



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 114 OF 2009

BETWEEN

THE HON. ATTORNEY GENERAL APPELLANT

AND

HALAL MEAT PRODUCTS LIMITED RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Gacheche, J.) dated 7th October, 2005 in H.C. C. C. 1655 of 1986)

JUDGMENT OF THE COURT

1. Pursuant to a loan agreement dated 30th August, 1974 the respondent obtained a long term loan from the Government through the then Ministry of Agriculture and Livestock Development (hereinafter referred to as the Ministry) for constructing a state of the art abattoir at Bul Bul, Ngong within Kajiado. Despite the abattoir being completed in the year 1978 it remained closed for a period of six years. According to the respondent, the Ministry withdrew six veterinary officers seconded to the respondent after it turned down the request to include some of the members of the Kenya Meat Commission (KMC) in the company's board, thus rendering the abattoir incapable of operation.
2. Be that as it may, in the year 1984, the country experienced severe drought and in an effort to minimize loss of livestock, a presidential directive was issued for the respondent's abattoir to be opened in order to assist the Government owned abattoir in meeting the increased demand for its services. Consequently, on 1st July, 1984 the Ministry took over the respondent's abattoir and placed it under the management of KMC. By then the Government had communicated its intention to purchase the abattoir from the respondent at a consideration which would be determined through a joint valuation of the abattoir.
3. Unfortunately, the parties were unable to agree on the modalities of conducting the joint valuation. Thereafter, the Government by a letter dated 10th June, 1988 informed the respondent that it was no longer interested in purchasing the abattoir and of its intention to hand back its possession. However, the respondent refused to take back possession without a proper valuation being done to establish the state of the abattoir.
4. Eventually, the respondent filed suit claiming that the Government had unlawfully taken over the abattoir without reasonable compensation and/or payment of rent; the respondent had suffered heavy

losses of income on account of the Government's conduct; the Government had reneged on its promise to compensate it and restore the abattoir. By its further amended plaint the respondent sought *inter alia* a declaration that the acquisition of the abattoir was contrary to **section 75** of the former Constitution and that it was entitled to compensation.

5. In its amended defence and counter-claim, the appellant denied the respondent's allegations and claimed the outstanding loan amount which according to it, stood at Kshs.46,789,000/=. It is instructive to note that on 21st March, 1989 the late Rauf J. entered judgment on admission on the counter-claim against the respondent for Kshs.27,701,427/= which sum the respondent admitted owing the appellant. The learned Judge issued an order staying execution of the said judgment on admission pending the determination of the issue of interest payable by the respondent on the counter-claim and the respondent's suit.

6. Subsequently, in an attempt to settle the matter out of court, the parties agreed to carry out separate valuations on the abattoir based on agreed terms of reference dated 5th December, 1991. The purpose of the valuations was to determine what would be reasonable compensation to the respondent. Unfortunately, settlement proved elusive, more so, because of the wide disparity between the two valuations.

7. The trial court heard the suit on merit and by a judgment dated 25th October, 2006 found that the acquisition and continued occupation by the Government was contrary to **section 75** of the former Constitution; the respondent was not only entitled to *mesne* profits but also to restoration costs of the abattoir. The trial court further issued orders in the following terms;

i. THAT judgment be and is hereby entered against the government (appellant) in the sum of Kshs.1,807,772,000/= as per the plaint.

ii. The figure herein covers the period up to and including 31st October, 2004.

iii. The company (respondent) is hereby entitled to extra payment up to and including the date of this judgment that is 7th October, 2005 calculated on pro rata basis.

iv. The awards herein shall earn interest at court rates until payment in full.

v. That professional fees for the plaintiff's (respondent's) surveyors, engineers and contractors are hereby granted at 7½% of the above award.

vi. That the plaintiff is hereby awarded costs of the suit with interest therein at court rates until payment in full.

vii. That judgment on the counter claim is entered for the government in the sum of Kshs.27,701,127/= only being the principal sum with interest at 12% p.a. from 21st August, 1989 to the date of judgment.

viii. That the award to the judgment (sic) be set off from the award of the plaintiff company.

ix. That the government bears the costs of the counter claim.

