



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 82 OF 2009

SAMUEL MWANGI GATOTO

T/A DIANI FARMERS DAY & NIGHT CLUB AND ALSO

T/A GOMBATO GUEST HOUSE.....PLAINTIFF

-VERSUS-

THE ATTORNEY GENERAL.....DEFENDANT

JUDGEMENT

1. The plaintiff brought this claim against the government through his plaint dated 24.3.2009 and later amended on 6th October 2014 and filed in Court on 9th April 2015. The plaintiff sought compensation for the loss suffered as a consequence of the 2007 – 2008 post-election violence and gave the amount he is seeking in the suit as:

- a. Cost of repair of destroyed building on the 2 properties Kshs. 15,718,000/=
- b. Loss of business on business carried out on property known as A from March, 2008 to date Kshs. 7,200,000/=
- c. Loss of business on business carried out on property known as “B” from March, 2008 Kshs. 3,600,000/=

2. The Attorney General entered appearance and filed a statement of defence dated 9.6.2009 and later amended on 11th May 2016 denying the plaintiff’s claim. The defendant pleaded that it had no knowledge of the allegations of loss and damage suffered by the plaintiff and put him to strict proof. That the duty of the defendant to afford security to the public is to all Kenyans and not specific to the plaintiff and denied there was any breach. The defendant pleaded that it is not liable to the acts of violence of the mob or lots of unidentified persons. That the plaintiff’s suit is statutorily time barred. He therefore urged the Court to dismiss the suit.

3. Once the pleadings closed, the parties set down the suit for hearing. The plaintiff testified as PW 1 on 16th May 2016. He told the Court that he runs two businesses called Diani Farmers Day & Night Club and Gombato guest house. He adopted his statement filed in Court on 28.10.2014 as his evidence together with documents attached to his list dated 28.10.2014. The documents were admitted by consent. PW 1 stated that on 30th December 2007 violence erupted as a result of the disputed election results between Honourable Kibaki & Honourable Raila. That the local population (Digo) supported Raila and since he was born in Nyeri, he was told to return where he came from. PW 1 continued that he went to report to Diani Police Station that his guest house was burning and things stolen. A week later, the club was also attacked.

4. The plaintiff said that he never got help from the police. That they only went to the suit property after the destruction was done. He obtained a police abstract showing the details of the properties destroyed. That his club has been running from 1975 and was fully developed. He also prepared a report of the damage (pages 10 – 13 of his documents) giving total loss @ Kshs 5,119,310= . The witness stated further that he used Kshs 17 Million for repairs. He produced photos of the burnt guest and club houses as well as the farm of oranges. The report on the damaged tree oranges was put at Kshs 6,750,000. He also produced a certificate of official search showing plot No 3046 was his.

5. PW 1 said he was unable to do business for about five months. That he has never seen any valuer sent by the government yet he had reported the incident. That he had seen tension build from February 2007 yet there was no security beefed up. He had also written to the O.C.S Kwale. This is why he sued the government seeking compensation.

6. In cross – examination, PW 1 said that Gombato is not registered while Diani farmers is registered as a business name. He has about 30

acres of land in Ukunda. That the businesses were burnt down by mobs. The letter of February 2007 to the D. C was about encroachment by squatters while the 2nd complaint was about the club operating 24 hours daily. The incident was recorded in January 2008. At page 10 is a list of properties looted. That the repairs on the premises was not completed in one day and he used to pay the contractor with cash & cheques as the works were ongoing. He used to pay income tax for the businesses. Currently, Diani farmers is not running because of interference from the government.

7. **JOSEPH KIBACHIA KINJA** testified as PW 2. He carries on business under the name of Waken Construction Company and was registered with the Ministry of Works under category F. Currently he is registered with National Construction Authority in Category 6. He confirmed carrying on repairs on the property of the plaintiff as set out in the bill of quantities. He also confirmed being paid for the services rendered. He identified photographs of the premises that were burnt down as they were before the repairs and after.

