

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.3923 OF 1985

KIGIKA DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

NAIROBI CITY COMMISSION.....DEFENDANT

RULING

This matter originally came before me on an application to strike out the defence. I struck out the defence but as the action was somewhat unusual I refused to give judgment, but directed that the case be set down for Formal Proof.

When the case came before me for Formal Proof, the Advocates for the parties had not properly thought out the case, but after some discussion in Court and a 1/2 days adjournment the issues became clear to both Judge and Counsel and I have had much assistance from the Advocates. Briefly the facts are these –

The Plaintiff purchased land in NAIROBI with the intention of developing it. Unfortunately the defendants took over this land for its own public purposes without following the Statutory Procedure as laid down in the Land Acquisition Act (cap 295) and dispossessed the plaintiff. This type of semi forcible dispossession is not a new thing in Kenya and the Court have found a remedy for it. The Courts treat the unlawful acquisition as a compulsory purchase and award damages as if the land had been acquired under the Land Acquisition Act (cap 295) that is the Market Value of the lands and 15%

This method of dealing with compensating this wrong was the method decided upon by the late Mr Justice Chanan Singh in *New Munyua Sisal Estates Ltd vs Attorney General* [1972] EA 88. This case has never been dissented from, Counsel for both parties agree that the decision is correct and for my long experience in the State Law Office, I know that it has been used as the appropriate method of settling many claims where Government has taken land unlawfully or under the guise of Management Orders to settle the landless I propose to apply its principles to this case. By doing so I believe I am satisfying 3 of Mr Munenes claims which he categorized as follows:-

- (1) Unlawful acquisition of LR 219/16
- (2) Trespass
- (3) Breach of an agreement to offer to exchange land for Land Acquired.

I propose to hear evidence of the value of the lands, assess its market value to which I shall add the appropriate 15%. Mr Munene has 2 further claims which I shall now consider. The first claim amounts to a sum of over 12 Million shillings damages. Particulars of this claim which is alleged to have arisen from the unlawful refusal or neglect of the defendants to approve of the plaintiffs development plans for the said plot, are set out in Paragraph 10 of the Amended Plaint.

Can the plaintiff claim damages for this? I think not. Admittedly the defendants were under a Statutory duty to approve or disapprove of these plans. Does a refusal to act whether malicious or not gives rise to a claim in damages? The English Court of Appeal in *Davis v Browly Corporation* [1908] 1KB 170 decided that it did not. This decision criticized by the Privy Counsel in *David v Abdul Kadhi* [1963] 1 WLR 864. This was a decision on delict in Roman Dutch Law but the comments of the Board are relevant. They

pointed out that there had been considerable development in the law relating to actions for damages since Davis & Browly and the decision might have to be reconsidered in the light of such developments. These developments can be found in the House of Lords decision in *Cutler v Wandsworth Stadium Limited* [1949] AC 398. As I understand this decision there is an action for damages for breach of Statutory duty causing injuries to a person for whose benefit the Statutory duty has been imposed. Thus a factory Worker who is injured because of a breach of Statutory duty under the Factories Act (cap 514), can sue for damages caused by reason of the breach because the Factories Act was enacted for the protection of Factory Workers. The Town Planning Legislation however was enacted to protect the public interest and not the land developers, consequently the plaintiff does not have an action for breach of Statutory duty which duty arises out of this legislation.

The plaintiff has further difficulty in respect of this claim. The damages alleged is not physical injuries to a person or property, it is “economic loss” only. The Courts and the Faculties of Law in Universities have long pondered the question whether the Courts can compensate by an award of damages economic loss only. The diversity of views on this subject can be seen by reading the judgments in *Sperton Steel & Alleys Limited v Martin & Company (Contractors)* [1972] 3W LR 502. Our Court of Appeal and Mr Justice Kneller (as he was then) have decided that an action based on *Rylands v Fletcher* does not lie when the only injuries is “Economic Loss” (*Kenya Ports Authority v KP&L Company Limited* (in) App No 41/1981. Can an unlawful failure to approve building plans be actionable when the only injuries is “economic loss”. The Tort of malicious or negligent abuse of power is as one writer puts it still A nascent tort. Each Tort is different and since the matter is one of policy, each can be decided in a different way from the next one. Were I told to hold that the defendants were liable in this case, I should have to hold the City Council liable to these when they would have been employed on the plaintiffs proposed development to potential suppliers and to potential Maisonnettes purchasers. The policy consideration set out by Mr Justice Blackburns in *Castle v Stockton Waterwork* LR 10 QB 453 apply to this claim of the plaintiff and I am prepared to hold further that the plaintiff cannot review damages for economic loss caused by the failure (be it negligent or malicious) to approve his building plans. I accordingly refuse to award any part of the special damages claimed in paragraph 10 of the Amended Plans.

As to Exemplary Damages, I do not believe this is a case for the same. No word of such damages was made in the New Munyua Sisal case and I do not propose to give any here. I shall accordingly, hear evidence only in the value of the land in 1981.

Dated and Delivered in Nairobi this 14th day of October 1986.

J.F.SHIELDS

JUDGE