



**Corby Limited v General (Civil Case 375 of 2009)
[2023] KEHC 18100 (KLR) (Civ) (22 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18100 (KLR)

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

CIVIL

CIVIL CASE 375 OF 2009

AN ONGERI, J

MAY 22, 2023

BETWEEN

CORBY LIMITED PLAINTIFF

AND

ATTORNEY GENERAL DEFENDANT

JUDGMENT

1. The Plaintiff in this case CORBY LIMITED (hereafter referred to as the Plaintiff company) sued THE ATTORNEY GENERAL (hereafter referred as the Defendant only) seeking special damages of 1,385,476,780.00 together with costs of the suit and interest at court rates from the time of filing suit until payment in full.
2. The Plaintiff filed a plaint dated 8/7/2009 which was amended on 19/7/2013 in which it averred that the Plaintiff is a limited liability company incorporated in the Republic of Kenya while the Defendant is the Attorney General of the Republic of Kenya.
3. The Plaintiff further averred that at the material time, the Commissioner of Mines and Geology issued the Plaintiff with a special licence no. 210 for a term of five years with effect from December 2002 to prospect for precious and semi-precious stones in Marigat, Baringo Central District, Rift Valley Province of Kenya.
4. The Plaintiff further stated in the plaint that the Defendant agreed to provide security through its servants and/or agents to enable the Plaintiff to do the prospecting.
5. Further that the special licence granted to the Plaintiff was renewed from time to time and the Plaintiff set up equipment for prospecting and built a 3 kilometer road to enable the Plaintiff access the site.



6. The Plaintiff also averred in the amended plaint that on the 8th day of May 2006 the Defendant failed to provide security and the Plaintiff's equipment were vandalized and carried away by the local community.
7. The Plaintiff is now seeking special damages as follows
 - i. Cost of machinery vandalized ksh. 81,993,600.00
 - ii. Cost of labour & manpower ksh. 49,149,750.00
 - iii. Projected cost for 5 years ksh.1,185,040,818.00
Total ksh.1,316,184,168.00 plus
 - iv. Fuel ksh. 43,102,102.00
 - v. Car hire ksh. 32,984,000.00
 - vi. Machinery hire ksh. 400,960,000.00
 - vii. Travel ksh. 2,991,467.00
 - viii. Imports ksh. 67,905,174.00
 - ix. Nairobi rent ksh. 9,077,600.00
 - x. Accommodation ksh. 39,210,000.00
 - xi. Wages ksh. 111,746,000.00
 - xii. Miscellaneous ksh. 95,500,000.00
 - xiii. Formation and licences ksh. 251,280.00
 - xiv. Marketing & Branding ksh. 1,447,680.00
 - xv. Tools & Equipments ksh. 11,897,462.00
 - xvi. Projection tax ksh. 568,403,990.00

Total ksh.1,385,476,780.00
8. The Defendant entered appearance on 23/7/2009 and filed a defence which was amended on 27/1/2020 in which the Defendant denied the Plaintiff's claim.
9. The Defendant further averred in the said defence that the Plaintiff's suit is time barred under the *Public Authorities Limitation Act* Cap 39 Laws of Kenya and that at the earliest opportunity the Defendant would raise a preliminary objection to strike out the Plaintiff's suit.
10. The case proceeded by viva voce evidence. The Plaintiff called three witnesses as follows;
 - i. NITTIN PATTNI (PW1)
 - ii. STANLEY GATHERU NGATIA (PW2)
 - iii. MOSES MUNGAI KIOI (PW3)
11. PW1 adopted his witness statement dated 5/7/2019 as his evidence in chief. He produced a bundle of documents in support of the plaintiff's case. In the said statement, PW1 stated that pursuant to the grant of license No. 210, it took the company 2 years to set up the finances and necessary machinery to start the work. They began the operations on November 2004 and as soon as they started moving the



