



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI**

**Civil Suit 1114 of 2000**

**EKALE KICHAKAE & 21 OTHERS..... PLAINTIFFS**

**VERSUS**

**PAUL YATICH & 3 OTHERS.....DEFENDANTS**

**JUDGMENT**

The plaintiffs, Ekale Kichakae together with 21 others, sued the 4 defendants including the Attorney General, jointly and severally seeking **“full compensation for their animals together with all calves given birth to by the same cows confiscated by the 1st and 2nd defendants unconstitutionally and illegally, and general damages resulting from the unconstitutional actions of the defendants, quantum to be determined by the court and also exemplary damages to be awarded to the plaintiffs against the defendant because of their unconstitutional and illegal actions and costs of this suit.....”**

The plaintiffs claimed that on divers dates between 13th to 17th October, 1999 their herd of cattle, 602 in all, was confiscated by both administrative and regular police at Baragoi water points without any lawful reason, despite the pleas by the plaintiffs. They contended further that,

**“On or about 18th October, 1999the stolen and recovered 121 livestock together with the 602 unlawfully confiscated livestock of the plaintiffs were given to the Samburu on directives of the 1st and 2nd defendants leaving the innocent plaintiffs suffering without any justifiable, reasonable or lawful cause, thus rendering this suit necessary”.**

The plaintiffs contended that the value of the 602 herd of cattle, confiscated by the 1st and 2nd defendants was Kenya Shillings twelve million (Kshs.12,000,000/-) at the rate of Kshs.20,000/= per cattle. It is the total sum of twelve million shillings which the plaintiffs claim from the defendants jointly and severally in the suit. By a statement of defence filed on 1st August, 2003 the defendants denied the plaintiffs claim, and state at para 3,

**“Save that some cattle rustlers had driven away some livestock which were later recovered and given to their owners, the defendants deny each and every allegation contained in paragraphs 9,10,11,12,13 and 14 of the plaint and puts the plaintiffs to strict proof”.**

The defendant further in para 4,

**“In the alternative and without prejudice to the foregoing the defendants contend that the plaintiffs were given an opportunity to identify and take their livestock which did and that this suit is merely an abuse of court process”.**

The plaintiffs had earlier obtained an interlocutory judgment which was set aside with no order as to costs by consent of both parties on 22.3.2004.

The 1st plaintiff, Ekale Kichakae gave evidence on behalf of all the other plaintiffs named in the plaint.

The plaintiff who hails from Samburu, is an ex army officer, where he served for 15 years. Subsequent to that, he was appointed a chief, a position he held for 24 years, until he retired in 1998, when he became a livestock farmer.

The plaintiff recalled that on 7th October, 1999, there was a cattle raid in Losujin in Paragoi Division, Samburu District. The District Commissioner ordered that the animals be followed. The Samburu followed them but the plaintiff did not go.

The plaintiff alleged that the D.C., the OCPD, and their askaris came to Baragoi water point and took their cattle, which were 602 in number to Baragoi police station. That police fired in the air, and did not allow the plaintiff and his fellow farmers to go near the cattle.

That later on 18.10.99 the leaders who had earlier pursued the cattle returned with 121 herds of cattle and brought them to Baragoi police station.

According to the plaintiff, the D.C. announced that the people whose 602 cattle were stolen would be given back.

The plaintiff complained that they did not get their cattle back. That the heard of 121 cattle was put together with 602, and nobody knew where they were taken to.

The plaintiff and his fellow farmers went to look for the D.C. in Maralal. They did not find the D.C. they had earlier dealt with as he had gone on transfer to Nyambene. There was a new D.C. who said he knew nothing about the stolen animals.

The plaintiff and the fellow farmers decided to sue for their lost animals which were valued at Kshs. 8 million, at the time, but today, they are valued at Kshs. 22,.9 million as per the valuation of the Veterinary doctor, one Jacob W. Wakhungu, PW2.

Several questions were put to the plaintiff, to which he replied that he did not report this incident to the police. The plaintiffs own animals were 125 in number. He prayed for compensation of just over Kshs. 22 million.

At a resumed hearing, the plaintiff produced an authority signed by all the 21 plaintiffs. He said it was the authority given to him by the other plaintiffs to “prosecute” this case. The document showed the number of cattle each claimant lost and their value.

Pius Kone Baraza, was the second witness for the plaintiff. He is a councilor at Nachola ward, Maragoi Division of Samburu District.

He was aware of the cattle rustling which took palce on 7th October, 1999 in Losujin, a sub-location of Suiyon in Maragoi division of Samburu District. He related how on 11th October, 1999, he was amongst the leaders of Marti location and Nachola location who were instructed by the District Commissioner, Mr. Paul Yatich to follow the cattle rustlers.

Together with the home-guards of the location, the witness followed the foot steps of the cattle rustlers until they reached the boarder of Turkana and Samburu districts. They found the cattle and recovered 121

herds of cattle, on 16th October, 1999.

The following day of 17th October, they traveled all the night until the following day of 18th October, when they reached Baragoi at 11.00 a.m., where they found the claimants of the cattle assembled at the petrol station.

The D.C. ordered the police to allow the cattle to graze until 3.00 p.m. awaiting row, but at 3.00 p.m. no meeting took place as scheduled, and the cattle were not there either.

The witness did not count the number of the cattle which was recovered, but he said they were many.

Ewoi Lokor Lopongoi, is a chief of Marti location since 1998. The plaintiff Ekale is a subject of his location.

Chief Ewoi was aware of the incident of cattle rustling of the 7th October, 1999, but his cattle was not stolen, and the theft was in a neighbouring location from his, but he was nevertheless in the group of persons who followed the cattle rustlers. They went up to the boarder of Turkana and Samburu Districts until they found 121 cattle in all, with about 7 to 8 cattle rustlers. There was an exchange of fire. The recovered cattle were brought to Baragoi police post on the morning of 18th October, 1999.

Many people had gathered at Baragoi police post. There were about 21 complainants. The D.C received the cattle and handed them over to the police and ordered everybody to return at 3.00 p.m. that same day.

The Chief returned to Baragoi police post at 3.00 p.m. together with many other people. No meeting took place as the D.C. did not show up. And also the herd of cattle was not at the police post.

To give evidence for the defendant was James Ochieng' Omia, an Assistant Commissioner of police, currently attached to the Coast Province, but in October, 1999, he was OCPD, Samburu District.

He recalled on 7th October, he received a report from the officer in charge, Maralal police station that some livestock had been stolen within Miriti location.

James informed D.C. Yatich of the incident. He also mobilized the District Security team and they all went to Nachola within Baragoi Division. They had a meeting, and later got a report that some cattle had been surrendered by Turkanas.

The team proceeded to Baragoi, where the witness saw the cattle and the owners identified them, but the Turkanas were asked to go and get the rest of the animals. They agreed to go and bring the remaining animals.

James said that he camped at Baragoi DO's office until the following day when 50 herd of cattle were recovered and out of that, 40 were identified, but not ten. That finally, the 40 identified cattle were handed over to the owners who identified them, but the ten that were not identified were given to the Turkanas, as nobody claimed them. The witness arrived in Baragoi on 10th September 1999 and left and never returned. He was not there on 18th October 1999. He knew nothing about 121 herd of cattle that the plaintiff and his witness talked about.

From the evidence which I considered, the evidence adduced by the plaintiff and his witnesses, as well as the evidence of the defendant's witnesses.

I noted that some facts were not disputed, these were, that there was a cattle raid on 7th October, 1999 in Baraboi division in Samburu district, that as a result of the raid, the then District Commissioner ordered his security team, home guards etc etc, to follow the foot steps of the cattle and the raiders. This was done and according to the plaintiff's witnesses, a total of 121 cattle were eventually recovered and brought back on 18.10.99.

The plaintiff's evidence however is different from the evidence of all his 3 witnesses as he testified that as their leaders followed the stolen animals, he did not go with them. That as that exercise was going on, **“The DC and the OCPD and their askaris came to Baragoi water point and Logitock water point and Katankuriu water point and took our cattle, 602 to Baragoi police station. We were not allowed to go near the cattle and the police fired in the air. We did not know why our cattle was taken.... On 18.10.99, the leaders who were pursuing the stolen cattle returned with 121 herd of cattle.....”**.

This evidence of the plaintiff about the 602 cattle was not corroborated by any of his witnesses, who in fact testified that the 602 cattle were put together with the 121 cattle which were recovered.

PW 3 Chief Ewoi, who was in the team of those who recovered the 121 cattle, did not refer to the 602 cattle which the plaintiff and the 21 complainants say they lost or better still, were confiscated by the DC and the OCPD.

So do I have sufficient evidence to find that the plaintiff and his friends lost 602 herd of cattle?

Before answering that question, I read the submissions made on behalf of the plaintiffs once more. On page 2 at para 2, I find that the submissions did not tally with the evidence given by the plaintiff about the 602 cattle. This left the plaintiff's evidence about the 602 cattle unsubstantiated and I cannot accept it, in these circumstances.

The plaintiff called PW2 who gave the amount of claim of the 602 cattle lost to be about Kshs.22,000,000/=. But this claim cannot hold, unless it is first proved that the plaintiff and his friends lost 602 cattle, which were confiscated by the DC and the OCPD as he alleged.

I am not satisfied from the plaintiff's sole evidence on record that together with his friends they lost 602 cattle, which were not part of the 121. The evidence of the loss of the 121 cattle is not sufficient either as it appears on record.

The plaintiff has, in my considered opinion failed to prove his claim on a balance of probabilities and I proceed to dismiss his case with costs to the defendants.

**Dated at Nairobi this 10th day of November, 2005.**

**JOYCE ALUOCH**

**JUDGE**