



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

CORAM: OMOLO, SHAH & O'KUBASU, J.J.A
CIVIL APPLICATION NO. NAI. 317 OF 2001 (UR.168/2001)

BETWEEN

SHELL & BP (MALINDI) KENYA LIMITED

(Formerly Agip Kenya Limited)APPLICANT

AND

JULIUS GIKONYO KIANOFIRST RESPONDENT

JOHN KARABA NGUYOSECOND RESPONDENT

**(An application for injunction pending the hearing and
determination of an appeal from the Ruling of the High
Court of Kenya at Nairobi (Onyango Otieno, J) dated 6th
September, 2001**

in

H.C.C.C.C NO. 986 OF

RULING OF THE COURT

On the 28th day of June, 2001 the applicant, **Shell & BP (Malindi) Kenya Limited** (the Plaintiff in the suit) filed a suit in the superior court against the two respondents (the defendants) claiming, inter alia, the following relief:

"a.An injunction to restrain the Defendants or any of them by themselves, their servants or agents or otherwise howsoever from evicting the plaintiff or taking possession or interfering with the plaintiff's possession of the premises known as KARATINA/BLOCK 1/284 formally L.R. NO. 7235/424."

Simultaneously with the filing of the suit the applicant took out a chamber summons under Order **XXXXIX** rules 2,3, and 9 of the Civil Procedure Rules and inherent jurisdiction of the court claiming, inter alia, the following relief:

"2)Pending the hearing and determination of this suit or until further orders of the court the Defendants or any of them whether by themselves their servants or agents or otherwise howsoever be restrained from evicting the plaintiff or taking or attempting to take possession of or interfering with the plaintiff's quiet possession of the premises known as Title Number KARATINA/BLOCK 1/284 NYERI (formerly L.R. NO. 7235/424)"

The history leading up to the start of litigation is that the first respondent was and still is the registered proprietor of the said property (hereinafter referred to as "the suit property"). He demised the suit property to Agip Limited for a term of 30 years with effect from 1st July, 1971 at a yearly rent of one Peppercorn (if demanded). Apparently the suit property was a vacant parcel of land in 1972. Agip Limited was to erect thereon a petrol service station, other improvements and all equipment that goes with a petrol station. Agip Limited was also to pay a lump sum of Shs.200,000/= to the first respondent prior to the execution of the lease. The first respondent would, at the written request of Agip Limited (or its successors and assigns) to be made at least one month before the expiration of the term of the lease (that is 30th June, 2001) and if there were no breaches of the terms of the lease or non-observance of any of the covenants therein, grant to Agip Limited a further lease of 10 years. The first respondent was to receive a sum of Shs.66,667/= upon registration of a duly registered renewal of the lease.

On the 22nd day of October, 1984 the first respondent appointed the second respondent as his agent with power and authority to fully manage the suit property for which purpose he donated a power of attorney to the second respondent.

The applicant now known as Shell & BP (Malindi) Kenya Limited exercised the option for renewal of the lease by its letter dated 28th May, 2001 and sought the first respondent's confirmation thereof. Prior thereto the second respondent had intimated to the applicant that he wished to receive vacant possession of the suit property as the lessee was in breach of several terms, condition and covenants of the lease. The lessee denied being in any breach of any of the terms conditions and covenants of the lease.

Whatever may have been the position as regards the previous lease, by an agreement made on 23rd day of June, 1999, that is previously to the date of expiry of the original lease, between the second respondent and Agip (Kenya) Limited the second respondent had, as de facto owner of the suit property and awaiting its registration in his name, in consideration of an advance payment of rent in the sum of Shs.200,000/=, and other matters, agreed to grant a 10 year lease over the suit property to Agip (Kenya) Limited from 1st July, 2001 at an annual rent of Shs.45,000/- payable in advance "in one lump sum of Kenya Shillings Five Million Four Hundred Thousand (Kshs.5,400,000.00) for the entire term". The second respondent under and by virtue of the agreement to lease dated 23rd June, 1999 undertook to obtain a transfer of the suit property in his name; he also agreed to grant, thereafter, the said 10 year lease. To enable him to have the suit property registered in his name the second respondent has so far received, and this is common ground, a sum of Shs.1,002,680/=. However, the first respondent says that this sum was a loan to him whereas the applicant says that the sum was paid to the second respondent as advance rental for the proposed new lease. The agreement to lease, signed by both parties, that is the second respondent and Agip (Kenya) Limited has annexed to it the new lease as "second schedule" thereto.

The first respondent has made it clear that he is not interested in the suit property any longer and that the matter in question is entirely between the second respondent and the applicant. The second respondent's stand is that the original lease was terminated by the first respondent. He entered into negotiations with a view to granting a fresh lease but there has been no agreement yet. He has filed Civil suit No. 157 of 2000 in Nyeri against the lessee whereby he seeks to restrain the lessee from trespassing on to the suit property and from selling or transferring or assigning the same to Kenya Shell Limited or to any other person. He also seeks a declaration to the effect that the lease between the first respondent and **Agip Limited** stands determined. He also seeks an order for eviction against Agip Limited. Basically his stand is that there is no lease subsisting between him and Shell & BP (Malindi) Kenya Limited and that therefore no equitable remedy of an injunction ought to be granted. He also says that the agreement dated 23rd June, 1999 is only a draft and there is no concluded agreement to lease. There are several matters

still not agreed upon, he says.

All these facts were before the learned Judge when he declined to grant the temporary injunction the applicant was seeking. The applicant has shown its desire to appeal and pending the hearing and determination of its intended appeal it seeks an injunction from this Court in the same terms as it sought in the superior court. It urges that it has a "strong arguable appeal". We suppose it says that the intended appeal is not frivolous. It takes issue with the learned Judge's conclusion that the word "will" used in clause 3(iii) of the original lease is not used in a mandatory sense. It also takes issue with the learned Judge's finding that it had shown no prima facie case with a probability of success. It also takes issue with the learned Judge's finding to the effect that it will not suffer irreparable harm if the injunction was not issued.

Of course, at this stage, we are not called upon to determine the intended appeal. We are only called upon to decide if the intended appeal is arguable. We discern the following points, amongst others:

"1.It is arguable at this stage if the applicant is the successor to Agip Limited.

2.It is also arguable if the exercise of the option contained in clause 3(iii) of the original lease entitled the applicant to a 10 year extension of the lease.

3.Does the agreement of 23rd Ju ne, 1999 create new enforceable rights?"

These points are sufficient to enable us to determine that the intended appeal is indeed an arguable one.

Having come to that conclusion we have to decide if the success of the intended appeal will be rendered nugatory if the injunction is not granted. The applicant's predecessor has built the petrol station on the suit property. There is substantial investment thereon. If the suit property goes out of the reach of the applicant it would lose all it has put in probably including the sum of over one million shillings it has paid to the first respondent who is as yet not the registered proprietor of the suit property. The first respondent says the money was a loan to him but he was not even offered to refund it to the applicant. Taking everything into account, we think we should grant the injunction sought.

The upshot of all this is that we grant the orders prayed the notice of motion dated 13th September, 2001 and lodged in this Court on 14th September, 2001. The costs of this application shall be costs in the intended appeal.

Dated and delivered at Nairobi this 16th day of November, 2001.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.