- machinery towards their site from Lobo Township, then known as Baringo District, the community stopped them and informed them that they could not proceed further than where they had reached as they did not have requisite permission from the community to enter the area.
12. Thereafter, with the help of the commissioner of mines and Geology, the District Commissioner and other government officials they had a meeting on 8th January 2005 with the community to reach a Memorandum of Understanding (MOU). They afterward embarked on the process of prospecting and as there was no road from Sandai Township to the licensed area they had to make two roads which took 3 months to accomplish. They set up the site and the machinery and started the exploration in August 2005 using water from the river Waseges. They built 2 dams to in order to recycle the water from the plant to the dam and employed 14 people who were working on the project full time. They stopped the work on 12th December 2005 after handing in their progress report for 2005 to the commissioner of Mines and Geology.
 13. Due to the lack of rains, they could not resume their work for the succeeding 5 months until 26th April 2006. On 8th May 2006 about 100-150 people stormed into the site, vandalized the company property and machinery, stole management and employees cell phones, money and other valuables. The employees sustained injuries from rungs, simis and stones hurled at them by the locals. To asses damages they requested security of 2 policemen and 3 AP's from Marigat Police Station on Sunday 14th May 2006 and went to the site. They assessed the damages but as they were going back they were accosted by a group of people to which they reported the incident at Marigat Police Station.
 14. PW1 stated that the locals had accused them of polluting the water from the river which was not the case as tests were carried out on the water upstream and downstream from the site and found the water to be of equal quality with no contamination.
 15. He indicated that they tried to access the site once again in efforts to salvage what they could of the equipment and machinery but their efforts were once again thwarted by the community. Several lorries turned up to the site to collect materials which were later impounded by the community. They reported the matter to the Commissioner of Mines and Geology who in turn wrote letters to the District Commissioner Baringo and were copied to the Permanent Secretary, Provincial Commission Rift Valley but no action was taken. They also wrote to the president who wrote to the Provincial Commissioner of rift Valley Province with copies to the Director of Criminal Investigation Department, Commissioner of Mines and Geology, Provincial Criminal Investigation Officer, Rift Valley Province, the director of Nema, the District Commissioner -Kabarnet, the OCPD Kabarnet and the DCIO- Kabarnet and again no action was taken. As a result they sustained losses to the tune of Kshs. 1,385,476,780.
 16. In cross examination, PW1 said the Plaintiff company was vandalized for lack of security. He said they had been issued with a five-year license to prospect.
 17. He said prospecting occurs before mining. He said they had a meeting with the local community and they had a MOU displayed at page 48 of the Defendant's bundle of documents.
 18. He said they had agreed to dig boreholes for water and when the boreholes did not yield water, they build dams and use the river.
 19. PW 1 said they were not using any chemicals and they obtained a letter from the Water Resources Management Authority and other agreements to utilize the water resources.
 20. PW 1 said they had to build access roads to access the area they were prospecting. He said they went to the site in 2004 and started doing the all-weather roads.



21. He said they imported equipment for the assignment but before they could embark on prospecting, they were kicked out of the area and their equipment vandalized stolen and others destroyed. He said he has a full inventory of everything that was stolen and vandalized or destroyed.
22. PW 1 said they got the licence in 2002 but they started prospecting in 2004 because they were first setting up the equipment and building access roads.
23. PW 1 said the original area was 101 sq km but it was reduced to 5 km. He said the site was on top of a mountain. He said they had hired staff and the labour alone was 49 million shillings. He said the fuel was 877.500 and accommodation cost was 39 million.
24. PW 1 also said that marketing and branding was done for the benefit of the company with the Geological Institute of America which was to market the company.
25. He said the stones were taken to the international gemstones association for checking and that the Ministry Geologist used to visit the site.
26. PW 1 further said in cross examination that some people had to stay at Marigat, Kambi ya Samaki for the 4 years they were laying a foundation.
27. He said among the machinery they lost were water pumps excavators, dumpers and a processing plant. PW 1 said there was a conflict with the local administration was trying to solve and that he attended a meeting on 27/8/2007.
28. PW 1 said the incident was reported to the police but he was not called to testify in the criminal case.
29. He denied that the person arrested was his employee. He said the goods were released by police because a report was made that the goods belong to Colby and not Corby Limited.
30. PW 1 said they used Kshs. 158 million to construct a road. He said the terrain was steep and it passed through rivers.
31. PW 2 STANELY GATHURU NGATIA also adopted his written statement dated 5/7/2019 as his evidence in chief. He said he was working at the Plaintiff as the project engineer dealing with machinery and civil engineering works.
32. In his written statement PW 2 reiterated what was contained in PW1's statement.
33. PW 2 said in his evidence in court that they built the roads to access the site and one of the roads was 8km and the other 16km. He said the area is called Mchongoi and it is dry and hilly.
34. PW 2 said they spent ksh.158,390,000 to build the two roads and they used the roads to take equipment to the site.
35. In cross examination PW 2 said that the licence was for prospecting but the roads were required to access the site. He said the works started in the year 2004 but the local community started having problems with the company.
36. PW 2 said they dug three boreholes but there was no water at the licenced area.
37. PW 3, MOSES MUNGAI KIOI also adopted his written statement dated 5/7/2019 as his evidence in chief. In his statement he indicated that among the machines required by the company were caterpillars and pumps which they hired at a costs of Kshs. 400,960,000 excluding the costs for hiring other machinery on daily basis. The costs of putting up the roads in the area of operation was Kshs. 158,390,000 as per the Bill of Quantity by Nicon Construction Co. Ltd.



38. He indicated that the process of prospecting required the use of plenty of water and it was upon them to find means of getting the water that they required. This led to the unsuccessful drilling of three boreholes which averagely costs them Kshs. 1,140,000. In the month of August, 2005, they then set up the site and the machinery and started the exploration using the water from River Wasenges and built two dams to recycle the water from the plant to the dam.
39. PW 3 said he was in charge of the Plaintiff company's resources. He said the licence was issued in 2002 and they had to obtain funds and the operations started in 2006.
40. PW 3 said the company drilled three boreholes which were not successful and they build two dams.
41. He said the company spent kshs.400,960,000 for hiring machines. He said the total loss incurred amounted to 1,385,476,780 including the construction of the roads, drilling boreholes and hiring equipment and staff salaries.
42. PW 3 said the company had done work for 3 months before they were invaded by the local community.
43. In cross-examination, PW 3 said in his report he tabulated expenses from 2002 to 2006 when the company was vandalized. He said there is also a report of the vandalized items.
44. The Defendant called two witnesses ENOCK KIPSEBA (DW 1) and MICHAEL CHEKPKUTO (DW 2)
45. DW 1 ENOCK KIPSEBA was a geologist employed by the ministry of Petroleum and mining. He said that at the material time he was Geologist in Baringo District. He said he was aware that the Plaintiff company applied for an exclusive prospecting licence for a period of 3 years.
46. DW 1 said the licence was for the period 2002 to 2005. DW 1 said condition no. 13 of the licence was on indemnity and it stated that the commissioner and the government are not responsible for any damage to the prospector.
47. DW 1 said the local community wanted water and they asked for boreholes. He said they had an MOU dated 9/1/2005.
48. DW1 said the road which was constructed did not go to the extent the community wanted but it reached the site. He said the Plaintiff company constructed sedimentation ponds next to the river.
49. DW 1 said that there was a water challenge between the Plaintiff company and the local community. He said the company had its own security.
50. DW 1 said a test was conducted at river Wasenges and it was found that the Plaintiff was polluting the water.
51. DW 1 also said that one of conditions for grant of the licence was that the Plaintiff company was not to damage the environment. He also said on 8/4/2004 a letter was sent to the Plaintiff company not to undertake mining before a licence was provided.
52. DW 1 also said several meetings were held at provincial commissioner's board room and it was indicated that the Plaintiff company was mining and not prospecting. He produced minutes of meetings held on 27/6/2007 and 27/8/2007.
53. In cross-examination DW 1 said he used to visit the site from time to time. He said there was pollution from the Plaintiff company's site and leakage of the sedimentation ponds and also toilets which were near the river.



54. DW 1 also said in cross-examination that the commissioner of mines does not provide security.
55. DW 2 MICHAEL CHEPKUTO who was the chief of Sandal location in Baringo county adopted his stated dated 5/3/2020 as his evidence in chief.
56. DW 2 in his statement told the court that ruby stones were discovered in Marigat in 2001 which led to the explosion of population in the area. There were issues of environmental degradation, public health issues, business growth, children drooped out of school which was a big concern.
57. In 2002 Corby Limited applied for prospecting right and required consent from the then county council which held the land in trust for the community. The then county council gave consent without public participation. When the residents learnt that consent was given without their knowledge they raised the issue with his office. The then District Officer called for two public Baraza to iron out the issue. It was agreed that a memorandum of understanding should be signed between the community and the plaintiff but the plaintiff brought its prospecting machines even before the agreement could be signed.
58. During the meeting they came up with several conditions among which was fulfilled was the opening of the road to make it accessible so that they were able to move their machines to the site. The road that they were to make accessible was hilly making it difficult to move their machines so they decided to open a different road in another area.
59. There were two other groups that were formed where one group was for the plaintiff to continue with its prospecting activities while the other was against it. As a result the plaintiff called for a meeting between the administration and the residents. The plaintiffs concern was that the water was not found and they wanted the resident to allow them to put up a water pump to pump water from the river and construct sedimentation ponds for retaining the waste water from the processing plant to which the residents agreed.
60. However, there were shortcomings that the company engaged on such as; constructing a septic tank near the river, closing of the original path which was in use by the community, pollution of river waseges, and further there were allegations that the company management was arrogant and there was high turnover in hiring of workers.
61. In 2006 DW2 received a report about an attack from the residents to which he informed the District Officer. The plaintiff was advised to report the matter to the police and when they visited the company they found that no vandalization had taken place. Having found that the plaintiff informed them that they were not comfortable to continue staying at the site. They therefore took everything of value and left.
62. After 2 weeks they returned but the residents would not allow them to continue since they felt like the plaintiff company had taken them for a ride. The police made two arrests in connection with the attack on the two Indians managing the company. The complainants failed to attend the court to testify and as a result the suspects were acquitted and released.
63. There was too much hostility between the residents and the management of the plaintiff company due to the fact that the company was keen on its own interests and not the interests of the community. They received information that two lorries were carrying some machines which belonged to the plaintiff company to which the two drivers were arrested. There was however an out of court settlement where both drivers were released. That finally in the long run the management of the plaintiff company sold the remaining machines as scrap metal.



64. DW 2 said in cross examination that the Plaintiff company was prospecting for ruby stones at Baringo. They said they were licenced by Baringo County Council.
65. DW 2 said initially the community was against the project but later it was allowed. He said a memorandum of understanding was done on 9/14/2005.
66. DW 2 said the Plaintiff company agreed to do roads, a hospital and to improve the local schools but they did not fulfil their promise.
67. DW 2 also said the Plaintiff company said they would compensate the community for trees that were on the roads.
68. DW 2 said the Plaintiff company were supposed to dig boreholes but the same did not yield water and they opted to bump water from the river to a dam and they dug reservoir ponds near the river and a septic tank near the river.
69. DW 2 also said the Plaintiff company closed the community footpath and there was pollution from the site.
70. DW 2 said in 2006, the community invaded the Plaintiff company's site in the night.
71. DW 2 called police and the D.O and they went to the camp. He said the staff were told to leave and police guarded the camp for 2 months but they left because may be they were not facilitated.
72. He said after the police left theft continued at the site and some people were arrested.
73. DW 2 said one Justin Kinalu and Shadrack Chepkuto were arrested but nobody from the Plaintiff company attended court.
74. DW 2 also said the Plaintiff company sold the equipment as scrap metal.
75. DW 2 also said the Plaintiff company was located at Chebenying, Sadal and Lobol locations. He said the camp was invaded at night.
76. DW 2 said the Plaintiff company got a lot of money from the project. He however did not know how much money the Plaintiff company made.
77. DW 2 denied that he incited the community to destroy the Plaintiff company's property. He said he went to the site when the report of the attack was made and further that investigations were done and some people were arrested.
78. I took over this case from Justice Chitembwe at judgment stage. I am alive to the fact that I did not do the case and therefore I did not have the advantage of seeing the witnesses.
79. I have carefully perused the evidence on record together with the written submissions and documents produced by both parties.
80. It is the duty of the Plaintiff to prove its case to the required standard in civil suits which is on a balance of probabilities.
81. I find that is not in dispute that the plaintiff company was licensed to prospect for precious stones at the then Baringo District.
82. There is evidence that the plaintiff company's camp was invaded on the 8th day of May 2006 and the plaintiff company lost both equipment and machinery.



83. The plaintiff is seeking compensation from the Defendant in respect of the loss sustained by the plaintiff company.
84. The issues for determination in this case are as follows;
- i. Whether the Defendant owed the Plaintiff company a duty of care.
 - ii. If so whether the Defendant was in breach of the said duty of care.
 - iii. If so whether the Plaintiff suffered damage as a result of the alleged breach of duty of care.
 - iv. Whether the Defendant is liable to pay the Plaintiff special damages of ksh.1,285,476,780.00.
 - v. Who pays the costs of this suit.
85. On the issue as to whether the Defendant owed the Plaintiff company a duty of care, the Plaintiff's evidence was that the Defendant agreed to provide the Plaintiff company with security.
86. However, there is no explicit agreement produced to prove that the Defendant was under a contractual duty or otherwise to provide the Plaintiff company with security.
87. In Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017] eKLR the Court of Appeal further stated that: -
- “We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties, They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”
88. There is also evidence that the condition for grant of the licence was that the government was not required to indemnify the Plaintiff company for any loss.
89. In the circumstances, I find that the Defendant did not owe a special duty to the Plaintiff company.
90. There is no evidence that the plaintiff company approached the police to seek protection. The plaintiff company did not bring itself into a special category that required special protection or prove that the police had information on the likelihood of violence occurring.
91. The plaintiff company did not prove that the police were aware or that they had information on the likelihood of occurrence of violence or that the police had agreed to provide the plaintiff company with security for their operations.
92. The plaintiff company was prospecting for their own benefit and they were under a duty to arrange for their security.
93. I find that the Defendant had no way of knowing that there was going to be an attack on the plaintiff company.
94. I accordingly find that the Defendant did not owe the plaintiff company a duty of care.
95. On the issue as to whether the Defendant was in breach of the duty, I find that the answer is in the negative for reasons stated above.
96. It follows that the Defendant is not responsible for the damage the Plaintiff company incurred.
97. It is not in dispute that the Plaintiff company was invaded by the local community. The reason was as a result of unresolved disputes arising from pollution from the Plaintiff company and unfulfilled promises.



98. I therefore find that the Defendant is not liable for the loss incurred by the Plaintiff company. The Defendant cannot be held liable for criminal activities of 3rd parties. There is evidence that some people were arrested and charged in court.
99. In *James Omwoyo Meroka & 2 others v Attorney General & 3 others* [2016] eKLR where it was held that
- “It is clear that the State through police, would only be liable for the acts of third parties only if the Petitioners can bring themselves into the special category as discussed above and prove that the police had information on the likelihood of violence occurred. To prove their allegation that the police were aware and had information on the likelihood of occurrence of violence, they relied on the Waki Report which they produced as evidence.”
100. On the issue as to whether the Defendant is liable to pay the Plaintiff special damages of ksh.1,285,476,780.00 I find that the answer is in the negative for reasons that the plaintiff company did not prove that the Defendant owed it a duty of care or that they were in breach of the duty of care.
101. Even if the Defendant had breached a duty of care, which they did not, I find that the amount the plaintiff company is seeking as special damages is highly exaggerated and it includes Projected costs for 5 years of Kshs. 1,185,040,818.00 which is speculative and imaginary figure.
102. The law requires that special damages must be specifically pleaded and proved.
103. Had the plaintiff company proved its case to the required standard, this court would have awarded it special damages in respect of equipment and machinery and wages amounting to Kshs. 300,000,000.
104. However, I find that in the circumstances of this case, the Defendant is not liable to pay the Plaintiff special damages of 1,385,476,780 or any amount for criminal activities of 3rd parties.
105. There is evidence that some people were charged in court but nobody from the Plaintiff company went to testify in court.
106. The Plaintiff company should have followed up the issue and pursued the people responsible for invasion and destruction of their equipment and machinery instead on laying blame on the Defendant.
107. I accordingly find that the Plaintiff company has failed to prove its case to the required standard in civil suits which is on a balance of probabilities.
108. On the issue as to who pays the costs of this suit, I find that there is evidence that the plaintiff company incurred loss and the only reason that the Defendant is not liable for the said loss is that the Defendant was not in breach of duty of care and for that reason I will not penalize the plaintiff company with costs.
109. I accordingly dismiss the plaintiff company’s case and order that each party bears its own costs of this suit.

Orders to issue accordingly.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 22nd day of May, 2023.

.....
A. N. ONGERI

JUDGE

In the presence of:



..... for the Plaintiff

..... for the Defendant

NAIROBI HIGH COURT CIVIL CASE NO. 375 OF 2009	0
--	---

