Kenya Urban Roads Authority v Mimuka t/a Green Miles Distributor & another (Civil Appeal 11 of 2020) [2023] KEHC 17590 (KLR) (9 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17590 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 11 OF 2020

FA OCHIENG, J

MAY 9, 2023

BETWEEN

KENYA URBAN ROADS AUTHORITY ..... APPELLANT

AND

VINCENT J MIMUKA T/A GREEN MILES DISTRIBUTOR . 1ST RESPONDENT

CAROLINA CONSTRUCTION LIMITED ..... 2ND RESPONDENT

JUDGMENT

1. The appellant, Kenya Urban Roads Authority, was the 2nd defendant in the case which had been filed by the 1st respondent herein, Vincent J. Mmuka Trading As Green Miles Distributor.

2. By a judgment dated 10th January 2016, the learned trial Magistrate held the appellant liable for the loss of property which the 1st respondent had sustained. Accordingly, the trial court awarded the sum of Kshs. 2,850,000/-, being the value of the actual loss of the stock belonging to the 1st respondent. The trial court also awarded to the 1st respondent, the costs of the suit, together with interest as prayed in the plaint.

3. Being dissatisfied with the judgment, the appellant mounted this appeal, faulting the trial court for misapprehending the application of the doctrine of Strict Liability.

4. It was the appellant's case that the 1st respondent had not demonstrated how the activities of the 2nd respondent, Carolina Construction Limited, were either inherently dangerous or hazardous.

5 Secondly, the 1st respondent was said to have demonstrated that the activities of the 2nd respondent (hereinafter "the Contractor") amounted to a non-natural use of land, within the meaning set out in the case of *Rylands Vs Fletcher* [1861 – 73] ALL E.R. 1.

6 It was the understanding of the appellant that the loss (if any) was not caused by any activities attributable to the appellant or its agents. If anything, the appellant was of the view that the flooding

was attributable to the Local County Government, which had the legal mandate to maintain the storm water drains.

7 Thirdly, the appellant submitted that the 2nd respondent was an independent contractor, whose liabilities could not be pinned upon the appellant.

8 Finally, the appellant submitted that the 1st respondent failed to prove the value of the property which was either destroyed or lost. Therefore, it was the contention of the appellant that the trial court had erred when it awarded them sum of Kshs. 2,850,000/-, as compensation for the actual loss of property.

9 In answer to the appeal, the 1st respondent first urged this Court to find that the appellant ought not to be permitted to proceed with the appeal. His said view was premised upon the alleged non-compliance with the provisions of Section 79B of the *Civil Procedure Act*.

Pursuant to the said statutory provisions;

Before an appeal from a subordinate court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against, he may, notwithstanding Section 79C reject the appeal summarily."

10 The procedure for giving effect to the provisions of Section 79B is set out in Order 42 Rules 11, 12 and 13 of the *Civil Procedure Rules*.

11 An appellant is supposed to cause his appeal to be listed for directions before a Judge; and that step is supposed to be taken within 30 days of filing the appeal.

12 If the Judge declines to summarily reject the appeal, the appellant would then serve the memorandum of appeal, upon the respondent. It is my understanding that a Judge has the discretion to determine whether or not to summarily reject an appeal. However, such a draconian step ought to be exercised sparingly, and only in the cases which were obviously hopeless.

13 Whilst a case might, in the first instance, appear to be so weak that it could not be sustained, it may ultimately turn out to be otherwise.

14 The converse is equally true, as a case that initially appears formidable, might, in the final analysis turn out to be completely lacking in substance. First impressions may not necessarily give us the true picture.

15 In the final analysis, the best way of ascertaining whether or there was sufficient ground for interfering with the decree or order which had been appealed against, is by making a determination after hearing the parties.

16 The fact that the appeal herein was not placed before a Judge, who would have determined whether or not to reject it summarily, is not fatal.

17 Both parties have an equal opportunity, when canvassing their respective cases, to demonstrate whether or not the appeal was merited. I therefore reject the 1st respondent's invitation, to strike out the appeal.

18 On the substantive issues raised in the appeal, the 1st respondent submitted that the appellant was liable for the insufficient physical planning for the drainage. He also said that the failure of supervision of the work that was being carried out by the contractor, was a contributing factor to the damage which was caused to his property.

19 Being a first appellate court, I am enjoined by law to re-evaluate all the evidence on record, and to arrive at my own conclusions. However, at all times, I must bear in mind the fact that I did not have the benefit of observing any of the witnesses when they were giving evidence. Accordingly, when a decision

was made by the learned trial Magistrate, on the basis of the demeanour of any particular witness, I would have to be extremely reluctant to interfere with such finding.

20 In the particulars of negligence which the plaintiff attributed to the appellant herein, there was no claim that the appellant was liable for the "insufficient physical planning for the drainage."

21 It is well settled that parties are bound by their pleadings. Therefore, the plaintiff cannot be heard to contend that although he had not asserted that the appellant had carried out insufficient planning for the drainage, the Court could hold the appellant liable on account of some claim which it was never confronted with.

22 The learned trial Magistrate eloquently pronounced thus;

The rule in *Rylands Vs Fletcher* is one that imposes strict liability on the owner of land for damage caused by the escape of substances to his neighbour's land."

23 A look at the Plaint shows that the claim made by the plaintiff was founded upon negligence. The plaintiff testified about the alleged negligence.

24 In his submissions, the plaintiff sought to demonstrate that his claim had been proved against the defendants.

Nowhere in the evidence and in the submissions, did the plaintiff peg his claim on strict liability.

25 In his judgment, the learned trial Magistrate said;

Having established by documents and photographic evidence that the plaintiff lost goods in its warehouse, as a result of the flood diverted by the soil that was heaped by the Contractor, it was upon the Defendants to lead evidence that the damage was not caused by the heaps of the soil but rather it was by the act of God or negligence on the part of the Municipal Council of Kisumu."

26 Clearly, the trial court attributed the loss to the actions of the contractor; and the plaintiff had described the said actions as constituting negligence.

27 The trial court went on to hold that;

As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue."

28 Accordingly, and in keeping with the provisions on Section 107(1) of the *Evidence Act*, it was incumbent upon the plaintiff to prove the existence of the facts about the negligence he had attributed to the appellant.

29 The plaintiff had a duty to prove the particulars of the negligence, because if he did not do so, his case would fail.

30 In his submissions before this Court, the 1st respondent made reference (at paragraph 7), to his claim founded upon negligence, when he said;

To reaffirm negligence on the part of the appellant, the same construction project was abandoned by the 2nd respondent, while the appellant failed to inspect. The appellant was in control of the said project and therefore had the responsibility to inspect even with the road being constructed by the 2nd respondent."

31 From the aforegoing, it is crystal clear that the basis upon which the judgment was founded was anything other than that which the plaintiff had sought out to claim.

32 I find that the trial court erred by holding the appellant liable on the strength of a claim which the plaintiff had not pleaded or canvassed.

33 As regards the sum which was awarded, the trial court appreciated that there was need for certainty and particularity. Indeed, it is well settled that the Special Damages which are being claimed should be pleaded specifically, and must thereafter be proved with certainty.

34 The plaintiff is under a legal duty to present evidence to prove his claim.

35 The learned trial Magistrate was alive to the requirement, that the plaintiff ought to have adduced evidence to demonstrate the actual loss which he had suffered. He cited the following words from the case of *Kenya Industrial Industries Ltd vs Lee Enterprises Lt* [2009] KLR 135 ;

Generally speaking the normal measure of damages for damage to goods is the amount by which the value of the goods has been diminished.... Where, however, the goods are destroyed, the owner is entitled to restitution in integrum, and the normal measure of damages is the cost of replacement of goods; that is the market value at the time and place of destruction."

36 The trial Magistrate was satisfied that the plaintiff had proved the actual loss of stock. However, the appellant submitted that the plaintiff did not prove the value of the stock which was allegedly lost.

37 The plaintiff tendered the invoice in evidence. It was for the sum of Kshs. 2,852,087.66.

An award of Kshs. 2,850,000/= presupposes that all the goods were destroyed in the flooding. However, PW1 stated thus, in his evidence;

We tried to salvage the items but failed despite our best efforts. We also incurred much loss in repackaging items we managed to salvage."

38 The 1st respondent cannot have been repackaging items if none were salvaged. Nonetheless, I note that during cross-examination of PW1, the appellant did not take him to task on the evidence he had tendered regarding the value of the destroyed goods. Therefore, if I had upheld the finding on liability, I would have upheld the award of Kshs. 2,850,000/-. However, as I have allowed the appeal on liability, the award cannot stand.

39 In the final result, I allow the appeal, and aside the judgment against the appellant.

40 Costs of the appeal are awarded to the appellant.

DATED, SIGNED AND DELIVERED THIS 9TH DAY OF MAY, 2023.

FRED A. OCHIENG

JUDGE

I certify that this is a true copy of the original.

DEPUTY REGISTRAR