REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 164 & 254 of 2000

TOIYOI INVESTMENT LTD……..……PLAINTIFF

VERSUS

UCHUMI SUPERMARKETS LTD……...…….DEFENDANT

Consolidated with

TOIYOI INVESTMENT LTD……..……PLAINTIFF

VERSUS

UCHUMI SUPERMARKETS LTD……..…….DEFENDANT

JUDGMENT

The Plaintiff in HCCC 164 of 2000 presented its plaint on the 5th July 2000 against the Defendant seeking special damages and general damages. The claim was based on a fire outbreak at the Defendant's premises which occurred on 11th December 1998. The Plaintiff averred that the Defendant unlawfully and wrongfully started the fire in its demised premises and that the fire escaped and spread thereby causing extensive damage to the adjoining premises. The Plaintiff was the owner of all that property known as Eldoret Municipality Block 3/46. The Plaint was amended to provide particulars of special damages at the time of hearing the Plaintiff was proceeding on the basis of a Further Amended Plaint presented to court o 13th September 2005 seeking the following reliefs:

a) Special damages for:

i. Cost of reconstruction Kshs. 87,850,000/=

ii. Loss of rent Kshs. 372,000 per month from January 1999 until the completion of reconstruction

iii. Professional fees 2,938,739/=

iv. Cost of clearing debris Kshs. 1,500,000/=

b) General damages

c) Costs of the suit

d) Interest

The Defendant filed a defence and denied liability. The Defendant contended that by virtue of the Fires Prevention (Metropolis) Act, 1774 a statute of general application applied to Kenya under Section 3 of the Judicature Act it has no liability for accidental outbreak of fire. It further averred that the doctrine of *Rylands v Fletcher* has no application.

The hearing of the case commenced on 6th November 2002 before Justice A.G.A. Etyang as he then was. The Plaintiff called Joseph Ouma Olweny as PW1. He gave testimony that he was working as a Chief Fire Officer, Eldoret Municipal Council. That in March 1998 he received a report that Uchumi Supermarkets was on fire. He responded as usual. The fire had started within a store where foam mattresses were kept. He established that the foam mattresses had gotten into contact with florescent tubes which broke starting off fire. They advised that Uchumi Supermarket should store their goods in such way that they did not get into contact with electric bulbs or tubes. They did not find any fire or smoke detectors installed anywhere. Neither did they find fire, spray bulb system and emergency construction on the walk. They however found fire extinguishers both water type and chemical powder type Co2.

That on 11th December1998 he was at the Fire Station and he received report at around 1.42 pm that Uchumi Supermarket was on fire. They rushed to the scene. They were ten firemen and two senior officers. Upon arrival they found the front door closed and they were directed to the rear where they found the exist door grilled and locked as well. They had to break the first door. By the time they managed to get access the fire had engulfed the whole supermarket. A report was compiled by J.L. Shikanga Ag. Chief Fire Officer. He could not determine the cause of the fire because they reached the scene after it had engulfed the supermarket. PW2 was Kamal Mansukhlal Manek who stated that he was a tenant at Eldo center running a photocopying lab. His lab was next to Uchumi Supermarket. He recalled that on 11th December 1998 there was a fire outbreak at Uchumi Supermarket. That the fire was big and he decided to remove his properties from the lab. Efforts to extinguish the fire were made from the rear of the building. The fire started from the store. He did not know what goods were been kept there. He had been a tenant since 1996 and he did not see Uchumi supermarket employees conducting fire drills. On cross examination he stated that he did not see the fire starting. He was not in a position to say what caused it. In re-examination he said he was angry because the fire escaped and caused damage to his lab.

PW3 was Madhav Bandari. He was an Auditor with Madhya's Chartered Accountants. He had been auditing accounts for the Plaintiff Company. The Plaintiff was the owner of Eldoret Municipality Block 3/46. He produced a summary of rental income that he had prepared as P Ex. 2. After the fire, rental income dropped because part of the building which was burnt was rental offices which could not be rented out after the fire. He referred to lease agreements between the Plaintiff and its tenants and the rental income lost due to the fire. In total 24 tenants were affected. He did not know the cause of the fire. PW4 was Robert Odiwuori. He worked for Protectors Limited. In December 1998 he received instructions from Kenindia Company to investigate the circumstances surrounding the fire which was at Uchumi supermarket premises and to adjust the loss. They appointed their Forensic Engineer Dr. Keita Ormand to investigate the cause of fire. He explained how he went about adjusting the loss. The cause of fire was opined as having started accidentally when some cooking was in progress within the area of the scene of fire. The Plaintiff put up a claim of Kshs. 49,934,000 with Kenindia Assurance Company. They adjusted the loss to Kshs. 10,901,697. This is because the insured (Plaintiff) had underinsured. He produced letter dated 26th May 1999 as P Ex. 28. The letter demanded payment of Kshs. 696,243 as fees. He confirmed that the sum was paid.

PW5 was Devji Vekaria. He gave testimony that he has a construction company known as Vishva builders. He referred to letter dated 28th January 1999 addressed to the Plaintiff where he gave a quotation of Kshs. 38,000,000/= for reconstruction of the building. Cost as at date of hearing would have been Kshs. 40,850,000/=. He based his quotation on the original plans. PW6 was Stephen Wamathai Wagura. He owns a construction company known as Swabwa General Contractors. In 1999 he gave a quotation of Kshs. 1,500,000/= to clear debris from the site of the building which had been burnt. The quotation was

through a letter dated 22nd June 1999 which he produced as P Ex 29. On 26th June 1999 he was formally instructed to clear the debris. He produced the agreement as P Ex. 30 He did the work and was paid. PW7 was John Obara who gave testimony that he worked for Harold R. Fenwick & Associates as a Quantity Surveyor. His work was to carry out cost consultancy and contract management. He referred to a report prepared by themselves dated 21/6/1999. The reconstruction cost was estimated at Kshs. 87,850,000 which includes professional fees and VAT. He produced the report as P Ex. 32. PW8 was Fredrick Mwenda a Quantity Surveyor. In his testimony he stated that he was instructed by Protector Ltd to carry out an exercise in Eldoret to come up with new statement of costs of Eldo Centre. His brief was to come up with reinstatement costs. He carried out measurements and prepared a report dated 22/2/1999. He was then trading under the name Fredmar Quantity Surveyors. He produced the report as P Ex. 33. In his assessment the cost of replacing the burnt out building was Shs. 21,708,396/60. From his assessment it was not necessary to pull down the whole building but what was required was only replacement or reinstatement of only burn out portions.

PW9 was Joseph Andati. He gave testimony that he works as claims officer with Kenindia Insurance Co. They issued the Plaintiff with fire insurance cover. The cover was in force at the time of fire. The building was insured for Kshs. 49,934,000. He produced renewal advice as P Ex 34. He produced the Claim form as P Ex. 35.He appointed a loss adjuster M/s Protector's Ltd who recommended that the Plaintiff be paid a sum of Kshs. 10,901,697/=. He produced the report as P Ex. 34. The insured disputed the amount and declined to accept it. They engaged another contractor M/s Mclaren Toplis who came up with a recommendation of Kshs. 10,930,331. There was a difference of Kshs. 28,616. He received the report and it is in his custody. He produced the report from Mclaren as P Ex. 36. The Plaintiff accepted the second assessment of Kshs. 10,930,313 which was paid to the Plaintiff. He produced the acceptance form signed by the Plaintiff on 29/6/1999 as P Ex. 37.The Plaintiff was paid less because of under insurance. If he had insured for sh. 90 million he would have been paid his claim of Kshs. 49 million. He produced fee note raised by Protectors Ltd as P Ex. 38A and acknowledgement of part payment as P Ex 38B. He produced fee note raised by Fredman Quantity Surveyor for Kshs. 232,300/= as P Ex 39A. Bank statement certified of Kenindia Assurance Company A/c No. 0104015056301 was produced as P Ex 39B. He produced fee note raised by Gordon Melvin & Partners as P Ex. 40A and receipt dated 5/5/1999 as P Ex. 40B. Mclaren Toplis raised a fee note for Shs. 443,987/= which was paid on 7/10/1999. He produced the fee note as P Ex. 41A and receipt as P Ex. 41B. In cross-examination he stated that they had to contract several adjustors. If the building had not been insured the owner of the building would not have contracted these people. The insurance cover of Kshs. 49 million was for the whole building. This is the value the insured gave to them. The loss was not absolute loss. From their point of view only half of the building suffered loss. The portion to be reinstated was only half of the building damaged. The whole building was not written off.

PW10 was Henry Kiprono Kosgey. He gave testimony that he was a director of the Plaintiff company. It owns property described as Eldoret Municipality Block 3/46 developed and known as Eldo Centre. It is for rental income. He stated that had had report of fire and on 13/12/1998 he went to site. Slightly over 30% of the building had been gutted down. They had a mortgage with KCB. They informed them about the fire. They hired PW6 to clear the debris. The property was insured with Kenindia Assurance Co. They submitted a claim for Kshs. 49,934,000/= P Ex. 35. He then sought quotations from contractors starting with Seyani Brothers & Co. Ltd. They quoted Kshs. 44,190,000/=. Vishva Builders quoted 38 million. He testified that the insurer offered Kshs. 10,901,697/= as compensation which he rejected. He was later on approached by Maclaren Toplis and after lengthy negotiations he accepted Kshs. 10,930,313/=. He referred to the replacement cost of Kshs. 87,850,000/= prepared by Harold Fenwick and Associates. Based on he report he instructed advocates to sue for the sum of Kshs. 87,850,000/=. He stated that the claim against the Defendant company is for Shs. 49,000,000/= being replacement cost of the burnt out area. He abandoned the claim for Kshs. 87,850,000/= pleaded in the Plaint. He still maintained claim for loss of rent at the burnt area and general damages. He instructed Merali Chartered Accountants to carry out and prepare a schedule of loss of rental income in respect of the burnt out area of Eldo Centre. They came up with P Ex. 2 which was as at 30th September 2002. The lost monthly rent was Kshs. 354,330/=. He is claiming loss of rent for the period running from date of fire 11/12/1998 to twelve months from date of judgment, if it will be in favour of the Plaintiff.

On cross-examination he stated that the building was purchased in 1992 for Kshs. 45 million. At the time of fire he had insured it for Kshs. 49 million. He did not agree that 30% burnt out area would reflect a value of Sh. 16 million. He did not agree that Kshs. 16 million would be adequate compensation. He did not agree with the Insurance assessment that the cost of replacement of Eldo Centre would be Kshs. 21 million. According to reports filed the cause of the fire was not arson. The Plaintiff rested its case on 13/8/2003 and the Defendant sought an adjournment to prepare for defence. On 14/7/2004 the parties recorded a consent before Justice Gacheche that the Plaintiff's case be reopened to the extent that the evidence of PW7 and PW9 be heard de novo thereafter the matter to proceed to full hearing and final determination. On 7/12/2004 PW9 was recalled. He gave testimony as before and when it came to production of Protector Ltd report counsel for Defendant raised an objection which the court upheld and marked the report as MFI 27 for author to be called to produce it. He stated that payment to insured was made vide cheque number 000429 of 30/8/1999 in favour of Kenya Commercial Finance Company. We enquired in whose favour to make payment. The insured wrote and instructed them on 12/8/1999 which he produced as P Ex 42 (A) and 42(B).

Plaintiff's Counsel applied for leave to recall PW4 to produce MFI 27. PW4 was recalled. An objection was raised by counsel for Defendant that PW4 did not sign the report. Counsel for Plaintiff applied to stand down PW4. MFI 27 was finally produced by PW11 Manjit Dhadialla. Through a consent letter dated September 12, 2005 it was ordered by consent that the Plaintiff be granted leave to further amend the Amended Plaint in paragraph 9 by adding the following sentence thereto:

"*The Plaintiff was partly compensated by Kenidia Asurance Co. Ltd under the terms of a policy entered between the Plaintiff and the said Insurance Company and the sum of Kenya Shillings twelve million, three hundred and sixty nine thousand and fifty two Kshs. 12,369,952/ of the special damages above mentioned is sought to be recovered in exercise of the insurers right of subrogation.*"

Hearing resumed on 1/3/2006, PW12 was Keith Ormond. He gave testimony that he holds a bachelor degree in Industrial Chemistry from the University of Loughborough in the U.K., a doctorate degree from the University of Sheffiled in Organic Chemistry awarded in 1967 and a Masters degree in Forensic Science from the University of Strathchide in Scotland. He explained what forensic science entails and stated that he was consulted by Protectors Ltd in 1998 regarding a fire that broke out in Eldoret. His duty was to try and identify the cause of the fire. He went to Eldoret on 16/12/1998. He examined the site of the fire and prepared a report on his findings. He gave the report to Manjit Singh and completed his work. He is aware that his notes were used to compile a report (P Ex. 27). He has seen the report before. His report is contained in paragraphs 3-19. According to his opinion the cause of the fire was misuse of small stove. The stove was found in the area. On cross-examination he stated that he did not do any chemical analysis. It was very difficult to say what the exact cause of the fire was. He could not say as fact that the cooking caused the fire. It was possible that the fire was caused by something different.

The further cross examination of PW4 was dispensed with by consent. The Plaintiff then closed its case.

DW1 was John David Miners. He gave testimony that he works as a loss adjuster, based in Nairobi. He is the managing director of Cunnigham Lindsay Kenya Ltd. He is a Fellow of the Chartered Insurance Institute of the UK and a Fellow of the Charted Institute of Loss Adjusters of the UK. He was aware of the fire at Uchumi Eldoret in 1998. They had been instructed by the insurer UAP Insurance Company to deal with several claims. That he worked closely with lawyers for UAP Hamilton Harrison & Mathews. He was given two reports by Hamilton Harrison & Mathews to comment on. These were reports of loss adjusters acting for Kenindia. He was to give an opinion whether the reports represent a fair and reasonable assessment of the fire damage to the building and loss of rental income. His advice to HH & Mathews was in written form. He compiled his notes in letter dated 3/7/2003 which he produced as D Ex. 1. He stated that he preferred the report of Protectors Ltd as it was more detailed. On cross examination he stated that he could have engaged the services of other professionals if he had been asked to deal with matter. Counsel for Defendant sought an adjournment to call other witnesses. While case was pending Justice Gacheche was transferred and even though parties were of the view that she should conclude the matter she declined citing heavy work load at Kisii High court. On 30/5/2007 it was agreed by consent that the matter should proceed from where Justice Gacheche left.

Defence case was fixed for further hearing on 29th April 2009. On this date counsel for the Defendant sought an adjournment on the ground that witnessed had not appeared in court despite service. The application for adjournment was refused and on application of Plaintiff counsel the defence case was ordered closed. The court gave an order for written submissions to be filed.

I have considered the written submissions filed by the parties and the issues for determination are as follows:

1. Whether the Plaintiff has established that the fire outbreak was due to negligence of the Defendant.

2. Whether the plea of *res ipsa loquitor* applies.

3. Whether the circumstances of the case fit the rule in *Rylands v Fletcher.*

4. Whether the Defendant can rely on Fires Prevention (Metropolis) Act 1774 as a statute of general application in Kenya.

5. Whether the Plaintiff is entitled to the relief sought

6. Who should bear costs of the suit.

To prove its case the Plaintiff called a total of 12 witnesses. None of the witnesses was an eye witness on the cause of the fire. The testimony of some of the witnesses was based on inferences and possibilities. PW12 was the professional instructed to go and establish the cause of the fire. He went to scene of fire on 16/12/1998 this was about 5 days after the event. In his testimony he stated that he was of the opinion that the fire could have been caused by a stove that was used for cooking. On cross-examination he conceded that he could not affirm as a fact that the stove caused the fire. That a fire could be caused in several ways. He stated that there are about six or seven kinds of ignition. Any can cause a fire. I am persuaded after looking at the evidence as a whole that the Plaintiff has established on a balance of probability that the fire was started due to the negligence of the Defendant. The particulars of negligence in the plaint were given as follows:

i. Exposing combustible merchandise without due care and attention.

ii. Failing to install fire-fighting equipment in its premises or at all.

iii. Failing to hire and or employ persons with fire fighting skills in its premises.

iv. Failing to provide firefighting protective clothing to its agents and or servants.

v. Failing at all material times to extinguish or attempt to extinguish the said fire.

vi. Locking all the doors and entrances during the continuance of the fire and thereby eliminating the possibility of having the fire put off.

vii. Failing or refusing to summon professional firefighters at the onset of the fire.

viii. Continuing to add or causing to be added on to the fire combustible material by failing to remove gas cylinders and thereby increasing the said fire at a time when the Defendant was aware or should have been aware of the dry and hot weather conditions then existing and or the likelihood of winds causing the fire and or sparks and embers to spread within he demised premises and to the adjoining premises.

ix. Failing after commencing continuing and increasing the fire to control or extinguish it.

x. Failing to control or attempt to control the fire.

xi. Failing to take any precaution to ensure that the fire was contained and could not escape.

There was proof that combustible merchandise had been exposed and ignited a fire. The stove was found at back of the store with merchandise that led to inference that employees of Defendant had been cooking lunch. Failing to install firefighting equipment hampered efforts to contain the fire. Failing to employ persons with firefighting skills could not have caused the fire but maybe would have assisted in containing the fire. Failing to provide protective clothing also hampered fire fighting. Looking all doors, failing to summon professional help, failing to remove combustible substances like gas cylinders after fire broke out, failing to contain the fire so as not to escape are all factors that contributed to the spread of the fire. As pointed out earlier PW12 provided a probable explanation of cause of fire. It was human error. Employees of the Defendant were cooking using a stove. They must have used the stove so negligently as to cause a fire. The Defendant did not call employees who were in that section to rebut the cause of fire explanation provided by PW12. My finding is that on a balance of probability the fire was caused due to the negligence of the Defendant's employees.

The Plaintiff has sought to rely on the doctrine of ***res ipsa loquitur***. The Defendant has objected to this reliance arguing that it was not pleaded. I concur with counsel for Plaintiff that it is not necessary to plead ***res ipsa loquitur***. I cite with approval the holding in **Bennet v Chemical Construction (GB) Ltd [1971] 3 All ER 822 p. 823** where the issue was whether it was necessary to plead ***res ipsa loquitur***. It was held ***that "the pleading adequately covered the Plaintiffs claim in negligence, it being unnecessary to plead res ipsa loquitur because, if the accident was proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the Defendants, it was for the Defendants to show that it could have happened without negligence.***"

The circumstances of the fire do raise a presumption of negligence on the part of the Defendant. There was no explanation from Defendant that the fire could have started even without negligence. PW12 stated that fire could be ignited in several ways 6 to 7 ways. Fires are known to start and they start because of a given cause. I adopt the reasoning of Megaw LJ in **Lloyde v West Midlands Gas Board [1971] 2 1240**. He stated that

"***Res ipsa loquitur is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a Plaintiff prima facie establishes negligence where (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident, but (ii) on the evidence as it stands, i.e. in the absence of evidence from the Defendant, it is more likely than not that the effective cause of the accident, whatever it may have been, was some act or omission of the Defendant or of someone for whom the Defendant was responsible, which act or omission constitutes a failure to take proper care for the Plaintiffs' safety***."

The evidence as I stands in this case is sufficient to shift the incidence of prove. PW12 established that a stove was the possible cause of the fire. The fire started at a store demised to the Defendant. Taking into account the difficulty on the part of the Plaintiff to state with certainty how the fire started because these facts lie within the knowledge of the Defendant, I find that the doctrine of ***res ipsa loquitur*** was invoked properly. In the absence of explanation from the Defendant, it is more likely than not that the effective cause of fire whatever it may have been, was some act or omission of the Defendant or of someone for whom the Defendant was responsible.The Defendant would thus be liable under vicarious liability.

The Plaintiff has also put forward the case that the rule in Rylands v Fletcher applies. The non natural user of land is a stove. With respect Plaintiff counsel has stretched the rule too far. Stoves are sold in supermarkets. Stoves are to be found in residential as well as commercial premises. I reject the contention that the rule in Rylands v Fletcher applies.

The Defendant relies on the provisions of the Fire Prevention (Metropolis) Act 1774. It is common ground that this is a statute of general application by virtue of the reception clause under section 3 of the Judicature Act. It provides as follows:

And no action, suit or process whatever shall be had, maintained or prosecute against any person in whose house, chamber or stable, barn or other building, or on whose estate any fire shall accidentally begin, not shall any recompense be made by such person for any damage suffered thereby, any law, or usage or custom to the contrary notwithstanding.

Counsel for the Plaintiff cited the case of **H & N Emanuel Ltd v Greater London Council and another [1971]2 All ER 835** in support of the proposition that the Fire Prevention (Metropolis) Act 1774 does not cover a fire which begins or is spread by negligence. I fully endorse this view. The wording of the Act covers fire that 'accidentally' begin only. In this case there was no evidence from the Defendant to displace the presumption that the fire was caused due to negligence of its employees or servants. The evidence of PW12 was not controverted. The Plaintiff established negligence on balance of probability. I find that the Defendant is not entitled to rely on the Fire Prevention (Metropolis) Act 1774.

The Plaintiff has established negligence against the Defendant and it also established that it suffered loss due to the accident. The Plaintiff is claiming the sum of Kshs. 49 million as damages suffered due to outbreak of the fire. The evidence on record shows that the building was not completely destroyed. PW8 gave testimony that the cost of reinstatement would be around 21 million. PW10 obtained quotations from contractors based on original designs. According to PW9 the value of the building was Kshs. 90,000,000. Evidence on record was that the building was 30-40% destroyed. Taking the conservative value of 35% it gives a loss of Kshs. 31,500,000. The period of repair ranged from seven months to one year. The loss of rental income was a direct loss flowing from the fire accident. Were it not for the fire accident the Plaintiff would not have lost rental income. I award the Plaintiff loss of rental income of Kshs. 354,330/= from the period running from date of fire 11/12/1998 for twelve months to give a sum of Kshs. 4,251,960. The Plaintiff also proved a special damage loss of Kshs. 1,500,000/ that was paid to remove debris. I allow this claim of Kshs. 1,500,000/. The total damages due to the Plaintiff is Kshs. 37,251,960. Out of the Judgement amount of Kshs. 37,251,960/, the sum of Kshs. 12,369,952/ together with interest at court rate from the date of filing of filing suit will be paid by the Defendant to Kenindia Assurance Company Limited in settlement of subrogation claim. The balance of the decretal amount being Ksh. 24,88,2008/- together with interest at court rates from date of filing suit until payment in full will be paid by Defendant to the Plaintiff. The Plaintiff will have costs of this suit. It is so ordered.

Dated and SIGNED at Nairobi on this 21ST day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Eldoret on this 31ST day of OCTOBER 2012.

F. AZANGALALA
…….
Judge

In the presence of: Mr. muhor h/b for Mr. Kamau for Plaintiff

Mr. Kibichi h/b for Harris Hamilton & Mathews for Defendant