

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL CASE NO. 2332 OF 1993

JOHN NJENGA.....PLAINTIFF

- V E R S U S -

BATA SHOE COMPANY LIMITEDDEFENDANT

J U D G M E N T

In 1967 the Defendant agreed to let to the Plaintiff a portion of a building on its premises for the operation of a tea canteen. Among the conditions of the tenancy included the following:-

- (a) That the Plaintiff would keep the demised premises in a clean state; and
- (b) that the building would not be used for any purpose other than a refreshment room.

Sometime in 1975, the Defendant closed down the tea canteen when the Plaintiff breached conditions (a) and (b) above. Nonetheless, it appears that some compromise was reached and the Plaintiff was allowed to operate the tea canteen until 6th May 1993, when the defendant locked it up. On that occasion, the Plaintiff was absent although his employee one Harrison Gichire Kamau, was present. The Plaintiff's case is that he was never given notice to vacate the demised premises and that the Defendant did not give him an opportunity to take away his goods from the tea canteen upon its closure so that he lost a substantial part thereof while the same were within the Defendant's custody or control. He brings this suit claiming special and general damages for that loss.

Several issues were formulated by the parties for the court's determination but after looking at the pleadings and hearing the evidence led by the parties, I think that the only question left is whether the Plaintiff suffered any loss and damage. However, before I go into that matter, I would like to dispose of the minor issues first.

Although it was canvassed at the hearing that the Plaintiff had not been given notice to vacate the demised premises, this point was not pleaded and I see no reason to make any determination on it. In any event, it is quite clear that the substance of his claim concerned the damage caused to his goods, when he was denied, if at all, access to them by the Defendant. Now, was the Plaintiff given opportunity to collect his goods from the defendant's premises upon his eviction? On this question, the parties are adrift as they could possibly be. It is quite clear that upon the closure of the canteen, the Plaintiff quickly moved to this court. The court record shows that when the parties appeared in court on 28th June, 1993, the presiding Judge (DUGDALE, J.) adjourned the matter generally. It would appear that on that occasion the Learned Judge made an "off-the-record-order" that the Plaintiff be allowed to collect his goods from the canteen. Although the Plaintiff denies it, it appears that the Defendant wrote to the Plaintiff on 20th September, 1993, asking him to go and collect his goods. The Plaintiff on his part says that when he went to collect the goods on 30th June, 1999, he was denied access to them. Thereafter, he instructed a firm of Advocates to assist him in the matter. Mr. Edwin Njoroge Mugu, an Advocate with the firm of Advocates hired by the Plaintiff was called as a witness in this matter. He testified that he wrote to the Defendant's Advocates twice that is on 16th July, 1993, and on 20th September, 1993, asking that his client be allowed to collect his goods. It is not clear what happened when the Plaintiff was advised by his Advocates to collect his goods but from the Advocate's letter dated 20th September, 1993, the Plaintiff informed him that when he went to collect his goods on 12th August, 1993, he was once again turned away by the Defendant's security personnel. On these matters, it is not clear at all whether the Defendant is guilty of having denied the Plaintiff access to his goods. The Plaintiff did not mention in his testimony

the fact that he was turned away on 12th August, 1993, and it would appear that his Advocates only relied on his instructions when they wrote the letter dated 20th September, 1993, to the Defendant's Advocates. That letter cannot assist this court to determine whether the Plaintiff was indeed turned away on that occasion. His Advocates appear to have relied only on what he told them and that is no evidence on that question. In any event, it is curious that the Plaintiff did not call any other witness to corroborate that fact yet he says that he was with his "loaders" on that day. In general, the Plaintiff appeared to me as a person who was not truthful at all. He may not have taken any positive steps to recover his goods and went about creating scenes. It remained upon him to show, on a balance of probability, that he had made a conscious effort to recover his goods and that it was the Defendant who prevented him from doing so. From the material before me, that remains a matter of conjecture and I must, in that case, resolve it in favour of the party accused, that is the Defendant. In any event, these matters came to be resolved on 12th October, 1993, when access was allowed albeit, delayed, of which as I have held was caused by Plaintiff's own fault. If anything, the presence of the Plaintiff on that date was not secured without a stern letter from the Defendant's Advocates dated 6th October, 1993, when it was threatened to obtain a court order to forcefully remove the Plaintiff's goods from the canteen. As I had said earlier, these were, in my view, minor issues but touching on the resolution of the question of liability. The main question is whether the Plaintiff sustained any loss as a result of the foregoing. Although it may be that the Defendant terminated the tenancy unlawfully it is apparent that the Plaintiff, not challenging that action, did not take any reasonable steps to recover his goods. Who then is liable for the Plaintiff's loss in that case? I need to go back and state once again that the question as to whether the tenancy was lawfully or unlawfully terminated was never pleaded and therefore, does not have a place in this judgment. The Plaintiff's claim was substantially based on the damage to his goods, if any, upon the closure of the canteen but as we have already seen, he did not act reasonably to collect his goods and in that case he alone remains responsible for the loss to his goods.

However, assuming for a moment that the loss to the Plaintiff's goods was caused by the Defendant's default, which in my view is not the case, has the Plaintiff established what loss he has sustained?

The Plaintiff pleaded exact figures of his loss as K.shs. 696,482/20 the same being made up of K.shs. 692,724.55 as the value of lost property, that is property that was found missing and K.shs. 3,757.65 being the value of property which had expired.

On the amount of loss sustained, the Plaintiff was very unreliable and his evidence and that of his witness was sometimes contradictory. He alleged that he had stock worth K.shs. 700,000/= before the closure of the canteen part of which he stated to have purchased from Sigona Wholesalers priced at K.shs. 414,740.30. Of this price, he claimed to have paid K.shs. 104,800/= but did not produce any receipt to prove that fact. In any event, there was no evidence of such purchase as the invoices produced in support thereof do not themselves prove any such payment. In this case nothing would have been easier for the Plaintiff than to produce receipts to show that he had actually paid for those goods. It was also upon him to show that those goods had in fact been delivered to him. The Plaintiff's evidence was also shaky in view of the fact that he made wild estimations as to his turnover that could never be expected of the nature of business in which he was engaged. The Plaintiff called Mr. Ndungu Maina, an Accountant, to testify on his behalf. This witness claimed that when he took stock on 3rd May, 1993, the value of the Plaintiff's stock was K.shs. 896,190.10 and that when he did so again on 12th October, 1993, he found stock worth K.shs. 203,415.55. This witness' evidence would not support the purchases that were alleged to have been made subsequent to the first stock check. It would also not account for any sales between the date when it was done and three days later when the canteen was closed down. In these circumstances, this witness account is unreliable and in some instances contradictory to the Plaintiffs own testimony. For example the Plaintiff stated in his testimony that when he carried out a stock check, on 4th May, 1993, he found that he had goods worth K.shs.700,000/=. If that were the case, then taking into account the value of goods allegedly bought on 5th May, 1993, the value of his stock as at 6th May, 1993, when the canteen was closed down should have been K.shs. 1,114,740/=. This is obviously not consistent with his Accountant's finding. In any event, the Accountant admitted that he never kept the Plaintiff's books; he never looked at those books; he is not aware of their existence. One may ask: what was the basis of his findings? Did he carry out this exercise by looking at what was physically on the Plaintiff's shelves? If that was so how come subsequent purchases done by the Plaintiff appear to be accounted for in his

findings? Obviously, little weight can be attached to this witness' testimony. On another matter, although this court is not in a position to decide for the Plaintiff when to check his stock, it is quite curious that a person who was under a threat of eviction would proceed to make a substantial purchase, take stock himself and invite an Accountant to do so also. In any event, the findings of both stock takings remain questionable. For all these matters, it is very hard for this court to conclude that the Plaintiff has suffered the damage for which he brings this action. The Plaintiff has not in my view proved the damage suffered by him.

There is no loss proved for which this court can hold the Defendant liable. I will conclude and by quoting the following statement by LORD CHIEF JUSTICE GODDARD in **Bohham-Carter v. Hyde Park Hotel Ltd** [1948] T.L.R. 177 at p. 178:-

“On the question of damages, I am left in an extremely unsatisfactory position. Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court saying: ‘This is what I lost; I ask you to give me these damages.’ They have to prove it. The evidence in this ca se with regards to damages is extremely unsatisfactory.”

The same can be said to apply with equal force to this case.

I, therefore, dismiss the Plaintiff's case with costs.

DATED and DELIVERED at NAIROBI this 26th day of April 2001.

ALNASHIR VISRAM

JUDGE.