IN THE COURT OF APPEAL

AT KISUMU

(Coram: Gachuhi, Masime & Kwach JJ A)

CIVIL APPEAL NO 69 OF 1991

ESSO KENYA LTD.....APPELLANT

AND

MARK MAKWATA OKIYA.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Kakamega (Osiemo J) dated 20th February 1991

in

HCCC No 379 of 1990)

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JUDGMENT

Kwach JA. Esso Kenya Limited (the appellant) is the registered owner of a petrol station on Plot LR Nos 15 and 16, Kakamega in Western Province. Under an arrangement dated 4th January 1989 entered into between the appellant and Mark Makwata Okiya (the respondent), the appellant granted the respondent an exclusive license to sell the appellant's products at the service station and for that purpose only. The agreement was for a term of six months renewable. The respondent paid the appellant an operator's fee of Kshs 2000/- per month and an additional fee calculated at the rate of 2 cents per litre of motor fuels and kerosene purchased by the respondent for sale at the service station. The respondent was to purchase exclusively from the appellant at the current listed or applicable prices all supplies of petroleum products, which might be required for the purpose of the agreement.

Among matters agreed to between the parties to the agreement was that the agreement could be terminated by either party, giving the other party six months notice of his or its intention to do so (clause 23(x)). On 22nd November 1990, the appellant's Area Sales Representative at Kisumu wrote to the respondent terminating the agreement with immediate effect. The letter was in the following terms:

> "M M Okiya Service Station
>
> PO Box 1044
>
> Webuye
>
> Dear Dealer

Termination of dealership at our Kakamega Company owned Service Station

We refer to our letter dated 29th October 1990, regarding the contamination of products in the above station on 26th October 1990, which you are fully aware of.

According to analysis done on the sample taken of products from your station, it has been confirmed that the product was actually contaminated. This is a serious breach of our operation agreement.

You are therefore requested to hand over vacant possession of the station immediately and in any case NOT later than Friday, 23rd November 1990.

You are hereby required to sign the attached copy of this letter to certify (sic) that you received this communication.

Yours faithfully,

N O Okoth

Area Sales Representative Kisumu."

This letter was copied to Mr Martin Smith, the appellant's Fuel Products Sales Manager, among others. The events which culminated in the termination of the respondent's dealership were summarised in a letter addressed to the respondent by Mr Okoth dated 23rd October, 1990, which I will also read in full:

"Dear dealer

Contamination of Products

at your Station

I have learnt with dismay through the driver who delivered products to your station on 26th October 1990, and also through my meter reconciliations, that you damped 0.448m3 and 1.1023m3 of 1K into the RMS and ADO respectively. EKL takes this very seriously for the damage that the above-contaminated products could cause to the people's motor vehicles and general machineries could have irreversible worst effect on our business (sic).

As a first remedy, this is to confirm our earlier telephone discussion with you this morning that you shouldn't sell any RMS and ADO in that station till the contaminated ones have been removed and replaced with pure products from the depot.

Also for the management to get to know what really happened and also for the above to make sure that you understand the gravity of such an act, you are hereby requested to report to EKL Head Office, Nairobi on 8th November 1990 at 2.30 pm and see our Sales Manager and the Fuel Products Sales Manager.

Thank you and please I will kindly ask you to cooperate with us.

Yours faithfully

N O Okoth

Area Sales Representative- Kisumu."

The effect in law of the second letter from Mr Okoth dated 22nd November 1990, regardless of the express stipulation in clause 23(x) of the agreement was to bring the agreement to an end at once. This

letter was apparently delivered to the respondent by Mr Okoth the same day.

On 23rd November 1990, the respondent filed a suit in the High Court at Kisumu against the appellant seeking a number of reliefs including an injunction restraining the appellant from terminating the contract of dealership. Simultaneously, he took out a chamber summons under order 39 of the Civil Procedure Rules seeking a temporary injunction restraining the appellant from stopping him operating the service station or evicting him and a further order compelling the appellant to continue supplying him with petrol and petroleum products. The application was supported by an affidavit sworn by the respondent to which he annexed copies of the agreement and the letter from Mr Okoth dated 22nd November 1990. He did not annex a copy of the earlier letter dated 23rd October 1990 in which the reasons which ultimately led to the termination of the agreement were given.

