



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 6 OF 2013**

**AMOS GIKONYO TURUNGA.....APPELLANT**

**VERSUS**

**DUNCAN MAINGI.....RESPONDENT**

*(Being an appeal against the judgment and decree in Nanyuki Chief Magistrates' Court Civil Case No. 69 of 2010 (Hon J.N. Nyaga) on 23<sup>rd</sup> January, 2013)*

**JUDGMENT**

The respondent was the plaintiff in a suit in which he sued the appellant (the defendant) together with the then Municipal Council of Nanyuki for an order directing the latter ***“to renew and/or issue the plaintiff with a single business permit”***; he also sought for an order directing the appellant to give vacant possession of the suit property to the plaintiff, as well as general damages for loss of business and the costs of the suit.

According to the respondent's plaint amended on 20<sup>th</sup> day of May, 2010 and filed in court on the same date, the appellant is said to have been allocated by the Municipal Council of Nanyuki, a kiosk, more particularly identified as ***“Kiosk No. 5 identification No. 11374 at Kanyama Hawkers and Jua Kali selected site”*** within Nanyuki Municipality and that he had been paying for a single business permit for that particular space which he was in actual possession since the time of the allocation.

The genesis of the respondents' suit was that the appellant had fraudulently represented himself as the owner of the kiosk and thus the Municipal Council of Nanyuki had issued the appellant with the business permit for the year 2010 apparently to operate the kiosk in question.

The appellant denied the respondent's claim and in his defence he contended that he had always been the bona fide allottee and “possessor” of the open space and that the respondent was an employee of the appellant; he denied that the respondent had any property in the premises. In fact, so the appellant contended, it was in the course of his employment to the appellant that he misrepresented himself as the owner or as the allottee of the suit premises.

In his judgment the learned magistrate upheld the respondent's claim and granted him the prayers as sought in the plaint.

The plaintiff was dissatisfied with the decision of the learned magistrate and therefore he appealed to this court on the following three grounds:-

1. The learned magistrate misdirected himself in concluding that the irregularities and

inconsistencies contained in the “Single Business Permit” on which the respondent relied to prove ownership of the subject premises was not material to the respondent’s case;

2. The learned magistrate misdirected himself in failing to accord due weight to the documentary evidence by way of a list of allottee proffered by the Municipal Council of Nanyuki or in concluding that the said list was fake;
3. The judgment in favour of the respondent was against the weight of evidence.

This is a first appeal from the lower court and therefore it is incumbent upon this court to interrogate the evidence afresh and come to its own conclusions independent of those that the trial court came to but bearing in mind that it is the latter court which saw and heard the witnesses, an advantage that this court does not have. While emphasising this legal obligation **Sir Clement Lestang, V.P** in **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** said:-

*“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an 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 witnesses and should make due allowance in this 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 (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”*

The respondent testified that he was allocated stall No. 5 near the Hindu Temple by the Municipal Council of Nanyuki in 2008 and was given a licence to operate for that particular year. At the same time, he was employed by the appellant although he left the appellant’s job in the year 2010 after working for him for six years. While he was in the appellant’s employment a friend of his used to run his stall for which he had been licensed by the Council to operate.

In the year 2010 the Council issued him with the business permit for that particular year; however, the identity card number on the licence was the appellant’s and not his. Subsequently, and more particularly on 6<sup>th</sup> May, 2010, his kiosk was carted away by the Council and replaced with the appellant’s. He therefore asked the magistrate’s court to order the council to issue him with the business permit and restore him to his space. He also asked for damages and costs of the suit.

The respondent’s only witness was **Michael Wachira Mathigu (PW2)** who was the chairman of the hawkers within the Municipal Council of Nanyuki; he testified that the respondent was one of the registered hawkers within the municipality. It was his evidence that, as the chairman of the hawkers, he allocated particular spaces within the municipality to members of the hawkers association and that the respondent was one such member. According to him, only those members who had been allocated space were issued with business permits.

The appellant testified that the respondent was his employee from 2002 to 2009. It was his evidence that the Municipal Council of Nanyuki allocated him plot number 5 in the municipality in March, 2008. On 13<sup>th</sup> March, 2008 he sent the respondent to get a licence for him. He also got the licence for 2009 but in the name of the respondent. According to him the licence was changed to his name in the year 2010. He also testified that the council did not issue any ownership document.

The representative of the Municipal Council of Nanyuki was **Estun Nyaga Mukara (PW3)** who testified that he was in charge of enforcement of the council by-laws and security at the Council. He testified that sometimes in the year 2010 the appellant came to his office and complained that someone had taken over the space he had been allocated and constructed a kiosk there. According to the records at the council, the

appellant had been allocated plot No. 5 which was the site in dispute.

The witness also established from the same records that the respondent had applied for a business permit for the year 2009 in his own name; however, apart from his name, the rest of the particulars in the application including the identity card number, the PIN and even the phone number were those of the appellant. Apparently, it is on the basis of this information that the council issued the licence to the appellant instead of the respondent.

According to the respondent's complaint, his grievances against both the appellant and the Municipal Council of Nanyuki arose from the latter issuing the appellant with a business permit for the year 2010 to operate a business on a specific plot or site. It was his position that he was more entitled to the business permit than the appellant; the basis of what he thought was his entitlement, as far as I understand his case, are two single business permits issued to him in the years 2008 and 2009. Having been issued with the permits for the two preceding years, it was the respondent's contention that he ought to have been issued with the one for the year 2010 as a matter of course.

While it is apparent from the body of the complaint and the respondent's evidence that it was the business permit for the year 2010 that was in contention between him on one hand and the appellant and the Municipal Council of Nanyuki on the other hand, the prayer in respect of this particular permit was not that clear; all the plaintiff prayed for in this regard was:-

***“a) An order directing the 2<sup>nd</sup> defendant to renew and/or issue the plaintiff with single business permit.”***

If it is acknowledged, and indeed there is no evidence to the contrary, that business permits were issued or renewed yearly in any particular year, the respondent's prayer was ambiguous to the extent that it did not specify the year for which the permit was sought.

It is easy to understand the extent of this ambiguity if it is noted that while the suit was filed in the year 2010 the decree sought to be executed was issued in the year 2013; if this decree was to be served upon the municipal council of Nanyuki, I suppose the latter would certainly find it difficult to satisfy it because it is not clear on its face if the permit sought was for the current year (when the decree was served) or it was for the year 2010 whose permit was in contention at the time the suit was filed. Suffice it to say, any prayer sought in a complaint must be unambiguous, certain and specific and in this particular instance, it should not have been left to the municipal council of Nanyuki to speculate or assume the permit sought was for any particular year.

Another crucial component of the respondent's argument concerning the permit he was seeking was his perceived link between the municipal council's permit or permits and the ownership of land at any particular location within the municipality. Going by his pleadings and evidence, the respondent appears to have associated the issue of the business permits by the municipal council of Nanyuki with ownership of the particular sites or spaces within the municipality and, in particular, the place he had erected his stall or kiosk. It would appear from the learned magistrate's judgment that he was convinced by this contention that the business permits had everything to do with ownership of plots in the council and this is clear in his judgment where he said:-

***“The licence to the space was issued in the name of the plaintiff for two consecutive years-2008 and 2009. I am persuaded that it is the plaintiff who had been allotted the space. I am persuaded that it is the plaintiff who was conducting a business at the place until he was evicted by the defendants. The fact that the personal details of the 1<sup>st</sup> defendant were contained in the single business permit of the plaintiff did not make him the owner of the space. I do not believe the 1<sup>st</sup> defendant's evidence that it is the plaintiff who had obtained for his space in the plaintiff's name. The space belonged to the plaintiff.”(Underlining mine).***

With due respect to the learned magistrate, the issue of a licence by a local authority to operate a business within its jurisdiction does not, in itself, confer any proprietary or ownership rights or interest in the

property from where the licensee has been licensed to operate his business. Much as the respondent may have been licensed to operate within the council's municipality during the years 2008 and 2009, it did not *ipso facto* follow that he "owned" any particular location in the municipality merely because he held single business permits for those particular years; it was not demonstrated, in any event, that a licence to operate a single business in any particular year or years entitled the holder thereof to such permits in subsequent years *ad infinitum*.

In any case, the business permits with which the respondent had been issued did not specify any particular place from which he was to conduct his business. Although there is a provision in the permits for the purpose of indicating the business physical address of the licensee, no such address or place was indicated in the two permits in issue; the space for which it was provided was left blank in both permits. It cannot therefore be argued, as the respondent suggested and as the learned magistrate seemed to agree, that the respondent's business permits placed or entitled him to any particular location or site within the municipality of Nanyuki.

Apart from the question of ownership of what the respondent referred to as the "suit property" the other issue that the learned magistrate ought to have been concerned with is whether the respondent was entitled to general damages which he sought in prayer (bb) of his amended plaint. That particular prayer was expressed in the following terms:-

***"bb). An order directing the 1<sup>st</sup> defendant to give vacant possession of the suit property to the plaintiff, as well as general damages for loss of business."***

The first limb of this prayer relates to ownership of the so called suit property, which is an issue that has been addressed hereinbefore; at this juncture, it is the second part of that prayer that deserves attention much as it has been intertwined with the prayer for vacant possession.

Damages for loss of business must necessarily be pleaded and proved; they are largely special damages. It therefore follows that to ask for "***general damages for loss of business***" is nothing more than a contradiction of sorts, or to be more precise, a misconception; without a specific pleading and proof of the damages, in circumstances which they ought to be pleaded and proved, a prayer for such damages would be misconceived and a court of law ought not to grant it.

And even if it was to be assumed, as the respondent suggested in the prayer in issue, that he was seeking for general damages, I cannot find any evidence from the record on the extent of the loss alleged to have been suffered; neither is there any evidence of any sort of assessment of such a loss either from the record itself or from the judgment of the learned magistrate.

In the decree that was extracted from the judgment, it was decreed, *inter alia*:-

***"2. The 1<sup>st</sup> Defendant to give vacant possession of the suit property to the plaintiff and pay general damages for loss of business."***

The question that arises from this decree is, in the absence of the assessment of the general damages, how much of those damages, if any, was the judgment debtor expected to satisfy? Asked differently, was the decree at all executable; in my humble view it was not and it was impossible to execute simply because it shouldn't have been issued in the first place. I would opine that to the extent the learned magistrate granted this prayer, he misdirected himself on the law.

I am satisfied, for reasons I have stated, that the appellant's appeal is merited and ought to be allowed; I will allow it with costs to the appellant. Orders accordingly.

**Signed, dated and delivered in open court this 15<sup>th</sup> day of January, 2016.**

Ngaah Jairus

**JUDGE**