



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CIVIL APPEAL NO 79 OF 2016**

**JOSEPH KIMANI GATHECA.....APPELLANT**

**VERSUS**

**GATUNDU SOUTH WATER AND SEWERAGE COMPANY....RESPONDENT**

**[Being an appeal from the Judgment and Decree of Hon A. N. Maina Principal Magistrate (PM) in CMCC 234 of 2015 delivered on 5<sup>th</sup> October 2016 at Principal Magistrate's Court at Gatundu]**

**IN**

**JOSEPH KIMANI GATHECA.....PLAINTIFF**

**VERSUS**

**GATUNDU SOUTH WATER AND SEWERAGE COMPANY.....DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

1. In his judgment delivered on 5<sup>th</sup> October 2016, the Learned Trial Magistrate A.M. Maina, Principal Magistrate dismissed the Appellant's suit with costs to the Respondent on the ground that the Appellant had failed to establish his claim against the Respondent.
2. Being dissatisfied with the said judgment, on 4<sup>th</sup> November 2016, the Appellant filed a Memorandum of Appeal of even date. He relied on four (4) Grounds of Appeal.
3. The Appellant's Written Submissions were dated and filed on 5<sup>th</sup> September 2017 while those of the Respondent's were dated and filed on 20<sup>th</sup> March 2018.
4. When the matter came up for the hearing of the Appeal on 21<sup>st</sup> March 2018, both parties requested this court to write its judgment based on the aforesaid Written Submissions that they relied upon in their entirety. The judgment herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. Is there no case law.
6. Having considered the aforesaid submissions, it appeared to this court that the issue that had been placed before this court for its determination was really whether or not the Appellant had proved his case against the Respondent on a balance of probability.
7. The Appellant submitted that the Respondent admitted that there was extensive damage to crops in his land and substantial soil erosion. He pointed out that an Assessment Report by Ministry of Agriculture was adduced in evidence which showed the extensive damage that was caused in his land as a result of which his livelihood was affected. He said that as the evidence was uncontroverted, the Learned Trial Magistrate erred in concluding that he did not adduce sufficient evidence to prove his case.

8. He contended that he had never experienced any landslides on his land and thus urged this court to treat the Respondent's assertions that his land was slanted as a non-issue. He averred that the purchase of two (2) gabions by the Respondent evidenced the fact that it was prudent to install the said gabions due to the existing pipes and as such gabions would have protect his family and investments on his land, the Respondent ought to have incurred the costs of installing the same.

9. He was categorical that he had particularised his claim, which he supported in his testimony and that if the gabions were not installed, he was likely to be faced with another calamity.

10. He relied on the case of Rylads vs Fletcher (1868) UKHLI where the Plaintiff therein was awarded damages following flooding of his land from a neighbour's land. He also cited the case of Kenya Shell Ltd vs Milka Kericho Onkoba [2010] eKLR where the said case of Rylads vs Fletcher (Supra) was cited therein.

11. He further urged this court to be guided by the cause -in- fact causation in law which is determined by the "but for" test and find that the construction of the gabions would not be necessary "but for" for the grave danger that was posed in his land by the Respondent's pipes which he argued justified his argument that the Respondent ought to bear the costs of installing the gabions.

12. On its part, the Respondent submitted that the Appellant did not adduce any evidence to prove that his perimeter stone wall got damaged when its water pipe burst and caused a landslide in his land. It relied on the cases of Kenya Ports Authority vs East African Power & Lighting Ltd [1982] eKLR, Mutunga Karori Mutokulea vs Jadiel Gichuru & Another [2017] eKLR and Peter Kariuki Njenga vs Gabriel P Muchira & Another [2017] eKLR where the common thread was that the burden of proof must be discharged by a party who seeks to prove a claim of negligence.

13. It added that the fact that it purchased two (2) gabions for the Appellant ought not to be construed that it was responsible for their installation because their purchase was a humanitarian act that was not envisaged under the Water Act 2002. In this regard, it relied on the case of Kenya Airports vs Mitu- Bell Welfare Society & 2 Others [2016] eKLR where the Court of Appeal held that the trial court gave orders and directions while ignoring the appellants' express statutory mandate.

14. Further, it submitted that the doctrine of estoppel was applicable herein for the reason that the Appellant herein had undertaken to install the gabions in his land.

15. In his evidence, the Appellant herein testified that in August 2014, he was asleep with his family when a water pipe belonging to the Respondent burst and ended up destroying crops in his land L.R No Kiganjo/Gachika/1236 and a perimeter wall. The damage of the crops was assessed at Kshs 89,677/= which he acknowledged having been paid. He pointed out that the Respondent undertook to send an Engineer to see how his perimeter wall could be repaired and how gabions could be installed.

16. His testimony was that this was never done as a result of which he sought a mandatory injunction to compel the Respondent to put up gabions on his property and compensate him for the damage to his perimeter wall. He admitted that the Agricultural Officer focused on the damage to crops only and that the installation of the gabions was the said Agricultural Officer's recommendation.

17. Joseph Waithaka Kimani (hereinafter referred to as "PW 2") was an Agricultural Extension Officer. He assessed the damages to the crops at Kshs 89,672/=. He testified that the stone wall perimeter wall was demolished and recommended that gabions be installed.

18. John Kinyanjui Ngugi (hereinafter referred to as "DW 1") worked for the Respondent as a Scheme Manager. In his evidence, he testified that a water pipe connecting water to the Appellant's land burst causing damage therein. He said that the Respondent paid the Appellant the sum of Kshs 89,672/= and purchased gabions for him which he was to install at his own cost and that they were surprised to receive the Appellant's claim that the Respondent install the said gabions.

19. He tendered in evidence a letter dated 5<sup>th</sup> January 2015 wherein the Appellant and his "boss" entered into an agreement for the purchase and installation of the gabions. This letter was disallowed by the Learned Trial Magistrate following an objection by the Appellant's advocate.

20. In his Complaint that was dated 10<sup>th</sup> November 2015 and filed on 11<sup>th</sup> November 2015, the Appellant did not itemise the cost of the perimeter wall. It was a special damage that ought to have been specifically proven. Indeed, it was a claim that ought to have been proven to assist this court determine the value of restoration to the original state. Its compensation could not be by way of an award of general damages.

21. This court looked at the photos that were annexed in the Appellant's List of Documents dated 10<sup>th</sup> November 2015 and filed on 11<sup>th</sup> November 2015 and noted that the same did not show the type of fence that had been destroyed. The Appellant and PW 2 did not also adduce evidence to demonstrate that the fence that was damaged was made of stone or that there was indeed a fence that had been made of stone prior to the incident herein.

22. This court therefore agreed with the Respondent's submissions that the Appellant did not discharge his burden of proof to demonstrate that the perimeter wall was made of stone or that there was a fence as required by Section 107 and 109 of the Evidence Act Cap 80 (Laws of Kenya).

23. Section 107 of the Evidence Act provides as follows:-

**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”.**

24. Section 109 of the Evidence Act states that:-

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

25. The Learned Trial Magistrate therefore arrived at the correct conclusion when he observed that there was no evidence of there having been a perimeter wall in the Appellant’s land or that it was destroyed or if it was destroyed, the value thereof so as to assist the court in determining the amount that would have been adequate to restore it to its original state.

26. Going further the Appellant’s submission that the Respondent ought to have installed the gabions was not supported by any documentary evidence. His oral evidence that there was such an agreement between him and the Respondent was overshadowed by PW 2’s Report that failed to allude to such an obligation on the part of the Respondent. Indeed, this court did not find any evidence to suggest that the Respondent was under any legal or contractual obligation to install the gabions on the Appellant’s land. In PW 2’s evidence, the installation of gabions was a recommendation. His Report dated 14<sup>th</sup> August 2014 did not make any reference to such recommendation, a position that was rightly pointed out by the Respondent.

27. This court understood the Appellant’s case to have been one for “mitigating damages to his farm in future”. Compensation for negligence as was in the case of **Rylands vs Fletcher (Supra)** that he relied upon envisages damage or loss as having occurred before compensation is paid. It does not deal with a speculative scenario. In other words, compensation cannot be paid for a future event which it is not known when or whether the same will occur. The basis of a claim for negligence is that there must be damage or a loss for compensation to be paid.

28. In this regard, this court found and held that the Learned Trial Magistrate arrived at a correct conclusion that the Appellant failed to prove that the Respondent had an obligation to install the gabions in his land at its cost. It was this court’s view that the Appellant’s insistence on the installation of the gabions did not fall under the principle of **“but for”**. Rather, that it had potential to amount to unjust enrichment as it was clearly a speculative claim

29. Accordingly, having analysed the evidence that was adduced in court, the Written Submissions and the case law that was relied upon by the Appellant and the Respondent herein, this court came to the firm conclusion that the Appellant failed to discharge the burden of proof and thus did not prove his case against the Respondent on a balance of probability.

**DISPOSITION**

30. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 4<sup>th</sup> November 2016 was not merited and the same is hereby dismissed with costs to the Respondent.

31. It is so ordered.

**DATED at NAIROBI this 28<sup>th</sup> day of July 2018**

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED at KIAMBU this 30<sup>th</sup> day of July 2018**

**C.MEOLI**

**JUDGE**