



**IN THE COURT OF APPEAL
AT NAIROBI**

CIVIL APPEAL NO. 166 OF 1995

AGIP (KENYA) LIMITED.....APPELLANT

AND

APPOLLOS KENNEDY MWANGI t/a APPOLLOS

SERVICE STATION.....RESPONDENT

(Appeal from an order of the High Court of Kenya at Nakuru (Rimita, J.) dated 31/10/1994

in

H.C.C. SUIT. NO. 443 OF 1994)

JUDGMENT OF THE COURT

Agip (Kenya) Ltd (the appellant) is one of the major oil companies in Kenya and owns petrol stations in a number of towns and trading centres in the Republic. One such petrol station is on Plot L.R. NO. Nakuru Municipality/Block 9/26 (the station). By an agreement dated 1st November, 1991, the appellant granted Appollos Kennedy Mwangi (the respondent) the right and licence to run and operate the station for the sole purpose of selling, advertising and displaying the products of the appellant on certain terms and conditions agreed between the parties.

Clause 2 of the agreement provided that subject to clause 17 the Agreement could be terminated by either party giving the other 30 days written notice expiring at any time. Clause 17 deals with the mechanics of handing over the station upon the termination of the agreement. Prior to the execution of this agreement the respondent had operated the station under a temporary arrangement for 16 ½ months. Under clause 13 the respondent was required to deposit with the appellant a sum of Shs.75,000/- as security for the performance of his obligations. The appellant also charged the respondent 4 cts for every litre of all grades of petrol, gas oil and kerosene sold to the respondent. The agreement also set minimum targets of sales the respondent was required to achieve during the continuance of the same.

According to the respondent, he ran the station without any problems until about May 1993 when Trade Bank Ltd, a bank in which he was a customer went under and he lost a substantial sum of money. As a result of this debacle his business failed and he was not able to pay his way. He fell into arrears and on 3rd December, 1993 in what appears to have been a rescue operation the appellant took over the running of the station without terminating the licence. At that point in time the respondent owed the appellant a sum of Shs.782,568.25 and it was for the purpose of recovering this debt and resuscitating the operation of the station that the appellant took over the station temporarily. By 4th February, 1994 the appellant had recovered its debt and the station was returned to him upon his undertaking to pay an

additional deposit of Shs.2,255,500/-. The respondent failed to pay this deposit and on 7th April, 1994 the appellant served a notice on the respondent terminating the licence and taking over the station forthwith. In order to stop the take-over, the respondent filed a suit in the Resident Magistrate's Court at Nakuru against the appellant and obtained an injunction which temporarily restrained from taking over the station. This particular suit was subsequently dismissed on 14th June, 1994 for want of jurisdiction.

On 13th June, 1994, a day before the case in the Resident Magistrate's Court was dismissed, the appellant served a second notice of termination which was in the following terms;

"Dear Sir

TERMINATION OF THE OPERATOR (SIC) LICENCE AGREEMENT DATED 1ST NOVEMBER, 1991

We refer to the above captioned agreement.

We hereby give you thirty (30) DAYS notice to terminate the said agreement in accordance with clause 2 thereof. The said notice will be effective from the date of this letter and will expire on 12th July, 1994.

Under clause 17 of the said agreement you are required to deliver up the station, plant and equipment to us and to vacate the station on or before 12th July, 1994 failing which the provisions of clause 17(b) shall apply.

Yours faithfully

Agip (Kenya) Ltd.

G. Carbone

Managing Director."

The respondent's reaction to this notice was the institution of proceedings in the superior court which has culminated in the present appeal. According to the plaint dated 29th June, 1994, but in fact filed on 28th June, 1994, the respondent took over the station under a temporary agreement on 15th June, 1990. On 1st November, 1991, an operator's Agreement was signed by both parties under the terms of which the appellant granted the respondent a licence to run the station. The respondent alleges that although he signed the Agreement he was not given a chance to negotiate its terms and conditions. The respondent also refers to the first notice of termination dated 7th April, 1994 and the steps he took to resist the appellant's attempt to evict him from the station. He also refers to his second notice dated 13th June, 1994 and avers that in purporting to terminate his licence, the appellant acted in bad faith. The reliefs sought by the respondent included an injunction restraining the appellant from terminating his licence or interfering with the running of the station; a declaration that the Agreement entered into between him and the appellant is unconscionable and damages for breach of contract. Simultaneously with this plaint, the respondent applied for a temporary injunction under Order 39 rr 1, 2 and 3 of the Civil Procedure Rules. Rimita, J gave him an ex parte order on 4th July, 1994 and set the application down for hearing inter partes on 19th July, 1994. On that date there was no appearance for the appellant and the injunction given ex parte on 4th July, 1994 was confirmed. On 20th July, 1994, the matter again came before the Judge in the presence of counsel for both parties and by consent the order made the previous day confirming the ex parte injunction was set aside and the application by the respondent dated 29th June, 1994, was fixed for hearing on 15th September, 1994. An interim injunction was issued which was

extended from time to time until 19th October, 1994, when the application was finally heard.

Meanwhile, on 20th June, 1994 the appellant made an application under Order 39 rule 4 of the Civil Procedure Rules seeking the discharge of the ex parte order made on 19th June, 1994. This was followed by a defence and counter-claim dated 2nd August, 1994. The defence, which like the plaint, is not a model of clarity, denies the respondent's claim in general terms. It contains an allegation that the respondent was in breach of certain and conditions of the agreement and an averment that the notice of termination dated 13th June, 1994 was valid. Among the breaches alleged against the respondent are that he failed to raise the additional deposit agreed when the station was returned to him on 4th February, 1994 and that the respondent issued a number of cheques to the appellant which on presentation for payment were dishonoured by his bank. The replying affidavit filed on behalf of the appellant in opposition to the respondent's application was sworn by it's sales manager, one Mungaithi. It is a detailed affidavit and among the annexures to it are copies of the dishonoured cheques. They were six cheques altogether and considering the amounts involved and the frequency with which they appear to have been issued it is not surprising that they were dishonoured.

The respondent's application was finally heard on 19th October, 1994. The Judge delivered his ruling and issued a temporary injunction against the appellant pending trial of the action. It is against that decision that the appellant has now appealed to this Court citing 9 grounds of appeal. Except for grounds 2, 8 and 9 the rest of the grounds are not strictly germane to the points in issue in this appeal. We will therefore disregard them and not trouble ourselves with the submissions made by counsel in relation to those grounds.

The complaint in ground 9 of appeal is that the learned Judge erred in his application of the principles governing the grant of a temporary injunction as a result of which he exercised his discretion wrongly. In his consideration of the matter the Judge made some observations which seem to imply that he has some reservations regarding the application by the courts in Kenya of the principles governing the grant of temporary injunctions as laid down by the Court of Appeal for East Africa in the well known case of Giella v Cassman Brown & Co Ltd, (1973) E.A. 358. Those principles have been reiterated in a number of decisions. In his judgment in the case of Abel Salim & Others v. Okong'o & Others, (1976) KLR 42, Mustafa JA said at page 48:

"I am of the view that the conditions for the grant of an interlocutory injunction are now well settled in East Africa, and I can see no reason to depart from them. These are stated in Giella v. Cassman Brown and Co. Ltd, (1973) E.A. 358 at 360. The decision of the English House of Lords to the contrary in American Cyanamid Co v. Ethicon Ltd, [1975] 1 All ER 504 does not alter the situation here. The conditions are: (1) the probability of success; (2) irreparable harm which would not be adequately compensated for by damages; and (3) if in doubt, then a balance of convenience."

We would say that until Giella's case is overruled by this court, the courts are bound to apply it as part of the law of Kenya. Considering the sentiments expressed by the Judge, it is impossible to eliminate completely the probability that his personal feelings in relation to those principles may have clouded the exercise by him of his judicial discretion in this matter.

The complaint in grounds 2 and 8 of appeal is that the learned Judge erred in finding that termination notices issued by the appellant were inconsistent and also in his failure to make a finding with respect to the validity of those notices. As regards those notices the Judge had this to say:

"What the court is able to gather so far from the material before it is that the respondent feels that the applicant must go. In this effort it has given notices which are not consistent. This is within a period of two months. Unless the matter goes to hearing and the parties and witnesses are cross-examined I am not able to make up my mind on the affidavits whether I would or would not hold the notices as valid under the circumstances."