8. It is that decision that has provoked the appeal before us. The appellant complains that the learned trial Judge erred in law and fact by:

(a) Finding that government's actions amounted to compulsory acquisition.

(b) Finding that the appellant had conceded to the respondent's claim of mesne profits.

(c) Awarding mesne profits to the respondent despite finding that there was compulsory acquisition.

(d) Failing to appreciate that issue of valuation required the evidence of an independent expert.

(e) Awarding a sum of Kshs.1,807,772,000/= and professional fees to the respondent without proof or justification.

(f) Misdirecting herself on the applicable rate of interest with regard to the appellant's counter claim.

9. The appeal was disposed by way of both written submissions and oral highlights. Mr. K. Onyiso appeared for the appellant while Mr. D. Otieno Okatch appeared for the respondent.

10. Mr. Onyiso faulted the learned Judge for finding that the Government's actions amounted to compulsory acquisition despite the evidence on record. He maintained that the Government entered into possession of the abattoir in 1984 and continued in possession with the respondent's consent; further, in 1988 the Government offered to give back possession but the respondent declined to take possession; consequently, the relationship between the parties was that of a landlord and tenant.

11. It was submitted that the learned Judge erred in holding that the appellant had conceded to the respondent's claim for *mesne* profits. According to the appellant, the learned Judge properly appreciated that *mesne* profits were only payable in cases where there is wrongful occupation of property but erroneously awarded the same to the respondent in total disregard of the circumstances of the Government's occupation.

12. In Mr. Onyiso's view, the learned Judge applied the wrong principles in assessing damages. He argued that she erred in relying on 'without prejudice' correspondences and the respondent's valuation which failed to take into account that the Government was ready and willing to give back possession in the year 1988. Mr. Onyiso submitted that there was no basis for the learned Judge to award professional fees which were neither specifically pleaded nor proved. According to the appellant, the learned Judge erroneously departed from the basic principle that costs ought to follow the event by condemning it to bear costs for the counter claim. Mr. Onyiso urged us to allow the appeal.

13. Rehashing the facts of the case, Mr. Okatch submitted that the learned Judge correctly found that the Government's conduct amounted to compulsory acquisition of the abattoir. In his view, the admission by the appellant that it had been in occupation of the abattoir without compensating the respondent clearly demonstrated that the occupation was not only unjust but that the respondent had suffered loss and damage; the Government was a trespasser having refused/neglected to perform its obligation to compensate the respondent.

14. According to Mr. Okatch, the dispute revolved around one central issue, that is, the amount of compensation payable to the respondent and not on liability. It was argued that the learned Judge properly exercised her discretion in rejecting the appellant's valuation and fixing the interest rate for reasons outlined in the impugned judgment. Citing the case of *Mbogo & Another -vs- Shah (1968) EA 95*, the respondent submitted that there was no reason for this Court to interfere with such discretion.

15. On professional fees, Mr. Okatch submitted that they arose from the valuations conducted on the abattoir for purposes of enabling the court to determine the dispute, hence in his view they were appurtenant to the matter. He argued that the said fees were awarded on the basis of the omnibus prayer seeking any further relief as the court deemed fit. He maintained that it was trite that surveyors and engineers' fees are usually pegged on a percentage of the total cost of the project concerned.

16. Mr. Okatch submitted that the assessment by the trial Judge was the only basis upon which the respondent could be justly compensated for being put out of its investment since the year 1984. He urged us to dismiss the appeal with costs.

17. It is our duty in this appeal, being a first appeal, to evaluate afresh the evidence on record in order to draw our own independent conclusions on the matters in controversy while at the same time bearing in mind that we have not seen or heard the witnesses. See Selle -vs- Associated Motor Boat Co. Ltd [1968] EA 123.

18. In our considered view, the starting point would be to determine the nature of the Government's possession and/or occupation of the abattoir. Contrary to the appellant's allegation it is clear from the record that the Government took possession and control of the abattoir following a presidential directive. This much is confirmed by the appellant's letter dated 1st August, 1984 addressed to the respondent's advocate. We set out the relevant extract of the said letter herein below;

"In view of the fact that the GOK has undertaken to pay for the factory whichever way the valuations go, I should now be grateful to get your clients okay to take physical possession of the factory to facilitate its immediate use by GOK in line with H. E. directive that the factory be put to immediate use to serve the country (sic) loss brought about by the prolonged drought."
Emphasis added.

19. Furthermore, we find that the respondent did not willingly give up possession of the abattoir but did so out of compulsion. In finding so we take note of the Government's conduct and in particular, the appellant's letter dated 10th August, 1984 wherein the appellant informed the respondent through its advocate in part as follows;

"...the Government has decided that Kenya Meat Commission should now utilize the machinery to stem any further loss of animals that are dying in many numbers due to the draught now prevailing in the country.

The Government wishes to assure your clients, and those others who claim interest in the factory under them, that their interests as much as the government's will be safeguarded. The Government will therefore not agree to a further delay in handing over possession of the factory for immediate use by the Kenya Meat Commission after an assurance has been made quite categorically to your client on the basis of lack of a valuation from the Government."

20. Viscount Simonds in Kirkness -vs- John Hudson & Co. Ltd [1955] AC 696 at page 707 while considering compulsory acquisition stated;

"To say of a man who has had his property taken from him against his will and been awarded compensation in the settlement of which he had no voice, to say of such a man that he has sold his property appears to me to be as far from the truth as to say that a man who has been deprived of his property without compensation that he has given it away."

Halsbury's Laws of England, Vol. 18 (2009) at para 501 defines compulsory acquisition as,

"Where land or an interest in land is purchased or taken under statutory powers without the agreement of the owner it is said to have been compulsorily acquired".

Therefore, we concur with the trial court that the Government took possession of the abattoir on the basis of compulsory acquisition.

21. As a general principle everyone has a right not to be deprived of his/her property.

However, as per Lord Denning MR in Priest -vs- Secretary of State [1982] 81 LGR 193, 198 put it,

"There is also no doubt that no citizen is to be deprived of his land by the State or any public authority against his wish unless expressly

"authorized by law and public interest also decisively demands so".

In cases where the law allows such deprivation it sets out conditions/regulations to be met in order to safeguard against arbitrary conduct. In Kenya's case, the safeguards were enshrined under **section 75** of the former Constitution and currently under **Article 40 (3)** of the Constitution. As was aptly observed by Pall, J. A in **Commissioner of Lands & Another -vs- Coastal Aquaculture Ltd. KLR**

(E&L) 1 264,

“I also agree with the learned Judge that section 75 of the Constitution provides protection and safeguards to the owner of land sought to be compulsorily acquired against arbitrary acquisition of his property.”

22. In this case the acquisition by the Government occurred in 1984 hence the applicable law is **section 75** of the former Constitution which provided in part as follows: -

“75 (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –

a

b.....

c. provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation”. Emphasis added.

23. Clearly one key feature in compulsory acquisition is that there ought to be prompt compensation for the property/ interest acquired. See the case of **Commissioner of Lands -vs- Essaji Jiwaji & Public Trustee [1978] eKLR**. In this case the Government was aware of the principle of compensation as evinced by its offer to purchase the abattoir at a consideration which would be determined through joint valuation. The fact that it later reneged on its intention to purchase the abattoir in our view did not disentitle the respondent to compensation, more so, bearing in mind that the Government utilized the said abattoir to the exclusion and detriment of the respondent.

24. It is clear to us that both parties are agreed on one thing, that is, that the respondent is entitled to some sort of compensation on account of possession of the abattoir by the Government. However, the nature and extent of compensation due is another matter altogether which in our view forms the crux of this appeal.

25. With a view of reaching an amicable settlement the parties agreed to carry out separate valuations on the abattoir based on terms of reference dated 5th December, 1991. The terms of reference were executed by the parties' representatives and provided the parameters for determining suitable compensation. It is imperative at this juncture to set out a relevant extract of the terms of reference;

NOW THIS AGREEMENT WITNESSETH that in the premises and for the aforesaid consideration each party hereto has agreed to appoint its own team of valuers/engineers and/or experts to carry out the terms of this reference which are agreed as follows ...”

It is therefore clear that the parties agreed to be bound by the terms of reference and as such both the trial court and this Court are equally bound to give effect to the same in determining the issue of compensation. We are guided by the case of **National Bank of Kenya Ltd -vs- Pipe Plastic Samkolit (K) Ltd & Another (2001) KLR 112** wherein this Court at page 118 held:

“...A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

26. With regard to *mesne* profits, we concur with the trial court's finding that the appellant had conceded

that the respondent was entitled to the same. In finding so we take cognizance of clause 6 of the terms of reference which provided;

6. Both teams agree that since the premises in question comprise an abattoir the purpose of the valuations should be to calculate the mesne profits. Emphasis added.

Furthermore, it is not in dispute that the Government took possession of the abattoir and utilized it without compensating the respondent as required by law. Consequently, its occupation of the abattoir was unlawful. It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as *mesne profits* for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages, 18th Ed. para 34-42*.

27. Turning to the assessment of damages, we are at a loss as to why the appellant contends that the assessment period ought to be from the date the Government took possession until the date it communicated its desire to hand back possession of the abattoir. It is crystal clear from the terms of reference that the assessment period as agreed between the parties was from 1st July, 1984 until such time that possession of the abattoir would actually be handed back to the respondent. It is also evident from **clause 7** of the said terms of reference that the Government also undertook to restore the abattoir in the condition it was as at 1st July, 1984 when it took possession. We set out herein below the particular clause;

The Government undertakes to restore the plant and machinery, the buildings, road, fences, roofing, treatment plant, furniture, office equipment, fittings and generally all civil works and also spare parts to the condition as at 1st July, 1984 and ensure the machinery and plant are in a proper working order and in a condition which will be approved by the veterinary department and the inspector of the European Community and if the Government is unable to do this then compensation enabling Halal to do this will be assessed and paid.

We find that the trial Judge was correct in finding that the respondent was entitled to both *mesne profits* as well as to restoration costs.

28. Pursuant to the terms of reference the parties herein submitted their respective valuation reports for the period between 1st July, 1984 and 31st October, 2004 before the trial court. However, the appellant faulted the trial Judge for picking the respondent's valuation over its own without any cogent reason. The appellant also attacked the respondent's valuation on the ground that the base figure therein was an offer from the Government which had been rejected by the respondent; consequently, in its view the figures therein were exaggerated and unfounded.

29. The trial Judge in adopting the valuation report prepared by C. P. Robertson Dunn on behalf of the respondent expressed herself as follows;

“Though in his valuation report, DW1 acknowledged the aforementioned agreement of 5/12/1991, he however proceeded to assess only the mesne profits which would be payable to the company on account of rent for the premises, in total disregard of the requirement that apart from such portion of mesne profits, which the Government had acknowledged would be assessed by the court(sic), but he failed to take into account the fact that the Government had undertaken to restore the abattoir in the same condition and to the same standard as it was as at 1/7/1984..... He also appears to have disregarded the type of abattoir for which he was preparing the valuation report, for according to the agreement of 5/12/1991, the abattoir was not a mere butchery but, comprised of plant and machinery, the buildings, roads, fences, roofing, treatment plant, fittings, civil works and also two years' worth of spare parts....., in any event completely ignored and failed to take into account the fact that the abattoir which is the main building was a superior type of a slaughter house with cold stores, meat processing rooms, or that the company could deal with the hides from the animals which it would have slaughtered, and that it had other extra facilities like de-boning..... I will therefore disregard DW2's report

as well as his evidence as it falls short of the standard which was envisaged by these two in the agreement of 5/12/1991.

I find that the method of valuation and assessment of mesne profits by PW2 complies with the terms of reference that were contained in the aforementioned agreement of 5/12/1991. It is more to the point, and I will rely on it.”

30. As was succinctly observed by this Court in *Juliet Karisa -v- Joseph Barawa & Another - Civil Appeal No. 108 of 1988 (Unreported)*;

“Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.”

It is our considered view that the reasons given by the trial Judge for adopting the respondent’s valuation and rejecting the respondent’s are cogent. Hence, we have no reason to interfere with her discretion.

31. As far as the base figure used in the respondent’s valuation is concerned, we agree with the trial Judge that the fact that the respondent proposed a higher figure of Kshs.350,000,000/= did not amount to a counter offer or rejection of the offer of Kshs.287,160,736/= made by the Government on 4th March, 1993. In our considered view, the proposal was an inquiry of whether the appellant would modify its offer. In distinguishing between a counter offer and mere inquiry, the learned authors of *Chitty on Contracts 23rd Ed. Vol. 1* at paragraph 52 stated;

“It is necessary to distinguish between a counter-offer and a mere request for information. If the offeree is seeking further information or simply inquiring whether the offeror will modify his terms, he is not necessarily making a counter- offer. Whether he is in fact making a counter-offer or not is, of course, a question of construction for the court to decide.”

Consequently, there was no impediment on the respondent accepting the offer and using it in its valuation. We find that the trial Judge properly assessed and awarded the respondent the sum of Kshs.1,807,772,000/= which was inclusive of *mesne* profits up to 31st October, 2004 and restoration costs. We also find that she was correct in granting further compensation on a pro rata basis for the period after 31st October, 2004 up to and including the date of judgment.

32. It is trite that a court should only determine issues raised before it by way of pleadings. See *Nairobi City Council -vs- Thabiti Enterprises Limited (1997) eKLR*. However, the exception to the foregoing was set out in *Odd Jobs -vs-Mubia (1974) EA 476* wherein it was held that a court may base its decision on an unpleaded issue where it appears from the course followed at the trial, that the issue has been left to the court for determination. It is not in dispute that the respondent did not specifically plead for professional fees. However, it is also not in dispute that the parties had agreed to carry out valuations on the abattoir which would naturally call for professional services. Additionally, the respondent in its evidence before the trial court attributed the substantial professional costs it had incurred to the appellant and prayed for the appellant to meet the same. This in our view was an issue which called for consideration by the trial court. We find no reason to interfere with the award of professional fees by the trial court.

33. Last but not least, interest and costs in a suit are matters within the discretion of the trial court. It is trite that this Court can interfere with the exercise of such discretion only in exceptional cases, that is, where it is satisfied that the Judge misdirected himself/herself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice. See *Mbogo & Another -vs- Shah [1968] EA 93*.

34. With regard to interest, we are guided by the case of *Salim & Another -vs- Kikava (1989) KLR 534*

wherein this Court held that although a court had wide discretion in awarding interest under **section 26** of the Civil Procedure Act, the discretion should be exercised judicially. In our view, the trial Judge exercised her discretion properly and we see no reason to interfere with either the interest rate or the cap thereon applied by the trial Judge in the counter-claim.

35. Generally, costs ought to follow the event unless the court otherwise orders for good reasons. The Supreme Court in ***Jasbir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & Others (2014) eKLR*** held,

“It is clear that there is no prescribed definition of any set of “good reasons” that will justify a Court’s departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify “good reasons” for such a departure.”

In this case the learned Judge in awarding costs of the counter-claim to the respondent stated,

“The award to the Government will be set off from the above award of the company. However, the Government, which was the cause of the non-payment of the loan, shall bear the costs of the counter-claim...”

In light of the circumstances of the case we see no fault in the manner the trial Judge exercised her discretion by condemning the appellant to bear costs of the counter-claim.

36. The upshot of the foregoing is that we find that the appeal herein lacks merit and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 29th day of July, 2016.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR