



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 154 of 2008

MECHAI INTERNATIONAL LTD.....PLAINTIFF

**VERSUS
TIMOTHY BUSIENEI
DR. R.N WAMBUGU**

ELIUD YEGO.....DEFENDANTS

JUDGMENT

1. The Plaintiff, MECHAI INTERNATIONAL LTD is registered company limited by guarantee and filed a suit against the Defendants seeking the following prayers
 - (a) The sum of Kshs 63, 860,408/=
 - (b) General and exemplary damages
 - (c) Costs.
2. The Plaintiff is the registered owner of the parcel of land known as ELDORET MUNICIPALITY BLOCK 13/444.
3. The Defendants are the officials of ELDON VIEW RESIDENTS ASSOCIATION and are also residents of ELGON VIEW ESTATE situated in Eldoret.
4. The Plaintiff is in the business of construction of churches, orphanages, schools and charitable institutions. The Plaintiff sought to put up a workshop on the aforementioned premises. Before doing so, it applied for a change of user of the premises from the Eldoret Municipal Council. The change of user was from residential to industrial.
5. The Defendants being residents of Elgon View Estate and fearing that the change of user would jeopardize their health, security and would also interfere with their properties filed objections to challenge the change of user.
6. The genesis of the suit arises from the Defendants decision to challenge the change of user and the Plaintiff claims that the Defendants actions stalled the Plaintiffs venture and the Plaintiff suffered loss and damage.
7. The Plaintiff called two (2) witnesses to testify on its behalf and the Defendant also called two (2) witnesses.

8. The issues for determination that arise after hearing the evidence of the witnesses and also from reading the written submissions and hearing the highlights of oral submissions of both the Plaintiffs and Defendants Counsel are:

(a) Special damages

(b) General and exemplary damages

(c) Costs.

9. The first witness, SOREN PEDERSON (**PW1**) gave evidence and stated that he was the Director of the Plaintiff company.

10. That the Plaintiff had applied for change of user from the Eldoret Municipal Council and the same was approved and granted.

11. That the approval was suspended pending the hearing of the objection brought by the Defendants.

12. The Defendants also proceeded to file suit against the Plaintiff in **ELDORET CMCC 793 "A" of 2004** and obtained injunctive orders against the Plaintiff.

13. The Defendants also filed an appeal **CASE NO. 10 OF 2006** at the National Environmental Tribunal.

14. The witness testified that the objection raised by the Defendants was dismissed.

15. The objection raised at the National Environmental Tribunal was also dismissed and finally the **ELDORET CMCC 793 "A"** was dismissed as well.

16. As a result of the Defendants actions the witness contended the Plaintiff suffered loss and damage and proceeded to enumerate the loss or revenue and also produced electricity bills, rent receipts, rates receipts for the premises, litigation costs and transport costs all totaling the sum of Kshs 63, 860,468/=

17. The Plaintiff claims the above amount as special damages.

18. In defence NICHOLAS MACHARIA WAMBUGU **DW11** the Secretary of the Defendant Association stated that the association was formed to deal with the welfare of the area. To keep the area organized, neat and to protect the area.

19. The witness confirmed that the objection was filed so as to stop the Plaintiff from putting up a Light Industry that would spoil the area.

20. They sought assistance from NEMA and filed an appeal with the Tribunal which was heard and determined and the ruling was an "observation" and that each party was condemned to bear its own costs.

21. The Defendants prayer was that the case be dismissed as the actions of the Defendant were not unlawful or illegal or unreasonable.

22. This court must assess and determine whether the defendants action to stop the Plaintiffs was wrong and whether the Plaintiff has established a cause of action warranting compensation byway of damages.

23. The Plaintiff's submit that all the objections raised by the Defendants were dismissed. The one raised at the Eldoret Municipal Council was dismissed. The Defendants lost **ELDORET CIVIL CASE NO. 793 "A" OF 2006** and the objection before the National Environmental Management Authority (NEMA) was disallowed. The Plaintiff submits that the Defendant must bear the consequences of losing he objections. A party who places unnecessary obstacle should also be made to bear the consequences of their objections or actions.

24. For the Plaintiff to claim special damages it must establish that the Defendants actions were wrongful.

25. Special damages are defined in the Blacks Law Dictionary as;

“ damages that are alleged to have been sustained in the circumstances of a particular wrong.”

26. Under the provisions of Section 26 of the Physical Planning Act the Defendants have a right to raise objections

27. The Defendants also paid a premium for their properties and must have put up palatial residences and the Plaintiff did inf act submit that it was within the Defendants Constitutional Right to lodge the objections.

28. The Defendants also have a Constitutional Right to protect their property if their rights particularly to peaceful enjoyment are denied, violated or infringed upon or threatened.

29. To be awarded special damages the Plaintiff must prove that the actions of the Defendants were wrongful and the Plaintiff must specifically claim and prove the amount claimed.

30. Form the evidence adduced by the Plaintiff and on a balance of probabilities this court finds that the Plaintiff has not proved that the actions of the Defendants were wrongful, illegal, unlawful or were actuated by any malice.

31. The court reads tenacity in the Defendants quest for justice and the subjections even though they were eventually all dismissed the same were not wrongful.

32. For those reasons this court finds that the Defendants are therefore not liable to pay the Plaintiffs special damages.

33. To prove special damages of Kshs 59,974, 131/= the Plaintiff called **JACKSON WETOSI (PW2)**. The witness is a Certified Public Accountant working with the firm of **JACKSON WETOSI and ASSOCIATES**.

34. The witness testified that he had received instructions from the Plaintiff company to estimate the cost revenue.

35. **PW 2** stated that he had utilized audited accounts for the years 2003 to 2007 to project and support he Plaintiffs estimated loss of revenue.

36. In cross-examination the witness acknowledgment that he did not have the said audited accounts with him in court and that is why the same were not produced in evidence as exhibits.

37. The witness also conceded that the Plaintiff was a non-governmental organization was also not in the business of making profits. That it was a charitable organization Dependant on donor funding.

38. The word revenue has been described in the Blacks Law Dictionary as:

“ gross income or receipts.”

39. The Plaintiff claims the sum of Kshs 59,974,131/= as lost revenue. This figure is being claimed as special damages.

40. The Plaintiff in evidence confirmed that the business at the suit premises had stalled and the witness PW2 confirmed that figure was speculative.

41. It is trite law that a speculative figure cannot be classified as special damages because there is no evidence to facilitate reimbursement.

42. The Plaintiff company is a non-profit organization and is Dependant on donor funding therefore the issue of profit does not obtain.

43. On the issues relating to general and exemplary damages this court shall not belabor this issue as the Plaintiff has not proved on a balance of probabilities that there was some form or any form of wrong doing committed by the Defendants to warrant compensation in the form of general or exemplary damages.

CONCLUSION:

44. For those reasons stated above the Plaintiffs case is hereby dismissed.

45. Each party shall bear its own costs.

46. It is so ordered.

Dated and delivered at Eldoret this 23rd day of January 2013.

**A.MSHILA
JUDGE**

Coram:

Before Hon. A Mshila J

CC: Oscar

Counsel for the Plaintiffs: Mwaka

Counsel for the Defendants: Kitiwa

**A.MSHILA
JUDGE**