REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1447 OF 1982

WAITITU & OTHERS..PLAINTIFFS

VERSUS

KENYA RAILWAYS CORPORATION...................................DEFENDANTS

JUDGMENT

The plaintiffs, in an amended plaint filed herein on 10th May, 1983 have sued the Kenya Railways Corporation claiming *inter alia*:

(a) “Damages for unlawful and wrongful termination of tenancies.

(b) Loss of profits and business after a full and proper account.

(c) A refund of the rents paid for the months of April 1982 together with the three months’ deposit and the value of goods destroyed or lost as per the 2nd schedule herein.

(d) Costs of the suit plus interest.

(e) Interest on damages

(f) Alternative site for plaintiffs’ operation of their business”.

The plaintiffs’ case is that they were *kiosk* operators on the defendant’s land at Makongeni and Muthurwa Estates. By various agreements entered into between the individual plaintiffs and the defendant, the defendant agreed to let each of the plaintiffs operate *kiosk* business at an agreed monthly rent of Ksh 150/= together with a deposit of three months’ rent in the total sum of 450/=, on the aforesaid premises. Pursuant to the agreement, the plaintiffs commenced their business of operating tea *kiosks*, food and groceries *kiosk* and paid their rents as they became due, and also obtained the necessary hawkers’ licences.

By a letter dated 31st March, 1982 the defendant decided to give the plaintiffs notices to remove their *kiosks* and cease to operate their businesses on the defendant’s premises. Three other letters were written restating the same on 10th April, 1982, 22nd April, 1982. However, in the letter of 16th April, 1982 the defendants offered to give an alternative site to the plaintiffs. The plaintiffs were willing to move to the new site although it was not suitable while they negotiated for a better site. It was while these negotiations were going on that the defendant “maliciously, arbitrary and most unreasonably moved on the premises and locked up the *kiosks* and refused the plaintiffs’ access to the same”.

On 28th April, 1982 the defendant finally moved of the premises and demolished and destroyed the plaintiffs' *kiosks* thereby causing them a lot of damages on their *kiosks*, perishable goods and all other goods.

Notwithstanding the fact that the defendant had actually offered alternative sites, they turned round and refused the plaintiffs to take possession of those sites so as to continue with their businesses.

It is on this basis that the plaintiffs claim that the defendant is in breach of the agreement and tenancies between them as a result whereby the plaintiffs have suffered damages.

Further at the time of the breaches the defendant had not given the plaintiffs any or any reasonable notice having regard to nature of their business.

The defendant in its amended defence filed herein on 8th August, 1983 denied any liability and stated as follows: that the plaintiffs were never tenants of the defendant, they were mere licensees and had been so licenced to use the site in the defendant's estate.

Pursuant to the licence so granted to the plaintiffs by a letter dated 30th March, 1982, the plaintiffs were informed that arrangements and plans had been made to move and relocate the *kiosks* in both the estates to few central places in the estates and that the move would take place immediately but not later than 13th April, 1982. On 6th April, 1982 a meeting took place between the plaintiffs and the defendant's District Industrial Relations & Welfare Officer, Nairobi. It was agreed that the plaintiffs would move the *kiosks* to the new sites. That was the final agreement. The plaintiffs did not move. So on 16th April, 1982 the security officer of the defendant requested the plaintiffs to move to the new site as it had been agreed.

As far as the defendant is concerned the new site had been agreed upon and it was not unsuitable nor were their any further negotiations still being carried on. The plaintiffs persistently refused to move to the new site. As a result, the defendant gave the plaintiffs a written notice dated 22nd April, 1982 revoking their licences and requesting them to move from the site before 27th April, 1982 which in their view was a reasonable notice of the revocation and/or termination of the licences. Further they had given the plaintiff ample time to move to the new and alternative sites. Therefore the plaintiffs were not entitled to any of the prayers they were seeking.

It is important to briefly consider the evidence adduced herein, in the light of the agreed upon issues. Stephen Waititu (PW 1) gave evidence on behalf of all the plaintiffs, the *kiosks* owners, in that he had owned a *kiosk* in Muthurwa Railway Estate. An estate with a population of about 30,000 - 40,000 people. His co-plaintiffs were the other *kiosk* owners. The *kiosks* were made of wood and corrugated iron sheets and cemented floors. He was in the business of selling provisions. All their *kiosks* were demolished by the railway *askaris* on 28th April, 1982 and the materials carried to the railway dumping ground. He had applied to the railway for premises to start his *kiosks* as far back as January, 1977.

He got a letter of approval. Upon taking the same to the City Hall, he was accordingly issued with a hawkers licence. The agreement was that he would pay a deposit of three months rent which amounted to Ksh 150/= plus a monthly rent of Ksh 50/=. He had accordingly paid his rent when the railway *askaris* came and demolished his kiosk on 28th April, 1982. Prior to this, on 9th January, 1982, he had received a letter notifying him that the payable rent had been increased to Ksh 150/ = per month. He protested on the ground that it was too high. No reply was forthcoming till he was invited to a meeting of all *kiosk*-owners in a letter dated 31st March, 1982.

The meeting took place on 6th April, 1982 with the defendant's District Industrial Relations and Welfare Officer Mr Kabichu.

A number of issues were discussed, the most important being that the railway had decided to group together all the *kiosks* in the estate. They required them to move their *kiosks* to a new site that they would be shown and also that revised rents of Ksh 150/= per month would be paid. They were supposed to move by the 13th April, 1982. They all agreed to move to the new site on condition that the DRO had surveyed

the same and that they would be given assistance to move their goods. On 16th April, 1982, he received a letter that they should vacate, the earlier notice given had expired. That notwithstanding, on 20/4/82 another person came demanding rent which they paid. On 22nd April, 1982, one Kuisiba came with *askari* and gave them a final notice to move out of the estate by the 27th of April, 1982. On that day the same people came and locked up the *kiosks*. They all went to Muthurwa Police Station and made a report when they failed to get any help from their councillors or railway administration.

"On 26/4/82, we took our stock in the presence of railway *askaris* and locked all the *kiosks*. On 28/4/82 we rushed to the estate and *kiosks* were demolished. We were not allowed in."

On 30th April, 1982 he went back to see what had happened but was prevented by the *askaris* from getting into the estate. On top of his monthly rent of 50/=, he also was paying for the City Council licence a sum of 705/ = per annum. He produced all the letters that the defendant had written to them about "Grouping of *kiosks*". Exhibits A (111-119) being licences from the City Council, photographs of the demolition, valuation reports of all the stocks and the *kiosk* from all the plaintiffs. They had quantified all the losses incurred by all the 15 plaintiffs in a list scheduled as Exh 2. Those being the damages each of the plaintiffs were claiming from the defendant.

Michael Mwangi Macharia (PW 2) supported Mutitu's testimony about the demolition. So did Mary Ngonyo Ngunjiri (PW 3). They both confirmed Mutitu's evidence that they collected their stocks from their *kiosks* on 26th April, 1982.

John Francis Kabichu (DW 1) and James Okumu (DW 2) gave evidence for the defendant, Kabichu being the District Industrial Relations and Welfare Officer, Nairobi district, while Okumu was a Senior Welfare Assistant. According to Mr Kabichu he knew all the plaintiffs very well and had dealt with them from as far back as 1978. They all had been authorised by the defendant to put up *kiosks* after requests from them in Makongeni and Muthurwa Estates. He was the one that would process the letters of requests and issue letters of authority which would in turn authorise the plaintiffs to obtain licences from the City Council. As far as he was concerned, the plaintiffs were mere licensees and not tenants. His letter of authority is revocable at a short notice of about seven days. Upon withdraw of the letters of authority, the City Council licence would be terminated automatically. Thereafter the plaintiffs would remove their *kiosks* forthwith.

In the agreed bundle of documents Exh A No 5 was one of the letters of withdraw of authority to Macharia (PW 2) on an account of not complying with the Public Health Act.

No (10) of bundle (A) was a letter addressed to all the plaintiffs as far back as October, 1980 to the effect that:-

"Removal of *Kiosks*

As you are probably already aware, the railway management has decided that all the shops and all other related buildings in the Railway Muthurwa and Makongeni Estates which have hitherto been rented by the railway to the Nairobi Consumers Co-operative Society Ltd and which shops are vacant should be taken over immediately by the corporation and be tendered for as and when they are advertised.

The purpose of this letter therefore is to alert you in advance that immediately the shops in the estate have been allocated, all the *kiosks* will cease to operate. However, the tender will be open to all and you will be at liberty to apply along with other applicants".

The whole exercise was to be finished by 31st December, 1980.

"Please take note that you will be required to remove your *kiosks* from the Railway Estate on or before that date failing which the management will take such steps it deems necessary to effect your eviction."

As far back as 1980, the plaintiffs were aware of their eviction. None of them moved. On 23rd March

1981, Kabichu wrote another reminder requesting that his instructions contained in the above letter be complied with.

On 31st March, 1983, the defendant wrote to the plaintiffs and yet another letter in the following terms:

"Grouping of *Kiosks*

Further to my letter on the above subject, this is now to confirm that all the necessary arrangements and plans of moving and locating the *kiosks* in both Muthurwa and Makongeni Estates at few certain central places have been finalised and you are required to move immediately not later than 13th April, 1982.

Will you please therefore report to my office on 6th April, 1982 at 2.00 pm so that I let you know where you are supposed to put your *kiosks*".

Kabichu testified that the meeting took place. The meeting decided on how the plaintiffs were to be resettled on a new site.

The plaintiffs did not vacate or move at the expiry of the notice on 13th April, 1982 so on 16th April, 1982, Mr Kabichu once more gave a final notice of allocating the new site as follows:

"Grouping of *Kiosks*

Further to my letter of even reference dated 30th March, 1982 followed a meeting in my office on 6th April, 1982, I now write to confirm what we have agreed that you should move your *kiosk* to a new site near Chibuku Bar area.

Since the last date for such a move expired on 13th April, 1982 this letter serves to inform you that any time from today you will be thrown out from our estate and you will only be yourself to blame".

The defendant did not demolish the *kiosks* as can been seen in Exh A (l) & a photograph from the Nation Newspaper, the *kiosks* were locked undestroyed and undismantled and taken to the new site. However, some of the people were given two extra weeks to move their *kiosks* to wherever they wanted. As conceded by the plaintiffs in their evidence they all removed their stocks before the *kiosks* were moved. Kabichu together with other officers supervised the removal of the *kiosks* only after the notice had expired and the plaintiffs had refused to move. None of their stocks were destroyed. As far as he was concerned, nobody's *kiosk* or stocks were destroyed and therefore none of them were entitled to any damages.

The ten issues agreed upon for determination can be safely grouped as follows:

Were the plaintiffs' tenants or licencees? If they were licencees, what were their terms of licenses and were they given possession of the defendant's land on which they constructed their *kiosks* and carried on their business? What kind of possession was it? Further, was the notice given for the termination of the licences proper or reasonable?

If on the other hand they were tenants, what were the terms of their tenancies? Consequently, was the notice given for their termination of their tenancies proper or reasonable?

Lastly, on the issue of damages; are the plaintiffs entitled to damages for breach of the agreement, demolition and destruction of their *kiosk* and loss of their stock-in-trade? If so, how much?

The plaintiffs contention as contained in the pleadings, evidence and submission of counsel is that the plaintiffs were tenants of the defendant in their two estates, Makongeni and Muthurwa Estates while the defendant's contention is that the plaintiffs were not its tenants, they were mere licensees whom it had merely authorised to put their *kiosks* on its land in the two above mentioned estates and do business after obtaining the requisite licences from the City Council. The documents produced as exhibits in respect of

the tenancies are the applications by the plaintiffs and letters of authority from the defendants upon which the annual licences were obtained from the City Council and the numerous receipts of monthly payment of 50/= to the defendant for the premises.

The letter of authority that is depended upon by the plaintiffs was as is stated in Exh A(130) to James Mwangi (transferred to Charles Kaganya 1st plaintiff) dated 20th May, 1972.

"Tea *Kiosk* at Muthurwa Housing Estate

I refer to your application dated 11th March, 1972 addressed to the District Welfare Officer, Nairobi and further to an interview you had with the personnel officer (W) on Friday 19th May, 1972 in connection with the above subject and would inform that I agree to <u>you being issued with a licence to operate a tea *kiosk*</u> in Muthurwa Housing Estate at a monthly rental fee of Sh 25/=. You should also pay a deposit to cover three months' rent. You will have to obtain a City Council licence first to enable the District Welfare Officer, Nairobi to finalise your case." (The underling is mine)

If that is the authority and agreement that the plaintiffs rely on, there was no question of tenancy from the start. The letter made it clear that the agreement that the two parties were entering in was based on a licence.The defendant was merely authorising the plaintiffs to occupy its land for a period that they would find convenient. The authority does not state any other condition or terms of any tenancy for instance, lease for a certain length of period. Hence some of the plaintiffs had had their *kiosks* on the land for more than 10 years.

I am unable to find that the plaintiffs were tenants of the defendant in the absence of any other agreements as indicated by the plaintiffs. In the letter of authority, it is clear that the intention of the plaintiffs and the defendant was not to create the relationship of tenant and landlord.

To my mind what the parties herein wanted to create was the relationship of a licensee and licenser. See *Halsbury Laws of England Fourth* Edition at page 66 Par (8):

"A licence is normally created where a person is granted the right to use premises without becoming to exclusive possession of them or the circumstances and consent of the parties show that all that was intended the grantee should be granted a personal privilege with no interest in the land".

The defendant's conduct in revoking its licence even on the basis of noncompliance with the Public Health Act, and giving notices of the *kiosk* having to be moved to the defendant's other grounds, clearly indicated that all that the plaintiffs had were mere authority to occupy land given to them at anyone time. They had no exclusive possession of the land. The nature of a licence;

"does not create any estate or interest in the property which it relates, it only makes an act lawful which otherwise would be unlawful.

See *Heap vs Hartlery* [1989] 42 Ch d at page 461 at 468.

I therefore find that whatever possession the plaintiffs were given by the defendant created no interest or gave them no legal rights in the land that their *kiosks* stood on.

The licence under which the plaintiffs operated did not specify the duration of the licence. It was a gratuitous licence revocable at any time and at the defendant's wish. However, in a case like this one where the plaintiffs had built their *kiosks* and established businesses for a long time, they were entitled to a proper and reasonable notice of the revocation and reasonable time for them to remove their property and make arrangements to carry on their businesses elsewhere. See *Millennium Production Ltd* [1948] AC 147; [1947] 2 All ER 331.

The fact of revocation of the licence is not in dispute. The plaintiffs' contention is that it was unlawful in that they were not given a proper notice and therefore they did not have a reasonable time in which to

move both their *kiosk* or their stock-in-trade. The weather was bad as indicated in the report from the Meterological Department, hence all the perishable thrown out being destroyed. They also did not have time to collect monies owed to them from the people in the estates. In addition, they were still waiting to agree on terms upon which they had to move to the new site.

As noted earlier in this judgment, letters indicating that the plaintiffs would be evicted went as far back as 1980.

It was intimated to them that once the reallocation of the other shops were done on 25th October, 1980, the plaintiffs' licences were to be revoked. On 23rd March, 1981, there was another notice this time round giving the plaintiffs a two weeks notice to move. When nothing happened, there was the letter of 31st March, 1982 that called for a meeting between the parties this being the final arrangement for the plaintiffs to move to a new site allocated . Contrary to what Waititu said in Exh A(20), a letter of 16th April, 1982, the exact site was given as it had been agreed and the letter clearly indicated that it was the last notice for the plaintiffs to remove themselves since the time of the notice had expired on 13th April 1982.

This letter was followed by a letter to the plaintiffs dated 22nd April, 1982. It stated:-

"Removal of *Kiosks*

Having defied instructions contained in my letter reference No DIRO/NRB/9/1 of 16/4/82 I am now giving you a final notice that you must move completely out of the estate on or before, Tuesday 27th April, 1982. Please note that if you fail to do so your structures will be demolished".

The evidence from both parties was that the notices were indeed received and were not complied with, notwithstanding that new sites had been offered. According to the plaintiffs, they did not like the new sites. The numerous reminders on the revocation of the licences were in my view sufficient. They constituted proper notices of the revocation. It cannot be said that the defendant acted out of the blues. For a period from 1980 to April 1982, the plaintiffs had been notified every now and then that they were required to vacate. Apart from the notices, a meeting was held and the notice of revocation confirmed. I am not persuaded that the notices so given were not sufficient or that indeed the plaintiffs required any more time to move their *kiosk* to a site that had already been allocated to them. In respect of collection of their outstanding debts, it would appear that they had been operating in the estates for a long time and definitely knew their customers who weren't going to leave the estate. The opportunity to collect their money was still available. I am satisfied that the plaintiffs have not proved their case that the revocation of their licenses was unlawful or that the defendant breached any law.

Even if I had found that the notices of revocation of the licences was not proper, I would not have awarded the money claimed for destruction of the *kiosk* and the stock-in-trade. There is evidence from the plaintiffs themselves that they collected all their goods from the *kiosk* on 26th April, 1982. Waititu (PW 1) in his evidence and cross-examination stated clearly that on 26th April, 1982 he took his stock in the presence of the railway *askaris*.

While Michael Macharia (PW 2) stated:

"My *kiosk* was demolished on the same day I had taken my stock on 26-4-1982. It was worth Ksh 143,479/50 as per Exh 2".

This is the figure that the witness was now claiming for as damage. This was the position of all the other plaintiffs. They did not lose the stock-intrade. Nor were their *kiosks* demolished.

In view of the above findings, I hereby dismiss this suit. The order which appeals to me in the circumstances of this case in respect of costs is that each party shall bear its own costs.

Order accordingly.

E.OWUOR

JUDGE