



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1655 OF 1986

HALAL MEAT PRODUCTS LIMITED..... PLAINTIFF

VERSUS

THE ATTORNEY GENERAL..... DEFENDANT

J U D G M E N T

Halal Meat Products Ltd was incorporated in Kenya on 21/12/1972 as a limited liability Company. Its original shareholders were Mr. and Mrs. Mohamed Ali Modha.

Within two years of its incorporation, it acquired four plots whose total acreage is about 22 acres (hereinafter referred to as the 'subject property'), from the Government of Kenya with a view to setting up an abattoir thereon, as Kenya Meat Commission (KMC), which was the only Government sponsored abattoir in the country, could not meet the demand for meat.

Halal Meat Products Ltd; which I shall now refer to as the company, claims that the abattoir which took 4 years to complete, and which comprised of Danish machinery was very modern, that it was the only one of its kind in Africa, whose standards complied with EEC standards, and in furtherance of its goals, the company managed to obtain a loan from the Government to set up the abattoir,

The company experienced its first problems when its directors refused to allow the Ministry of Agriculture's request that KMC joins its board and it would appear that due to such refusal, the Ministry of Agriculture withdrew the services of six 6 veterinary officers, who it had seconded to the company, without whom, the abattoir could not operate. A dispute ensued between the parties after which the abattoir was closed. It remained idle for about 6 years and only became operational under Government management when the country experienced serious droughts in 1984, because the KMC could not cope with the high demand for slaughtering of animals. The company acted in the belief that it would be compensated as assured by the Government on 10/8/1984. The factory was operated by KMC, until 1988 when the Government decided to hand it back to the company. The company however declined to take possession until the abattoir was valued to establish its condition and standards, and the status of the spare parts.

The Government and the company held a meeting at which it was agreed that the abattoir would be valued and that the report would be ready by 31/12/1991 but by 1996, the abattoir had not been handed over to the company.

The company now claims that the Government which has had the use of the abattoir since 1/7/1984, has neither compensated it, nor paid any rentals or alternatively any mesne profits for the said use and occupation, nor has it handed over vacant possession, and that in the

circumstances, it seeks a declaration that the said occupation, retention and detention amounts to compulsory acquisition.

The company also claims that it would have had booming business from the Middle East, where Muslims eat a lot of meat especially during Ramadhan, and that it has, due to the said withholding of the abattoir, suffered heavy losses of income and profits which it would have generated thereon, as well as lost opportunities to re- invest its profits; that it has had to incur high professional fees payable to its consultants; that despite its several requests following Government assurances, the latter has failed to rehabilitate and restore the machinery which form part of the abattoir, and to clean and clear the premises and the grounds which form part of the subject land.

In its re-amended plaint, the Company seeks judgment against the Government as follows:

- (a) *A declaration that the Government's acquisition of its abattoir at Bul Bul, Ngong was in contravention of Section 75 of the Constitution of Kenya and an order that the plaintiff be restored possession of the abattoir in the same condition as it was when unlawfully acquired by the Government.*
- (b) *An order for the payment of the amount found to be due to it by way of compensation immediately.*
- (c) *An order that the Government do pay to it mesne profits from the date of occupation until the payment of the said compensation.*
- (d) *That judgment be entered in its favour against the Government for the following sums:*
 - (i) *Kshs. 1,246,855,000/-*
 - (ii) *Kshs. 383,617,000/-*
 - (iii) *Kshs. 177,300,000/- being the cost of rehabilitating the abattoir.*
 - (iv) *Kshs. 1,807,772,000/- being the current value of the abattoir with interest thereupon at prevailing bank rates from 1st November 2004 until payment in full.*

It also prays for costs of the suit and interest thereon until payment in full.

In its amended defence and counterclaim, the Government which denies most of the claims however contends that it informed the Company as far back as 10/6/98 that it was not interested in the purchase of the abattoir and that it had then intimated that it would proceed to pursue its counterclaim for the loan of K.Shs.46,789,000/= as well as interest thereon, from the company, It acknowledges that it had held discussions with the company, but it contends that the negotiations were held on a purely '*without prejudice basis*'.

In its reply and defence to the counterclaim, the company joins issue with the Government and denies owing the amount so claimed. It avers that it became discharged from further performance of the loan agreement and repayment of the said loan and interest, due to the conduct of the Government.

On 28/5/1987, the parties agreed on the following issues for determination.

1. *Does the Court have jurisdiction to determine this matter.*
2. *What is the correct method of calculating the value of the abattoir? What is the effective date of the said valuation?*

3. *How much does the company owe the Government and is the latter entitled to charge any interest? If yes, at what rate?*
4. *How much should the Government pay to the company for compensation?*
5. *Is the company entitled to mesne profits as pleaded in the plaint? If yes, at what rate and until when?*

The issue of jurisdiction was not urged before me, but the pleadings reveal that at one time, the Government under the misconception that the company was under receivership, intended to take up an objection to the validity of this suit, but that appears to have been abandoned at some point. As I say it was a misconception as there is no proof on record that the company was ever placed under receivership, and in my view this court has the relevant jurisdiction to hear and determine this matter.

Be that as it may, it is common ground that the Government took over the abattoir on 1/7/1984. The Government denies that it is still in possession and in this connection it claims that the company has all along refused to take over the premises. The company claims that the premises have never been handed over to it, nor has it ever had access to the premises to enable it carry on its business therein and that the premises have been under heavy guard by Government forces.

The legal position on possession and handing over of premises by the occupants is well illustrated in par. 3095 of **The All India Reporter [Vol.85]**, as *'the duty of the tenant upon determination of the tenancy is simply to yield up peaceable and complete possession of the premises, demised to him together with all fixtures except those which he is entitled to remove This duty will be implied in law if not expressed in the contract between the parties and the tenant will not discharge the duty by merely going out of possession unless he restores possession to the Landlord'*

Based on the above and also on the fact that the company has never been allowed into the premises, which the court learnt, are guarded by members of the General Service Unit, I find that the Government is still in possession of the subject premises, and the continued occupation, without compensation despite several requests for handing over, does in my mind amount to acquisition contrary to section 75 of the Constitution.

What recourse would the company have against the Government?

It claims both mesne profits as well as the replacement value of its abattoir, and while the Government concedes to the request for mesne profit it however maintains, that that would be all that the company would be entitled to, and in support of that contention, the Government relies on **Swordheath Properties v. Tabet and others [1979] 1 All ER 240** at page 242, in which the court held that *"when a plaintiff has established that the defendant has remained on as a trespasser in residential property, is entitled; without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and in the absence of anything special in the particular case (underlining mine), it would be the ordinary renting value of the property that would determine the amount of damages."*

The above legal proposition would be generally acceptable herein. It is however important to note that it relates to dwelling premises. It is also important to note that the Megaw & J., qualified that the position when he added *"and in the absence of anything special in the particular case"* which in my mind would cater for those dwelling premises where the landlord would be able to earn more than just the normal rent that would be payable thereon, by perhaps demonstrating that the premises had an added value.

The issue before me revolves around an abattoir, which as has been stated above was one of its kind in Africa and from where the company expected to run and manage its business and to make profits.

The position in law is that, *“if the tenant holds over after the termination of his tenancy, he is liable to pay mesne profits. The expression mesne profits is the name given to damages for trespass. Where the trespasser is a former tenant of the land owner, the liability to pay mesne profits arises even where the landlord has in fact suffered no loss. The principle is that a trespasser shall not be allowed to make use of another person’s land without in some way compensating that other person for that user It has also been suggested that the tenant may be liable for deterioration in the premises during a period in which he remains unlawfully in possession” (Woodfall Landlord & Tenant par. 19.012).*

Mesne profits which is defined in section 2 of our Civil Procedure Act as *“in relation of property ... those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefore, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”*

I have already found that by its continued occupation of the subject premises, the Government acted in contravention of section 75 of the Constitution, the company had not been compensated as would be expected.

It cannot be gainsaid that a defendant who insists on remaining on such premises would be liable not only for mesne profits, which would in this case include loss of expected earnings and profits, expected income on investments that the plaintiff can show it would have invested profitably, the replacement value of the machinery and equipment, and the abattoir as a whole.

