



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 623 OF 2008

JENNIFER WANJIRA NG'ANG'A..... 1ST PLAINTIFF

JOEL WAINAINA NG'ANG'A 2ND PLAINTIFF

- V E R S U S -

ATTORNEY GENERAL..... DEFENDANT

JUDGEMENT

1. The plaintiffs herein by way of plaint dated 23rd December 2008 filed an action against the defendant for subjecting the plaintiffs to a loss to the tune of kshs.18,303,000/=. The plaintiffs being husband and wife at all material times were owners of land parcels known as no. L.R no. UG/KIMUMU/1244 and VG/RACECOURSE/12490. The aforesaid parcels had been acquired to enhance their value with movable and immovable investments. As at December 2007 the plaintiffs parcels together with the developments therein were valued at kshs.18,303,000/=. Following the post election violence of December 2007 and early 2008, the plaintiffs' properties and investments were set ablaze and others destroyed and stolen forcing the plaintiffs to flee with their family members from their home, thus subjecting the plaintiffs to a loss of properties valued at ksh.18,303,000/=

2. The plaintiffs hold the defendant liable for default acts of commission, omissions and neglect. It is alleged that the defendant;

a. Failed to ensure the safety of the plaintiffs and their properties

b. Failed to use all the intelligence organs to anticipate the likelihood of violence, arson damage and eviction of the plaintiffs and their family.

c. Failed to use available security organs to stop arson, theft and eviction being visited upon the plaintiffs.

d. Allowed impunity to take root in the society with the consequence of arson, theft and eviction.

e. Allowed third parties to evict the plaintiffs and their goods to be set ablaze and stolen

f. Failing to take the moral option to apologise and resign at having failed in discharge of the scope of his office in the particular circumstances of the plaintiffs.

g. Accepting or electing to continue to occupy office, draw earnings, get privileges and enjoy security of office tenure at the cost of tax payers including the plaintiffs without any value and

consideration to the plaintiffs.

3. The plaintiffs sought for judgment in their favour and against defendant for:

a. Compensation in the sum of kshs.18,303,000/=

b. Damages

c. Costs

d. Interests.

4. The defendant filed its statement of defence dated 12th October 2010 in which she stated that: the claim by the plaintiffs is bad in law and not justifiable as it is based on issues which are purely constitutional and which can only be the subject of determination by this honourable court in exercise of its constitutional jurisdiction, and not in exercise of its civil jurisdiction under the Government Proceedings Act Cap 40 Laws of Kenya. The defendant states that the government as at December 2007 had a Ministry of Internal Security with qualified personnel who ensured security for all citizens through the intelligence organs. It was therefore the duty of the plaintiffs to report any insecurities and criminal acts perpetrated against them to be investigated and perpetrators made to face the due process of law.

5. The defendant further stated that this suit is frivolous, scandalous, vexatious and a sham and does not disclose any known cause of action under the Government Proceedings Act Cap 40 Laws of Kenya against the defendant. Therefore, at an opportune time, the defendant will urge the court to strike out the plaintiff's suit with costs.

The defence cross-examination did not displace the substance of the plaintiff's testimony

6. The plaintiff's summoned a total of four witnesses in support of their case.

Jeniffer Wanjira Ng'ang'a (PW1), the first plaintiff and the registered owner of the assets named herein above. She gave the list of properties she owned and narrated the events that took place before the properties were destroyed. She stated that the government was supposed to give her and her family security and protection to live peacefully and enjoy their investments and properties. She alleged that the direct loss she suffered is estimated at kshs.18,303,000/= . PW1 also claimed that she lost increased value of the property and income of ksh.64,552,000/=.

7. Timothy Njuhia (PW 2), a holder of BA Land Economics being a valuer by profession informed the court of the value of the plaintiffs property through a report dated 19/12/2007. PW2 stated that his firm received instructions from Savings & Loan (K) Ltd, Eldoret branch to establish the open market value, mortgage value and forced sale value. The registered owner of the properties to be valued was the 1st plaintiff from the official search dated 21.12.07.

8. Willy K. Sang (PW3), a chief of Chepkoilel location confirmed that the plaintiffs lived and owned the properties which are in his location. He also confirmed that the plaintiffs were victims of the 2007/2008 post election violence.

9. Joel Wainaina Ng'ang'a (PW4) the 2nd plaintiff and husband to the 1st plaintiff regurgitated what the 1st plaintiff(PW1) told this court in her testimony.

10. The defendant did not present any witnesses in support of its defence.

11. They further submit that it is the duty of the government of Kenya, through the police service and other security agencies, to protect the lives and property of its citizens but it failed to do so in the case of plaintiffs, therefore depriving them of their fundamental rights to equality and freedom from

discrimination; freedom and security of the person; their right to privacy and the right to property.

12. The plaintiffs further urge the court to find that they are entitled to compensation for the value of the destroyed and stolen goods, accessories, equipments, tools, animals and farm input and also for damages for the said violations.

13. The plaintiffs aver that their evidence were not controverted by the defendant. Learned counsels appearing in the matter were invited to file written submissions.

The plaintiffs relied on the provisions of Article 29, Constitution of Kenya, on Rights to security which the plaintiffs are entitled to, and Article 40 which provides for the Right to property.

The plaintiffs submit that these obligations placed on the state are unqualified, unlimited and unconditional. The state is not given any excuse to derogate and or compromise and or adjust. It is an absolute obligation placed on the state, to guarantee and secure the property of her citizens. The plaintiffs have also argued that they have not been provided with any form of relieve and or mitigation/consolation for their loss nor given alternative housing, resettlement or access to land or other means of upkeep for themselves and family.

14. The plaintiffs also argued that they and their family suffered and were displaced. The plaintiff further submitted that children being part of the family unit are vulnerable and Article 53 places the obligation on the state to protect children amongst other vulnerable groups. The plaintiffs' also averred that their school going children were forced to relocate therefore their education and housing rights were violated.

15. The plaintiffs sought for payment of Ksh.14,000,000/= for the injury loss, damage and inconvenience suffered as a result of the post election eviction. They relied on the case of **Ibrahim Sangor Osman –V- Minister Of State for Provincial Administration and Internal Security EKLY (2011)**. Where 2,000,000/= was awarded as damages, because of the plaintiffs had not adduced adequate evidence in the tribulations. And the case of **Aracherry Limiter –vs- Attorney General (2014) eKLR** where 3,000,000/= was awarded as general damages for unlawful eviction. The plaintiffs submit that they are entitled to be awarded ksh.7,000,000/= each for their loss, lack of mitigation and economic frustration.

16. The defendant submits that from PW1's testimony, UG/Kimumu/2144 measuring 0.45 hectares was charged on 6/7/04 to Savings and Loans Kenya Ltd to secure ksh. 2m and that the 1st plaintiff discharged the charge on 26/9/2008 and charged the property again on 29/7/2009 to Equity bank for Ksh.1 million. PW1 did not substantiate her assertion that as at December 2007 the parcel of land with the developments therein were valued at kshs.18,303,000/=. The witness did not explain to the court how she computed the various items she claims to have lost. In cross examination the defendant avers that it was clear that the figures were based on estimates and not the actual valuation. It was pointed out that PW1 acknowledged that the government made public offers for compensation for victims of post election violence but she never registered to get the compensation like the other victims did. It is stated that PW1 considered the Government's offer to be meagre and amounting token remittances. The defendant further argued that the evidence of ownership of 10 heads of Ayrshire cows, the heifers, poultry layers, turkey and the animal feeds and the stated costs was not produced. The defendant also argued that evidence was never adduced to show the destruction of motor vehicle registration no. KAA 225B nor was any credible evidence tendered from motor vehicle dealers and valuers to justify the total claim for ksh.450,000/=.

17. The defendant further poked holes on the claim of damages for the twin pumps in the petrol station and loss of 10,000 litres of diesel and 5,000 litres of regular petrol arguing that they were not substantiated. This court was urged to disregard the Plaintiffs' claim for Ksh.18,303,000 and the additional claim for ksh.64,552,000/= for increase in value and loss of income.

18. It is further the submission of the defendant that Timothy Njehia (PW2), a licensed valuer, could not produce evidence of a valid practising certificate for the year 2007 when he carried out the valuation. In cross-examination it came out that he never visited the site to carry out the valuation, therefore no weight should be attached to his testimony.

19. The defendant also pointed out that Senior Chief, Chepkoile, location (PW3) stated that the plaintiffs' house was partially burnt but never saw the items allegedly burnt and he could not justify the figures as stated by the plaintiffs. The list of damages incurred stamped by the chief was not done by him, but by the then chief of pioneer location, the late Peter Samoei. The plaintiffs wrote the list of items they are claiming to have been lost or destroyed but he never saw the respective items himself and therefore he was not in a position to confirm the items and their value.

20. It was further submitted that Joel Wainaina Nganga(PW4) could not explain how he arrived at the values of the properties listed to have been lost or destroyed. The properties are registered in the 1st plaintiff's name. He could not explain the valuations that they recorded at the police station for the properties lost and destroyed. He testified in respect of the single business permit issued by Eldoret Municipal Council which had expired on 31/12/06. Photographs of evidence taken did not show who took them and the valuation of the two petrol pumps and did not state who carried out the valuation. All the documents and licences he was relying on were all expired and could not explain why he could not obtain copies from the respective offices that had issued them considering his assertion that his copies were destroyed in the skirmishes. In cross-examination, he said that the said property UG/KIMIMI/2144 had been sold contrary to the earlier assertion that it had been taken over by invaders.

21. Having considered the evidence presented by the plaintiffs plus the rival submissions three main issues commend themselves for determination. First, is whether or not the defendant owed the plaintiffs a duty to protection.

Secondly, if the answer to above question is in the affirmative, whether or not the defendant can be found liable.

Thirdly, whether or not the plaintiffs are entitled to damages.

22. On the first issue as to whether or not the defendant owed the plaintiff any duty of protection, the plaintiffs have presented evidence to show that in the post election violence which occurred in 2007/2008, they lost various properties and were forced to move out their homes to safer grounds. The plaintiffs have argued that after every election circle in the country, the animosity between tribes is clear and there would always be people from a particular tribe whose lives were always endangered and forever at a disadvantage for being minority like them. The plaintiffs are of the strong view that the police owed a duty to the most disadvantaged group which the plaintiffs found themselves in. The plaintiffs relied on the provisions of Articles 29 and 40 of the Constitution of Kenya, 2010 which clearly provides for protection of the citizens of Kenya from violence either from the public and private sources. The defendant is of the view that the police do not owe a duty to an individual but to the general public. It is clear to me that Article 40 of the Constitution of Kenya, 2010 places affirmative constitutional duty on the state and its agencies not to deprive any person of their properties until the due process of law is followed. With respect, the aforesaid Article does not place on the state and its agencies a positive constitutional obligation to protect private persons from harm or potential harm that may be visited upon them by other private reasons. It is also apparent from the aforesaid Article that the police owe a duty to the public to maintain law and order and to protect property and lives. With respect, I agree with the arguments of the defendant that the duty is owed to the public at large and not to any specific individual unless there is proof that the police were the aggressors or created the danger which the victim is exposed or that there existed a special relationship between the police and the victim of the violence or crime.

23. In **Deshaney =vs= Winnebago County Department of Social Services 109 S.ct. 998 (1989)** the United States Supreme Court had the occasion to interpret the due process clause of the Fourteenth Amendment which provision is similar to Article 40 of the Constitution of Kenya, 2010 and expressed itself inter alia as follows:

“But nothing in the language of the Due Process Clause itself requires the state to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act not as a guarantee of certain minimal levels of safety and security. It forbids the state itself to deprive individuals of life, liberty or

property without due process of law, but its language cannot fairly be extended to impose an affirmative obligation on the state to ensure that those interest do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the fifth amendment, the due Process Clause was I entered to prevent government from using (its) power of employing it as an instrument of oppression ...”

24. In short, I am convinced that the defendant owed a duty to the public at large and not to specific individuals by application of the Public Duty Doctrine. One of the underlying reason for the Public Duty doctrine is so as to allow Government agencies particularly the police to conduct their duty efficiently without fear of litigation or sanctions for compensation and also to prevent imagined claims as well as waste of public resources in defending such claims.

25. Having determined, the first issue, I now turn my attention as to the question as to whether or not the defendant can be held liable in the circumstances of this case. In **Deshaney case**, the U.S Supreme Court proceeded to further state as follows:

“If the Due Process Clause does not require the state to provide its citizens with particular protective services, it follows that the state cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a state’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”

In **Westminster Investing Corporation vs= G. C. Murphy Co. 434 F.d2 521, 526** the premises and property the subject of the suit were destroyed by a riotous mob following the assassination of Dr. Martin Luther King in April 1968. Officials of the Metropolitan police Department of the District of Columbia had decided to limit police presence in the area of the Murphy Company’s store during the 1968 riots. Murphy’s store was destroyed and the company filed a claim against the District of Columbia contending that the police department had deliberately or negligently abandoned its policing obligations during the riots and thereby permitted rioters to destroy Murphy’s property. The United States Court of Appeal for the District held that the District of Columbia had no direct legal obligation to Murphy and that Murphy, therefore, had no substantive right to recover the damages resulting from the failure of the government or its officers to keep the peace. **Turner v. Unites States, 248 U.S 3543, 39 S.Ct. 109, 63L. Ed. 291 (1919)** was quoted.

26. In the circumstances of this case, I am not convinced that the defendant can be held liable for the damage and or destruction visited upon the plaintiffs as a result of the post election violence. There was no special relationship between the police and the plaintiffs to found liability on the police for the actions of armed gangs.

27. The third and final issue is the question in relation to quantum of damages. I must first state that having found the defendant not liable then no damages can be awarded. However, the law enjoins the court to determine the issue and make a finding supposing the plaintiffs had succeeded. Both plaintiffs tendered documentary evidence proving the particulars of loss in the sum of kshs.18,303,000/= . Though the defendant attempted to challenge the authenticity of the documentary evidence tendered by the plaintiffs, the defendant failed to summon witnesses to controvert the same. This amount is specifically pleaded as special damage. If the action had succeeded I would have awarded the plaintiffs this amount as pleaded and specifically proved.

28. The plaintiffs had also asked to be paid each general damages in the sum of kshs.7,000,000/= . I find this claim to be exorbitant in view comparable of the past awards submitted. I would have awarded each plaintiff a modest sum of kshs.2,500,000/= an this head. Had the plaintiffs succeeded I would have awarded them ksh.23,303,000/= representing both general and special damages.

29. In their submissions, the plaintiffs beseeched this court to award them a sum of ksh.64,552,000/= representing loss of value and income on their assets and investments. In my view, this claim ought to be specifically pleaded and proved. It cannot be categorised as general damages. Having failed to plead for

the same, I decline the invitation to make an award.

30. In the end, I find no merit in the suit. It is dismissed in its entirety. In the circumstances of this case, a fair order on costs is to direct, which I hereby do that each party bears its own costs.

Dated, Signed and Delivered in open court this 31st day of October, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant