



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO. 40 OF 2000

SHIV CONSTRUCTION CO. LTD. APPELLANT
VERSUS
ALFRED NDOMBI1ST RESPONDENT
PAUL NDOMBI2ND RESPONDENT

(From the decree and order of Z.M ZALON, SRM in Bungoma CMCCC NO. 694 OF 1996)

J U D G E M E N T

The Respondent herein, by an amended plaint dated 14.5.1997, claimed against the appellant, Special damages in the sum of Kshs. 213,000/-, General Damages and Loss and costs. The claim was based on the following facts.

That during January to December, 1995, the appellant a contractor, constructed a high-rise building adjacent to the Respondents shop building known as Khetia Supermarket. That the Appellant so negligently and/or recklessly carried out his construction works, that he occasioned damage to the Respondents adjacent business premises, damage estimated at Kshs. 213,000/-.

The Respondent also claimed general damages for the inconvenience caused to him and loss of rent incurred during the time and afterwards due to the shoddy job carried out then, as it interfered with Respondent's and his tenants business and enjoyment there from. He had estimated the loss of rent during the period of construction of 24 months at Kshs. 1,500/- per month.

The Respondent/Plaintiff in addition had pleaded that the negligency and/or recklessness pleaded on the part of the Appellant/Defendant, arose from the fact that the Appellant/Defendant had carried the stated construction next to the Respondent/Plaintiff's building without erecting protective canopies to prevent falling rocks, building materials and any other unmitigated risks frequent in such sites. That the failure to construct the canopies indeed led to the damage alleged, hence the claim.

In his defence, dated 15.11.1996 the Appellant/Defendant had admitted that it indeed carried out the constructions alleged adjacent to the Respondent/Plaintiff's business premises. It however, denied interfering or tampering with the Respondent/plaintiff's building as alleged in the plaintiff. It put the Respondent/plaintiff to strict proof.

During the hearing of the suit at the lower court, the plaintiffs testified and called on additional one witness. They confirmed the facts alleged in the plaint. They also stated that the Appellant had been warned of the damage it was causing but paid little attention to the complainants. The main witness of the Respondent/Plaintiff, PW3 PIUS ISIAHA KHAOYA, had stated that he held a Bachelor's degree in law Economics and a Diploma in Valuation. He had visited and evaluated the damage done to the Respondent/Plaintiff's building relevant to the case and made a report which he produced. The report showed that the falling debris during construction had caused damage which he assessed at kshs. 213,000/- as therein in detail explained. His conclusion was that the Respondent would need the sum of

Kshs. 230,000/- in repairs to return the building to what it was before the construction.

The Appellant/Defendant had called one witness, Bernard Etyang. He in his evidence admitted that during the relevant construction there was no canopy constructed. He also agreed that rubble, plaster and other debris indeed fell on the roof of the Respondent's building. He gave the reason for failing to construct the necessary canopy as the closeness of the new building to the Respondent's building. He however, denied that any damage resulted and could not ascertain if the Respondents complained to the Appellant's company directors.

In his judgement the trial magistrate accepted the evidence of the Respondents to the effect that their building was damaged by the debris falling from the construction. He accepted that it required Kshs. 213,000/- to repair the damage. He therefore made a finding that the Appellant was liable to pay the said sum to the Respondent. The honourable Magistrate also found that the sum of Kshs. 1,500/- got lost as rent per month totaling Kshs. 36,000/- for the 24 months, should be compensated to the Respondent because the failure to occupy the Respondent's premises arose from the damage which made the premises risky to occupy through the conduct of the Appellant. He therefore awarded a total sum of general damages of Kshs. 249,000/- with costs to the Respondents. That is what aggrieved the Appellant and made him file this appeal.

I have carefully considered the evidence on record. There is clear evidence that the Appellant did not construct a canopy on the new building as the building rose higher and higher. It cannot be denied generally nor did the Appellant deny that its failure to construct a canopy on the new building, allowed debris of concrete and other building material to fall on the roof and walls of the Respondent's building. Indeed, the Appellant's only witness confirmed that fact.

In the above circumstances, if the falling debris caused damage as the Respondent testified and was supported by his witness, who else would take up the resulting liability?. The Appellant tried to deny that no damage occurred to the Respondent's building but the trial court did not believe it; nor do I. The result then was that there was adequate evidence to prove the Respondent's case on the balance of probability.

The extent of the damage caused was assessed by PIUS ISAIAH KHAOYA, a real property valuer, who testified as PW3. He found that the damage would require Kshs. 213,000/- to cure or repair the damage caused by the Appellants debris. In my finding, the Respondent required no more, no less, than what would cure only the damage caused by the Appellant. The assessment of damages to that end at the said sum, was in my view properly arrived at and I see no reason to interfere with the figure of Kshs. 213,000/-.

The trial court also found that tenants vacated or kept off from taking occupation of the Respondent's building because of the risk the falling debris created to occupants. As a result the Appellant lost or failed to get the monthly rent of Kshs. 1,500/- which the tenancy would fetch if the building was occupied. Since the construction by the Appellant took 24 months to complete a probable total sum of Kshs. 36,000/- was assessed as lost in rents. The lower court awarded the said sum in addition to the sum of Kshs. 213,000/- which brought the total of Kshs. 249,000/- as general damages with costs.

I have considered the second item of damage arising from the loss of probable rent. I am satisfied that it is based on a logical and lawful ground. I find no reason to interfere with it.

For the above reasons I find no merit in this appeal. I accordingly dismiss it. Costs follow the event. Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 21st DAY OF July 2011

D. A. ONYANCHA
JUDGE