**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL SUIT NO 378 OF 1989**

**SAMUEL MWANGI THUKU …….. PLAINTIFF**

**VERSUS**

**OL KALOU TOWN COUNCIL……..…DEFENDANT**

**JUDGMENT**

The plaintiff herein filed a plaint herein on 6-12-89 in which he avered that he owned a kiosk vide MIN 53/87. He submitted building plans for the construction of the same which were duly approved by the defendant. That subsequent to the said approval the said building as per specifications of the approved plan and by 6-10-89 the plaintiff had incurred up to Kshs 200,000/= or there abouts towards the said construction. That on 6-10-89 the defendant unlawfully, maliciously and ultraviresly demolished the plaintiff's building and the plaintiff suffered damages. That the said demolition was *ultra vires* and he sought damages to the tune of Kshs 200,000/- being the value of the subsect *kiosk* costs, interest at court rates and any other relief that the Court may deem fit to grant.

The defendant put in a defence filed on 10-2-90 in which they avered that its predecessor Nyandarua country coucil granted a temporary licence to one John Kamau Njuguna known as temporary *kiosk* number 6 in the proposed temporary *kiosks* and garages section at Olkalou township upon and subject to the terms and conditions contained in the application of temporary *kiosk* or plot duly signed by the said John Kamau Njuguna and the said Nyandarua county council, that the said John Kamau purported to transfer the same to the plaintiff without the defendants consent, that it was an express term of the said temporary licence that the licencee would only construct a temporary *kiosk* for operation of a general business which condition attached to all transferees of the licence, that in breach of the said term and conditions of the grant of licence the plaintiff unlawfully and wrongfully and without any claim of right whatsoever encroached into licence *kiosk* number 7 and another unlicenced or unallocated area and contrary to the said terms and conditions of the licence unlawfully commenced to construct a structure with permanent materials in flagrant breach of the defendants by laws, that the defendant upon noting the breach aforesaid demanded in writing and otherwise that the plaintiff do stop constructing the said permanent structure but the plaintiff defiantly refused, failed and or neglected to comply as a result of which the defendant had to demolish the illegal structure in accordance with the powers vested in it, that in the circumstances the defendants action was lawful, justifiable, was not *ultra vires* unlawful or malicious as alleged in paragraph 6 of the plaint and puts the plaintiff to strict proof thereof, that the defendant denies that the plaintiff had incurred Kshs 200,000/- in putting up the said illegal structure or that by reason of the defendants lawful action the plaintiff suffered damage of Kshs 200,000/- or in any

other sum or that the plaintiff is entitled to payment of Kshs 200,000/- as claimed and puts the plaintiff to strict proof thereof, that the plaintiff's claims for shs 200,000/- is unlawful, arbitraly, vexacious and the same should be struck out and suit dismissed with costs to the defendant.

The parties gave evidence. The plaintiff in his evidence reiterated what he had averred in the plaint to the effect that he purchased the *kiosk* from the person who had been allocated the same by the Ol kalao town council. He purchase a plan exhibit 1 from the town clerk dated June 1989. After obtaining the plan he purchased building materials and commenced construction. The cost of materials and labour charges came to 200,000/-. The plaintiff produced no receipts to show how much he had spent but he said it is because he never expected any trouble and so kept no records.

He built the whole structure with rough stone. When the council raised objection he told them it was easier to built with rough stone than timber which was restricted. The structure was later demolished by the defendant hence this suit for compensation. He was firm the town clerk told him to build with stone up to the window but did not specify whether it was up to the lower or upper window and he went ahead and built up to the lintels. He produced photographs to show that there were *kiosks* within the locality which had been built all through with stone and yet they were not demolished.

When cross-examined he was firm that he built with rough stone as stones were cheaper than timber. That the materials used were not meant to be permanent confirmed with the fact that the stones were removed quickly. That he had been given ample time to remove the stones he could have done it carefully and put the stones to some other use. He denied the suggestion that *askaris* stopped him from building but he went ahead to construct with stone and also that he received notice to demolish the same but he failed to do so. That he did not keep a record of the building transaction and the value he has given is a mere approximate.

In the cause of the trial the plaintiff was allowed time to produce the agreement between him and the original allottee exhibit 3, the only letter from the council exhibit 4 which concerned a boundary dispute with his neighbour and not construction of the *kiosk* with rough stone. Also Letter of Allottement given to him by the original allottee exhibit 5 exhibit 6 abund summoning him to attend court which he did but the defendants did not turn up.

The evidence on behalf of the defendant was adduced by its Ag town clerk who attained the powers of the defendant in connection with the procedures followed in connection with the *kiosks*.

Concerning the suit the defendant averred that allottement letter for *kiosks* is standard and any signatory to it indicates that the applicant is going to abide by the conditions set out on that form, that the major requirement is that the kiosks be constructed using temporary materials consisting of offcuts, timber, and mud although the foundation may be made of stone.

DW1 confirmed that the plaintiffs duly came for the plan to construct the said *kiosk* exhibit 1 and he DW1 explained to him what was required of him and the plan was duly endorsed that the construction was temporary. He was firm that after the plaintiff was issued with exhibit 1 he did not come back to be shown specifications on the ground and that is why the plaintiff started construction with stones. He DW1 summoned plaintiff to his office *vide* exhibit 4 and they discussed the issue but the plaintiff did not take heed and encroached on somebody else's kiosk as shown on exhibit D2, 3 which was dispatched on 2-10-89 as per exhibit D4. The plaintiff did not heed the notice as he did not demolish the *kiosk* to the level required. The witness denied the suggestion that he told the plaintiff to construct up to the lentils with stone.

The witness gave 4 reasons as to why they demolished the building stones namely:-

1. Building with stones above ground, encroaching on somebody elses portion failing to comply with the council's verbal instructions on the materials to be used, he was not ready to co-operate.

He was firm the action taken was justified and in accordance with the councils bylaws as authorized by section 269 of the Local Government Act.

He added that they don't licence construction of *kiosks* with stones unless the individual specifically applies to the council for the same for his own reasons as the council does not consider stones to be temporary.

The witness added that the area under dispute has now been taken over by the Commissioner of Lands as per the plan exhibit D6. He disputed the claim of Kshs 200,000/- as per exhibit D7, 8.

In cross-examination the witness stated that the defendant had no quarrel with the sale or purchase of the said plot for a *kiosk*. The witness conceded that the standard allotement letter does not say that the structure will be demolished if it is not constructed by temporary materials and also that the conditions do not define what is temporary materials. He agreed the conditions are silent on the circumstances of a demolition and thus there is no provision for the council having to pull down the structure.

The witness also conceded that the materials to be used to construct there were namely off cuts, timber and mud are not indicated on the approved plan. But he was firm that these are the materials generally used for constructing such *kiosks*.

Concerning the bylaws in LN 16/63 the witness conceded he does not know if these were operational before or after independence or whether they still applied to date.

That by the time exhibit 4 was written on 22-2-89 following a verbal complaint that the plaintiff had encroached on somebody elses plot but by this period the plaintiff had not started construction.

He conceded exhibit D2 was drawn on 16-6-89 one day after he had signed the approval plan exhibit 1. He accepted that his advice to the plaintiff to use temporary material for construction is not in writing. He accepted he had no authority to allow the plaintiff to construct the foundation and one course above ground with stone but he did not warn the plaintiff that he had no such authority. He added that exhibit D4 was written on 20-9-89, posited on 2-10-89 and the demolition was carried out on 6-10-89. He was sure the letter was received as it was hand delivered and the plaintiff came to see him over the issue personally in his office but he has no record of this.

He conceded that there are people with specific approval of the council who have constructed *kiosks* with stone but he had no details of them.

The demolition was carried out because the bylaws had been breached.

Lastly he accepted that there is no gazette notice or any document to show that the defendant council had adopted the bylaws of Olkalau town council. He denied the suggestion that the demolition was malicious.

The witness was recalled at a later stage and he produced minute No 8 of 88 by which the defendant council adopted the bylaws of Nyandarua town council exhibit D9. That they gave the plaintiff 48 hours

notice by pinning a notice on to his *kiosk*. He conceded that at the time the plan exhibit once was issued the plaintiff had already started construction and the plan was merely validating the illegal structure.

DW2 testified that he drew building plans for Nyandarua county council as well as Olkalau urban council. He drew exhibit D2 in respect of plot 6&7 showing the encroachement by the plaintiff on to plot 7 but accepted that details of the maker of exhibit 2 are not on this piece of paper.

At the close of the whole case both counsels put in written submissions. The plaintiff counsel submitted as follows.

1. The plaintiffs estimation of the value of the demolished *kiosk* remains unchallenged.

2. That the demolition was not justified as there are no provisions for demolition in the letter of allotment, that there is no reference to other regulations or laws, there is no provision enabling demolition by the defendant.

3. The only requirements for removal are where permanent plots are surveyed and allocated, and where the area is required for other developments.

4. That the plaintiff was advised by the defendants agent to build a few courses with stone and the plaintiff should be believed that he was told to build up to lintel level.

5. That the plaintiff built with stones because they are cheaper and his was not the only *kiosk* in the council constructed with stones and this establishes malice on the part of the defendant.

1.The defendant submitted that the claim should be dismissed on the grounds that the plaintiff commenced construction of the *kiosk* before approval of the plan.

2. The plaintiff was also in breach of the conditions attached to allocation of *kiosks* which specified that materials to be used must be of a temporary nature.

3. That the plaintiff has been shown to have encroached on the area allocated to plot 7 and unallocated area.

4. That the plaintiff was given due notice to demolish the kiosk but he did not heed this notice hence the demolition which was valid and justified in the circumstances and the same is not contrary to public policy.

5. That there is no discrimination shown against the plaintiff as there are no other kiosks constructed with stone.

6. That the plaintiff is not entitled to the amount claimed as this is a special damage which should be specifically proved, but this is not the case as there are no receipts or record of building transactions.

From the evidence adduced by both parties and the submissions of both parties it is evident that there is no dispute that vide minute No 53/87 a plot for a *kiosk* was allocated to one John Kamau Njuguna as shown by exhibit 1. The allottement letter is dated 30-12-87 and construction was to be carried out within one year from the date of allocation. This allocation was for a temporary general kiosk. There are conditions attached to the application form exhibit 1B.These are “I fully understand and declare that if I am granted the trading premises the licence thereof shall be purely temporary and liable to cancellation

any time and that I shall not be entitled to any compensation whatsoever for the temporary construction or stock therein in the event of closure of 1 premises when permanent trading plots be surveyed and allocated or the area is required for other types of development or I am asked to pull down the construction or close down the business as Nyandarua county council may decide. I also understand that if granted the trading premises I would be required to complete the construction and start the business within 6 months from the date premises is granted.

I will also pay the rents and rates as Nyandarua county council may decide and that rates or rents are due after 2 months after being granted the premises, and that I shall only operate the business I have applied for".

It is evident from reading of the conditions as submitted by the plaintiffs counsel that the conditions do not define what is meant by temporary or what materials were to be used in the construction of the said *kiosk*.

According to the plaintiff he understood fully that the structure was to be temporary. He conceded that he could have used timber or off cuts to construct the wall but at the time it was not easy do get timber or off cuts and at the same time they were expensive. According to him he decided to use stones because these were cheaper, available and they could also be demolished when need arises as they were demolished.

According to the defendant it is true the conditions do not specify what materials are temporary but these are normally understood to mean timber, mud and offcuts. DW1 stated as supported by the defence counsel in the submissions that they relied on the local government regulations and adopted bylaws which define what is meant by temporary.

As per the evidence on the record Olkalou town council was formerly part and parcel of the Nyahururu County Council and it therefore followed that the bylaws applied to Olkalou town council were those of Nyandarua county council. When it gained sovereignity it adopted the bylaws of the parent council as per exhibit D9 Min 8/88 states in part "That the council do and hereby adopts all the approved Nyandarua county council by-laws which were being enforced within the jurisdiction of the Olkalou township boundaries namely building bylaws among others.

The building bylaws being relied upon by the defendant are those whose copies were produced as exhibit D5 LN 256/1963. The court was informed that the bylaws are made in pursuance of the Local Government Act formerly Regulations cap 265 Laws of Kenya. In respect to exhibit D5 the defence witness DW1 stated that he could not tell whether those bylaws were made before or after independence but on perusal of the same the Court found that they were signed by the Minister of Local Government on 29-11-68 which period falls after independence. Section 210 of the Local Government Act empowers the Minister for the time being in charge to make bylaws for adoption by local authorities.

Section 211 of the same Act empowers a similar local authority to enforce bylaws of a Senior Local Authority having jurisdiction in the area. No doubt the defendant council acted under this section when it adopted the bylaws of Nyandarua County Council as per exhibit D6.

Exhibit D5 was part of standard bylaws. The defendant did not produce any minute to show that the same had been adopted by the Nyandarua county council after approval by the Minister. However, the court does not doubt his evidence that he found these regulations in use and he had been using them himself. In the absence of any evidence to the contrary I have no doubt that these were the regulations in use at the time in question.

The point at issue is whether temporary materials have been specifically defined by the defendant and brought to the notice of the plaintiff and 2ndly whether the defendant was entitled to demolish the *kiosk* as he did and 3rdly if he was not entitled to do so whether he is entitled to pay the damages as claimed. The Court observed that exhibit 5 which is being relied upon by the defence does not specify what materials are termed as temporary. Section 29 of the said exhibit simply states that all constructions have to be approved by the council. In the instant case it is on record that the plaintiff purchased the licence to put up a *kiosk* from the original allottee as per exhibit 3. He duly paid for the approval plan as per the receipt exhibit 2 and he was duly issued with a plan exhibit 1. It appears from the record that the plaintiff had commenced construction earlier on and the plan was to validate what the plaintiff had already commenced to construct. DW1 had indicated that the construction was commenced immediately after the plan was approved but in the absence of records from the plaintiff this Court is not in a position to say when construction was commenced. It is observed from the plan that the type of materials to be used is not specified.

Although DW1 endevoured to state that he informed the plaintiff of the materils to be used verbally it is his word against that of the plaintiff who claimed he was told to build with stones up to window level. Knowing that the type of material to be used is very important it was up to them to specify so in their letter of allottement or some other minute or note. In the absence of such a note the Court has no alternative but to fall back on to the conditions specified in exhibit one on the application forms. These denote that the construction in whatever form it was constructed was of a temporary nature. That the applicant was under an obligation to pull down the same whenever he is requested to do. The conditions specified therein are only two:- 1. When permanent trading plots are surveyed. 2. When the area is required for some other developments. There is no requirement for pulling down of the *kiosk* due to failure to use certain unspecified materials.

The defence has placed a lot of reliance on section 29 of exhibit D5. I have perused the same. That section denotes that no construction can be commenced without plans. In this case there is an approval plan. There is no complaint that the construction was not done according to plan. Exhibit D3 the letter dated 20-9-89 specifically talks of building with stones. Section 29(1) (d) empowers the defendant to require the person concerned to demolish the structure after due notice. It is the stand of the plaintiff that the proper procedure was not followed while the defence contends that the correct steps were taken. They rely on exhibit D3 which gave the plaintiff 14 days to pull down the structure or else it be demolished. The letter is dated 20-9-89. The christian name used does not belong to the plaintiff. Since the commencement of the notice was from the date of the letter it means it had to be dispatched on the same date. The dispatch register was produced as exhibit D4 and it shows that the letter was dispatched on 2-10-89. The plaintiff was firm he never received it. Even if it was received it cannot be said that the plaintiff was accorded the 14 days stipulated in the letter. After the notice to demolish was given and no action taken the defendant was required to give another notice in writing of not less than 48 hours requiring compliance failing which they carried out the demolition.

From exhibit D3 and 4 it is clear that the defendant did not comply with section 29 of exhibit D5 as regards issuing of notice. After issuing the first notice prescribing a period of time within which to comply the defendant was required to issue another notice of not less than 48 hours after which demolition could be carried out.

Regarding the notice it is observed a wrong christian name was used and receipt is denied by the plaintiff. DW1 was firm the plaintiff appeared before him in response to the notice of demolition and they discussed the matter verbally but there is no record of this meeting.

From the foregoing the Court has found as a fact that there is no note or written memorandum from the

defendant defining what is meant by temporary materials what has come out clearly is that it is generally understood that such materials include timber, offcuts, mud etc. According to DW1 stones are permanent materials but according to the plaintiff even stones are temporary and that is why his kiosk was demolished within the shortest possible time. Concerning *kiosks* built using stones the plaintiff produced photographs showing that there were other *kiosks* besides his within the locality built with stones. DW1 did not rule out such a possibility but stated that those who wished to construct *kiosks* using stones had to apply to the town clerk to obtain authority to do so. This applies that possibility of constructing *kiosks* with stones cannot be ruled out. With permission from the relevant authority one can put up such *kiosk* however DW1 made it clear that construction of such a *kiosk* did not confer the owner thereof ownership of the portion of land on which the *kiosk* is constructed as that falls within the power of the Commissioner of Lands. This confirms the conditions in the application form. It therefore follows this did not confer any ownership of the land to him and he would have been required to pull the *kiosk* down to give way to permanent survey plots or if the area is required for any other development. The defendant through DW1 gave other additional reason for demolition was because the plaintiff had encroached on another persons plot. A sketch plan exhibit D2 (b) was produced to show this. However there is nothing on it to show that it related to the plaintiff's *kiosk* and the maker did not endorse it. It therefore has no evidential value.

From the foregoing the Court is satisfied that the overriding conditions are those set out in the application form which has only two conditions for pulling down one's *kiosk* namely to give way to permanent surveyed plots or to give way if the area is required for any other developments since the type of materials for construction are not set out in the application form nor the approved plan the only reasonable inference that the court can draw is that it does not matter what materials the *kiosk* is constructed of as the over riding factor is "that such a construction whether made of stone or otherwise are temporary and in the event of demolition for the sake of the two conditions to take place the owner thereof is not to claim any compensation for the structure. The Court therefore finds that demolition for the reason given by the defendant was not justified.

Having found that the demolition was not justified the Court has to assess the damages payable. The plaintiff produced no records and no receipts to show how much he had incurred but he used cement, sand, stone, water etc to construct the *kiosk*. He gave an estimate of 2000,000/-. The defendant has rightly submitted that costs incurred are special damages which must be proved. It is thestand of the defence that these have not been proved. DW1 on behalf of the dependent stated that such *kiosks* would not namely cost over 10,000/-. The plaintiff gave no receipts allegedly because he did not anticipate any problem. However the Court is of the opinion that any prudent person would normally keep records of major transactions especially purchase of stones, cement, sand water etc.

In the absence of records the Court is normally placed in a difficult position when assessing damages payable.

I will now proceed to examine principles upon which damages are to be assessed. The basis for assessing damages is that there must not be so inordinately low or so inordinately high. The onus to prove the loss is on the plaintiff. See the case of *Henry Hidaya Ilnga v Manyama Manyoria* [1961] EA 705.

The 2nd principle is that a specific loss of profit consequent upon the loss of an article or for a specific period prior to the date of the plaint is special damages which must be pleaded and proved.

However where no receipt is produced and the court is satisfied that loss was incurred the court has to make a reasonable assessment. See the case of *Kampala City Council v Makay* [1972] EA 446.

It is on record that the floor of the *kiosk* had been constructed with consent using hard core, cement, sand and water. The plaintiff said he used hired labour and he has not been challenged on this. He has also said that he transported water to the site using a hired lorry. DW1 stated that there was water in the vicinity which would have been connected to the site. Since the connection was not done the court had no alternative but to find that the plaintiff hired a lorry to ferry water to the site. The Court also finds that plaintiff paid for sand and its transport to the site and also paid for building stones and its transport to site. Also cement used.

Bearing in mind all the circumstances of this case especially the fact that no records were produced and doing the best.

I can I would assess a figure of Kshs 65,000/- as being a reasonable assessment for the loss of materials and labour of the wrongfully destroyed *kiosk*.

I therefore enter judgment for the plaintiff on the following terms –

1. Damages for the destroyed *kiosk* Kshs 65,000/-

2. Costs of the suit

Dated and Delivered at Nakuru this 14th day of March, 1993

**R. N. NAMBUYE**

**……**

**JUDGE**