The application came before Khamoni J, *ex-parte*, the same day and the Judge granted the orders sought and also made an order that the application be served on the appellant and heard *inter-partes* at Kakamega. After at least two false starts, the matter finally came before Osiemo J, on 17th January 1991, when he heard submissions and reserved his ruling, which he delivered on 20th February 1991. He granted the injunction and made two further orders which had not been asked for in the chamber summons, directing the appellant to get the pumps (which in the meantime had been disabled) working again within seven days, and to pay the respondent unspecified damages from the date the temporary injunction was granted to the date the station would be opened. The appellant applied for a stay of this order but this was refused. A stay pending appeal was subsequently granted by this Court.

From the affidavits filed by both sides there was a great deal of conflict on the reasons why the appellant terminated the respondent's dealership. According to the appellant, the respondent had been guilty of deliberate contamination of products at the station. Mr Okoth deponed in his affidavit that when he confronted the respondent with the allegation on 26th October 1990, the respondent admitted having contaminated the products in order to save on the cost of transportation.

It is not clear from Mr Okoth's affidavit as to when exactly he delivered the letter of termination to the respondent but it would appear that it was done on 22nd November 1990, when he travelled to Kakamega to supervise the disabling of all the pumps at the station to stop the respondent using the equipment. If that is correct then it seems to me that by the time the *ex-parte* order was made on 23rd November 1990, the agreement had already come to an end and the station had by then been immobilised. This state of affairs must of course have been known to the respondent.

In his ruling, the learned Judge appreciated that for an application for an injunction to succeed; the applicant must make out a *prima facie* case with a probability of success. He said the respondent had come to prove that the letter of termination of dealership was in breach of contract and that the petroleum products were not contaminated or that even if they were, it was not done either by the respondent or his servants.

The decision of the learned judge has been attacked on some eleven grounds of appeal but in my view, this appeal can be disposed of on one single ground, which reads:

> "(2) The learned Judge erred in holding that the conditions for the granting of an interlocutory injunction had been fulfilled and further erred in granting the same when the facts before him as deponed in the affidavits dictated a refusal of the application."

Dealing with this ground of appeal, Mr Muthoga, for the appellant submitted that the respondent had not shown a *prima facie* case with a probability of success nor had he shown that if he did not get the injunction he would suffer irreparable injury, which would not be adequately compensated by an award of damages. He also submitted that if the matter fell to be decided on the balance of convenience, the balance did not favour the respondent and his application should have been dismissed.

Mr Bakhoya, for the respondent, on the other hand, submitted that the respondent had established a *prima facie* case with a probability of success. He also submitted that the petrol station provided the only source

of income for the respondent and that if he was not allowed to continue operating it, the damage he stood to suffer could not adequately be compensated by an award of damages.

Mr Bakhoya cited the case of *Esso (Kenya) Ltd v Gumbi Road Service Station Ltd* Civil Appeal No 12 of 1991 (unreported), which is a decision of this Court. In that case, the appellant (Esso (Kenya) Ltd) gave the respondent six months notice to terminate a dealership agreement on the strength of which the respondent operated a petrol station in Kisumu. The respondent filed proceedings and applied for a temporary injunction before the expiry of the notice. The respondent also challenged the validity of the notice and disputed the existence of a valid dealership agreement on which the appellant purported to rely in issuing the notice of termination. The appellant also claimed that the respondent was a trespasser while the respondent claimed that its occupation was based on an oral agreement. A temporary injunction was given restraining the appellant from evicting the respondent from the petrol station and compelling the appellant to continue supplying the respondent with petrol.

In my view, the injunction in that case was properly given, because in the absence of a valid dealership agreement, it was only fair and just that the *status quo* be maintained while the true legal status of the respondent at the station was being investigated by the Court. That is not the position in this case. Here there was a valid dealership agreement in existence which the appellant purported to terminate. *Gumbi's* case is therefore of no assistance at all to the respondent in this appeal.

The conditions for granting an interlocutory injunction were stated by the Court of Appeal for East Africa in the well known case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358, where Spry, VP said at page 360-E:

> "The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. *EA Industries v Trufoods* [1972] EA 420."

The respondent's case at the trial will be that the termination of the contract by the appellant was unlawful in that the appellant did not give the respondent six months notice as stipulated by the agreement. This may or may not be true, but even if it was, that alone would not, in my judgment, entitle the respondent to an order of injunction.

