REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL APPEAL NO. 45 OF 2016

AGNES TUWAN GLARIO…..……...……APPELLANT

VERSUS

CHINA WU YI COMPANY LIMITED……...……RESPONDENT

*(Being an Appeal from the Judgment in **Mwingi Senior Resident Magistrate's Court Civil Case No. 74 of 2012** by **Hon. Hon. M. W. Murage (RM)** on **20/08/15**)*

J U D G M E N T

1. **Agnes Tuwan Glario,** the Appellant, instituted a suit against **China Wu Yi Co. LTD,** the Respondent, in her capacity as the Administratix of the Estate of **Patrick Mwendwa Munyoki** (Deceased) the registered owner of **Plot No. 72 (Mwingi)** (subject plot) per the amended Plaint. The claim was for **Kshs. 680,000/=,** costs and interest founded on negligence.

2. The Appellant alleged that between **September, 2011** and **May, 2012,** the Respondent set up a crush plant near the subject plot. Further, the Appellant avers that the Respondent negligently and without taking due care of the Appellant's property, set up crushing machines and crushed concrete materials whose eruptions caused the Appellant's house and water tank to develop cracks on the wall making the house completely inhabitable.

3. The Respondent in its defence disputed ownership of the subject plot by the Deceased. It claimed that it took all due care and attention, obtained all necessary licences and approvals before erecting the crusher plant. The Respondent also claimed that if indeed the damages occurred in the Appellant's house it was due to the Appellant's lack of adequate safety measures on her premises including poor structure quality.

4. During trial the Appellant availed three (3) witnesses. PW1 **Tabitha Musyoka** testified that she was a tenant at the Appellant's house where she paid rent of **Kshs. 5,000/=** per month. She stated that towards the end of **2011,** the Respondent began construction work nearby the brick buildings on the Appellant's compound and the work resulted to damage on the building she lived in and that she made complaints to the Respondent. On cross examination, she denied having any documents to prove that she was indeed a tenant. She also stated that she did not have a place to live any more.

5. PW2 **Agnes Glario** (Appellant) adduced in evidence a certificate of grant of representation to the Estate of the Deceased. She testified that there was a brick house and cement water tank built on the subject plot that she rents out at **Kshs. 5,000/=** per month. That the house was in good condition until **2011** when cracks began to develop due to the Respondent's construction work. That she raised a complaint and obtained relevant letters from the Health Officers, valuer that she adduced in evidence. On cross examination she said that from the report, the house was not habitable and her tenant had nowhere to go.

6. PW3 **Peter Gitau Nguli,** a Valuer (**Certificate No. 267)** and Registered Building Surveyor (**Certificate No. 431)** stated that he undertook a valuation on behalf of the Appellant and did a report indicating the structural cracks that had been caused on the structure. He opined that the structure (house) needed reconstruction. On cross examination he stated that at the time of valuation the excavation was ongoing and the buildings nearby had similar damages.

7. The Respondent called one witness, **Daniel Kigod Nzambawa,** a Liaison Officer/ Administrator who testified that the Respondent who was constructing a road from **Mwingi** to **Tseikuru** obtained licences and approvals for the crusher plant from the **National Environment Management Authority** (NEMA) which included lease agreements between the Appellant and various owners of the parcel of land and the licence to emit noise in excess, manufacture and blast explosives inclusive. On cross examination he stated that there were effects of the explosives but he did not know the extent. That the Appellant's house had damages similar to which other buildings had and that Public Health Officials were not qualified to do structural valuation.

8. The trial court considered evidence adduced, dismissed the suit for want of proof of the cause of cracks and when they occurred.

9. Aggrieved, she appeals on grounds that:

- That the learned Magistrate erred in law and in fact by failing to consider the evidence adduced by the Appellant's witnesses.
- That the learned Magistrate erred in law and in fact by failing to record the Appellant's witnesses' evidence.
- That the learned Magistrate erred in law and in fact by according undue weight to the defence documents that were in the first place inadmissible.
- That the learned Magistrate erred in law and in fact by failing to give reasons for her Judgment.

10. The Appeal was canvassed by way of written submissions.

11. It was urged by the Appellant that the burden of proof as required in civil cases was established. She relied on the case of **Treadsetters Tyres LTD vs. John Wekesa Wepukhulu (2010) eKLR** where **Ibrahim J.** (As he then was) quoted **Charles Worth & Percy on Negligence, 9th Edition** at **Page 387** on the question of proof where it was stated that:

> ***"In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."***

12. It was further argued that the Respondent did not tender any evidence to prove that safety measures had been taken to ensure the effects of blasting did not affect other people and their properties. That the documents relied on were just permits and licences that allowed them blasting activities.

13. The trial Magistrate was faulted for being biased for allegedly failing to record some of the Appellant's witnesses' evidence as pointed out by the Respondent's Counsel; allowing the Respondent to file their documents after pre-trial directions and even after the close of the Appellant's case and according undue weight to the defence documents which were inadmissible upon which she formed an opinion.

14. The Respondent on its part argued that the issues in dispute relate to the environment therefore the Court lacks jurisdiction to determine it.

15. That the Appellant never lodged any complaint to **NEMA** which is the primary institution mandated to handle any complaints, the Respondent having been in possession of all the requisite permits and licences. In this regard he cited the case of **Diasta Investments Limited vs. Nilesh Devan Kara Shah & 4 Others (2013) eKLR** where it was held that:

> ***"The application is premised on eleven grounds appearing on the face of the application which are reiterated in the supporting affidavit sworn on 11th July 2011 by Priten Patel, a director of the Plaintiff. The Plaintiff's case is that the Defendants who are the registered proprietors of LR. No 209/7584 proposed the construction and/or development of shops and offices with a total of eight (8) floors which included the basement, ground floor and the first (1st) to sixth (6th) floors. The Defendants are said to have carried out an environmental project study whereupon an Environmental Impact Assessment Project Report was submitted for approval the National Environmental Management Authority (NEMA). It is deponed that NEMA approved the proposed construction and issued the Defendants with an Environmental Impact Assessment (EIA) License dated 28th April, 2009."***

16. That there was no evidence as to the cause of the alleged damage caused to the house as a result of the actions of the allegations and the alleged tenancy.

17. That the Appellant pleaded a liquidated amount which was not specifically proved.

18. This being a first Appellate Court, it is my duty to re-examine afresh the evidence and material tendered before the Lower Court and draw my own conclusions, but I have to be slow in overturning the decision of the trial Court, bearing in mind that I did not have the opportunity of seeing or hearing witnesses who testified so as to assess their credibility **(See Selle vs. Associated Motor Boat Company Limited (1968) EA 123).**

19. The Appellant has questioned the jurisdiction of this Court. The celebrated case in respect of jurisdiction, **Owners of Motor-vessel "Lilian 'S' vs. Caltex Oil LTD (1989) KLR 1,** it was stated by **Nyarangi, J** (As he then was) as follows:

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

20. Jurisdiction is the legal authority the Court is seized of to hear and determine issues before it. It may be statutory or territorial limits in nature.

21. The Respondent did not raise the issue of jurisdiction at the earliest opportunity during trial but brought up the issue in its submissions.

It's argument was that the body that was mandated to hear the matter/dispute was **NEMA.** It faulted the Appellant for not taking any step to complain to **NEMA.** The trial Court opined that pursuant to practice directions of the **Chief Justice** in **Gazette Notices No. 167** dated **9th February, 2012** and **5178** dated **25th July, 2014** the Court was mandated to hear disputes that were environmental in nature.

22. Similarly, at the Appellate stage, counsel for the Respondent appeared severally before Court and directions were given in his presence. The jurisdictional issue was raised in submissions. It therefore behooves this Court to inquire whether it has the inherent jurisdiction to determine the instant matter for a Court of law can only entertain a matter within its jurisdiction.

23. In the case of **Republic vs. Chief Registrar & Another (2019) eKLR Mativo, J.** quoted the case of **Vuyile Jackson Gcaba vs. Minister for safety and Security First & Others Case CCT 64/08 (2009) ZACC 26** it was stated that:

> ***Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. The South African Constitutional Court [11] had this to say:-***
>
> ***"Jurisdiction is determined on the basis of the pleadings, [12]… and not the substantive merits of the case… In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim …, one that is to be determined exclusively by……{another court}, the High Court would lack jurisdiction…"***

24. In the instant case the pleadings show it was a case of a tort of negligence. Acts of negligence complained of were clearly particularized. Paragraph 7 of the Plaint states thus:

> ***"As a result of the Defendant's negligence the Deceased's house in Plot No. 72 and the water tank were extensively damaged by way of developing cracks in the walling and the same became completely inhabitable …"***

25. In its defence the Respondent blamed the Appellant to have substantially contributed to the negligence of the Plaintiff by failing to take adequate measures for safety of her premises. Jurisdiction of the Court was admitted.

26. **Section 13(2)(a)** of the **Environment and Land Court Act, 2011** provides thus:

> ***"(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?***
>
> ***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;"***

27. It is therefore a question of interpretation and in interpreting the statute this Court must look at both the text and context in order to ascertain the true legislative intent. In the case of **Reserve Bank of India vs. Peerless General Finance and Investment Co. LTD, 1987 SCR (2) 1,** the Supreme Court of India stated thus:

> ***"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."***

28. Having read the statute (**ELC Act**) and the alluded to provision of law in a way that gives it fundamental value in regard to the claim and also examined the object and purpose of the statute, I find the argument that the case should have been handled by the ELC without basis. The Respondents have therefore failed to satisfy the Court as to why the matter in respect of a tort of negligence should have been heard by the ELC.

29. **Section 107** of the **Evidence Act** provides thus:

> ***"(1) 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.***
>
> ***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

30. Following the elementary principle aforestated, the burden of proof lay with the Appellant.

31. **Section 112** of the **Evidence Act** must also not be disregarded. It provides thus:

> ***"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

32. It is not in dispute that as at **May, 2012** the subject building had multiple cracks. The Appellant attributed the cracks to activities of the Respondent's crusher plant estimated to be some 500 metres away from the quarry. The building in question per the findings of PW3 was constructed between **1985-1986.** According to PW1 who alleged without evidence of tenancy stated that the cracks on the wall begun to be noticed in **2011.** In an endeavor to prove the cause of the cracks, the Appellant called PW3 a valuer who did a valuation of the property and opined that the building had depreciated and hence needed replacement. The valuer, however, did not give an expert's report on what caused the cracks.

33. The Appellant faulted the trial Court for admitting documents that were inadmissible even after an objection was raised but overruled.

34. The impugned documents were produced in evidence irregularly without a proper basis being laid as to why they were not produced by the author. They were also filed after pretrial directions were given. The argument of the trial Magistrate was that the documents would be interrogated through cross examination. It was possible that it may have been done out of ignorance but not necessarily out of bias. That notwithstanding as earlier stated the burden of proof lay with the Appellant. And, having failed to prove what actually caused the cracks, there was no proof on a balance of probabilities that the Respondent was the one responsible.

35. In the premises, I find the Appeal lacking merit which I dismiss. Each party shall bear its costs.

36. It is so ordered.

Dated, Signed and Delivered electronically through Skype this 27th day of May, 2020.

L. N. MUTENDE

JUDGE