



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

**Civil Appeal 82 of 2004**

**MUNUNGA TEA FACTORY LTD.....APPELLANT**

**VERSUS**

**EPHANTUS MUNYI GICHIMU.....RESPONDENT**

*(From original Judgment of the Principal Magistrate's court at Nyeri in Civil Case No.52 of 2003 by R.M. GITONGA (PM) dated 21.9.2004)*

**J U D G M E N T**

The appellant herein was the defendant and the respondent was the plaintiff in the case in the subordinate court that has given rise to this appeal. In the subordinate court, the respondent had sued the appellant claiming interalia; general damages for breach of contract, costs of the suit and interest.

The claim arose out of an alleged tenancy agreement entered into between the respondent and the appellant wherein the respondent was allowed to operate a staff canteen owned by the appellant at a monthly rental of Ksh.300/= payable on the 1<sup>st</sup> day of each month and that in the event that the appellant wished to terminate the tenancy, it would issue to the respondent 3 years notice. However on 30<sup>th</sup> May, 1997, the appellant without giving the required 3 years notice unilaterally terminated the tenancy and required the respondent to vacate the premises in one day. It is this act of the appellant that triggered the suit in the subordinate court.

Upon being served with the suit papers, the appellant entered appearance and subsequent thereto filed a defence. In its defence, the appellant essentially denied the respondent's claim and averred that the respondent's occupation of the premises were under an arrangement which amounted to a license and not a tenancy, since the respondent was not in exclusive possession of the premises. That during the occupation of the premises by the respondent, the appellant would occasionally use the premises for meetings and recreational activities for its staff from time to time. The appellant further averred that the respondent's occupation of the premises was conditional upon him remaining in employment of the appellant as this was the only way he could gain access to the premises.

These were contrasting positions in this matter that the learned magistrate was confronted with and upon which she was called upon to make a determination. In support of the respondent's case, only the respondent testified. In summary his evidence was that on 1<sup>st</sup> January, 1995 the parties herein entered into a lease agreement for the appellant's staff canteen at a monthly rent of Ksh.300/= payable on the 1<sup>st</sup> day of the month. That the lease agreement further provided for a Notice of 3 years termination period by the appellant. The said lease agreement was produced in court as an exhibit. The respondent further

contended that the lease agreement was very clear in its terms; the parties intended the same to create leasehold and not license relationship. In abid to demonstrate that indeed what existed between them was a tenancy, the respondent tendered in evidence various rent payment receipts as exhibits. Finally the respondent testified that he had exclusive possession of the factory canteen and his being possession of the premises was not on conditional on him remaining in the employment of the appellant.

On the part of the appellant, only its factory unit manager testified. Essentially his testimony was that there was no tenancy agreement subsisting as at 30<sup>th</sup> may, 1997 capable of being breached by its letter of that date asking the respondent to vacate the premises. That as at that date, the respondent was not entitled to three years notice as the terms of the agreement entered into on 1<sup>st</sup> January, 1995 had already been varied by the appellant's letter dated 31<sup>st</sup> may, 1996. According to the witness, the respondent was a mere licensee as at the material time, as he had no exclusive occupation of the suit premises.

Having carefully weighed the evidence tendered as well as the written submissions tendered by the respective parties to the suit, the learned magistrate found for the respondent and awarded him Ksh.200,000/= as general damages. The appellant was aggrieved by the judgment and hence preferred this appeal through **Messrs Muthoga Gaturu & Company Advocates**. In its memorandum of appeal, the appellant faults the learned Magistrate's judgment on 6 grounds to wit;

- 1. The learned Magistrate erred in law and infact in finding that there existed a tenancy agreement between the appellant and the respondent as at 31.5.97.**
- 2. The learned Magistrate erred in law in awarding the respondent general damages for breach of contract when there was no legal basis for such an award.**
- 3. The learned Magistrate erred in law and in fact in finding that the appellant was in breach of a tenancy agreement dated 01.01.95.**
- 4. The learned Magistrate misapprehended and misconstrued the law of contract and law of evidence in assessing and awarding general damages for breach of contract.**
- 5. The learned Magistrate's judgment is against the weight of evidence.**
- 6. The learned trial Magistrate erred in law and in fact in disregarding the evidence adduced by the defendant when there were no facts entitling her to do so thus caused injustice to the defendant.**

When the appeal came up for hearing before me the appellant was represented by **Mr. Mugambi**, learned counsel whereas the respondent was represented by **Mr. Kahiga**, learned counsel as well. Both parties by consent agreed to have the appeal determined by way of written submissions. Subsequent thereto parties filed their irrespective submissions and authorities which I have carefully read and considered.

As the first appellate court, it is my duty to subject the evidence tendered during the trial to fresh and exhaustive evaluation so as to reach my own conclusions. See **Ephantus Mwangi & Another V Duncan Mwangi Wambugu (1982 – 88) 1 KAR 278.** To my mind, the issues which called for the learned Magistrate's determination were four told, one whether there was a tenancy agreement between the appellant and the respondent, two whether it had been breached, three whether such a breach should attract an award of damages and if so that being the 4<sup>th</sup> issue, the quantum. Although the learned magistrate answered the first issue in the positive, I do not think that on the law and evidence on record, the learned Magistrate should have come to such conclusion. The essential terms of an agreement are:

- 1) The identification of the lessor and lessee;**
- 2) The premises to be leased;**

- 3) **The commencement and duration of the term and**
- 4) **The rent or other consideration to be paid.**

**(See generally Halsbury's Laws of England 3<sup>rd</sup> Edition volume 23, Mulla, the transfer of property Act, 1882, 10<sup>th</sup> edition, the Law of contract 5<sup>th</sup> Edition, Cheshir & Fifoot).** It follows from the foregoing that a tenant in any tenancy must acquire the right of possession to the exclusion of the landlord. The period of the lease must also be ascertained. It is evident from the agreement produced by the respondent that the term of the lease is not ascertainable. There is also evidence that the purported agreement did not confer on the respondent the exclusive possession of the premises. Indeed even from the said document it is difficult to ascertain the suit premises. There is clear and uncontradicted evidence that the respondent did not at all have exclusive possession of the canteen as the appellant would routinely use the facility for other purposes such as sports and other leisurely activities. That being the case, one cannot in law really say that there was a tenancy agreement between the appellant and the respondent capable of being enforced. It would appear to me that the respondent was actually a mere licensee on the premises. In the case of **Prakash Rao V Nihar State Road Transport Corporation (1981) air Pat142**, the estate road transport allowed the plaintiff to run a refreshment room under an agreement. The agreement empowered the corporation to inspect and check the manner in which the refreshment room was being run by the plaintiff and to remove the plaintiff's employees. It was held that the agreement created no interest in the premises in favour of the plaintiff and the plaintiff was only a licensee. The fact that the premises were given to the plaintiff, for a term of one year made no difference, since a clause in the agreement required the giving of three month's Notice on either side to terminate the agreement. And in the case of **Torbett V Faulkner (1952) 2 TLR 659**, it was observed that a servant could be a licensee even if he is permitted to occupy the premises for convenience, or pays the rates, or receives the premises as part of his remuneration. The facts of the above cases are no different from the facts of this case with a few variations here and there.

Even if we were to agree that the said agreement dated 1<sup>st</sup> January, 1995 amounted to a tenancy agreement, it was subsequently varied by the appellant's letter dated 31<sup>st</sup> June, 1996. In this letter, the appellant clearly stated that it intended to start using the canteen hall for indoor games and social gatherings. The effect of this was that during such occasions the respondent's business would be affected. In consideration thereof, the appellant offered not to charge the monthly rent any more. This being the case, can the respondent really be heard to argue that there was a valid tenancy agreement obtaining then? In abid to overcome this hurdle, the respondent submitted that this subsequent letter was of no consequence since the same did not constitute any agreement between the parties discharging them from the duties and obligations of the purported lease dated 1<sup>st</sup> January, 1995. This stand cannot be possibly right. The respondent in his evidence stated that the appellant's letter aforesaid took effect in that its employees started using the premises for their leisure and sporting activities thus interfering with his business. Similarly he never paid rent from that date until the premises were taken back by the appellant. He was therefore a beneficiary of the revised terms and conditions of his occupation of the premises. He cannot therefore be heard to say that they terms and conditions were not revised and varied by the appellant's subsequent letter aforesaid. Henceforth the relationship that subsisted between the appellant and the respondent did not avail the respondent exclusive occupation of the premises. Instead it availed the plaintiff an obligation not to impede the appellant or its employees in the exercise of its rights of possession, control and use of the facility. The respondent's occupation of the premises was in effect that of a licensee. A licensee as stated in **Halsbury's laws of England Supra**, is not entitled to a Notice to quit before eviction. Accordingly, the appellant was under the law not required to serve the respondent with Notice to terminate the tenancy if at all there was one.

The totality of the evidence on record and the law irresistibly point to one conclusion which is that as at 30<sup>th</sup> May, 1997 there was no tenancy agreement between the parties herein capable of being breached and as such, the learned Magistrate erred in holding that there was a tenancy agreement between the appellant and the respondent. The relationship which existed between the two was one of licensee, since the respondent had no right of exclusive possession of the premises, the premises were not defined, the period of occupation was uncertain or capable of being ascertained and finally even monthly rent payable

if any, was on and off. It is clear that by the time the appellant took back its premises, the respondent had been excused from paying monthly rent as the appellant's workers would occasionally use the premises for their own social activities.

It is my holding therefore held that there was no tenancy agreement between the parties capable of being breached, the learned Magistrate in holding otherwise erred. In any event even if I had held otherwise, I do not think that the breach thereof would have attracted an award of damages general or otherwise. A tenancy agreement is in the nature of a contract. In the case of **Joseph Ungadi Kedera V Ebby kangisha Kawai, CA.239 of 1997**, (unreported), the court of appeal held:

**“.....There can be no general damages for breach of contract.....”** See also **Johnstone Mwangi V African Safari Ltd, CA.No.122 of 1997** (unreported). **Eliud Ngungi Mungai v Samuel Kangau Njenga, HCCA No.561 of 1999** (unreported). This case law is clear that the trial Magistrate did not have jurisdiction to award general damages for breach of contract. I could therefore have allowed this appeal yet again on this ground. Lastly, even if the respondent had been entitled to damages, the amount awarded was arbitrary. It seems like the learned Magistrate merely plucked a figure of Ksh.200,000/= from the air and planted it on the appellant. There was no factual basis or evidence adduced by the respondents upon which appropriate damages awardable in the circumstances would have been considered.

I therefore, allow the appeal and set aside the decree of the lower court. The appellant will have the costs of this appeal and in the court below.

***Dated and delivered at Nyeri this 31<sup>st</sup> day of January 2008.***

**M.S.A. MAKHANDIA**

**JUDGE**