



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 36 OF 2004

BETWEEN

KOBIL PETROLEUM APPELLANT

AND

PATRICK OLASA WABIDONGE RESPONDENT

*(Appeal from the judgment and decree of the High Court of Kenya at
Bungoma (Mbito, J.) dated 24th day of August, 2000*

in

H.C.C.C. NO. 44 OF 2000)

JUDGMENT OF THE COURT

This is an appeal from the judgment of the superior court (Mbito, J.) delivered on 24th August, 2000 in which the learned Judge gave judgment in favour of the plaintiff (the respondent in this appeal) **PATRICK OLASA WABIDONGE**.

The dispute between the parties goes back to the last century when the respondent herein filed a plaint dated 16th December, 1999 in the Senior Resident Magistrate's Court at **Busia in Civil Suit No. 572 of 1999**. The record shows that by a consent order dated 14th March, 2000 the Civil Suit was transferred to the High Court at Bungoma. It is important to reproduce what transpired on that day. The record reads as follows:-

“14.3.2000

Corum: Ombonya J. D/R

Mr. Oye for applicant

Mr. Ombija for the Respondent

cc. **Catherine**

Mr. Oye We have a consent to record.

ORDER: *By consent the applicants application dated 6th March, 2000 in (sic) hereby allowed to the extend (sic) that Busia SRM Civil Case No. 572/99 is hereby transferred to High Court Bungoma for hearing and further that the applicant herein is allowed to amend his plaint with (sic) 7 days from the date hereof and that the draft amended plaint annexed to his application be deem (sic) to here (sic) been duly filed upon payment of court fees. That the respondent to amend his defence and file a counter-claim within 14 days.”*

Pursuant to that consent order the respondent filed a Re-Amended Plaint dated 20th March, 2000. Paragraphs 3 and 4 of that Re-Amended Plaint were as follows:-

“3. *The plaintiff runs a filling station at Bumala on the 14th December, 1999, the defendant wrote a letter breaching a contract existing between the parties whereof the defendant had contracted to install fuel dispensing equipment on hire at the plaintiff’s premises at Bumala. That it was a term of the agreement that the plaintiff, at his expense, runs and operates the filling station upon agreed terms during the period of hire and or of the equipment.*

4. *That for unexplained reasons, and or on unsubstantial allegations the defendant unlawfully rescinded terminated the contract between the parties and indicated that it intends to remove the equipment. An indication the plaintiff acceded to, followed by removal of the fuel pumps.*

(a)As a result of the breach aforesaid, the removal and the unlawful termination of the agreement, the plaintiff has suffered and continues to suffer substantial loss for which he seeks remedy as hereunder.”

Then followed a litany of what the respondent considered to be the loss suffered as a result of the appellants breach of contract. The Re-Amended Plaint concluded thus:-

“REASONS WHEREFORE: The plaintiff prays that judgment be entered against the defendant for:-

(a) *SPECIAL LOSS – KSHS 17,609,263.*

(b) *That accounts between the parties be taken.*

(c) *That the junction (sic) above sought be issued and maintained permanently restraining the defendant by themselves, their servants and or agents from removal of the station’s equipments and other accessories.*

(d) *General damage be awarded to the plaintiff for the inconvenience aforesaid.*

(e) *Cost of this suit and interest be awarded to the plaintiff.”*

In response the appellant filed an Amended Defence and Counter-Claim dated 31st March, 2000. There was a Reply to Amended Defence and Defence to the Counter-claim dated 10th April, 2000. The advocates for the parties filed a document dated 26th April, 2000 entitled **“Agreed Issues for Determination.”**

The hearing of the suit commenced on 4th July, 2000 before Mbiti, J. when the respondent **Patrick Olaso Wabidonge** gave evidence. He narrated the relationship between the parties which was based on a Licence Agreement of 15th February, 1995. The respondent went through what he considered to be his losses and produced receipts and other documents in support thereof. He was cross-examined at length and concluded his testimony on 6th July, 2000 when the appellant's first witness John Gitahi, the Area Representative of Kobil in Western Kenya took the witness stand. The appellant's second witness was Charles Ongulu Shiriko who was in charge of maintenance at the Head Office in Nairobi. At the close of the appellant's case on 6th July, 2000 the advocates filed written submissions and judgment was reserved. The said judgment was eventually delivered on 24th August, 2000.

From the evidence before the superior court it was not in dispute that the respondent was a businessman trading in selling and distribution of petroleum products and a hardware shop at a place called Bumala in Busia District along Kisumu-Busia road. The appellant, on the other hand is a limited liability company engaged, inter alia, in the business of buying and selling petroleum products to its distributors. By the time the parties started dealing with each other, the respondent had been running his business for about two years on his own piece of land registered as Marachi/Bumala/1325 measuring about 0.04 hectares. As the respondent was desirous of expanding his petroleum business he applied to the defendant (in a letter dated 23rd October, 1991) for equipment to enable him sell the products on a wider scale. In response and in a letter dated 8th January, 1992, the appellant wrote to the respondent as follows:-

“Patrick O. Wabidonge

P.O. Box 30,

BUMALA.

Dear Sir,

RE: COMPANY EQUIPMENT

We thank you for your letter of October, 23rd 1991 asking the company to provide you with equipment to sell Regular, Kerosene and Diesel at Bumala.

Your application has been considered but we do not have equipment in store at the moment. However, there are two tanks of Government Accounts in Ukwala and one in Kombewa which you may be allowed to excavate and transport to your place at your own cost.

If this is agreeable to you and you can make arrangements to install the equipment then we would request you to come by to sign a letter of commitment to this effect with the company as soon as you can.

Please note that this letter is not a final authority to issue the equipment to you.”

The respondent then proceeded to Nairobi as requested in the above quoted letter. On reaching Nairobi he was asked to commit himself to selling and distributing the appellant's products only which the respondent duly did. He was given one new underground tank with a capacity of 10,000 litres which he transported to his place of work and had it installed at his own cost. He was also given pumps which he transported and had them installed at his own cost. Later he was given one tank for 9,000 litres, two tanks for 4,500 litres and identification sign which he paid for their transport and installation. According to the respondent he paid a total of **Shs.146,265/=** for transport installation and excavation of the site for the appellant's equipment. The respondent produced receipts to support the claim for **Shs.146,265/=**.

Although the land on which the petrol station was situated belonged to the respondent, the parties entered into a Licence Agreement on 15th February, 1995 which agreement entitled the respondent to use

the appellant's name to sell its fuels and lubricants, on the premises, the equipment, furniture, chattels, fixtures and fittings belonged to the appellant. The licence agreement was to commence on *1st March, 1995* until determined by one month's notice at the beginning of each year or as soon as the appellant's title to the suit premises is terminated. The agreement could also be terminated by the appellant on one month's notice in the event the respondent failed to observe any of the obligations under the licence or forthwith if the respondent breached any of the obligations contained in the schedule thereto, which included selling products from other sources without consent of the appellant. In consideration of the licence, the respondent was to pay to the appellant a sum of Shs.1,000/= per month.

The parties also entered into a lease agreement dated *10th January, 1995*. According to this agreement the respondent leased the suit premises to the appellant for thirty (30) years with effect from *1st July 1994* at an initial rent of Shs.400,000/ for the first 5 years of which Shs.200,000/= was paid to the respondent and Shs.200,000/= held as security for the appellant's equipment until the lease is terminated. After the first 5 years, the rent was to be increased by 15% for the next 5 years and by a similar margin for every next 5 years until the expiry of the lease starting at 9 cents per litre of all fuels sold through the station and at 15% more after expiry of every 5 years. The lease agreement did not make provision for termination by notice.

The relationship between the parties remained cordial until sometimes during *November 1999* when the appellant's representative alleged that the respondent was selling products of other oil companies. The appellant threatened to stop doing business with the respondent. The respondent, however, denied the allegation of doing business with other oil companies. The appellant appears to have been satisfied by the respondent's stand and so on *7th December, 1999* the appellant informed the respondent that it (appellant) had adjusted its prices to allow a higher profit margin to the respondent if only the respondent would buy products worth Shs.3,690,105/= and that the appellant would supply the respondent with the products immediately if the payment was made by bankers cheque or cash on or before *8th December, 1999*.

Acting on the above representation, the respondent negotiated a facility with his bank and paid the said amount (Shs.3,690,105/=) to the appellant on *8th December, 1999* and sent three trucks to collect the products on that day (*8th December, 1999*). He was, however, informed that the products would be available on the following day. When the respondent sent the three trucks on the following day the story was the same – come the following day. This continued on the third and fourth day. Finally on the fifth day, the respondent was informed that the appellant no longer wanted to do business with him. According to the respondent he lost 526,000/= for the five abortive trips his trucks made as per the agreement he was entitled to 98 cents per litre/kilometer.

Since the relationship between the parties had broken down the appellant removed its equipment from the site and after three months the respondent acquired his own equipment so as to mitigate his losses. The respondent testified that after the appellant removed its equipment he was unable to do anything including running the hardware shop which was on the plot. That is when the respondent filed this suit against the appellant to recover Shs.3,690,105/= which he had paid for the products that were never delivered. This explains why the respondent initially filed the suit in the Senior Resident Magistrate's Court at Bungoma as his legal advisers must have been of the view that the Senior Resident Magistrate's Court at Bungoma had jurisdiction to entertain that claim. That, however, was not correct and hence that is why the suit was transferred to the High Court Bungoma by consent of the parties, as it was only the High Court which had the jurisdiction to entertain the claim by the respondent.

The appellant did not deny the relationship of the parties as already analysed but denied receipt of Shs.3,690,105 as claimed in the plaint. It also denied general damages and instead put in a counter-claim on the ground that it was the respondent who breached the dealership licence by buying products from a third party without permission and hence the appellant lost Shs.7/= per litre sold. The appellant also claimed that the respondent had breached the lease agreement and hence denied it business for the remaining 24 years and 7 months of the lease.

There were 43 agreed issues but the main issue for determination was whether there was a breach

of the two agreements – dealership agreement and the lease for the suit premises. The learned Judge considered this issue and came to the conclusion that it was the appellant who brought to an end the agreements by its letter of 14th December, 1999. The contents of the letter were as follows:-

“14th December, 1999

Patrick O. Wabidonge,

Bumala Service Station,

P.O.Box 30,

BUMALA.

Dear Sir,

RE: DUMPING AT BUMALA SERVICE STATION

We regret to advise that the records we have indicate that you have dumping petroleum products bought from other sources into our dispensing equipments, contrary to the agreement you have with us.

In view of the above problem, we cannot allow you to continue using our equipments in the manner aforesaid, and the management have decided to divest from your site effective immediately. We are arranging with our contractor to come and remove the Tanks, Pumps, ID Sign and all other moveable items.

We expect your cooperation during the above exercise and as soon as we have removed our equipment we will sell to you the balance product after deduction of all our expenses and losses against the money we are holding in your trading account.

Please confirm receipt of this letter and advise us in writing your acceptance and the date that we can come to remove the equipments.

Yours faithfully,

G. Strassburg

Marketing Co-ordinator”

The learned Judge of the superior court (Mbito, J.) considered the evidence as already summarized above and the written submissions by counsel appearing for the parties and on the question of breach of agreements he had the following to say in the course of his judgment:-

“In my humble view therefore the agreements between the parties were breached by the defendant and is wholly to blame for the dispute herein.”

In dismissing the appellant’s counter-claim the learned Judge said:-

“As I have already held that it was the defendant who breached the contracts between the parties herein, the plaintiff is the innocent party and is not therefore liable to the defendant for expected period of the lease term. Even if I had held in favour of the defendant, he would have only been entitled compensation for a reasonable period within which he could have got an alternative site as a party is always under a duty to mitigate his losses in contract laws.

In view of the fact that I have held that the defendant was to blame for the termination of the

agreements between the parties herein, it follows that the defendant was not justified in terminating the dealership agreement nor can it be compensated for the loss of Shs.506,630/= as the dumping allegation was not proved. My humble answers to issues no. 8 and 9 are therefore the negative.

As the defendant is the one who breached the lease agreement by terminating the lease on a ground not included or implied in the lease, he is not entitled to Shs.73,838,333/94 or any other sum. Even if I had found in the favour of the defendant, I would have only allowed damages for only a short period of say 3 months within which it could have acquired (and) contracted an alternative site.”

Having so stated, the learned Judge proceeded to deal with the respondent’s claims. He was satisfied that the respondent had proved his case and proceeded to order that he was entitled to the following:-

“(a) Money paid to the defendant for products

on 7-12-99

Shs.3,690,105/=

(b) Amount held by defendant as security

under the lease for equipment

Shs. 200,000/=

(c) Loss of profits for 3 months as from

7th December 1999

Shs.3,000,000/=

(d) Plot rent arrears

Shs.1,501,200/=

(e) Loss of transport business

Shs. 1,470,000/=

(Distribution of Kobil products)

(f) Loss of profits during removal of

tanks 2 weeks.

Shs. 500,000/=

(g) Installation and piping of 4 tanks

Shs. 500,000/=

(h) Transport charges for 5 trips

Shs. 526,000/=

(i) Transport and installation of initial

underground tanks (1992 & 93)

Shs. 126,263/=

(j) Transportation of 4 new tanks to Bumala *Shs. 140,000/=*

(k) Electrical wiring of 4 new pumps

Shs. 60,000/=

(l) Transportation of 4 new pumps

Shs 80,000/=

(m) Installation of 4 new pumps

Shs. 40,000/=

(n) Transportation of initial fuel pump

Shs. 20,000/=

(o) Loss of profit on lubricants oils

etc for 3 months

Shs. 120,000/=

(p) *Loss of profit on tyre repairs* Shs. 60,000/=

(q) *Interest on Shs.3,690,105/= at 14.5*

per annum (confirm) up to date of filing Shs. 133,000/=

TOTAL LOSS Shs.12,154,345/=

The learned Judge however found that the appellant was entitled to Shs.35,109= for licence fees as claimed in the counter-claim.

The learned Judge concluded his judgment thus:-

“In the result and for the reasons herein before canvassed, I hereby enter judgment for the plaintiff against the defendant for:-

(a) *PRINCIPAL AMOUNT* SHS. 12,154,345/=

(b) *LESS AMOUNT TO THE DEFENDANT* SHS. 35,109/=

BALANCE DUE TO THE PLAINTIFF SHS.12,119,236/=

Except as above I dismiss the counterclaim with costs.

I further award the costs hereof to the plaintiff plus interest from usual court dates.

Judgment accordingly.

Dated at Bungoma this 24th day of August, 2000.”

It is the foregoing that triggered this appeal in which the appellant through its advocates set out 51 grounds of appeal. By consent of the advocates appearing for the parties, (Mr. Esmail for appellant and Mr. Odunga for the respondent), it was agreed that written submissions be filed. That was done and judgment reserved.

We have considered the written submissions by counsel for both parties and the record of appeal right from the Senior Resident Magistrate’s Court at Busia and the High Court of Kenya at Bungoma and having summarized the case for each party as presented in the High Court we now proceed to deal with the grounds of appeal.

The first seven grounds of appeal related to procedural issues in which it was argued that the Deputy Registrar had no jurisdiction to transfer the case to the High Court. It was further submitted that as no proceedings had been validly initiated in the superior court, the learned Judge had no jurisdiction to entertain the suit.

At the commencement of this judgment we set out how the claim was filed in the Senior Resident Magistrate’s Court at Busia as Civil Suit No. 572 of 1999 and then by a consent order dated 14th March, 2000 the suit was transferred to the High Court at Bungoma. It is to be observed that the appellant’s counsel who has raised the issue of jurisdiction participated in the proceedings before the High Court and never raised the issue of jurisdiction. It is to be noted that the counter-claim was filed in the High Court where the issue of jurisdiction was not even raised.

We have carefully considered the record of appeal and the written submissions on the issue of jurisdiction but we are of the view that taking into account the provisions of **Sections 3A** and **3B** of the Appellate Jurisdiction Act, we find no merit in the appellant's submission to the effect that the High Court had no jurisdiction to entertain the respondent's suit. The appellant fully participated in the transfer of the case from the subordinate court to the High Court. Accordingly, we reject grounds 1 to 7 of the Memorandum of Appeal.

Grounds 8 to 51 of the Memorandum of Appeal faulted the learned Judge's findings on evidence and the quantum of damages. These, in our view, are the main grounds in this appeal. Before entering into consideration of these grounds, we think it necessary to set out what we consider to be the approach, function and duty of the Court in connection with this appeal. An appeal from the High Court to this Court is by way of a re-trial and as this Court has pointed out on various occasions, it is not bound necessarily to accept the findings of fact by the court below but this Court must re-consider the evidence, re-evaluate it and make its own conclusions, although always bearing in mind that it has not had the advantage of the trial judge in seeing and hearing witnesses.

In **SELLE V. ASSOCIATED MOTOR BOAT COMPANY [1965]** E.A. 123 at p. 126 Sir Clement De Lestang VP stated:-

"..... An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

The above was cited by this Court in its later decision in **JIVANJI V. SANYO ELECTRICAL COMPANY LTD. [2003] KLR 425** but the Court went on to state:-

"As we are asked to interfere with the trial judge's award of damages, we are also guided by settled principles as stated by Law JA in Bashir Ahmed Butt v. Uwais Ahmed Khan (1982-88) 1KAR 1, at page 5:-

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low....."

We shall bear in mind the foregoing as we consider **grounds 8 to 51** of the Memorandum of Appeal which as we have already stated relate to the evaluation of evidence and assessment of damages. In the superior court, the respondent gave detailed evidence supported by various documents in a bid to prove his case against the appellant. There can be no doubt that there were two agreements between the parties. There was the *"dealership agreement"* and then there was the *"lease agreement"*. We have already referred to these agreements. The issue before the superior court for determination was who breached the agreements. The learned Judge considered the evidence before him and came to the conclusion that it was the appellant who was in breach. It was in view of that finding that the learned Judge entered judgment in favour of the respondent. We have carefully considered the evidence of the respondent and that of the two witnesses who testified on behalf of the appellant and it is our view that the learned trial Judge was entitled to find that the appellant was in breach of the agreements. According to the evidence of **John Gitahi** (DW1) who described himself as the Area Representative of Kobil in Western Kenya, the licence (dealership agreement) was terminated because of dumping. In his evidence in chief, this witness stated inter alia:-

"The Licence was terminated because of the dumping. The Licence was terminated by Ext. 17 of 14th

December, 1999. The matter was not a surprise. We were holding his money. He has not been refunded his 3.6 million. It is Kobil who enticed him with the offered (sic) special discount to deposit the 3.6 million.

I only relied on information received through telephone. I did not investigate the dumping.”

From the foregoing, it is clear that the appellant’s Area Representative for Western Kenya did not investigate the allegations about dumping. Consequently, we are satisfied that the appellant was in breach when it terminated the agreements without valid reasons and without any notice. We therefore find no fault in the reasoning of the learned Judge on the issue of breach of agreements.

Having agreed with the learned Judge’s findings on the question of breach of contract, we must now consider whether we agree with him on the issue of damages. There can be no doubt that the respondent was entitled to Shs.3,690,105/=. In his evidence in chief, the respondent testified as follows in respect of this amount:-

“On 7th February, 1999 they informed me that they had adjusted prices. I sent them Shs.3,650,000/= by bankers cheque and cash Shs.38,000/= to meet their target. These are the receipts which they gave me.”

Since that was conceded by the appellant’s Area Representative, as already seen from the evidence of Gitahi (DW1), we find that the respondent was entitled to **Shs.3,690,105/=**.

We have perused the amount awarded in respect of various expenses and it is our view that taking into account the evidence of the respondent as supported by the exhibits produced it would be fair and just to award him a global sum of **Shs. 3 million** as loss of profit and business arising from what befell him when the appellant unilaterally and without any justification terminated the agreements. We have carefully considered the awards made by the learned Judge in respect of various items but we think the Shs.3 million would sufficiently compensate the respondent in the circumstances of this case. Hence in the final analysis, the respondent is entitled to **Shs.3,690,105/=** as a refund which he had paid to the appellant on 7th December, 1999 and **Shs.3,000,000/=** as loss of business and expected profits. That makes a total of **Shs.6,690,105/=**. The learned Judge found that the appellant was entitled to **Shs.35,109/=** hence this will be subtracted from the foregoing figure. In the end the respondent is entitled to **Shs.6,654,996/=**.

This appeal therefore succeeds to the extent that the figure awarded by the learned Judge is reduced from **12,119,236/=** to **Shs.6,654,996/=**. The respondent will be entitled to interest at court rates on this reduced figure from the date of the superior court’s judgment until payment in full. Since the appellant has partially succeeded in this appeal, we order that it shall be entitled to half the costs of this appeal and in the superior court.

Dated and delivered at NAIROBI this 9th day of July, 2010.

R.S.C. OMOLO

.....

JUDGE OF APPEAL

E.O. O’KUBASU

.....

JUDGE OF APPEAL

J.G. NYAMU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR