



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

HIGH COURT CIVIL APPEAL NO. 12 OF 2013

GARISSA MAIZE MILLERS LTD..... PLAINTIFF

V E R S U S

- 1. ATTORNEY GENERAL 1ST DEFENDANT**
- 2. MINISTRY OF DEFENCE 2ND DEFENDANT**
- 3. CHIEF OF DEFENCE FORCES 3RD DEFENDANT**

JUDGMENT

1. BACKGROUND

The plaintiff Garissa Maize Millers Ltd commenced this case through a plaint filed on 17th May 2013. The Defendants are named as Attorney General as 1st Defendant, Minister of state for Defence 2nd defendant, and Chief of Defence Forces as 3rd defendant.

It is averred in the plaint that on the 19th of November 2012, following the killing of 3 members of the Kenya Defence Forces by unknown assailants in Garissa, members of the Kenya Defence Forces on direct orders of the Commander In Chief his Excellence President Mwai Kibaki through the military chain of command, instructed his soldiers to undertake a military operation in Garissa. It is also stated that the acts of the members of the Kenya Defence Forces were pursuant to orders made by the National Security Intelligence Committee chaired by the Commander In Chief of the Armed Forces to seek revenge for the killing of the three soldiers, and was thus an official act of state sanctioned by the highest state organ to inflict damage and loss on its own citizens. It was averred that in the violent operation involving 1000 members of the Kenya Defence Forces, civilians were killed, raped, assaulted and property destroyed. It was averred that one of the properties destroyed by the Kenya Defence Forces was the plaintiffs posho mill. It was averred further that on 20th November 2012, the Prime Minister Hon. Raila Odinga in a press release acknowledged that the operation was undertaken by the Kenya Defence Forces pursuant to Government policies and regretted the loss of life and destruction of properties.

Particulars of the properties destroyed were listed in the plaint. These were main building, 8 stores/godowns, four motor vehicles KAU 327Y, KBE 673P, KAK 610X and KBQ 009R. Machinery MK6BM, MK3 and posho mill. Cash stolen by members of the Kenya Defence Forces Kshs 5,800,000/=. Office furniture/computers, Kshs 38,000/=. Bags of raw materials (Maize flour). 120,000 empty sacks. Packing materials of (a), 148 Bales x (20 Kgs each) each Kshs 9,000/-, (b) 230 bales (10Kgs each) each Kshs 18,000/- per bale.

Particulars of special damages were listed in the plaint. These were burning of properties valued at Kshs 20,000,000/-. Burning of 8 store/godowns valued at Kshs 92,000,000/-. Cash stolen by members of the

Kenya Defence Forces Kshs 5,800,000/- , Motor vehicle KAU 327Y, KBE 673P, KAK 610X and KBQ 009R Kshs 25,200,000/-. Machinery MK 6BM, MK3 and posho mill Kshs 33,300,000/-. Office furniture/computers 3,000,000/-. Raw material (maize flour) comprising 38,000 bags valued at Kshs 3500/- per bag – Kshs 133,000,000/-. Empty sacks 12000 x Kshs 450 amounting to Kshs 5,400,000/-. Packaging materials of 148 bales x Kshs 2,000 each bale @ Kshs 9,000 amounting to Kshs 1,332,000/= , and 230 bales of 10Kgs each 18,000 per bella amounting to Kshs 4,140,000/-. Loss of profit for two years during which time the plaintiff would undertake construction Kshs 84,000,000/-. The total claim under special damages is Kshs 407,172,000/-.

The plaintiff asked for entry of Judgment against the defendants jointly and severally for the following orders. Firstly, a declaration that the acts of the Kenya Defence Forces were illegal. Secondly, a declaration that the plaintiff suffered loss as a result of the destruction of the property. Thirdly, payment of Kshs 407,172,000/- plus interest at courts rates from the date of filing suit until judgment is entered. Fourthly, costs of the suit. Fifth, interest on special damages and costs from the date when incurred. Lastly, any further relief that the honorable court may deem fit and appropriate in the circumstances.

When the plaint was served, the 3 defendants filed a statement of defence through the office of the Attorney General. They denied that the plaintiff was the lessee of GSA/BLOCK 1/190 and that the plaintiff was running a poshomill business on the strength of a small industry permit from the Municipal Council of Garissa. The defendants admitted the killing of 3 members of the Kenya Defence Forces but denied that the Commander in Chief of Kenya Defence Forces ordered the undertaking of any military operation in Garissa. They denied the existence of a National Security Intelligence Committee. They denied the undertaking of any military operation by the Kenya Defence Forces at Garissa as alleged.

They stated that if the Prime Minister made a statement then it was his own political statement during a campaign period and not a Government statement. They denied all the particulars of special damages. They also denied that the Government announced compensation before an investigation was conducted. They also averred that the facts pleaded in the plaint pointed to a riotous situation of which no liabilities attached in law. They stated that the joinder of the 2nd and 3rd defendants was unlawful and contrary to the provisions of the Government Proceedings Act and that they would at an opportune time apply for the 2nd and 3rd defendants to be struck off from the list of parties in the proceedings.

The plaintiff filed a reply to defence on 12th September 2013. They reiterated the contents of their plaint. They stated that the defendants were misguided in relying on Article 240 (8)A of the Constitution which only applied to deployment of Kenya Defence Forces outside Kenya. They also stated that Section 22 of the Kenya Defence Forces Act empowered the Defence Council to establish Committees for effective discharge of their duties. They stated that the events of 19th November 2012 were covered by both local and international media. They stated that demand and notice were sent to the defendants by the letter dated 22nd November 2012. They maintained that all the defendants were lying.

During the hearing of the case, the plaintiff called one witness. The defendants also called one witness.

2. CASE FOR THE PLAINTIFF

On the side of the plaintiff Hassan Ibrahim Ahmed testified as PW1. He stated that he was a manager of the Plaintiff. He confirmed that he signed the verifying affidavit to the suit, and relied on his witness statement and list of documents.

It was his evidence that on 19th November 2012 at around 1.00 Pm after prayers, he was at the business when Kenya Defence Forces Officers invaded the premises. He referred to a bundle of documents and identified photographs which he said were for various damaged items related to the suit. One of the photographs showed the building of the maize mill and machinery together with sacks of maize for milling. The photographs also showed the house in which the factory was situated. He stated that the machines were clearly shown in the photographs as well as a pickup which was used to transport maize flour to local shops. Part of the machinery was also in the photographs as well as a car used for ferrying staff. He stated that there was an agreement for sale of the car which was purchased for the company. At

page 3 of the documents, was photo of the building and a damaged car. The photograph also showed the production house where maize flour was produced and put into sachets. At page 4, he identified a Kanzu and Tshirt which he said belonged to him. He also pointed at maize grains on the photos and a storage area. He stated that the photos showed that he sustained injuries and was bleeding after having been beaten by Kenya Defence Forces officers. He stated that he was injured after the assault by the Kenya Defence Forces officers while inside the milling plant. He stated that a canter was also damaged.

He also pointed at a house owned by the company and part of the machinery which was damaged. He said that all the machines were owned by the company and were actually operational before the damage.

He said that all the buildings were damaged by Kenya Defence Forces and that they burnt them without any reason. He stated also that the Kenya Defence Forces Officers came into the factory and also burnt or destroyed the nearby market. He stated that he had worked for the factory for about 20 years and that they produced over 1000 bales of maize flour per 24 hours and that each bale was worth Kshs 1,100/-. He stated that the company documents which they would have relied upon were burnt in the incident. He stated that they kept money in the safe in the main house of the factory. He stated that his statement clearly stated what was destroyed and lost.

He stated also that the bundle of documents also contained a lease agreement for the plot which was initially owned by the Municipal Council which he signed as Managing Director. He stated that the documents relied upon included a licences issued by the Municipal Council of Garissa, and documents on taxes paid to Kenya Revenue Authority. They also included a receipt for one of the vehicles which was used by a manager, and which was burnt.

He stated that the documents also evidence the registration number of a truck which was under repair in Nairobi, and also a Profoma Invoice evidencing the price of a caterpillar.

He stated in evidence that there was a vehicle which was purchased from a private citizen but burnt at the premises. The purchase price was Kshs 2,500,000/-.

It was his evidence that there was a Probox vehicle belonging to the company whose sale agreement was annexed to the bundle of documents. He stated that the vehicle was also damaged.

He stated that the documents included a quotation from Toyota Kenya for the value of the Probox vehicle. According to him the quotation was obtained after the properties were burnt because they wanted to seek compensation.

He stated that there was an estimate of the value of the machines as well as a breakdown of the parts of the machines. He said that the machine parts were totally burnt and that only remains were in existence.

He stated also that, after the burning incident two delegations from the Government came to assess the damage. One was led by Hon. Raila Odinga, then Prime Minister. The second was led by Hon. Yussuf Hajji then the Minister of Defence. According to him Hon. Raila Odinga stated that he would see to it that the Government would do something. He stated also that a Parliamentary team also came to Garissa and later issued a report which was in the bundle of documents, and which recommended compensation to be paid by the Government.

He stated that there was no good reason why Kenya Defence Forces did what they did. He maintained that he was at the premises when Kenya Defence Forces Officers stormed wearing military uniform. He said that they send notice to Government asking for compensation, before commencing proceedings.

He testified that as a result of the destruction of the properties and injuries suffered, the plaintiff was seeking compensation from the court. He stated that they were asking for all the reliefs sought in the plaint. He denied that youth were involved in burning the premises and maintained that the burning was caused by the Kenya Defence Forces officers. He stated that he was told later that 3 Kenya Defence Forces officers had been killed near the General Hospital and maintained that the Kenya Defence Forces

officers destroyed many premises, including mosques.

He stated that he reported the incident to police who took no action. He said that he now did not own any business and that he had been reduced to poverty. He stated that he was emotionally disturbed and needed compensation for all the properties destroyed. He stated that he did not receive any letter requiring him to appear in any office on security issues. He stated that he did not receive compensation from Government. According to him, a group of around 10 officer's stormed the office of the company during the destructive operation.

At this stage, the counsel for the plaintiff Mr. Cohen stated that he relied on the bundle of the plaintiff's documents.

The witness then proceeded to say that the Kenya Defence Forces Officers left their vehicles outside and some entered the premises and assaulted them. He stated that Hon. Yussuf Hajji and Prime Minister Raila Odinga made promises of compensation.

In cross examination, he maintained that he was manager of Garissa Maize Millers who filed this suit. He stated that they were three Directors (including himself) and that a company resolution was made to file the suit, which was exhibited in documents. He stated that the plaintiff was a registered company and that they made annual returns to the Registrar of Companies. According to him, some of documents burnt was the Returns. He stated that the Kenya Defence Forces officers burnt some of the relevant documents, and that was why some relevant documents were missing.

He maintained that Garissa Maize Millers was a Company and that the products were sold in the name of Maua Maize millers because Maua was a brand name. He stated that the photographs were taken at the time of the incidence but were printed later. He said that the photographs were taken by many people, some of whom were hired by the Company and others on their own. He said that the photos produced in court were taken by media houses and Human Rights Organization but he brought them in court.

When referred to documents, he stated that there was a document for registration certificate for motor vehicle KBQ 009R. He stated that it was the same vehicle referred to in paragraphs 9 and 19 of his witness statement. He said that it belonged to the company though it was in the name of Hassan, and the seller was a person by the name Nabeet Bhatt and the buyer was Hassan. He confirmed that the vehicle was in his name. He said that Mohamed Hussein Hassan was the driver. He said that it was an oversight that the vehicle was not registered in the name of the company.

He stated also that after the photos were taken, he valued all the destroyed properties including the main house. According to him that is where the value of Kshs 20,000,000 and a value of Kshs 92,000,000 came from. He stated that he had however not filed a valuation report in court, but said he could file one in due course.

With regard to the photographs, he stated that they were taken on the date of incident but were printed on 27th November 2012. He maintained that the Kenya Defence Forces officers were responsible for the damage and that he was an eye witness. He stated that he could not take photographs of the vehicles outside the building as everybody was grounded. Only people who had high vintage could take photographs. He said that some photographs were taken during the incident while others were taken later. He did not know if any photos of Kenya Defence Forces officers were taken, but maintained that he was an eye witness. He stated that the evidence of Kenya Defence Forces officer's involvement would be produced.

He stated that he had conducted the business for 20 years and that from 1998 it operated under the name of Garissa Maize Millers, but previously it was in the name of Maua Maize Millers. He stated that the registration certificate for Maua Maize Millers was returned to the registration office during change of name.

When referred to paragraph 13 of his witness statement, he stated that the Somalis were a small

community and that before this incident, many atrocities had been committed by the Kenya Defence Forces against them. He thus took the incident to be a continuation of those atrocities. He agreed that a few Somali officers were in Kenya Defence Forces, but said that they had no say. He confirmed that Hon. Yussuf Hajji was a Minister then but maintained that he had no power because the Minister had explained to them that he was isolated from power.

When referred to page 8 of the plaintiff's bundle of documents, he stated that it was his photograph and maintained that he had been assaulted by Kenya Defence Forces Officers. He stated that when he went to the police station but was denied a P3 form and, as such sought private medical treatment. He stated however that the documents for treatment from the private hospital were burnt in a subsequent attack by the Kenya Defence Forces on another night, whose date he could not remember.

When referred to page 1 to page 10 of the photos, he stated that those photos related to the damage of 19th November only. He stated that the 1% damage of the subsequent attack were not recorded.

When referred to paragraphs 18 of his statement, he stated that the Kshs 5.8 million was money kept in the office for a long period, because the harvest season was approaching and that they would also have to pay suppliers. According to him those were the reasons why they put the money in the safe. He stated that the money was banked rarely. He maintained that item (V) was the cost of machinery which was burnt of approximately Kshs 33,000,000/-. He stated that they bought the machines from South Africa.

He stated also that the costs office furniture and computers destroyed was Kshs 3,000,000/-, though he did not have documents to support the value and maintained that they could get the said documents. On item 7 and 8 the value of bags of approximately Kshs 33,000,000/-, he said that the documents were burnt but that the Stock Manager would come to testify. He then said the Stock Manager was not going to be a witness.

When referred to documents on motor vehicle KAU 327Y, he stated that the registered owner was Ahmed Sheikh one of the Directors. Its value was said to be Kshs 25.2 million. He maintained however that it was a company vehicle but not registered in the name of the company.

When referred to his witness statement on the motor vehicle KBE 673B, he said it was a tractor which ordinarily was in Nairobi but was burnt during the incident. He said that it was registered in the name of Sheikh Hussein Ahmed a Director and co-owner of the plaintiff.

With regard to motor vehicle KBQ 009R Probox, he confirmed that that was the vehicle that appeared on page 2 of the documents of the plaintiff's documents. He stated that after the incident he made a report to the police and recorded a statement.

When referred to the defendants list of documents on the OB record, he stated that a report was made to the police by Mohamed Mohamud Kassim. He said that that person made his own report, but that the witness also made his own report. He stated that in his report he, said that his machines had been damaged. He maintained that various Government delegations visited the premises, who included Members of Parliament in the company of the local MP Adan Duale, and Hon. Yussuf Hajji who was then Minister for Defence. In addition, a group led by the Speaker of the National Assembly visited them about two or three days later.

He stated that it was then a time approaching the election, but maintained that it was only the Kenya Defence Forces and not Garissa youth who could have started a fire. He maintained that he saw the persons who started the fire after the killing of Kenya Defence Forces Officers. He came to know about the killing of Kenya Defence Forces Soldiers after the burning incident.

He stated that the Kenya Defence Forces Officers who stormed his premises were over 10 in number.

When referred to paragraph 18 of his witness statement, he said the company (plaintiff) had suffered loss of Kshs 1.3 million and Kshs 4.1 million due to destruction of materials for packaging of maize flour. He

stated that they bought the materials from Nairobi and that they could get quotations for the cost from Nairobi.

On the claim for loss of profit of Kshs 84 million, he stated that the loss covered a period of two years. He stated that they knew the cost price and selling price of business items, as well as expenses, and as such they used such figures to arrive at the loss. He said however that relevant documents were burnt and they were thus not able to support the loss with documents.

In re-examination, he stated that no Director had complained about his action in filing this case. He stated that there as no one able to take photographs, the media houses took the same. He stated that Mohammed Hassan was the driver of motor vehicle KBQ 009K which was at the premises during that time.

On valuation of the burnt properties, he maintained that the properties were burnt and that, on that day, many soldiers came into the premises and he could not take away or sell anything. He stated that he went to hospital for treatment, and had reported the incident to the police who refused to give him a p3 form. He stated that his report was entered in the OB, whose exact number he could not remember.

He maintained that they kept money, especially on weekends, in the safe. He said that as 19th November 2012 was a Monday and also near the end of the month, they kept money in the safe to pay suppliers. He maintained that their office furniture and computers had been burnt. He further said that Hussein Mohammed was one of the Directors whose car, which was parked in the premises, was burnt. He said that the Kenya Defence Forces officers assaulted him, and that they first assaulted him and then started the fire. He stated that it would take more than two years to reconstruct the premises. He stated that they bought packing materials from Nairobi which were all burnt, and as such they made an estimate of the loss. He said that he infact expected an increase in prices of materials currently.

After this witness testified, Mr. Cohen abandoned the plaintiffs request to rely on video recording and closed the plaintiff's case.

3. THE DEFENCE CASE.

During defence, the defendants called only one witness DWI Major Kenneth Kirui. He stated that when he filed the witness statements, he was a Captain. He adopted his witness statement as evidence, and also relied on the defence which was filed in court, and on the defendants list of documents which had been filed.

He stated that he was a Transport Officer.

He testified that on 19th November 2012, there were officers deployed at Garissa Military Camp as part of Amisson Troops who were part of a group transiting from Mada through Mandera to Somalia who had passed through Garissa. At around 1100 hrs he received a request to authorize repair of tyres and he authorized repairs of the puncture as the transport officer.

The transit officers left the camp, and at around 1200 hours information was received from one of them Private Karanja, that they had been attacked by unknown people at a garage and that the said Private Karanja and another soldier, had managed to escape. After they received the information he was instructed by Major Muriithi who was the second in command at the Garissa camp, and who was then in command, to move to the scene of the attack with the intention of checking on the injured soldiers. They left the camp in less than 10 minutes in a section which comprised of 9 soldiers - 5 being the protection team and 3 nurses. He was the 9th person as the commander of the section.

When they arrived at the scene of the shooting, they found 3 dead soldiers who had died of bullets wounds. The scene had already been controlled by four Administration Police officers who were controlling the crowd. He immediately made a phone call to Major Muriithi who was at the camp, and informed him that the soldiers had died. Major Muriithi then instructed him to make immediate

arrangements to transfer the bodies to Garissa General Hospital Mortuary, and they did so, using two police vehicles and one military vehicle.

Thereafter they received information from the police, that the assailants had been seen with a vehicle at Bulla Muzuri which was beyond the General Hospital behind the University in Garissa.

It was his evidence that the police on the ground requested him for reinforcement and he requested for another section of 9 men from the military camp to accompany the police. According to him, in such an operation, the police and military played different roles. The police were to do the search while the military were to provide protection to the police.

He testified that the additional section proceeded to Bulla Muzuri while the initial section cordoned the scene of the shooting incident. He stated that they were with police officers who were interrogating civilians at the scene. It was his evidence that as this was happening, at around 1330 hours some rowdy youth took the questioning to be harassment and, to express their anger started burning tyres on the road and also burnt makeshift structures.

He later received a report from Bulla Muzuri that the assailants were not traced and he thus instructed the military section that had gone to Bulla Muzuri to join him at the scene. According to him, the nine men from Bulla Muzuri joined them at 1500, when the youths were still protesting and lighting fires.

He then instructed his soldiers to go back to the camp by walking carefully at 1530 hours. They avoided boarding motor vehicles for security reasons. The police and the military tried to disperse the youth from the road, and were able to walk safely back to the camp, while the vehicles followed with only drivers.

According to him, by 1630 hours they paraded all the soldiers at the camp to check if any had suffered injuries or lost equipment or if anything needed to be known or acted upon. He found that all soldiers and equipments were intact and that no injuries were noted and he so briefed the Camp Commander. He then dismissed the parade and told the soldiers to remain in the camp and wait further orders.

He then prepared the official report to Kenya Army Nairobi Headquarters at 1700 hours to the Deputy Army Commander and the General Officer In Charge of Eastern Command Major General Ronoh. He also briefed Colonel Kitilit and Major Muriithi about what happened. According to him, the men under his command did not leave the camp thereafter because he told them to await his further orders.

On the following day, they went on with routine activities and they did administrative movements such as going for water supply. He denied receiving orders from the Commander in Chief Hon. Kibaki to undertake a military operation. In any case, based on the timing, he stated that such an order would have taken time to reach him. He stated also that the reason why they moved out of the military camp in the first place was not to conduct an operation, but to try and rescue injured soldiers and take them to hospital.

He stated that after public outcry, on the alleged military operation, a Board of Inquiry was conducted and he testified before the panel. He stated that he was aware that the findings of the Board of Inquiry exonerated the military from any blame in looting, destruction of property, rape and shooting of civilians. He stated that it was not true that after the killing of three soldiers, the military went on a revenge mission. He maintained that their main reason of coming out of the military camp was to save and evacuate the injured soldiers, but they found that they had already died and the mission ended there. He stated that a military operation would have involved more than 18 soldiers.

When referred to paragraph 8 of the plaint, he stated that it was not true that 1000 soldiers were deployed. According to him the military camp was small and was not residential but a transits camp. He stated that generally the men at the camp did not exceed 150 members, and that since also some go on leave, it was not possible to have had 1000 men in Garissa. He said that transit soldiers were ordinarily not held at the camp for more than 3 days. He maintained that, at that time the total soldiers in the camp were less than 200. He further stated that they could not allow soldiers go to Garissa town and leave

sensitive materials at the camp unguarded.

He said further that the following day which was 20th November 2012, Senior Officers from Nairobi came to Garissa and a series of meetings were held at the Provincial Headquarters. The Commander of the region from Liboi also came and got a brief and took over the matter. He said that it was the Commander from Liboi who appeared before the Committee of Parliament. It was his evidence also that from that point he did not pursue the matter further and was only involved a week later when a Board of Inquiry was conducted.

When referred to documents on the defendants list, he stated that he was aware of the report prepared by the Security Committee. He maintained that there was no shooting by the military officers and that his soldiers remained at the scene and did not go to town. He stated that military officers only shot because of self defence, as arms issued had to be accounted for. He stated that during the parade, they found that no ammunition had been used.

When referred to the plaintiffs list of documents and photographs, he stated that the photographs indicated that they were taken on 27th of November, which was about a week later. He said that the destruction was not associated with military soldiers.

When referred to paragraphs 13 of the plaint he said that the military were not an interested party in production of products from maize.

When shown paragraph 13 of PW1 witness statement, he stated that the military did not hate members of the Somali Community. He stated that he moved with soldiers who were mainly of Somali descent because of logistic, navigation and translation requirements. He maintained that hooligans took advantage of the situation and caused the damage.

In cross examination he stated that at Garissa military camp he was under the instructions of Major Muriithi. He said that he was not at the scene of incident when the shooting occurred. He said that on arrival at the scene, he found the military truck, and weapons and that nothing was stolen. He maintained that Major Muriithi remained at the camp. He stated that he gave Major Muriithi a report which was not in court. He said that Major Muriithi gave him oral orders at the camp, and maintained that military orders are either written or oral. He said that Private Karanja had initially informed Major Muriithi that soldiers were injured but when he went to the scene, he found that they were already dead.

He stated that he was a General Duty Officer and could be employed to do any military duty, though he was a Transport Officer. He maintained that he sent officers to Bulla Muzuri and that the section which proceeded to Bulla Muzuri was under his command, though he did not go there. He stated that the section which went to Bulla Muzuri went there to assist the police in the operation and that it would be wrong to say that the military went there on an operation. He confirmed that after the section from Bulla Muzuri joined them at the scene of incident, the County Commissioner told him to remove any security men to reduce the tension. He stated that Maua Millers was about 500 meters from the Garissa Military camp main gate and that the scene of crime was about 900 metres away, but in the same area. He said that he made a report to the Board of Inquiry about the incident but that report was not in court.

When referred to the report to the Joint Committee which was a defence document, he agreed that there was a record of shooting, but he maintained that when they went to the camp, they counted the arms and found that there was no used ammunition.

He admitted existence of a four storey building next to the military camp and that police were also there. He admitted that security personnel and the gang exchanged fire because when one was threatened they could return fire.

When referred to paragraph 2 of the report on shooting, he stated that the report said that security personnel rushed to track down assailants and that it was a combined operation.

When referred to the recommendations, he said that he did not attend any investigations enquiry. He maintained however that the Defence council did not authorize the operation. He stated that the County Commissioner tried in vain to calm the situation when the police were engaging gangs and firing at them.

He stated that though the report from the Parliamentary Committee might have referred to Kenya Defence Forces officers, the committee did not call any of them to testify. He denied any meeting of the County Security Committee as he was a member of the committee and was not called to testify in that committee. He stated that the report says that the attack was uncoordinated, and also recommended that an investigation to be conducted.

On loss of lives and destruction of properties by Kenya Defence Forces, he confirmed that two people had been confirmed in the report as dead. He however doubted the authenticity of the report, since he was the incharge of the Kenya Defence Forces officers.

When referred to page 82 paragraph 11 of the report, he maintained that there was no operation by the Kenya Defence Forces. He confirmed however that the Committee of Parliament recommended compensation.

When referred to his evidence in court, he stated that the report from the police was that the vehicle used by the attackers was a Probox. He stated that as they walked towards the military camp, the police cleared the crowd ahead of them and denied that anger was unleashed by any of the men. He maintained that he found that no ammunition had been used by his men, though he did not bring the report to the court.

He stated that the Regional Commander who sat in the Provincial Security and Intelligence Committee came to Garissa the next day. He maintained that bullets could not cause fire to buildings.

He stated that as night was approaching, they had to move back to the camp, and that Major Muriithi was at the gate of the military camp trying to prevent officers from coming out. He refused to confirm the contents of the Security Committee report as he did not participate in its deliberations and said that the authors of the report might be trying to exonerate themselves.

He said that the soldiers at the military camp were very few, and though he acknowledged the destruction, he denied the involvement of the Kenya Defence Forces. He stated that he was a member of the District Security and Intelligence Committee, and said that he was at the scene of the shooting of three soldiers for more than 3 hours. He maintained that the soldiers only took defensive positions. He stated that it was wrong to rely on recommendations of Committee where one was not involved. He stated also that there was a lot of discrimination in the report against the Kenya Defence Forces.

In re-examination, he stated that he was not aware if the report of the Parliamentary Committee was acted upon. He was not even aware if Parliament adopted it. He stated that the orders given by Major Muriithi herein were verbal. He reiterated that Garissa Maize Millers was about 500 meters from the military camp, and maintained that there was no military operation on 19th November 2012. He stated that they did not get the registration number of the Probox vehicle involved and that if a Probox vehicle was burnt at Garissa Maize Millers premises, that was not because it was the said suspects Probox.

He stated that before shooting was done by the military, orders had to be given and that cartridges from Kenya Defence Forces guns would have been identified as they are serialized. He stated that the report had recommended conducting proper investigations and he was not aware whether proper investigations were conducted.

With regard to destruction of properties and terror he said that those were mere allegations as he conducted a parade after returning to the military camp and confirmed that ammunition was intact. In his view, a proper investigation would have collected cartridges to confirm whether they were from the Kenya Defence Forces. He maintained that as military officers they could not interrogate civilians as that was the legal responsibility of the police. He maintained that no military operation occurred on 19th

November 2012.

At this point Mr. Kamau for the defendants stated that they had two recorded witness statements, and that they had intended to call Major Muriithi but were informed by the Ministry of Defence that he was in the Central African Republic on a United Nation Mission. He stated that, since the witness who had testified was the person on the ground he would close the defence case.

4. SUBMISSIONS OF THE PARTIES COUNSEL.

Both counsels agreed to file written submissions for highlighting and they did so.

In highlighting the submissions of the plaintiff, Mr. Cohen relied on the plaint, as well as the bundle of documents which were paginated from page 1 to 90. He also acknowledged the written submissions filed, the list of authorities and supplementary list of authorities. Counsel submitted that the plaintiff called one witness Hassan Ibrahim Ahmed an eye witness to the events which occurred of 19th November 2012. The plaintiff wanted to prove the involvement of Kenya Defence Forces soldiers in the loss caused to the plaintiff. Counsel stated that the plaintiff had a lease and owned the property.

On the day in question, counsel submitted the premises were attacked by Kenya Defence Forces soldiers as stated in paragraphs 10 of the plaint, and Mr. Hassan (PWI) confirmed this and said that Kenya Defence Forces officers entered the premises and set the factory ablaze. Counsel submitted that after the incident a Parliamentary report was made, which they produced. At page 51 of the report it says that information from local administration and others were that the Kenya Defence Forces were involved in the destruction. The report also contained what the Minister said.

Counsel emphasized that DW1 Major Kirui, admitted having gone to the scene where 3 Kenya Defence Forces soldiers were killed and asked for reinforcement to escort the police to Bulla Muzuri – which was a military operation. According to counsel that was wrong Counsel relied on Article 241(2c) of the Constitution and said that, such deployment of the military officers, would only be sanctioned by Parliament and as such all what happened was illegal.

Counsel emphasized that the Minister for Defence who was also a defendant herein, testified before the Parliamentary Committee and that there was a recommendation in the report that compensation be paid for this uncalled for action, and that Ahmed (PWI) was beaten and injured, and there was thus justification for compensation.

Counsel submitted that at page 8 of the report, it was said the Security Committee did not sanction the operation. In counsel's view it was curious that Major Kirui (DW1) testified about the shooting but did not say who was involved in the shooting. Counsel submitted that the observations of the District Security and Intelligence Committee was that there were 15 soldiers who went to remove the 3 dead soldiers and that some others came to pursue the attackers contrary to what Major Kirui said. A recommendation for compensation was also made in the report.

Counsel also submitted that properties were destroyed, such as buildings, cars furniture which was clear evidence as contained in the photographs.

Counsel submitted that the documents relied upon included a list of vehicle and proforma invoices to ascertain the prices of the destroyed machines and cars because the original documents were destroyed. Counsel also submitted that the court visited the destroyed factory and saw for itself that the factory had been damaged and was not working. Counsel referred to the OB report number 35/20/11/12 where it was said that a Somali man from Maua Maize Millers had reported that Kenya Defence Forces officers set the factory, vehicles and machinery on fire. He stated that this report was annexed to the plaint to show the importance of the report.

Counsel relied on a case of *Maharaj -vs- Attorney General of Trinidad and Tobago (1978)2 ALLER 670* a case on commitment for contempt of court and emphasized that as the Kenya Defence Forces were

a State organ and violated the Constitutional Rights to peoples properties, the State was liable.

Counsel also relied on a case of *Associated Provincial Picture Houses Ltd –vs- Wednesbury Corporation (1947) ALLER 680* on liability of State for illegal actions.

With regard to the issue of damages, counsel submitted that the plaintiff was seeking compensation and that the monetary amount of the claim was particularized. Counsel submitted that the nature of the case was that everything, including receipts in the factory, were burnt and could not be available for tendering in court. Counsel submitted further that the proof of damages depended on the facts of each case, and relied on a case of *Ouma -vs- Nairobi City Council (1976-801)1KLR 375*. Counsel emphasized that what happened herein on 19th November 2012 was an act of Military Officers against civilians and urged the court to put this particular situation into consideration, when considering or awarding damages.

Counsel submitted that Major Kirui (DWI) said that he was a member of the District Security and Intelligence Committee but was not called for any meeting, and gave the view that he could not be called to the meeting because he participated in the incident in question. In any event counsel argued, Major Kirui did not say that his superiors were not called to the committee to testify. Counsel also submitted that since there was no military operation as stated by Major Kirui, it was illogical to parade officers on return to the camp in order to find out whether ammunitions had been used.

Counsel submitted also that a court should consider where the plaintiff would be if the incident did not occur, and submitted that the plaintiff was entitled to the reliefs sought and that the Parliamentary report supported this position. Counsel relied in the case of *Jephtar & Sons Ltd –vs- Attorney General - HCT-00-CV-0699 – 2006* a Ugandan High court case on damages awardable. Counsel also relied on the case of *Mosisili -vs- Editor Miller Newspapers CIV/T/275/2001* from Lesotho where the court awarded what was just and fair. Counsel further urged the court to consider the award of equitable damages in the present case, and stated that the plaintiff was asking for appropriate relief as the court may deem fit.

Finally counsel submitted that the court should find the 3 defendants jointly liable for the reliefs sought and grant declaration and damages sought together with costs and interest.

Mr. Kamau for the defendants relied on the statement of defence, list of documents, witness statement of Major Kirui and written submissions together with authorities.

Counsel submitted that though counsel for the plaintiff alleged carrying out military operation on 19th November 2012, no evidence was brought to court to prove an operation or allegations of destruction by Kenya Defence Forces. Counsel submitted further that though the plaintiff talked about a direct order from the President for that operation, no such order was proved.

With regard to paragraph 16 and 18 of the plaint on particulars of special damages, counsel argued that the specific sums of money or values of the properties given were not proved. Counsel relied on case of *Hahn -vs- Singh (1985) KLR 717* as well as a case of *Ratcliffe -vs- Evans (1892)2QB 524* on special damages. Counsel emphasized that special damages must not only be pleaded but also be proved. Counsel submitted that as no valuation report was relied upon to prove the alleged special damages or figures, the case should fail.

Counsel also relied on a case of *Sande -vs Kenya Cooperative Creameries (1992) LLR 314* on proof of special damages and maintained that, in the present case the particulars of special damages had not been proved.

Counsel also submitted that since the suit was instituted by Garissa Maize Millers Ltd, a limited liability company, the rules were clear that the verifying affidavit must be sworn and filed by an officer authorized by the Corporation. According to counsel the verifying affidavit by the Managing Director did not comply with the legal requirements, as it was not under seal.

Counsel submitted also that the plaintiffs relied on Parliamentary proceedings which were not produced

in court in accordance with Section 35 of the Evidence Act. Counsel relied on the case of ***Delta Haulage Services Ltd -vs- Complast Industries Ltd – Civil case No. 1058 of 2006***, in which the court quoted Halsburys Law of England and stated that a mere admission of documents did not make them evidence.

Counsel submitted also that Parliament formed a Committee and made a report. However under the doctrine of the separation of powers, this court is where the plaintiffs was required to prove his case on the balance of probabilities. Counsel emphasized that there was no proof on the burning or damage of properties by the Kenya Defence Forces as alleged. Counsel emphasized that Major Kirui stated that he was in a group of only 9 soldiers including himself, and that the next group of nine soldiers went to assist the police in their investigations at Bulla Muzuri. The Kenya Defence Forces officers were thus not involved in an operation and as such the plaintiff failed to prove that Kenya Defence Forces officers were involved in an operation.

Counsel submitted further that with regard to damages, the plaintiff made a prayer for damages to motor vehicles, for total amount was Kshs 25,200,000/-. No single logbook was exhibited in court. In addition, the vehicles were said to be in the names of other people.

The plaintiff also asked for damages of Kshs 5,400,000/- for damage to packaging materials, but no evidence to prove same was supplied.

The plaintiff also asked for damages of Kshs 133,000,000/- for maize flour in bags, but no evidence was tendered to prove the existence of those bags. A claim was also made for stolen cash Kshs 5,800,000/-. Again no evidence was presented in court to justify the existence of that money in the factory. Counsel submitted that in the submissions the plaintiffs lawyers stated that various Articles of the Constitution were violated. Counsel relied on the case of ***Mumo Matemu -vs- Trusted Society of Human Rights Civil Appeal No. 290 of 2012*** in which the case of ***Anarita Karimi -vs- Republic (1976-80) KLR 1272*** was relied upon that a person needs to prove how a Constitutional right or freedom was infringed, before a court can act on the same.

Counsel also submitted that parties are bound by their pleadings. He relied on a case of ***Adetoun -vs- Nigerian Breweries - sc 91/2002*** - wherein it was held that submissions made without a basis in the evidence should be ignored.

Counsel submitted that the plaintiff had not proved a claim for loss of 2 years profit and construction of 84,000,000/-.

Counsel submitted that as a consequence of the plaintiff failures above, the burden of proof had not been discharged by plaintiff on the balance of probabilities as required in a civil case. Counsel submitted lastly that this was a civil suit and not a Constitutional petition and as such, the plaintiff could not ask this court to grant any other relief deemed fit to grant.

Mr. Cohen for the plaintiff in response, submitted that if the military operation was not approved by the Commander In Chief, then it was illegal. Counsel relied on the case of ***Hahk -vs- Singh(supra)*** and said that degree of proof in a civil case depended on the circumstances of each case. The witness herein being the Managing Director, there was no contention about his position and as such his evidence was authenticated.

Counsel submitted that the Parliamentary Committee worked together with other Government Institutions or organs. Since the defence did not object to the documents produced or relied upon, they could not come and challenge them during submission.

Counsel emphasized that what was being called cordoning by the defence, was actually an operation.

With regard to cars or vehicles, counsel submitted that some were in the names of company while others were in the names of directors.

Counsel submitted that the case of *Anarita Karimi and Mumo Matemu(supra)* referred to by the defence were Constitution Petitions and not civil cases. Counsel submitted that the pleadings herein were clear, and that the OB report clearly showed that Kassim made a report to the police.

With regard to proof on a balance of probabilities, counsel submitted that the plaintiffs case was proved, as the inquiries held supported the evidence that there were burnings. Counsel submitted that Major Kirui said that they escorted police to Bulla Muzuri and that was an operation. Counsel emphasized that Major Kirui even admitted to calling in additional military officers. Counsel contended that youth could not riot for nothing. On the case of *Sande -vs- Kenya Cooperative Creameries(supra)*, Counsel submitted that each case has to be determined on its own facts and circumstances. Counsel emphasized that the receipts herein for the damaged items were burnt.

