



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

Civil Case 2901 of 1995

CAPTAIN GODFREY JULIUS NDUMBA PLAINTIFF

VERSUS

NAIROBI CITY COUNCIL DEFENDANT

JUDGMENT

By the Amended Plaintiff dated 4th September, 2006, the Plaintiffs claim from the Defendant the sum of Kshs.180,655,000/= in special damages arising from loss of business and other actual losses suffered by them as a result of trespass on the Plaintiff’s land and destruction thereon of property, and other illegal conduct of the employees, agents and workmen of the Defendant (for whose illegal acts the Defendant is vicariously liable) **“on various and diverse dates, before and after 20.06.1994; 06.10.1994 and 03.11.1994”**. The losses and special damages claimed by the Plaintiffs include:

1. Chicken enclosures and stores;

Workers premises and other structures..... Kshs. 2,500,000/=

2. Chicken feeds, feeders, water drinking

Equipment, wiremesh, corrugated Iron

Sheets and other items on the land Kshs.1,500,000/=

3. Loss of Business by the Plaintiff over

The yearsKshs.107,000,000/=

4. Other losses occasioned by illegal acts of the Defendant’s servant, resulting in Auction by various Banks and Financial Institutions of the properties of the Plaintiff.....
hs.73,655,000/=

It is explained that the properties referred to in item 4 above had been pledged by the Plaintiffs to various Banks as collateral to the institutions to secure credit for the poultry business. The Plaintiffs identify the auctioned properties in paragraph 10 C of the Amended Plaintiff and a summary of the Plaintiff’s claim, for special Damages have been outlined in paragraph 11 of the Plaintiff.

The basis of the Plaintiff's case is that the first plaintiff had purchased a two (2) acre portion of land from No. NAIROBI/KASARANI/12499 from one James Robert Kigunda (also written Robert James Kigundi) who at one time was an employee of the Defendant. But the two acres portion had not yet been transferred into the name of the First Plaintiff although some transfer process was commenced.

The vendor James Robert Kigunda in whose name the portion of land is registered is not included as party to this suit and from the evidence, the above mentioned transfer process seems to have run into trouble as otherwise there should have been no case, Nairobi High Court Civil Case No.6195 of 1991 between the First Plaintiff and the vendor James Robert Kigunda over possession and occupation by the First Plaintiff of the suit portion of land. Since the Plaintiff's evidence is that a restraining order in Civil Case No. 6195 of 1991 in favour of the First Plaintiff and against the said Robert James Kigunda was registered at the Lands Office against the suit title as Entry No. I.R.52210/10 on 14th January, 1992, then it means the suit title emanates from the Commissioner of Lands through the Defendant to the said Robert James Kigunda through whom the First Plaintiff was trying to get that title but to-date the First Plaintiff has not succeeded in doing so despite the fact that as far back as the year 1994 the Plaintiffs had started carrying out, on the suit portion of land, the Poultry business that has given rise to this suit.

From the nature of the Plaintiff's claim, the poultry business cannot be said to have been undertaken on a small scale. Special damages only having been put at the total value of **Kshs.180,655,000/=** before adding exemplary and/or punitive and/or general damages, is no small business.

The Plaintiff's are now relying upon the injunction court order in HCCC No. 6195 of 1991; the fact of the existence of City Magistrate Criminal Case No. 1190 of 1992 – REPUBLIC (Nairobi City Council) – vs - ROBERT JAMES KIGUNDA where Plaintiffs were not also prosecuted and the absence of documentary evidence concerning the sale and transfer transaction between the Plaintiffs and Robert James Kigunda; to get legitimacy against the City Council of Nairobi – the Defendant in this suit, may be, with the intention that thereafter they may be able to gain some mileage towards acquisition of the title.

The Defendant's case is that the Defendant did not demolish the said structures and further that the structures should not have been on the land, in the first place, as the same had not been authorized by the Defendant and the Plaintiffs had not been authorized to carry out on the business they were carrying out on the land as the primary user of the land in that zone was residential and not agricultural as the Plaintiffs were purporting to put it to use.

Concerning the Plaintiff's argument that they could not produce documentary evidence such as relevant permits and licenses because the Defendant's agents/servants had carried them away when they did the alleged demolition, the Defendant replies that the Plaintiffs could have obtained copies from the relevant departments of the Defendant or from the land Office and the Defendant points out that the Plaintiff's never even served a notice to the Defendant to produce the documents, if any.

The Defendant points out that since the area or zone 18 in which the suit portion of land is found is a residential area, to carry out the type of business the Plaintiffs were doing needed a permit for change of user grantable by the Defendant upon application by the person intending to do the business. If such an application were ever made, copies of various documents would have been available, at least in the Defendant's relevant departments.

The Defendant explained that in Criminal Case No. 1190 of 1992, Robert James Kigunda was prosecuted alone because he was the registered owner of the suit portion of land. He was the legal registered owner and the Defendant avers that that in itself that prosecution was proper notice and consequently any demolition by the Defendant's servant, if done, would have been in conformity with the laid down procedure and lawful as by law the Defendant was required to serve the notice upon the registered owner only. He was to be served with notice to remove the offending structures which the Defendant had done to Robert James Kigunda giving rise to his successful prosecution in the above mentioned Criminal Case. The Defendant cannot be held responsible for the registered owner's failure to notify the Plaintiffs of the requirement to remove the offending structures.

The Defendant says that it has the task of ensuring that developments in the City of Nairobi are well planned and orderly. That cannot be done if parties like Plaintiffs in this case run to court for the type of court orders sought in this suit. The Defendant points out further that Plaintiffs have not adduced sufficient evidence to show how they arrived at the figures in the special damages claimed.

Having carefully considered all that I have referred to above in the light of all that was brought to my attention during the hearing of this suit, it is my opinion the position should be as stated by the Defendant and therefore the Plaintiffs have not satisfied this court on the basis of the evidence on record, even on the balance of probabilities, that the Defendant is liable to pay the Plaintiffs what the Plaintiffs are claiming in this suit. Having failed to prove that they are the registered owners of the suit premises and that the lawful user of the suit premises is the type of business for which they seek damages against the Defendant, the Plaintiffs instead come out (to use a mild language) as unauthorized occupiers whose stay on the suit premises should not be secured by the Defendant whatever the magnitude of the developments the Plaintiffs may have effected on the suit premises. The Defendants have the lawful duty to see that developments in the City of Nairobi is not only orderly but also lawful and since the development the basis of the suit herein ignores those basics, even if indeed that development was effected to the magnitude claimed. I would not accept the Plaintiff's claim. Today is end the year 2007. If a party relying on a sale agreement of the year 1994 or earlier, is today not the registered owner of the suit portion of land, what merits can the relevant suit have? I see none. Accordingly this suit is hereby dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 13th day of December, 2007.

J. M. KHAMONI

JUDGE

Present:

Mr. Adala for the Plaintiff

Mr. Osiemo for the Defendant

Buoro Court Clerk

Further Order:

Upon oral application by Mr. Osiemo

Defence exhibits D1 and D2 released to Mr. Osiemo who promised to produce them should they be further required by the court.

Further certified copy of this Judgment and certified copy of the proceedings may be supplied to the parties on payment.