In dealing with these grounds are not oblivious of the fact that this is an interlocutory appeal and the

substantive suit is still pending in the superior court. The notice that prompted the respondent to go to court a second time was obviously the second notice and it is therefore the only notice whose validity is in issue. The Judge quite clearly misunderstood the position when he thought that he was being called upon to decide the matter on the basis of two notices. It is obvious to us even from this distance that the appellant issued the second notice because it must have been advised that the first notice was patently invalid to the extent that it purported to terminate the licence otherwise than in accordance with clause 2 of the Agreement. The second notice gave the respondent 30 days' notice and appears to comply with the termination clause in every material particular. Mr. Konosi, for the respondent, freely admitted in the course of his submissions before us that at the time the second notice of termination was issued, the respondent had indeed committed the breaches alleged by the appellant. In those circumstances it is difficult to see on what basis the Judge felt there was still an issue which ought to go for trial.

There is one other point which the Judge should have considered but he did not. There is an averment in the plaint that the agreement is unconscionable together within a prayer for a declaration to that effect. By that plea, the respondent is, in effect, seeking to avoid the Agreement and that alone disentitles him to an order, even temporarily, keeping the Agreement in force. There are other remedies available to him if his claim is sustained and we note that he has also asked for damages.

This was a matter within the discretion of the Judge and unless we feel that he had gone completely overboard, we would not substitute his discretion with ours even if we felt we could have reached a different decision. In the case of Mbogo & Another v. Shah (1968) E.A. 93 Sir Clement de Lestang V.P. said at page 94:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it had acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the Judge was wrong and this, in my view, it has failed to do"

Sir Charles Newbold, P., put it this way at page 96:

"For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."

This Court has recently restated the principles in the case of D.T. Dobie & Company (Kenya) Ltd. V. Samwel Wabwire, (Civil Appeal No. 15/93) (unreported) where it said:

"Githinji J. considered the reason or reasons which were offered as to why the appellant had allowed default judgment to be entered against it. Having considered the whole situation as it obtained before him, the learned Judge came to the conclusion that the appellant had not satisfied him that he ought to exercise his discretion in him that he ought to exercise his discretion in the appellant's favour. Perhaps if one of us, or even all the three of us, had been in Githinji J's position we might well have come to a contrary conclusion. But that is neither here nor there. The truth of the matter is that before exercising his discretion against the appellant the Judge considered all the relevant matters which were placed before him. It is not alleged that he took into account any irrelevant matter; it is not alleged that he failed to take into account any relevant matter which was placed before him. Nor can it be alleged with any semblance of truth that his decision is patently wrong. That being so, even if we thought that if we had been sitting in his place we would have come to a contrary decision, that alone would not justify our interfering with his decision. He was exercising a discretion and we would not be entitled to substitute his discretion with ours."

Applying those principles to this case, we are satisfied that this is one of those cases where ought to interfere with the exercise of a discretion by a judge. Going purely by relevant matters which were before

the Judge and which he does not seem to have taken into account, there is, first, the question of the notice of termination which he made no attempt to construe and to express a view on its validity. Secondly, there is this averment by the respondent that the agreement is unconscionable which implies that the respondent wishes to be relieved of his obligation to be bound by it. The Judge did not take that into account at all. And finally, there is the admission by the respondent that he had committed breaches of the Agreement as at time the notice of termination was served upon him by the appellants.

All these matters suggest to us conclusively that the Judge exercised his discretion wrongly and we are bound to interfere. Accordingly. We allow this appeal and set aside the ruling and order of Rimita, J. dated 31st October, 1994, and substitute therefor an order dismissing the respondent's application dated 29th June, 1994 with no order as to costs. We order that each party shall bear its own costs of this appeal.

Dated and delivered at Nairobi this 11th day of January 1996.

J. E . GICHERU

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JUDGE OF APPEAL

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL