REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 256 of 2002

RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED…...…….PLAINTIFF

VERSUS

KENYA WILDLIFE SERVICES……DEFENDANT

JUDGMENT

The plaintiff, Rift Valley Agricultural Contractors Limited, brought this action in the year 2002 against the defendant, Kenya Wildlife Services claiming general, special and exemplary damages for the loss occasioned to the former's crops by wild animals.

According to the plaint, the animals, namely wild beasts, zebras, antelopes, *inter alia*, invaded in droves, the plaintiff's plantation of wheat and barley crops and destroyed 1,689 hectares of the crops. The estimated value of the damaged crops and the inputs is pleaded as Kshs.64,160,130/=. Efforts to have the government compensate the plaintiff for this loss having failed, the plaintiff brought this suit.

In defence, the defendant raised the following two broad grounds:

i) that it was wrongly sued in this case;

ii) that it is not liable for the reason that it was not negligent, or in breach of any statutory duty.

Through its chairman, P.W.1, Benson Njiru Karanja, the plaintiff led evidence to the effect that the plaintiff had leased land from the local community in the area near the famous Masaai Mara National Reserve and planted both wheat and barley crops on 7000 acres.

In the month of May, 2000, wild animals believed to have come from the neighbouring Tanzania descended on the farm after damaging the eight-strand barbed wire fence and grazed on 1600 hectares of wheat and 400 hectares of barley. Reports were prepared by Kenya Breweries Limited, Wheat Growers Association, Divisional Agricultural Officer, Ololulunga, Ministry of Agriculture and Rural Development, the District Commissioner, Nakuru, among others. Several letters were also exchanged between the plaintiff and other persons and institutions regarding the loss in question.

P.W.2, Shem Shikuku Shikulu, the District Agricultural Officer, Narok South, produced two reports prepared by the Divisional Agricultural Officer, Ololulunga dated 9th June, 2000 and 30th June, 2000 and one prepared by the District Agricultural and Livestock Extension Officer, Narok, the combined effect of which is that the plaintiff suffered loss as a result of the invasion of the farm by wild animals. The reports also give the value of the destroyed crops.

P.W.3, David Gagicha Nyenjeri prepared the Kenya Breweries Limited report dated 7th August,

2000 after visiting the farm and assessing the damage to the crops. The plaintiff had a contract with Kenya Breweries Limited hence the latter's involvement.

The case for the defendant was presented by D.W.1, Muteru Wathutu Njauine, a Warden 1 with the defendant deployed in Central Rift Conservancy which covers Narok and Transmara Districts. At the time of this incident the witness was working in Kakamega and could not testify on the events leading to this claim. It was his evidence that wildlife in Kenya does not belong to the defendant but to the Government of Kenya; that compensation for crop destruction is made through the District Wildlife Compensation Committees and compensation paid by the relevant Ministries and not the defendant.

In summary, the foregoing constitutes the evidence presented in this claim. It is not in dispute that wild animals from the park invaded the plaintiff's farm and devoured mature barley and wheat crops grown on the farm. There is also no doubt that as a result of the invasion and destruction of the crops the plaintiff suffered loss. The only two broad questions that fall for determination are, one, whether the defendant is liable for the loss and, two, whether the plaintiff has proved the nature and extend of that loss.

Starting with the first question, the plaintiff's claim is based on breach of statutory duty, negligence, the rule in **Rylands**V. **Fletcher** and nuisance. The defendant is established under **section 3** of the **Wildlife (Conservation and Management) Act (the Act)** as a uniformed and disciplined service. The functions of the defendant are set out, in pertinent part, in **section 3A** as follows:

"3A. The functions of the service shall be to-

(a)formulate policies regarding the conservation, management and utilization of all types of fauna (not being domestic animals) and flora;

(b) advise the Government on establishment of National Parks, National Reserves and other protected wildlife sanctuaries;

(c) manage National Parks and National Reserves;
……;

(i) provide advice to the Government and local authorities and landowners on the best methods of wildlife conservation and management and be the principal instrument of the Government in pursuit of such ecological appraisal or controls outside urban areas as are necessary for human survival;

……..;

(l) render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife."

The foregoing provision vests in the defendant the responsibility of conserving and managing all the wildlife within Kenya. The defendant similarly exercises an advisory role to the Government, landowners and local communities on the best methods of wildlife conservation, in addition to providing services to the farmers in all parts of the country for purposes of protecting crops and domestic animals against destruction by wildlife.

Before the amendment to **section 62(1)** by the **Act No.16** of **1989**, there was provision for compensation of any person who suffered bodily injury or death or loss of crops or property caused by any wildlife. However, with that amendment, compensation for damage or loss of crops or property destroyed by wildlife was removed. In place of compensation, the amendments placed an obligation upon the defendant to ensure that the farming and ranching communities in Kenya are protected against loss to their crops and animals from the wildlife.

See **Joseph Boro Ngera & Superduka Nakuru Limited** V. **Kenya Wildlife Services**, Civil Appeal No.171 of 1997.

Clearly, from the defendant's functions enumerated under **section 3A (a)** to **(l),** some of which I have reproduced, there cannot be any doubt that the defendant is under a statutory duty not only to formulate policies on all issues of wildlife but also to ensure, among other things, the protection of crops and other domestic animals against destruction by wild animals.

There is overwhelming evidence that indeed from the month of May through to the month of July, 2000, wild animals, mainly wild beasts, zebras, antelopes and others, numbering about 5000 descended upon the plaintiff's farm and destroyed crops of wheat and barley. The fact that this happened is evidence that the defendant failed in its duty to protect the plaintiff's crops as required by law. The farming community including the plaintiff had planted. There was drought and the only source of water and vegetation were the farms, yet the defendant did not advise the Government on the best method to avoid the invasion of the farms by wild animals. The plaintiff on their part had fenced the farm as that was all they were expected to do. But due to the sheer numbers of animals involved, the fence was no match. The defendant was alerted of the imminence of the invasion but reacted when it was too late.

Although the provisions dealing with compensation for damage to crops and property was removed in the Act the Court of Appeal in **Joseph Boro Ngera** (supra) held that the absence of provision for compensation in itself was no bar to an aggrieved party to claim damages under the common law.

So, what quantum damages is the plaintiff entitled to? According to the plaint, the plaintiff seeks general, special and exemplary damages. But in his testimony, the plaintiff's chairman concentrated his evidence only on special damages. The written submissions similarly deal mainly with the question of special damages.

It is trite learning that special damages must first be pleaded and then strictly proved. There are authorities in abundance dealing with that requirement. See **Kampala City Council** V. **Nakaye** (1972) EA 446 Ouma V. **Nairobi City Council**, (1976) KLR 297, **Eldama Ravine Distributors Limited & Anothe**r V. **Samson Kipruto Chebon**, Civil Appeal No.22 of 1991 and **Coast Bus Service Limited** V. **Sisco E. Murunga Ndayi & 2 others,** Civil Appeal No.192 of 1992.

In the last mentioned case, the court stated that:

"It is only when the particulars of the special damages are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars."

In the plaint, the plaintiff claims Kshs.64,160,130/= made up as follows:

i) Loss of wheat – Kshs.50,565.600/=

ii) Loss of barley – Kshs. 10,980.000/=

iii) Cost of guarding the farm Kshs.2,614,530/=

An estimate by Kenya Breweries Limited which was the subject of David Gagicha Nyenjeri's testimony put the loss for the damaged barley at Kshs.7,470,820/=. The Divisional Agricultural Officer, Ololulunga in his first report dated 9th June, 2000 estimated that the plaintiff lost wheat worth Kshs.27,000,000/= and Kshs.4,500,000/= worth of barley (see report dated 30th June, 2000), making a total of Khs.31,500,000/=.

In their demand letter to the defendant, the plaintiff's advocates sought compensation in the sum of Kshs.65m – (see a letter dated 31st July, 2000 from Kigano and Associates Advocates).

Finally, the Ministry of Agriculture and Rural Development (as it was known in the year 2001) made a

report dated 6th September, 2001 in which the total loss suffered by the plaintiff was estimated at Kshs.45,470,820/= constituted as follows:

First wheat assessment – Kshs.27,000,000/=

Second wheat assessment – Kshs.11,000,000/=

Barley assessment by KBL – Kshs.7,470,000/=

The plaintiff's chairman, P.W.1 Benson Njiru Karanja stated in his evidence that he preferred the above estimates by the Ministry of Agriculture and Rural Development. His preference notwithstanding, the plaintiff was required to prove the loss.

According to the report of 30th June, 2000 by the Divisional Agricultural Officer, out of 400Ha of barley, 200Ha was completely damaged. He estimated the expected yield at 12.5 bags per Ha and estimated price of Kshs.1,800/= per bag which translated on the salvaged 200Ha as follows: 200 x 12.5 x 1,800= Kshs.4.5m.

Kenya Breweries estimates for the same crop is Kshs.7,470,820/= and the yield per hectare is clearly exaggerated at 15 bags. The actual acreage of the damaged crop is given as 400 Ha instead of 200 Ha. What has been proved to the satisfaction of the court for loss of barley is therefore Kshs.4.5m.

On the loss of wheat, the Divisional Agricultural Officer, Ololulunga gave a report dated 9th June, 2000 and noted that wheat was planted on 2000 Ha. 1200Ha of the wheat crop was destroyed as at the date of the report. Yield expected was 12.5 bags per hectare, at a price of Kshs.1,800/= per bag translating to 12.5 x 1800 x 1200 = Kshs27,000,000/=. Although not the author of the report, P.W.2, Shem Shikuku Shikulu explained how the above figures were arrived at and I am satisfied that the sum of Kshs.27,000,000 has also been proved on a balance of probability as the loss of wheat crop damaged by the wild animals.

There is however, no evidence at all that there was a second assessment of the loss of wheat conducted on 29th June, 2000 which estimated further loss at Kshs.11m as claimed in the plaint.

In the result, judgment is entered for the plaintiff in the sum of Kshs.31,500,000/= as explained above.

I also award costs and interest to the plaintiff.

Dated, Delivered and Signed at Nakuru this 27th day of July, 2011.

W. OUKO
JUDGE