they could not compete with discounts from illegal traders of as much as shs. 10 per litre.."***

It will be recalled that this is one of the reasons advanced by the plaintiffs for poor performance. This observation coming from the defendant buds credibility to the plaintiffs case as a whole.

I have asked myself whether or not the plaintiffs are likely to obtain mandatory orders at the determination of the suit against the defendant. If they are, then temporary mandatory orders should be granted now. If they are not, they shall remain locked out of the station.

The evidence before me at this stage point to a position in favour of the plaintiffs. The facts speak for themselves and their insistence that the operators licence of 1988 applies must carry the day. Termination was not effected thereunder. With respect the conduct of the defendant in this matter was high handed and tinctured with oppression. The defendant cannot be heard to say that the status quo to be maintained is that that existed after the taking over of the station. If anything, having found that the steps taken did not justify the take over of the station, the status quo to be maintained is that which prevailed ante the action of the defendant.

I have seen the appointment letter of the caretaker to run the said station. It is dated 14th March, 1998 to run for three months and renewable at the company's discretion. Notice of termination thereof shall be one week. the terms thereof cannot preclude the plaintiffs from being restored to the premises as submitted.

It has been submitted that damages shall be adequate compensation. My answer is that an offended party should not be forced to take damages in lieu of restoration into the premises.

I am not in any doubt about my findings herein above and so the balance of convenience does not arise. But even if I were, I would find that the balance of convenience favours the plaintiffs. They were evicted after a plausibe explanation which was also shared by the defendant only to be told that the same was “unsatisfactory” without reasons attributed thereto. their determination to succeed under difficult circumstances is well documented and addressed to the defendant.

In the end the plaintiffs application succeeds. I grant orders 2, 3, 4 and 5 of the Chamber Summons dated 18th March, 1998. The plaintiffs shall also have the costs of the application. Orders accordingly.

Dated and delivered at Nairobi this 27th day of October, 1998.

A. MBOGHOLI MSAGHA

JUDGE