



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 290 OF 2000

ABDULHAMID EBRAHIM AHMED PLAINTIFF

- Versus -

MUNICIPAL COUNCIL OF MOMBASA DEFENDANT

J U D G M E N T

The plaintiff is the registered proprietor of three pieces of land situate in Mombasa and known as plot Nos. Mombasa/Block XLIV/3 Mombasa/Block XLIV/118 and Mombasa/Block XLIV/185 (the suit pieces of land). In 1998 he decided to extend the building on one of those pieces of land and at the same time construct on the other two. In March 1998 he caused to be drawn building plans which he submitted to the defendant for approval. They were approved in June 1998 and on 28th December 1998 the plaintiff got a hoarding/scaffolding licence from the defendant and started excavating. While going on with excavation on the 5th January 1999 he was served with a notice purporting to revoke the allocation of the suit pieces of land to him. Cancelling the building plans and requiring him to stop the construction the following day the plaintiff, through his lawyers, wrote to the Council demanding an explanation. He never got a response. He also visited the defendant's offices but got no explanation. On 15th January 1999 the defendant's employees and other people went to the suit premises and demolished the scaffolding damaged the building materials carrying some away in its vehicle and back filled the excavated area. Later on the plaintiff filed Mombasa HC Misc. Application No. 57 of 1999 and by consent obtained the judicial review orders of certiorari quashing the defendant's said decision and prohibiting the defendant from interfering with the plaintiff's construction on the suit premises. On the 29th June 2000 the plaintiff filed this suit claiming general damages for defamation and special damages of Sh. 727,192/= plus costs and interest.

The defendant filed appearance and filed a defence. Apart from admitting that it approved the plaintiff's building plans and issuing the notice canceling them and revoking the allocation of the suit premises the defendant denied the rest of the averments in the plaint. The defendant denied that the cancellation of the building plans was malicious and stated that the same was justified under the Local Government Act Cap 265 of the Laws of Kenya. It also specifically denied that the notice was defamatory of the plaintiff.

The plaintiff gave evidence and called five witnesses. In his evidence the plaintiff stated that he inherited from his parents plot No. Mombasa/Block XLIV/3 and the other two were grants to him from the Government and not from the defendant. He produced as exhibits a certified copy of an extract of title showing that plot No. Mombasa/Block XLIV/3 is a freehold title registered in his name and copies of certificates of lease showing that he is the registered lessee from the Government of Kenya of the other pieces of land. He denied that any of the pieces of land was allocated to him by the defendant.

The plaintiff testified that prior to 1998 plot No. Mombasa/Block XLIV/3 was developed. He however wanted the building extended and at the same time construct a commercial cum residential block

on the other two pieces. He got plans drawn and submitted them to the defendant and the Commissioner of Lands for approval. They were approved. He later revised the plans and they were also approved and he was issued with a building permit and the hoarding/scaffolding licence. He produced the plans as well as the building and scaffolding permits.

Before he started construction work to avoid encroachment onto the neighbouring plots, he got a surveyor to replace the boundary beacons. He paid Sh. 30,000/= and produced a receipt to prove that. As he wanted to put up a storey building he started excavating to enable him lay a firm foundation. When he had excavated upto a depth of about 20 feet he was on 5th January 1999 served with the defendant's said notice purporting to revoke the allocation of the pieces of land to him and canceling the building plans as well as demanding that he should stop the construction work immediately. The notice was served upon him by people he described as belligerent. He knew them. They were not employees of the defendant. They threatened to stone his workers if they did not stop construction and vacate the suit premises immediately. Those people pasted copies of the notice at several conspicuous places in the area including Mlango wa Papa mosque and Shakila Corner where people used to converge. The notice, which he produced is exhibit 8 was written by the Chief Building Inspector of the defendant and was copied to residents of Mji wa Kale, the area councilor, Messrs Omar Awadh and Yahya Awadh as well as the Town Clerk and the Medical Officer of Health of the defendant. The plaintiff further testified that he was not called to the Council Meeting which cancelled his building plans and purported to revoke the allocations of the pieces of land to him. In spite of his lawyer's letter and his personal visits to the defendant on 15th January the defendant's employees, most of whom he knew and the four people who had delivered the notice to him went to the site in a council vehicle and demolished the scaffolding and damaged building materials carrying away others. They also back filled the excavation. As they did that they cheered with remarks to the effect that the plaintiff was "finished". The crowd that had gathered at the site appeared surprised.

Thereafter he stopped going to Mlango wa Papa Mosque. The people who gathered at Shakila Corner sneered at him and he felt like a pariah and stopped going there also. Having worked in the defendant council before the innuendo notice, was that, the plaintiff was a land grabber. He had used his position to grab public land. He felt ridiculed and defamed in the eyes of the public. He filed this suit and claimed damages. In respect of special damages he claimed a total of Sh. 727,192/= being

(a) scaffolding fees he paid to the Council	Sh. 1,392.00
cost of construction including damaged	
(b) building materials	Sh. 480,800.00
(c) survey fees	Sh. 30,000.00
(d) approval fees paid to Commissioner of Lands	Sh. 1,500.00
(e) Approval fees paid to the defendant Council	Sh. 3,500.00
(f) Loss of profits (rent) for 7 months	Sh. 10,000.00

In respect of loss of rent he said he estimated that the construction could have taken four months to complete. One Hamdun Said Salim P.W.2 had agreed to take a lease of part of the premises at the agreed rent of Sh. 30,000/= per month. To book it he had paid in Sh. 180,000/= which he was forced to refund when the construction was stopped by the defendant. He therefore claimed rent for a period of seven months which he said was reasonable.

Prior to filing this suit the plaintiff had filed Mombasa HC Misc. App. No. 57 of 1999 and by consent obtained orders quashing the council's decision and prohibiting it from interfering with the construction. He produced a copy of the order

. In cross examination the plaintiff admitted that with or without the disruption he could still have paid the survey approval and scaffolding fees. He said that he has not completed the construction of the building the loan he had secured for the purpose was cancelled when the building stopped. He therefore prayed for general damages for defamation, exemplary as well as special damages costs and interest.

P.W.2, Hamdun Said Salim, is the businessman who had agreed to let the plaintiff's premises. He confirmed that he had agreed to let part of the plaintiff's premises when completed and that to book it he had paid a deposit of three months rent of Sh. 180,000/=. He identified the agreement he had entered into with the plaintiff and the receipt he issued to the plaintiff when he refunded the money to him.

P.W.3, Said Mohamed Mwijaa, said he had lived with the plaintiff in old town for about 30 years. Between the 23rd and 29th December 1998 the area Councillor Abubakar Kibarawa asked him and other area residents to sign some documents to stop the plaintiff from constructing a building in the area. They refused. On 5th January 1999 he saw a notice posted on the scaffolding and heard some young people talking about it. When he read it he regretted having not signed the documents the councilor had taken to them. He thought the plaintiff having worked in the council before he had grabbed the pieces of land he was building on.

P.W.4 Twalib Said is an elder at Mlango wa Papa Mosque where there is a baraza. He knows the plaintiff since childhood. He said in December 1998 or 1999 while with P.W.3 and 5 to 6 other s, Councillor Kibarawa asked them to sign a document to sue the plaintiff who had grabbed council land. They refused. After a few days when they had a baraza he saw people come in a pick-up and paste notices on the scaffolding and on other conspicuous places around. Those people were rough and rowdy. He heard them say that the plaintiff had grabbed council land but they had finished him. Some said that even the house the plaintiff was living in was grabbed. He was also surprised but knowing that the plaintiff used to work in the council he thought the allegation of grabbing could be true.

