



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 223 OF 2012

ALEX OTUKE ONDIMU.....1ST PLAINTIFF

MOTOR WORLD LIMITED2ND PLAINTIFF

VERSUS

COMMISSONER OF POLICE.....1ST DEFENDANT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND DEFENDANT

THE HON. ATTORNEY GENERAL.....3RD DEFENDANT

JOSEPH MUTHUI KIRAGU.....4TH DEFENDANT

JUDGMENT

BACKGROUND

1. The plaintiffs herein filed this suit by plaint dated 22nd June 2012 filed on 25th June 2012. Amended plaint was filed on 8th December 2020 seeking the following orders:

a. A declaration that the entry and search of the 1st plaintiff's house and the 2nd plaintiff's premises and subsequent seizure and detention of motor vehicles registration No. KBL 111S, KBN 141T and KBN 181L and the documents was illegal, unlawful, arbitrary, capricious and malicious and was only meant to harass and intimidate the plaintiffs and violated the plaintiff's right to privacy and property protected and guaranteed under articles 31 and 40 of the Constitution.

b. Kshs. 28,113,722 damages for loss of business and income.

c. A declaration that that institution of Criminal Case No. 188 of 2011 against the 1st plaintiff was illegal, arbitrary, capricious, malicious and abuse of power and/or authority and the 1st plaintiff's right to dignity and not be subjected to psychological torture guaranteed and protected under articles 28 and 29 (d) of the Constitution have been violated by the respondents.

d. General damages for violation of rights under articles 28, 29(d), 31 and 40 of the Constitution. Costs and interest.

2. The 1st plaintiff is the managing director of the 2nd plaintiff. They filed this suit following the raid of their premises by 4th defendant acting on instructions from the 1st and 2nd defendant on 23rd January 2011 and the 24th January 2011. The plaintiffs 'contention is that the entry and search of their premises and towing of the motor vehicles registration numbers KBL 111S, KBN 141T, and KBN 181L was illegal and unlawful; that it culminated in the 1st plaintiff's arrest and arraignment in court vide Criminal Case No. 188 of 2011 and as a result of the said actions, the plaintiff lost income to the tune of Kshs. 28,113,722. That there was a decline in sales from Kshs 54,450,000 in 2010 to Ksh 12,800,000 in 2011. Further that the 1st Plaintiff has suffered mental anguish, trauma, anxiety and loss of reputation and dignity among his peers and the defendants actions amounted to infringement and violation of his right to privacy which includes the right to a home, or property search as envisaged in **article 31(b) of the constitution**.

3. The defendants denied the claim and filed defence dated 28th August, 2013.

PLAINTIFF'S EVIDENCE

4. PW1 **Alex Otuke** adopted his witness statement and list of documents both dated 3rd December 2020. He testified that he was involved in the business of selling motor vehicles but he stopped selling vehicles after the allegations that he was involved in stealing vehicles.
5. During a cross-examination, he stated that he does not know the people who lodged the complaint in the criminal case but he was informed that he was selling stolen vehicles on transit. He said he recorded statement with police on the issue. He further said police went to his house on 23rd January 2011 a Sunday night and confirmed that he run away when he was informed of the presence of people looking for him by the watchmen. He said the police entered his house and took vehicles and his documents in a briefcase.
6. He further stated that on 24th January 2011, the police went to him with a warrant of arrest. He was arrested and taken to Mombasa court but did not record a statement.
7. PW1 said that he knew **Naval Abdul Abdi** as he worked as a manager at **Yuasa Motors** and he was listed as one of the complainants in the matter. He said he used to buy vehicles from Abdul and resell them and that he paid for the vehicles he bought using his name using Open Cheque.
8. PW1 testified that he had purchased motor vehicle registration KBK 865S Mitsubishi Rosa but he was not paid and when he followed on the payment he was intercepted by the police on allegations that he sells stolen vehicle on transit.
9. He testified that his practice was to purchase many vehicles and pay a deposit on each vehicle and fully repay the amount after the sale of the car but the business was short lived after Yuasa Motor took away the vehicles in his yard that were waiting to be sold.
10. He confirmed that he purchased motor vehicle registration No. KBJ 249K from Yuasa international and he was issued with the logbook.
11. He said he was acquitted in Mombasa Criminal Case No.979 of 2011 and that he sued the 4th defendant in his own capacity as he arrested the 1st plaintiff without conducting any due diligence and that he arrived at a claim of damages Kshs 28, 113,722 as per the accounts filed by **Stanley Mbeche**.
12. He stated motor vehicle KBL 111S Prado and KBN 118L were taken from his home while KBN 141T was taken from the office and logbooks for the vehicles were taken from home.
13. On re-examination, he stated he closed his business in 2014, as he could no longer trade in the business as his reputation had been injured. He said his total expenses was Kshs.10,199,289 and the net profit was Kshs. 5,140,711 further in the year 2011 the sales were 12,800,000 and he incurred a loss of 3,850,000 and the net sales was 8,950,000. He said the costs of sale for that year was 22,896,400 which constituted purchases and closing stock for 2010. The closing stock was 2.5 M and the loss for the period in gross was kshs 13,946,400 together with the general expenses of 14,167,322 as such the total loss for the year 2011 was 28,113,722.
14. **PW2 Stanley Mbeche** adopted his witness statement dated 3rd December 2020. He stated the accounts relates to 2 years 2010 and 2011 showing general; performance of the business. He stated in the 2010 the business had a turnover of kshs 54,450,000, the sales incurred for the period was Kshs 39,110,000 and the gross profit amounted to Kshs 15,340,000.
15. Further, in the year 2011 there was a loss of 14% against sales of a negative figure of Kshs 28,113,722 due to a fall of sales. Other expenses incurred in the year 2011 include legal expenses of Kshs. 3,853,000, financial loan interest of Kshs 3,022, 638, costs of freight and loading Kshs 3,245,000, normal expenses of the business. As per the report on page 186 to 198 marked as PEXHB. 20.
16. During cross-examination by **Counsel Ondieki**, he stated he has practiced as an accountant since 1993 and he was engaged by the plaintiff in the year 2010. In compiling his accounts he used ledgers, importation documents, rent receipts, bank statements, master's payroll, the documents were prepared by in house accounts.
17. PW2 was stood down on 15th December 2020, to allow the filing of the documents. Hearing proceeded on 10th February 2021.
18. Further he stated the business had only been in operation for a year before the accounts were prepared. He continues to say he did not make any future trajectories as he only looked at the sales in 2010 which were at Kshs 54,450,000 while in the year 2011 the sales dropped to Kshs 8,950,000. The reason for the loss of business was loss of loan interest due to default.
19. **PW3 Teresa Njambia** wife to PW1 adopted his witness statement dated 3rd December 2020. She confirmed the police officers raided her home on 24th January 2021 and that media were present who published the incident in the standard newspaper. She said during the raid, the police officers took away documents from the house. She stated that the business was closed as they could no longer continue due to the damage that had been caused.

DEFENDANT'S EVIDENCE

20. **DW1 Sgt Joseph Kiragu** testified that between 2010 and 2012, he was based in DCI Mombasa in the Fraud Investigations, and later transferred to Nairobi. He adopted his witness statement date d 16th July 2016.
21. He further stated that the allegations against the DCI are false as he has never met the plaintiff and as such, the allegations are malicious

and ill intentioned.

22. DW1 further testified that the investigations could not be malicious as the DCI was working on a complaint and there was no malice in conducting the investigations. He said that it was during the weekend and there was no possibility of obtaining a warrant. He said the evidence adduced implicated the plaintiff. He denied the allegation that investigations had any impact on the loss incurred in the plaintiff's business.

23. On cross-examination, DW1 stated that he is also called **Joseph Muthu** and that he was present when the plaintiff's home was raided. He said he had no complaint report adduced as evidence as the complaint was written down as an O.B or incident report.

24. He stated that the complaint report was not given the number plate of the vehicle but only the make and description, therefore the investigation was based on a claim of theft by agent. He said the vehicles stolen were imported vehicles with no number plates and when searching for the vehicles they were using the chassis numbers. He said the investigations were on a sequence of events as they had received information that the vehicles had been taken to Nakuru.

25. He stated that the Mombasa Criminal Case No. 188 of 2011, Mombasa Criminal 997 of 2011 was not conclusively tried as the 1st plaintiff obtained orders vide Nakuru Jr No. 7 of 2010. He said he did not challenge the order, as he had no personal interest in the matter.

26. He further stated that despite charging the plaintiff in various criminal cases, there was no evidence that linked the plaintiff to the complaint raised by **Mr. Owino**, though the accused was charged with 2 cases arising from the complaint by **Mr. Owino**. Further, he was not involved in Nakuru Civil Case No. 249 of 2010 but he could see it is the plaintiff suing **Yuasa International**.

27. He stated he is not aware of the outcome of Mombasa Criminal Case No. 188 of 2011 as he was transferred and left the matter in its initial stages. The motivation during the investigation was based on the fact he was a police officer and was not geared to get any material gain from the plaintiff.

28. On re-examination, he confirmed that he has availed copies of O. B No 8 of 11/1/2011 in Criminal 188 of 2011 and O.B. No 16 of 24/9/2011 and a letter addressed to the commissioner in respect to the investigation.

PLANTIFF'S SUBMISSIONS

29. The plaintiff's counsel submitted that failure by the defendants to appeal the decision of the High Court in JR No. 7 of 2011 shows that the impugned action of the defendants was illegal and unlawful and actuated by malice. Further, the defendant's defence raises no reasonable defence and ought to be dismissed; that the defendants have failed to prove that they were acting on a complaint as there is no evidence of the complaint that was availed in court; that there was no occurrence book neither was any witness called to testify in court.

30. The plaintiff further submitted that what was seized largely comprised of personal documents like the 1st plaintiff's form four certificate, passport, pin certificate that have no relationship with the alleged complaint and defendant's filing Mombasa Criminal Case No. 188 of 2011 when Nakuru HCC No. 249 of 2010 was still pending, was in bad faith and in excess of their call of duty; that the case was instituted to intimidate and harass the 1st plaintiff.

31. In respect to loss and damage suffered by the plaintiffs, counsel for the plaintiff submitted that they have attached the 2nd plaintiff's audited accounts as proof that before the defendant's actions, the business was on an upward trajectory in terms of turnover and submitted that the defendants acted maliciously and occasioned damage to the plaintiff and defendants should be held wholly responsible.

32. In conclusion, plaintiff's counsel submitted that the plaintiffs are entitled to the reliefs sought having sufficiently pleaded and proved them and urges the court to grant interest and costs.

DEFENDANTS' SUBMISSIONS

33. In submissions filed on 4th November 2021, the defendants advocate submitted that their submissions are three.

34. First being whether the entry and search of the plaintiff's premises and seizure of documents and motor vehicle were unlawful. On this issue the defendants submitted that the entry and search were justified and lawful as it was conducted according to the police mandate under the law; that the police were discharging their duties after a complaint was raised by **Mr. Owino Whongo** a director at Speedboat Freighters Ltd relating to an alleged theft of various motor vehicles on transit from the port of Mombasa to Uganda and Juba via the port of Malaba.

35. The defence counsel submitted that the national police service has a constitutional mandate to detect and investigate crime and police are entitled to search premises and seize property without warrants; further since the search and seizure was conducted on a Sunday 23rd January 2011, it was not possible to obtain the warrants in time. Further submitted that the 1st plaintiff's conduct of jumping over the perimeter wall on seeing police necessitated the search and the seizure of the motor vehicle was in furtherance of the investigation.

36. On the second issue of whether the institution of Criminal Case No 188 of 2011 against the 1st plaintiff was malicious, the defendants submitted that the arrest and arraignment of the 1st plaintiff in court was done after a legitimate complaint. The defendants further submitted that the criminal case was terminated by the High Court ruling in JR No. 7 of 2011 without prosecution being given a chance to present its case thus no inference of malice can be drawn.

37. The defendants further submitted that the plaintiff has failed to adduce evidence of malice, spite or ill will or indirect or improper motive

on the part of the defendants and the termination of the criminal proceedings does not lace the criminal proceedings with malice.

38. On issue of costs, the defendants counsel submitted that the plaintiff is not entitled to the reliefs sought; that the claim of special damages for kshs 28,113,722 for loss of business is grossly exaggerated and completely unsupported and the same must fail. Further special damages should be strictly proved and urged this court to find the claim unmerited and dismiss the same with costs.

ANALYSIS AND DETERMINATION

39. I have considered evidence adduced, perused and considered pleadings and submissions filed. There is no doubt that the plaintiff's premises was searched and motor vehicles plus personal documents seized by officers of the first defendant. The plaintiff's contention is that the defendant's actions were illegal and unlawful while the defendants argue that they were carrying out their duty. I consider the following as issues for determination:-

- A. Whether the search, seizure of personal documents of the 1st plaintiff and motor vehicles was illegal and unlawful
- B. Whether the plaintiffs are entitled to the reliefs sought

(i) Whether the search, seizure of personal documents of the 1st Plaintiff and motor vehicles was illegal and unlawful

40. The plaintiff's argument is that the search, seizure of the motor vehicles, arrest of the 1st plaintiff and the subsequent arraignment in court was unlawful and done maliciously while on the other hand, the defendant contend that the same was lawful and done within the scope of their mandate as it was done after a complaint was initiated.

41. The 1st plaintiff's evidence is that the motor vehicles were detained on 24th January 2011 and were released on 5th February 2011 following court order issued in JR. No 7 of 2011 but some documents have not been released to the 1st Plaintiff.

42. In support of argument on violation of his constitutional rights the 1st plaintiffs cited the case of **Joram Nyaga Mutegi v Kenya National Highway Authority [2017] eKLR**, where Mwita J observed as follows:-

“Rights have values and must be respected and protected at all times. The petitioner has a right to do business and earn a living, and continued retention of his vehicle's registration plate is a violation of this right given the circumstances of this case. The law is to be followed and where there is no evidence, any purported action of retaining the vehicle registration plate is unacceptable.”

43. In respect to arrest without warrant, **Section 58 of the National Police Service Act Chapter 84 Laws of Kenya** provide as follows:-

“Subject Article 49 a police officer may without a warrant, arrest a person—

- (a)...
- (b)...
- (c) **whom the police officer suspects on reasonable grounds of having committed a cognizable offence;**
- (d) **who commits a breach of the peace in the presence of the police officer;**
- (e) **in whose possession is found anything which may reasonable be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to that thing...”**

44. **Section 24 of the National Police Service Act** provide duties of police officers. They are not only required to receive complaints when made to them but are equally bound to investigate such complaints.

45. It is not in dispute that a claim was lodged on the loss of motor vehicles while on transit and the police acting on a tip-off landed at the plaintiff's premises. The 1st plaintiff has however alleged that he was not involved in any theft of the alleged motor vehicles as he deals with a legal business of sale of motor vehicles. The defendant's argument in defence of their action is that the search and seizure was done on a Sunday which fell on a weekend and thus there was a challenge of obtaining a warrant. DW1 stated that investigations conducted did not link the plaintiffs to complaint lodged by **Mr.Owino**. The lower court proceeded to acquit the plaintiff in Criminal Case Number 188 of 2011 under **Section 215 of the Criminal Procedure Code**.

46. In my view, the defendants were required to inform plaintiff of the alleged seizure of the motor vehicles and call upon him to prove legal possession of the vehicles and failure to do so renders their action a violation of the plaintiff's constitutional right.

47. On whether the plaintiffs are entitled to the reliefs sought, the 1st plaintiff availed audited accounts in proof of financial position of his business in the year 2010 and 2011. From the record as captured in paragraphs 13 to 15 above, there is a downwards trend in the sale made in the year 2011 compared to the year 2010.

48. In **Daneva Company Limited v Kenya National Highways Authority [2014] eKLR** the court considered whether the petitioner was entitled to damages for wrongful detention of his motor vehicle and observed as follows: -

“The issue of whether a claimant is entitled to damages for unlawful detention of his motor vehicle has been dealt with by our courts before. In the case of Great Lakes Transport Co. (U) Ltd vs- Kenya Revenue Authority [2009] eKLR the Court of Appeal held that equity would not allow a wrong to be suffered without a remedy and went ahead to assess damages for illegal seizure and detention of a motor vehicle”.

49. The plaintiff adduced evidence of effect of seizure and arrest on his business and reputation. Assessment of damages is within the discretion of the court. On the issue of special damages, the party seeking special damages must specifically plead and prove. The plaintiff has claimed a sum of Kshs 28,113,722 for loss of business and income.

50. The plaintiffs have adduced evidence of audited account of 2nd plaintiff of the years 2010 and 2011, it is evident there was a downward trend of sales in the year 2011 as compared to 2010. The 1st plaintiff has adduced audited accounts in proof of the trajectories of his business (Motor World Limited) sales in the year 2010 was Kshs. 54,450,000 while in the year 2011 the sales were Kshs. 8,950,000 and in the same year made losses amounting to Kshs. 28,113,722 .while in the year 2010 the profits was Kshs. 5,140,711.

51. From the evidence adduced by the plaintiff I do note there is a downwards trend in the sale made in the year 2011 as compared to the year 2010 from the accounts attached as evidence. It is therefore not in dispute that the sales went down in the year 2011. The defendant alleges their actions of investigation could not have interfered with the sale of the plaintiffs business and the claim must not only be pleaded but should be specifically proved.

52. The plaintiffs’ contend that as a result of the arrest and subsequent prosecution, the business and income went down leading to closure of the business operations in the year 2014. From the evidence of the 1st plaintiff, he was arrested and stayed in the police cell for one day before he was released. He however continued to conduct business until in the year 2014 when he decided to close the business.

53. The plaintiffs argue that they made losses after the actions of the defendants in arresting and prosecuting him on allegations of stolen motor vehicles which action ruined his business and he could not get clients due to loss of reputation. From data shown by the plaintiffs there is no doubt that the business was lower compared to the period before arrest. However in my view, other factors affecting businesses cannot be ruled out and losses listed cannot solely be attributed to the defendants actions. From the foregoing, I am inclined to award plaintiffs damages of kshs 3,000,000.00.

54. FINAL ORDERS

- 1. I hereby declare that the actions of the defendants of entry and search of the 1st plaintiff’s house and 2nd plaintiff’s premises and subsequent seizure and detention of the motor vehicles Registration No. KBL 111S, KBN 141T and KBN 181L were illegal, and a violation of the plaintiffs’ right under Articles 31 and 40 of the constitution.**
- 2. That the plaintiffs are awarded generals damages in the sum of Kshs 3,000,000.**
- 3. Interest on 2 above at court’s rate from the date of this judgment until payment in full.**
- 4. The costs of the suit be borne by the defendants.**

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 30TH DAY OF MARCH, 2022

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RACHEL NGETICH

JUDGE

In the presence of:

Francis Lepikas - Court Assistant

Mr. Ochang for Plaintiffs

Mr. Ondieki for Defendants