



REPUBLIC OF KENYA



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**Cheki v Onyancha (Suing as the duly appointed Attorney of Benjamin Ongaga Onyancha)
(Civil Appeal 50 of 2023) [2024] KEHC 2649 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2649 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 50 OF 2023
HI ONG'UDI, J
MARCH 12, 2024**

BETWEEN

BENARD MATWERE CHEKI APPELLANT

AND

**CLEMENCIA NYABOKE ONYANCHA (SUING AS THE DULY APPOINTED
ATTORNEY OF BENJAMIN ONGAGA ONYANCHA) RESPONDENT**

*(Being an appeal from the Judgment and decree of Honourable C. A Ocharo Senior
Principal Magistrate in Kisii CMCC No. 468 of 2018, delivered on 12th May 2023)*

JUDGMENT

1. This appeal arises from a judgment and decree entered in Kisii Chief Magistrate's Civil Suit No. 918 of 2019. In the said suit, the respondents sued the appellant for payment of kshs. 231,728/= as costs of repairs of his motor vehicle and re-building of the collapsed wall. Additionally, the respondent prayed for interests at 14% per annum from April 2018, costs of the suit and any other relief the court deemed fit.
2. The respondent is the registered proprietor in respect of LR No. Central Kitutu/Daraja mbili/1575 (the suit property) while the appellant is said to own the adjoining property. It is averred in the plaint that on or about 19th March 2018 at about 11.00 pm, the bricks belonging to the appellant were stored on the appellant's side of residence and were leaning on the respondent's wall. The said bricks exerted undue pressure and/or weight on the respondent's wall thereby causing a substantial portion of it to collapse and as result suffered loss and damage. The respondent accused the appellant of negligence.
3. The matter was fully heard and the trial Magistrate delivered Judgment on 12th May,2023 in favour of the respondent as prayed.
4. Being aggrieved with the judgment the appellant lodged the appeal dated 24th May,2023 on the following grounds:



- i. The learned trial magistrate erred in fact in awarding ksh 95,028/= for repair of motor vehicle whereas what was purportedly proved in court was ksh 73,300/ and further that the receipt in support of the said sum was not produced as an exhibit but was only marked for identification.
 - ii. The learned trial magistrate erred in law in finding that the 1st respondent was duly appointed attorney for Benjamin Ongaga Onyancha, the 2nd respondent herein.
 - iii. The learned trial magistrate erred in law and fact in not making a specific finding on who was the owner of the land upon which the bricks that allegedly broke the wall were stored and/or that if she did it was clear that the appellant was not and hence the court erred in finding the appellant as liable for the tort in issue.
 - iv. The learned trial magistrate erred in law in making a finding the doctrine of *Ryland's Fletcher* applied in the circumstances and facts of the instant case against the appellant herein.
 - v. The learned trial magistrate erred in law in shifting the burden of proof to the appellant.
 - vi. The learned trial magistrate erred in law in relying upon documents like NCA report which was inconclusive and incomplete which document was produced by PW2 as Exhibit 1 and hence arrived at a wrong decision.
 - vii. The learned trial magistrate erred in law and in fact in relying on documents like an invoice/ quotation to support some for special damages and also documents produced by PW3 that were vague and did not bear the name of the appellant.
 - viii. The learned trial magistrate erred in law in relying on some documents to prove special damages which they were not.
5. The appellant urged the court to set aside the judgment delivered on 12th May, 2023 and proceed to dismiss the respondents suit with costs.
 6. The Appeal was canvassed through written submissions.

The Appellant's submissions

7. The appellant's submissions were filed by Ben K. Advocates and are dated 21st December, 2023. Counsel listed the grounds in the memorandum of appeal and submitted on each of them. On the first ground he submitted that the trial magistrate erred in law in awarding the sum of kshs. 95,028/= to the 2nd respondent as the same was not proved to the required standard.
8. He added that the document in support of the repairs was not produced by the 1st respondent in court instead it was marked as PMFI 5. He also referred to the testimony of PW3 who testified that the total cost for spare parts, labour and painting was kshs. 73, 300/= and that Automobile Association of Kenya only did valuation and not repairs.
9. On the second ground, counsel submitted that the power of attorney produced in court as the respondents' exhibit 10 was done by Benjamin Onyancha and the donee was Clemencia Onyancha. He argued that the person who sued in this case being the 1st respondent was not given the power of attorney and hence lacked capacity to sue. Further, that the said power of attorney was not registered and therefore incapable of being used to prosecute a suit on behalf of the 2nd respondent. He placed reliance on the case of *Francis Mwangi Mugo v David Kamau Gachago* [2017] eKLR.
10. On the third ground, the court's attention was drawn to pages 94 and 99 -100 of the record of appeal. On the fourth ground, counsel submitted that it was not proved that the appellant was the owner of the



- land upon which bricks had allegedly been stored. It was therefore counsel's submission that the trial magistrate erred in relying on the case of *Rylands v Fletcher* as ingredient number 1 was not proved.
11. On the fifth ground, counsel submitted that the trial magistrate erred in law in shifting the burden of proof to the appellant. He placed reliance on section 109 of the *Evidence Act* which provides as follows;

“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”
 12. On the sixth ground, the court's attention was drawn to page 96 of the record of appeal in regard to the evidence by PW2 and Exhibit 1. Counsel went on to submit that with the evidence on record, it could not be conclusively stated that the cause of the alleged wall collapse was exclusively due to pressure from the bricks. He placed reliance on the case of *St. Anne's Well Brewery Co. v Roberts* [1928] ALL E.R Rep 28 at 33, where part of the ancient city wall of Exter collapsed and damaged the claimant's inn which adjoined it. The cause of the collapse was obscure and the owners of the wall were held not liable.
 13. Lastly, on the seventh and eighth grounds counsel submitted that courts had held that an invoice was not proof of payment and that only receipts meet the test. He placed reliance on the cases of *Christine Mwigina Akonya v Samuel Kairu Chege* [2017] eKLR and *Total (Kenya) limited formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR, *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR.
 14. He urged the court to allow the appeal and set aside the orders by the subordinate court.

The Respondents' submissions

15. The respondent's submissions were filed by Oguttu Mboya, Ochwal and Partners Advocates and are dated 20th December, 2023. Counsel listed the grounds in the memorandum of appeal and submitted on each of them. On the second ground he submitted that the appellant waived his right not to seek leave and appeal before the high court in view of the trial court's ruling of 13th February 2021 which dealt with the issue of the power of attorney.
16. He added that the same was *res-judicata* in so far as the trial court duly considered and dealt with the same. Reliance was placed on the decisions in *IEBC V Maina Kiai & 5 Other* [2012] eKLR, *Mayfair Holding Ltd v Ahmed* [1990] eKLR and *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR.
17. On the fourth ground, counsel submitted that the facts and circumstances of the present case befit the principle of the case of *Rylands v Fletcher*. He further placed reliance on the case of *David M. Ndeti v Orbit Chemical Industries Limited* [2014] eKLR. He went on to submit that the trial court was not considering issues of ownership of land but claims for general compensation and strict liability.
18. Lastly, counsel submitted on grounds 1, 5, 6, 7 and 8 that the trial court appreciated the fact that the case before her was on strict liability. He added that the respondent proved her case to the required standards as was demonstrated in the case of *Ryland v Fletcher* (supra) and that all the documents were produced by calling the relevant makers. He urged the court dismiss the appeal with costs.

Analysis and Determination

19. This being a first appeal, this court has a duty to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances. It must bear in mind that it did not see nor hear the witnesses testify, and must give an allowance for that.



20. In the classic case of *Selle & Another v Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 the Court of Appeal stated as follows on the power of the first appellate court:

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).[emphasis added]

21. Having considered the record of appeal, grounds of appeal the parties submissions and the authorities relied on by the respective parties, I opine that the issues for determination are:

- i. Whether the respondent proved her case on a balance of probability.
- ii. Whether the respondent proved his claim for kshs. 231,728/= as damages.

