**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 523 OF 2012**

**PAUL OKUKU MIREGI.....PLAINTIFF**

**VERSUS**

**THE DISTRICT COMMISSIONER MBITA DISTRICT...1ST DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2ND DEFENDANT**

**JUDGMENT**

The plaintiff is a businessman who brought this suit against the defendants jointly and severally claiming the sum of Kshs. 47,041,952/= being special damages he suffered as a result of the closure of his business by the 1st defendant from 1st October, 2011 to 28th June, 2012. It was his case that the closure of his business was unilateral, malicious and intended to cause him the loss pleaded. Before filing his plaint, the plaintiff addressed a notice of intention to sue to the Attorney General dated 12th July, 2012 setting out his cause of action.

This letter was received by the Attorney General who then forwarded the same to the acting permanent secretary Ministry of State For Provincial Administration and Internal Security Office of the President vide a letter dated 19th July, 2012. The plaintiff therefore complied with Section 13 A (2) of the Government Proceedings Act Cap 40 Laws of Kenya.

From the pleadings, he had applied the renewal of his night club Liquor Licence under the Alcoholic Drinks Control Act which was granted by the committee on 8th August, 2011.The licence was subject to compliance with some health requirements and he accordingly paid for the same. That notwithstanding, the Licence was never issued but instead the 1st defendant recommended that he be refunded part of the money paid, and he be allowed to run a bar and restaurant as his nightclub licence had not been approved.

Following the closure of his business, it is the plaintiff's case that he moved to the High Court by way of Judicial Review application No. 89 of 2011 at Kisiii High Court. It is his case that the court found the 1st defendant's decision not to renew his night club licence was an independent decision and not that of the committee. The court farther found that the 1st defendant acted in an administrative capacity and not as chairman of the committee. His actions were therefore deemed ultra vires his powers as chairman of the committee.

The court quashed the 1st defendant's decision and compelled him to issue the licence as approved by the committee on 8th August, 2011 and for which he had paid on 29th August, 2011. It is his case that after the court ruling he was issued with a licence to operate the night club from 28th June, 2012. In effect therefore, his night club had not been running from 1st October, 2011 up to 28th June, 2012. He gave a tabulation of the loss that he had incurred. The plaintiff called P.W. 2 Mr.Caleb Orwa an accountant by profession to testify. This witness gave an analysis of the previous performance of the business leading to the claimed loss.

The defendants had filed a statement of defence which was subsequently amended on 6th October, 2014. There was also a defence witness statement by one Aloise Obel Ojwang dated 8th July and filed on 4th August, 2016 who was then the Deputy County Commissioner Mbita Sub County. The defendants however did not call any evidence in support of the amended defence which therefore remained a statement of facts without any evidence in support.

I must now deal with the issue of whether or not that statement should be considered before I address the evidence of the plaintiff. Courts have severally held that where evidence is not called, in support of the statement of defence, that statement remains mere allegation. – see **Edward Muriga thru Stanley Muriga vs. Nathaniel D Schulter Civil Appeal No. 23 of 1997** cited in **Gateway Insurance Company Limited vs. Jamila Suleiman & Another (2028) e KLR.** See also Grace **Nzula Mutunga vs. Joyce Wanza Musila (2017) e KLR and Montex Knitwear Limited vs. Gopitex knitwear Mills Limied (2009) e KLR.**

The fact that the defendants did not adduce evidence does not however shift the burden of proof bestowed upon the plaintiff to prove his case. This is because Section 107 of the Evidence Act Cap 80 Laws of Kenya and Section 109 of the same Act requires the plaintiff to prove his case.

The court must be satisfied that the plaintiff has adduced credible evidence capable of being believed, which can stand in the absence of rebuttal evidence by the defendant. In fact, where the plaintiff's case is discredited, for example through cross examination, judgment cannot be entered in favour of the plaintiff merely because the defendant did not call any evidence. – see **Karugi & Another vs. Kabiya & 3 others (1987) KLR 347.**

The plaintiff produced a bundle of documents which he relied on to prove his case. It will be recalled that he told the court that his licence had been approved by the Committee. In a letter dated 12th September, 2011 addressed to the National Co-ordinator Nacada in Nairobi by Joseph O.Maghoha District Commissioner Mbita District, relating to District Alcoholic Drink Licencing Committee Returns, the following is stated,

> **"NB: Those applicants who applied and were not approved by the District Alcoholic Beverages Control Committee were duly intimated on the area where concerns were raised so as to take remedial action.**
>
> **It is important to note that one applicant Paul Okuku Miregi was approved for a Bar and Restaurant licence but went ahead and paid to Nacada the whole amount for Bar and restaurant (Night club) that is Ksh. 80,000/= without consulting this office. This office had advised him to seek for a refund for the same from Macada and reapply for the approved licence."**

The plaintiff then addressed a letter dated 26th September, 2011 to the Chairman Nacada Board Mbita District Seeking permission to appear before the board to appeal for a nightclub licence. The letter says in part as follows,

> **"Kindly allow me to appear before you and tender my appeal to be allowed to operate a night club given that I have already paid Kshs. 80,000/= to the board. "**

That letter elicited a reply dated 27th September, 2011 from the District Commissioner, Mbita District addressed to the plaintiff in the following terms,

> **"After considering all options by perusing the minutes of our earlier meeting of the District Alcholic Drinks Control committee Mbita it was agreed that no applicant would be allowed licence to operate a nightclub in Mbita town.**
>
> **It was only later that this office noted that you had proceeded and paid Kshs. 80,000/= to Nacada account meant for a night club instead of Kshs. 30,000/= for bar and restaurant of which your premises had been approved for.**
>
> **You are therefore notified to cease operations immediately and make arrangements to pay the requisite Kshs. 30,000/= (thirty thousand only) for bar and restaurant so that you can be issued with the appropriate licence. By copy of this letter the National Coordinator Nacada is informed to make a refund of Kshs. 80,000/= (eighty thousand only) to the applicant."**

In fact earlier on, on 1st September, 2011 the District Commissioner, Mbita District had addressed a letter to the National Co-Ordinator Nacada, advising that the plaintiff be refunded a sum of Ksh. 50,000/= since his application to operate a night club was not approved.

In the plaintiff's list of documents there is also a copy of a licence to operate bar restaurant and lodging date-stamped 28 th January, 2011 by public health office which was to expire on 31st December, 2011. It is clear from the above information that the plaintiff's nightclub licence had never been approved. Otherwise would not be seeking any appeal.

The foregoing notwithstanding, the closure of the plaintiffs premises by the 1st defendant and which was the subject of Judicial Review Application No. 89 of 2011 at Kisii High Court has never been sufficiently answered by the defendant. It will be noted however that, the 1 st defendant had ordered the plaintiff to cease the operations of his business by a letter dated 27th September, 2011. That is the letter that was recalled by the Judge in the Judgement delivered on 28th June, 2012. Based on the foregoing liability attaches on the defendants.

The computation of time during which the plaintiff premises was closed is nine months. The plaintiff produced financial records of the years 2009 and 2010 showing a profit of Kshs. 14,979,383/= and Kshs. 16,821,946/= respectively. It will be recalled the plaintiff's claim in this suit is Kshs. 47,979,383/=. The obvious question that arises is how that figure has been arrived at for a period of nine months when the premises remained closed. Compared to the previous two years when the witness was in operation. One is obviously tempted to conclude that this was an exaggeration.

The law requires based, on decided cases, that special damages must be specifically pleaded and strictly proved. – see **Mohammed Ali & Another Vs. Sagoo Radiators Limited (2013) E KLR And Hahn vs Singh (1985) (KLR) 716.**

The degree of certainty as held in this case and particularity of proof required, depends on the circumstances and the nature of the act itself. It will be noted from the pleadings that the plaintiff is saying **"had my premises remained open, this is what I would have earned.**" But that is speculative. Speculation cannot be a basis of proof of special damages. No receipts have been produced and no delivery notes have been produced other than the statement in the plaint and the account provided.

That is not to say the plaintiff did not suffer loss because of the action of the 1 st defendant. As a guide, I can only depend on the statements of account relating to the year 2009 and 2010 which I have referred to above. The average is 15,000,000/= per year which works to Kshs. 1,250,000/= per month. For the nine months therefore, the plaintiff would be entitled to Kshs. 11,250,000/=.

Doing the best with the material presented, I find that the plaintiff has proved his case against the defendants in the sum of Kshs. 11,250,000/=. Accordingly there shall be judgment in favour of the plaintiff against the defendants in the above sum plus costs and interest at court rates.

**DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH 2021.**

**A.MBOGHOLI MSAGHA**

**JUDGE**