Case Number:	civ case 1805 of 84
Date Delivered:	28 Mar 1985
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	John Mwangi Gachuhi
Citation:	Grinyamwaya vs Nairobi City Commission[1985] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

Grinyamwaya v Nairobi City Commission

High Court, at Nairobi March 28, 1985

Gachuhi J

Civil Case No 1805 of 1984

Cases

Obongo & Another vs Municipal Council of Kisumu [1971] EA p 91 at page 96 letter B

Rookes v Barnard and others (1964) AC 1129

Kampala City Council v Nakaye [1972] E A 446 at page 448

Matthew Thimbara vs Athumani Singa and another H C C C 2141/82 (unreported)

Statutes

March 28, 1985, Gachuhi J delivered the following Judgment.

The plaintiff a retired employee of the City Council of Nairobi filed this action claiming special and general damages against the City Commission and one of its employee in the City inspectorate department. The claim is based on the destruction of a kiosk and the loss of income from the date of destruction ie September 8, 1983 to date. The defendants have denied the claim.

The undisputed facts are:

1 The plaintiff was lawfully allocated the site by the Railway Corporation to whom the ground rent is payable.

2 The kiosk was running under two licences issued by the city commission, one for grocery and the other in the name of the plaintiff's daughter for gruel and cooked mixed vegetables.

3 The kiosk was constructed. 4 That part of the kiosk was demolished on September 8, 1983.

5 No compensation for destruction has been paid.

After the commencement of the hearing the parties recorded a consent order for judgment in the sum of Kshs 18,263.80 in a way of special damages. In the plaint the sum of ksh 14,263.80 was claimed but the increase was negotiated.

The plaintiff applied to include a claim for exemplary damages in the prayer as a result of malicious motive of the second defendant. The court after hearing the argument allowed the amendments.

The plaintiff 's evidence is that she constructed her kiosk in 1981 while she was working with the City Council. She then retired to run it. She obtained the necessary licence having complied with council's

requirement. In her kiosk she had installed water and light. She had good business as she had a variety of customers during the construction of Plainsview estate, also as the new occupiers of the estate were moving in. She had business also form railway quarters residence.

On the morning of September 7, 1983 a City Council Inspector accompanied by two City Commission askaris from the City Inspectorate Department went to the kiosk. The Inspector was not in uniform. Without introducing himself, he started removing rafters that caused one corrugated iron sheet to fall. The plaintiff pleaded with him not to demolish. The inspector demanded the licences which two licences he was given, then walked away. The plaintiff complained to one of the commissioners in city hall when the matter was taken up with the City inspectorate and instructions given for the return of the licences. The instruction note dated September 8,1983 was directed to the second defendant. The note was put in as Exhibit 1(a). On the same day, when the note was given to the second defendant he went to the kiosk. In the absence of the plaintiff and without any warning the second defendant assisted by four other inspectors damaged and destroyed part of the kiosk that the roof of the extended parts that formed grocery shop, the kitchen and the store, collapsed. The plaintiff then complained to the assistant secretary at the city hall. The assistant secretary wrote a memo of the reported complaint and gave instructions to the senior assistant chief city superintendent that Mr Karanja, the second defendant should suspend any further demolition and should restore that demolished part so as to allow the plaintiff to operate the kiosk. The plaintiff also stated in her evidence that the kiosk was visited by two commissioners and the senior assistant chief city superintendent who witnessed the damage as well as new kiosks which were under construction on instruction of the second defendant. Inspite of this the plaintiff was not assisted in rebuilding the kiosk. I find the memo to be so important as an admission of the matter complained of that I find it necessary to reproduce it in this judgment.

“ Memo

FROM: ASSISTANT SECRETARY REF: AS/10/503

TO: SENIOR ASSISTANT CHIEF SEPTEMBER 8, 1983

CITY SUPERINTENDENT –

MR J G HOME

DEMOLITIONOF KIOSK

We discussed the issue over the telephone. The bearer of this note Mrs Catherine Nyamwaya has been operating a kiosk at railways quarters at Nairobi South B since 1980.

The kiosk has been demolished is part by one of the askaris in charge of Industrial area Mr J Karanja . This was done without notice and without cause. The owner of the kiosk has licence for operation. This Mr Karanja refused to accept a letter from Mr Harsan, the licensing officer. Mrs Nyamwaya will show you the letter.

Mr Karanja also brought some person and showed her a place to build a kiosk which is now complete and operating.

It is not clear as to why Karanja selected this kiosk for demolition.

Our instructions are that you go with the bearer of this note to the kiosk and instruct Mr Karanja to

suspend or rather stop demolition, and replace the parts of the kiosk demolished.

The owner of the kiosk to be allowed to continue operation immediately Mr Karanja should present his case to me through Mr J G Maina and yourself.

I shall be waiting to see him (Mr Karanja) before 10.30 am.

Please take action as discussed over the telephone.

SGD I Omondi

ASSISTANT SECRETARY – NCC."

The Memo in addition to admission, shows the motive behind the destruction that Mr Karanja wanted the plaintiff's business to be discontinued so that the other person, a lady, who was brought to the site and constructed a kiosk next to the plaintiffs, should have business. The note also accepts that the destruction was without notice and without cause. Mr Karanja in his evidence accepts having visited the kiosk twice on September 7 and 8, 1983. and the roof collapsed. To justify his action he stated that he was carrying out directives. He had seen the plaintiff running the kiosk but also admitted that there was nothing wrong in carrying out the extension.

Though Mr Karanja said that he was carrying out verbal directives form his superiors, he never called any of such superiors to support his case. If there was such directives no doubt they would have been produced in court. He never served any notice on the plaintiff to remove the extension if they were not allowed. He admitted that notice is served for removal of old kiosk. I do not find reasonable excuse for demolishing an extension to an old kiosk without giving notice. The memo referred to above, admit that the action of Mr Karanja was unjustified.

Whatever Mr Karanja may say does not alter the position. The admission is firm that his action was also motivated by malice by bringing another person to the site and allowing that other kiosk to be constructed so hurriedly that it was completed by the time the demolition took place. This is all in the memo. The demolished kiosk was operating legally without licences issued, by the first defendant. Whether licences were of two different persons is not the issue in this suit. The demolition was not based on licences.

The suit is based in tort for demolition and damages caused which I find in evidence and the admission contained in the memo and other correspondence put in as exhibits that both defendants are liable.

On the question of damages this has been put under three heads. There is special damages for the reconstruction of the kiosk. An amount has been agreed and judgment entered for the sum of Kshs 18,262,80. There could not have been a consent judgment if there was no admission of liability. What the defendants really are disputing is the claim for general damages and exemplary damages.

On the general damages, the plaintiff is claiming for the loss of business from the time of the destruction to the date of judgment. She states that she has not been running business as such because all the money she has was spent on reconstructing the kiosk in the hope that she will be re-imbursed by the defendants. In her evidence, she stated that she had been promised several times to be paid. She even qualified her damages in undated letter to the defendants which letter she set out her claim for 54 days. This letter was produced by the defence and marked Exh A. In that letter the plaintiff was claiming

Kshs 500 per 54 days. When payment were not made, then the suit was filed in July 1984.

The plaintiff produced an accountant who prepared the accounts for the period December 1982 to August 31, 1983. The accountant stated that he prepared accounts for nine months which gave an average daily profit of Kshs 105.40. He further stated that through experience the profit would be projected to be 40% for the following year and 25% for the third year. This gave a net result of Kshs 78,245 for the period September 8, 1983 to March 7, 1985, a period less than two years. The witness obtained all the information required from the books produced as well as the receipts which were exhibited in court.

The defence do not dispute the accounts presented or the projected profits as such but disputes that the plaintiff has not suffered loss apart for the three weeks she was rebuilding the kiosk. The plaintiff maintains that she had not carried out any business as such as she didn't have the money and the purchases she may have made that the receipts were found was to keep the family going. There is no evidence produced before this court by the defence to challenge the plaintiff's case. The defendants did not pay even for the costs of reconstruction as had been promised which would have really reduced the period for which damages is claimed. The evidence of Mr Karanja that he even visited the kiosk on March 6, 1985 when this case was going on is not supported by any other witness.

I note that the plaintiff has not mitigated her damages by either making effort to have the business resumed. She is prone to stand firm on her evidence that after the reconstruction she was left with nothing. She even produced demand notices for money borrowed from the Ministry of Commerce Kshs 10,000 which she had borrowed for the kiosk business.

She also produced an advertisement in the Standard for the sale of her house for failure to keep up her instalment. Also demand from her bank for her loan and overdraft. The plaintiff did not disclose how she and her children have managed to live without any source of income. Even how she has been travelling to her Kisii mother land which journey costs money. Furthermore, how she has been meeting her rents. She did not eve disclose how much rent she is receiving from her rented house. I would not think that the business would keep on increasing the marginal profits without incurring losses or profits becoming static. In her evidence, Plainsview estate was under construction when she started kiosk business, part of which was completed at the time of destruction. If she was feeding most of the labourers, the number went on decreasing as the estate became completed. She would have been drawing provision from the kiosk for own use that would have reduced her marginal profits. Again profit are at times high and at times very high and at times low or none. I do not think that I am bound to accept the projected figures as a basis for assessing damages as these are merely presumptions though I have considered them.

The accounts for the period December 1982 to August 31, 1983 were never challenged.

The profits is given as Kshs 28,458 for nine months at an average of Kshs 3,162 per month. As I have stated above that the business does not make profit or the margin being static all the time, I have to give allowances for such eventuality and allow the sum of Kshs 2,371.50 as the average maginal profit per month which the plaintiff lost from the date of the destruction of the kiosk to the date of judgment thus giving the total figure of Kshs 45,058.50 for 19 months.

The plaintiff in her pleading prayed for general damages. It is in the course of the hearing that the question of exemplary damages arose. The general damages claimed were on the line of loss of business and that is why an accountant prepared an account. There is no argument based on aggravated damages, it may be that when the argument for exemplary damages came up, it was

confused with the aggravated damages. On aggravated damages, Spry V P had this to say in the case of Obongo & Another vs Municipal Council of Kisumu [1971] EA p 91 at page 96 letter B:

“It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress.”

There being no room for this in the pleading and in the absence of the amendment, this court cannot find any ground for awarding aggravated damages in addition to damages for loss of business in addition to exemplary damages.

On the exemplary damages, the argument advanced is that the destruction was malicious.The second defendant is said to have brought a person to the site and build a kiosk and completed it by the September 8, 1983 when the commissioners visited the site. It could be said that the second defendant had an interest in the other kiosk so he took to himself to destroy the plaintiff’s kiosk so as to transfer business to the other person. It is on this evidence that the plaintiff is claiming exemplary damages.

Exemplary damages are awarded as punitive and not consolatory as the objective is purely punitive. The leading case on exemplary damages is Rookes v Barnard and others (1964) AC 1129 quoted in Obongo v Municipal Council of Kisumu [1971] E A 91 at page 94 where Spry VP held:

“ The decision in Rookes v Barnard [1964] A C 1129 so far as it related to exemplary damages, is of outstanding importance in English Law both because it defines the circumstances in which such damages may be awarded, overruling certain earlier decisions, and because it indicates the correct approach to the assessment of such damages. It was a decision of the House of Lords and the opinion of Lord Devlin who dealt with this aspect of the case, was endorsed by all the other members of the House. It is a decision therefore, which must command the highest respect in any country which has adopted the English Law of Tort.”

Summarising the effect of Rookes V Barnard Spray VP stated at P 94.

“It will be convenient to begin summarizing very briefly the effect of Brookes v Barnard. In the first place, it was held that exemplary damages for tort may only be awarded in two classes, of case (apart from any case where it is authorized by stature), these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and secondly, where the defendant’s conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour, the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal: and the means of the parties and everything which aggravates or mitigates the defendant’s conduct is to be taken into account. It will be seen that the house took the firm view that exemplary damages are penal, not consolatory as had sometime been suggested.”

Again in Kampala City Council v Nakaye [1972] E A 446 at page 448, Luta JA said:

“As regards, exemplary damages, these are awarded on the principle (as a result of Brookes v Barnard, 1964 A C 1129) that there has been wanton or oppressive and a high-handed conduct by the defendant in respect of which there must be a punishment as a deterrent to others who may act in a similar manner. In other words they are awarded in order to punish the defendant in an exemplary manner and not as a compensation to the plaintiff.”

The case of Matthew Thimbara vs Athumani Singa and another H C C C 2141/82 (unreported) was another suit where a city inspector and the City Council of Nairobi were involved. The nature of the claim was similar to this except that in that case the plaintiff was a second hand book seller in the street duly licenced. Inspite of his protest that he had a licence his books were taken away. He was paid the cost of his books in addition exemplary damages of Kshs 10,000.

The award of exemplary damages has not deterred the City Commission and its inspectors from repeating the same act again. It is expected that any judgment acts as deterent and should be made known by the appropriate body to those concerned.The plaintiff's property was damaged without any cause. Such action would not only amount to trespass to property but would make the defendant to be charged for a criminal offence of malicious destroying, damaging property, for which the defendant would be punished. Under the provision of the law enumerated above for the exemplary damages, the defendants ought to be punished for that offence. I award the sum of Kshs 15,000 to the plaintiff under the prayer of exemplary damages. As a whole, there will judgment for the plaintiff against the defendants jointly and severely being special, general and exemplary damages in the sum of Kshs 78,322.30 together with costs thereon. The sum of Kshs 18,263.80 being special damages will carry 12 % interest from the date of filing suit while the balance sum of Kshs 60,058.50 will carry 12% interest from the date of judgment till the entire amount is paid in full.