



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Suit 37 of 2000

JOSHUA KASINAPLAINTIFF

Versus

THE DISTRICT WORKS OFFICER MWINGI1ST DEFENDANT

SIMON KIERU.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

AND

MWINGI TOWN COUNCIL.....THIRD PARTY

JUDGMENT

JOSHUA KASINA, by a Complaint dated 24th January 1997 has sued three defendants that is District Works Officer Mwingi, Simon Kieru and the Attorney General, claiming special and general damages and costs of the suit for damages cost to him when the 1st and 2nd Defendants trespassed into his plot No. 25 at Mwingi Market using a grader Reg. No. GK 939V and caused demolition and destruction to the pavement, walls, doors, iron sheets and wiring system at his premises. The alleged trespass was on 21st June 1996. He has specified the special damages as Kshs.500,000/.

After serving the Defendants with the summons and the Complaint the Attorney General, through his State Counsel filed a defence on behalf of all the Defendants, dated 15th August 1997. In that defence, the Defendants averred that on the date mentioned in the Complaint of 21st June 1996, the date the alleged demolitions and destructions were carried out on the Plaintiff's plot, the said grader GK 939 V, which was owned by the Defendant, had been lent out to Mwingi Urban Council as requested by them by a letter dated 30th May 1996. The Defendants averred that if any damage was suffered by the Plaintiff, then it was caused by Mwingi Urban Council.

By a Chamber Summons application dated 22nd April 1998, the Defendants herein successfully applied for leave to serve Mwingi Town Council with a third party notice in the suit. Subsequently the Town Council, through its Town Clerk, filed a memorandum of appearance to enter appearance in the suit as third party on 25th August 1998. The third party also filed a written statement of defence on the 26th August 1998. In the said defence the third party averred that the third party had instructed the 1st and 2nd Defendants to carry out the demolition of the pavement which had been erected on a public path-way.

That the damage caused upon the Plaintiff's premises if any was incidental to the said demolition of the pavement and that the Plaintiff must be taken to have assumed it when he erected the pavement illegally and more so when he refused to carry out the demolition by himself. The third party prayed that the suit be dismissed.

The case was eventually set down for hearing and heard before me on the 24th May 2006. The Defendants did not come despite service. The third party was represented by Counsel, Mr. Mwaniki. The Plaintiff testified and called two witnesses. In his evidence, the Plaintiff testified that he owned plot No. 25 within Mwingi Urban Council since 1975. He said that the Council later changed its name to Mwingi Town Council.

The Plaintiff produced receipts for payment of rent for the Plot dated 30.3.95, P. exhibit 1, dated 10.5.04, P. exhibit 2. He also produced a letter dated 12th September 2003 written by Mr. J.M. Mutuku, Clerk to Mwingi Town Council to the Commissioner of Land. The letter confirmed that the plot No. 25 within Mwingi Town Council belonged to the Plaintiff.

The Plaintiff also produced an allotment letter to the Plot issued to him on 23rd June 1998 as P. exhibit 4. He also produced Plan Approvals by District Public Health Officer Kitui dated 19th December 1991, by District Physical Planning Officer dated 19th December 1991 and by Clerk to Kitui County Council dated 13th January 1992 – P. exhibit 5. All were approvals for development of his plot before he put up the building in question.

In the matter at hand the Plaintiff testified that on 21st June 1996, his brother PW2, who was one of his tenants at the building in question called him from his house at 10.00 a.m. That he went to his plot and found a grader GK 939V, driven by the 2nd Defendant under the authority of the 1st Defendant had just destroyed part of the wall of his building. He followed it to the 1st Defendant's office whom on questioning asked to be given time to investigate. Later the 1st Defendant, District Works Officer, informed him that indeed the grader that had damaged part of his building belonged to his department and was driven by the department's driver but that it had at the time of the damage complained of been lent out to Mwingi Town Council. That the Plaintiff then decided to see the Clerk to the Mwingi Town Council who declined to give him audience. The Plaintiff stated that he had not been served with any notice before the demolition was carried out. The Plaintiff said that he sent a notice to the 3rd Defendant, the Attorney General of the intention to sue the Town Council for the said destruction before instituting this suit.

The Plaintiff said that in October 1998 he hired Mr. Mwangangi of Cost Bill, a Quantity Surveyor by profession to carry out an assessment of the damage. He was PW3. That he did an assessment in which he found that the cost of restoring the building to its original state was Kshs.500,000/-. The report is P. exhibit 6(a). The Plaintiff said that he approached the same person to carry out another assessment on same damage in May 1999 and he came up with P. exhibit 6(b) showing an assessment of Kshs.800,000/-.

PW2 Joseph Kasina, the Plaintiff's brother and tenant corroborated the Plaintiff's evidence concerning the damage to his premises and the person who caused it. PW2 was at the plot when the 2nd Defendant went with a grader and demolished part of the premises. PW2 also confirmed calling the Plaintiff to the scene.

PW3 Julius Mwangangi said he was a Quantity Surveyor with a First Class Honours Degree from the University of Nairobi. He corroborated PW1's evidence that he carried out two assessments on the Plaintiff's building at Mwingi Town Council P. exhibit 6(a) dated 1998 and 6(b) dated 1999. He explained that the second assessment was necessitated due to the increase in the cost of materials.

After the close of the Plaintiff's case the third party asked for adjournment to call witnesses. However the request was declined since the advocates failed to show any good cause why his witnesses had not come. He then closed the third party's case.

The Plaintiff and the third party gave submissions through their counsels. I have considered the evidence adduced herein, the pleadings and the submissions given by the counsels. The issues are very clear. There are undisputed facts: -

1. That the plot in issue No. 25 at Mwingi Town Council, was allotted to the Plaintiff and that the Plaintiff is the owner of it.
2. It is also not in dispute that the Plaintiff constructed a stone building on the said plot after the necessary approvals both by the District Planning Health Officer, under which the Town Council fell in 1991, the District Planning Officer and the Clerk to the Kitui County Council under which the plot fell then.
3. From the pleadings before court there is no dispute that a grader belonging to the 1st Defendant and driven by the 2nd Defendant moved into the Plaintiff's said plot and carried out demolitions which caused damage to the Plaintiff's building and structures therein.

The issues before Court are two fold. First the extent of the damage caused broadly speaking and secondly who was liable for the damage.

The Plaintiff, PW1 has adduced evidence to prove that his building was damaged due to the act of the 2nd Defendant, an employee of the Government. The 1st Defendant was the one under whose command the 2nd Defendant worked, the 2nd defendant being a driver working under him. The grader in question which was driven by the 2nd Defendant at the material time was government property and was under the command and control of the 1st defendant. The defendants in their defence admitted the descriptions given by the Plaintiff in the Plaint in paragraphs 1, 2, 3 and 4 to that effect. The Defendants have also admitted that the grader GK 939V belonged to the Defendants. This is admitted in their defence at paragraph 4. That settles the issue of the ownership of the grader that was seen by PW1 and PW2 being used to demolish the structures at the Plaintiff's plot. The Plaintiff's evidence was that he arrived at his plot on the material morning as the 2nd Defendant whom he knew, was completing his demolition work. The Plaintiff described what the 2nd Defendant, using the grader controlled by the 1st Defendant had done at his plot. He said that he had constructed five shops, a butchery and a hotel which had all been rented out at Ksh.7,000/- per month. That four of the shops and the hotel were vacated due to damage because there were cracks to the wall. The Plaintiff said he hired the services of PW3 who assessed the cost of repair as Kshs.500,000/-. PW2, the Plaintiff's tenant confirmed the damage. PW2 was present when the 2nd Defendant drove the government grader into the plot. He had rented the hotel as stated earlier. PW2 said that the 2nd Defendant pulled out the pavement outside his hotel and also pulled down an entire section of one of the shops. That as a result of the said demolition the whole building was damaged causing all the tenants to move out. PW3 explained the damage as cracks on the wall, broken traces and damaged roofs. As of 1998 the cost of repairs was estimated by PW3 at Kshs.500,000/-. PW3 in his evidence produced his report which justified the estimated cost by showing each itemized material and its cost required to repair the building to its previous condition.

The Plaintiff's evidence as to the extent of damage and the cost of restoring the building to its previous condition has not been challenged by either party to this suit at all. I find therefore that the Plaintiff has proved the case as regards the damage caused to his building as per paragraphs 6 and 7 of the Plaint.

The third party challenged the figures quoted in the report P. exhibit (a) as not adding up to Kshs.500,000/-. That is true the figures exceed slightly and PW3 took account of said discrepancy by rounding off the amounts above the figure to the sum claimed. The discrepancy is immaterial in the circumstances.

The Plaintiff has pleaded Kshs.500,000/- for special damages but in evidence tried to adduce evidence to show that the cost of repair claimed has since gone up to Kshs.800,000/- as of May 1999. However since no application to amend the Plaint was made at an appropriate time before introducing the evidence in support of a claim of Kshs.800,000/- that evidence cannot be considered. I find that the Plaintiff

proved special damages of Kshs.500,000 being the actual cost of repair to restore the building to the state it was before the demolition.

The Plaintiff also tried to introduce other evidence to show that he has lost earnings at Ksh.7,000/- a month per shop at his said plot. However, this too is a special damages claim that needed to be pleaded and specifically proved. That claim could not be entertained. I will get back to the issue of general damages later.

I now wish to deal with the second issue which is one on liability. I have already found that the defendant admitted that the grader used to demolish the Plaintiff's premises was driven by the 2nd Defendant under the command of the 1st Defendant and that the two defendants were employees of the government and the grader the property of the Government.

In their defence, the defendants averred that the third party Mwingi Town Council, whom they later joined to the suit as a third party had asked for the grader to be lent to them. This averment is contained in paragraphs 4 of the Defendant's defence as follows: -

“(4) That with further regard to paragraph 6 of the Plaint the defendants state that Mwingi Urban Council had vide their letter number MUC1715/Vol II/41 dated 30th May 1996 requested to be lend the Defendants grader registration no. GK 939V and the same was under their possession and control on 21st June 1996.”

The averment refers to paragraphs 6 of the Plaint which states thus: -

“On or about 21st June 1996 at Mwingi Market the 2nd Defendant who is under the 1st Defendant and on whose instructions he was acting and/or presumed to have been acting, trespassed onto the Plaintiff's Plot No. 25 Mwingi and destroyed and/or demolished the pavement walls, the door to the building, iron sheets to the building, and finally destroyed and/or damaged some wiring system.”

The Defendants have directed the blame to the third party claiming that the grader had been lent to the third party at the time the damage was allegedly caused to the Plaintiff's premises. The Defendants did not however defend the suit.

The third party in paragraph 2, 3 and 4 of their statement of defence averred as follows: -

“2. The third party contends that it issued instructions to the 1st and 2nd defendants to demolish a pavement which was erected on a public pathway.

3. The third party contends that the demolition was carefully done under the careful supervision of the third party without causing an extraneous damage to the said premises.

4. The third party further contends that if any damage was ever caused upon the alleged Plaintiff's premises, the same is only incidental to the demolition of the said pavement and the Plaintiff must be taken to have assumed it when the Plaintiff erected the pavement illegally and even more so when he refused to carry out the same by himself.”

The third party admitted in their defence that they directed the defendants to carry out the demolition of the pavement on the Plaintiff's premises. The third party has however brought in two more issues which affect liability. One that the demolition was to a pavement constructed by the Plaintiff on a public way and which they had notified the Plaintiff to remove. The third party called no evidence and therefore that averment was not substantiated. The Plaintiff in his evidence denied that the pavement was a public way and produced a ground plan of the plot. The ground plan P. exhibit 5 shows the pavement being at the centre of his plot in between the shops. I fail to see how it could have been a public path being within the Plaintiff's plot and premises. More importantly however, is the Plaintiff's evidence that he never received any notice written or oral, touching on the pavement or any claim that the pavement was a public

way. The Plaintiff also testified that he was never asked to remove the pavement. PW2, his tenant, testified that the pavement in question was outside the hotel he had rented from the Plaintiff and that it was not a public path. On a balance of probability, I find that the pavement and the premises demolished by the Defendants was the Plaintiff's property and not a public way. There was therefore no justification to demolish the pavement at all.

The Third party averred that they supervised the demolition on the Plaintiff's plot and that if any damage was caused to the Plaintiff's premises then it was incidental to the demolition of the pavement and therefore the Plaintiff should be assumed to have assumed it. As I have already stated, the Defendant and or third party were not justified to enter into the Plaintiff's property and demolish any pavement or structures therein. The demolitions were illegal and unlawful. The Plaintiff cannot therefore be found to have assumed any damage at all.

On the issue of liability, I find the third party's submissions that it cannot be held liable because it was not joined as a defendant untenable. The third party was so joined into the suit and is therefore a party to the suit. The third party submitted that the Defendant never came to court and should be held liable. The fact a party to a suit has not come to court during the hearing of a case is not per se proof of negligence. The Plaintiff has proved that his premises were damaged by the Defendants herein. The Defendant implicated the third party. The third party has in his statement of defence admitted that he ordered the demolition. The third party has in its own admission in the Statement of Defence admitted liability for the damage caused to the Plaintiff's premises. I find that it is wholly liable for the same and that it should satisfy the judgment that will be entered in this case.

Before I end I will consider the claim for the general damages. The Plaintiff's advocate submitted that the same is payable. That the third party's action was high handed made without justification and without notice and as a result the Plaintiff has lost rent earnings and use of the property since 1997. The Plaintiff relied on the case of **KINYI vs. NAIROBI CITY COUNCIL HCCC NO. 3151 OF 1997.**

The cited case is of persuasive authority to this Court. In that case, the Plaintiff's kiosk was demolished by the Defendant Nairobi City Council and the court found that act was without justification. The court found that general damages was awardable due to the off-handed manner in which the Defendant destroyed the Plaintiff's property and the Court awarded Kshs.400,000/-.

The third party's advocate has urged this court not to award general damages arguing that the award of special damages was sufficient to satisfy the Plaintiff's claim. He cited no authority.

I find that the general damages claimed is awardable. The third party acted unlawfully, high handedly and without any justification. I assess the general damages at Kshs.200,000/-.

I enter judgment for the Plaintiff against the third party in the sum of Kshs.500,000/- in special damages and Kshs.200,000/- in general damages with interest at court rates and costs of the suit.

Dated and delivered this 22nd day of June 2006.

.....

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of;

JUDGE