REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 3424 OF 1982

BP NAIROBI SERVICE STATION LTD.....PLAINTIFF

VERSUS

BP KENYA LTD.....DEFENDANT

JUDGMENT

April 27, 1989, **Muthoga CA** delivered the following Judgment.

The Plaintiff B.P. Service Station Limited brought this action against the defendant Kenya Shell Limited later amended and substituted with that of B.P. Kenya Limited claiming:-

> (a) An injunction restraining the defendant from interfering with the plaintiff's quiet possession and enjoyment of the premises known as L.R. 209/2391 Ngara in Nairobi which are owned by the defendant and which the plaintiff claims are let to it;
>
> (b) An order directing the Defendant and others claiming through it to allow the Plaintiff, its servants and agents unhindered access to and possession of the said premises;
>
> (c) Damages; and
>
> (d) Costs and interest.

The Plaintiff claims in its plaint that from about the month of February 1978 it has been in sole and exclusive possession and occupation of the said premises and has paid the agreed rent for the same to the defendant. It further alleges that by operation of law or alternatively by payment and acceptance of the said rent the Plaintiff became and is still the tenant of the defendant in respect of the said premises which were at all material times used for retail trade and that the resultant tenancy is a "controlled tenancy" within the meaning of the Landlord and Tenant (Shops Hotels & Catering Establishments) Act (Cap. 301) (hereinafter called "the Act").

The Plaintiff does not plead how it came into "Sole exclusive possession and occupation" of the said premises or what the "agreed" rent was and how and when it was agreed with the defendant. It does not also plead whether its coming into such sole and exclusive possession was in accordance with or pursuant to any written agreement between it and the Defendant or whether it was in consequence of an oral agreement. It, however, continues to plead that in or about the last week of September and the first week of Oct. 1982 and thereafter on various and diverse occasions the Defendant by its servants and agents entered upon the said premises and forcefully took physical possession of the same and evicted the

plaintiff from them. By reason of eviction the Plaintiff states that it has suffered loss and damage and seeks in addition to the orders of injunction and possession damages to be assessed. When the hearing opened before me it was agreed that evidence relating to damages and all issues related to them would be adjourned to be tried or taken after the issues of liability have been decided on. Accordingly, the suit was fought only on the issues of liability.

The defendant filed a defence on the 26th June 1983 which it subsequently amended on the 26th February 1986 denying that the Plaintiff has had sole exclusive possession and occupation of the premises as alleged in paragraph 4 of the Plaint, or that any rent has been agreed or paid to the Defendant by the Plaintiff and also that there was a tenancy between it and the Plaintiff. It admits having taken over possession of the premises but states that it was legally entitled to do so having terminated the Plaintiff's licence and, since in any event the Plaintiff did not have title to the land to which the Defendant could have trespassed. It further alleges that the Plaintiff's licence was terminated by notice.

At the commencement of the hearing of the suit it was agreed that the issues for determination by the court are set out in a document known as "Issues" filed in court on the 15th May 1986. That document set out the issues as:-

1. Has the Plaintiff been in sole and exclusive possession of the suit premises?

2. Has any rent been agreed between the parties?

3. Is the Plaintiff a protected tenant of the premises?

4. What is the contract between the parties?

5. Is the Plaintiff a licencee of the defendant?

6. Was notice terminating the licence given to the plaintiff?

7. Who is entitled to possession of the premises, and

8. Costs.

With tremendous respect to Counsel on both sides who appeared before me, who are both eminent Counsel at the bar with many years of practice before them, this was not a very helpful way of setting out the real issues that the Court must determine in order that the dispute between the Plaintiff and the Defendant might be resolved. The only real issue between the Plaintiff and the Defendant is whether the Plaintiff holds the premises on L.R. 209/2391 Ngara Road Nairobi as a tenant of the defendant or as a licencee of the Defendant. If the Plaintiff holds such premises as a tenant it would automatically follow that the tenancy, unless it has been reduced in writing and is for a period in excess of 5 years would become a controlled tenancy within the meaning of Section 2 of the Landlord and Tenant (Shops Hotels & Catering Establishments) Act (cap 301) and consequently the tenancy may not be terminated except in accordance with the provisions of Section 4 of that Act. If the Plaintiff is a Licencee of the Defendant and uses the premises as such it would not be entitled to protection under the Act since the Act protects only tenants and tenancies on which terms is connoted some interest in the land.

