



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL**  
**AT NAIROBI**  
**CORAM: WAKI, OUKO & J. MOHAMMED, J.J.A.**  
**CIVIL APPEAL NO. 234 OF 2004**

**BETWEEN**

**DANIEL MUIGA ..... APPELLANT**

**AND**

**NAIVASHA TOWN COUNCIL ..... RESPONDENT**

**(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Lenaola, Ag. J) dated the 16<sup>th</sup> September, 2004**

**in**

**HCCC NO. 2287 OF 1990)**

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**JUDGMENT OF THE COURT**

**Background**

This is an appeal from the judgment of the High Court dated 17<sup>t</sup> September, 2004, wherein the Court dismissed the appellant's claim in HCCC NO. 2287 of 1990.

A summary of the appellant's case in the High Court was that on 4<sup>th</sup> January, 1990, he applied for a licence from the respondent to operate a *kiosk* within Naivasha Township. He obtained approval to construct a *kiosk* from the respondent's Town Planning, Markets, Works and Housing Committee. He paid the requisite fees to the respondent and proceeded to construct the *kiosk* at his cost. Thereafter, he procured stocks from M/s Mumbo Jambo Craft Sales Limited on credit at a cost of KShs.625,492/=.

He stored the stock in the *kiosk* and waited for the respondent to issue the requisite licence.

On 4<sup>th</sup> April, 1990, the respondent's agents demolished the *kiosk* as a result of which some of the stock was damaged and others lost. The respondent carted the demolished *kiosk* and the damaged items to the appellant's house. As a result, the appellant suffered loss and claimed special and general damages. The appellant filed a suit in the High Court on 10<sup>th</sup> May, 1990, and sought *inter alia*, special damages of

KShs.401,851/-, general damages, costs of the suit and interest thereon.

The respondent in its defence, averred that its Town Planning Markets Works and Housing Committee had approved the appellant's application but the full Council in a subsequent meeting, nullified the approval. The respondent, however, denied unlawfully demolishing the appellant's kiosk.

At the hearing before the High Court, the appellant called one witness, Paul Chege Gitahi [PW2] who had supplied curios to the appellant on credit, and produced a demand letter from his company demanding KShs.625,492/- for unpaid stock. The respondent did not call any witness to testify on its behalf. The learned Ag. Judge of the High Court, [Lenaola, Ag J {as he then was}] considered the evidence and dismissed the appellant's suit as devoid of merit, stating in part as follows:

**“5. I have seen all the documents produced by the Plaintiff. None of them constitutes a license to do all the things that he did. It was incumbent upon him to show that he had a right to construct, stock and operate the kiosk within the area that is under the control of the Defendant. It is not enough to pay for an application form, pay for service charge and claim a legal right. That right must be based on something known to law. The Plaintiff in the plaint categorically states at paragraph 5 that “on 29<sup>th</sup> March 1990 the Plaintiff constructed the said kiosk which cost a sum of Kshs.18,165/-”. On what basis was he doing that? Did he have a license as he claims?”**

6. **A license per Sir Fredrick Pollock is “that consent which, without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful”- see Torts, 9<sup>th</sup> Edition pg 284. In this case clearly there is no consent, no right to possession and the Plaintiff's acts were all wrongful. By this own wrongful acts, the Plaintiff has been injured and I do not see that there can be a remedy granted to him.”**

Aggrieved by the said judgment, the appellant filed this appeal contending in 11 grounds of appeal that the learned Judge erred in law and fact in:

