



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL CASE NO. 14 OF 2015**

**NICE RICE MILLERS LIMITED ..... PLAINTIFF**

**-VS-**

**MERU COUNTY GOVERNMENT ..... DEFENDANT**

**JUDGMENT**

1. By an Amended Plaintiff filed on 27<sup>th</sup> September, 2017, the plaintiff claimed as against the defendant a sum of Kshs. 95,400,914/= as compensation for financial loss suffered as a result of what it claimed to be unlawful acts on the part of the defendant against it. It also claimed interest on the said sum and costs of the suit.

2. The plaintiff's case was that, sometimes in the year 2015, it was issued with permits by the defendant to carry out within Meru County, the business of selling merchandise such as rice and soft drinks. The plaintiff paid in full, all the required levies to the defendant.

3. That, from May 2015, or thereabout, through its employees/officers/agents, the defendant commenced harassing the plaintiff's workers and tampering with its business operations within Meru County by, inter alia robbing the plaintiff's officers and workers; confiscating and carting away some of its goods for sale; unlawfully impounding and unjustifiably detaining its wagons and lorry.

4. As a result of the aforesaid actions, the plaintiff contended that it had incurred monumental financial losses as particularized in paragraph 7 of the amended plaintiff.

5. In its statement of amended defence filed in court on 17<sup>th</sup> October, 2017, the defendant denied the plaintiff's allegations and claim and urged that the same be dismissed.

6. At the trial each party called two witnesses in support of its respective cases. **PW1 Charles Njiru Kaburu**, the managing director of the plaintiff adopted his witness statement filed on 27<sup>th</sup> September, 2017 and testified that; in the year 2015, the defendant licensed the plaintiff to carry out within Meru County, the business of selling merchandise such as rice and soft drinks. However, within the same month, the defendant commenced harassment of the plaintiff's workers; confiscated and carted away the plaintiff's goods meant for sale; unlawfully impounded and unjustifiably detained the plaintiff's 10 wagons and lorry reg. no. KBL 168D Those happened in Meru, Maua and Timau towns within Meru County. At the time of impounding and detention of the said wagons and lorry, they were fully loaded with various items including rice and soft drinks meant for sale whose value was put at KShs.7,361,700/=.

7. As a result of the foregoing, the defendant's officers and employees were charged with robbery with violence in **Nkubu SRM Cr. Case No. 525 of 2015**. The plaintiff also sued the defendant in **Meru CMCC NO. 1281 OF 2015** whereby, on 26<sup>th</sup> January 2016, orders were made for, inter alia, the unconditional release and surrender to the plaintiff of the aforesaid mobile wagons and lorry together with the aforesaid goods.

8. The defendant failed to comply with the order. When the same was finally complied with on 8<sup>th</sup> March, 2016 under pain of contempt proceedings against the defendant's officers, it was discovered that a lot of the plaintiff's goods were missing or had expired and that the lorry and wagons were damaged. **PW1** therefore contended that through the defendant's action, the plaintiff incurred monumental financial loss which he itemized as follows:-

i) Unrealized milling income and profit -	Kshs.83,677,174/=
ii) Advertisement in Meru Town -	Kshs.300,000/=
iii) Director's expenses from May 2015 to March, 2016 -	Kshs.372,000/=
iv) Sales staff salary and marketing-	Kshs.786,000/=

v) Rent -	Kshs.2,076,000/=
vi) Single business permits and other county charges -	Kshs.489,400/=
vii) Store keepers and watchmen-	Kshs.534,000/=
viii) Stock loss -	<u>Kshs.7,166,914/=</u>
TOTAL -	Kshs.95,400,914/=

9. The plaintiff engaged the services of Philip Kamuru & Associates, a firm of auditors, who prepared the stock and revenue loss reports which the plaintiff relied on in this case. The plaintiff held the defendant fully liable for the afore-stated loss since the defendant had no justification whatsoever in interfering with the plaintiff's business operations.

10. **PW2 John Nyaga Njiru**, a partner in the audit firm of Philip Kamuru and Associates testified that, he had prepared reports for the plaintiff namely; the stock loss report and statement and revenue loss report and statement. That the reports were a true reflection of the loss suffered by the plaintiff. He produced the reports as **PEXh.2**.

11. In cross examination, he told the court that the source of the information for the preparation of the reports was the examination of the primary books of records and secondary books of records of the plaintiff. That the primary information was the stock sheets obtained from the plaintiff to establish the opening stocks. He explained the two reports to constitute the stock that was lost when the wagons were returned whose value he gave as Kshs.6.5 million. The stock that was returned but found to have been expired was worth Kshs.629,230/-.He explained that the Revenue Loss report was a special report that was confined to a specific period for a special instance.

12. On the other hand, **DW1** was **Gitonga Silas**, the director of compliance in Meru Alcoholic Drinks and Control Board. He adopted his statement filed on 7<sup>th</sup> June 2018. He admitted that the plaintiff was licensed to trade at designated areas within Meru County. That however, on numerous occasions and in total breach and violation of the terms and conditions of the trading license, the plaintiff carried its business by stalling its goods, merchandize, wagons and lorries at undesignated and unauthorized areas in various sub-counties within Meru County. That the plaintiff unlawfully carried its business within parking bays, matatu stages and terminus which were not areas specifically designated to do the kind of business the plaintiff was carrying. That it is because of this breach of the law that he instructed the defendant's officers to impound the plaintiff's goods in enforcing the defendant's by-laws.

13. In cross examination, **DW1** admitted that when the wagons and lorry were impounded, they had goods meant for sale. That there was no inventory taken at the time of impoundment of the wagons and lorry. He further admitted that the defendant had not provided the list of what it calls designated areas. That the designated areas were not specified in the permits issued to the plaintiff. He further admitted that he had not specified which of the defendant's regulations had been breached by the plaintiff and that none of the plaintiff's employees was charged in any court for the alleged breaches.

14. **DW2 Moses Maingi**, the deputy enforcement officer of the defendant testified that the plaintiff was licensed to trade at designated areas within Meru County. That on numerous occasions, the plaintiff was found to be in total breach and violation of the terms and conditions of the trading license by stalling its goods, merchandize, wagons and lorries at undesignated and unauthorized areas. That it was upon this total breach of the law that himself and other officers impounded the plaintiff's goods. That the defendant was not liable for any losses incurred by the plaintiff as claimed since the actions of the County officers was lawful and justified.

15. In cross examination, **DW2** told the court that the permits given to the plaintiff indicated that the place of business was '**open space**'. That there was no document issued to the plaintiff indicating what the designated areas or open space were. He admitted that no notice was issued to the plaintiff of any breach of the defendant's regulations. That the defendant's actions were based on the **Local Government Act Cap 265 of the Laws of Kenya**. He admitted that when the goods were released to the plaintiff, some of them were found to be spoilt.

16. Learned Counsels for the parties filed their respective submissions and framed the issues which they submitted on. These issues, which the court adopts are; ***whether or not the actions of the defendant were legal, and whether or not the plaintiff is entitled to compensation of Kshs.95,400,914/= as prayed for in the plaint.***

17. I have carefully considered the pleadings, the testimonies of the witnesses and the rival submissions and authorities relied on by the parties. I have already alluded to the two issues framed by the parties which fall for determination.

18. With regard to the 1<sup>st</sup> issue, it is not in dispute that in the year 2015, the defendant did grant to the plaintiff licenses to carry out, the business of selling merchandise within the County of Meru. The plaintiff paid in full to the defendant, all the required levies and parking fees. It is also not in dispute that on diverse dates in the months of May and June 2015, the defendant impounded and carted away the plaintiff's mobile wagons and a lorry loaded with goods for sale. **PW1** stated in cross examination that the licenses given to the plaintiff had conditions which extended to designated areas which he was shown. He specified the areas which the plaintiff was shown and placed its mobile wagons.

19. On its part, the defendant contended through its two witnesses that the plaintiff breached its by-laws by placing its wagons and carrying on business on undesignated areas. That the defendant's actions were therefore justified.

20. At pages 2 to 17 of **PEXh1** are copies of the Single Business permits granted to the plaintiff by the defendant. These are Permit Numbers 2015/7376, 2015/7378, 2015/7379, 2015/7380, 2015/7381, 2015/7382, 2015/7383 and 2015/7384, respectively. They were for Meru town, Nkubu town, Maua town and travelling licenses. The plot numbers where the business was supposed to be undertaken is christened "**open**

space". There are no other limiting conditions attached to the said permits. Further, the open space indicated against the physical address has no other explanation whatsoever. **PW1** was firm that the plaintiff placed its wagons in open spaces pointed out to it by the defendant's personnel.

21. The defendant's witnesses admitted that there is no list of places with the defendant that specify what the designated areas are. They also admitted that the plaintiff was never given any notice to advise it against carrying on business at the places it had stationed its wagons prior to the impoundment and carting away of its goods.

22. Further to the foregoing, even when challenged to cite the by-laws and regulations that were breached by the plaintiff, the defendant was unable to specify the same. Its witnesses sought refuge under the repealed **Local Government Act Cap 265 of the Laws of Kenya**. Even if that was the case, the defendant did not point out the specific section of that repealed law that allowed it to act as it did. That is, to issue permits that were vague as to the place of doing business, rudely proceed to impound goods belonging to a trader who has licences without notice and hung on to those items for nearly two years even in the face of a court order.

23. In view of the foregoing, I am satisfied that the actions of the defendant are indefensible. They bordered on impunity and were anything else but lawful. They were unwarranted and may have been actuated by pure malice.

24. The second issue is whether the plaintiff is entitled to compensation to the tune of Kshs.95,400,714/= as claimed. It was the plaintiff's contention that through the defendant's action, it incurred monumental financial loss which it pleaded and particularized in the Amended Plaintiff.

25. The plaintiff's claim is in the nature of special damages. It is trite law that special damages must not only be pleaded but must be strictly proved (See *Capital Fish Kenya Limited v. The Kenya Power & Lighting Company Limited [2016] eKLR*).

26. In the present case, the plaintiff pleaded its claim with particularity. I will consider each claim and the evidence tendered in respect thereof separately. With regard to the claim for unrealized milling income and profit amounting to Kshs.83,677,174/=, the plaintiff relied on the auditor's report and submitted that it had lost income by way of unrealized milling income. On the other hand, the defendant contended that the plaintiff being a limited liability company carrying business all over Kenya, it was not clear from the report whether the milling was done specifically for supply and sale within Meru or other Counties as well.

27. **PW2** testified that the Revenue Loss Report was prepared specifically for the issue before court. That whereas normal auditors report is prepared on a comparative basis from year to year, the report produced as part of **PEXh.2** was for a special instance. That he obtained documents and information from the plaintiff in preparing the report.

28. I have looked at the Revenue Loss Report and Statements at page 17 to 25 of **PEXh.2**. The report computes the milling schedule for the days in question and finds an average per day. Then the same is multiplied by the number of days in which the plaintiff's goods were in the custody of the defendant and was not carrying on business. **PW2** told the court that he was an auditor of not less than 20 years' experience and that he is the one who prepared the report. He appeared at the trial, testified and was cross-examined at length. He told the court that the report was prepared from the information and documents submitted by the plaintiff. His testimony remained unshaken. His was expert testimony on a specialized field.

29. This court takes cognizance of the fact that the plaintiff went out to do business for gain. That out of the unlawful acts of the defendant, 10 of its wagons and a lorry were out of business for nearly a year. During that period, the plaintiff was out of use of the said equipment. In addition, it could not sell the rice and merchandize for which the business had been intended and the Single Business Permits paid for. In my view, in the unique circumstances of this case, the plaintiff had proved on a balance of probability that it had lost revenue to the tune claimed. It cannot lie in the mouth of the defendant to contend that the loss must have included other areas other than Meru County. **PW2** was offered for cross-examination on his report and his testimony remained firm and unchallenged on this aspect. The notes to the financial statements in my view are clear on how the loss was computed.

30. Further, the court notes that the report relied on by **PW2** was filed and served upon the defendant long before the trial date. If the defendant was not satisfied with the explanations therein, it should have notified the plaintiff to produce at the trial, the primary documents relied on in the preparation of the report. This it did not do. The plaintiff cannot therefore be faulted for relying on PEXh 2 only without the production of the primary documents from which the information was extracted.

31. Accordingly, I allow the claim for KSh.83,677,174/= for revenue loss as having been proved to the required standard.

32. With regard to the claim for directors expenses amounting to Kshs.372,000/=, the plaintiff did not specifically state the exact expenses that the directors incurred and for what. In cross examination, **PW1** stated that it was for fuel as he was making trips to the defendant's offices and that his documents were with his auditor's as he had given them the same to compile this figures.

33. I have looked at the report of the plaintiff's auditors. Although this expense is alluded to at page 22 of **PEXh.2**, there are no explanatory notes to show how the same was arrived at. It was expected that **PW2** would give a background to the same, make an explanation for it and state the primary documents he considered. Hard evidence of the same lacking that claim fails.

34. With regard to sales staff salary, store keepers and watchmen amounting to Kshs.786,600/= and Kshs.534,000/= respectively, although specifically pleaded, these claims were unsupported and were not strictly proved as by law required and the must subsequently as well fail. They may have been incurred but there was no evidence as required by law on how they were incurred. There was no evidence of pay slips or appointment letters that were either produced or referred to in the report.

35. With regard to the claim for rent, the plaintiff claimed a total of Kshs.2,076,000/=. It was contended that in preparation for business, the

plaintiff had rented out premises which were not utilized because no business was ever conducted as a result of the defendant's actions. The plaintiff produced lease agreements with various parties in the towns in which it had obtained single business permits from the defendant. The agreements show that a total of Kshs.2,076,000/= was paid and receipt thereof acknowledged by the respective Lessors. Even though the plaintiff did not produce receipts to support the same, I am satisfied that with such acknowledgements, the plaintiff was able to prove that this amount was indeed expended on rent. The Lease agreements speak for themselves that the rent had been paid and receipt thereof acknowledged. That claim has been proved on a balance of probability and the same is allowed.

36. With regard to the claim for single business permits and other charges paid to the defendant, the plaintiff claimed a total sum of Kshs.489,400/=. The plaintiff contended that it paid for the permits to enable it do business in Meru County but this was not possible since its business was paralyzed by the defendant for a whole year. This claim was not only pleaded, but receipts were also produced to show that the money was paid over to the defendant. These permits were rendered useless with the impoundment of the plaintiff's goods by the defendant. The same is allowed.

37. With regard to advertisement, the plaintiff claimed a total sum of Kshs.300,000/=. Both the plaintiff and defendant were in agreement that the plaintiff was unable to trade at the time that the plaintiff's merchandise was in possession of the defendant. The plaintiff produced an advertising order from Mediamax Network Limited which showed that the plaintiff had paid a total of Kshs.300,000/= as advertising fees. That claim is also allowed.

38. There was also the claim of Kshs.7,166,340/= being stock loss. It was contended for the plaintiff that the stock loss statement was informed by the report from the Kenya Bureau of Standards, hand over notes during return of the plaintiff's properties and that the report referred to loss related to lost goods, damaged goods and expired goods. It was also contended that **PExh.2** clearly specified the particulars of the wagons in question. The defendant refused to provide an inventory of the impounded goods and could not therefore challenge the same.

39. I have carefully perused the stock movement sheets prepared by **PW2** on behalf of the plaintiff. Contrary to the submissions by the defendant that the plaintiff company was a company with businesses all over the country, the stock movement sheets were very specific as to the locations and the specific wagons concerned. The defendant did not challenge these stock movement sheets. **DW1** admitted in cross examination that there was no inventory that was prepared during the impounding. I am satisfied that the plaintiff satisfactorily proved loss of stock to the tune of Kshs.7,166,340/= and I accordingly award the same to the plaintiff.

40. Due to the peculiar nature of this case, it would have been absurd to expect the plaintiff to produce receipts for loss of stock. In coming to this conclusion I am guided by the case of ***Mitchell Cotts (K) Ltd vs Musa Freighters (2011) eKLR*** in which the Court of Appeal expressed itself thus:-

***"... In the light of the above and in the circumstances we cannot fault the superior court which accepted the only evidence which was tendered to the court on the issue, the appellant having failed to give any evidence on the value of the tyres it had conceded it could not deliver to the respondent when called upon to do so. In this country civil cases are decided on the basis of a balance of probabilities. In the circumstances, the respondent had obviously put something on their side of the scales whereas the appellant had failed to do so resulting in the balance tilting in favour of the respondent on the critical issue of the value of the uncollected tyres. The court did its best and cannot be faulted. In addition, the loss was specially pleaded in paragraph 4 of the plaint. In view of the admission by the respondent, the critical issues for consideration were whether the special damages were pleaded and if so whether they were proved. In our view, the respondent has proved both issues and for this reason, our inclination is not to disturb the judgment of the superior court..."***

41. In the end result, I find that the plaintiff has been able to prove its case against the defendant on a balance of probability to the tune of KShs. 93,708,914/=.

42. Accordingly, I enter judgment for the plaintiff against the defendant for KShs.93,708,914/= together with interest thereon at court rate from the date of filing suit until payment in full. The plaintiff will also have the costs of the suit together with interest thereon.

**DATED and DELIVERED at Meru this 20<sup>th</sup> day of September, 2018.**

**A. MABEYA**

**JUDGE**