**AGIP (K) LTD V VORA**

**Division:** Court of Appeal of Uganda at Mombasa

**Date of judgment:** 18 February 2000

**Case Number:** 213/99

**Before:** Omolo, Lakha and Keiwua JJA

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

**JUDGMENT**

**OMOLO, LAKHA AND KEIWUA JJA:**

The Respondents in this appeal instituted a suit against the Appellant, Agip (Kenya) Limited (“Agip”) in the superior court, at Mombasa, claiming that the Respondents have since 1977 been operating a service station known as Tusks Service Station (“the station”), situated along Moi Avenue, Mombasa. The Respondents’ operation of the station has been a subject of a series of operator’s Licence agreements granted by Agip. The Operator’s Licence Agreement which was current at the time, prior to the institution of the suit, was made and dated 16 February 1993. Agip on 19 June 1999 served on the Respondents a letter dated 17 June 1999, and whose effect was to summarily terminate the Respondents’ licence. Agip soon thereafter, without notice to the Respondents, placed security guards in and around the station, thereby bringing business to a standstill. The guards cleared the station and locked the Respondents’ offices, rendering the premises inaccessible. All that happened despite the fact that the Respondents had met and observed their obligations in the licence. The Respondents have sold and striven to sell the prescribed minimum quantities of petroleum products. The Respondents have also made immense investment in money, equipment and goodwill, which cannot be measured in money. The Respondents, accordingly, filed suit because Agip threatened and intended, unless restrained by the court, to unlawfully terminate the licence or evict or stop the Respondents from running the station. The Respondents complained that Agip had failed and refused to withdraw the security guards or remove the padlocks.

On the basis of the said suit, the Respondents applied before the superior court, under the provisions of Order XXXIX, rules 1, 2 and 3 of the Civil Procedure Rules, for an injunction, to have Agip restrained from evicting, stopping or in any other way interfering with the Respondents’ operation of the station, pending the hearing of the suit. The Respondents also sought to have Agip restrained from terminating the licence. The Respondents complained that the reference in Agip’s letter dated 17 June 1999, to a licence granted on 15 September 1992, in the termination letter is attributed to an error, as that licence dated 16 February 1993 was made to take effect on 15 September 1992.

Subject to clause 16, the licence was to continue in force, until terminated by either party by thirty days’ notice. The parties intended that in matters falling under clause 16 of the licence, the thirty day notice requirement was not to apply. The licence at clause 6 thereof, makes it clear that for the licence the Respondents have not been required to give any consideration, by payment of monthly licence fees. What has been provided is a charge, for the supply by Agip to the Respondents, of a litre of petroleum, gasoline and kerosene products. The Respondents have to pay KCts 4,0 for such litre.

The learned Commissioner, in his ruling, appears to us to have not taken into account the provisions of clause 10(1) of the licence, which required the Respondents to maintain adequate stocks of the various petroleum products marketed by Agip. That requirement to maintain adequate stocks must, in our view, be read together with clause 16(i) of the licence, which conferred on Agip the right to terminate the licence without notice, on the failure of the Respondents to sell minimum quarterly quantities of petroleum products. Agip in its letter dated 25 February 1999 informed the Respondents of their failure during certain days in the month of February 1999, to maintain at all, any quantity of super petrol.

The letter concludes: “Please refer to clause 10(1) of the operator’s Agreement which stipulates that you should maintain adequate stock at your station. It was for the sake of maintaining the company’s image that the company salvaged you. Please can we have good reasons as to why the station has been having frequent stock runouts”. The Respondents did not bother to respond to Agip’s request. Instead, the Respondents filed the suit in the superior court, on the basis whereof they obtained orders barring Agip from evicting them and terminating the licence. It is from those orders, Agip has appealed to this Court. Grounds 1 to 3 of the appeal were argued together, while grounds 4, 5, 6, 7 and 8 thereof were also grouped together. Ground 15 was argued alone as was ground 17; grounds 18, 19 and 20 were clustered together. Broadly put, the first set of grounds of appeal are, the learned Commissioner erred, in holding that the letter of termination did not rely on clause 10(1) or that clause 16 did not entitle Agip to summarily revoke the licence, or that the letter of termination was ambiguous. This set of grounds arises from the findings by the Commissioner, which appear at pages 5 and 6 of his ruling, wherein he said:

“In addition to the above material from Mr Vora’s affidavit there is a replying affidavit sworn by one Lawrence Kinyanjui on 23 June 1999 and filed on behalf of Agip on the same day. He depones that Mr Vora’s affidavit contains ‘blatant falsehoods’ and that the Plaintiffs failed to maintain adequate stocks of Agip products, in contravention of clause 10(1) and further that the situation was so severe that on two occasions Agip complained by letters dated 25 February 1999 (‘LK1’) and 1 March 1999 (‘LK2’). It is worthy of note that the letter of termination above does not seek to rely on clause 10(1) but I shall advert to that later”. At page 13 the Commissioner adverted to the termination letter and said:

“Reverting to the letter, it is noted that no particulars are given of the breaches of clause 10(1); nor are any given of failure to sell minimum quarterly quantities; and is not shown how failure to maintain stocks is a breach of OLA. In the affidavit of Mr Kinyanjui Agip relies on the breach of clause 10(1) which is mentioned in the said letter”. With regard to the letters Agip sent to the Respondents as a prelude to the termination, carried in Agip’s letter of 17 June 1999, the Commissioner, at page 15 of his ruling said: “Finally, Mr *Lumatete* asks that the court looks at the evidence presented by Agip through Mr Kinyanjui’s affidavit. At this stage the documents, the court ought to examine are only the OLA and the letter of 17 June, 1999. The OLA is the base document and the letter is the all important instrument and prime mover. For reasons given above, evidence dehors, the letter ought not to be considered and are of peripheral, if any significance. I have however, looked at them. The letters exhibited do not aid Agip in any meaningful way as they merely pointed out the unsatisfactory state of business and were not intended to be a notice of any kind”. With tremendous respect, the learned Commissioner plainly misdirected himself, in restricting the scope of materials he was supposed to look at in order to ascertain if the Respondents had or had not established a *prima facie* case with a probability of success. In our judgment, the Commissioner

occasioned several fundamental errors in his holding that the letter of termination did not rely on clause 10(1) and that any evidence, before the letter terminating the licence, was to be ignored, as such evidence was of peripheral significance. The Commissioner fell into error in his view that the letters sent by Agip to the Respondents, prior to the termination, did not assist Agip. The Commissioner has clearly misapprehended the purpose for which Agip sent those letters to the Respondents. The Commissioner, in our view, fell into error, in holding, as he did, that the letter of termination was inadequate for its purpose of notifying the Respondents of the reasons which brought about the termination of the licence. In our judgment, the letter dated 17 June 1999 sufficiently addressed the reasons for the termination, being, the Respondent’s failure on divers dates, to maintain adequate stocks of products, whose details had been set out, not only in the termination letter, but in those preceding it.

To be able to understand the termination letter one must, of necessity, look at the previous letters. In our judgment, the Commissioner was wrong, in finding that the letters written prior to Agip’s termination letter purported to be a notice. He also erred in concluding at that stage of the proceedings, that any requisite notice was not given by Agip. The letter of termination pointed to the Respondents’ failure to sell minimum quarterly quantities of petroleum products, which the Respondents were to sell under the licence. Clause 10(1) of the licence required the Respondents to maintain adequate stocks of products and accordingly, in our opinion, any reference in the termination letter to any such failure, invoked the provisions of that clause 10(1). That, to our mind, is more so, given the fact that in Agip’s letters dated 25 February 1999 and 1 March 1999, the breach of clause 10(1) had been brought to the attention of the Respondents.

The second set of grounds of appeal are 4, 5, 6, 7 and 8, in which one of the complaints is that the learned Commissioner erred in holding that Order XXXIX, rule 1 of the Civil Procedure Rules was properly invoked by the Respondents. That finding is submitted not to be sustainable, in view of the provisions of clause 3 of the licence, which denied the Respondents any interest in the land or in the buildings or in any equipment in the station. The Commissioner is said to have erred in holding that the licence was not clear and was ambiguous, as to what the Respondents and Agip intended. In the application of the rule of *contra preferentum* the Commissioner wrongly imposed his own terms and intentions on the parties. Such imposition is submitted to be unnecessary, as the Commissioner’s interpretation had not been intended by the parties. The Commissioner misdirected himself in disregarding the binding effect of the licence and that the licence governed the relationship between Agip and the Respondents.

As to whether the Respondents in their application correctly invoked Order 39, rule 1 of the Civil

Procedure Rules, the learned Commissioner at pages 6 and 7 of the ruling observed:

“At the outset I need to deal with the first objection by Mr Lumatete, learned counsel for Agip, who submitted that Rule 1 of Order XXXIX cannot be invoked in this application as the Plaintiffs never had an interest in land in so far as the suit property is concerned. OLA merely gave the Plaintiffs a bare licence and that was not an interest capable of registration.

Accordingly, he submitted that the Plaintiffs could not be heard to complain of the suit property being wasted, damaged or alienated”.

It is, as well, at this juncture, if we quote Order XXXIX, rule 1 of the Civil Procedure Rules which provides:

“1. Where in any suit it is proved by affidavit or otherwise:

( *a*) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any part to the suit, or wrongfully sold in execution of a decree or

( *b*) that the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.

We call attention to the prayers of the Respondents’ application, before the learned Commissioner. That application in its relevant parts prayed for orders that:

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2. That the Defendant be restrained by itself, its agents and or servants from evicting, stopping or in any other way interfering with the Plaintiff’s operation of Tusks Service Station pending the hearing of this suit or further orders of the court.

3. That the Defendant be restrained from terminating the Plaintiff’s operator Licence Agreement”.

It is quite evident, from the prayers in the application that the Respondents sought to stop interference by Agip with what they perceived to be their rights under the licence. We are absolutely clear in our mind that the Respondents did not seek any order on the basis that any property which is in dispute, in the suit, was in danger of being wasted, damaged or alienated or was wrongfully to be sold by Agip. The Respondents did not go to the superior court, on the basis of an application that Agip threatened or intended to remove or dispose of its property, being the station, in any circumstance affording a probability that the Respondents will be obstructed in the execution of any decree in the suit. It is our view therefore, that Order XXXIX, rule 1 of the Civil Procedure Rules cannot be invoked in the circumstances of this case, to found a prayer for injunction. The learned Commissioner, in our judgment, was wrong to have granted the injunction orders having as their basis Order XXXIX, rule 1 of the said Rules. The other group of grounds of appeal is 9, 10, 11 and 12, the complaints being that the case of *Errington v Errington and Woods* [1952] 1KB 290, relied upon by the Commissioner, was distinguishable from the present case which has, as its basis, a written licence while *Errington* had none. In this present case, the Respondents were by clause 3 of the licence denied any interest in the land, thereby preventing the creation of any equity upon which an application under Order XXXIX, rule 1, may be based. It was wrong to grant an injunction after the termination of the licence which was tantamount to restoration of a validly terminated licence. In our judgment, it is only where mandatory injunction has been prayed for, which has not been explicitly sought in this case, that such an injunction may be granted to restore into possession a party who has been wrongly dispossessed.

The last group of grounds of appeal is 18, 19 and 20 which complain that the Commissioner erred in finding that the Respondents had built up immense goodwill. That finding was despite the fact that the licence only granted the Respondents the use of Agip’s name in connection with the business in the station. There is merit in this ground, and we are of the view that the learned Commissioner misdirected himself, particularly in view of the provisions of clause 3 of the licence which reserved possession of the station to Agip.

With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition thereof, a *prima facie* case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not, at that interlocutory stage of the matter, to condemn one of the parties before hearing the oral evidence that party being condemned had in opposition to the claims in the suit. The remarks by the Commissioner at page16 of his ruling to the effect that: “in conclusion I wish to deprecate the most callous manner in which Agip conducted itself in removing the Plaintiffs from the suit property. It is a factor which was weighed heavily against Agip in considering discretion under the application were, with great respect to him, totally inappropriate at this stage of the proceedings”.

The Court of Appeal for East Africa in *The Despina Pontikos* [1975] EA 38 at 57 said: “We turn now to the substantive issue, which is whether the mandatory injunction ought to have been granted. We would begin by remarking that this Court has held more than once that interlocutory mandatory injunction should only be granted with reluctance and in very special circumstances”.

We agree with these observations and we think there were no special circumstances in the present

Case to warrant the grant of the mandatory injunction. The licence contained provisions under which, on the occurrence of specified events, Agip might terminate it without recourse to court. That was the agreement made by the parties and they must be taken to have known and intended the consequences of their agreement.

The court in *the Despina Pontikos* case, continued:

“On the other hand, the issue of an injunction is in exercise of discretion and it is well established that this Court will only interfere with the exercise of his discretion by a trial judge in exceptional circumstances, though it will not hesitate to do so if the exercise of the discretion has been based on any wrong principles”. We have elsewhere in our judgment found that evidence which ought to have been considered by the Commissioner was wrongly excluded or considered by him to be of peripheral significance that resulted in the exercise of discretion being based on wrong principles.

The other aspect of the case, in which the learned Commissioner wrongly exercised his discretion, is with regard to whether damages would compensate the Respondents. The Commissioner did misdirect himself in his finding that the Respondents will not be able to find another station as good as Tusks Service Station. To begin with, the Respondents were not, by the licence, given possession of the station. In which event, the Respondents’ losses (if any), which might have ensued from the termination of the licence, can be measured in damages.

The Court of Appeal for East Africa at page 57 of *The Despina Pontikos* case added:

“Finally, in deciding whether to grant an equitable relief, a court is entitled to take into account the conduct of the parties. The judge clearly thought that the Defendants had been pursuing a policy of procrastination, if not evasion. On the material before us, we think that view was justified”. In the present case, the Respondents’ conduct appears to us to verge on evasion when the letters of 25 February and 1 March 1999 are looked at. That was conduct which the Commissioner ought to have taken into account and he, by excluding those letters, exercised his discretion on wrong principles. The last ground of appeal appears to us to be a summary of Agip’s complaints, regarding the manner in which the learned Commissioner exercised his discretion. That ground has adequately been covered in our findings respecting the other grounds of appeal.

The case of *Gusii Mwalimu Investment Co Ltd and others v Mwalimu Hotel Kisii Ltd* [1995] LLR 396 (CAK) was relied upon by the Respondents. The case concerned a landlord and tenant relationship. In our view, this cannot assist as the present appeal concerns a licence.

At page 5 of that case as per Shah JA: “The very act of levying distress in this particular case shows the existence of a tenancy”. To that finding, Lakha JA who was the third member of that bench, robustly disagreed, in his dissenting judgment. Like in the *Gusii Mwalimu Investment* case, there was no prayer for a mandatory injunction, in the present case. The application for interlocutory injunction had in this case been filed after Agip had terminated the licence and the Respondents had been out of the station. That again is another reason why that case will not assist the Respondents. At page 12 of his judgment in the *Gusii Mwalimu Investment* case Lakha JA observed: “Secondly and, more importantly, there was no prayer for a mandatory injunction in the application before the Learned Judge. The application was filed on 25 May 1995 well after the possession of the suit property had been handed over to the First Appellant. There is no explanation why a mandatory injunction could not have been prayed for. Indeed neither the plaint nor the application seeks a mandatory injunction. In granting it, therefore, it appears to me that the Learned Judge gave relief which was neither sought nor urged before him.

That, in my judgment, he was not, with respect, entitled to do …”

For all these reasons, we think there is merit in the appeal which we accordingly allow and set aside the order made by the Learned Commissioner on 8 July 1999. It also follows that the Respondents’ application to the superior court dated 21 June 1999 must be, and it is hereby dismissed with costs. The Respondents shall pay to Agip the costs of this appeal.

For the Applicant:

*Information not available*

For the Respondent:

*Information not available*