



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 496 of 2004

JAMES MUIGUA GACHIMO PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF MERU DEFENDANT

HON. ATTORNEY GENERAL THIRD PARTY

JUDGMENT

On 14th May, 2004, Mr. James Muigua Gachimo, the Plaintiff herein, filed a Plaint in this Court claiming damages of Shs.8,813,000/= from the Municipal Council of Meru, the Defendant herein, arising from the demolition of his building located on Plot No. Madaraka 97 within Meru Municipality (hereinafter “the suit property”).

In its Defence, filed on 1st July, 2004, the Defendant denied that it demolished the suit property, and claimed that it was the “officers of the Government” that did so, and invoked third party proceedings to join the Honourable Attorney General, seeking contribution and indemnity, from the Government. The Third Party filed its Statement of Defence on 8th November, 2005. In a rather strange and contradictory statement, it both admitted and denied the demolition. Paragraph 5 of the Defence states:

“5. The Third Party denies being responsible for the said demolition.”

and paragraph 7 states:

“7. The Third Party further avers that the demolition was carried out per the provisions of the Physical Planning Act and the Local Government Act hence they cannot be held liable for the same.”

Paragraph 6, which invokes the principle of alternative pleading states as follows:

“6. The Third Party avers in the alternative to the averments in paragraph 5 aforestated that the said demolition was lawfully done after sufficient notice had been given to the Plaintiff and was done in accordance to and pursuant to the law as the structure subject matter of this suit was erected on a road reserve.”

In addition to the above pleadings, the Third Party filed written submissions, part of which states as follows:

“It is the Third Party’s case that the demolition was lawful and was carried out pursuant to the

provisions of both the Local Government Act (Cap 265) and the Physical Planning Act (Cap 286) after a valid notice had been issued to the Plaintiff.”

Based on this submission, and the pleadings filed by the Third Party, I find that the Third Party has admitted that it was its officers that carried out the demolition. I wanted to outline this important finding of fact in advance for two reasons: first, that some considerable time was spent on examining witnesses at trial about who exactly it was that carried out the demolition, and secondly, because of this clear-cut finding, I do not now need to analyse the fairly long evidence before the Court relating to this particular issue.

So, the central issues before this Court, are whether the demolition was lawful, and if not what is the measure of damages that may be awarded.

1. Was the demolition lawful?

In its submissions before this Court, Mr. Bitta, Counsel for the Third Party, argued that the demolition was lawfully carried out under the provisions of the Local Government Act (Cap 265) and the Physical Planning Act (Cap 286) because the suit property was located on a road reserve. The Third Party called no evidence whatsoever, and produced no documents or material before this Court, to show (i) that the suit property was indeed located on a road reserve, and (ii) that it followed “due process” in demolishing the same. Instead, the Third Party relied on the evidence of DW1, Joseph Nturibi Mwithimo, who is employed as a Works Officer with the Defendant, whose main function at this trial was to produce “work tickets” of the motor vehicle alleged to have been used in the demolition. It is this witness who claimed during cross-examination that the suit property was located on a road reserve. However, he produced no documents, records, or material to justify this extremely important point. Nor do I believe he had the authority and competency to advance such testimony, and I do not regard his evidence on this point as credible.

On the other hand, the evidence of the Plaintiff and his witnesses point credibly to the fact that the allocation of the land, and the construction of the suit property, was undertaken lawfully, and approved by the Defendant.

The Plaintiff, who was, at the material time, a businessman selling food products at the suit premises gave evidence that the suit plot was first allocated to him in 1985 on a temporary basis. By a letter dated 4th May, 1995 (PEX1) the Defendant formally allocated the same to him. On 27th February, 1998 the Defendant again wrote to him saying that the suit property was recorded in his name; that he should pay the necessary fees, and contact the Town Engineer and District Physical Planning Officer for further advice. He did exactly that. In consultation with the latter, he prepared a building plan (PEX.3) and built a permanent structure on the plot. He then obtained the Occupation Permit, which is exhibit No. 4 in this suit. He paid his rates and rents and business licence fees regularly, as per receipts produced in this Court.

According to his testimony, on 3rd October, 2003, there was a meeting of Town Planning Council when all the plot allocations were discussed (PEX.16 – Minutes of Meeting). There was nothing said of his plot being on the Road Reserve. However, on 13th February, 2004, the Defendant painted a huge “X” mark on the suit property, indicating that it was set for demolition. He visited the Defendant’s offices, met with its officers and got assurance “that it meant nothing and was of no consequence.” The Defendant even wrote to him by its letter dated 13th February, 2004, confirming that he was safe and that no demolition would take place. Despite all this assurance, on 5th March, 2004, the suit property was indeed demolished, by the Third Party, as I have found. I find that the Plaintiff presented a credible case, based on a balance of probability, that he was lawfully allocated this plot, that he obtained all the necessary permits to build on the same, and to operate a business on the same, and that the demolition was completely unjustified and unlawful. **I find further that there is no credible evidence before this Court, that the suit property was located on a road reserve. By its own admission, I find the Third Party liable for this unlawful act.**

2. Damages

The next issue is the quantum of damages. It is trite law that special damages should be specifically pleaded and strictly proved. The Plaintiff's claim for damages falls under two heads:

a) Damage to building: Shs.3,195,000/=

b) (i) Loss of food items: Shs.2,918,000/=

(ii) Loss of business: Shs.2,700,000/=

Total Shs.8,813,000/=

With regard to the claim for damage to the building, I find that the Plaintiff has produced credible evidence showing that the building cost Shs.3,195,000/= to construct. He also consulted with a Quantity Surveyor, to prepare an estimate of the current replacement cost. Mr. David Mwangi Gaitho, a Quantity Surveyor, practicing in the firm name of Amazon Consultants (PW3) testified before this Court regarding the estimate, and produced his report (PEX. 19) which shows the replacement cost of Shs.3,543,319/50.

The Plaintiff has produced receipts and documents relating to labour and material used toward the construction of the suit property. I am satisfied that on a balance of probability, he has established his claim for Shs.3,195,000/= in respect of damage to the building.

With regard to his claims for loss of food items, being stock in trade, amounting to Shs.2,918,000 and loss of business of Shs.2,700,000, **I find these claims grossly exaggerated, and not proved on a balance of probability.** The Plaintiff produced a Sales and Purchases account for the period 2003/2004 showing fairly large volumes of receipts and payments. Indeed, he claims he lost stock worth Shs.2,918,000/= but had considerable difficulty answering simple questions like where did he indeed store these huge quantities of food; why would he need to carry such huge items of partly perishable foods; why did he not have a bank account to deposit fairly large sums of money that he received; and why had he not produced his tax returns to show how much the business paid in taxes. I find that all his other claims have not been proved on a balance of probability, and I reject the same. The onus is always on the Plaintiff to establish his case. He has not discharged that onus with respect to his claims of loss of food items, and loss of business.

Accordingly, and for all the reason outlined, **I enter Judgment for the Plaintiff for Kshs.3,195,000 against the Third Party. I also award him costs, and interest at Court rates. The Third Party shall also pay the costs of the Defendant.**

Dated and delivered at Nairobi this 28th day of March, 2007.

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ALNASHIR VISRAM

JUDGE