To sum up, counsel submitted that the report from Parliamentary Committee was not a report from a single member of Parliament. He maintained that there was evidence of burning, injuries to persons, loss of properties and loss of business. Counsel urged the court to award the total sum claimed, costs and interest and grant any necessary orders. Counsel urged that the defendants be punished for their actions and that the plaintiff be placed in the same position he would be if the destruction did not occur.

5. ANALYSIS AND FINDINGS

This is a civil case. The burden is on a plaintiff to prove his case against a defendant. The plaintiff is the claimant and has to prove his claim. In Kenya Section 107 of the Evidence Act(cap.80) clearly makes it statutory that he who alleges must prove. The section provides as follows-

“107(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which she asserts must prove that those facts exist

(2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

In civil cases, the standard of proof is on the balance of probabilities. The plaintiff herein is therefore required to prove his case against a defendant or defendants on the balance of probabilities.

From the evidence and submission on both sides, a number of issues arise.

The first issue that arises is with regard to parties. It has been argued by the defendants counsel that the 2nd and 3rd defendants were wrongly or illegally joined by the plaintiff as parties contrary to the provisions of the Government Proceedings Act. Indeed the Government Proceedings Act, provides that the defendant in cases where a complaint is made against a Government department is the Attorney General. Constitutional Petitions and Judicial Review proceedings are however different as they target the actions of particular officers or offices with or without the direct involvement of the Attorney General. This is not a Constitutional Petition or a Judicial Review application.

In my view, with the facts disclosed in this matter, the joinder of the 2nd and 3rd defendants in the claim brought by way of plaint, was a mistake. However the correct defendant, the Attorney General was also made a party. He sent a representative who defended the case. Though the 2nd and 3rd defendants were wrongly joined, I find that the defendant did not suffer any prejudice. I find that the error regarding the list of defendants herein is a technical one and does not affect the substance of the plaint. It is curable under the provisions of Article 159(2)(d) of the Constitution and section 3A of the Civil Procedure

Act(cap.21). I thus find that the plaint is valid and proper even though it joined some parties who should not have been joined herein.

The defendants have also raised an issue that they were not served with a Notice of intention to Sue. Again on this point, I find that that complaint cannot be sustained. The evidence on record is that they were informed in writing about the intention to sue. In my view, even if that notice was not served it

could not render the proceedings null and void. It could only perhaps affect the issue of costs since the absence of that notice would mean that the Attorney General might not have had an opportunity to explore the possibility of a settlement out of court, after obtaining instructions from the relevant departments. I dismiss that complaint.

The third issue relates to the existence of the company, ie the plaintiff, and whether the person who signed the verifying affidavit Hassan Ibrahim Ahmed was authorized to institute the proceedings on behalf of the company. I observe that there was no request by the defendants for production of company documents by the plaintiff to prove the existence of the company. As such the defendants cannot state that the company or plaintiff is a sham. It might have been Maua Maize Millers sometime back, but that cannot be an issue now because the defendant did not raise that issue in any way or ask for better particulars.

As for signing of the verifying affidavit by an officer of a company, that is a legal requirement. Order 4 Rule 1(4) of the Civil Procedure rules is clear on this. However in my view a Managing Director is an officer of a Company. There is no requirement that the authority of the Board of Directors be filed in court. The person who signed the verifying affidavit signed as Director. No Director or other officer of the company has come to court to challenge his authority. I dismiss that complaint.

The next issue is whether there was a military operation on the 19th of November 2012 in Garissa town.

Evidence has been tendered on both sides. The Plaintiff's single witness stated that a military operation did occur after three military officers were shot dead. He claimed that the operation occurred within Garissa town and that the military soldiers went to Garissa Maize Millers premises where he was present, and harassed him and also set buildings, equipment's and cars on fire. He relied on photographs, but which were not formally produced in evidence as exhibits, though same were listed among the items to be relied on by the plaintiffs. The photographs also do not indicate the presence or image of any military officer. They are photographs of damaged items and a person who appears to have sustained some injuries.

The defence through their single defence witness, say that indeed three military officers were shot dead in Garissa town on that day. They said that a few military (a section of 9 officers) officers were dispatched from the military camp to guard the scene of shooting and assist in taking the deceased to the mortuary. That another section of a military officers were dispatched from the Garissa military camp to proceed to Bulla Muzuri to assist police in tracking down the culprits. They say that in the course of interrogations, some youth became irritated and became rowdy, and started burning tyres and structures. The witness stated that they had to be escorted back to the camp on foot by police officers in the evening of that day.

To them, if there was any destruction or damage to properties in Garissa town, it was caused by the youth. They denied having been in an operation as such was not authorized by the Military Command or the Commander In Chief. They stated that on going back to the camp, they checked on all ammunitions and found that none was used.

Weighing the versions of testimony of the plaintiff and the defence on whether the military were involved in an operation that day, in my view, the military were indeed involved in an operation of trying to track down the killers of three military officers in Garissa.

As to whether they got formal orders from the Commander In Chief or from the Military Command, that is an internal matter which this court cannot delve into at this stage since they never brought the Commander In Chief or the Military Commander who gives such orders, to come and testify and be cross examined. The factual situation is however that indeed the military were physically in Garissa town attempting to track down the culprits who had killed their colleagues.

They were doing so together with the police. The defence evidence that the youth became rowdy and started burning tyres could be true, but if the military were not involved in the operation, there would be no need for them to be escorted back to the military camp by the police. According to the evidence of the

defence, it was the police who were interrogating civilians to get information and, if it were true then in my view a reaction by the youth against the interrogation, would be against the police. It would not be that the police be the ones who interrogate the youth, and yet the same police become the protestors of the military officers from the reaction of the youth.

The evidence that the military ammunition was found to be intact at their military camp, again that is an internal matter which this court cannot investigate. It suffices if civilians heard gun shots when the military and police were interrogating people after a crime was committed. That in my view was an operation.

In my view therefore on the balance of probabilities, the plaintiff has proved that the military were involved in an operation in Garissa of trying to trace the culprit or react to the shooting of three military officers, on 19th November 2012.

The next issue is whether the military set the factory and equipment and cars of the plaintiff on fire and damaged properties. The plaintiff's claim for compensation is in the form of special damages.

I have anxiously considered the evidence of the plaintiff and the defence. The burden is always on the plaintiff to prove his case against the defendant on the balance of probabilities, even if the case proceeds by way of formal proof see the case of *Kirugi –vs- Kabiya & 3 Others (1987)KLR 347*.

The Garissa Maize Millers has been described by the single witness as a working factory on the day of the incident. It was a commercial enterprise. Such business premises, on a working day which is Monday, it was expected there would be other people who were working. There is no indication that anybody there was shot dead.

The defendants denied that they burnt the premises. There is evidence that youth were also involved in burning items on the road and other places in Garissa town that day. This evidence is not controverted.

It was thus for the plaintiff to call cogent evidence to support his claim that the military were in or around the factory premises and set the same on fire. Even a honest member of the public who was around the scene or who came to the scene shortly after the incident would suffice. It would infact be expected anybody working in the factory that day would come to support the single witness story. That did not happen. The photographs relied upon do not indicate presence of any military officer. The evidence of the single witness on his encounter with military officers was hazy, and not convincing.

In my view the plaintiff has left the court in a situation where it is to use guess work. This court cannot make a decision in favour of a plaintiff based on guess work. Considering all the facts on record, I am not convinced that the plaintiff has proved, on the balance of probabilities, that the factory was burned by the military officers on that day. The reports from the Committee of Parliament and other reports do not help the plaintiff. This is because they were not admitted by consent of the parties in evidence or produced through witnesses.

The next issue is whether the plaintiff has proved the damages incurred. Under paragraph 18 of the plaint, the claim of Kshs 407,172,000/= is a claim for special damages. Though the witness claimed to have been assaulted and injured by the military, he did not make a claim for general damages for pain, suffering and loss of amenities.

It is trite law that any claim for special damages has to be specifically pleaded and proved. Both sides have relied on a number of court cases on this legal principle. I will merely cite the case of *Sande –vs- KCC Ltd(1992)LLR 314* where the court of Appeal stated – ***“It is now trite law that special damages must not only be pleaded but must also be specifically proved.”***

The plaintiff was thus required to prove ownership or legal interest in the items listed. He had to prove the actual value, he had to prove the damage by the defendants. The plaintiff has listed eleven quantified items, including loss of profit for two years during which he would undertake construction totaling Kshs

407,172,000/- as special damages.

This court visited the premises just before submissions were made by counsel in court. Premises and items were damaged. The destruction was alleged to have occurred in November 2012 which is about four years now. At the time the court visited the premises, no reconstruction had commenced.

The plaintiff has maintained that documents on the value of the items in question were also burnt in the fire and a subsequent fire. Only one witness tendered evidence and he was not an expert nor did he claim to be an expert in assessing the costs of equipment's and materials.

In my view other than proof of ownership by the company, the plaintiff was required to bring expert assessors to testify on the value of the damaged items.

He did not bring any technical people to testify on the value of burnt premises for the claim of Kshs 20,000,000/-. He did not bring a technical person to testify on the burning of 8 stores or godowns valued at Kshs 92,000,000. He did not bring a cashier or accountant to testify on the loss of Kshs 5,800,000/- that was said to have been kept in the safe. He did not bring an expert to testify on the value of motor vehicles KAU 327Y, KBE 673P, KAK 610X and KBQ 009R said to be worth 25,200,000/-. In addition to this, the motor vehicles were not in the names of the company but were registered in the names of private individuals who did not come to court to testify.

The plaintiff he did not bring technical person to testify on the value of machinery MK6BM, MK3 and posho mill said to be of a value of Kshs 33,300,000/-. The plaintiff he did not bring technical person to testify on office furniture and computers valued at Kshs 3,000,000/-. They did not bring a technically qualified person to testify on raw materials (maize flour) comprising 38000 bags valued at Kshs 3,500 per bag totaling to Kshs 133,000,000/-. They did not bring a technically qualified person to testify on empty sacks 120,000 x Kshs 450 amounting to Kshs 5,400,000/-. They did not bring a technically qualified person to testify on packing materials of 148 bales x 2000 each bales valued at Kshs 9,000/- for a total of Kshs 1,320,000/-. They also did not bring an expert person to testify of packing materials of 230 bales (10kgs) each Kshs 18000/- per bale totalling Kshs 4,140,000/-. They also did not bring a technically qualified person to testify on loss of profit for 2 years during which construction of the maize meal would be undertaken amounting to Kshs 84,000,000/-.

In the English case of *Bonham Carte –vs- Hyde Park Ltd 1948 64 TLR 117* the court stated –

--- “Plaintiffs must understand that if they bring action for damages it is not enough to write particulars this is what I have lost, I ask you to give these damages they have been proved”.

In essence the plaintiff pleaded special damages in the plaint, however they failed to prove the special damages on the balance of probabilities. Merely mentioning or listing the special damages in the plaint is not the same as proving the same. Proof of special damages does not necessary need to be on documents, but there has to be cogent evidence to establish that the loss quantified in terms of money, has been established, and that that loss was visited upon the plaintiff by the defendant. The plaintiff herein in my view has failed to prove their claim for special damages.

6. DETERMINATION

The prayers in the plaintiff are first, a request for a declaration that the acts by the Kenya Defence Forces were illegal.

This prayer can only relate to the acts of the Kenya Defence Forces as regards to the plaintiffs claim herein for damage to their properties through burning. Since the plaintiff has not proved that the burning of his premises and other items was done by the Kenya Defence Forces, this prayer cannot be granted.

The second prayer is for a declaration that the plaintiff suffered loss as a result of destruction of properties. Indeed, from the evidence on record, there was destruction of properties and loss must have

occurred. However the plaintiff failed to prove that the items were destroyed by the Kenya Defence Forces. Therefore this prayer cannot also be granted by this court.

The third prayer is for award of Kshs 407,172,000/= plus interests at court rates from the date of filing suit until judgment is entered. This is a prayer for award of special damages plus interest. As I have said earlier in this judgment, the special damages were pleaded herein by the plaintiff, were not proved. Therefore this court cannot enter judgment for the special damages or award interests, to the plaintiff. The prayer also fails.

The fourth prayer is for costs of suit. The plaintiff has lost the suit. In the normal course of events, costs will follow as a consequence, and they would be to the defendants. However in the present case, the defendant is the Attorney General of the Republic of Kenya and this is a case which has been lost because the plaintiffs, for whatever reason, shied away from bringing forward tangible evidence in court to prove his case. In the circumstances of this case, therefore I will order that each party will bear their respective costs of the suit.

The prayer for interest also fails.

To conclude the plaintiff's suit fails. I dismiss the plaintiff's suit and order that each party will bear their respective costs of the proceedings.

Dated and Delivered in Garissa this 9th March 2016.

GEORGE DULU

JUDGE