Qaydee (Quarry) Limited v Maraga (Appeal 37 of 2020)
[2022] KEELC 3173 (KLR) (8 June 2022) (Judgment)

Neutral citation: [2022] KEELC 3173 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

APPEAL 37 OF 2020

M SILA, J

JUNE 8, 2022

BETWEEN

QAYDEE (QUARRY) LIMITED ..... APPELLANT

AND

MICHAEL MASUMBUKO MARAGA ..... RESPONDENT

(Being an appeal against the judgment of Hon. L.N Wasige, Principal Magistrate, delivered on 25 November 2020, in the suit Kaloleni PMCC, Land Suit No. 2 of 2018, Michael Masumbuko Maraga vs Qaydee Quarry Limited)

JUDGMENT

(Respondent having sued the appellant claiming that the appellant's quarrying activities have caused damage to his houses; respondent testifying and calling two of his neighbours to prove his case; the oral evidence of the respondent being that his house has developed cracks and one has fallen; appellant disputing the claim of the respondent; judgment entered for the respondent with the trial Magistrate concluding that the damage to the respondent's house must have been due to the blasting activities of the appellant and making an order for assessment of the damage post judgment and exemplary damages; judgment reversed on appeal; the mere oral evidence of the respondent not sufficient to demonstrate that the cause of the damage to the houses was as a result of the appellant's activities; no evidence led by the plaintiff about the soundness of his houses; the same were built without any approved plan and without any inspection; no expert evidence to demonstrate that the damage caused was consistent with damage that would be caused by quarrying activities; no evidence led on the actual damage and it was wrong for the trial Magistrate to order a post judgment assessment of the loss; exemplary damages; nature and when the same may be awarded; even assuming that the damage was caused by the activities of the appellant, no basis for the award of exemplary damages; appeal allowed)

1. Through a plaint filed on 4 September 2018, which plaint was subsequently amended, resting with the further amended plaint filed on 21 August 2019, the respondent sued the appellant, claiming that

the appellant's quarrying activities had caused damage to his two houses developed on the Plot No. 946 in Mwele Simakeli Demarcation Section. He pleaded in his plaint that his house was located about 400 metres from the appellant's quarry and that in the year 2010 the appellant started extending its quarrying activities to near where he resides. He pleaded that in the year 2016 he noticed some cracks to his two houses and he engaged the services of a valuer M/s Elite Africa Valuers Limited, to undertake an assessment of the damage. It was pleaded that a report was made which concluded that the source of the cracks was the persistent blasts undertaken at the appellant's quarry and that the house was risky for habitation. He pleaded that the appellant was guilty of negligence and/or nuisance and the following particulars were laid out :-

a. Failure to uphold the duty of care owed to the neighbouring community, and addressing complaints raised by the neighbouring community.

b. Failure to consult and acquire the consent of National Environment Management Authority (NEMA).

c. Failure to consult and acquire the consent of the Local Authority and the plaintiff.

d. Using the land bordering the plaintiff in a non-natural manner.

e. Carrying its use of the land to cause harm to the plaintiff.

2. In the suit, the respondent asked for the following orders :-

i. General damages.

ii. Exemplary damages.

iii. Special Damages – Kshs. 40,000/= (being fees paid for the valuation report)

iv. Costs of the suit and interests thereon.

v. Any other remedy the court deems fit to grant.

3. The appellant filed defence where she refuted the claims of the respondent. She pleaded that she has all the necessary approvals from NEMA and has a licence to carry out quarrying activities. She pleaded that it has upheld its duty of care by ensuring that its blasting methods are safe and sound and approved by the relevant authorities. It averred that it has been mining in the area for the past 20 years without any complaint from the area residents.

4. The matter proceeded for hearing with the respondent testifying and calling two witnesses. He introduced himself as a teacher by profession and asserted that it is the blasting of boulders at the appellant's quarry which caused his two houses to crack. He reported the matter to the chief who wrote him a letter and he also wrote demand letters to the appellant but they were not responded to. He then engaged a valuer who valued his loss at Kshs. 2,700,000/= and he was charged Kshs. 40,000/= for the report. He testified that he built his house in the year 2007 and that in the year 2010 the appellant extended its quarry which is about 400 metres from his house. He testified that one of his houses collapsed in the year 2017. Cross-examined, he testified that he did not prepare any building plans for his house and neither did he obtain a permit to build. He denied that his house was built by an unqualified person but he did not know the qualifications of his 'fundi' nor did he know where he was trained. Neither did officials from NEMA or the National Construction Authority attend to his site. No inspection of the development was ever done. He never obtained any certificate of completion for the houses. He stated that one house was a bungalow made of bricks and the other was a semi-permanent structure with mud walls and iron sheet roofing. He acknowledged that the appellant was

undertaking quarrying activities in the 1990s and has buildings with windows which is about 200 metres away from the quarry. He also acknowledged that what he had was a valuation report and not a structural survey. Neither did he have a report from an environmental expert. He acknowledged that there are other factors that can cause vibrations other than blasting activities.

5. PW-2 and PW-3 were the respondent's neighbours and have no professional qualifications in building. They testified that the respondent's house has cracks and they attributed these cracks to the blasting activities of the appellant.

6. With the above evidence, the respondent closed his case. Notably, he did not call the valuer who prepared the valuation report and the same was never produced as an exhibit.

7. The appellant called one witness, a Mr. Vijay Patel, the appellant's quarry manager. He affirmed that the appellant carries out quarrying operations in the area but he asserted that their methods are safe and approved. He stated that their company has structures within the quarry which have remained solid despite the quarry. He stated that they have previously received complaints caused by flyaway rocks and they have made good such damage. He refuted that their activities have caused damage to the respondent's houses and speculated that it could be from other factors, such as structural design, soil erosion, quality of materials used, and workmanship. He testified that this has been a mining area since the 1930s. Cross-examined, he testified that they have never received complaints caused by tremors. He had an EIA licence for the quarry, an environmental audit report and a business permit issued by the County Government of Kilifi. With that evidence, the appellant closed her case.

8. Counsel were invited to file written submissions, which they did, and the court pronounced judgment on 25 November 2020. In her judgment, the trial court was satisfied that the damage to the plaintiff's houses was caused by the activities of the appellant. She found the evidence of the respondent corroborated by PW-2 and PW-3 who were his neighbours. She was persuaded that the cracks to the houses of the respondent were caused when the appellant extended its quarrying activities in the year 2010. She was not persuaded that the damage could have been caused by other factors because the respondent's house had been standing from the year 2007 until when the appellant extended its quarrying activities towards the plaintiff's house. It was her considered view that had the quarry not extended towards the plaintiff's house, his houses would not have been damaged. She concluded that it is the blasting activities of the appellant and the vibrations thereof which caused damage to the respondent's houses. On damages, she found that the valuation report had not been produced and could not therefore be relied upon. She did not therefore make any award in general damages. She instead directed parties to file quantity surveyor's reports outlining the bill of quantities to illustrate the cost of repairs within 30 days. On special damages, she made no award, since no proof of payment of the sum of Kshs. 40,000/= for the valuation report was tendered. On the claim for exemplary damages, she found the same merited. She found that the conduct of the appellant was calculated to make a profit for herself. She awarded Kshs. 200,000/= under the head of exemplary damages. She also granted the respondent costs of the suit.

9. Aggrieved, the appellant filed this appeal and 16 grounds have been listed. I find them repetitive and I can narrow them down to 6 as follows :-

    i. That the trial Magistrate erred in holding that the damage to the respondent's house was caused by the appellant's blasting activities.

    ii. That the trial Magistrate erred in failing to question the soundness of the respondent's structure especially in light of the express admission of the respondent of lack of the requisite approvals from the relevant agencies and professionals.

iii. That the trial Magistrate erred in finding that the evidence of PW2 and PW3 corroborated the evidence of the respondent.

iv. That the trial Magistrate erred in finding that the damage to the respondent's house came about in the year 2010 despite lack of any evidence to support this.

v. That the trial Magistrate erred in allowing the respondent to file a quantity surveyor's report for purposes of determining general damages while at the same time holding that the respondent failed to produce evidence in the valuation report which formed the basis for the respondent's claim for general damages and that the court had become functus officio.

vi. That the trial Magistrate erred in awarding Kshs. 200,000/= as exemplary damages.

The appellant wishes to have the judgment set aside and she be awarded the costs thereof and the costs of this appeal.

10. I gave directions for the appeal to be heard by both written and oral submissions. I have taken note of the submissions presented by both counsel for the appellant and counsel for the respondent. Although counsel for the appellant referred to some decided cases in her submissions, none were provided and I do not have the benefit of them. I am therefore unable to refer to them in my judgment.

11. This is a first appeal and this court has the duty to re-evaluate the evidence and come to its own conclusion while at the same time bearing in mind that it did not see nor hear the witnesses. This was affirmed in the case of *Gitobu Imanyara & 2 others v Attorney General*, Court of Appeal at Nairobi, Civil Appeal No.98 of 2014, [2016] eKLR where the Court of Appeal stated as follows :-

> This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.
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> I will thus proceed to evaluate this appeal based on the above principles.

12. The case of the respondent was based on negligence and this is indeed what was pleaded in the plaint. The respondent did plead that the appellant owed him a duty of care and because of its quarrying activities, he had suffered damage. The respondent thus had the burden of demonstrating cause and effect, that is, firstly, that it is the activities of the appellant that caused damage to his houses, and secondly, that indeed, there was damage to his houses. I am persuaded that the respondent failed to discharge this burden.

13. At the outset, none of the particulars of negligence pleaded were ever proved. It was claimed that the appellant had no NEMA licence nor authority to carry out the quarrying activities. The appellant displayed the NEMA licence and licence from the local authority which authorised her quarrying activities. It was also pleaded that the appellant used her land in a non-natural way, but even the respondent himself agreed that the land of the appellant had been used as a quarry for a very long time. The evidence showed that the land had been set apart as a quarry and it was not therefore correct to allege that it was being used in a manner not contemplated. Neither was there any evidence of complaints raised by residents which the appellant failed to address, nor any evidence that the appellant deliberately used her land to cause damage to the respondent, as pleaded. The particulars of negligence

were all unproven, and that being the position, the case of the respondent ought to have collapsed by failure to prove negligence.

14. Apart from the above, there was never any expert report produced which confirmed that there was actually damage to the houses of the respondent, the nature of any such damage, and the probable cause of the same. I am not persuaded that in the circumstances of this case, it was enough for the respondent to merely state, orally, without any documentary evidence, or expert evidence, or expert's report, that his houses had cracks. I do not see how a court can be persuaded that a house has cracks and is damaged without there being any documentary evidence of such cracks or damage. Not even a photograph of the alleged damage was availed. I agree with the appellant that it was erroneous for the trial court to depend on the oral evidence of PW-2 and PW-3 as corroborating evidence. What was in issue needed an expert to assess and the report of such assessment be presented. The expert would not only have had to demonstrate that indeed there are cracks, or damage to the houses, but also correlate that damage to the activities of the appellant, and demonstrate that such damage could not have been caused by any structural defects, or other causes, apart from the activities of the appellant, or that at the very least, the activities of the appellant contributed to the damage. It needed an expert to show that the damage to the houses of the respondent was consistent with the blasting activities of the appellant, and could only have been caused by the appellant's activities, and nothing else. The respondent did not avail any such expert evidence or expert's report. The trial court ought to have taken the evidence of the respondent and his two witnesses with a pinch of salt.

15. The position of the respondent was in fact extremely precarious because the respondent did not demonstrate any planning approval for his houses, did not demonstrate that his houses were developed by a qualified person, and did not demonstrate that his houses had been inspected upon completion and given a clean bill of health. There is no evidence to conclude that what the respondent developed was a structurally sound building that could not have fallen apart owing to poor workmanship or poor structural design.

16. In addition, no evidence was given of the seismic effects of the activities of the appellant. Again, these could only have been provided by the opinion of a geologist or other qualified expert. None was presented.

17. Merely because the appellant has a quarry near the houses of the plaintiff, by itself, in the circumstances of this case, cannot be said to be the cause of the damage to the houses of the plaintiff, if indeed such damage was ever proved. There was therefore no basis for holding the appellant responsible for any damage that may have been caused to the houses of the respondent. I find that the trial Magistrate erred in finding the appellant liable. The respondent never proved that the appellant was liable for any damage caused to his houses. Without there being liability proved against the appellant, there would be no basis to make any award of damages against the appellant.

18. But even assuming that liability was proved, was there any basis for the award of damages that were made in this case ? I am not persuaded. I note that the trial court made an award of general damages and exemplary damages. Starting with the award of general damages, if there was any damage to the houses of the respondent, the damage would be actual and specific, and would be quantifiable ; in other words, it would have been in the nature of special damages and not general damages. It is trite that special damages need to be specifically pleaded and proved. Thus, the respondent needed to plead in his plaint the exact loss that he has suffered owing to the activities of the appellant. If it was the amount noted in the valuation report (that was never produced), then this amount ought to have been specifically pleaded. And it would have been special damages and not general damages. Nothing was specifically pleaded as being the actual loss to the respondent and nothing was proved, for the valuation report was never tendered in evidence. I reiterate that this was a specific claim for a specific amount. It

could never pass to be under the head of general damages. It was therefore wrong for the trial court to purport to make an award of general damages and wrong to direct the filing of a bill of quantities as proof of general damages. Such costs are specific and can only be special damages.

19. Turning now to exemplary damages, was there any basis for the award of the same? I am not persuaded that there was any. Exemplary damages are punitive in nature and as put forth by Devlin LJ in the case of *Rookes vs Banard* (1964) AC 1129, they are awarded in three categories of cases. In the said case, Devlin LJ, elaborated as follows :-

> The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category,—I say this with particular reference to the facts of this case,—to oppressive action by private corporations or individuals... Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff... This category is not confined to moneymaking in the strict sense. It extends to cases in which thedefendant is seeking to gain at the expense of the plaintiff some object,— perhaps some property which he covets,—which either he could not obtain at all or not obtain except at a price greater than he wants to put down. Exemplary damages can properly be awarded whenever it is necessary to teach a wrongdoer that tort does not pay. To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute.

20. It will be noted from the above that the three categories where exemplary damages may be awarded are :-

    i. Oppressive, arbitrary or unconstitutional action by the servants of the Government;

    ii. Where the defendant's conduct is calculated so that he can make profit for himself which may well exceed the compensation due to the plaintiff; and

    iii. Where the same is expressly authorised by statute.

21. The first category, as Devlin LJ took pains to explain, is restricted to actions by servants of the Government and is not extended to private corporations or individuals. Thus in the case of *Huckle v. Money* (1763) 2 Wils. K.B. 205, the plaintiff was awarded exemplary damages for being placed in illegal custody. In *Benson v. Frederick* (1766) 3 Burr. 1845 the plaintiff, a common soldier, obtained damages of £150 against his Colonel who had ordered him to be flogged so as to vex a fellow officer. Mansfield C.J. said that the damages "were very great, and beyond the proportion of what the man had suffered" but the sum awarded was upheld as damages in respect of an arbitrary and unjustifiable action. In the second category, it was explained that it applies, so as to deter improper conduct by the defendant, especially where, the defendant stands to gain profit by continuing with his action, because whatever he stands to pay as compensation to the plaintiff, is far outweighed by the benefit that he will gain by continuing with the conduct. For example, if a wrong will result in loss of say Kshs. 100,000/= to the plaintiff, but owing to that wrong, the defendant gains Kshs. 500,000/= then it will be seen that at the end of the day, the defendant profits, and he may be incentivised to pursue the wrongful conduct because of the profit that he stands to gain. The only way to deter his conduct is by making an award which is greater that the compensatory damage of Kshs. 100,000/= so that whatever he stands to gain as profit is obliterated. Within the case of *Rookes vs Barnard*, example was given of the decision in the case of B*ell v Midland Railway Company* (1861) 10 CB (NS) 287, where the plaintiff brought an action against a railway company for wrongful obstruction of access from the railway to his wharf. It was found that the defendants had committed a grievous wrong with a high hand and in plain violation of an Act of Parliament; and persisted in it for the purpose of destroying the plaintiff's business and

securing gain to themselves. The third category set out in Rookes vs Barnard is where statute provides for an award of exemplary damages.

22. *Rookes vs Barnard* outlines the common law principle of the award of exemplary damages. However, I do not think that a court cannot expand these principles, if it finds prudent, that owing to the nature of the wrong that has been presented, such wrong can only be discouraged by an award of exemplary damages. For example, if a court is faced with conduct that is so egregious and so abhorrent, such that the defendant needs to be punished by an award beyond what is due as just compensation to the plaintiff, and a statement needs to be made that such wrong cannot be condoned in the kind of society that we live in, then I would think that the court would be perfectly entitled to make an award in the nature of exemplary damages.

23. In our case, I do not see any reason why exemplary damages were awarded. First, none of the tests in *Rookes vs Barnard* were ever met. The appellant was not a Government official; neither was there a provision in statute for the award of exemplary damages, and there was no evidence to suggest that the appellant continued with a wrongful conduct, while in the knowledge that the same was causing loss to the respondent, yet that loss was less than the profit she would derive from continuing with such conduct. Even assuming that the blasting was wrong and caused loss to the respondent, there was no evidence to demonstrate any aggravation of wrongful behaviour on the part of the appellant so that an award of exemplary damages could be made. In my view, there was absolutely no basis for the award of exemplary damages. In any event, the rather paltry figure of Kshs. 200,000/= , compared to the alleged actual loss of about Kshs. 2,700,000/= (which is what was in the unproven valuation report) cannot in my view pass as exemplary damages, which in themselves need to be punitive and you would thus expect a much larger award.

24. I think I have said enough to demonstrate that this appeal has merit and it succeeds. I set aside the whole of the judgment of the magistrate's court. I substitute the judgment with an order that the respondent's case is dismissed with costs. The respondent will also pay the costs of this appeal.

25. Judgment accordingly.

DATED AND DELIVERED THIS 8 TH DAY OF JUNE 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA