



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G. B. M. KARIUKI & KANTAI, JJ.A.)

CIVIL APPEAL NO. 5 OF 2014

BETWEEN

CALTEX OIL (KENYA) LIMITED (Currently trading

as TOTAL KENYA LIMITED).....APPELLANT

AND

EVANSON NJIIRI WANJIHIA RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Osiemo, J.) dated 31st May, 2007

in

H. C. C. No. 5366 of 1993)

JUDGMENT OF THE COURT

Evanson Njiri Wanjihia (the respondent) successfully applied for dealership of Caltex Petrol Station located on Waiyaki Way, Nairobi sometime in 1991. By a letter dated 29th October 1991, **Caltex Oil (Kenya) Limited (the appellant)** offered him the dealership originally on probation basis for a period of six (6) months. The respondent accepted the terms of the offer and signed the same on 30th October, 1991. He complied with the terms of the offer and furnished the appellant with the name of the Petrol station and deposited the Ksh.1, 000,000 as required. According to the respondent, he was not given the other conditions immediately as the highway next to the petrol station was being constructed and it would have been unrealistic to impose any conditions then. The terms and conditions of the dealership were spelt out later in a letter dated 16th December, 1992. He accepted the terms and signed the letter on 22nd January 1993.

However, on 3rd August, 1993, the appellant wrote to the respondent informing him of its intention to reconstruct the petrol station in question. The respondent was asked to make arrangements to “temporarily wind up” his business within two (2) weeks and to hand over the petrol station to the appellant to enable the contractor move into the site and proceed with the reconstruction, which in the appellant’s estimation was expected to take about four (4) months to complete.

However, about two months later, in an unpredicted turn of events, the appellant wrote to the respondent informing him that his licence to operate the station had expired on or about 23rd July, 1993 and the appellant had no intention of renewing it. He was given one month notice to vacate the petrol station.

The respondent who expected to be restored back to the petrol station after completion of the reconstruction felt aggrieved by this unexpected development. He consequently promptly moved to the High Court by way of plaint in **Nairobi HCCC No. 5366 of 1993** seeking several reliefs as against the appellant. These included *a prayer for specific performance of the contract; (which prayer was abandoned later); a temporary injunction restraining the defendant from breaching the contract and handing over possession to any other person other than the respondent before the suit was heard and determined. He also prayed for costs of the suit.*

The suit was resisted by the appellant vide the statement of defence filed in Court on 26th January, 1995. According to the appellant, the respondent had failed to comply with the terms and conditions of the agreement of offer in that he had failed to maintain high standards of cleanliness of the petrol station and pump attendants; poor customer service; and overcharging on the appellant's products were some of the reasons given for terminating the contract.

Further, according to the appellant, the terms of the agreement clearly stipulated that the same was for a probation period of six (6) months, which was not renewed at the behest of either party and which had therefore expired by effluxion of time in July 1993. According to the appellant, the agreement was not irrevocable and the same was determinable by either party giving one (1) month notice. The appellant prayed for dismissal of the suit with costs.

While the matter was pending in Court, the parties engaged in negotiations with a view to settling the matter out of court, with proposals and counter proposals being made. There was however no settlement reached and the matter proceeded to hearing, with the respondent testifying and calling one witness, **Timothy Thuku Muchiri**, an accountant as his witness.

No evidence was called by the appellant and an order was issued for parties to file submissions within fourteen (14) days upon close of the defence case. Submissions were filed and after considering the submissions and the entirety of the evidence before him, the learned Judge (Osiero, J) rendered the judgment dated 31st May, 2017, in which he awarded the respondent Kshs. 15,055,423/=, for breach of contract plus costs of the suit and interest thereon.

Aggrieved by that judgment, the appellant moved to this Court by way of the memorandum of appeal dated 24th December, 2013 in which it has proffered three (3) broad grounds which in paraphrase are as follows:-

That the learned Judge erred in not appreciating that the plaintiffs cause of action was premised on breach of a dealership contract whose awardable damages in lieu of specific performance were in the nature of special damages which had to be specifically pleaded and proved; that specific damages had not been specifically pleaded and proved; that the learned Judge had failed to appreciate that the dealership licence had expired and that the same had not been renewed. The appellant thus urged us to allow the appeal and set aside the impugned judgment and all consequential orders thereto, and order that **HCCC No. 5366 of 1993** stands dismissed with costs.

This being a first appeal, we are enjoined to appraise and re-analyse the evidence adduced before the trial court in its entirety and come to our own independent conclusion, as mandated by **Rule 29(1)(a)** of the **Court of Appeal Rules**. In doing so however, we must be alive to the fact that we neither heard nor saw the witnesses as they testified and give allowance for that.

See **Kenya Ports Authority vs Kuston (Kenya) Limited, Civil Appeal No. 315 of 2005.**

We have earlier in this judgment given the background of this matter and how the parties found

themselves before this Court. We shall now look at the evidence in more detail, the submissions of counsel and the law before we arrive at our decision.

In his evidence before the trial court, the respondent told the court that he was a retired senior manager, who retired from Gailey and Roberts in order to run the appellant's petrol station after he was awarded the dealership. He raised and deposited the Kshs. 1,000,000/= with the appellant as required, and started running the petrol station under the name of Caltex ENWA Petrol Service Station. He also obtained bank guarantee with Kenya National Capital Corporation to the tune of Kshs. 400,000/-. He then started business but about two or three months later, the construction on the Nairobi-Nakuru highway interfered with his operations of the petrol station as access to the petrol station from the main road became hampered. When construction of the road was completed about a year later, the operations of the petrol station went back to normal and the respondent was put on target performance.

According to the respondent, it was he who suggested to the appellant that it needed to refurbish the petrol station to bring it at par with other modern petrol stations. His suggestion was well taken and he was asked to temporarily hand over the station to the contractor which he did. He said that he was promised that he would be reinstated to the petrol station once the construction and refurbishment work was completed, in about four months.

To his surprise, after completion of the said works, instead of being handed back the petrol station he was handed over the letter dated 27th September, 1993 withdrawing his dealership licence which read in part:

“Dear Sir,

**“WITHDRAWAL OF DEALERSHIP LICENCE FOR ENWAR SERVICE STATION
WAIYAKI WAY – NAIROBI**

We write to inform you that we are herewith withdrawing our letter of licence dated December 16th 1992 that conferred dealership rights to you for ENWAR Service Station located on Waiyaki Way, Nairobi. The withdrawal is with immediate effect. You therefore cease to be our licenced dealer at the subject station immediately...

Several reasons were given for the said drastic action against the respondent. It is not clear what happened thereafter but about one month later, on 25th October, 1993, another letter was sent to the respondent this time referenced “TERMINATION OF OPERATOR'S LICENCE FOR ENWAR SERVICE STATION WAIYAKI WAY NAIROBI.”

Although authored by the same person i.e M. J O'REILLY – Manager Retail Marketing and Operations, this letter did not make reference to the earlier letter withdrawing the licence. The letter stated:

“October 25, 1993

Mr. Evanson N. Wanjihia

P. O. Box 50151

NAIROBI

Dear Sir,

***REF: TERMINATION OF OPERATOR'S LICENCE FOR ENWA SERVICE STATION,
WAIYAKI WAY NAIROBI.***

Dear Sir,

**“WITHDRAWAL OF DEALERSHIP LICENCE FOR ENWAR SERVICE STATION
WAIYAKI WAY – NAIROBI**

Reference is made to our letter of December 16, 1992 granting you licence to operate the company’s service station along Waiyaki Way Westlands Nairobi called Enwa Service Station.

The said licence expired on or about July 23, 1993 and the company does not intend to extend the same for any further period. We believe that you do not have any personal goods lying on or about the Service Station since you collected them all prior to the demolition of the Service Station for demolition of the Service Station for reconstruction. This notice constitutes one calendar months’ notice.

Please sign the extra copy of this letter enclosed here with and return it to us as an acknowledgement of receipt.....

Signed.”

According to the respondent, upon receipt of the letter, he went to the appellant’s head office to try and see the managing director or his deputy but he was rebuffed, and met with hostility by the respondent’s officers. He therefore moved to court and filed the suit in question.

As stated earlier, attempts to settle the matter out of court bore no fruit, and after a long exchange of letters, with proposals and counter proposals, and an exchange of not very polite words between learned counsel for the parties, the matter proceeded to hearing. In his testimony, the respondent conceded that there was no termination clause in their agreement, but he agreed that the dealership could be terminated in the event he breached the conditions given in the letter. It was his evidence that he had met the set targets every month by selling 177,000 litres of petrol per month.

His witness was Timothy Thuku Muchiri, a Chartered Public Accountant. He was requested by the respondent to audit ENWA Petrol Station books for the income year 1992 – 1993.

The witness prepared a statement of accounts which he produced before court as exhibit. It was his evidence that the respondent had made a net profit of Kshs. 1,128,535/= for the first year under review, and Kshs. 928,538/= for the last eight months of his business averaging Kshs. 93,512/= per month.

The learned Judge considered this evidence along with the written submissions filled by the parties and case law on the subject, more specifically as enunciated in **ADAIS VS GRAMOPHONE CO. LTD [1909] AC 408**, and **V. R. CHANDE AND OTHERS VS E.A AIRWAYS CORPORATION [1964] EA 78**.

The learned Judge found that there was a clear case of breach of contract. He made a finding to the effect that the appellant had tricked the respondent to handover the petrol station believing that it would be handed back to him after reconstruction, only to terminate the licence abruptly. The learned Judge found that the respondent was entitled to damages and proceeded to assess the same. He assessed the damages using the figure of Kshs. 93,512/= per month, from the date of the breach to the date the matter was heard, which was 161 months and awarded the respondent Kshs. 15,055,432/= with costs and interest. This is the award that gave rise to this appeal.

This appeal was canvassed by way of written submissions and brief oral highlights by learned counsel for the parties.

For the appellant, submissions were filed on 19th August, 2016. The thrust of the submissions is that the damages awarded by the learned Judge were in the nature of special damages and that special damages were neither specifically pleaded nor strictly proved as required in law. The appellant called in aid the case of **Savannah Development Company Limited vs Post Telecommunication Employees Housing Co-operative Society Limited Civil Appeal No. 160 of 1991**.

Secondly, it was submitted that if the damages in question were general damages, then the same were not available for breach of contract. The learned Judge was therefore, faulted for awarding damages either way.

On the proposition that general damages cannot be awarded for breach of contract reliance was sought on the case of **Oharamshi vs Karsam [1974] EA page 41** and the latter case of **Provincial Insurance Co. East Africa Limited vs Nandwa [1995 – 98] 2 EA 288**, and this Court's recent decision in **Kenya Power & Lighting Co. Ltd vs Abel M. Momanyi Birundu [2015] eKLR**.

On the issue of pleading special damages with specificity the appellant called in aid this Court's decision in **Siree vs Lake Turkana Elmolo Lodges Ltd [2000] 2EA 521**, and **Coast Bus Services Ltd vs Sisco E. Murunga Danyi & 2 Others, Civil Appeal No. 192 of 1992** (unreported) among others.

Learned counsel urged that since special damages were not pleaded, and the court cannot award that which has not been pleaded, then the learned Judge fell into error in awarding the amounts in question. According to learned counsel, even assuming the learned Judge had jurisdiction to award the said damages, he had no basis to award the Kshs. 15,055,432.00 for two reasons. Firstly because the learned Judge did not question the sum of Kshs. 93,512.00 which was given as the average profit, and further that the contract was terminable on reasonable notice and there was no basis therefore for awarding damages for a period of 161 months. Learned counsel submitted that even in absence of termination clauses, a contract can be terminated by either party on "reasonable notice". The English cases of **Winter Gardens Theater vs Millennium [1947] 2 All ER 331**; and **Staffordshire Area Health Authority vs South Staffordshire Waterworks Co. [1978] 3ALL ER 769**, were cited for their persuasive value.

In learned counsel's view, a one month notice which had been given by the letter to the respondent dated 25th October, 1993 was adequate notice. Counsel therefore urged us to allow this appeal and set aside the impugned judgment and all consequential orders thereto including the taxed costs. He also prayed for costs of the appeal.

Submissions on behalf of the respondent were filed on 19th September, 2016. Learned counsel for the respondent submitted that the damages awarded by the learned Judge were not special damages but damages for anticipated profits. He submitted that the respondent had proved that he used to make profits to the tune of Kshs. 93,512 which he however lost as a result of the unlawful termination of the dealership. He submitted that the learned Judge could not therefore be faulted for awarding damages as he did. He cited the case of **Kimakia Co-operative Society vs Green Hotel [1988] KLR 242**, and the case of **Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya [2015] eKLR** where this Court held that:-

“where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and he did not, he cannot have more than nominal damages.”

The cases of **Total (Kenya) Limited formally Caltex Oil (Kenya) vs Jane Wams Limited [2015] eKLR** and **Visai Sawmills Ltd vs The Attorney General [1997] eKLR** were also cited.

It was counsel's submission that the learned Judge did not mention whether the damages awarded were general damages or special damages but were damages awarded to retribute, or restore the respondent to the position he would have been in if the dealership had not been unlawfully terminated. Learned counsel concluded by urging us not to interfere with the discretion exercised by the learned Judge in awarding the damages. He urged us to dismiss the appeal.

In a short rejoinder, in submissions filed on 27th September, 2016, learned counsel for the appellant reiterated his earlier submissions and tried to distinguish the cases cited by the respondent from the present case.

We have given due consideration to all the material that has been placed before us. What we need to do

now is make our independent determination on whether the learned Judge's impugned judgment calls for setting aside, either partially or in whole, or the same should be upheld. We have crystallised the following as the germane issues calling for our determination.

1. Whether there was a valid contract between the parties herein. If so what were the terms; was there a termination clause?
2. Was there breach of the contract on the part of the respondent?
3. Was the termination or cancellation of the dealership licence fair in circumstances of the case?
4. Was the one month purported notice adequate in the circumstances?
5. Did the learned Judge award damages for breach of contract, when the same had not been specifically pleaded and strictly proved?
6. Finally, is the appellant entitled to the damages he was awarded, or to any amount at all?

On the first issue, according to the appellant as stated in its written submissions, the dealership agreement is the one dated 29th October 1991. That was however the letter of offer in which the appellant requested for the name the respondent intended to use for the petrol station to enable appellant prepare the agreement. The letter also asked the respondent to avail to the respondent a banker's cheque for one million shillings. The respondent accepted the offer and signed the letter in question. This was followed by another letter dated 16th December, 1992, appointing the respondent as a dealer for the appellant's Petrol station on Waiyaki Way. The letter was specific that the dealership was for a 6 months probationary period. This was the letter that set the target sales to be met and also spelt out other terms on expected levels of cleanliness and customer service, among others. The letter also stipulated what would happen in the event the respondent failed to comply with, or abide by the terms set out therein. The letter categorically stated that if there was default within six months of signing the said agreement, then the dealership would be terminated without further reference to the respondent.

The respondent accepted to be bound by the said terms and signed the letter. We can therefore say that the said letter coupled with the letter of offer signed earlier amounted to the dealership contract between the two parties and they were bound by the terms therein. Business appears to have progressed well but according to the respondent, the petrol station was too old and he approached the appellant and suggested that the same be refurbished. The appellant is said to have agreed to refurbish the petrol station and what followed was the letter dated 3rd August 1993, by which the appellant informed the respondent of its plans to completely pull down and rebuild the petrol station. The contents of the said letter are very important and we reproduce them as hereunder:

"August 3, 1993

Mr. Evason W. Njiri

Enwa Service Station

P O Box 50151

NAIROBI

Dear Sir,

RECONSTRUCTION OF ENWA SERVICE STATION

We write to inform you that the applications for reconstruction of your service station were

approved and consequently tenders have already been awarded. The contractor is expected to move on site in the next two weeks or so, effective today August 3, 1993.

Taking into consideration that the station is going to be rebuild a fresh with all the facilities changed or provided new, we wish to advise you to make arrangements to temporarily wind up your operations in the next two weeks and handover the site to Caltex and the contractor to embark on the major works. The reconstruction may take upto four (4) months due to the scope of works to be done, before completion. However it may take a shorter or longer period. Its our hope that you'll appreciate our commitment to rebuild the site to give it a new and fresh look in line with our ongoing "Project Bright Star".

Please feel free to consult our Retail Representative Mr. J. Khaemba and our project Engineer Mr. R. I. Sultani on any issues that you may deem necessary.

Looking forward to your cooperation.

Yours very truly

CALTEX OIL (KENYA) LIMITED

C. L. DOUGLAS – MANAGING DIRECTOR

BY: _____

M. J. O'REILLY – MANAGER

RETAIL MARKETING & OPERATIONS".

We have underlined the word 'temporarily' as that is the key word in that letter. According to the respondent, he temporarily wound up the operations, moved into a temporary structure in the same compound, retained his staff, trained them and continued paying their salaries as he waited to take back a modern station with better trained and more motivated staff, with prospects of higher profits.

To his utter shock and disbelief however, even though the petrol station was expected to take at least four months to reconstruct, slightly over a month later, on 27th November, 1993, the respondent received a letter informing him that his dealership licence had been withdrawn with immediate effect. He was accused of failing to meet the set sale targets; failing to keep the expected standards of cleanliness and generally failing the suitability test of a good dealer. That letter was followed by the one dated 25th October, 1993, purportedly 'constituting one month Notice' terminating the operator's licence. He was informed vide the said letter that his licence had actually expired on or about 23rd July 1993, and the respondent had no intention of extending it. He was further notified that the said letter constituted one month Notice for him to vacate the premises. This is the notice that is the subject of issue number four as framed earlier. We hold the view that this subsequent letter was totally superfluous given that the earlier letter had terminated the dealership licence with immediate effect. It is evident therefore from the foregoing that the contract was terminated without notice.

From the above analysis, we are able to answer issues 1-4 as framed earlier. On the question as to whether there was a valid contract between the parties, we have found that the dealership agreement coupled with the letter of offer constituted a valid and binding agreement between the parties. The terms were clearly spelt out in the body of the agreement. The agreement however stipulated that it had a lifespan of 6 months, a fact that was admitted by the appellant in its letter dated 25th October purporting to terminate the Licence. This in our view would therefore mean that the contract expired by effluxion of time and from 23rd July, 1993, there was no binding contract between the parties which was capable of being breached. This would mean that what remained between the parties was a nebulous working relationship with no termination clause. The party wishing to end the said relationship would be required to give the

other reasonable notice. Reasonable notice depends on the circumstances of each case.

Further it is our view that there was no proof of breach of the terms of the contract. We say so because there was no communication to the respondent between December 1992 when the said agreement/contract was entered into, and 27th September 1993 when the licence was terminated, to the effect that he had breached any terms of the contract. We note that there was a letter sent to the respondent on 22nd May 1992, in which the respondent was complaining about poor customer service, but that was before the contract in question. According to the respondent they had agreed to suspend the contract pending the completion of the opening of the highway.

As we said earlier, the respondent was not given any notice at all. He continued operating the petrol station long after the six month probation period covered by the agreement had expired. Was the immediate termination of the licence fair in the circumstances? We don't think so. As stated earlier, the appellant was doing his business under difficult circumstances when the Highway was under construction. After business was opened up, the issue of refurbishing the petrol station came up. He was requested to hand over "temporarily" to await completion of the construction. He had taken a loan from the bank, negotiated and posted a Bank guarantee, continued to pay his workers, and expected to get back into business. This was not to be and he was not even given notice to sort himself out with his financiers, or even to prepare himself psychologically. There was evidence which was not refuted that after getting the dealership, he left a well-paying job in order to devote himself to running the petrol station on permanent basis.

We must point out that asking the respondent to wind up temporarily to await reconstruction was in utmost bad faith, and an act of trickery to remove him from the petrol station without giving him notice. Issues 2, 3, and 4 are therefore answered in the negative.

This brings us to the question as to whether the respondent's claim was based on contract. We start by saying that with respect to learned counsel who drafted the plaint, the same was not very well drafted. In the body of the plaint, (paragraph 9), the plaintiff pleaded breach of contract of the dealership agreement. At paragraph 11 however, he says he claims damages in lieu of specific performance. When it comes to the prayers/ reliefs sought, he asks for damages for breach of contract. He has not quantified the said damages. He has not claimed any damages under the head of special damages. As we have observed above however, as at the time the respondent was served with the letter terminating the dealership licence, there was no contract in place which was capable of being breached. Although the respondent's claim for damages is so muddled up, what remains certain in our view is that the claim could not have been based on breach of contract. The learned Judge in our view therefore fell into error when he proceeded to assess the damages as if the same were for breach of contract. We hold the view that these were damages at large, or general damages. To that extent therefore, they did not need to be particularized or specifically pleaded. We find however that the learned Judge was correctly guided by the principle articulated in Adais vs Gramophone Co. Ltd 1909 AC 408 where the court held:

“In many other cases of breach of contract there may be circumstances of malice, fraud, defamation, violence which would sustain an action for tort as an alternative remedy to an action for breach of contract. If one should select the former mode of redress, he may no doubt recover exemplary damages, but if he should seek redress the form exaction for breach of contract, he let in all the consequences of that form of an action...one of those consequences I think is this, that he is to be paid adequate compensation in money for the loss of that which he would have received had his contract been kept and no more”.

The learned Judge found that the appellant had applied trickery to force the respondent out of the petrol station and leased it to somebody else, and proceeded to assess damages for the said breach, with a view to restoring the respondent to the place he would have been had the contract not been so casually terminated.

In assessing the damages, the learned Judge was guided by the audit report compiled by a certified accountant who had compiled it at the request of the respondent. It is clear to us that the said report was

not challenged by the appellant when it was produced in evidence. The figures given as profits were not even questioned. We hold the view that the learned Judge had no other figure to guide him in his assessment of the said damages, and he cannot therefore be faulted for using that figure. We agree that the amount was not specifically pleaded in the plaint, but as we have stated, the claim was not one for special damages for breach of contract, but a claim for damages at large.

The next issue was whether there was justification for awarding the said damages for 161 days. In our considered view, that period was unjustifiable. The Court cannot be seen to award damages whimsically. It is true that there was no termination clause in the contract either as at the time it was signed or at the time it expired. This was a “Licence for value” which meant that as long as the respondent met the set targets, then the licence would not be taken away from him. We have held that there was no evidence of breach by the respondent and there was therefore no reason for the termination of the contract without notice.

In calculating damages in such circumstances, the court must take a reasonable approach. Unjust enrichment is always frowned upon by the court. There is also the expectation by the law that the aggrieved party must mitigate its loss and not fold its hands and expect to reap a windfall by way of award of damages by the court. The position adopted by the courts is that where there is no termination clause the court must determine what amounts to reasonable notice taking into consideration the peculiar circumstances of each case. What then was reasonable notice in this case?

It was not disputed that the respondent had a loan facility which he was servicing; he also had a bank guarantee which he needed to discharge; he had a source of income which was going to be taken away from him; he needed time to scout for alternative business or job. In our view, bearing this in mind the minimum amount of time he would have needed to get back firmly on his feet was fifteen months. This would have enabled him clear his liabilities and pursue other options. In the circumstances, we find the 161 days applied by the learned Judge to calculate the damages grossly inflated. We are satisfied that the amount was arrived at after applying the wrong principles of the law. We therefore find justification in interfering with the same. Accordingly, for the foregoing reasons this appeal partially succeeds. We allow it to the extent that the impugned judgment delivered on 31st May, 2007 and all consequential orders arising therefrom, is here set aside. In its place we substitute therewith an order that the sum of Ksh 15, 055,423 is hereby set aside and substituted with an amount of Ksh 1,402,680/= which is made up of the monthly income of Ksh 93, 512 for a period of 15 months (Kshs 93,512 x 15 = 1,402,680) which we find to be a reasonable award in the circumstances of the case.

The amount will attract interest at court rates from the date of the judgment of the High Court until payment in full.

The appellant is also awarded half costs of this appeal, and before the High Court.

Dated and delivered at Nairobi this 29th day of September, 2017.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR