IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Apaloo JJA & Kwach Ag JA)

CIVIL APPEAL NO. 113 OF 1984

BETWEEN

EAST AFRICAN RAILWAYS CORPORATION.....APPELLANT

AND

KARANGI.....RESPONDENT

JUDGMENT

(Appeal from a judgment of the High Court at Nairobi, Platt J)

October 27, 1988 **Apaloo JA** delivered the following Judgment.

The East African Railways Corporation (which I shall hereafter call the Corporation) appeals against the judgment of the High Court, Platt J (as he then was) delivered on the 19th January 1984. By that judgment, the Court awarded general and special damages against the corporation for unlawful eviction of the respondent from its quarters.

The respondent was first employed into the service of the corporation on 1st July, 1952 as Welfare Assistant. He subsequently progressed through the ranks and by April 1975, attained the status of Personnel Officer. On the 25th June, 1974, he was appointed to act Senior Personnel Officer. As was natural enough, he hoped to be appointed to the substantive office as he appeared to have acted in this office on other occasions. His hopes turned to be only a pious one. Not only was he not confirmed in that office, but on the 2nd April 1975, the Corporation, acting by its Regional Manager, gave him notice of compulsory retirement. He was to retire from the service of the Corporation, three months from the date of the notice. That would be July 1st, 1975. The Regional Manager claimed in that letter that the respondent had "reached the lawful age" at which he could be called upon to retire. The corporation professed to be acting under the Railway Corporation Regulations of 1974.

Apparently, the "lawful retiring age" which the respondent reached, was 50 years. How did the corporation come by this age? It says, all staff recruited into its service were required to complete a document called "Form of Declaration for Employment". In that document, the respondent recorded his date of birth as 15th September, 1924. So at the date of the notice, the respondent, was according to the record of the Corporation, 50 years 7 months old. The period of notice expired on the 1st July, 1975.

On the very next day, the Regional Manager addressed another letter to the respondent. He said the period of notice given him had expired and he was to be on leave. He would not be allowed to spend the leave frequenting the office as the accommodation was required, apparently for his replacement. He was also to

vacate “your present quarter without delay and in any case, not later than Thursday the 10th July, 1975.”

The respondent contested his compulsory retirement and raised two issues with the Corporation. First, he said the Corporation acted unfairly and unjustifiably in refusing to confirm him in the post of Senior Personnel Officer and that its action violated standing practice and procedure. He appealed to the Corporation’s board. Second, the respondent said his premature retirement was wrongful as he had not attained at he age of 50 years. The Corporation refused to budge on either complaint. His petition or appeal to the board was rejected. The Corporation also held him bound by the date of birth he declared to it on the eve of his first appointment. The respondent complained to his Union, the Railways and Harbours Union of the T.U.C. The Union took the cudgel on his behalf and filed a trade dispute with the Industrial Court on these two issues. That Court sustained the corporation’s position and the claim failed on both counts.

While these two matters were pending for resolution by the board and the Industrial Court, the Corporation took steps to regain possession of its quarters in occupation of the respondent. At about 3 pm on the 28th July 1975, the security staff of the Corporation entered the respondent’s premises. The latter was himself absent. His wife and family were at home. The Corporation’s officers asked and obtained the keys of the rooms. Although the wife pleaded with the Corporation’s servants to suspend action and await the respondent’s return home they did not agree. They removed the personal possessions of the respondent to wit, beddings, tables, chairs, cooking utensils furniture, etc placed them outside, locked the doors and took the keys away. So the respondent’s family were left out in the cold when the latter reached home about 7 p.m. There can be little doubt that the respondent was evicted from his home on that day. But it is worthy of note that nobody suggested that the Corporation’s servants used any force, let alone unreasonable force in securing the respondent’s eviction.

On the 29th July, 1975, that is the day following the eviction, the respondent sought the intercession of his Union. An officer of the Union pleaded with management and it was then agreed that the respondent be re-admitted to the premises but must vacate on receipt of his retiring awards. The respondent was also to complete the necessary forms for his entitlement to be computed. He had hitherto failed to do this. Upon this understanding, the keys of the house were handed back to the Union representative. He in turn turned them over to the respondent who regained possession of the premises about 6 pm that evening.

It appears that up to a point, the respondent kept faith, completed his pension forms and was paid his entitlement on December 17, 1975. But he did not vacate the premises upon its receipt. So the corporation gave him verbal notice to quit on the 6th January 1976. This was followed with a written one two days later. The respondent appeared to have stayed put.

So as it did the previous July, the Corporation sent its servants who again evicted him on the 10th January, 1976. The respondent’s reaction to this was to commence an action against the Corporation for general and special damages. The plaint was filed in March 1976.

The respondent averred that the Corporation’s actions in evicting him from the premises both on the 28th July, 1975, and on the 10th January, 1976, were unlawful. The avowed basis for the illegality of the Corporation’s actions, was that no notice to quit was given him in accordance with the East African Railways Act 1967. The respondent also claimed that while evicting him, the Corporation’s servants damaged some of his personal effects and he claimed the value of these as an item of special damages. The Corporation for its part, denied that its action was unlawful. It said the respondent was retired from the services of the Corporation on the 1st July, 1975 but continued in unauthorized occupation of its premises and despite repeated requests to give up occupation, the respondent refused to do so. On what actually took place on the 28th July, 1975 and 10th January 1976 the Corporation was less than candid.

It said on the 28th July, 1975, its servants went into the respondent’s house to assist him vacate but he set his fierce dog on them and they were obliged to flee for safety. It said on the 10th January, 1976, it made transport available to the respondent at his request and its employees assisted the respondent to move and that on that day he voluntarily vacated the Corporation’s house. In sum, the Corporation denied that it evicted the respondent on either of these two days. But in view of the wealth of evidence tendered to the

Court, the Corporation's stated factual position flew in the face of the facts. In a long and careful judgment, the learned judge declined to hold that the eviction of the 10th January 1976, was unlawful and dismissed the respondent's complaint on that score. But the judge sustained the respondent's complaint on the eviction of the 28th July 1975. The Judge said:

> "I hold therefore that the plaintiff is right in his claim on the first eviction."

The court therefore awarded him special damages of Kshs 333.15 and general damages of Kshs 10,000/= to provoke this appeal.

It is to be noted that what the respondent alleged in his pleading as grounding the unlawfulness of the eviction, is the failure by the corporation to give him notice to quit in accordance with the Railways Legislation. As a ground for impugning the validity of the eviction, the Court found against that. The Judge found that notice to quit was given. Said the Judge:

> "The notice to quit was given in Mr. Mwangola's letters, first in that of 2nd April, 1975. It said that Mr. Karangi would be advised of his annual leave. He would take his leave immediately after his notice period ended. He would get his terminal benefits and for that purpose was to fill in his questionare. Then in his letter dated 2nd July 1975, Mr. Mwangola notified the plaintiff that he was on leave pending retirement, that he could not occupy his office and that he should vacate his house without delay and in any case, not later than Thursday 10th July, 1975."

The finding by the Court that notice was given for a period just over three months before the eviction, knocked off the basis on which the respondent's contention of the legal invalidity of his eviction was rested. But the type of notice the Corporation incurred an obligation to give, was laid down by section 83 (2) of East African Railways Corporation Act (Cap 18). I shall thereafter refer to it as the Act. It is a somewhat long section, but its relevant requirement, for present purposes, says, *inter alia*:

> "If .....the premises is not delivered to the Corporation or vacated, the Director General shall give notice in writing to the person appearing to him most likely to be in possession of such property or in occupation of such property or vacate such premises within such time as may be specified in the notice."

It is a striking feature of this provision, that no period of time is laid down for the length of the notice. It obviously depends on what the Director General, bearing in mind the needs of the Corporation, considers reasonable. For instance Mr. Mwangola the Regional Manager testified that when he left the Corporation in 1978, he "was asked to vacate in seven days and I did".

Section 83(2) of the Act empowers the Corporation, acting by its Director General to terminate the right of a retired employee's occupancy of railways quarters by written notice. Subsection 1 of that section, imposes a correlative duty on the employee on leaving the service to relinquish possession of the premises or vacate it "as soon as practicable".

There has been a reasonable practice sanctioned by usage but not by law, that upon retirement, an employee is permitted to retain his use and occupation of railway quarters, until his retiring awards are paid to him. This period normally varies from two to three months. Mr. Muthee, the erstwhile Chief Personnel Manager of the Corporation on this subject testified that retired employee gets pension at the end of the month but said:

> "While that is being processed, you can stay in Railway house for 2 months or upon settlement whichever is earlier. If you do not fill form, then you can say nothing to wait for and you can be got out of the house immediately."

The evidence is that the respondent, though invited to fill the form to enable his retirement awards to be processed, refused to do so. So he fell in the category of retired employees who can be ordered out of the

quarters immediately. This fact should be borne in mind, when the legality or otherwise of his earlier eviction of the 28th July, 1975 is considered. The reason why the respondent denied the Corporation its assistance in filling the form, was because he disputed the validity of his enforced retirement and as events proved, unsuccessfully.

The position therefore was that the respondent having reached the regulated age, was retired by the corporation. He was in occupation of Corporation premises. He was given notice, as the Judge found, to quit. He refused to quit when the notice expired. What was his legal status vis-a-vis the Corporation? It does not require a great deal of learning in the law, to say he was a trespasser. If that is right, what remedies did the Corporation have to enable it regain possession of its premises? The Act, by subsection 2 of section 83, provides one such remedy. It says, the Corporation may apply to a magistrate for an order empowering a police officer, among other things, to evict him from the premises.

That is not the only legal remedy available to the Corporation. This is only an enabling power but the Act leaves intact any other legal remedies that may be open to the Corporation to obtain the respondent's eviction. Thus, the Act says, "the Director General may, without prejudice to any other means of recovery apply etc". The question to be determined on this part of the case, is what legal remedy is available to an owner of a house in occupation of a trespasser and who refuses to quit? I think that is the right of re-entry, a species of self-help but nevertheless still good law.

That is the right the corporation exercised both in July 1975 and January 1976. And the evidence is that it did not use any force or unreasonable force in securing the respondent's eviction. Its servants merely entered the premises, put away there respondent's personal belongings, locked the doors and obtained peaceably the possession of the keys. Is the Corporation liable in damages to the trespassing respondent for this? Unless my appreciation of the law on this subject is faulty, my opinion is that it is not. The old case of *Newton v Harland* (1840) 'I SGNR 174' appears to have imposed civil liability on an owner exercising a right of re-entry in those circumstances in a thrice split decision. But the modern law on the subject, is the decision of the English Court of Appeal in *Hemmings and Wife v The Stoke Poges Golf Club* [1920] 1 KB 720.

There, the plaintiffs, a man and his wife, lived in a cottage belonging to the defendants, the man being in their service and being required by them to live in the cottage as part of his service and for the performance of his duties. He left their service, but refused to give up the cottage after notice to quit was duly given him. Thereupon, by command of the defendants, several persons entered the cottage and removed the plaintiffs and their furniture, using no more force than was necessary for that. The husband and wife jointly sued claiming damages for assault, battery and trespass. Mr. Justice Peterson decided in their favour.

The Court of Appeal reversed that decision and held unanimously, that the defendants were not liable, their right of entry being a defence to the civil proceedings for the acts complained of. Lord Justice Scrutton, one of the three Justices, let fall from his lips the following:

> " But I see no reason to add to the existing privileges of trespassers on property which does not belong to them by allowing them to recover damages against the true owner entitled to possession who uses a reasonable amount of force to turn them out."

Bankes LJ shares this sentiment and for his part said:

> "If the view of the law expressed in *Newton v Harland* is correct, it must follow that the law confers upon the lawless trespasser, a right to occupancy the length of which is determined only by the law's delay".

And it is common knowledge that in view of the tardy and time-consuming process of the Courts, suits for possession of land are notoriously difficult and for businessmen singularly frustrating. *Hemmings v Stokes* is the modern law on the subject and has been consistently followed.

In the comparatively recent case of *Aglionby v Cohn* 1955 1 QB 558, a landlord who had served on the tenant a notice to quit, which he had ignored, commenced an action to recover possession of the premises and obtained judgment against the defendant. The tenant continued to occupy the premises and the landlord, without calling in the help of the sheriff put his (the tenant's) chattels outside the premises and regained possession. Mr. Justice Harman held, on the authority of *Hemmings v Stokes*, that notwithstanding that the landlord had invoked the law and obtained judgment for possession, he had not lost his common law rights, and was entitled in the circumstances, without calling on the services of the sheriff to enter as he did. That is the beaten track of the decisions. If they are right, the learned Judge cannot have been right in awarding damages in favour of the trespassing respondent for "wrongful eviction" – a synonym of trespass.

How does the principle of law apply to this case? The Corporation was the owner of the premises. The respondent was allowed to occupy it while he was in its service. When he left the service, the corporation gave him notice to quit. He ignored it and stayed put. The Corporation was empowered by section 83 of the Act to apply to a magistrate for an order empowering a police officer to evict the respondent on its behalf. But the Act left intact other legal methods open to it to regain possession. One of such methods, is the right of re-entry. The Corporation exercised this right and there was no showing that it used unreasonable or excessive force. On these facts and in the state of law, a claim for damages for trespass could not lie. The learned Judge thought otherwise.

One must now look carefully at the learned Judge's contrary holding. The Judge did not discuss the law and the respective legal rights and obligations of the parties as they relate to this case.

At the date when judgment was given, the Corporation's right to retire the respondent compulsorily which was questioned in the Industrial Court, was affirmed. But the Judge seems to have thought the Corporation should have desisted from proceeding with its decision to evict the respondent until two outstanding matters had been resolved, namely the respondent's appeal to the board against his lack of promotion and second, the final ascertainment of his terminal benefits. Of course, the Court did not suggest, even faintly, that any law obliged the Corporation to suspend its action on account of these matters.

With regard to the terminal benefits, the evidence is that the respondent declined to fill the necessary papers to enable the Corporation process this and was wholly impervious to the latter's persistent requests for him to do so. It would have been strange if the Corporation were to permit the respondent to gain an indefinite right to stay in the premises because of his intransigence and unco-operative attitude. In view of the terms of the notice to quit, the Corporation was entitled to decline to allow the respondent to benefit by this manoeuvre.

With regard to the pending appeal to the board, it may make good sense for the Corporation to suspend its decision to evict the respondent until the result of the respondent's appeal to its board was known. But it was not obliged to do so. Sound reasons of Corporation policy may have decided management to proceed with its decision to evict the respondent at once. Accommodation may well have been required for serving officers. In which way the Corporation should exercise its discretion, either to suspend action or proceed with the eviction, is peculiarly a matter for the commercial judgment of businessmen. It is not the business of the Courts. To condemn the Corporation to pay damages, for doing what the law empowers it to do, is, in my humble view, impossible to support.

At one stage in this long drawn proceedings, the Corporation, by counsel, conceded that the eviction of the 28th July, 1975 was wrong. This concession, was apparently n reflection, retracted. The learned judge drew attention to this concession and its retraction. For my part, that fact gives me no trouble. Counsel is entitled to urge a view of the law and to retract it, if he feels on reflection that it is wrong. There is nothing like estoppel barring him from doing this. After all, in litigation, the law is said to be in the bossom of the Court not Counsel. In my view, that fact contributes nothing to the resolution of the issues debated in this case.

The one ground which the respondent put forward and on which he based his claim to damages, namely,

that he had not been given notice to quit, was found against him. In my humble view, the respondent was not entitled to damages for trespass or wrongful eviction and the learned Judge's contrary holding, was, in my respectful view, erroneous.

This is a hard result for the respondent. It ought not to be thought that I am unfeeling towards him. But this court is governed by principles of law not the hardship of any individual case. At all events, this Court should resist the temptation of allowing its feelings to get the better of its judgment. My conclusion is that he damages awarded against the Corporation for trespass or wrongful eviction was not warranted in law and should be set aside.

Accordingly, I would allow the appeal and set aside the judgment appealed from together with the order for costs. In lieu of it, I would dismiss the respondent's claim and enter judgment for the appellant corporation with taxed costs here and below. I would also order that the judgment debt and costs, if paid, should be refunded to the appellant.

Gachuhi JA. I entirely agree with the judgment prepared by Apaloo JA that the appeal should be allowed with costs, with the further orders he proposes that this court should make.

As Kwach Ag JA also agrees the order of the Court is that the appeal is allowed with costs. The judgment of the High Court is set aside and substituted therefor with the judgment for the defendant with costs. Any amount paid to the defendant in pursuance of the High Court Judgment to be refunded to the appellant.

Kwach Ag JA. This is an appeal by the East African Railways Corporation (the Corporation) against the judgment of the High Court (Platt, J as he then was) delivered on the 19th January, 1984, by which he awarded special and general damages against the Corporation for unlawful eviction of the respondent from his quarters which had been occupied by the respondent for a considerable period of time as an employee of the Corporation. The Corporation was one of the Corporations within the East African Community which collapsed in 1977 paving the way for the creation by Kenya of the present Kenya Railways Corporation. The Corporation was set up by an Act of the Community known as the East African Railways Corporation Act which came into force on the 1st June, 1969.

There is really no dispute on the facts in this case and they have been fully set out in the judgment of Apaloo JA, which I have had the advantage of reading in draft and with which I am in complete agreement. Such dispute as there is therefore relates only to the application of the law to those facts. The Corporation fired the first salvo in this saga by a letter addressed to the respondent dated 2nd April, 1975 under the signature of the Regional Manager which was in the following terms:

"COMPULSORY RETIREMENT

> Your letters of representations dated 5th and 21st March, 1975 were referred to the Director General who had directed that as you have reached the lawful age at which you can be called upon to retire from the service of this Corporation under regulation 12 of the East African Railways Corporation (Appointments and Discipline) Regulations, 1974 and paragraph 6 of the East African Railways Corporation Pensions Regulations, 1970.
>
> You are hereby being given three months notice with effect from 2nd April, 1975.
>
> You will be advised, as early as possible, of annual leave due to you, which will commence from the date after the expiry of the notice period and at the conclusion of which your services with the Corporation will finally terminate. You should, therefore, submit your application for leave to your District Officer by return....
>
> P J Mwangola
>
> REGIONAL MANAGER (K)"

When the notice expired, the Regional Manager (K) wrote to the respondent on 2nd July, 1975 in the following terms

"RETIREMENT

> In my letter of even reference dated 2nd April, 1975 you were given 3 months notice which expired yesterday, the 1st of July, 1975.
>
> You are therefore on leave pending retirement and whilst you are free to spend your leave anywhere, I would like to make it clear to you that I will not allow you to spend this leave in the office as I require accommodation for another officer.
>
> You should also make arrangements to vacate your present quarter without delay, and in any case, not later than Thursday, 10th July, 1975.
>
> P J MWANGOLA
>
> REGIONAL MANAGER (K)"

The respondent ignored this notice and refused to vacate the premises and on the 28th July, 1975 the Corporation exercised its right of re-entry and evicted the respondent. The respondent thought that the eviction was unlawful and brought an action for damages for trespass and the value of his goods which he claimed had been damaged by the Corporation's servants in the course of the respondent's eviction from the premises.

The respondent had challenged the legality of his notice of compulsory retirement contending that he had not reached the age at which he should be called upon to retire and he thought he could remain in the employment of the Corporation with all the trappings that went with his employment while the dispute over this age was being discussed between his trade union and the Corporation. He took a recalcitrant attitude and virtually refused to cooperate in the administrative procedures pertaining to his final disengagement. For the purposes of this case I am not concerned with the issue of the respondent's age at the date of his retirement and I am assuming without expressing any concluded view on the matter that the respondent was validly retired.

The Corporation was without any doubt the largest single employer within the East African Community with a highly developed welfare system for its employees. It provided housing for virtually all its employees across the board from the Director General and the Chairman of the Board to the grass cutter at Makongeni estate in Nairobi. Obviously these premises were available for occupation by the employees as long as they were in the service of the Corporation and once they left the service or ceased to be in the employment of the Corporation they would have no justification to continue in occupation and would be required to vacate and hand over vacant possession. From time to time, cases arose as a result of which employees refused to vacate and to enable the Corporation to recover possession without the necessity of litigation, the East African Assembly in its wisdom enacted Section 83 of the East African Railways Corporation Act (Cap 18, Laws of the East African Community) which empowered the Director–General, without prejudice to any other means of recovery of Corporation property or premises occupied by former employees, to exercise the right of reentry after due notice to the occupant. The appellant was no doubt a trespasser occupying and remaining in occupation of the premises against the will and without the consent of the Corporation. And as a trespasser he could be evicted from the premises by the Corporation using no more than reasonable forces: See *Hemmings v The Stoke Pages Golf Club* [1980] 1 KB 720.

Considering all the evidence in this case I can find no legal basis for the learned Judge's finding that in evicting the appellant from the premises the Corporation committed any acts of trespass either upon his person or his goods. It follows that the award of damages were erroneous. I would allow this appeal and set aside the judgment and decree of the High Court and substitute therefor an order dismissing the plaintiff's claim with costs. Costs of the appeal to the appellant.

Dated and delivered at Nairobi this 27th day of October , 1988

J.M. GACHUHI

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JUDGE OF APPEAL

F.K. APALOO

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JUDGE OF APPEAL

R.O. KWACH

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Ag. JUGDE OF APPEAL

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

DEPUTY REGISTRAR