1. *failing to consider that the appellant application to build a kiosk had been approved by the respondent vide Council Minute No. TP/13/90 and thus the appellant had been given a go ahead to build the said kiosk.*
2. *failing to consider that by collecting service charge the respondent had accepted the appellant to operate the business and thus indicating to him that the licence would be issued.*
3. *making a decision that the Local Government Act has powers to keep away enthusiastic traders like the appellant and failed to consider that the appellant was not in that category of traders since he had followed all the procedures required by the respondent in the application and approval of building a kiosk.*
4. *failing to consider calling evidence from the respondent so that the appellant could cross examine them. Hence a miscarriage of justice.*
5. *failing to consider that the claim was not founded on illegality since the respondent had approved the construction of the said kiosk and even wanted to settle the issue out of court and wrote to me in that effect [sic] as per the letter to me.*
6. *failing to admit the photographs as evidence to show the damage caused on the property.*
7. *failing to consider that the respondent had approved the construction of the kiosk as per the copies of the plans and application forms attached and that the learned Judge failed to make a finding on the same.*

8. *failing to call evidence to show that the respondent nullified the construction of the said kiosk in their meeting thereafter.*
9. *finding that there was no consent, right to possession and that all the acts were all wrongful as per TORTS 9<sup>th</sup> edition pg 284 when the approval of construction constituted to [sic] approval and right of possession.*
10. *failing to consider that the construction of the kiosk comes first before the licensing of the business.*
11. *failing to consider that I was not served with the submissions of the defendant so that I could respond hence a miscarriage of justice.*

### **Submissions**

At the hearing of the appeal, the appellant was unrepresented and relied on written submissions filed on 25<sup>th</sup> March, 2013. He emphasized that the respondent through its relevant Committee had approved his application for construction of a *kiosk* pending the issuance of an operating

licence. He argued that had the respondent given him notice to remove his mobile *kiosk* from the premises, he would have complied and saved his *kiosk* and stock from destruction and loss. He further argued that as a result of the respondent's actions, he had suffered loss and damage and that the respondent was liable for the resultant loss and damage.

Mr Madialo, learned counsel for the respondent, submitted that the appellant did not have a licence to erect a *kiosk* and to operate the same on the respondent's premises as the respondent had rejected his application.

Further, that as the learned trial Judge found, the respondent enjoyed wide powers granted to it by the Local Government Act and it, therefore, acted within its powers to deny the appellant a licence.

### **Analysis**

This being a first appeal, we are enjoined to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. See **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY LTD, (1968) EA 123, 126 paras H-I, KENYA PORTS AUTHORITY V KUSTON (KENYA) LTD, (2009)2 EA 212 and PIL KENYA LTD V OPPONG, (2009) KLR 442**).

We have carefully considered the record of appeal, the submissions by the appellant and learned counsel for the respondent and the law. The issues for determination are as follows:

1. *Whether the respondent acted within its powers in denying the appellant the licence sought;*
2. *Whether the respondent was liable for any loss incurred by the appellant; and*
3. *The quantum of loss due and payable to the appellant.*

On the issue whether the respondent acted within its powers in denying the appellant the licence sought, the applicable law was the Local Government Act, (Cap 265) in respect of which Part ix and Part xiv, thereof gave Local Authorities, such as the respondent herein, wide powers in the management, control and use of the areas under their jurisdiction. The said powers include, inter alia, prohibition of obstruction in or on public places and environmental management. In the circumstances of this case, we find that the respondent acted within its powers in denying the appellant the licence sought.

The question then is whether the respondent acted within its power by demolishing the appellant's kiosk without notice and is thereby liable for the resultant loss.

The trial court in its judgment stated that:

***“7. Turning to the Defendant, was it obligated to the Plaintiff? Sadly, in the circumstances of this case, Part IX to Part XIV of the Local***

***Government Act give extremely wide powers to Local Authorities in the management, control and use of the areas under which they fall. Even if no notice for the eviction of the Plaintiff was given, and I don't see that it was necessary, it had a statutory mandate to keep away enthusiastic traders like him.***

***8. I see no merit in the suit for those reasons and the Plaintiff's claims being all founded on an illegality on the Plaintiff's part must fail. I see no need to go into each of them as that would be an exercise “foredoomed to failure” as was said by Devlin, J in WINDSCHUEGL LIMITED V PICKERING & CO LTD, 1950 8 LLOYD'S REPORTS 89.”***

On the issue of whether the respondent was liable for any loss incurred by the appellant, the record shows that the appellant applied for a licence to operate a curio kiosk from the respondent. He paid the requisite fees and the respondent's Town Planning Markets Works and Housing Committee approved the appellant's application. It is averred by the respondent that the Council at its meeting nullified the approval, but there was no evidence to support that averment.

Based on the said committee's approval, the appellant had the legitimate expectation that the licence to operate the kiosk would be issued and, therefore, he acted properly in constructing his kiosk. Legitimate expectation is founded upon the basic principle of fairness that legitimate expectations ought not to be thwarted and that in judging a case, a judge should achieve justice by weighing the relative strength of expectation of the parties. This principle was considered in the English case of ***R V IRC EX P MFK UNDERWRITING AGENTS***, [1990] 1 WLR 1545 at 1569-70 (approved by the Supreme Court in *R (on the application of Gaines-Cooper) v. HMRC* {2011} UKSC 47 at [27]- [29]) where Bingham LJ said:

***“I do not, I hope, diminish or emasculate the valuable developing doctrine of legitimate expectation. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed, it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting, a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness. But fairness is not a one-way street. It imports the notion of equitableness, of fair and open dealing, to which the authority is as much entitled as the citizen.”***

The doctrine of legitimate expectation was recently considered in ***DIANA KETHI KILONZO AND ANOTHER V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND OTHERS***, PETITION NO. 359 OF 2013 where the High Court stated:

***“At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. ...”***

We find that the appellant was justified in having the legitimate expectation that he would get a licence to operate the mobile kiosk constructed on the authority of the respondent.

The question then is: was the respondent required to give notice before demolishing the appellant's kiosk? The Local Government Act is silent on this.

Where no procedure is explicitly prescribed, the rules of natural justice, the due process, good faith and fairness and the peremptory need to comply with the principles of good administration will ordinarily be implied and applied in decision making. In ***BYRNE V KINEMATOGRAF RENTERS SOCIETY LTD, {1958} 2 All ER 579*** at 599 Harman J stated:

***“What, then, are the requirements of natural justice in a case of this kind? First... the person accused should know the nature of the accusation made; secondly, that he should be given an opportunity to state his case; and, thirdly, of course, that the tribunal should act in good faith.”***

Given that no notice was given by the respondent, it is therefore right to state that the respondent did not act in good faith. The kiosk was lawfully on the site. The respondent’s decision must be taken in accordance with the rules of natural justice giving the appellant an opportunity to remove his mobile kiosk from the respondent’s premises if any decision had been made to deny him an operating licence

The decision to demolish the appellant’s kiosk was carried out by the respondent’s servants and agents. The Naivasha Town Council is, therefore, vicariously liable for the torts of its employees in the course of their employment. The Town Council is, therefore, liable for the consequential loss and damage suffered by the appellant.

The appellant sought special damages of KShs.401,851/=, general damages, costs and interest. The settled principle is that special damages must be both pleaded and proved. The appellant produced a letter from M/s Mumbo Jumbo Craft Sales Limited in evidence in support of his claim.

He also called Mr Chege Gitahi, the proprietor of the said company who testified that he supplied the appellant with curios on credit amounting to KShs.625,492/=. The appellant has, however, not proved the total cost of stock destroyed or lost at the behest of the respondent. Only the cost of construction of the kiosk was proved at KShs.19,061/=.

Accordingly, the appeal is allowed to the extent that the appellant’s claim in respect of special damages succeeds in the amount of KShs.19,061/= with interest at court rates from 10<sup>th</sup> May, 1990 until payment in full. The appellant will have the costs of this appeal.

**Dated and delivered at Nairobi this 6<sup>th</sup> day of June, 2014.**

P. N. WAKI

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR