MUIRURI GAKOMBI……...……..PLAINTIFF

-versus -

SPECIAL STEEL MISSLS LIMITED…….DEFENDANT

JUDGMENT

This is a suit for damages of a special nature arising from damage to residential premises. The plaintiff is the widow of one Muiruri Gakombi, who died on 17th August 1991. She is continuing this suit, which was originally started by her deceased husband, as a personal representative of her husband's estate.

On the date of his death Muiruri Gakombi was working as an administration police officer. He was attached to the DO's office, Thika, and appears to have been working at Ruiru, but there is no clear evidence on that aspect.

The cause of action as pleaded, arose on 5th September, 1989. It is the plaintiff's case that on that day servants or agents of the defendant, a limited liability company, went to plot No. 2 T.O.L. Ruiru, pulled down several structures on the plot, carted away the materials together with household effects which were inside, and thereafter the defendant caused a grader to level the ground, with a view to putting up a nail manufacturing plant there. The plaintiff has averred in the plaint that the demolished structures together had a total of 29 rooms, a bathroom and toilet. They were giving her a monthly rent of Kshs 3480/- which she ceased to receive upon the demolition of the structures. She therefore prays for damages for the loss she and her family sustained as result of the demolition.

The defendant has denied responsibility in its written statement of defence, and avers, inter alia, that it has been wrongly described, that the plot as described in the plaint is non-existent, and that the plaintiff has no right, legal or otherwise over the property if at all it exists.

Issues were framed. There is no dispute that the plaintiff had some structures on a designated plot, at Ruiru township. There is no dispute the structures were demolished on 5th September, 1989, as pleaded in the plaint. Nor is there a dispute that the plot in question is presently registered in the name of the defendant. On the issue of liability there are substantially two issues, namely:

1. Whether the plaintiff was lawfully on the plot in question on the material date her structures were demolished; and

2. Whether the defendant demolished the structures in question.

The first issue poses no serious problems. The plaintiff's deceased husband was granted a licence in 1970, by an agreement between her and the Commissioner of Lands dated 1st October, 1970, to occupy the plot in question. The terms of the licence was indefinite. It was stated in the following terms:

"… for the term of 9 months from the date hereof and thereafter until determined as hereafter provided, at the yearly rental of Shs 250/- payable in advance on the first day of every quarter/year."

Provisions as to the termination of the licence state:

"This licence may be determined at any time after the expiration of the ninth month by either party giving to the other three calendar months' provisions notice in writing and is subject save where expressly herein otherwise provided to the provisions of the Crown Lands Act (cap 280) or any Act replacing it."

The Crown Lands Act is now the Government Lands Act, cap 280 Laws of Kenya

thereof deals with, inter alia, termination of licences as the one the plaintiff's husband had been granted; it requires a three months' notice provisions to the termination date, which notice must be in writing.

A licence may also be forfeited pursuant to the provisions of S.42 of the same Act. That normally would arise if there is default on the part of the licensee to satisfy any of the conditions of the licence. Where that happens the Commissioner of Lands has the right to declare the licence forfeited. It would appear to me that such a declaration must be in writing – in fact by dint of the provisions of S.78 of the Act, a court order is necessary before a licence can be effectively and properly forfeited.

The Commissioner of Lands has power under S.10 of the Act to grant leases to persons for terms not exceeding 99 years. Such a grant was made to the defendant company by way of a lease respecting the plot on which the plaintiff's structures stood on 26th March, 1974, for a 99 year term. The lease was given subject to the Provisions of the Government Lands Act, which in effect meant that the lease was subject to the licence which had been given the plaintiff's late husband.

As at the 5th September, 1989, the licence had neither been terminated nor forfeited. The letter terminating the licence dated 5th December, 1989, was received by the licensee long after his structures in the suit plot had been demolished. Consequently as at the date of the demolition the plaintiff was lawfully on the plot.

There was the question raised through the cross-examination of the plaintiff as to the effect of the several letters her husband had received from the District Commissioner, Kiambu District and his District Officer, then based at Thika. The effect of those letters was that the provincial administration was requiring the plaintiff to vacate the subject plot because the plot along with several others had been allocated to the defendant. The plaintiff refused to vacate. The reason the plaintiff gave for refusing to vacate is that the District Commissioner nor any of his subordinate officers had the power to require her and her family to vacate the plot. I entirely agree. The licence although it had been given by the Government, not every officer of the government had the right or power to cancel or revoke it. There is the authorized officer, namely the Commissioner of Lands who could do it. The Commissioner of Lands did not deem it fit to communicate to the plaintiff any decision to terminate the licence. It was therefore, deemed to be valid and in force until it was determined on 5th December, 1989.

The first issue must, therefore, be answered in the affirmative.

Then there is the second question whether the defendant demolished the plaintiff's structures. The plaintiff's case is that the defendant did so using its own employees. The defendant on the other hand contends and called evidence to the effect that the demolition was done by the provincial administration. In fact the District Commissioner, Kiambu District did address a letter to the plaintiff's husband, dated 29th September, 1989, stating, inter alia, that he had demolished the plaintiff's structures in order to create room for the rightful owner of the plot to effect some developments on it.

The D.C. did not personally carry out the demolition exercise. One of his chiefs one Solomon Kiuna Kiarie, testified for the defendant, that he personally led 12 administration policemen to plot no 145, Ruiru on the instructions of the area D.O. to carry out the demolition work. However his evidence and the several letters which the defendant tendered in evidence in support of its case must be looked in proper perspective. The defendant had complained to the provincial administration about the plaintiff's continued occupation of the plot which had been leased to it by the Government. The provincial

administration must have agreed to help considering the tone of the letters it later wrote to the plaintiff. Infact the D.C. was incensed that the plaintiff's husband who was his subordinate officer, did not vacate the plot even after he received a letter from him (D.C.). By his letter of 29th September 1989, the D.C. threatened to take serious disciplinary action against him which would possibly include dismissal, if he did not act according to his direction.

The tone of the D.C's letter above, and even that of the other letters which were exhibited, is clear that the D.C. was using his official position to assist in the enforcement of private rights. The Chief who testified before me was emphatic that he saw the plaintiff at the scene of the demolition exercise on the material date her structures were demolished. She could not possibly see something different from what actually happened if the Chief was telling the truth.

The plaintiff clearly testified that she saw the defendant's employees emerge from its factory which was nearby. They were equipped with appropriate tools which they used to demolish her structures. It is possible and highly probable that there were administrative policemen and even the chief present on the material date their presence must only have been necessary to ensure that law and order was preserved.

What I infer to have happened is that the D.C. authorized the demolition at the request of the defendant. That is why he was incensed by the plaintiff's husband's threat to bring a court action against the defendant.

Thus whether the defendant carried out the demolition using its employees or the demolition was carried out either by the provincial administers personally or with their approval the end result is the same. The provincial administration was acting as the agent of the defendant. Moreover, if it acted as the defendant contends, it was unlawful to do so. The use of police to enforce civil rights is frowned at by courts (see *Kamau Mucuna v The Ripples Ltd*, C.A. Civil Appl. No NAI 186 of 1992) and a party who calls them to his aid, in my view, becomes personally liable for any loss occasions by their action.

In our case the defendant invited the provincial administration to its aid instead of seeking a legal remedy. It caused the demolition of the plaintiff's property. It cannot now turn around and say that it was not responsible for the damage. The situation here is analogous to malicious prosecution where the complaint becomes liable for damages even though the prosecution is carried out by the government. His liability arises because he instigated the demolition whether by the use of its employees or by using the administrative policemen.

I would, therefore, answer the second issue in the affirmative as well.

I must now turn to the measure and quantum of damages. What the plaintiff lost were structures. Although they were attached to the ground they were basically like chattels. They were houses without land. The measure of damages is the cost of the materials or of replacing the same.

The plaintiff's case is that 29 rooms comprised in a block or blocks of rooms were demolished. Of those, 26 were occupied, 21 of them by tenants and five by the plaintiff and her household. Ten of the rooms were outside the plot respective which the plaintiff had a temporary occupation licence. Consequently they would not be included in the computation of loss. The plaintiff's husband had been asked to remove the structures but he persistently refused to do so. He had no justification for refusing to remove the structures which were outside the plot in question. However, he was perfectly entitled to resist any moves by the defendant to evict him from the plot because he had a licence from the Government to be there, which licence had not been cancelled or forfeited.

If the ten rooms which were outside the suit plot are disallowed, then only 19 rooms remain. The size of each room was said to be 15 feet by 12 feet. Those were large rooms. By ordinary computation only about 17 rooms would fit on the plot.

The plaintiff's evidence was that her husband spent Kshs 250,000/- to put up the 5 rooms he occupied with his family. The rooms were said to be made of timber with corrugated iron sheets of 24 gauge both

on the walls and the roof. The plaintiff testified that the receipts for the materials which had been used to construct the rooms were destroyed when the rooms were demolished. That is probable. By ordinary computation each room cost Kshs 50,000/- to construct. The plaintiff further testified that the floors were of concrete screed.

It must be remembered that the plaintiff's claim is for special damages. The facts of this case are more or less similar to those in the case of *Kampala City Council v Nakaye* [1972] EA 446. In that case as in this one the plaintiff lost the receipts during the time her house was demolished by the defendant. She could not therefore adduce documentary proof of her loss. She however orally stated what she had lost. The trial court believed her. The Court to Appeal for East Africa had no reason to interfere with that finding.

In our case the plaintiff has given evidence of the amount of money her husband spent in erecting the structures in issue. She has not been contradicted. Nor has any evidence been adduced to show that her figures are exaggerated. I have no reason to disbelieve her. I allow Kshs 250,000 for her five rooms. I will also allow Kshs 300,000 for 12 rooms which were for rental purposes. I disallow the claim for 10 rooms which were outside the suit plot. The figure 300,000/- is arrived at by using Kshs 25,000/- as the cost of each rental room. It is the quotient when 600,000 is divided by 24 which is the number of rented rooms. Since 10 were discounted 12 remained. It is the multiplier.

Then there is the claim for loss of rents. The figure leaded is Kshs 3,480/- per month for 29 rooms. However, three were said to have been without tenants, and 5 were occupied by the plaintiff and her household. However, when it comes to computation for damages, there should be no distinction between a house occupied by the owner and that occupied by a tenant if they are comparable as is true in this matter. Consequently I propose to compute loss of income on the basis of 17 rooms, and not 29 for the reasons I gave earlier.

Rent per room was said to be Kshs 150/- per month. That is a reasonable figure. Moreover, the evidence on that aspect was not challenged. The multiplier must be the period between the date of the demolition and the date the termination notice of the occupation licence was to expire, viz three months from 5th December, 1989. The total period is 5 months. So the total due comes to Kshs 4250/-. The total damages comes to Kshs 554,250/- on which I give judgment for the plaintiff against the defendant plus costs. Interest to accrue at court rates from the date of the suit until payment in full.

Dated at Nairobi and delivered this 12th day of October 1993.

S.E.O. BOSIRE

JUDGE