REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO 2408 OF 1987

MT KENYA SAFARI CLUB LTD.....PLAINTIFF

VERSUS

MUKAWA (HOTELS)HOLDINGS LTD.....DEFENDANT

RULING

April 6, 1989 **Rauf J** delivered the following Ruling.

It was agreed between the learned counsel for the parties that the issue No 2 in the draft issues annexed to the summons for direction be argued first in order that the claim for general damages in the plaint could be determined accordingly. The issue is:

> Did the agreement on its true construction impose an obligation on the defendant to use trade marks and other rights for a period of 10 years from 11th November 1983 or was the agreement on its true construction a licence at will which could be terminated at any time by the defendant without penalty or damages?

Mr Hewitt for the plaintiff argued that the agreement marked "A" annexed to the affidavit of Mukesh Kanji Rupshi Shah, a partner in the firm of Price Waterhouse Certified Accountings sworn in support of the plaintiff's application for a summary judgment filed on July 30, 1987 amounted to a binding contract forcing the defendant to use the trade marks of the plaintiffs for the 10 years period stipulated in the said agreement.

Mr Lakha argued that it was not a binding contract; that it was a contractual licence terminable by the defendant at will without giving rise to any penalty or damages. He relied on the same authorities as cited by Mr Hewitt namely;

1. *Winter Garden Theatre Ltd v Millenium* [1947] 2 All ER 331

2. *Staffordshire Area Health Authority v South Staffordshire Waterworks Company* [1978] 3 All ER 769

3. *Halsbury's Laws of England* 4th edition vol 9 to 12, pars 528, 529, and 530 on pages 364 and 365.

In reply to Mr Lakha's submissions Mr Hewitt conceded that the aforesaid agreement was a contractual licence but argued that since it was for a fixed term it was obligatory for the defendant to abide by it or

else be held liable to pay damages for its breach. He submitted that the defendant was not permitted to terminate the licence at will. Whereas under clause II of the agreement the plaintiff was entitled to end it by giving six (6) months notice, no corresponding right was accorded the defendant.

Mr Lakha submitted that the licence being terminable at will under the law there was no need for the parties to incorporate any restrictive clause as far as the defendant's right was concerned. They, however, agreed to fetter the plaintiff's right to do so by making it obligatory on its part to give six (6) months notice. In other words this argument accentuates the legal proposition that the licence is terminable at will unless otherwise clearly stipulated by the parties in the agreement creating the licence. The plaintiff circumscribed its right to six months notice voluntarily leaving the defendant's legal right intact. Since the defendant had its right entrenched by the law it would have been a superfluous reiteration thereof in the agreement unless the defendant also wanted to surrender or diminish that right or otherwise limit its scope by inserting a specific clause to that effect as it was done in clause II respecting the plaintiff's right. Its absence from the agreement indicates that the defendant was quite content to leave his right to the operation of the law. This in effect is the substance of Mr Lakha's submissions, as I understand them.

At the outset I must put it on record that on the true construction of the agreement and for the reasons canvassed by Mr Lakha I find that Mr Hewitt is quite right in conceding that the agreement is a contractual licence. The words and phrases consistently appearing in this lengthy and exhaustive document give rise to an indisputable inference that the agreement is a contractual licence. And so I find.

Now it remains for me to decide whether it is revocable at will as submitted by Mr Lakha. It is not in dispute that the defendant terminated it by giving notice of its intended action to that effect on 16-12-1986. The question is: was it entitled to do so under the law? It is also not in issue whether the period of notice was reasonable or what the reasonable period ought to be in this case.

What are the implications of a contractual licence? In *Winter Garden* case (supra) Lord Porter adopted the general proposition of law as to the rights conferred by a licence propounded as early as 1673 in the judgment of Vaughan CJ in *Thomas v Sorrel* (Vaugh 330; 3 Keb 264; Freem KB 137; 30 digest 501, 1594), according to which

> "A dispensation or licence property passeth no interest, nor alters or transfers property in anything but only makes an action lawful which without it had been unlawful."

Lord Porter elaborated the above quotation from Vaugh CJ's judgment in the following words:

> "This statement was quoted in *Wood v Leadbitter (*4) by Alderson B delivering the judgment of the court (13 M & W 844), and for the proposition that every licence is and must be revocable so long as it is a mere licence, he refers to *Brook's Abridgement*, sub tit "licence," para 15, to the judgment of Dodderidge, J (2 Roll Rep 152), in *Webb v Paternoster* (6), to *R v Horndon-on-the-Hill* (Inhabitants) (7), and to *Hewlins v Shippam* (8). It has been suggested that the decision in *Wood v Leadbitter* (4) turned merely on the pleadings and decided only that a right to enter and remain on land, though for no more than a limited period, required a deed to make it effective. I cannot think so. It is true that the decision ultimately turned on this point and equally true that the contention might not be good after the passing of the Supreme Court of Judicature Act, 1873, enjoining common law courts to take into consideration the doctrines of equity, but, as I read the case, it is assumed that a licence is prima facie revocable. Throughout the whole of the judgment this point is stressed. Indeed, Alderson, B, said (13 M & W 845):
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> <u>It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol …"</u> (underlining mine).

Lord Porter's judgment throughout reflects that "normally a licence is revocable."

> "It is one thing to say that a limited and temporal licence remains in force until the

particular object for which it is given is fulfilled or the definite period of time has elapsed: it is quite a different matter to allege that a licence once given in general terms can never be terminated." (p 338) I think, that *prima facie* licences are revocable" (p 339).

The substance of the above passage is echoed in the judgments of other Law Lords in the case. *Halsbury's Laws of England,* 4th Edition Vol 9 paragraph 530 on p 365 strengthens the above statement of the rule of law of contractual licences "which at common law be effectively revoked at any time whether or not it contained provisions regarding the duration …" It goes on to prescribe the remedies available to the licensee but none to the licensor. In this case the plaintiff is not entitled to any remedy because there was no breach on the part of the defendant, even if those remedies were available to it under the law.

The aforesaid agreement for the user of the plaintiff's trade marks by the defendant in consideration of the payment of certain sums of money does not create an interest in the trade marks in favour of the defendant as is usually done in tenancy agreements and leases etc. The agreement contains clauses that give an absolute right to the plaintif to award similar licences etc to any other party, even in competition with the defendant. Mr Hewitt argues that the very fact that the agreement expressly grants a right to terminate it to the plaintiff implies that the defendant did not have any option but to run the full period of 10 years or pay damages for the breach; and that the question of notice was expressly contemplated by the parties. But on the authorities before me I am of the opinion that clause II does not confer a special right on the plaintiff; on the contrary it abridges its common law right to terminate it at will. It is the consequence of the true construction of the agreement and the appliction of the law as set out above, following upon the consensus that the agreement is a mere licence.

Since the reasonableness or otherwise of duration of the notice dated 16-12-1986 terminating the licence is not an issue before me I refrain from making any finding on it.

In the result I dismiss prayer 'c' of the plaint in respect of the alleged "unlawful premature termination of the agreement" with costs.

Delivered this 6th day of April, 1989,

RAUF

JUDGE