

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
(COMMERCIAL DIVISION)**

HCT - 00 - CC - CS - 652 - 2006

PEACE ISINGOMA.....PLAINTIFF

VERSUS

MGS INTERNATIONAL UGANDA LIMITED.....DEFENDANT

BEFORE: THE HON JUSTICE GEOFFREY KIRYABWIRE

JUDGMENT

The plaintiff a proprietor of a petrol station brought this suit against the defendant petroleum company for breach of contract and wrongful termination of her petrol station dealership.

The case for the plaintiff is that she and her husband purchased land comprised in Kyadondo Block 220 plot 713 at Kiwatule Kampala and erected on it a filling station. It was then agreed between the parties that the defendant leases the filling station on condition that the plaintiff was appointed as the defendant's dealer at the said station. Subsequently both a lease and dealership agreements were executed between the parties in 2003.

It is the case for the plaintiff that on or about the 25th day of October 2006 the defendant's attempted to wrongfully terminate the plaintiff's dealership and chase them away on the grounds that the plaintiff was dumping fuel from other petroleum companies at the said filling station whereas not. On the 27th October 2006 the plaintiff obtained an Interim Order from Court stopping any eviction of the plaintiff from the filling station. However on the 28th October 2006 the defendant with armed personnel forcefully evicted the plaintiff and her staff and gave the station to another operator.

It is the case for the plaintiff that during the forceful eviction she lost property including loose money and suffered loss as a result of breach of her dealership agreement with the defendant.

The defendant denies any breach of contract. It is the case for the defendant that the lease and dealership agreements entered into with the plaintiff were separate agreements. It is the case for the defendant that the plaintiff breached the dealership agreement purchasing fuel from petroleum companies other than that of the defendant and sold that fuel at the Kiwatule filling station thus being involved in fuel dumping. It is also the case for the defendant that they lawfully terminated their dealership agreement with the plaintiff because of this fuel dumping and repossessed the station on the 25th October 2006. However the plaintiff tried to regain possession of the station on the 28th October 2006 armed with an ex parte Court Interim Order but was unsuccessful.

The defendant concedes that on taking over the station the plaintiff had fuel worth Shs 32,032,370/= in the tanks but returned all other property found at the station to the plaintiff who signed for it.

The defendant also counterclaimed for Shs 81,192,959/= as damages for breach of contract by the plaintiff and in particular for dumping fuel at the station. The defendant in this regard relied on an audit report from M/s JR ASSOCIATES on the amount of fuel allegedly dumped at the station.

This case had a bumpy start having been transferred to my docket from another Judge Hon Justice Lameck Mukasa who had to reclude himself of hearing for reasons I shall not go into here. As a result of that there was delay in the prosecution of the case. However by that time there had been some interlocutory matters that had been disposed of by him

On relocation the parties at the pre trial scheduling conference agreed to the following issues for trial

- I. Whether the Defendant lawfully terminated the dealership agreement.***
- II. Whether the Plaintiff suffered the losses claimed in the Plaintiff.***
- III. Whether the Plaintiff bought and sold at the station petroleum products from other companies in breach of the dealership agreement.***
- IV. Whether the Plaintiff is indebted to the Defendant for petroleum products sold to her stations at Kiwatule and Kira, respectively.***
- V. Whether either party is entitled to the relief's claimed.***

Judgment on admission was entered in favour of the plaintiff for Shs 16,778,000/= as fuel left at the station on the day of take over by the defendant.

At the trial the Plaintiff was represented by Mr P Nkurunziza while the defendant was represented Mr O Mwebesa by The Plaintiff called four witnesses herself (PW1) Mr Stanley Semakula a local council Chairman in the area (PW2) Mr. Robert Tumwesigye a supervisor of a private security company M/s Security 2000(PW3) and Mr Laban Akampurira a law clerk (PW4) while the defendant called eight witnesses Mr. Geoffrey Rugazoora the CEO of the defendant company (DW1) Mr Brain Ssali a Manager of Mogas (DW2) Mr Steven Masaba a Former Sale and Marketing Manager of the defendant company (DW3) Mr Martin Mugisha a security manager with the phone company UTL (DW4) Ms Maureen Assimwe a Security officer with the phone company MTN (DW5) Mr Walter Orach an Auditor (DW6) Mr Sevi Sentale an accountant with the defendant company (DW7) Mr Steven Musisi an Advocate (DW8).

Issue No. 1: Whether the Defendant lawfully terminated the dealership agreement.

It is the case for the plaintiff that the defendant used the wrong basis for the termination of the dealership agreement the namely that the plaintiff was dumping other company's petroleum not being that of the plaintiff's brand of products at the filling station at Kiwatule the subject of the dealership agreement between the parties.

The plaintiff testified that she had another filling station at Kira and that some of the fuel shown to have come from other petroleum companies was destined for the Kira service station and not the one at Kiwatule which was the subject of the dealership agreement. She also testified that the receipts from shown to court from other petroleum companies referring to the Kiwatule Station had been written in error.

She also disputed the audit report commissioned by the defendants that purported to show that there was dumping at the Kiwatule filling station on the grounds that she was not involved in its making.

The plaintiff testified that up to the time of her eviction she had been meeting the defendant's sales targets so she the defendant's were not justified in terminating their dealership agreement.

Counsel for the plaintiff submitted that the defendants in their evidence had failed to prove any dumping of fuel at the Kiwatule filling station. He dismissed testimony from the Mr Masaba a sales and marketing manager of the defendant company that he had on the 24th October 2006 intercepted a truck registration No UAF 307 G offloading petroleum from another rival company at the filling station at Kiwatule. Counsel for the plaintiff submitted that photographic evidence of this event that had been promised to be adduced in evidence was never brought. He further submitted that the correct way to prove dumping would have been to take readings from the fuel tanks at the station then determine whether there was excess fuel in the tanks which could not be accounted for which was not done.

Counsel for the plaintiff also submitted that the audit report could not be considered to be independent as it violated the rules of natural justice.

On the other hand it is the case for the defendants that clause 16 (a) (iii) of the dealership agreement provided that it could be terminated in the event of the dealer buying and or selling petroleum products of another person, firm or company.

Mr Masaba the sale and marketing manager of the defendant company at the time of the termination testified that he caught the plaintiff's truck No UAF 307 G off loading for another company on the 24th October 2006. When he did this the driver of the said lorry ran away and Mr Masaba took possession of the keys of the truck to prevent it being taken away from the incriminating spot.

Mr Rugazoora the CEO of the defendant company testified that when he was notified about this incident of dumping a meeting of the Defendant Company was held and it was decided that the dealership be terminated. This is because it was not the first time that the plaintiff had dumped fuel at the filling station and that the plaintiff had been previously been warned to avoid this practice in 2004.

Mr Orach an auditor with M/s J.R. Associates testified that his firm had carried out an audit of the filling station at Kiwatule and confirmed that dumping of fuel indeed had take place there.

Counsel for the defendant submitted that testimony of Mr Masaba was credible and that the evidence of dumping was confirmed by the audit report that had been tendered into court. He submitted that this was enough lawful reason for the defendant to terminate the dealership agreement because dumping amount to breach of contract under clause 16 (a) (iii) of the agreement.

I have considered the evidence adduced and the submissions of both counsels on this issue for which I am grateful.

It would appear to me that the issue to be resolved is what amounts to dumping fuel and whether indeed it occurred as alleged by the defendant.

Clause 16 of the dealership agreement provides that

“The Company shall terminate this agreement...(emphasis mine)”

then at (a) (iii) goes on to provide

“...in the event of the dealer buying and/or selling petroleum products of another person, firm or company...”

It is this clause that the parties refer to as dumping.

This should be contrasted with clause 16 (a) (vii) that provides that termination may also be

“...upon giving three months notice...”

It would appear to me that looking at clause 16 as a whole dumping of fuel under clause 16 (a) (iii) can lead to termination of the dealership agreement by the defendant company without giving a three months notice.

Like Mr Rugazooru testified the defendant company takes this breach as a serious one as it gives advantage to their competitors.

The primary evidence relied upon by the defendants as evidence of dumping are in their documents P 3-21 of the trial bundle which are receipts are signed for by the plaintiff for delivery of fuel from rival petroleum companies especially from M/s Moil (U) Ltd for delivery of fuel to both the plaintiff's Kira and Kiwatule filling stations. The truck belonging to the plaintiff Reg No UAF 307 G (and identified by Mr. Masaba for the defendant as dumping fuel on the disputed day the 24th October 2004) is consistently listed as the truck that made the deliveries. Actually one such receipt is dated 24th October 2006 which is the date of the night when Mr Masaba found the said truck dumping fuel at the Kiwatule filling station. The explanation given by the plaintiff with regard to this evidence at best is tenuous as the M/s Moil (U) Ltd receipts specifically mention the Kiwatule station. It is simply not enough in my view for the plaintiff to throw the burden of explaining this away on to M/s Moil (U) Ltd as a possible error.

There is also evidence of previous conduct of the plaintiff dumping as shown in a warning letter from the defendant to the plaintiff dated 5th May 2004(Exhibit D5) where the plaintiff was cautioned that a repeat of fuel duping would lead to termination of the dealership agreement.

In a similar case before me **Petro Uganda Ltd V Phenny Mwesigwa** HCCS 633 of 2004 I held that it was not enough to contest documentation brought by the other side without providing alternative commercial documentation to neutralise that which is presented before court. The plaintiff brought not documentation to show that she could not have been dumping fuel as alleged. So whereas addition evidence like photos could have been admissible what is on record can still meet the legal burden of proof test.

I found the testimony of Mr. Masaba to be credible and consistent as to his finding a truck dumping fuel on the 24th October 2006 at the Kiwatule filling station. That in my understanding is contrary to clause 16 (a) (iii) of the dealership agreement. With greatest respect the burden of proof in such a case is discharged on a balance of probabilities so.

I therefore find that the plaintiff breached clause 16 (a) (iii) of the dealership agreement on the 24th October 2006 and that in itself without more entitled the defendant to lawfully terminate the dealership agreement without notice which the defendant did.

Before I leave this issue both parties during the hearing and also when submitting on this issue went to great length to address the manner in which this agreement was terminated and the plaintiff was forcefully evicted from the filing station. This was not an agreed issue for determination but clearly it is also matter that needs to be addressed as it is also part of real dispute between the parties.

The plaintiff testified that on the evening of the evening of the 24th October 2006 and then again on the 25th October 2006 the defendant and its agents disrupted services at the Kiwatule filing station. Actually on the 25th October 2006 the defendant wrote to the plaintiff terminating the dealership agreement with immediate effect. The plaintiff then had to go to court to apply for an interim order which was granted on the 27th October 2006. The evidence before me was quite contradictory as to when the defendant actually gained possession of the filing station at Kiwatule. It was either the 25th or 28th October 2006. Hon Justice Lameck Mukasa in MA 652 of 2006 (an application for a temporary injunction) however found

“...that on the balance of probabilities the applicant (the present plaintiff) has proved that despite the termination letter dated 25th October 2006, she on that day continued in occupation of the station...and on the 26th October 2006 the applicant was still in occupation of the station...”

During the trial before me the defendants still insist that they were in possession on the 25th October 2006 and that even the plaintiff's private guards M/s Security 2000 had to leave the station and were replaced by the defendant's guards M/s Ultimate Security. This confrontation of the two private firms was said not to amicable and drew in police intervention. Whatever the truth as to when the filing station was taken over by the defendant it is the events of the 28th October 2006 that settled the question of possession of the filing station. It was that day that the plaintiffs were armed with an interim order from court. On that day armed people and the police got involved. It is said that an armed person named Guide Solomon said to have been on the side of the defendant drew a gun on people and many a scuffle ensued. At the end of the day the defendants won the day and the plaintiffs withdrew from the filing station.

Both sides used force but it could have been done differently as Clause 18 of the dealership agreement provides

“...that on failure to resolve amicably any dispute arising from or in connection with this agreement or in relation to its interpretation whether before or in relation to its termination such dispute shall be referred to an independent Arbitrator in accordance with the Arbitration and Conciliation Act ... (Emphasis mine)”

This contractual provision was not followed by the defendants in terminating the dealership with the plaintiff and as a result I find that though the defendant were entitled to effect a termination of the agreement the manner in which they did it was high handed in that excess force was applied.

Issue No. 2: Whether the Plaintiff suffered the losses claimed in the Plaintiff.

The plaintiff seeks special damages of shs 97,379,560/= and US \$ 4,000 and general damages suffered following her forcefully eviction from the filling station at Kiwatule. The special damages relate to fuel left at the filling station, transport costs, oils and batteries building materials and money lost during the scuffle, and lost profits.

At the early stages of this trial Judgement on admission was entered for Shs 16,778,000/= as fuel left at the station on the day of takeover by the defendant but not paid for by the defendant. The plaintiff in her testimony stated that this money was eventually paid by the defendant. That to my mind settles the claim for fuel.

As for the other claims it is important to note an inventory of goods was taken when the defendant took possession of the filling station and was signed out on by the plaintiff. There still however remain discrepancies between what the plaintiff claims was left and what the defendant admits to have found at the station. For example the defendant also claims to have paid the transport costs in Para 7D of the plaintiff. The defendant on the 7th September 2009 also conceded that oils found at the station should be paid but that the parties had not agreed on their prices.

I must say from the onset that this part of the trial was not as well explored as last issue. Documentation was weak (stock ledgers and store records were not provided) probably due

to how the whole exercise of eviction from the station played out given that it was not amicable.

Counsel for the defendant submitted that there was no evidence of loss of building materials (i.e. 88 boxes of tiles, plumbing and electrical materials) or of Shs 5,500,000/= that was said to be in the cash drawer. In this regard I must agree with counsel for the defendant. The plaintiff for example did not given the manner in which she was evicted report these loses to the police yet she called them in to intervene in her eviction. This to my mind was a strange omission. Such loses are in the nature of special damages that must be specifically pleaded and strictly proved. The proof in this regard such loses does not meet the required legal test to be awardable.

The plaintiff also seeks an award of Shs 720,000,000/= being a factor of Shs 5,000,000/= as her monthly profit multiplied by twelve months and then again by twelve years the unexpired period of her dealership agreement. This is a general damage and counsel for the plaintiff relied on the case of **Kabona Brothers Agencies V Uganda Metal Products & Enamelling Co Ltd** [1981-1982] HCB 74 that such was the plaintiff's loss that would have naturally flowed from the breach of contract by the defendant.

It must be remembered that an examination of general damages (assessment aside for that is another matter) for breach of contract as claimed by the plaintiff would have been legitimate if it was the defendant that breached the agreement. As I have found in this case it is the plaintiff who breached the agreement instead in which case the issue general damages would not arise.

I therefore find that save for what is admitted by the defendant the rest of the claims have not been proved by the plaintiff.

Issue No. 3: Whether the Plaintiff bought and sold at the station petroleum products from other companies in breach of the dealership agreement.

This issue has been resolved in the affirmative together with issue number one and I have nothing more useful to add to that finding.

Issue No. 4: Whether the Plaintiff is indebted to the Defendant for petroleum products sold to her stations at Kiwatule and Kira, respectively.

This issue arises out of a counter claim by the defendant where the defendant claims unpaid sums of Shs 17,922,079/= and Shs 5,850,000/= for petroleum products supplied to the plaintiff's Kiwatule and Kira filing stations respectively.

Mr Rugazoora the CEO for the defendant testified that the company had ledgers that showed what the state of accounts was between the defendant and plaintiff. The ledger however showed that the amount owed to the defendant company by the plaintiff from Kiwatule is Shs 16,957,027/= not Shs 17,992,079/=. It is on this basis that the defendant company made their counter claim. The defendant also claimed that the plaintiff would issue cheques that would bounce (like Exhibit D 32 worth 24,000,000/=).

For this claim counsel for the defendant relied on the ledgers in exhibits D30 and D31.

The plaintiff on the other hand testified that her transactions with the defendant company were to be on a cash basis.

Counsel for the plaintiff faltered the statement relied on by the defendant at P 57 of the defendant's bundle as inconsistent and unreliable. He pointed out that cheque No 700491 for Kiwatule showed a figure of Shs 14,430,000/= whereas the correct figure was Shs 24,580,000/=. He also submitted that whereas reconciled statements of account were supposed to be used to determine indebtedness the defendant was relying on statement's that his client had not signed.

Counsel for the plaintiff also submitted that the defendant did not produce any delivery notes and invoices for defendant's claim on Kira filing Station.

I have considered the evidence on this issue and the submissions of both counsels for which I am grateful.

Clause 5 (a) of the dealer agreement provides

"...The Dealer shall pay for all products supplier on cash basis before each specific supply..."

If this was followed I agree with counsel for the plaintiff that it would be strange for the defendant to make claims on the basis of bounced cheques. Mr Rugazooru testified that this provision was relaxed and sometimes the defendant accepted cheques from the plaintiff.

I also find that this issue was not as well developed as it should have by the defendant. This is a claim in special damages which should be strictly proved. I find that the ledger alone is not sufficient to meet this test. This claim is also contrary to the written agreement which raises questions why this clause was not amended to meet the changing situation on the ground with the necessary safeguards.

All in all find that the defendant has not met the required legal standard to prove these claims of fuel allegedly supplied to the plaintiff and not paid for.

Issue No. 5: Whether either party is entitled to the relief's claimed.

In dealing with remedies I shall first address myself to the head suit and thereafter to the counter claim.

As to the head suit the plaintiff prayed for special and general damages for breach of contract. The plaintiff also prayed for the return of all the plaintiff's documents. I have already found that the plaintiff is not entitled to any further special damages other than the compensation she has already received. As to general damages since the plaintiff was in breach of the dealership agreement she cannot be entitled to general damages for breach of contract.

All in all the defendant is the successful party in the head suit having had the legal right to terminate the dealership agreement but because of their conduct in forcefully evicting the plaintiff when other avenues were open to them I will award them half the legal costs of this suit.

As to the Counterclaim the defendant/counterclaimant prayed for special damages for fuel supplied to the Kiwatule and Kira filling Stations. I have found that the defendant/counterclaimant failed to prove these special damages and so they are not awardable. The defendant/counterclaimant also prayed for special damages of Shs 57,420,880/= for loss of profit from dumped fuel. This claim did not form an issue for trial. The defendant/counterclaimant on this point however made reference to the audit report of

M/s JR & Associates. The plaintiff/counter defendant contested this report on the ground that they did not have an input into it before its publication and were not heard in respect to it. To my mind the greatest weakness of this report is that it was made after the eviction of the plaintiff/counter defendant. It was therefore made after the fact and thus this reduces its probative value. For the above reasons the case this claim for loss of profit as a result the dumped fuel fails.

The defendant/counterclaimant also prays for damages for breach of contract. Counsel for the defendant submitted that Shs 50,000,000/= would suffice for the suffering that the plaintiff caused the defendant to suffer in the “public eye”. In the assessment of an award of general damages the court shall look at the circumstances of each case and also on the duty to mitigate the said loss by the party which suffers the loss.

In this case the forceful eviction of the plaintiff significantly complicated the termination of this contract yet the dealership agreement had a mechanism to deal with this that was not applied. This was a failure in mitigation by the defendant. That being said the plaintiff was in breach of the dealership agreement and so is liable to pay the defendant damages and I so award the defendant/counterclaimant the sum of Shs 10,000,000/ as general damages with interest at 8%pa from the date of this judgment until payment in full.

Being partially successful on the counterclaim I award the defendant/counterclaimant the one third of the costs of the counterclaim.

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Geoffrey Kiryabwire
JUDGE

Date: 01/10/2012

01/10/2012

11:10 a.m.

Judgment read and signed in open court in the presence of;

- J. Abaine h/b for O. Mwebesa for the plaintiff

In Court

- Mr. Isingoma husband of the Plaintiff
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 01/10/2012