The nature of the relationship between the parties is to be determined on a full examination of the dealings between them in their entirety. It does not depend solely on the interpretation of any agreement between them nor does it depend on the payment or otherwise of any rent or other consideration. It does not, it would appear, also depend merely on having or not having exclusive possession or as it is sometimes called exclusive occupation by the user. It is no longer possible to say that because a person has exclusive possession of the premises for which he pays rent or other consideration he is "*ipso facto*" a tenant and, conversely, that if he does not have such exclusive possession or occupation he is by that reason alone to be regarded as a licencee. That, Lord Justice Denning M.R. calls "old law", which is now gone, in the case of *Shell – Mex and B.P. Ltd vs. Manchester Garages Limited* [1971]1 ALL ER 841.

In that case, which is not entirely dissimilar to the present case, the issue was whether the operator of a petrol station under an operators agreement containing a clause in which the operator undertook not to impede the landowners (petrol company) in exercise by them of the right to carry out alterations of the layout decorations and equipment of the premises, held the premises as a tenant or a licencee. Lord Justice Denning in reading the judgement of the court stated at page 843

> "I turn, therefore to the point, was this transaction a licence or a tenancy? This does not depend on the label which is put on it. It depends on the nature of the transaction itself ...
>
> Broadly speaking, we have to see whether it is a personal privilege given to a person, in which case it is a licence, or whether it grants an interest in land, in which case it is a tenancy. At one time it used to be thought that exclusive possession was a decisive factor, but that is not so (emphasis mine): It depends on broade considerations altogether."

Primarily on whether it is personal in its nature or not: see (*Errington vs Errington and Woods*).

In *Errington vs Errington and Woods* [1952] 1 All E.R. 149 the honourable Lord Justice Denning had said at page 155 after considering the history of the distinction between a Lease and a licence as follows:-

> "The result of all these cases is that, although a person is let into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if circumstances or the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee."

This quotation was cited with approval by J.A. Forbes in the case of *Omar Bin Mohamed al Hatim vs. Mohsin Bin Saleh Alkhlagy* [1957] EA 486 at page 488. I was referred to and have carefully considered the judgement of the House of Lords in the 1985 case of *Street vs Mountford* which primarily deals with the problems of rent control relating to demises of residential accommodation. The decision does not restrict itself to demises of residential accommodation and infact cites with approval the Court of Appeal decision in *Shell Mex and B.P. Ltd. vs. Manchester Garages Ltd* [1971] 1 WLR 612 and particularly the passage and quote above. I understand the decision in *Street vs Mountford* to say that the grant which is short of exclusive possession will except in exceptional cases, result, in a licence while a grant conferring exclusive possession of the premises to the grantee will result in a tenancy. I do not understand the decision to say that the presence or absence of exclusive possession or occupation is itself conclusive and that one needs not look further. To that extent I do not regard the *Street vs Mountford* decision as necessarily over-ruling either the *Shell-Mex and B.P. Ltd v. Manchester Garages Ltd* or *Errington vs Errington & Woods*. I accept and adopt the words of Lord Denning as appears in the *Shell – Mex and B.P. Ltd vs. Manchester Garages Ltd* at Page 844 where he says:-

> "As I have said many times, exclusive possession is no longer decisive. We have to look at the nature of the transaction to see whether it is a personal privilege, or not."

And further,

> "It seems to me that when the parties are making arrangements for a filling station they can agree on a licence or a tenancy. If they agree on a licence, it is easy enough for their agreement to be put into writing, in which case, the licence has no protection under the Landlord and Tenant Act 1954. But, if they agree on a tenancy and so express it, he is protected. I realize that this means that the parties can, by agreeing on a licence, get out of the Act; but so be it; it may be no bad thing. Especially as I see that the parties can now, with the authority of the court, contract out the Act even with regard to tenancies."

Having now set out the legal premises within which I feel the dispute between these parties is to be

resolved, I now go to consider the factual situation of the relationship of these parties. But, in doing so or before doing so, let me cite two passages from the judgements of Lord Justices Sachs and Buckley in the *Shell-Mex vs Manchester Garages* case. Lord Justice Sachs' judgement which commences on page 844 contains a passage on P.845 stating:

> "Remembering that the plaintiffs are entitled to select who shall be entrusted with the promotion of their product, it seems to me at least very doubtful whether the contract embodied in the relevant document could as a whole be assignable. If it is not assignable, then, as I ventured to point out in *Barnes vs Barratt*, that is an element which may be taken into account when assessing whether any particular agreement results in a licence or a tenancy: for a tenancy involves an interest in land, and it is normally a characteristic of that interest that it is assignable".

In his judgement, appearing on page 845 Lord Justice Buckley says

> "I agree. It is clear authority that in considering whether a transaction such as we have before us in this case constitutes a licence or a tenancy the Court is not to have regard to the label which the parties give to the document or to the formal language of the document,but to the substance of the transaction (emphasis mine)"

and further;

> "One must look at the transaction as a whole and at any indications that one finds in the terms of the contract between the two parties to find whether in fact it is intended to create a relationship of Landlord and tenant or that of Licensor and Licencee."

Of particular significance in that case was the fact the petrol company reserved unto itself the right to exercise control and possession over the property especially the layout and the equipment. He regarded that as indicative of the fact that the transaction was to be a licence and not a tenancy. He went on to say:-

> "But the way in which this document is framed is not such as to contain reservation of rights by the plaintiff to enter on the property or to exercise any rights over it: it is assumed that they retain the right to possess and enter on the property notwithstanding the transaction, and that is a state of affairs which in my judgement clearly indicates that this should be regarded as a licence and not a transaction giving rise to the relationship of Landlord & tenant ...".

As I observed earlier in the judgement the Plaintiff did not plead what document, if any establishes its right to be on the Defendant's land. It did not point to any agreement. It merely pleaded that it was at all material times in exclusive possession of the premises and propositioned that as it was paying the agreed rent (without saying how the rent was agreed) it was a tenant and therefore a protected tenant. The defendant denied this proposition and served on the Plaintiff as a request for further and better particulars seeking to be told

> (a) Whether the alleged contract was written or oral and
>
> (b) the term of the alleged tenancy

The Plaintiff replied to the request for particulars stating that

> (a) "the contract was formed by course of trading between the parties by payment of rent and other dues by the Plaintiff and issue of the receipts and statement by the Defendant, and
>
> (b) The contract was to be in operation until due termination of the Plaintiff's tenancy of the suit premises."

It is noteworthy that in replying to this request for particulars the Plaintiff did not allude to the fact of "being in sole exclusive possession" as giving rise to the tenancy nor did it refer to the tenancy as being only determinable in accordance with the provisions of the Landlord & Tenant (Shops, Hotels & Catering Establishments) Act. It is also noteworthy to observe that even after the defence was amended to plead that the Plaintiff was a licencee of the suit premises and that its licence was properly terminated by notice the Plaintiff did not respond to that plea. No reply to defence was filed. Thus far the pleadings have spoken.

The evidence put forward by the parties establishes the following matters as not being seriously in dispute.

1. It is agreed that there was no document signed or executed by both parties setting out their relationship.

2. The relationship between the parties developed almost by default when there was a change in the nature and character of the Plaintiff. The Plaintiff's immediate predecessors were an unincorporated association (partnership) who sought permission of the Defendant to incorporate themselves into a limited liability Company. Following that permission the Plaintiff was incorporated with some (but not all) of the partners in the unincorporated body becoming equity holders in the plaintiff.

3. The running of the station continued throughout the time uninterruptedly as the proprietorship of the business changed.

4. To a large extent the defendants servants continued to deal with the same individuals before and after incorporation and there was little, if any, difference in the manner in which the station was run and managed by the two different owning bodies.

5. There was no visible or tangible change in management and control of the station vis a vis the defendant and its operations.

6. The operation of the station by the plaintiff's predecessors (the unincorporated body) was governed by and spelt out in a document exhibited as Exhibit 1 which is an agreement made between B.P. Kenya Ltd. of the one part and SULTANALI EBRAHIM ALIBHAI, AMIN MOHAMED SULTANAR EBRAHIM, KABIRUDIN SULTANALI EBRAHIM and SHAH SULTAN W/O SULTANALI EBRAHIM. The names would suggest and it was not disputed that these comprised virtually members of the same family. These are the people who the defendant B.P. Kenya Ltd selected to entrust with the promotion of its product at this station. They entered into an elaborate agreement containing provisions very nearly those in the agreement referred to in the *Shell-Max and B.P.* and *B.P Ltd vs Manchester Garages Ltd*.

7. The agreement imposed obligations on both parties and stipulated conditions that were to govern their relationship. The agreement provided that the defendant would permit the operators (the unincorporated body) to enter the premises described in the Schedule thereto which included the land on which a filling station had been constructed and the equipment thereon and to operate the petrol station thereon. The defendant undertook to install and maintain upon the station petrol and oil pumps and other installations as it considers necessary for the sale of those of its products as are now or may in the future wish to market and that the operators hereby agree to enter upon the station as Licensees thereof and to operate the same upon the terms and conditions hereinafter appearing.

The agreement set out a long list of terms and conditions most of which are as consistent with being in a lease as in a licence. Like in the *Shellmex* case the agreement contained two conditions which clearly militated against its being a tenancy and suggested that it could only be a licence.

It provided in Clause 2(r)

> "Keep the station open for sales and service to the public on such days and during such minimum hours as the company shall from time to time specify"

The operators were not free to do what they liked with the premises or to open and shut them as they pleased. The right to direct operational timing was of the grantor (BP Kenya Ltd.)

In clause 2(s) it provided: -

> "Permit the company to lock and seal all storage tanks and petroleum products dispensing equipment including pumps and the operators undertake not to interfere nor permit others to interfere with any such locks or seals."

The agreement also contained a provision to the effect that the Company shall be entitled to terminate the agreement if the operators or any of them is convicted of any offence against the laws of Kenya the punishment for which is a fine exceeding Shs. 2,000/- or imprisonment exceeding three months or both.

Clearly this provision indicates that the grant is intended to be personal to the grantee and is conditional upon his being of good character. Such a grant or right is rarely, if ever, assignable.

8. the station was run by the unincorporated body between 1968, and 1978 when the plaintiff was incorporated to run the station on the basis of the Agreement dated 14/6/68 (Exhibit 1).

9. Both the defendant and the plaintiff desired that on the plaintiff taking over operations from the unincorporated body the relationship between it and the defendant be regularized by the execution and registration of an Operator's Agreement.

10. Although the defendant thought that an Operator's Agreement had been prepared and sent for execution by the plaintiff and subsequently forwarded for stamping in the Lands Office no such agreement was ever stamped. Evidence does not show that any such agreement was infact executed. There is evidence, however, that had the plaintiff received the Operator's Agreement it would have signed it there and then. It follows that the parties regarded their relationship as being governed by an Operator's agreement. It is not clear whether both parties were aware of the terms of the Operators Agreement that was to be executed. It is clear, however, that both intended that their relationship should be governed by the standard Operators agreement. There is nothing to suggest that the Plaintiff expected its Operator's Agreement would be different from that used in respect of other Petrol Stations. At the very least the Plaintiff must be taken to have intended that its relationship with the defendant would be governed by an agreement of the type and with terms and conditions not dissimilar with those contained in exhibit I (the agreement of 24/6/68). The plaintiff was fully conversant with the terms of the agreement including those conditions that I set out above. In responding to the request for permission the Defendant wrote:-

5.9.75.

> We refer to Mr. Alibhai's discussion to-day with our Mr. F. G. Waweru and confirm that in principle we have no objection to your trading as a limited company provided it is clearly understood that your personal liabilities and objectives under the agreement dated 24th June 1968 are in no way affected or prejudiced by such consent. Kindly signify your co-operation by signing a copy of this letter:
>
> Yours faithfully
>
> for Kenya Shell Ltd
>
> F. G. Waweru
>
> We hereby confirm the above:

Sultanali Ebrahim Alibhai

Amin Mohamed S. Ebrahim

Kabrudin Sultanali Ebrahim

(See letter 4) of Exhibit 2)

It is clear from this letter therefore that the Plaintiff was to carry on the business of operating the Petrol Station on the terms of an agreement of 24th June 1968. I am not therefore able to accept Mr. Esmail's contention that the relationship between these parties was not governed by that agreement and that that agreement should be disregarded because it is not executed by the plaintiff.

On the basis of the evidence before me and upon perusal of the documents produced I find and hold that the Agreement of 24th June 1968 (Exhibit 1) set out the terms of the relationship between the plaintiff and the defendant and should be treated as a document duly executed by the two parties and binding on them. In examining the relationship between them I must therefore give due regard to that agreement.

I have already stated that I accept as correct law that in deciding whether relationship between parties amounts to a tenancy or merely a Licence that does not depend on the wording of the agreement. The whole of the transaction and conduct of the parties has to be examined.

Evidence on the relationship between the parties was given for the Defendant by Januarous Kipleting Mutai the Area Manager of the Central Division and also by Francis Geofrey Waweru (DW 2) For the plaintiff evidence relating to the relationship and conduct was given by Bashir Dewji (PW1) who is a director of the plaintiff.

The evidence of DW 1 Januarous Kipleting Mutai so far as it relates to the conduct of the parties was as follows:

The defendant does not let Service Stations on the basis of tenancies.

The Stations are operated on the strength of Operators Agreements signed between the Defendant and the various dealers. These are in form of Exhibit 1. Exhibit 1 was an agreement between the Defendant and the previous operators of the station.

There is no Standard Form Operator's agreement signed by the plaintiffs.

The charges payable by operators called station rental fluctuate with through put. The operator does not have exclusive possession. The defendant can go in and out of the Station as it wants and as necessary. It goes in order to assist the dealers and to check on what is happening at the Station. It removes and replaces equipment as it deems necessary.

The item of station rental on the invoice could go down to zero if the station made no sales during the month.

In cross-Examination he stated that the lockable parts of the station are locked by the dealer who keeps the keys and who has physical possession of the premises. He reiterated that the operator has the keys to enhance the security of the operations and of the equipment. When the defendant requires to do anything with the equipment or to have access to the locked premises it would ask for the keys from the plaintiff. The plaintiff would not be entitled to refuse and cannot exclude the defendant.

DW2 Francis Geoffrey Waweru in his evidence narrated the history of the running of the station originally by the unincorporated body and subsequently by the plaintiff. He gave evidence as to how an operators agreement comes into being and how it is processed. He stated that the Rep. and other staff of the Defendant visit the station regularly to undertake or oversee the undertaking of such things as are

necessary. The Rep is concerned with.

1. Good Housekeeping by the Operator – a term which combines cleanliness and tidiness of the station and staff.

2. Service to costumers

3. Congestion at the station

4. And generally sales promotion.

Apart from the Rep. a station would be regularly visited by the Pump service personnel. The defendant would also be concerned with training the employees of the Plaintiff on the job.

The defendant would keep a sharp eye on the volume of sales and would discuss any downward trends with the dealer and direct him whatever steps he should take. Both the dealer and the company stand to benefit from increased sales. Hence the rep.'s concern with decrease in sales.

The company would wherever necessary re-develop a station to make it give better service to its customers. That is the parole evidence as far as the Defendant goes.

The plaintiff tendered parole evidence via PW 1. Bashir Dewji who was incharge of the petrol station on behalf of the plaintiff during Feb 1978 – June 1986. He affirmed that he never signed an operator agreement. He is not aware of anyone else having signed. He stated that the plaintiff has paid station rentals as demanded in the invoices. He kept all the keys to the lockable areas of the station and ensured that no one from the defendant could gain access to these areas.

He further stated that the Defendant's employees very rarely visited the station and then only after repeated calls. He agreed that if there was breakdown of the equipment he would notify the defendant who would attend to it.

He would have signed the operator's agreement if it had been brought to him. The rent is not a fixed amount but varies with the purchases by the defendant. He confirmed that if the plaintiff did not purchase any fuel from the Defendant the rent sales would be zero.

If the dealer stopped selling Shell products and converted the station to sale of spares and tyres Shell would not be entitled to any rentals. The other evidence produced consisted of documents produced by both sides. These establish the manner on which Shell came to allow the Plaintiff to operate the station.

I have carefully examined the transaction the subject of this litigation and the relationship of the parties as it emerges from the oral testimony given in Court and the documentary evidence submitted and come to the conclusion that the Plaintiff did not enjoy exclusive possession of the premises and that such possession as it enjoyed was limited by the substantial degree of control that the grantor continued to exercise on the operations at the station and on the premises themselves. I have carefully examined the agreement dated 24th June 1968 which I have determined to be the document evidencing the relationship between the parties and governing their conduct and find that that agreement contains terms which clearly suggest that it is intended to create a licence rather than a contractual tenancy.

In coming to this conclusion I have considered not only the meaning of the words used and the tenor of the document but also all the surrounding circumstances. The documents clearly establishes a relationship which is personal to the grantee. The terms of the letter of the defendant of 5.9.75 according to the request for the operations to be carried on by a limited liability company clearly support this view. The Agreement is not intended to confer an interest which can be assigned. The assignability of the interest created by an instrument is a strong indication that the character of the interest is one of a tenancy rather than a Licence. The agreement conferred a personal priviledge on the grantees in the form of a Licence to operate the station which they could not properly assign.

In the premises I hold that the relationship of the plaintiff and the defendant is one of Licensor and Licensee and not of Landlord and Tenant and is accordingly not governed by the Landlord and Tenant (Shops, Hotels & Catering Establishment) Act (Cap 301).

In its plaint the Plaintiff complained that the Defendant had sought to terminate its tenancy wrongfully and in breach of the provisions of the Act. It further stated that being a tenant it had been wrongfully dispossessed of the premises to which it was entitled as a controlled tenancy. It claimed damages from wrongfully dispossession of the said premises on the basis that it is a protected tenant. I have found that no tenancy existed between it and the defendant and consequently that it cannot be dispossessed of it.

The defendant pleaded in its amended defence that the Plaintiff was a Licensee and that his Licence had been properly terminated. There was not as I observed earlier, a denial of this aversion by way of reply. I am constrained to hold therefore that the Licence was properly terminated.

The Plaintiff is not therefore entitled to damages for wrongful dispossession of any interest in land or for wrongful termination of the Licence.

In the result, I find that the Plaintiff is not entitled to an injunction as prayed in prayer 1 or to an order for possession as prayed for in prayer 2 of the plaint and for the reasons stated above is not also entitled to damages.

The suit must therefore be and is hereby dismissed with costs.

Dated and Delivered at Nairobi this 27th day of April , 1989

C . A MUTHOGA

JUDGE