The period for the calculation of the mesne profits, would in this case run from 1/7/1984 when the Government initially took over the abattoir, because though it had originally intimated that it would buy the abattoir, it however changed its mind on 10/6/1998, when it decided that it no longer wished to acquire it, and in my humble opinion, the effective date of trespass can be back-dated to 1/7/1984, as it was clear from the proceedings that based on the belief that it would be an outright purchase, the two had not settled the terms for the lease of the premises, nor was there evidence of remittances of rent by the Government on account of rent.

Both parties produced valuation reports in support of their claims and I have taken into account the two valuations one of which was undertaken and produced by PW2 while the other one was undertaken and produced by DW1. I have also had to look at all the other exhibits which are on record with a view to establishing whether the basis of the said valuations was proper especially in view of the several agreements which the parties entered into. Contrary to the Governments contention, none of the said agreements was entered into on ‘a *without prejudice basis*’, and this court is therefore at liberty to consider each one of the said agreement. I have in mind the company’s exhibit 2(d), which contained the Terms of Reference between them after the filing of this suit whose following clauses will shed light to the intention of these two as at 5/12/1991:

‘2. Each team will prepare a *Comprehensive Valuation Report* directing itself to the period of occupation by the Government, namely, 1st July 1984 until such time in the future (the keys being in possession of the Government) as the abattoir is restored to Halal in the same condition as it 1st July 1984, fair, wear and tear excepted it being anticipated that the abattoir would be handed back to Halal around 31st December 1991.

3. The valuation shall be prepared separately and in distinct parts in respect of the Land, the buildings and other fixed assets on the one hand and the plant and the machinery on the other hand.

4. *Each of the team shall be entitled to take into account any contract concerning the erection of the buildings and the installation of the plant and the machinery and other related matters culminating in the commissioning of the plant and also any agreements concerning the provision of finance.*

5. *Each of the teams will produce their respective valuations for the period up to 31st December 1991 provided further that if the valuations are not ready by the appointed date or the abattoir is not handed back to Halal by that date the Valuers shall provide on a pro rata basis for the additional period after 31st December 1991.*

6. *Both the teams agree that since the premises in question comprise an abattoir the purpose of the valuation should be to calculate the mesne profits.*

7. *The government undertakes to restore the plant and machinery, the buildings, road, fences, roofing, treatment plant, furniture, office equipment, fittings and generally all civil works and also spare parts to the condition as at 1st July 1984 and ensure that the machinery and plant are in a proper working order and in a condition which will be approved by the Veterinary Department and the Inspector of the European Economic Community and if the Government is unable to do this then compensation enabling Halal to do this will be assessed and paid.*

8. *The premises shall be redecorated and painted to their original condition by the Government and if not done to the satisfaction of Halal further compensation will be paid to enable the work to be done by Halal.'*

'11. On the 15th January 1992 the Government shall hand over the buildings plant and machinery, roads, fences, roofing, treatment plant, furniture and other things and articles as stated in Clause supra simultaneously with the completion and exchange of the Valuation Reports aforesaid. If Halal is satisfied with the condition of the works and related things and accepts possession the liability of the Government to pay mesne profits shall cease as from 31st December 1991. A set of plans of the improvements shall be supplied to each valuation team.'

Though in his valuation report, DW1 acknowledged the aforementioned agreement of 5/12/1991, he however proceeded to assess only the mesne profits which would be payable to the Company on account of rent for the premises, in total disregard of the requirement that apart from such portion of mesne profits, which the Government had acknowledged would be assessed by the court, but he failed to take into account the fact that the Government had undertaken to restore the abattoir in the same condition and to the same standard as it was as at 1/7/1978, fair wear and tear excepted (Exhibit P 2(a) par. 2. He also appears to have disregarded the type of abattoir for which he was preparing the valuation report, for according to the agreement of 5/12/1991, the abattoir was not a mere butchery but, comprised of plant and machinery, the buildings, roads, fences, roofing treatment plant, fittings civil works and also two years worth of spare parts, and except for shop space and small stores for butcheries and other general shops within Ngong Town, and offices and workshops in Industrial Area Nairobi, he failed to take into account all the other features described in the agreement of December 1991, in any event completely ignored and failed to take into account the fact that the abattoir which is the main building, was a superior type of a slaughter house with cold stores, meat processing rooms, or that the company could deal with the hides from the animals which it would have slaughtered, and that it had other extra facilities like de-boning; that though it was not a tannery, it had a building at the back where it could process by products of the slaughter house, and where it could prepare the hides for tanneries; that there was a large sewage works of about half an acre of land on one of the other plots from where all the effluence from the factory would be processed, and after the oxidation it would be discharged into a river which runs through the property, and that an abattoir of that kind would have two years worth of spares.

I will therefore disregard DW2's report as well as his evidence as it falls short of the standard which was envisaged by these two in the agreement of 15/12/1991.

I find that the method of valuation and assessment of mesne profits by PW2 complies with the terms of reference that were contained in the aforementioned agreement of 5/12/1991. It is more to the point, and I will rely on it. But before I proceed further, an issue that needs to be resolved is whether the base figure which PW2 used for his valuation was proper. The Government urges this court to find that his base figure was unfounded and hence exaggerated as the company had not accepted the offer of 3/3/1993, in which the said figure was included. The Government also urges this court to find that the company made a counter offer which amounted to a rejection, and in this connection it urges the court to find that *'counter-offer is equivalent to a rejection of the original offer, and after the counteroffer has been refused the original offer is no longer open for acceptance'* (**Halsbury's Laws of England 3rd Edn. Vol.8 par. 132**).

A perusal of the pleadings herein reveals that the relevant minutes are those of the meeting of 4/3/1993 at which meeting the Government's offer was discussed, clearly state that the company had offered to accept a higher figure of Kshs. 350,000,000/=, that to my mind could not be termed as a rejection, and it would fall within the ambit of the above mentioned paragraph of Halsbury's which goes on to provide that *"an enquiry whether the offeror will make some modification of the offer does not necessarily amount to a rejection"*.

I have evaluated the evidence by the company and especially that of PW2 who was able to show how the company was entitled to the profits, by relying on various figures whose source was Government's data on investments. He was also demonstrate what is the fair compensation that is payable to the company by the Government for its continued occupation and use of the abattoir for the period between 1/7/1984 to 31/10/2004, the expected date of handing over. I find that the evidence was not seriously challenged by the Government, and in the circumstances, the company has been able to prove its case on a balance of probability.

Having accepted the figure of Kshs 287,160,736/= as the base for the valuation of the company's claim, I do award it judgment against the Government in the sum of Kshs. 1,807,772,000 as per the plaint. This is the composite figure as it takes into account the company's prayer (d) (i), (ii) and (iii). As stated earlier, the figure covers to period up to and including 31/10/2004. The company shall be entitled to extra payment up to and including the date of this judgment calculated on a pro rata basis. I have taken into account the fact that the element of tax was incorporated by the company in its valuation report which I have referred to at arriving at the above figure.

The award shall earn interest at court rates till payment in full.

I also award it Professional fees for its Surveyors, Engineers and Contractors at 7½% of the above award. This particular award shall however not include the Lawyers, whose fee will be covered under the normal costs of the suit. The company shall otherwise have the costs of this suit with interest thereon at court rates until payment in full.

Following its application, on 21/8/1989, the Government obtained judgment in its favour on the counterclaim for Kshs. 27,701,127/- only, being the principal sum. The Hon. Justice Rauf ordered that the this court would determine the interest payable thereon; who would be liable for costs of that counterclaim, as well as costs of that particular application. In view of the fact that I have allowed the company to base its computation on commercial rates it would only be fair that I allow the Government interest on the above principal sum at 12% which was pleaded. The interest shall be payable from 21/8/1989 to the date of this judgment as it would not be in the interests of justice, to allow the interest to continue accruing until the set off is completed as it would be tantamount penalizing the Company for delayed compliance with the orders which I have issued in the company's favour. The award to the Government will be set off from the

above award to the company. However the Government, which was the cause of the non payment of the loan, shall bear the costs of the counterclaim and the resultant application for judgment. The company shall otherwise have the costs of this suit.

Dated and delivered at Eldoret this 7th day of October 2005

JEANNE GACHECHE

Judge

Delivered in the presence of:

Mr. Gautama and Mr. Khalwale for plaintiff

Mr. Kaka for the defendant