P.W. 5 Ibrahim Abdulhamid, is a son to the plaintiff. He took photographs of the notices posted on various places in the area well as the demolished scaffolding. He produced the photographs as exhibits. The plaintiff's last witness was P.W.6 Noah Osore Osumba a quantity surveyor. At the request of the plaintiff he visited the building site and assessed the value of work done and material damaged at about Sh. 480,000/=. The defendant did not call any evidence. Counsel for the parties filed written submissions and later submitted orally on points the considered salient. Counsel for the plaintiff submitted that the plaintiff had proved his claim on a balance of probabilities. She said that the words in the defendant's notice exhibit 8 that:

"The council in their 517th full council meeting resolved to cancel all approved building plans on the said plots and revoked all allocations that you possess on those plots" were defamatory by innuendo of the plaintiff. Citing the case of **Nation Newspapers Ltd. -Vs- Chesire [1984] KLR 156** in which it was held that in an action for libel by innuendo the plaintiff has to prove that special circumstances known to the persons who read the publications counsel submitted that the evidence of P.W.3 and P.W.4 proved the plaintiff's claim. Those witnesses knew the plaintiff as having worked for the council previously and were influenced by the notice exhibit 8 to conclude that the plaintiff must have grabbed the suit premises they called him "firauni" and that he was "finished". The plaintiff himself testified that the notice had caused him stress and made him avoid social places. It exposed him to public ridicule contempt and hatred. The publication of the notice inter alia to people in the plaintiff's neighbourhood who had no concern was malicious and called for an award of aggravated damages. Relying on the case of **Machira - Vs - Muraji [2001] 1 E.A. 110** in which a sum of Sh. 2 million was awarded under this head. She recommended a sum of Sh. 10 million as a reasonable figure to be awarded to the plaintiff in this case.

Counsel also submitted that the plaintiff is entitled to exemplary damages as well as special damages, costs and interest. On the issue of limitation of the defamation claim raised by counsel for the defendant she submitted that by dint of Order 6 Rule 4 the defendant should not be allowed to raise the issue at this stage. Limitation should have been pleaded, she said and put to the plaintiff's witnesses which was not done.

On his part Mr. Muinde, counsel for the defendant, submitted that the plaintiff's claim has not been proved as required by law. He said that the claim in respect of libel should be dismissed without further ado. It is time barred under the Limitation of Actions Act. In any case the claim could not have succeeded as the people alleged to have pasted the notices on the scaffolding and other places were not employees of the council. The notice itself is not defamatory and even if it was no aggravated damages cannot be awarded as the same were not pleaded. He also submitted that exemplary damages being punitive and not compensatory should not be awarded. Except for loss of rent for a period of three years he said that the plaintiff did not suffer any special damages. The fees paid for approvals and survey were paid even before the cause of action arose and the plaintiff has not lost any of them. He continues to his the building plans which were approved before the construction was stopped. He urged me to dismiss the claim.

I would like to first deal with the plaintiff's claim for damages for libel. Is the claim statute barred under the Limitation of Actions Act? Section 4(2) of the Limitation of Actions Act is in the following terms:-

“(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. Provided that an action for libel or slander may not be brought after the end of twelve months from such date”.

Mrs. Deche for the plaintiff did not dispute the fact that the plaintiff's claim based on libel is time barred. Her argument was that the defendant having failed to raise the defence of limitation in the defence it cannot raise it in the final submissions. For this www.kenyalawreports.or.ke proposition she relied on Order 6 Rule 4 of the Civil Procedure Rules and the authority in the case of **Kiungani Farmers Co. Ltd. -Vs- Mbugua (1984) KLR 476** Order 6 Rule 4(1) provides:-

“4(1) A party shall in any pleading subsequent to a plea plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality:-

- (a) which he alleges makes any claim or defence of the opposite party not maintainable; or
- (b) which, if not specifically pleaded, might take the opposite party by surprise; or
- (c) which raises issues of fact not arising out of the preceding pleading”.

Mrs. Deche argued that the raising of limitation, for the first time, in the final submissions was an ambush on the plaintiff. As I understand the position, rules of procedure are undermaids in the administration of justice. They do not, of themselves confer or take away the jurisdiction of the court to deal with any particular matter. Our case law is replete with decisions where courts have, in appropriate cases and in particular where the issues raised do not go to the jurisdiction of the court, ignored the rules and proceeded to do substantive justice to the parties. For instance in the case of *Johnston Joshua Kinyanjui & Another Vs Rachel W. Thande & Another* Civil Appeal No. 284 of 1997 (C.A.) the Court of Appeal stated that:- “It can be seen that no application is to be defeated by use of wrong procedural mode ...” Following this Court of Appeal decision in *Microsoft Corporation Vs Mitsumi Computer Garage Ltd.* [2000] 1 E.A. 127 at page 132 Ringera J. stated:-

“... I am of the firm view that it is in the overall interests of justice that procedural lapses should not be invoked to defeat applications unless the lapse goes to the jurisdiction of the court or substantial prejudice is caused to the adverse party”.

In this case my view is that section 4(1) of the Limitation of Actions Act takes away the courts jurisdiction to entertain a claim for libel outside the period of twelve months from the date the cause of action arises. Failure by the defendant to plead limitation in the defence or raise it in the course of trial does not confer the court with jurisdiction to entertain the claim. Jurisdiction can be raised at any stage of the pleadings and even on appeal. See **Osebe -Vs- Kenya Commercial Bank Ltd. (1982 - 88) 1 KAR.**

The Civil Procedure Rules are subsidiary legislation. As is clear from section 81(1) of the Civil Procedure Act under which they are made, they are not supposed to be inconsistent with the Civil Procedure Act and for that matter any Act of Parliament. If they are they will of course be void to the extent of their inconsistency. I am not saying that Order 6 Rule 4 of the Civil Procedure Rules is in conflict with section 4(1) of the Limitation of Actions Act. The Order does not purport to confer the court jurisdiction to entertain a claim for which is time barred. All I am saying is that if it was it would have to give way to the provisions of the Limitation of Actions Act. My understanding of Order 6 Rule 4 is that it is providing for pleadings which should facilitate the smooth trial of cases to avoid ambush and delay. Where in cases like fraud, inevitable accident, payment etc the court can bar a party who fails to plead such matter from raising or relying on it at the end or advanced stage of the proceedings if that will cause prejudice to the other party. In the case of Kiungani Farmers Co. Ltd. (supra) cited by Mrs. Deche the limitation period had not expired. I do not think that the court could have found for the plaintiff if limitation period had expired.

Mrs. Deche also urged me to consider the consent order in Mombasa HC Misc. C App. No. 57 of 1999 as an acknowledgement of the defendant's liability. Even if I were to do that the position would still not change the consent order was entered into on the 21st June 1999 while this case was filed on the 29th June 2000 when the limitation period had expired.

For these reasons I dismiss the plaintiff's claim for damages for defamation.

I will now proceed to consider whether or not the plaintiff is entitled to general and special damages against the defendant. Right from the outset I hold that the defendant is liable to the plaintiff for the wrongful act of interfering with the plaintiff's construction and for the damage caused to the plaintiff's building materials. Even without considering the other evidence adduced, the said consent order in Mombasa HC Misc. C. App No. 57 of 1999 Exhibit 11. That Order quashed the decision of the defendant which cancelled the plaintiff's building plans and prohibited the defendant from interfering with the plaintiff's construction on the suit premises. It is clear admission by the defendant of its wrongful act. The issue I should now consider is the quantum of damages. I should award to the plaintiff.

The plaintiff complied with all the building regulations before he commenced construction. He paid for and was granted both the construction and scaffolding permits. That was after his building plans had been approved by both the Commissioner of Lands and the defendant itself. The defendant had therefore absolutely no right to interfere with his construction work it is liable in damages to the plaintiff. Counsel for the plaintiff has submitted that the plaintiff is entitled to both aggravated and exemplary damages. Counsel for the plaintiff submitted that the plaintiff is entitled to neither.

Aggravated damages are awarded in actions where the damages are at large, that is to say where the damages are not limited to the pecuniary loss that can be specifically proved. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, trespass to land, persons or goods, conspiracy and infringement of copy right. Such damages are part of, or included in, the sum awarded as general damages and are therefore at large. As such they need not be specifically pleaded or included in the prayer for relief - **Rookes -Vs- Barnard [1964] 1 A.ER 367**. However where the plaintiff relies on any facts or matters to support his claim for aggravated damages, it is desirable that he should plead those facts or matter The matters the court should take into account in awarding such damages include the defendant's motives, conduct and manner of committing the tort. The court should consider whether or not the defendant acted with malevolence or spite or behaved in a high-handed malicious, insulting or aggressive manner. The court may also consider the defendant's conduct upto to the conclusion of the trial including what he or his counsel may have said at the trial. If any of the defendant's acts will have worsened the plaintiff's damage by injuring his feelings of dignity and pride that may also be considered in awarding aggravated damages Aggravated damages are therefore compensatory in nature.

Exemplary damages on the other hand are damages that are punitive. They are awarded to punish the defendant and vindicate the strength of the law. They are awarded in actions in tort, and only in three categories of cases. The first category relates to the oppressive, arbitrary or unconstitutional actions of

servants of government. This category is not confined to acts of government servants only but includes those of other bodies exercising functions of a governmental character. The case of Rookes supra related to the acts of a trade union. The reason why exemplary damages are awarded mainly against the government or bodies exercising functions of a governmental character is because the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service.

The other two categories are where the defendant's conduct is calculated to earn him profit and the third one is where exemplary damages are expressly authorized by statute.

Applying these principles to the present case I find that the defendant's conduct was not only high-handed but also malicious and spiteful. This is because instead of delivery the notice exhibit to the plaintiff in a civilized manner the defendant hired rowdy thugs to deliver it. I do not accept Mr. Muinde's submission that the defendant cannot be held vicariously liable for their acts. It must be held liable. They delivered to the plaintiff a letter from the defendant the authorship of which is not in dispute. About ten days later those thugs went with employees of the defendant in the defendant's vehicle and demolished the plaintiff's scaffolding damaging his building materials and taking some. I am satisfied and I believe the plaintiff when he says that these acts injured his feelings and humiliated him. However about six months later the defendant conceded and had its decision quashed and an order of prohibition issued against it. There is no evidence that it has tried to interfere with the plaintiff's construction thereafter. It called no evidence to dispute the plaintiff's claim. Its advocate Mr. Muinde has conducted himself with decorum. Taking all these factors into account I consider a sum of Sh. 2,000,000/= as a reasonable award of general damages inclusive of aggravated damages

As I have already stated the defendant had no right or reason to enter the plaintiff's land. Its acts of trespass were arbitrary and unconstitutional.

Punitive damages should also be awarded against it as a deterrent and to vindicate the strength of the law of this land in protecting its people. Having awarded general and aggravated damages I consider a sum of Sh. 100,000/= as exemplary damages reasonable.

As regards special damages the plaintiff admitted under cross-examination that even without interference by the defendant he could have still paid survey and approval fees. Infact he paid those fees before he was invaded. When he resumed construction he continued to use the approved plans and the building and scaffolding permits. He is therefore not entitled to those payments. He is however entitled to the value of the work that had been done and the damaged building materials.

His witness Mr. Osore valued them at Sh. 480,800/=. As his evidence is uncontroverted. I award the plaintiff that sum. The plaintiff is also entitled to loss of rent. He claimed the same for a period of seven months. Mr. Munde proposed a period of four months. I think an award for a period of six months at the rate of Sh. 30,000/= per month is reasonable. In total I award the plaintiff a sum of Sh. 2,760,800/= made out as follows:-

General and aggravated damages	Sh. 2,000,000.00
Exemplary damages	Sh. 100,000.00
Special damage	<u>Sh. 660,800.00</u>
Total	<u>Sh. 2,760,800.00</u>

There will therefore be judgment for the plaintiff against the defendant in the sum of Sh. 2,760,800/= plus costs and interest at court rates.

DATED this 24th day of February 2004.

D.K. Maraga

Ag. JUDGE