



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI
CORAM: KWACH, OMOLO, & SHAH, J.J.A
CIVIL APPEAL NO. 295 OF 1997
BETWEEN

JENIFFER NYAKINYUA WAMBUGU.....APPELLANT

AND

NAIROBI CITY COMMISSION.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mr. Justice J. A. Mango) given on 8th April, 1992

in

H.C.C.C. NO. 2559 OF 1990)

JUDGMENT OF THE COURT

This is an appeal by Jeniffer Nyakinyua Wambugu (the plaintiff) against the decision of Mango J. given on 8th April, 1992, by which the learned Judge dismissed with costs a suit which the plaintiff had instituted in the superior court against Nairobi City Commission (the defendant). In the suit the plaintiff sought to recover damages for loss and damage she claimed to have suffered when her mobile kiosk at the junction of Workshop Road and Machakos Road, in Nairobi, was demolished by the plaintiff's askaris on 19th February, 1990. In the course of the demolition, in addition to the destruction of the kiosk, the plaintiff claimed to have lost items of food, a variety of edibles and condiments, utensils and other items ordinarily used in a catering business.

The plaintiff operated the kiosk under a licence issued by the defendant on certain conditions which included condition No.4 which stated:-

"(4) Licensee must move away when no longer required at the site of hawking of business."

On 15th November, 1989, the defendant sent a notice in writing to the plaintiff requiring her to remove her kiosk from the site where it stood within fourteen days. The reason for requiring her to move was that the presence of the kiosk at that particular location was undesirable. The notice was addressed to the plaintiff care of one C. N. Wambugu, who was at the material time a senior officer in the City Inspectorate Department, a section within the defendant Commission.

The plaintiff's claim was based on the premise that the defendant demolished her kiosk without notice.

The defendant filed a defence denying liability and averred that a notice had been served on the plaintiff through Mr. Wambugu who was alleged by the defendant to be the plaintiff's husband. The learned Judge found as a fact that the plaintiff was indeed served with notice and rejected her claim for damages as he found no evidence to support the claim by the plaintiff that her goods had been destroyed or lost in the process of demolition.

The memorandum of appeal contains five grounds of appeal but Mr. Okeyo, for the plaintiff, abandoned the first four grounds leaving only ground five, in which the complaint is that the learned Judge erred in law in not finding that there was no notice served on the plaintiff. He submitted first, that the plaintiff did not receive the notice sent by the defendant, and secondly, that the service should have been effected on her personally at the site of the kiosk. Although the notice was sent to the plaintiff through her husband, her denial of receipt cannot be true in view of the fact that on 23rd November, 1989, she wrote to the defendant's Town Clerk appealing against the notice issued on 15th November, 1989 requiring her to remove her kiosk. Her appeal contained twelve grounds which she requested the Town Clerk to consider. If she had not received the notice as she alleged in her plaint and in her evidence before the Judge, there would have been no need at all for her to make representations to the Town Clerk. The learned Judge was clearly right in holding that she had been served with notice. This ground of appeal accordingly fails.

The plaintiff alleged that her kiosk and assorted goods were destroyed by the defendant's askaris, but there is no evidence to support this allegation as there was evidence before the learned Judge that Mr. Wambugu, the plaintiff's husband, was present during the operation and specifically requested the askaris not to damage the kiosk or the goods as he intended to remove them himself. In the face of this evidence, one would have expected the plaintiff to call Mr. Wambugu to deny it if it was not true but she chose not to do so, and it was quite properly accepted and relied upon by the learned Judge.

Mr. Okeyo also sought to advance an alternative submission based on waiver and estoppel that subsequent to the issue of the notice of 15th November, 1989, the defendant had renewed the plaintiff's hawking licence for the following year. This plea must fail for two simple reasons. First, the plaintiff did not plead either waiver or estoppel in her plaint and she is consequently precluded from canvassing them now. She cannot be allowed to depart from her pleading.

Secondly, the renewal of her hawking licence for 1990, did not affect the notice one way or the other because by that notice, the defendant had not sought to revoke the plaintiff's hawking licence. It only required her to move elsewhere.

For these reasons, the appeal fails and it is dismissed with costs to the defendant.

Dated and delivered at Nairobi this 25th day of February, 1998.

R. O. KWACH

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JUDGE OF APPEAL

R. S. C. OMOLO

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR