REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Nyarangi, JJ A and Gachuhi, Ag J A)

CIVIL APPEAL 35 OF 1984

BETWEEN

BERNARD GATHIGE NGUAH …….....…….……
APPELLANT

AND

AGIP (KENYA) LIMITED …….....….....……..….
RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Porter, J) dated June 17, 1983

In

Civil Suit 3224 of 1979)

JUDGEMENT OF KNELLER, J A

I, too, would dismiss the appeal with costs.

Unreservedly I agree that because Anna Njambi Gathige did not sign the Agip Operator Agreement, she was not made a defendant, did not intervene in any manner and the appellant made no issue out of this in the High Court or in this one, we need not be ensnared by it now. And that it was proved by the respondent on the balance of probabilities at the trial that the appellant had

(i) Failed in various years to obtain a current trading licence.

(ii) Either threatened with a bow and arrow or driven off his petrol station in Park Road, Nairobi or, having allowed onto it or found on it then unlawfully detained in his office. One of the servants or agents of the respondent, all of which so ruffled his feelings he refused to visit it on duty on behalf of the respondent (or at all I expect).

(iii) Failed to send in to the respondent records of his sales of their products; and

(iv) Refused on occasions to let its representatives examine those records.

Any of these breaches, and of course, all of them, entitled the respondent to terminate the agreement without notice.

The alleged failure to reach the target of (agreed) sales of various products of the respondent in one month may or may not have been proved by the standard required in a civil action because the appellant's order together with the respondent's delivery note and earlier receipt for cash for it do not tally so far as I can tell in the amount of time available for analysing the documents relating to such a matter, so, giving the appellant the benefit of the doubt, I would have found that in that particular month he did not sell enough of the respondent's products as he agreed to do but he has a reasonable (lawful) excuse for not doing so. No-one in this world can sell what he has paid for in advance but has not been given to sell in the stipulated period. The appellant in his submission on this was greatly vexed by the finding of the High Court to the contrary, but, in my view, it is, at the most, only one finding and does not profit him in the end in relation to his recurrent rumbling troubles with the respondent.

That apart, however, I can return to the finding and conclusion of Nyarangi, J A that the decision of the High Court judge was obviously right in the result he reached.

Gachuhi, Ag J A agrees.

The consequence is that this court now dismisses this appeal with costs.

Dated and delivered at Nairobi this 4th day of July, 1986.

A A Kneller

Judge of Appeal

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June 17, 1983 In

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JUDGEMENT OF NYARANGI, J A

This is an appeal from a decision of Porter J given in the High Court Nairobi on June 17, 1984. The plaintiff's claim against the appellant as defendant arose out of an agreement known as Agip Operator Agreement made between the appellant and one Ann Njambi Gathige both of one and the same address of Box 27093 Nairobi (the operator) and Agip Limited (the company). Mrs Anna Njambi Gathige did not sign the agreement and she was not a co-defendant: Benard Gathige Njuah, the operator, was sued as purporting to trade as Gichamu Petrol Service Station. Under the agreement the plaintiff granted to the defendant Company inter alia an exclusive licence to operate the plaintiff's service station erected on the plaintiff's land at Park Road Nairobi, for the purpose of selling the company's products according to the terms and conditions in the agreement. The agreement provided as is usual for termination of the agreement by either party upon giving a month's notice and that if the defendant was in breach of the agreement, the plaintiff could determine the agreement without notice.

The company claimed that the appellant as defendant had breached the agreement having failed to obtain and retain a current trading licence, refused the company's servants and agents to have free and unfettered access to the service station, failed to render reports and refused to permit the company to inspect the records of sales, and failed to attain the target of sales of the company's products as stipulated in the agreement. The company therefore determined the agreement by serving one month's notice on the defendant on the May 31, 1977. The company sought an order for a declaration that it was entitled to vacant possession of the service station and an order directed at the defendant to hand over the company the service station, an order to restrain the defendant from continuing to carry on business as the service station, an order that the defendant do forthwith hand over all stocks of the company's products and if necessary the company to refund to the defendant the cost of such stock pursuant to the agreement and an order directing the defendant to pay damages to the company in accordance with the relevant clause of the agreement.

The appellant filed an amended lengthy, and detailed defence. He counter claimed general and special damages on ground of alleged breach of clause 2(d) of the agreement. The appellant's specific complaint was that the company had either failed or refused or delayed to deliver to him petrol, oils, kerosene and other company products as per the agreement. The alleged particulars of the counterclaim were furnished and the items in support of special damages totalling Kshs 2,602,000.00 given.

The learned trial judge heard and fairly and properly considered the entire evidence adduced and held that the relationship between these parties was governed by the agreement, that the defendant had contravened the clause requiring him to keep and provide records of sales, that the appellant was in persistent breach of the clause relating to the target of sales he had to attain and that he had not convinced the judge that his failure to meet the target was attributable to the company and therefore that at any time since the February 1, 1975 the company could without notice terminate the agreement.

On my own perusal and study of the evidence, all of which was undertaken within the four walls of the grounds of appeal on which the appellant urged his appeal and on the reply by Mr Gaya, I remain unpersuaded that the trial judge's findings and conclusions can be faulted. The trial judge heard and saw all the witnesses. He held that the company had proved its case as required. It is axiomatic that this appeal is in the nature of a rehearing and that if it is clear that if the trial judge came to a wrong conclusion due to a misapprehension of important evidence as a whole, the decision of the High Court could be reversed: Lewin v Neylan (1934), 1 EACA 5 and Scarf v Sholan (1955), 22 EACA 270. But the trial judge did not misdirect himself in his findings both on fact and on law on each of the matters relied upon by the company. The ultimate sole question, therefore, is whether on the evidence, the trial judge's decision is correct. In my opinion the case is too clear for argument. The judge was wholly correct. It follows that I would dismiss the appeal with costs.

Delivered at Nairobi this 4th day of July, 1986.

J O Nyarangi

Judge of appeal