



**Garissa Maize Millers Limited v Attorney General & 2 others (Civil Appeal  
160 of 2016) [2023] KECA 1500 (KLR) (8 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1500 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 160 OF 2016  
HM OKWENGU, J MOHAMMED & S OLE KANTAI, JJA  
DECEMBER 8, 2023**

**BETWEEN**

**GARISSA MAIZE MILLERS LIMITED ..... APPELLANT**

**AND**

**MINISTER OF STATE FOR DEFENCE ..... 1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF OF DEFENCE FORCES ..... 3<sup>RD</sup> RESPONDENT**

*(An Appeal from the judgment of the High Court at Garissa,  
(Dulu, J.) delivered on 9th March 2016 in HCCC No. 12 of 2013)*

**JUDGMENT**

**Background**

1. This is an appeal by Garissa Maize Millers Limited (the appellant) against the judgment of the High Court at Garissa (Dulu, J) whereby the suit (HCCC No 12 of 2013) against the Hon Attorney General, Minister of State for Defence and the Chief of Defence Forces (the 1<sup>st</sup> to 3<sup>rd</sup> respondents) was dismissed and each party ordered to bear their respective costs of the suit.
2. A brief background will help put the appeal in perspective. On 17<sup>th</sup> May, 2013, the appellant filed a suit against the 1<sup>st</sup> to 3<sup>rd</sup> respondents averring inter alia that on 19<sup>th</sup> November, 2012 following the killing of 3 members of the Kenya Defence Forces (KDF), by unknown assailants in Garissa, members of the KDF on direct orders of the then Commander in Chief, his Excellency President Mwai Kibaki through the military chain of command instructed soldiers to undertake a military operation in Garissa. The appellant further stated that the acts of the KDF 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 therefore an official act of State, sanctioned by the highest State organ to inflict damage and loss on its citizens.

3. Consequently, the appellant sought judgment against the respondents jointly and severally, including orders inter alia as follows: a declaration that several acts of the Kenya Defence Forces committed against the appellant's property were illegal; a declaration that the appellant had suffered loss as a result of the destruction of the property known as GSA/Block 1/190 (the suit property) which it had leased from the Municipal Council of Garissa; payment of Kshs 407,172,000/- plus interest at court rates from the date of filing suit until date of judgment; costs of the suit and interest on special damages; costs from the date when incurred and any further relief that the Court may deem fit and appropriate in the circumstances.
4. The respondents filed a statement of defence through the office of the Attorney General. They denied that the appellant was the lessee of the suit property and was running a posho mill business on the strength of a small industry permit from the Municipal Council of Garissa. The respondents admitted the killing of three (3) members of the KDF but denied that the then Commander in Chief of KDF ordered the undertaking of any military operation in Garissa. They further denied the existence of a National Security Intelligence Committee. They denied the undertaking of any military operation by the KDF at Garissa as alleged.
5. The respondents denied all the particulars of special damages. They also denied that the Government announced compensation before an investigation was conducted. They further averred that the facts pleaded in the plaint pointed to a riotous situation for which no liabilities attached in law. They stated that the joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents was unlawful and contrary to the provisions of the *Government Proceedings Act*, and that they would at an opportune time apply for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to be struck off from the list of parties in the proceedings.
6. In a judgment delivered on 27<sup>th</sup> July, 2016, the High Court found that the appellant had not proved that KDF was responsible for the burning of the premises and other items enumerated in the plaint. The Judge therefore dismissed this prayer. On the 2<sup>nd</sup> prayer for a declaration that the appellant suffered loss as a result of destruction of its properties, the Judge found that the appellant had failed to prove that the items enumerated in the plaint were destroyed by KDF.
7. On the 3<sup>rd</sup> prayer which was a claim for an award of Kshs 407,172,000/- plus interest at court rates from the date of filing suit until the date of judgment, the Judge found that this being a claim for special damages, the appellant had failed to prove the same and the prayer therefore failed. The entire suit was dismissed with an order that each party bears its own costs.
8. The appellant being dissatisfied with the said judgment and decree therefrom, proffered this appeal. The grounds of appeal in the memorandum of appeal are inter alia, that the Judge erred in law and fact: in dismissing the case against the appellant in total disregard of the totality of evidence on record; in dismissing the appellant's case on account of not providing the link between the military operation and the burning and destruction of the appellant's properties contrary to the evidence on record; in linking the burning and destruction of the appellant's property to members of the community when there was no demonstration that there was inter community fighting; and in insisting on a technical person to prove ordinary facts contrary to trite jurisprudence on proof of special damages.
9. Further, that the learned Judge erred: in failing to invoke his extended powers under Section 173 of the *Evidence Act*, to which the court is empowered to order the production of evidence based on the exigency of facts at play in order to discover or obtain proper evidence in view of the fact that the documents to be used in evidence by the appellant were burnt by the respondents' officers; in failing



to consider the issuance of general and exemplary damages under the loss of business opportunity despite the appellant having prayed for any further relief that the court may deem appropriate; and in demanding a higher standard of proof on a beyond reasonable doubt despite the trite law on evidential burden and standard of proof in civil proceedings.

10. The appellant prayed that the impugned judgment be set aside in its entirety; that judgment be entered in favour of the appellant as prayed in the plaint; and for costs both in the High Court and this Court.

### **Submissions by counsel**

11. When the appeal came up for hearing, Mr. Amany Cohen, learned counsel for the appellant, relied on the appellant's written submissions.

There was no appearance on behalf of the respondents during the hearing, despite service. However, from the record, the respondents had filed their written submissions in which they opposed the appeal.

12. On the question whether the appeal has merit, learned counsel for the appellant urged that it is an uncontroverted fact that on 19<sup>th</sup> November, 2012, following the killing of 3 members of the KDF by unknown assailants in Garissa, members of the KDF undertook an operation in Garissa and the aftermath whether sanctioned or not is what brought the appellant to seek justice before the court. Counsel submitted that following the said incident, two delegations led by Government officials and the then Prime Minister assessed the damage and a report was issued that recommended compensation to the appellant by the Government. Counsel asserted that the fact that the respondents' witnesses did not take part in the making of the said report cannot disqualify the findings and recommendations contained therein. Counsel submitted that the report is a public document and the findings of the same have never been challenged or set aside by a court of law.
13. On the question whether the appellant proved its case on a balance of probabilities, counsel asserted that six (6) grounds in the appellant's memorandum of appeal centre on the issue of evidence adduced which according to the appellant, the Judge disregarded and further subjected the appellant to a higher burden and standard of proof than what is legally permissible. Counsel further asserted that during the trial the appellant adduced a plethora of evidence to prove its case and that the trial court carried out a site visit which confirmed the destruction of the suit property. It was submitted that the trial court could not purport that the occurrence of the said accident and the effects is in doubt and when the Parliamentary Committee confirmed the same.
14. Counsel further submitted that the respondents had heavily relied on Article 240(8)a of *the Constitution* which was totally misguided as the same applies to the deployment of the Defence Forces outside Kenya and that Garissa where the transgression is alleged to have happened is part and parcel of Kenya. Counsel contended that the respondents on their part did not adduce any evidence to show that the destruction of property did not occur and did not also adduce any evidence to imply that they were not responsible for the occurrence of the destruction of property once the burden shifted to them. Counsel submitted that the respondents did not object to the documents produced or relied upon throughout the trial and it is only when they were making their submissions that they alluded to the same. Further, that the trial court completely disregarded the Parliamentary report and this amounts to bad faith on its part.
15. Counsel asserted that the Parliamentary report clearly affirms that there was massive destruction of property and loss of lives caused by the KDF who unleashed terror on the local business community and the general public in Garissa. Further, that it was also a recommendation in the Parliamentary report that the Government should compensate for the losses incurred by Kenyans in Garissa during the un-called for destruction by KDF soldiers.



16. Counsel further submitted that the system of separation of powers goes hand in hand with the principle of checks and balances which ensure that there is cooperation and collaboration among the three (3) arms of the Government. Further, that the complete disregard of the Parliamentary report adduced without any valid reason was against the principles of checks and balances.
17. The respondents opposed the appeal by way of written submissions wherein they urged the Court to take judicial notice of section 31(2) of the *Kenya Defence Forces Act* that provides that whenever there is an operation by KDF to restore peace in any part of Kenya or promote national security, the same ought to be sanctioned by the National Assembly. Further, that in this case there was no evidence of such sanction, consequently there was no operation and the appellant's allegations were therefore imaginary and unproven. Counsel asserted that it is on record that a group of rowdy people barricaded Kismayu road in Garissa and burnt tyres and that there is therefore a high possibility that the appellant's losses may have been caused in the melee. Further, that the trial Judge did not err in dismissing the appellant's case on account of the purported photographs laid before the trial court and that the appellant failed to adhere to the laid down law on the production of photographic evidence. Reference was made to *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* [2015] eKLR for the proposition that if documents are simply referred to by witnesses but not formally produced, they do not acquire the status of exhibits in the case.
18. On the award of exemplary damages, counsel submitted that the same is discretionary and the appellant has not made out any case to warrant the award of the same. Counsel further submitted that the trial Judge having properly dismissed the case against the appellant for lack of proof, the Judge did not err in rejecting the same. Counsel urged that the appeal be dismissed with costs.

### **Determination**

19. This being a first appeal, our role is to re-evaluate, re-assess and re-analyze the evidence before the trial court and draw our own conclusions. In *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 where this Court held that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

20. We have considered the appeal, the submissions, the authorities cited and the law. The first question we wish to address is whether the appellant proved its case on a balance of probabilities.

21. The applicable law as to the burden of proof is found in Section 107 ( 1) of the *Evidence Act* which states that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 further provides that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”



22. This Court in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, held that:

“Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say; -

- a. “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
- b. This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

23. As a general rule, the appellant had the duty of proving the facts constituting damage and destruction of his property by the respondents. In this case, the evidence was that PW1 on 19<sup>th</sup> November, 2012 at around 1.00 pm after prayers, was at his 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 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. The appellant stated that there was an agreement for sale of the car which was purchased for the company. At page 3 of the documents, was a 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 T-shirt 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 KDF officers. He stated that he was injured after the assault by the Kenya Defence Forces officers while inside the milling plant.

24. Based on this, the appellant has asked us to relook the trial court’s finding that:

“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.”

25. In apportioning blame on the respondents, the appellant relied on the testimony of PW1 who stated that he was in the posho mill when KDF officers invaded the posho mill and destroyed property. Based on this and photographs presented in the trial court claimed that the KDF officers were responsible for destroying the appellant’s property. There was evidence that there was presence of the KDF in Garissa following the shooting of three of its officers and that the military were indeed involved in an operation of trying to track down the killers of three military officers in Garissa.

26. Further, the Parliamentary Report and statement by the then Prime Minister found that KDF had invaded Garissa town where property was looted and destroyed. The Parliamentary Report



recommended “that the Government should compensate for the losses incurred by Kenyans in Garissa during the uncalled-for destruction by the KDF soldiers.”

27. The Judge found that KDF were in Garissa town on the material day and had to be escorted back to the camp in the evening by the police and that the soldiers would not have required such escort had they not engaged in mayhem earlier reported in Garissa town. Further, there was the direct evidence by PW1 that he witnessed the soldiers engage in the mayhem and that he was injured. Photographs of destroyed properties and the injured man were tendered in evidence.

The totality of the evidence including that of PW1 and the photographs was sufficient to establish liability and further the Parliamentary report supported the appellant’s case that KDF officers were responsible for the destruction and loss.

28. As such we find that the appellant proved liability in tort against the respondents and the judgment of the trial court in refusing to affix blame on the respondents and apportion them with liability was erroneous. We therefore, with respect, find that the trial court erred in its finding that the appellant failed to prove that the respondents were liable for the destruction of the appellant’s property.

29. As to whether the special damages claim was specifically pleaded and proved, it is trite that special damages are awarded for losses that are not presumed but have been specifically proved and that can be quantified, such as out-of-pocket expenses or earnings lost during the period between the injury and the hearing of the action. It is trite under common law in this regard that special damages must be specifically pleaded and proved. This Court is guided by the reasons why special damages must be pleaded and proved as set out in D.B. Casson and I.H. Dennis, Odgers: *Principals of Pleading and Practice in Civil Actions in the High Court of Justice* at pp. 170 to 171:

“Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the defendant’s act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant’s conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant’s act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote.”

30. Likewise, in the English case of *Perestrello e Companhia Ltd v United Paint Co. Ltd.*, [1969] 3 All E.R. 479 Lord Donovan held as follows at pp. 485-486:

“Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. “The question to be decided does not depend upon words, but is one of substance” (per Bowen L.J, in *Ratcliffe v Evans* ([1892] 2 Q.B. 524 at 529)). The same principle gives rise to a plaintiff’s undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as “special” in the sense that fairness to the defendant requires that it be pleaded. The obligation to particularize in this latter case



arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible.”

31. In the instant appeal and upon our perusal of the plaint filed in court by the appellant we have noted that the appellant at paragraph 18 of the plaint listed the properties and items that were destroyed by the fire caused by the KDF officers and assigned specific sums or values to the items. However, there are no specific receipts, invoices or valuation reports on how such values were arrived at. The appellant’s witness (PW1) testified that the same were destroyed in the fire as there is uncontroverted evidence that the fire incident indeed took place and caused the loss and damage. Having found the respondents liable for the fire and damage and that the appellant’s receipts were destroyed in the fire thereby handicapping their ability to specifically prove their loss, we find that this is an appropriate case for remittance to the trial court to determine the appropriate measure of damages payable to the appellant taking into account the particular circumstances of this case.
32. The appropriate measure of damages was defined in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas.25 at 39 per Lord Blackburn, thus:

“that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is not getting his compensation or reparation.”
33. Rule 31 of the *Court of Appeal Rules* provides that:

“On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such direction as may be appropriate, or to order a new trial and to make any necessary incidental or consequential orders, including orders as to costs.”
34. Accordingly, we remit the matter back to the High Court for purposes of fresh hearing and consideration regarding the quantum of a global award to be awarded to the appellant in the circumstances. We order that the matter be heard before any Judge of the High Court, other than Dulu, J
35. The result of the foregoing is that:
  - a. Civil Appeal No 160 of 2016 is allowed to the extent that the matter is remitted to the High Court, before any Judge other than Dulu, J, for purposes of hearing the parties and determination of a global award on quantum.
  - b. The order that commends itself to us is that each party will bear its own costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF DECEMBER, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**



**S. ole KANTAI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

\_\_**DEPUTY REGISTRAR**

