REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA AT KISUMU

civ app 64 of 83

PETER ORONGE GORO …….…… APPELLANT

AND

CALTEX OIL (K) LTD ……..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Schofield, J.) dated 9th March 1983

in

Civil Case No. 59 of 1981)

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JUDGEMENT OF HANCOX, J.A

Under an Operator's Agreement dated October 1, 1977 the appellant operated the WINAM petrol filling service station at Land Reference 1148/1532 in Kisumu, the purpose of which was to sell Caltex petroleum products and lubricants to members of the motoring public. The products were to be supplied to the appellant by Caltex Oil (Kenya) Limited, who is the Respondent to this appeal, and he was bound, under clause 6(a) of the Agreement to pay for them in cash at the time of delivery, or in such other manner as might from time to time be acceptable to Caltex.

Under sub-clause (k) of clause 6 the Appellant was obliged to give adequate notice to Caltex of his requirements. Mr Angir the sales representative of Caltex for the area, said 48 hours notice was necessary. His further obligations included the maintenance of adequate stocks, (clause 6(1)) the maintenance of true records of products sold (clause 6(c), and not to purchase petroleum products from sources other than Caltex. Either party could terminate the license given to the appellant under the Agreement by one month's notice in writing (clause 3) and Caltex could do so forthwith if the appellant, inter alia failed to perform any of his obligations under the Agreement (clause 8(n)).

I assume that the appellant began to operate the Winam Service Station on the date of commencement of the license, that is to say October 1, 1977, and matter seem to have proceeded relatively smoothly (with the exception of a complaint by Caltex in October 1978 that the appellant's sales did not improve as they hoped, this being the reason why he had been allowed a discount) until the year 1980, when the appellant said he found that his orders for products were not being complied with. Either he was given short supply or there was a delay, which apparently was not the case as regards other filling stations in Kisumu. He accordingly wrote the letter of June 5, 1980, (Exhibit 2), complaining to Caltex that because of these matters his business was deliberately being "sabotaged". One specific complaint was that products which were ordered on May 31, 1980 were not delivered until June 4 of that year. It was, moreover, alleged that

the Caltex sales representative, presumably Mr Angir, had visited his station at odd hours, had behaved badly and that he wished to obtain the station for himself.

Mr Angir described the level of purchases which the appellant was required to maintain under the second schedule to the Agreement (which is not included in our record) and in particular that the dealer or operator should always take a minimum deliver of 6,000 or 8,000 litres, depending on the capacity of the lorry delivering it.

According to Mr Angir the appellant did not achieve the Company's target for August or September, 1980, and he discovered discrepancies between the petrol sold through the pumps and that shown in the invoices. Furthermore, the plastic bottles in which Caltex Oil was being sold were broken and the oil was mixed with water. Mr Angir admitted going to the appellant's service station at night but presumably this was for the purpose of checking the pumps and records.

Matters continued to deteriorate, and, on February 12, 1981, Clatex wrote to the appellant in effect terminating the Agreement and requiring him to vacate the Service Station on March 18, 1981.

This, of course, they were entitled to do without assigning any reason under clause 3, though two breaches were specified, in that it was stated that the appellant had not improved his sales as he had been required to do, and that he had been buying the products from competitors.

The appellant then sued the Caltex alleging a breach of the agreement and that they had terminated it without just or lawful cause. He obtained an injunction against Caltex restraining them from unlawfully evicting him from the Petrol Station pending the determination of the suit, but nevertheless vacated it himself on November 6, 1981. In his reply he denied the breaches of agreement which Caltex had alleged against him in their defence, but, although he alleged that Caltex had failed to deliver their products in time as and when ordered, he did not specifically say, as he has in the Memorandum of Appeal filed on his behalf, that it was their failure to deliver products as required which had led to his own failure to perform his part of the Agreement.

The learned judge made a careful examination of the evidence and reached the conclusion that Caltex had not failed to deliver petrol and other products and would have had no intent to frustrate the appellant in his operation of the Service Station. He accepted that the appellant was not maintaining adequate stocks, that he had not improved sales and that he had not purchased the minimum quantities of products required under the second Schedule.

Consequently he resolved the issue a to whether there had been a breach of the Agreement by Caltex in its favour, holding that the appellant was in breach of the Agreement and that Caltex was therefore entitled to determine it even without one month's notice.

In my judgment the learned judge's consideration and evaluation of the evidence was unexceptionable. He was entitled to hold on the evidence before him that the appellant had committed breaches of the Agreement and that Caltex was entitled to determine it.

Though it did so by giving over the required one month's notice, Caltex would have been perfectly within its rights to have determined the agreement summarily. I do no therefore think there is any substance in the grounds of appeal, which state that the Judge erred in law in holding that the appellant was guilty of a breach of a fundamental term of the Agreement, and that Caltex were entitled as a consequence to discharge it. Neither do I think that there is any justification for saying that the breach on the part of the appellant was induced by the actions and behaviour of Caltex and its employees, or that the appellant was thereby prevented from performing the Agreement as Mr Gumba maintains on the appellant's behalf. Finally there was in my opinion evidence upon which the judge was entitled to find that the appellant was not operating the Service Station efficiently.

I turn now to the two authorities which Mr Gumba invited us to consider. The first consisted of certain passages in Halsbury's Laws of England, as I understand it, Volume 9 of the 5th, not the 3rd, Edition. But

those passages relate wholly to stipulations in a contract as tot he time of performance of a party's obligations, and whether such stipulations will be regarded as of the essence of the contract. I do not find those passages as being of nay assistance in deciding a matter of this nature, which relates to a breach of the terms of the agreement by one party and whether that breach entitles the other to determine it under the express terms thereof. The second authority was Khatijabhai Jiwa Hasham v Zenab d/o Ohandu Nansi [1957] EA 38. In that case the appellant had purported to renounce the contract before the time for her performance of it had arrived. The Court of Appeal for Eastern African held that the respondent, as the injured party, was entitled to treat that repudiation as a beach entitling him not only to treat the contract as at an end and to sue for damages, but also as a kind of anticipatory breach enabling him to sue also for specific performance, even though that did not involve treating the contract as at an end. I do not find that case of any assistance in deciding whether a breach has occurred in the course of the performance of the contract in question, and whether that breach entitles the other party to determine the agreement under its express terms. This is not a case of recission, but of determination, of the contract.

For the foregoing reasons I am of the opinion that the learned judge was right in rejecting the appellant's claim and I would dismiss this appeal with costs to the respondent.

Dated at Kisumu this 9th day of December, 1983.

A.R.W. HANCOX

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JUDGE OF APPEAL;

am:

PETER ORONGE GORO ……..…… APPELLANT

AND

CALTEX OIL (K) LTD ……. RESPONDENT

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JUDGEMENT OF KNELLER, J.A

I agree with the judgment and order proposed by Hancox JA and as Chesoni Ag JA does to the appeal is dismissed with costs.

Delivered at Kisumu this 9th day of December, 1983.

A.A. KNELLER

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JUDGE OF APPEAL

am:

PETER ORONGE GORO ……..…… APPELLANT

AND

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JUDGEMENT OF CHESONI, AG, J.A

I agree with the draft judgment of Hancox JA which I have read and I have nothing to add.

Delivered at Kisumu this 9th day of December, 1983.

Z.R. CHESONI

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGISTRAR

am: