REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 398 OF 2009

1. INTRASPEED LOGISTICS LTD.....1ST PLAINTIFF

2. DOOBA ENTERPRISES LTD.....2ND PLAINTIFF

3. WILEX UGANDA LTD.....3RD PLAINTIFF

4. SEBCO UGANDA LTD.....4TH PLAINTIFF

5. KPI LTD.....5TH PLAINTIFF

6. SULEIMAN BATEGANYA.....6TH PLAINTIFF

7. DAVID MUSANA.....7TH PLAINTIFF

8. BUNYONY SAFARIS LTD.....8TH PLAINTIFF

9. SEVEN HILLS IMPEX LTD .....9TH PLAINTIFF

10. UGANDA AGRIGULTURAL TOOLS LTD.....10TH PLAINTIFF

11. BOARD CITY LTD.....11TH PLAITNIFF

12. ARTHUR TURYAHIKAYO.....12TH PLAINTIFF

13. BIDCO (U) LTD .....13TH PLAINTIFF

14. KAMPALA CITY TRADERS ASSOCIATION.....14TH PLAINTIFF

15. KATRACO (U) LTD.....15TH PLAINTIFF

16. MUGENGA HOLDINGS LTD.....16TH PLANTIFF

VERSUS

THE COMMISSIONER OF POLICE.....1ST DEFENDANT

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

JUDGMENT

The plaintiffs herein are said to have been victims of the post-election violence that followed the year 2007 general election in Kenya spreading into the year 2008. They were all involved in transnational transport business using trucks to transport goods to and from Mombasa spreading into DRC Congo, Rwanda and Uganda.

As a result of the violence the plaintiffs lost trucks and goods by way of arson and theft. They blamed the 1st defendant for failure to provide

adequate security for their trucks and goods and therefore claimed damages as set out in the amended plaint dated 12th March, 2010.

By the time the amended plaint was filed, the defendant had already filed a defence to the original plaint denying liability of the plaintiffs' claim in its entirety. In particular, the defendants pleaded that they reasonably discharged their statutory duty of care in providing security and therefore were not liable to the plaintiffs. The contents of special damages were also denied.

Subsequent to the pleadings, the 16th plaintiff filed an application for leave to enter judgment on liability against the defendants under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. This application was served upon counsel for the 1st to 15th plaintiffs and the defendants but when the application came up for hearing on 23rd November, 2017 counsel for the defendants did not appear and the plaintiffs were allowed to prosecute the application.

The advocates for the plaintiffs persuaded the court that the order sought should apply to all the plaintiffs because the claim arose from the same circumstances, and in any case the documents attached to the application by the 16th Plaintiff were also in possession of all the plaintiffs.

The court was persuaded that liability cannot be avoided in view of the concession of liability by the defendants to the 16th Plaintiff. That being the case, concession extended to the rest of the plaintiffs. Judgment was therefore entered in favour of all the plaintiffs against the defendants jointly and severally on liability. The issue of quantum was reserved for hearing. That order was made on 23rd November, 2017 and there has not been any appeal or review of the said order at the instance of the defendants.

Subsequently, the parties appeared before the court to address the issue of quantum. Although the plaintiffs called evidence and produced documentary evidence to prove their case against the defendants, the defendants did not call any evidence at the close of the plaintiffs' case. Parties have filed submissions and cited several authorities which I have read and considered.

Counsel for the defendants in his submissions has challenged liability of the defendants to the plaintiffs notwithstanding judgment against the defendants in that regard. I have deemed it necessary to set out herein below a few observations in that regard.

Kenya is a member of the East African Community. Article 89 (f) of the Treaty for the Establishment of The East African Community provides as follows,

> **"In order to promote the achievement of the objectives of the Community as set out in Article 5 of this treaty, the Partner State undertake to evolve co-ordinated, harmonized and complimentary transport and communications policies; improve and expand the existing transport and communication links; and establish new ones as a means of furthering the physical cohesion of the Partner States, so as to facilitate and promote the movement of traffic within the Community. To this end, the Partner States shall take steps, *inter alia*, to;**
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> **(f) Provide security and protection to transport systems to ensure the smooth movement of goods and persons within the Community."**

An obligation was therefore placed on the Kenya Government to provide security as provided under that Treaty. The destruction of the plaintiffs' properties pleaded in the plaint within its jurisdiction *prima facie* pointed to lack of or inadequate security required.

In the record before me, I have come across a letter dated 21st June, 2010 addressed to the Permanent Secretary Office of the President, Provincial Administration and Internal Security by the 2nd defendant. The 2nd defendant is the principal advisor to the government. That letter refers to claims against the Attorney General by victims of post-election violence. The present case is item No. 6 of that letter, which reads as follow,

> **"The claimants are 16 transport companies incorporated in the Republic of Uganda and Rwanda respectively. They are represented by Messrs Guserwa and Co. Advocates and are claiming damages and special damages in the sum of US dollars 47.557,081 equivalent to Kshs. 3,804,566,480.00 plus costs and interest suit…**
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> **The claims can therefore be categorised as follows: -**
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> **(i) Claims by Kenyan citizens whose properties were destroyed during the violence, who are claiming special damages amounting to Kshs. 2,975,595,828.00**
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> **(ii) Claims by Uganda and Rwanda transporters whose trucks and goods were destroyed while transiting through Kenya to Uganda/Rwanda during the violence. They are claiming damages amounting to Kshs. USD 47,557,081 equivalent to Kshs. 3,804,566,480.**
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> **Claims under (i) and (ii) are founded on the basis that the police were in breach of their statutory duties as provided by Section 14 of the Police Act which states that it is the duty of the police to ensure maintenance of law and order, preservation of peace and protection of life and property, detection and apprehension of offenders. The claimants allege that they made reports of the impending violence/attacks and expected police to maintain law and order under Section 14 but the police failed. In both the Waki and Kriegler reports the actions of the police during the violence were questioned which gives credence to these claims.**

In these claims the state can only escape liability if it can be proved the state employed all its resources and efforts to ensure that the police performed their duties. Unfortunately the finding of the two commissions do not support such a position. It will thus be very difficult to defend the claims where the claimants will only need to prove their case on a balance of probability that the police were negligent in the performance of their duties.

Our advice in this matter is that the claims in the two categories (i) and (ii) should be settled out of court to avoid unnecessary protracted litigation which will only increase costs."

This letter was annexed to the application for judgment on liability against the defendants filed by the 16th Plaintiff on 31st May, 2017. It is instructive that it is the 2nd defendant who is the author of this letter yet opposed to the plaintiffs' claim.It is 8 years since that advice was given but nothing has been done to settle the case.

Further, in the application for leave to enter judgment against the defendants, the 16th Plaintiff annexed some documents whose source can only be the defendants themselves, containing sub-committee proposals and recommendations. The title to some of the annexures reads,

"SUB-COMMITTEE PROPOSAL ON POST ELECTION VIOLENCE CLAIMS ASSESSMENT FOR DAMAGES FOR AN OUT OF COURT SETTLEMENT".

The plaintiffs in this suit feature prominently in that document which has not been denied by the defendants even during the hearing. There is evidence on record that an attempt was made to settle this claim out of court. The defendants cannot therefore at this stage run away from liability. In the submissions, the defendants appear to be giving evidence. Counsel is not a witness and submissions may not take the place of evidence.

This is not the only case relating to claims for compensation as a result of the post-election violence in the country. Cases ranged from personal injury to resettlement of victims affected thereby. In **ELC No. 82 of 2009 Samuel Mwangi Gatoto vs. The Attorney General** the plaintiff sought compensation for loss suffered as a result of the 2007 – 2008 post-election violence. The defendant denied plaintiff's claim. In defence the defendant pleaded that it was the duty of the government to afford security to all Kenyans and not specific to the plaintiff. As a result it was not liable to acts of violence of the mob or identified persons.

The court in its judgment observed as follows,

"In donating sovereign power to state organs, in my view creates a responsibility on the state to ensure that the rule of law prevails and that law and order is maintained at all times…… the defendant did not state …. security was put in place to protect the plaintiff or that they sought reinforcement to improve the security in the area and also protect the public from further attacks. This in my view a dereliction of duty.

There has also been mitigation where judgment has been made for compensation for post-election violence for instant the case of Paul K. Waweru and others vs. AG and 2 others (2016) e KLR……. It is therefore my finding that the state failed in its obligation to protect the plaintiff's business from being burnt down. Further even if there was no breach of duty, the plaintiff was entitled to some sought of compensation like the other victims of the post-election violence as paid out by the state. For those reasons I find the defendant is liable to compensate the plaintiff for the loss and damage he suffered as a result of the post-election violence visited upon his business."

See Also **Petition No. 132 of 2011 Florence Amunga Omukanda vs. Attorney General and 2 others (2016) eKLR** and **Civil Case No. 197 Of 2008 George Efedha Madora vs. Attorney General (2012) e KLR.**

The plaintiffs called John Bosco Rusagara P.W. 1 the Chief Executive Officer of the 1st plaintiff to given evidence on behalf of his company and also on behalf of the 2nd to 15th Plaintiffs on whose behalf he held Powers of Attorney. He set out the claims by specific reference to the documents produced which included police abstract, log books, valuation reports and financial statements. All these are contained in P exhit 1. The total claim in P exhit 1 amounts of USD 47,577,081.

The plaintiff also called Faustin Mbundu P.W 2 who represented the 15 plaintiff Katraco (U) Limited. He adopted the evidence of P.W. 1. The other witness who testified was Tom Mugenga the Managing Director of the 16th Plaintiff. He also gave evidence relating to the loss suffered by the 16th Plaintiff and produced P exht 3. Lastly the plaintiff called Abubakar Katende P.W. 4 a valuer employed by Zolm International Limited who carried out valuations to properties belonging to 1st, 15th and 16th Plaintiffs.

From the pleadings and in particular the amended plaint filed on 12th March, 2010 the plaintiffs claim is for general damages, special damages, costs and interest at commercial rates of 24% per annum from 1st march, 2007 to the date of payment.

The value of the plaintiffs' trucks appears in the documents filed on their behalf and all along there was no indication that any objection would be raised with respect to valuations. P.W. 4 Mr. Abubakar Katende who gave evidence stated his qualifications and experience. He is also a certified practitioner who personally undertook their valuations. Expert evidence can only be challenged by expert evidence.

The defendants have not presented any evidence to challenge the valuations presented. Some questions have been raised as to the signatory of the reports. Mr.Katende did not claim to be the signatory. The reports were signed by the Managing Director of his company. In the case of **Arnacherry Limited vs. Attorney General (2014) e KLR**, Lenaola J (as he then was) said as follows,

"52. In evidence before me, the witness who testified on the making and validity of the Valuation Report was one Willis Odede. He testified that he is the one who on behalf of M/S. Syagga and Associates conducted the valuation after visiting the suit land. The report was later signed by Prof. Olima as the person authorized to sign documents of behalf of the said firm.

53. To my mind, the explanation given is not unreasonable neither is it unlawful because the person producing it had "personal knowledge of the matter dealt" in it, within the meaning of Section 35 of the Evidence Act. I am not satisfied therefore that there is any reason why the valuation report should be excluded as is sought by the respondent and that is all there is to say on the issue under consideration."

Mr. Katende's evidence related to what he did and his reasons for his conclusions upon personal examination of the destroyed vehicles. In the case of **Parvin Singh Dhalay vs. Republic (1997) e KLR** the court stated as follows,

"Of course, where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis which such opinion could ever be rejected."

I have already stated that no contradictory evidence was advanced by the defendant and therefore the evidence of Mr. Katende remains uncontroverted. I watched him give evidence and observed his demeanour. He remained firm under cross-examination and I have no doubt that he told the truth. Special damages must be specifically pleaded and strictly proved. The combined value of the plaintiffs' loss relating to the motor vehicles destroyed has been proved by evidence on a balance of probabilities to the tune of USD 47,557,081 as pleaded.

This was a material damage claim. The plaintiffs claimed loss of revenue or business as a result of the loss of the motor vehicles. This is akin to a claim for damages for pain and suffering in personal injury litigation. Some figures have been provided in the submissions which however the defendant submits lack proof and in any case are remotely connected to the destruction. It is expected under such a claim that the plaintiffs would offer some proof in the form of existing contracts to transport goods or some schedules of the trucks which however was lacking in the evidence except by the 16th plaintiff. Such contracts have not been displayed.

There is no doubt however that they lost some business as a result. It is now almost 10 years from the time the cause of action arose. It is hard to say for how long those vehicles would have remained on the road doing the same business for the benefit of the plaintiffs. Long distance haulage of goods is not only straining in terms of wear and tear, but also prone to accidents. Considering the nature of their business but with little any evidence to guide the court, I consider it fair and just to assign 15% loss of business per truck per annum for a period of 6 years based on the value of each truck to carter for loss of business. I leave it to the parties to calculate the loss in that regard.

Evidence has been led with respect to compensation to the goods lost. Decided cases have addressed that issue and in this regard the case of **H.N Kariithi vs. Vivk Investment Limited (2011) e KLR** supports this proposition. It was stated in part as follows,

"I find that it is not disputed that the appellant transported a container carrying goods belonging to the respondent. The issue was whether the appellant carried the goods as a common carrier or a Bailee. As stated in Chitty on Contracts a common carrier is a person who holds himself as willing to carry goods for members of public for reward. …….. Thus the common carrier is responsible for all loss or damage which occurs in the course of transit including loss which occurs through the wrongful act of 3rd parties."

Paragraph 12 of the amended plaint has set out the value of the lost goods attributed to the negligence of the defendants alongside the value of the trucks. The schedule attached to the amended plaint speaks for itself. These figures as I have observed above are not a surprise to the defendants.

The plaintiffs have established on a balance of probability loss of goods set out as particularized in the submissions and therefore are entitled to not only the demurrage charges as a result of destruction of trucks, but also the value of goods destroyed as a result of the defendants' negligence. I hasten to add that no serious challenge was advanced by the defendants in that regard.

The 16th Plaintiff through Mr. Tom Mugenga has given evidence as to the loss of his residential properties in Kenya and Uganda due to the collapse of his businesses following the burning of his trucks. I am persuaded that this was a direct consequence of the loss of his transport business. There is no evidence however that the house in Uganda has been lost as a result. He shall only be entitled to only Kshs. 20,000,000/= for his house on subdivision No. 3918 Section 1 Mainland North Mombasa sold by Bank of Africa Limited.

On a balance of probability he is entitled to compensation as claimed to the tune of USD 16,813,959.25 being special damages. His loss of business shall also be limited to 15% per annum for every truck lost for a period of 6 years based on the value of each vehicle. Once again I leave it to counsel to calculate the figures. Parties are bound by their pleading and any claim not pleaded may not attract the attention of the court. I believe I have addressed the interests of the parties herein guided by the pleadings and evidence presented.

Justification for payment of interest at commercial rates required production of documents relating to the said loans with particular reference to the motor vehicles and business concerns. It is common practice where a motor vehicle is co-owned with the bank, the registration book (log book) would be in the names of both the owner and the bank. This has not been shown.

Where a company borrows money from a bank documents are executed to that effect. None have been shown in that regard. The plaintiffs are entitled to interest but in the absence of proof of commercial rates they are only entitled to interest at court rates.

The end result is that the plaintiffs have proved their cases against the defendants jointly and severally, and therefore I enter judgement as

set out herein above. For avoidance of any doubt, the judgment is in US Dollars or its equivalent in Kenya Shillings at the current market value. They are also entitled to costs and interest at court rates.

Dated, signed and delivered at Nairobi this 28th Day of June, 2018.

A. MBOGHOLI MSAGHA

JUDGE