



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU**

Civil Appeal 54 of 1996

**JAMES O. ONYANGO T/A WATCH DEALERS WHOLESALERS.....
APPELLANT**

AND

**MUNICIPAL COUNCIL OF KISUMU.....1St
RESPONDENT**

**HABIL OGADO T/A WINAM CYCLE CO.....2nd
RESPONDENT**

**(Appeal from Judgment and Decree of the High Court of Kenya at Kisumu (Justice
Mango) dated 26th day of November, 1993**

IN

H. C. C. C. NO 48 OF 1991

JUDGMENT OF THE COURT

The appellant, watch-repair along Accra Street, Kisumu Municipality, brought a suit against the respondents, Municipal Council of Kisumu, hereinafter referred to as the Municipal Council and Winam Cycle Trading Company, hereinafter referred to as the second respondent, claiming damages for loss and damage occasioned to him by the respondent's illegal acts of trespass and demolition of his shop.

The facts out of which this appear arose are tht the second respondent is the owner of the shop situate on Section XXIX plot No. 21 Accra Street, Kisumu. He rented part of it to the appellant. There was a timber wall partition separating the two shops. Sometime in 1985, the second respondent wanted to remove the appellant from the premises so that he could acquire a larger space for his expanding business. The appellant resisted the attempt despite threats by the second respondent. By a letter dated 20th November, 1985 the Acting Town Engineer of the Municipal Council wrote to the second respondent as follows:-

“20th November, 1985

M/S Winam Cycle Trading Company

P. O. Box 685

KISUMU

RE: REMOVAL OF TEMPORARY PARTITION PLOT

(Block 7/1)

No. 21/29 - ACCRA STREET

Further to your letter dated 22nd October, 1985 on the above, we have investigated and inspected and have no objection to the removal of the temporary partition which had been irregularly and illegally constructed.

Liaise with our Building Inspector to ensure tht Municipal by-laws are complied with in the exercise.

G. JAKANDANG'O

Ag. TOWN ENGINEER"

This letter was, of course, not copied to the appellant.

On 9th January, 1986 a team of Municipal Council's Askaris led by Aguko Omoro and John Omware descended, without warning, upon appellant's shop, and talking to him and in full view of the public, forcibly removed the doors and completely demolished the wall partition. The Askaris threw out the appellant's watches and other stock in-trade goods valued at Shs. 167,069/50. These goods were left unguarded and most of them were stolen in the melee'. The police refused to intervene. The appellant went to the Town Hall and saw the Acting Town Clerk and explained to him what had befallen his shop. The Acting Town Clerk disowned the action stating that the Municipal Council had not sanctioned the demolition.

On 17th March, 1986 the appellant filed suit in the High Court of Kenya at Kisumu (H. C. C. C. NO 48 OF 1986). On 15th May, 1986 after service of summons upon it, the Municipal Council's Finance Staff and General Purposes Committee met and after deliberations passed the following resolutions:-

"126.COURT CASES

(a) KISUMU/NCC NO. 48 OF 1996

The Municipal Advocate reported that the Council Officers i.e. Mr. Shem Amos Okech, Senior Accountant and Mr. A. A. Omoro Senior Enforcement Officer and some Askaris went to the premises owned by a Mr. Ogado of Winam Cycle Trading Company and demolished the partitions erected therein by the tenant has sued the Council as the first defendant and the landlord Mr. Orado as the second defendant and he was claiming damages to the tune of Kshs. 180,000/= from the Council.

She advised that she was of the opinion that Council be exonerated from the case and the officers be personally responsible for the case because they acted ultra Vires.

Members considered the matter in detail. They wondered how the offices could act ultra Vires and directed that the said officers be called before the committee to explain to members the circumstances which led to the incident. They further felt that through legal machinery the Municipal Advocate be authorized to exonerate the Council from the case and the said officers be held personally responsible for the case before the court of law. It was therefore;

RECOMMENDED

(i.) That the Municipal Advocated be authorized to exonerate the Council from the court case NCC NO. 8 OF 1986.

(ii.) That the said officers i.e. Mr. Omoro and Mr. Shem Amos Oketch who acted ultra vires be held personally responsible for the said case.

(iii.) That the said officers Mr. Omoro and Mr. Shem Amos Oketch be served to the next meeting of the Committee to show cause why disciplinary action cannot be taken against them.”

The second respondent testified that it knew nothing about the demolition and did not authorise it. The sum total of the evidence adduced in Court by the appellant clearly establishes that the Municipal Council of Askaris led by the Senior Enforcement Officer went to the appellant’s premises and demolished them without any lawful authority and without notice. The Municipal Council, in trying to exonerate itself from liability failed to appreciate that is Senior Officer, the Acting Town Engineer, Mr. Jakandang’o who was present during the 15th May, 1986, meeting had expressly and unequivocally given authority to demolish the appellant’s premises . The Municipal Council had unwittingly been led by the second respondent to resort to jungle law. However, in its written statement of defence filed on 7th April, 1986 the Municipal Council denied the claim. The learned trial Judge (Mango, J.) dismissed the claim on the ground that the appellant had not shown tht the Municipal Council had authorised any of its employees to vandalize his premises.

The appellant, who is unrepresented, had gallantly argued several grounds of appeal the main one being that the learned trial judge gravely misdirected himself in coming to the conclusion that the unlawful acts of the Municipal Council Employees did not occasion any liability on it because the said acts were not authorised by it.

We have no doubt that this ground of appeal must succeed. The decision to demolish the appellant’s shop was made by a senior officer of the Municipal Council in collusion with the second respondent. It acted through its Askaris who were its servants and agents carrying out orders from its chief officer. The Municipal Council therefore vicariously responsible for the torts of its employees in the course of their employment with itself. The Municipal Council must therefore compensate the appellant for the consequential loss and damage. The second responded, though served, did not oppose this appeal.

We allow the appeal and set aside the judgment and decree dismissing the suit and substitute therefore a judgment and decree dismissing the suit and substituted therefor a judgment in favour of the appellant against the respondents jointly and severally for Shs. 165,069/50 with costs and interest at Court rates form 26th November, 1993. The appellant will have the costs of this appeal as well as the costs of the suit in the High Court.

Dated and delivered at Kisumu this 22nd day of November, 1996.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

G. S. PALL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR