REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIORBI
H.C.CIVIL APPEAL NO.575 OF 2002

JUBILEE INSURANCE COMPANY LTD ……..…….APPELLANT

VERSUS

MARGARET MUKUHI NJUGUNA …… RESPONDENT

JUDGMENT

There are two appeals before me in respect of proceedings in CMCS (Milimani) No.4792 of 2002.

In that suit the Appellant in C.A. 575 of 2002 (Jubilee) and the appellant in C.A. 594 of 2002 (Metro) were both found liable by the Learned Magistrate for injuries suffered by the Respondent Margaret Mukuha Njuguna (the Plaintiff) The suit was filed against Jubilee in connection with an accident where the Plaintiff slipped and fell on the premises belonging to Jubilee of which the Plaintiff was a joint tenant under a lease dated the 9/8/1994.

The incident in which the Plaintiff alleged she was injured occurred on the 25/6/1999 during the currency of the lease Clause 1(iv) (d) to the Provisio in the Lease states as follows: “

> ***The landlord the owner and builder of the Buildings shall not be liable for any loss damage or injury to the tenants the family employees servants agents visitors or licenses of the tenants or the property of the tenant or of any such persons caused by a. -***
>
> ***b. -***
>
> ***c. -***
>
> ***d. any act of default (negligent or otherwise) of any servant of the***
>
> ***landlords agents as licensees”***

The Plaint alleged that the accident occurred solely due to the negligence of Jubille her (sic) tenants or agents. It further alleged that Jubilee was liable for the act of its agents.

The particulars of negligence are as follows

> ***(a) Keeping the floor of the said building slippery***
>
> ***(b) Keeping the floor in an uninhabitable state by leaving heaps of unscrambled floor wax on the floor***

(c) Failing to exercise providence and caution while cleaning the floor of the said building and leaving water on the floor making it impassable. In so far as will be applicable the Plaintiff will rely on the doctrine of Re-Ipsa-Loquitur

It will be noticed that the Plaint refers to a second defendant however I presume this is a reference to Metro, which in fact was joined as a third party to the suit.

The Defence filed on behalf of Jubilee denied the fact of the accident or that the same was caused by the negligence of Jubilee as particularized. In the alternative it alleges that the accident was wholly or substantially contributed to by the Plaintiff. It then set out particulars of her alleged negligence.

Subsequent to the filing of the Defence to which there was no reply, Jubilee filed a Third Parties Notice seeking indemnity against Metro alleging firstly that Metro, whilst contracted by Jubilee to undertake cleaning services, carelessly and negligently and/or unprofessional (sic) preformed your professional services that it caused the 3rd floor to be slippery by leaving polish on the floor causing the Plaintiff to slip thereon and sustain serious injuries. Then are set out particulars of Metro's alleged negligence.

Metro filed a Defence to these allegations in which it averred that it skillfully professionally and carefully performed its cleaning duties. It then alleged that the Plaintiff's claim against Jubilee was highly questionable as was Jubilee's claim against Metro and set out particulars, which were as follows

(a) The Plaintiff was never injured at all

(b) If the Plaintiff was injured, it was not because of the Third Party's negligence as the floor of the said building is naturally slippery, whether wet or dry.

(c) The Plaintiff already suffered from injuries sustained elsewhere and not in any way related to her alleged fall on or about 25th June, 1999.

(d) The Plaintiff voluntarily assumed a risk by agreeing to enter and lease premises in the defendant's slippery building with eh full knowledge of the likely consequences. The Third Party will rely on the defence of Volenti non-fit injuria.

(e) The Defendant did not complain and has indeed never complained that the Third party performed its cleaning duties negligently and or unprofessionally and or carelessly, or that it caused the alleged accident on 25th June, 1999 or at all.

These were the issues before the Magistrate as can be ex extrapolated from the pleadings.

Miss Omondi very ably submitted that there were matters, which the Magistrate erred in making findings on.

1. In his Judgment the That Jubilee was exonerated from liability by virtue of the disclaimed clause on the lease set out above.

2. That the Plaintiff not having filed a Reply to Defence must be deemed to have admitted the particulars of negligence raised against her.

3. That the Plaintiff should have pleaded her claim under the Occupiers Liability Act.

4. In making findings contrary to the weight of the evidence

5. In apportioning liability equally between the Jubilee and Metro and excessive or inordinately

6. In awarding exercise or moderately high damages

1. In his Judgment the Learned magistrate held that Jubilee was not entitled to rely on the disclaimer clause in the lease, as the same was not pleaded in the Defence. He found the matter arising out of a contract should have been specifically pleaded. He agreed with Plaintiff's Counsel that no evidence should therefore be allowed to be leas on this point. As was pointed out by Mr. Kingara in his submission, in this Appeal the lease was referred to by the witness of Jubilee but not made an exhibit in this case and as such it is not in evidence I agree with the Magistrate that findings can only be made on matters which are pleaded and as the clause of the lease was not pleaded to exempt Jubilee from liability to the Plaintiff the Magistrate was correct in not making a finding on this issue 2. The absence of a Reply to the Defence does not in my view amount to an admission of the particulars of negligence against the Plaintiff O.6 rule (9) (1) states as follows:

> ***"Subject to subrule (4), any allegation of fact made by a party in his pleading shall be deemed to be admitted by the opposite party unless it is traversed by that part in his pleading or a joinder of issue under rule 10 operates as a denial of it"***

and rule 6 10 (1)states under Rule 10(4)

"(1) If there is no reply to a defence, there is a joinder of issue on that defence (4) A joinder of issue operates as a denial of every material allegation of fact made in the pleadings on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operate as a denial of every other such allegations"

The position therefore is that the fact of the Plaintiff's negligence as particularized is deemed to have been denied as there is a joinder of that issue under rule 10(1) and as there is a joinder of issue under rule 10(4) the joinder operates as a denial of every material allegation of fact made in the pleadings.

In the rules of pleading in England it was always said that a Reply is only necessary in order to confess and avoid.

Of course where there is a counter-claim a Reply is necessary under O.VII rule 10. This however does not apply in this case.

3. The Occupiers Liability Act allows a person lawfully within premises to bring an action against the owner of the premises for injuries sustained there be virtue of a tortuous Act of the owner. It is not however necessary to plead the Act as the Act gives rise to the cause of action. All that is required is to plead facts which give rise to a claim against the owner of the building

4. The Magistrate made findings of fact on the evidence before him. The findings were in my view in accordance with the weight of the evidence, which he accepted and on which he could have made his findings. Having read the evidence, I would agree with his findings arising from it. Miss Omondi pointed out that the Plaintiff in her evidence said that the floor was wet whereas it was pleaded that it was slippery. The magistrate found that the floor was wet and there were no signs. The evidence was that the floor was slippery due to excessive wax being put on the floor. Although not wet it is clear that its was slippery whether due to wetness or wax and as such the Magistrate was entitled to find Jubilee and Metro liable for negligence in leaving the floor in a slippery state. I see no reason to interfere with the Magistrate's finding that there were no notice bringing the fact of the slippery floor to the notice of the Plaintiff.

5. With regard to the apportionment of liability as the case was before the Magistrate there was an allegation of negligence against Jubilee as a result of the negligence of its agent Metro. It was not denied that Metro was its agent. It is possible it could have raised a defence that Metro was an independent contractor for whose negligence it was not liable, however this was not pleaded, as the pleadings were, Jubilee sought to be indemnified by Metro. They were therefore joint tortfeasors. Jubilee being

vicariously liable for the acts of its agent. Metro however was on the findings the one whose negligence caused the injuries to the Plaintiff. In the result I do not think the Magistrate was wrong an apportioning liability as he did.

6. So far as damages are concerned an Appeal Court will only interfere with an award of damages if the same is manifestly too high or too low or if some wrong principles has been acted upon. In my view the award of damages made was fair having regard to the serious nature of the Plaintiff's injuries.

In the result I dismiss these appeals with costs to the Respondent in both.

Dated and delivered at Nairobi this 5th day of February 2004

P.J. RANSLEY

JUDGE