



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO. 103 OF 2019

ANVI EMPORIUM LIMITED.....APPELLANT

VERSUS

MOHINDER SINGH SAGOO.....1ST RESPONDENT

JASWINDER KAUR SAGOO.....2ND RESPONDENT

[Being an Appeal from the Judgment and Decree of Hon. J. K. Ng'arng'ar,

Chief Magistrate given at Kisumu on the 31st July, 2019

in Kisumu CMCCC No. 404 of 2016]

JUDGMENT

The Appellant, **ANVI EMPORIUM LIMITED**, was the Defendant in a suit which had been instituted by the Respondents, **MOHINDER SINGH SAGOO** and **JASWINDER KAUR SAGOO**.

1. The learned trial magistrate had found the Appellant liable, and awarded to the Respondents Special Damages in the sum of Kshs 8,006,306/=, and a further sum of Kshs 500,000/= in respect to General Damages for trespass and for the temporary loss of amenities and also for inconvenience.
2. The Appellant has asserted that the Respondents failed to prove that their property, (upon which the building and a vehicle were damaged), was an adjoining property to the Appellant's property.
3. The significance of that assertion stemmed from the finding by the trial court, that the common law rule in **RYLANDS Vs FLETCHER** was applicable to the case.
4. It is common ground between the parties herein that;

“The rule in RYLANDS Vs FLETCHER is one that imposes strict liability on the owner of land for damage caused by the escape of substances to his neighbour's land.”
5. In a nutshell, the Appellant's position was that the rule in question could not be applicable unless the Respondents had proved that the land upon which damage took place was neighbouring the Appellant's property.
6. Secondly, the Appellant pointed out that Respondents' claim was never founded upon the strict liability that flows from the rule in **Rylands Vs Fletcher**. If anything, the Respondents are said to have firmly based their claim on allegations of negligence.
7. Having founded their claims on negligence, the Appellant asserts that the Respondents ought to have proved the various particulars of negligence which they had attributed to the Appellant.
8. However, the Appellant submitted that none of the particulars of negligence were proved by the Respondents.
9. In those circumstances, the Appellant submitted that the trial court ought to have dismissed the suit. But the Respondents are faulted for

introducing the rule in **Rylands Vs Fletcher**, at the stage of submissions.

10. In the light of that development, the Appellant submitted that the Respondents had deviated from their own pleadings.

11. And by holding the Appellant liable on the basis of the rule which had not been the foundation of the Respondents' case, the trial court is said to have erred.

12. Another issue which was raised by the Appellant was in relation to the Special Damages. It was the Appellant's case that the Respondents failed to prove the special damages which had been pleaded.

13. As regards the award of damages for trespass, the Appellant submitted that none should have been awarded, as there was no proof of trespass.

14. On the award of damages for loss of amenities, the Appellant submitted that none should have been awarded after the court had awarded Special Damages and damages for inconvenience.

15. And in relation to shock and stress, the Appellant submitted that the trial court should not have awarded any damages, as no such claims had been pleaded.

16. In a nutshell, the Appellant reasoned that the award of General Damages was arbitrary, injudicious and unreasonable.

17. Finally, the Appellant submitted that the finding on liability was against the weight of evidence.

18. This Court was therefore invited to set aside the entire judgment of the trial court, and to substitute it with an order dismissing the suit.

19. Being the first appellate court I will re-evaluate all the evidence on record and draw my own conclusions therefrom. My said conclusions will be informed by the pleadings on record, the evidence tendered and the relevant applicable law. However, I shall bear in mind the fact that, unlike the learned trial magistrate, I did not have the benefit of observing the witnesses when they were giving evidence.

20. For that reason, where the assessment of the trial court was informed by the demeanour of a witness, I would be very hesitant to interfere with such assessment. Indeed, in such a situation it would only be if the particular conclusion, based on demeanour of the witness, was inconsistent with the totality of the other evidence that the appellate court would justifiably intervene.

21. When re-evaluating the evidence tendered, I have to bear in mind the particulars of the Plaintiff and of the Defence, so that the process of re-evaluation is placed within context.

22. The Plaintiffs asserted that their residential home, which was located on **L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/12**, shared a common boundary with the Defendant's property **L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/15**.

23. It was the Plaintiffs' case that the storey building which the Defendant was constructing on its property collapsed, causing damage to the Plaintiff's building.

24. At paragraph 5 of the Plaintiff, the Plaintiffs provided particulars of the negligence attributable to the Defendant.

25. At paragraph 6 of the Plaintiff, it was asserted that;

“..... the only reason the building collapsed and caused damage to the plaintiff is because the same was constructed negligently, recklessly and in outright violation of the law applicable.”

26. At paragraph 7 of the Plaintiff, it was reiterated that;

“..... as a result of the defendant's negligence, it has suffered immense loss in costs for repairs and other revenues collected on a daily operation of a hotel business.”

27. The Plaintiffs then set out particulars of the Special Damages as follows;

“a) Repair Cost to the building 6,537,006

b) Repair cost to motor

vehicle KXQ 777..... 650,000

c) Cost of accommodation

for 7 days 95,000

d) Lost Refrigerated food stuff...	87,000
e) Washing machine damaged....	69,000
f) Loss and damaged	
Industrial Beerings	
120 pieces	350,000
g) Damaged Furniture Bed	
& Mattresses	165,000
h) Damaged Glass crockery.....	3,500
i) Damaged Decorder,	
DSTV	8,000
j) Damaged Microwave.....	6,800
k) Food and Beverages.....	<u>35,000</u>
T O T A L	<u>8,006,306”</u>

28. Having set out their claim, the Plaintiffs sought judgment for the Special Damages. They also sought General Damages for Trespass and Infringement of proprietary rights.

29. Thirdly, the Plaintiffs sought General Damages for loss of amenities and inconvenience.

30. There was also a claim for Interest and costs.

31. In its Defence, the Defendant denied the assertion that the Plaintiffs' property neighboured the Defendant's property. The Defendant also denied that the 2 properties shared a common boundary.

32. The Defence denied the assertion that a storey building was being erected on the Defendant's parcel of land, or that the alleged building collapsed. Indeed, the Defendant denied all the particulars of negligence.

33. In the alternative, the Defendant asserted that if its building collapsed, the loss and damage arising from such collapse was attributable to the acts and omissions of an Independent Contractor.

34. Finally, the Defence denied the claim by the Plaintiffs, that they were entitled to any of the reliefs they sought in the Plaint.

35. Flowing from the pleadings, the Plaintiffs drew up the list of Issues which would be placed before the trial court for determination.

36. The first 2 issues concerned the ownership of the two parcels of land.

37. The third issue was about whether or not, the Defendant's building collapsed

“due to the negligence on the defendant's part”;

and whether the Plaintiffs' building was damaged as a consequence of the collapse of the Defendant's said building.

38. The other issues appertained towards the reliefs to which the Plaintiffs were entitled to.

39. In the Judgment, the learned trial magistrate also set down the issues, which largely mirrored the ones drawn up by the Plaintiff.

40. **PW1, MOHINDER SINGH SAGOO**, is the 1st Plaintiff. He testified that **L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/15** belongs to the two Plaintiffs. He also said that their said property neighbours the parcel of land **NO. KISUMU MUNICIPALITY/BLOCK 8/12**.

41. **PW1** said that on the material day, the Defendant's building which was on Parcel **No. 12** collapsed, and caused damages to the Plaintiffs' property which was on Parcel **NO. 15**.

42. **PW1** produced the Certificate of Lease for Parcel **No. 12**, which showed that that property belonged to the Plaintiffs.

43. He also produced the logbook for the Mercedes Benz Motor Vehicle Registration **KXQ 777**. According to the logbook, the vehicle belonged to **KISUMU BODY WORKS**.

44. From the photographs produced in evidence, there is no doubt that the vehicle suffered very serious damage, especially to the body.

45. During cross-examination **PW1** said that;

“The adjacent building for the defendant collapsed suddenly.”

46. Later, **PW1** explained that after the incident he built the wall between the Defendant and the Plaintiff’s place.

47. On his part **DW1, VINOD KUMAR PAL**, testified that whilst he knew that the Defendant’s parcel of land was **L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/15**, he did not know the physical location of the parcel of land **L.R. KISUMU MUNICIPALITY/BLOCK 8/12**.

48. Nonetheless, **DW1** was aware that physical damage occurred on the plot adjacent to the Defendant’s property.

49. During cross-examination **DW1** said;

“Mr Sagoo is a neighbor to my plot.

The building next is residential.

There is a person staying there and claims to be Sagoo.”

50. He also testified that;

“The materials I brought to the site are the ones that fell. The building collapsed. The materials might have fallen on my neighbours place. All that fell were materials from my place.”

51. From the totality of the evidence summarized above, I find that the Plaintiff’s property was adjacent to the Defendant’s property.

52. I further find, that by the concession made by the Defendant’s witness; coupled with the testimony of **PW1**, the damage to the Plaintiffs’ property was occasioned by the materials which fell from the Defendant’s building, when the said building collapsed.

53. The real issue to be determined is whether or not the claim ought to be dismissed, on the grounds that the Plaintiffs failed to prove any of the particulars of negligence which they had attributed the cause of damage to.

54. That is significant when it is borne in mind that before the trial court, the Defendant spelt out the following as the issues which the court was expected to determine;

Ø Whether the Plaintiffs’ property L.R. NO. KISUMU MUNICIPALITY/BLOCK 8/12 was damaged and the Plaintiff suffered the other losses as pleaded?

Ø Whether the damage and losses,if any, suffered by the Plaintiff was a result of the Defendant’s negligence?

Ø If the answer to the second issue is in the affirmative, whether the Plaintiffs are entitled to the reliefs sought in the plaint?”

55. From the evidence of the 1st Plaintiff and also of the Defendant’s witness, it is clear that some damage occurred to the Plaintiffs’ property when the Defendant’s building collapsed and the material therefrom fell upon the property of the Plaintiffs.

56. In its submissions before me, the Appellant reiterated that liability under the common law rule of **Rylands Vs Fletcher** is strict. The Appellant said;

“The person injured need not prove negligence and it is enough that the incident happened; in which case the burden shifts to the Defendant to prove that he was not to blame for the claimant’s injury.”

57. Having given due consideration to all the evidence on record, I find that although the Plaintiffs’ claim was founded upon alleged negligence, the Plaintiffs did not prove any of the particulars of negligence.

58. In those circumstances, the Appellant submitted that the Plaintiffs’ case ought to have been dismissed.

59. In principle, when the Plaintiff fails to prove his claim against the Defendant, the court has no option but to dismiss the said claim.

60. However, when the alleged negligence was not proved, but the evidence provided showed that the damage caused to the Plaintiff's property was attributable to the Defendant, I find that it would be inconsistent with justice to deprive the Plaintiff his entitlement to compensation.

61. Therefore, on the strength of the evidence tendered by the parties, I find that the Appellant was correctly held liable for the damage caused to the Respondents' property.

62. Accordingly, the appeal against the finding on liability is dismissed.

63. As regards the damages awarded I am in agreement with the Appellant, that the Respondents did not establish the nexus between them and the Motor Vehicle Registration **KXQ 777**.

64. The vehicle was shown to belong to **KISUMU BODY WORKS**, yet the Respondents failed to lead evidence to prove that the said registered proprietor had any connection with them. It was therefore wrong to award to the Respondents damages that could only have been claimed by **Kisumu Body Works**.

Costs of Repairs to the Building

65. The Appellants suggested that the evidence of **PW2** should be disregarded because he did not show the Court, the drawings made by the architect.

66. **PW2** was an expert witness. By qualification, he is a Quantity Surveyor.

67. He testified that he was engaged by the Plaintiffs to carry out an assessment of the damaged parts of the building, and to put together a Bill of Quantities.

68. **PW2** said that he visited the Plaintiffs' building, carried out measurements, and then prepared the Bill of Quantities, reflecting the cost for the reconstruction of the damaged portions.

69. I find that the drawings by the architect were not a necessary component of the report of the Quantity Surveyor.

70. As **PW2** visited the premises and carried out measurements before putting together his report, I hold the considered view that his evidence provided sufficient proof of the amount of money which would be required to reconstruct the damaged parts of the Respondents' house.

Accommodation for 7 days

71. In the Plaint, the claim was for 7 days accommodation. **PW1** testified that he and his wife stayed at the **IMPERIAL HOTEL** for "7 to 12 days."

72. **PW1** testified that he paid Kshs 95,000/= for accommodation, and Kshs 35,000/= for food and beverages.

73. First, there is no separate claim in the Plaint, for the amount allegedly spent on food and beverages.

74. But, in any event, if **PW1** paid the amounts in issue, he ought to have been able to produce the receipt issued to him.

75. During cross-examination **PW1** said that **Mr AMIN LILANI**, of Imperial Hotel was his friend, and had offered refuge to the Plaintiffs' "on humanitarian grounds."

76. Meanwhile, **PW4, FRANCIS MBANDA**, who was the Finance Manager of Imperial Hotel, said that the Plaintiffs stayed at the hotel for 5 days.

77. Although the Plaintiffs incurred bills totaling Kshs 130,000/=, **PW4** said that the Plaintiffs had not paid the said bills.

78. **PW4** testified that under normal circumstances, claims by the hotel would be supported by receipts and documents. However, in this instance there were no such receipts or documents. The explanation given by **PW4** was that the hotel's "system" crashed.

79. I note that during cross-examination **PW1** said;

"Amin Lilani of Imperial Hotel did not give me free service. There was no requirement for payment, but I forced him to charge me something small.

The receipts were in the house and they were misplaced."

80. It cannot be true that **PW1** had receipts as Imperial Hotel was never paid.

81. Secondly, it appears that it was **PW1** who had “forced” Amin Lilani of Imperial Hotel to charge him something small.

82. Taking into account the inconsistent pieces of evidence tendered, coupled with the lack of supporting documents, I find that the Respondents failed to prove their claim in respect of Accommodation and the related expenses at Imperial Hotel.

Other Special Damages’ Claims

83. The Respondents did not prove the claims in relation to;

(i) Lost refrigerated food stuff;

(ii) Washing machine damaged;

(iii) Loss and damaged Industrial

Bearings, 120 pieces;

(iv) Damaged Furniture, Bed & Mattresses;

(v) Damaged Glass Crockery;

(vi) Damaged Decorder DSTV;

(vii) Damaged microwave; and

(viii) Food and Beverages.

84. In the result, the only amount that was proved is in relation to the cost of the repairs to the building; which was in the sum of Kshs 6,537,006/=.

General Damages for Trespass and Infringement of Primary Rights

85. The learned trial magistrate held that part of the claims under this head had

“been factored in the special damages above. I do find that most of the damage would be trespass and temporary loss of the amenities and inconvenience, which according to the Plaintiff is for between 7 days to 72 days staying at a hotel. There was also shock and would amount to stress.”

86. I do agree with the Appellant, that the trial court erred when it took into account the alleged stress, when computing compensation. I so find because there was no claim founded upon stress, in the plaint.

87. Secondly, if the Plaintiffs had proved the sums spent at the hotel, the court would have awarded it as special damages; and therefore, it would have been duplicity to also award compensation for the alleged “loss of amenities and inconvenience.”

88. Accordingly the award of Shs 500,000/= under that head is unsustainable, and it is therefore set aside.

89. In the result the appeal on the quantum is allowed, in part.

90. The special damages are reduced to Kshs 6,537,006 (down from Kshs 8,006,306/=).

91. The General Damages of Kshs 500,000/= are set aside.

92. As the appeal is partially successful, I order that each party will bear his or her own costs thereof.

93. It is so ordered.

DATED, SIGNED and DELIVERED at KISUMU

This 23rd day of **September** 2021

FRED A. OCHIENG

JUDGE