



REPUBLIC OF KENYA
HIGH COURT AT MOMBASA
CIVIL CASE NO. 14 OF 2011

ALI YISLAM HARIZ PLAINTIFF

V E R S U S

KENYA RAILWAYS CORPORATIONDEFENDANT

RULING

(1) Vide an agreement dated 10th September 1987 the Defendant leased to the Plaintiff land known and described as **Mombasa/Block/XI/51**. The term was for 99 years from 1st March 1986 at an annual rent of Kshs. 8,000/-. A Notice dated 13th October 2010 issued by the Defendant for revision of rent has given rise to a disagreement.

(2) The Plaintiff has in these proceedings asserted that the purported valuation and reassessment of annual rent is in breach of the written agreement and has asked this Court, inter alia, to declare the valuation null, void and unenforceable. In the meantime the Plaintiff seeks protection by way of an injunction. In a Notice of Motion dated 29th January 2011 filed at the commencement hereof, the Plaintiff has prayed for-

(3) That the Defendant/Respondent its employees, servants and/or agents be restrained from levying any distress for non-payment of rent for any amount over and above that specifically provided for in the Lease Agreement between the parties and/or otherwise entering into the suit property with the intention of levying such distress for rent and/or otherwise repossessing the said property for such non payment of the increased annual rent OR otherwise interfere with the Plaintiff/Applicant's quiet enjoyment pending the hearing and determination of the suit.

(4) That the Defendant/Respondent its employees, servants and/or agents be restrained from proceedings with the hearings advertised on 19th January 2011 in the Daily Nation Newspaper OR otherwise act contrary to the lease terms pending interparties hearing of this application.

(5) That the Defendant/Respondent its employees, servants and/or agents be restrained from proceeding with the advertised hearings of objections pending the hearing and determination of this matter.

(3) The Plaintiffs action and application is resisted by the Defendant. In the Statement of Defence filed by its advocates Ndegwa Muthama & Katisya Associates the Defendant states that the reassessed annual rent was done in accordance with the law and then raises two preliminary objections in paragraph 8-

(a) The suit is premature and is expressly barred by Section 87(a) of the Kenya Railways Act which stipulates that legal action shall not be commenced or against the corporation for any act done in pursuance or execution, or intended execution of the Act until one month after written

notice containing the particulars of the claim and of intention to commence the action or legal proceedings has been served upon the Managing Director.

(b) This Honourable Court's jurisdiction to hear and determine this suit is limited by Section 83(1) of the Kenya Railways Act which mandatorily enjoins the Plaintiff to pursue direct negotiations with the corporation and to refer the matter to a single arbitrator appointed by the Chief Justice.

These two objections were also contained in a Notice filed earlier on 7th February 2012 by the Defendant. It was agreed by parties that the Preliminary Objection be argued within the framework of the application dated 25th January 2011. I will start by determining the objection.

(4) In leasing its land to the Plaintiff, the Defendant would be acting within Statutory powers donated to it by Section 13 of The Kenya Railways Corporation Act (Chapter 397 Laws of Kenya) hereinafter "**The Act**"). Section 13(2) (h) empowers the Defendant to-

“to sell, let or otherwise dispose of any property, movable or immovable, which in the opinion of the Board is not necessary for the purposes of the Corporation:

Provided that the Corporation shall not sell, let or otherwise dispose of any building or land placed at its disposal by the Government otherwise than with the consent of, and on conditions agreed by, the Government.”

(5) It is the contention of the Defendant that these proceedings are premature and barred by Section 87(a) of The Act as the Plaintiff did not serve the mandatory one month Notice upon the Defendants' Managing Director prior to the institution of the suit. This is what Section 87(a) provides-

“the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding has been served upon the managing director by the Plaintiff or his agent.”

(6) It is accepted that the leasing of the property to the Plaintiff was done by the Defendant in pursuance of its statutory power under Section 13(2) (h). Any action relating to the lease would have to comply with Section 87(a) of The Act.

(7) The position of the Plaintiff is that not only did he serve the Notice but that it was indeed acknowledged and responded to by the Managing Director of the Defendant (see paragraph 11 of the Amended Plaintiff). In his further affidavit sworn on 16th February 2011 the affidavit annexed a Notice dated 9th November 2010 sent out by his advocates to The Managing Director. It is reproduced-

“Our ref: MSB/H/35/1

9th November 2010

Your Ref:

***The Managing Director,
Kenya Railways Corporation,
P.O. Box 30121-00100,
NAIROBI***

BY REGISTERED POST

Dear Sir,

RE: THE GOVERNMENT LAND ACT (CAP 280) NOTICE FOR REVISION OF LAND RENTS SECTION 11 (2 & 3) PLOT NO. LR. MSA/BLOCK XI/51

We act for the lessee Mr. Ali Y. Hariz in the above matter and refer to your letter dated 13th October 2010.

Our client objects to your aforesaid letter in which you purport to assess a revised rental amount arising out of an alleged valuation you carried out for purposes of determining rents payable for the periods, commencing 1st January, 2010 and ending 31st December, 2011. You have mentioned that your purported assessment was undertaken pursuant to the provisions of the Government Lands Act upon which your claim is based on.

It is our contention that the Government Lands Act relied upon and in particular Sections 11(2), 11(3), 18B and 147 of the said Act does not apply nor do they give the Kenya Railway the power they now purport to usurp.

Accordingly, such purported valuation based on the said Act is ultra vires the Corporation and in breach of the lease agreement which stipulates the manner in which the lessor is guided in imposing or revising charging or assessing any such rents that the Lessee is required to pay.

We therefore hereby demand that you immediately withdraw the said unlawful Notice.

TAKE NOTICE *that if you fail neglect ignore and or refuse to comply with this demand within the next thirty (30) days hereof our client will be left with no alternative but to move to Court for appropriate legal redress including injunctive relief, at your risk as to costs and consequences.*

This notice is served to you under the provisions of Section 87(a) of The Kenya Railways Act (Cap 397) as an expression of our client's intention to institute proceedings should you fail to abide.

Yours faithfully,

For: BALALA & ABED

M.S. BALALA
CC. Client."

By a letter dated 27th December 2010 the Managing Director wrote directly to the Plaintiff but made reference to the letter referenced MSB/H/35/1 dated 9th November 2010. That letter is the above notice. The issuance of the letter by Balala & Abed Advocates and the response by the Managing Director have not been contravened by any evidence by the Defendant.

(8) I did not hear the Defendant argue that the Notice dated 9th November 2010 was insufficient in content. That is that the Notice does not contain the particulars of the claim and a clear intention to commence action or legal proceedings. Looking at the Notice this Court finds that in it the Plaintiff outlined the basis of his grievance and specifically stated that he would move to Court for legal redress if the demand for revised charges was not withdrawn. He then closed in these words-

“TAKE NOTICE *that if you fail neglect ignore and or refuse to comply with this demand within the next thirty (30) days hereof our client will be left with no alternative but to move to Court for appropriate legal redress including injunctive relief, at your risk as to costs and consequences.*

This notice is served to you under the provisions of Section 87(a) of The Kenya Railways Act (Cap 397) as an expression of our client's intention to institute proceedings should you fail to abide.

In my view that Notice is sufficient in content.

(9) Again not contravened was that the above Notice was sent via Registered Post on 12th November 2010. Section 91 of The Act provides for mode of service of a Notice on the Managing Director as follows-

“Any notice or other document required or authorized under this Act to be served on the Corporation, or the Managing Director, may be served-

(a) by delivery of the notice or other document to the Managing Director or to any authorized employee; or

(b) by leaving it at the office of the Managing Director; or

(c) by sending it by post to the Managing Director.”

Service by Post is an acceptable mode.

(10) Then Section 3(5) of the Interpretation and General Provisions Act makes certain provisions on service by Post-

“Where any written law authorizes or requires a document to be served by post, whether the expression “serve” or “give” or “send” or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.” (my emphasis)

Service of the letter of 12th November 2010 would have been effected, unless the contrary is proved, at the time at which the letter would be delivered in the ordinary course of the Post. This Court was not told when actual delivery happened. But one thing is clear, the Managing Director had received the letter by at least 26th December 2010 when he wrote his response. If, however, there is a contest as when exactly that letter was delivered, then that can only be settled by receiving and considering evidence. In which event that would not be a matter to be properly taken as a Preliminary Objection (see **Mukisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Ltd [1969]EA 696**). For that reason I am unable to uphold the first objection.

(11) I turn now to consider the arguments on Section 83(1) of The Act which provides-

“In the exercise of the powers conferred by Sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.” (my emphasis)

This Court reads this provision as applying to claims for compensation by persons who have suffered damage caused by the Corporation in exercise of its statutory powers. The proceedings before this Court are not about compensation. The claim by the Plaintiff is that the revision of annual rent made by the Defendant is unlawful and any increase of rent must be done only in accordance with the lease agreement of 10th September 1987. This Court doubts that Section 83 was intended to cover claims of this nature.

(12) I would also think that the damage referred to Section 83 is physical damage that the Corporation may cause to third parties in the exercise of its statutory duties or functions. I say so because although Section 13 of the Act is on the General Powers of the Corporation Sections 15, 16 and 17 (which are also cited in Section 83) are in respect of physical tasks that may be undertaken by the Corporation. That is

why the Section enjoins the Corporation, when exercising its powers, to “**do as little damage as possible.**” The Plaintiffs claim here is not about any physical damage. I do not find merit in that objection.

(13) I now turn to consider the substance of the application. This Court is told that the terms of lease between the parties are contained in the lease agreement dated 10th September 1987. That is the basis of the contract between the two. The argument by the Plaintiff, as I understand it, is that rent can only be revised in accordance with the terms of the lease. It is his view that the purported increase in annual rent is unlawful as it has been made before the expiry of the term. Although the Plaintiffs Counsel did not point out the relevant Clause in the agreement, this would be Clause 2(a) which reads-

“That the Lessor shall have the right at the expiration of each period of thirty years of any extended term granted in accordance with Condition Number 3(a) hereof to raise the annual rent to a figure equivalent to one-twentieth part of the unimproved value of the land at the date of such revision.”

(14) The Defendants submission did not respond to the argument that the revision of rent breached the terms of the lease agreement. In the statement of Defence, the Defendant simply says this-

“The Defendant states that the valuation of the suit property and demand of the reassessed annual rent was and is in accordance with the law.”

The Defendant did not point out which law, if any, permitted or empowered the Defendant to revise rent outside the context of the lease agreement. For this reason I find that the Plaintiffs complaint is not a trifle. He has on the material presented to Court established a prima facie case.

(15) It is the argument of the Defendant that no irreparable damage can possibly ensue even if the injunction were not granted. The Court agrees that any enhanced rent paid by the Plaintiff can be recovered if the increment will be found to have been effected unlawfully. Am I therefore to reject the application? I have found that upto this stage of the proceedings the Defendant has not laid down the legal basis of the revision of rent. Save for the technical objections raised there has been no substantive answer to the Plaintiffs assertions. Of course the matter is yet to go to hearing on merit and the Defendant has all opportunity to set up a credible defence. But for now I think that this Court should interpose to restrain the revision as it is probably unfounded in law. In doing so I take the cue of the words of Ringera, J (as he then was) in **Waithaka –Vs- Industrial & Commercial Development Corporation [2001] KLR 374 at page 381-**

“I think some of the considerations to be borne in mind is the strength or otherwise of the Applicant’s case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the Applicant this may move a Court of equity to say: “money is not everything at all times and in all circumstances and don’t you think you can violate another citizen’s rights only at the pain of damages.”

(16) I allow the application of 25th January 2011 in terms of prayers (3) and (5) but prayer 5 shall only be limited to any hearing in respect to the suit premises herein. The Plaintiff shall have costs.

Dated and delivered at Mombasa this 3rd day of October, 2012.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Mohammed for the Plaintiff

Sittonik for the Defendant

Court clerk - Benta

F. TUIYOTT

JUDGE