22. On the first issue, as listed above, the elements of strict liability in the case of *Rylands - v- Fletcher case(supra)* were crystallized as hereunder:

- a. The defendant must make a non-natural use of the land.
- b. The defendant must bring something onto his land which is likely to do mischief if it escaped.
- c. The thing in question must actually escape; and
- d. Damage must be caused to the plaintiff’s person or property as a result of the escape.

23. From the said case the prerequisites of a strict liability entail the following; that the defendant made a “non-natural” or “special” use of his land; that the defendant brought onto his land something that was likely to do mischief if it escaped; the substance in question escaped; and the Plaintiff’s property was damaged because of the escape.

24. During hearing the respondent who testified as PW1 stated that the bricks belonging to the appellant had been stored near her wall and the same fell on her motor vehicle. In cross-examination, she confirmed as to not having documents to show that the appellant owned the adjacent land but all she knew was that the owner was one Benard Matwere. In re-examination, she stated that she was present when the appellant brought the bricks.

25. The appellant on his part testified as DW1 and stated that he knew the respondent and where her land was situated but denied having any land there. He stated further that he lived next to the respondent’s plot in a flat which has 6 occupants but denied having dumped the bricks in the said plot. He added that the said flat belongs to an investment company known as ‘Bencoco’.

26. In cross -examination, he confirmed that he did not avail any evidence to show that the ‘Bencoco’ company owned the plot or that the bricks were not his. In re-examination, he confirmed that it was



the bricks that had caused the damage but the same did not belong to him as he was just a tenant in one of the flats.

27. It is not disputed that the bricks which had been stored in the plot adjacent to that of the plaintiff caused damage to the plaintiff's property. What is in dispute is ownership of the said plot and the bricks since the appellant denied being the owner while the respondent claimed that he was. This issue was similarly raised in the trial court but it was not addressed by the said court. It is this court's view that this was a grey area which ought to have been dealt with before judgment was entered in favour of the respondent. It is important to note that the respondent during cross examination admitted to not having documents to prove that the appellant was the owner of the adjacent plot where the bricks had been stored.

28. In civil cases, the onus is on the plaintiff or any other claimant to prove the position he or she postulates on a balance of probabilities. This position is anchored under section 107 of the Evidence Act which provides guidance in this area, it states as follows: -

Section 107 of the evidence Act states that;

- i. 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.
- ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

29. The Court of Appeal in the case of Karugi & Another V. Kabiya & 3 Others (1987) KLR 347 stated that:

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...-. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

30. Additionally, in the case of Rylands – v- Fletcher case(*supra*) as relied on by the respondent it required the respondent to prove that the plot actually belonged to the appellant considering that there were other tenants living in the said plot and the appellant having alleged that the said plot belonged to a company known as 'Bencoco'. The fact that the respondent alleged to have been present when the appellant brought the bricks to said plot was not proof that he was the owner. In my view, the respondent ought to have enjoined the alleged owner or availed a report from the Registrar of Lands to confirm that indeed the said plot belonged to the appellant.

31. Lastly, in the issue as to whether the respondent proved her claim for kshs. 231,728/= as damages. During the hearing the respondent testified that she had spent kshs. 136,700/= for reconstruction of the wall and kshs. 98,000/= for motor vehicle repair. She went ahead and produced an invoice and a receipt for the said amounts which were marked as PMFI 2 and PMFI 5 respectively.



32. This court upon perusal of the records did not find any original receipts produced as evidence in support of the said amounts. My finding is that the documents relied on by the respondent were never produced as exhibits but they were only marked for identification. The trial court could not therefore rely on them to award damages.
33. Consequently, this court finds that the respondent did not prove liability against the appellant nor any award for damages as pleaded in the plaint.
34. The upshot is that the appeal has merit and is hereby allowed. The judgment of the trial court is set aside.
35. Costs to the appellant
36. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 12TH DAY OF MARCH, 2024 AT NAKURU.

**H. I. ONG'UDI
JUDGE**