8. During cross-examination, Mr Kibachia stated that he was told the premises were burnt by a mob. That the invoice of Kshs 4,300,000 dated 25.4.2008 was more than the 10% down payment and by this time they were already working. He had a register for casual workers; they bought materials from the hardwares and other places. That in construction you cannot be exact because of the wastages. That he did the actual work. In re-examination, PW 2 stated that he did the worksm and that he did not know there would be a case. The monies quoted to be spent were actually spent.

9. PW 3 was **Nelson Vidgi Mugale** who is the plaintiff's auditor. PW 3 stated that he works for Kaleka Auditors. The plaintiff has been their client for over 20 years. That he did the plaintiff's books of accounts for the year 2005 – 2007 in respect of Diani Farmers and Gombato guest house. In his report, he found the net profits made by the plaintiff as follows:

Diani Farmers:

2005: Kshs 6,445,263

2006: Kshs 7,191,743

2007: Kshs 7,513,894

Gombato:

2005: Kshs 2,515,695

2006: Kshs 3,235,111

2007: Kshs 3,356,784

That these documents were prepared by their company and signed. He also gave estimates of profits that would have been made in the year 2008 at Diani Farmers; at 7.9 Million and Gombato at Kshs 3.7 Million.

10. In cross-examination, PW 3 said he is not a registered accountant but Kaleka was before he joined the employment of Kenya Revenue Authority. The statements of accounts were prepared in 2008 and signed on 28.4.2008. The documents used to prepare the accounts were supplied in February 2008. At page 44, the figures given do not tally with the expenses listed as over heads. PW 3 was aware when the accounts were being prepared, the business had been burnt. That the documents had been kept at the home of the plaintiff. He denied making the accounts purposely for this case. In re-examination, PW 3 stated that the errors in the entry do not affect the substance of his report as long as they had supporting documents. This marked the close of the plaintiff's case.

11. The defendant called one witness **C.I.P PETER MWALALI KIEMA No 219685**. He is currently the O. C. S Athi River and previously the OCS Diani Police Station between the years 2007 – 2009. He adopted his witness statement filed in Court on 16.5.2016. The witness stated that the plaintiff had made several reports in 2008. He also stated that he entered the report in the O. B on 2.1.2008. That after the election results were announced on 31.12.2007, there was tension from 1.1.08. The people of South Coast were not happy with the results as announced.

12. The witness continued that due to the tension, officers himself included were out patrolling. At about 8 pm, they saw some fire and rushed to the scene. He entered this incident in the O. B which report he produced as Dex 1. In his written statement, the witness stated that he knew the plaintiff owing to his stay at Diani Police Station where he had previously worked between 1994 – 1998 and confirmed that the plaintiff operated the two businesses. That before 2007 elections, the police at Diani were not aware of any threat of violence eruptions neither did the plaintiff report any threat against his properties. That on 1.1.2008 the fire only consumed the makuti sheds at Gombato. They managed to put off the fire with the assistance of members of the public. The witness stated that the protests in Diani lasted for a period of less than a week after the announcement of the results. He denied any incident took place at Diani Farmers Day & Night Club.

13. The witness on cross-examination by Mr Gikandi advocate for the plaintiff admitted the businesses were fully operational even before 2007. That to the naked eye, the plaintiff had improved the businesses. He saw the letter dated 16.2.2007 but stated that the OCPD dealt with it. He knew security was enhanced. That there were threats towards upcountry people depending on your political inclination. In his area, there were several destruction of properties and there was insecurity. That it is possible other destruction was done to the suit premises but it had to be reported. The witness was not certain of the genuiness of the police abstract produced by the plaintiff.

14. He witnessed the fire at Gombato but could not ascertain what was lost. He does not know if renovations were done on the premises as the file was forwarded to the D.P.P. When damage is proved, the witness stated victims are entitled to compensation. In re-examination, he

said he attended to the scene immediately the fire started. That they dispersed the youth in other places after the fire. He is unaware if the plaintiff has appeared before any compensation committee. When the fire began, he was out on patrol. This marked the close of the defendant's case.

15. The parties' advocates filed written submissions together with supporting cases annexed. I have read and considered them. From their evidence adduced by both sides, it is not in dispute that the plaintiff was living in Ukunda Diani and operating two businesses named as Gombato guest house and Diani Farmers Day and Night Club prior to 2007. It is also not in dispute that as a result of the 2007 elections that was disputed, the plaintiff's businesses were burnt down. The defence witness admitted witnessing the makuti structures at the compound of the guest being on fire but doubted if the club house was also burnt down. Further it is not in dispute that there was tension between the local population and the people from upcountry depending on their political affiliation i.e. the pro PNU and ODM as at the time.

16. The plaintiff stated that the premises were set on fire by rowdy youths. That as a result of the fire incident, he suffered heavy losses. In the report made by the defendant's witness, he stated thus ***"Now from a scene of fire at Gombato guest house which occurred at 20.30 hours burning down two makuti thatched situated structures inside the compound of the guest house. There was nothing in the shades during the incident there was no damage nor injuries reported. Thereafter tension arose between Muslim youths and the Kikuyus."***

17. The questions framed for determination by the Court are two i.e.

(1) Did the plaintiff suffer any loss as a result of the violence?

(2) Who is liable to compensate him for that loss?

18. The plaintiff produced copies of his two titles for parcel Nos Kwale/Ukunda/3046 and Kwale/Diani Beach Block/688 to confirm that he is the owner of the land where the business were being undertaken. He also produced photographs of the damages caused by the fire on the building as well as the burnt down farm where PW 1 stated there were 2500 orange trees. PW 1, also produced photographs of the premises after the repairs were done and the evidence of PW 2 who was the contractor that undertook the renovations. PW 2 produced the quotation for the renovations on Diani Farmers as Kshs 10,433,240 exclusive of V.A.T and for the guest house estimated at Kshs 4,982,520 exclusive of V.A.T. PW 2 also referred to invoices issued to the plaintiff as well as receipts issued for monies paid.

19. The defendant's witness said the fire was put off with the assistance of the public but after two of the makuti houses were burnt down. He could not ascertain what was damaged but at the same time he said nothing was damaged. The fact of burning of the makuti structures in itself is damage as the said structures were being used for the operations of the business. The defendant confirmed the business was running long before the violence erupted. Without getting into specifics of what was burnt as C.I.P Kiema did not aver that any property was salvaged from the premises, the plaintiff indeed suffered loss as a result of the fire.

20. Part of the loss entailed the renovating costs of the premises. There are five pieces of receipts issued to him (page 28 – 32 of his documents) by the contractor for monies paid for the repairs and renovations. The receipts add up to a sum of Kshs 15,718,000= . During the period of January – February 2008 the plaintiff was unable to carry on business because of the political tension that had built up. C.I.P Kiema admitted as much that there was tension between the Muslim youths and the Kikuyus. The plaintiff belongs to the Kikuyu community and therefore this Court takes judicial notice of the fact that because of his clan of birth, there was hostility to his person as well as his business just like there was such tension that had built up in most parts of the country. I am therefore satisfied that the plaintiff has proved that he suffered loss and gave the nature and extent of such loss in his documentation filed and admitted in evidence by consent.

21. The next question is who is to compensate him for the loss? He sued the government for negligence in failing to provide him and his property with sufficient security. I have looked at the letters dated 14.6.2007 which the plaintiff wrote to the District Commissioner, Kwale. It is referenced ***"frustration by police at Diani Farmers Day & Night Club."*** Further the letter of 16.2.07 was a complaint against a chief and land invaders in Diani location. In my view they had no correlation to the election violence that erupted soon after the Presidential results were announced on 31.12.2007. Consequently I find the two letters not to assist the plaintiff's case as is pleaded and presented.

22. The evidence adduced does show that the plaintiff was a victim of post-election violence of 2007 – 2008. **Article 40 (1) of the Constitution** of Kenya guarantees every person a right to acquire and own property (a) of any description (b) in any part of Kenya. The people of Kenya have through the same Constitution donated their powers back to the state to be governed as provided for in article 1 of the Constitution so that the rule of law prevails.

23. In donating sovereign power to the state organs, in my view creates a responsibility on the state to ensure that the rule of law prevails and that law and order is maintained at all times. The defendant's witness in his evidence stated that while out on patrol, they saw a fire and rushed to the scene where they helped put out the fire and thereafter dispersed the youths. At the time he saw the fire, he was attending to a scene of attempted arson at Rongai Butchery within Ukunda Township. This scene was about 600 metres from Gombato Guest house (from his written statement). 600 metres can be far in a fire in adent. Secondly while responding to the incident, no evidence was led that they had fire extinguishing equipments. No wonder the the witness said they put out the fire with the help of members of the public. (If this is not negligence and or breach of statutory duty then what is?) Same police officers (numbering about 7) responding to two scenes of crime of arson?

24. Further, the Court took judicial notice of the resettlement programmes undertaken by the government to resettle internally displaced persons who were displaced as a result of the post-election violence of 2007 – 2008. This involved a process of being given alternative plots to settle on as well as some funds to use for putting up structures. If a fund and or a program was set up to take care of the victims of the post-election violence, then such programme should not be undertaken in discrimination of others. The defendant's witness in cross-examination stated that he was aware that a compensation fund was set up to compensate victims of the post-election violence. In refuting the plaintiff's claim, the defendant referred to the decision in the case of **Charles Murigu Murithi & 2 Others vs A. G (2015) eKLE**.

25. This decision is persuasive, but I find it supporting the plaintiff's case when it made a reference to provisions of section 14(1) of the

Police Act Cap 84 (now repealed) thus “*The duties of the police force in Kenya include the prevention and detection of crime and the apprehension of offenders. The police force is also to protect life and property.*” which is now captured in section 24 of the National Police Service Act No 11A of 2012. In the **Charles Murigu** case, the Judges found that the police owe a duty to call and not specifically to each and every individual resident within Kenya. That for the State to be held liable, there must be a special duty activated by information available to the State of the police that certain individuals were at risk of being exposed to the acts of violence so that the state could in turn take necessary measures to protect the lives and properties of those individuals in question.

26. In the case before Court, the defendant’s evidence stated that there was tension in Diani pitting Muslim youths & the Kikuyu community. Having been aware of this scenario, the defendant did nothing to beef up the security of the plaintiff who was at risk. Further, the plaintiff stated that Diani Farmers club was burnt down a week after the burning of the guest house. Given that the defence witness was aware of the burning of the guest house, the defendant did not state that after this incident, the security was put in place to protect the plaintiff or that they sought re-enforcement to improve the security in the area and also protect the public from further attacks. This in my view was a dereliction of duty.

27. There has also been litigation where judgement has been made for compensation of post-election violence. For instance the case of **Paul K. Waweru & 4 others vs A. G & 2 Others (2016) eKLR** in which Maureen A. Odera J. referred to a Directorate of Special Programmes set up to compensate such victims and in conclusion ordered that the 312 applicants listed in their report be compensated. It is therefore my finding that the State failed in its obligation to protect the plaintiff’s business which was burnt down. Further even if there was no breach of such duty, the plaintiff was entitled to some sort of compensation like the other victims of the post-election violence as paid out to the state. For these two reasons, I find the defendant is liable to compensate the plaintiff for the loss and damage he suffered as a result of the post-election violence visited on his business.

28. In conclusion, I find the plaintiff’s case as proved and enter judgement in his favour as prayed in the amended plaint in the sum of Kshs 15,718,000 being costs of renovations, proved and Kshs 5119310 being value of looted items. The plaintiff did not say he wasn’t able to continue with his businesses after the renovations. I therefore award no damage under this heading. On the burnt oranges I make no award as there was no agricultural officer’s report. In total therefore, I award the plaintiff the sum of Kshs 20,837,310 as special damages proved.

Dated, signed & delivered at Mombasa this 12th March 2018.

A. OMOLLO

JUDGE