As to whether the respondent would suffer irreparable injury which cannot adequately be compensated by an award of damages, there is no evidence to suggest that this would be the case. Indeed, the Judge himself made an order for payment of damages against the appellant which implies that he accepted that this was a case where damages would be an adequate remedy. This appreciation should have logically led him to the conclusion that the respondent had not laid any proper basis for the grant of a temporary injunction and he should have dismissed the application.

There is one other reason why the Judge should have declined to grant the injunction sought by the respondent. If this was a purely private commercial dispute between the parties then perhaps the judge's decision could have been justified. Unfortunately, this was a dispute with implications going beyond the particular interests of the parties directly involved. One of the affidavits filed on behalf of the appellant was sworn by a Mr Martin Smith, the appellant's Fuel Products Sales Manager. He makes some very pertinent points and I think I should set out here some of them. He deponed *inter-alia*:

> "(4) That on or about 26th October 1990, my office received a report that the operator at Kakamega Esso Petrol Station, the plaintiff herein, had deliberately mixed products in the tanks containing diesel and regular fuels with kerosene. This is a very serious matter as it could jeopardise public safety.
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> (5) That on receipt of the information, I directed my officers at Kisumu to make the necessary

initial investigations and to take such steps as they considered necessary to ensure that the public is not endangered. I am informed, and verily believe that adequate measures were taken by Mr Nashon Okoth, the Area Sales Representative, and the situation was brought under control.

(6) That I further directed that samples of the contaminated products be removed and forwarded to the company's laboratories at Mombasa for the necessary testing. This was done and it was established beyond doubt that the products had indeed been contaminated.

(7) That deliberate contamination of products is about the most serious breach of the agreement between Esso Kenya Ltd and its dealers. It could well result in extensive damage to both life and property and cannot possibly be tolerated.

(9) That following confirmation that the products at the plaintiff's station had been contaminated and on verification that such contamination had been done deliberately and in utter disregard of the safety of life and property, the management of Esso decided to terminate the plaintiff's dealership on 22nd November 1990.

(11) That I verily believe that in doing what it did Esso was acting in fulfilment of a higher duty to protect the public from the actions of a misguided profiteer intent on making a profit even at the risk of causing untold hardship to the unsuspecting members of the public." (Underlining is mine).

There is no reference to this important affidavit in the judge's ruling which leads me to the inevitable conclusion that he did not take into account the serious issues of public safety and possible damage to property alluded to in Mr Smith's affidavit. These are considerations which must of necessity override the economic interests of the respondent. In his pursuit of profit, the society cannot allow him to put at risk the lives and property of the members of the public. There was therefore a higher duty imposed on the appellant to act at once and decisively as aptly put by Mr Smith in his affidavit. I have no doubt in my own mind that if the learned Judge had taken this factor into account he would have arrived at a different conclusion, and that in failing to do so, he fell into a serious error. He exercised his discretion wrongly and this Court is bound to interfere.

For these reasons, I would allow this appeal, set aside the ruling and order of the High Court and substitute therefore an order dismissing the respondent's application for a temporary injunction with costs. I would also award the appellant the costs of appeal.

Masime JA. The pleadings in this dispute and the application for interlocutory orders from which this appeal arises have been summarized in the judgment of Kwach JA, which I have read in draft. Like Gachuhi JA, I would respectfully agree that this appeal should be allowed on the grounds stated by Kwach JA. I wish however to add the following.

The principle underlying the issue of injunctions is that the *status quo* should be maintained so that if at the hearing the applicant obtains judgment in his favour the respondent will have been prevented in the meantime from dealing with the property in such a way as to make the judgment nugatory. On the material before us the sequence of events from the 23rd October 1990 showed in no uncertain terms that the appellant was contemplating the termination of the operator's arrangement. If, as happened in *Esso (Kenya) Ltd v Gumbi Road Service Station Ltd* CA No 12 of 1991(unreported) the respondent had in anticipation of the termination filed action and sought an injunction, perhaps it may have been possible to obtain such an injunction. On the facts of this appeal, however, the respondent filed action and sought injunction after the termination of the operator's agreement and the immobilization of the petrol pumps at the station.

In my view once the operator's agreement was terminated the prayers in the temporary injunction application could not be granted as they assume that the agreement is in place. After the *ex-parte* orders of Khamoni J, the application was served. Affidavits in reply were then filed before the hearing *inter partes*. From the material before the trial Judge it was abundantly clear that by the time the suit and the application were filed the operator's agreement had been terminated in accordance with its provisions. In

the event the only course open to the respondent was to sue for damages if as he contended the termination breached the agreement. As it is settled law that where the remedy sought can be compensated by an award of damages, then the equitable relief of injunction is not available. In any case since there were serious allegations about the respondent himself having committed fundamental breach of the operator's agreement there was a serious hurdle in his path, as "he who seeks equity must come with clean hands." I appreciate that the respondent denied having deliberately contaminated the fuel products but that was a matter for trial in the main suit.

It is for the above reasons that I concur with the orders proposed by Kwach JA and agreed to by Gachuhi JA for allowing this appeal.

Gachuhi JA. I have read the judgment prepared by my brother Kwach JA and I agree with it.

However I would add that the principles underlying the granting or refusal of injunction are well settled in several decisions of this Court. Where an injunction is granted, it will preserve or maintain the *status quo* of the subject matter pending the determination of the main issue before the Court.The merits or demerits of granting injunction orders deserve greater consideration. The Court should avoid granting orders, which have not been asked for in the application before it or determine the issue in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. In *Halsbury's Laws of England* 4th Ed Vol 24 Para 953 it is stated:

> " On application for an injunction in aid of a plaintiff's alleged right, the Court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the Court ought in all cases to be regulated, but in no case will the Court grant an interlocutory injunction as of course."

In the present case it is alleged that the respondent deliberately mixed products in the tanks contaminating diesel and regular fuels with kerosene which action the appellant viewed as grave and dangerous. In order to protect the public from being sold the contaminated product, the appellant claimed in its affidavits that it was justified to disable the pumps and terminate the agreement by giving shorter notice which required the respondent to hand over the service station with immediate effect. The respondent filed suit based on breach of the operator's agreement and among the reliefs he prayed for were injunction, specific performance, compensation and in the alternative damages for the breach. Simultaneously with the plaint, he filed a chamber summons for injunction to restrain the appellant from stopping the respondent operating the business, evicting him or interfering with the respondent, his servants or agents in any way until the determination of the suit.

The cause for termination of the agreement for contamination of product was of a public protection nature that had not been specifically included in the agreement between the parties but which the appellant claims was provided for in clause XI (h) of the agreement, which provides:

> "That if there shall be flagrant breaches of the operator's obligations hereunder, Esso shall become entitled to re-enter the station or any part thereof in the name of the whole and take over and resume the operation, and management of the station."

The Court ought to look at the allegations in the affidavits by the plaintiff and the defendant and weigh them whether there is a possibility of the plaintiff succeeding or whether there is a possibility of quantifying damages. Only in cases of doubt the Court will proceed on the basis of the balance of convenience while being aware that formal evidence will be adduced at the hearing.

The respondent filed suit having been served with the letter of termination of the operator's agreement, which took effect on delivery of the notice on 23rd November 1990 but did not pray in his plaint that in the event of being wrongly evicted, he should be reinstated. The Court in addition to granting an injunction and the order of enforcing operator's agreement granted consequential orders that were not

prayed for in the application in that regard and condemned the officer of the appellant company for the action he took to protect members of the public and the reputation of his company, without having heard him in the matter.

The orders that were granted having not been prayed for are:

> "3. Mr Okoth, the respondent's company representative in Kisumu having been instrumental in disabling the pumps at the station should cause the said pumps to be operative within seven days of this order and in default the applicant is at liberty to invoke the provisions of order XXXIX rule 2(3) of the Civil Procedure Rules.
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> 4. The defendant/respondent is hereby ordered to pay damages to the applicant, from the date the temporary injunction was granted to the date the station will be opened."

The respondent having pleaded breach of the agreement and prayed for damages, the Court ought to have denied him injunction and the order of reinstatement because his claim could have been quantified and be compensated by the award of damages as one of the considerations enumerated in *Giella v Casssman Brown & Co Ltd* [1973] EA 358. There were no terms attached to the order granting injunction as to giving security.

In my view the Judge was wrong in granting the injunction and I would allow this appeal with costs.

As Masime JA also agrees this appeal is allowed in terms of the order proposed by Kwach JA.

Dated and delivered at Kisumu this 10th day of July , 1992.

J.M GACHUHI

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

R.O KWACH

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR