REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 48 OF 2013

ELIUD GIBSON MURIGI……..…APPELLANT

VERSUS

BERNARD NDUNG'U NGOTHO…….RESPONDENT

(Being an appeal from the whole judgment and decree of the Honourable A.K. Kaniaru in Murang'a Senior Principal Magistrates Court Civil Case No. 593 of 2007 between Eliud Gibson Murigi Kinuthia versus Bernard Ndung'u delivered on 25th May, 2011)

JUDGMENT

This appeal arises out of a judgment in which the appellant's suit against the respondent in the senior principal magistrates' court at Murang'a was dismissed with costs. In that suit the appellant sought for judgment against the respondent for a sum of Kshs. 683,994/- as special, general and exemplary damages for trespass; the appellant also sought for mesne profits and a permanent injunction restraining the respondent from further trespassing on the appellant's land. He asked to awarded costs of the suit and interest thereof.

From the pleadings filed in the magistrate's court, it is apparent that the appellant's land and that of the respondent shared a common boundary. On the respondent's land was a tree which, going by the evidence on record, must have been massive in size. On 17th November, 2007 this tree landed on the appellant's house when it was being brought down. The appellant attributed the tree's downfall and the destruction it left in its wake to the respondent's negligence. Basically, as I understand it, his case was that being so close to the appellant's house, the respondent should have foreseen the destruction by the tree if it was carelessly or negligently felled; in other words, the respondent owed the appellant a duty of care and to the extent that he failed in this duty, he was negligent and therefore liable in tort.

The respondent did not contest the fact that the land on which grew the tree that destroyed the appellant's house was his parcel of land except that he was not in physical possession of land when this incident occurred. The land was occupied by his sons at the material time. Of particular importance to the defendant's case was his argument that he had sold the tree in issue to a third party prior to its felling. His case was that the property in the tree had passed to its purchaser from the time of the sale and therefore he was exempted from any ensuing liability occasioned by the tree.

In dismissing the appellant's suit, the learned magistrate was persuaded by the respondent's argument and concluded that the appellant's suit could only have succeeded if the appellant had joined the third party who is alleged to have bought the tree in the suit. In his own words this is what the learned magistrate

said:-

> ***"The tree belonged to Mwangi. At the time of the incident, property had passed from defendant to Mwangi. When the plaintiff took up the issue with Mwangi at the local level, he was obviously aware of this fact. But the move to drop Mwangi and pursue the defendant alone was ill-advised. The more prudent move would have been to sue the two together. That way, the confusion as to who is liable would have been resolved by the court without any problem.***
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> ***Why do I say so? I say so because it is obvious that the plaintiff's house was seriously damaged. The damage was extensive and costly. Somebody obviously needs to pay for it. Circumstances show that the plaintiff was not very sure who to hold liable. That is why it was James Mwangi and then the defendant.***
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> ***But where a scenario like that obtains there is simple procedural law to invoke. The plaintiff had services of counsel and the law should have been invoked***
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> ***That law is contained in Order 1 rule (7) of the old Civil Procedure Rules (which is still contained in order 1 rule 7 of the new Civil Procedure Rules (Cap 21)."***

In his appeal, the appellant particularly faulted the learned magistrate's finding on this issue and this is apparent from the grounds set out in the memorandum of appeal. According to the appellant, the learned magistrate erred in law and in fact by holding that the appellant had met a certain James Mwangi who had allegedly cut the tree that destroyed the appellant's house. In the appellant's view there was no evidence that the said James Mwangi had purchased the tree in issue and therefore it was erroneous for the learned magistrate to hold that James Mwangi should have been joined to the suit.

After the appeal had been admitted, the parties' counsel agreed to have the appeal determined by way of written submissions; counsel for the appellant highlighted his submissions on 26th November, 2013 but the respondent's counsel opted to adopt his written submissions save to reiterate that it is James Mwangi who cut the tree in issue.

The record leaves no doubt that the parties were at consensus on what one would consider as fundamental issues in the determination of the dispute between them; for instance, it was not in dispute that the appellant and the respondent had adjoining properties, sharing a common boundary; it was also not in dispute that the tree that fell on the appellant's house grew on the respondent's land; it was not in issue that this tree fell on the appellant's house after it had been cut; the magistrates court found as a fact and it was not in dispute that the appellant's house was extensively damaged. The court also established that as a result of the damage and based on the evidence on record, the appellant had lost Kshs. 683,994/= in damages.

The main issue at the trial which, owing to its importance in the ultimate determination of the appellant's claim against the respondent, has escalated into the appeal herein is where to place liability for the loss and damage that the appellant suffered. The learned magistrate thought, as the respondent did, that one James Mwangi was the person to bear the blame while the appellant was of the view that liability lay with the respondent. It is necessary to revisit the evidence pertinent to the answer to this question and there is no better place to start than begin with the appellant's evidence on this issue.

Upon cross-examination, the appellant said he made a report of the destruction of his house to the area assistant chief, who apparently came to witness the destruction caused by the tree the following day, which was the 18th November, 2007. The appellant was not aware that James Mwangi had bought the tree from the respondent but he came to learn that it was James Mwangi who cut the tree. According to his evidence, the appellant met James Mwangi in his capacity as the respondent's agent. The appellant was emphatic that the owner of the tree ought to compensate him for the loss and damage he had incurred.

Mr Mohamed Ali who was called by the defendant as one of his witnesses told the court he was the assistant chief of the area at the material time and that on 17th November, 2007 his senior, the chief,

received a report that a tree had fallen on the appellant's house. On the following day, they visited the scene where they also met James Mwangi who, according to the assistant chief's evidence, promised that he would compensate the appellant. He said that their meeting at the appellant's place was impromptu and so no minutes were taken.

Counsel for the respondent, in his submissions reminded the court that the appellant was reluctant to call Ali as his witness and it is the appellant took it upon himself to have the chief summoned to testify; indeed the record shows that on 13th September, 2010 the respondent's counsel applied for witness summons for one Mr Kanyama who was said to be the chief from Ichagaki location. Mohamed Ali rather than Mr Kanyama attended court and, as noted, testified on behalf of the respondent.

In his evidence, the respondent confirmed that the tree and the land on which it stood were his except that as at 17th November, 2007, when the tree destroyed the appellant's house he had sold it to James Mwangi. Though no written agreement was entered into with regard to the sale of this tree, the respondent told the court that he reminded James Mwangi to exercise care when cutting the tree to avoid damaging the appellant's house and having so warned him, it was up to James to exercise the necessary precaution**.**

This is as far as the evidence most pertinent to the determination of the parties' rights and obligations went.

While dismissing the appellant's suit the learned magistrate heavily relied on the provisions of **Order 1 Rule 7**; that rule says;

> ***7. Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.***

According to the learned magistrate the appellant was in doubt as to who to sue and therefore he ought to have invoked this rule; however, I do not understand this to be what the rule says. The rule is clear that the plaintiff has discretion to join two or more defendants whenever he is in doubt as to who between them is liable.

Be that as it may, I am unable to gather from the record or from the appellant's pleadings that the appellant was at cross-roads as to whom between the respondent and James Mwangi was liable for destruction of his house. My understanding of his case was that though James Mwangi cut the tree, it was at the behest of the respondent; that James Mwangi was only his agent. He pleaded this in paragraph 9 (h) and (i) of the particulars of negligence in his plaint. In that paragraph the respondent was blamed for his failure to use the proper expertise in cutting a tree of the size that destroyed the appellant's house; the respondent is said to have either failed to use proper expertise to cut the tree or that he allowed people who are not experts and who lacked proper machinery to cut the tree and thereby exposed the appellant's property to danger. The evidence on record suggests that the appellant had the appellant's agent in mind in this contention.

The learned magistrate went further to state that the appellant's case would have succeeded if both the respondent and James Mwangi had been sued. At the outset this would imply that the learned magistrate appreciated that the appellant probably had a cause of action against the appellant but in his view the suit could only have succeeded if James Mwangi had been sued together with the respondent. The position taken by the learned magistrate appears to be at variance with the law because in negligence, where there are the two or more tortfeasors each one of them is liable for the entire damage resulting from the tort; a principal will be sued for the actions of his agent though they may both be sued together. Again it cannot be denied that persons who take concerted action to a common end and in the course of executing that joint purpose commit a tort are either jointly or severally liable**. (See the case of Brooke versus Bool (1928) 2KB 578.**

In any event, misjoinder or non-joinder to a suit cannot be a basis for its failure and the learned magistrate would have appreciated this position of the law had he read beyond **Order 1 rule 7** of the **Civil**

Procedure Rules which apparently influenced his decision to dismiss the appellant's suit and considered **Order 1 rule 9** of the same rules which is to the effect that no suit shall be defeated by reason of misjoinder or non-joinder of parties; under that rule, the court has the leverage in every suit before it to deal with the matter in controversy so far as regards the rights and interests of the parties before it.

Another aspect of the argument as to who should have been the proper defendant or defendants in the appellant's suit revolves around the respondent's contention that one James Mwangi was to blame for the destruction of the appellant's house; this is clear in paragraph 7 of the defence filed in court on 5th December, 2007. In that paragraph, the respondent was categorical that:-

> ***7. Further and in the foregoing, the defendant avers that there is a gross material non-disclosure in the plaint. The defendant was not the owner of the tree or property therein as the same had been sold to a 3rd party one James Mwangi and the same person cut down the tree.***

The respondent was clearly passing the blame to a third party, who in his view should bear liability for the destruction of the appellant's house. This scenario is not one of a kind; it is squarely addressed under **rule 15 (1) of** the same **Order 1** of the **Civil Procedure Rules**. The rule states:

> ***15.(1) where a defendant claims as against any other person not already a party to a suit (hereinafter called the third party)-***
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> ***(a) that he is entitled to contribution or indemnity;***
>
> ***(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or***
>
> ***(c) that any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and the third party or between any or either of them,***
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> ***He shall apply to the court within fourteen days after the close of the pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.***

In view of the respondent's averment in paragraph 7 of his defence which has been quoted hereinbefore, and considering the provisions of **Order 1 rule 15** the rules, there is no doubt that it was incumbent upon him, and not the appellant, to seek to join to this suit James Mwangi, whom the respondent correctly described as the third party, as contemplated in this rule. The rule is couched in a mandatory language and so the respondent was under obligation to join the third party once he sought to lay responsibility upon him.

The respondent also argued that there was an agreement between him and the said James Mwangi in which he sold the tree to the latter. If such an agreement existed the appellant was certainly not privy to it and therefore he would not be expected to know whether, among the terms of that contract, liability in the course of its performance would pass to a person other than the respondent. If indeed that was the case then an additional reason why it was necessary for the respondent to initiate third party proceedings against the said James Mwangi was that it was only in those proceedings that the responded would have properly and procedurally demonstrated the extent of their respective obligations under that contract as far as third party rights were concerned. I suppose that is the essence of **Order 1 rule 15** of the **Civil Procedure Rules.**

From the record, the existence of the contract itself appears to me to be doubtful. The respondent testified that he told the appellant that the tree was going to be cut by James Mwangi; however, in his evidence, the appellant did not even appear to know who exactly cut down the tree. He was candid during his cross-

examination that he did not have any persons in mind that may have witnessed the tree being felled. He also said that he was not aware that James Mwangi had bought the tree and the contention by the respondent that there was a contract between them was alien to him.

It should be noted that having alleged that there was a contract between him and James Mwangi, it was incumbent upon the respondent to prove that indeed such a contract existed. Looking at the evidence on record I am persuaded that there was no such proof apart from the allegation by the respondent and denial by the appellant that there was a contract. I am further inclined to sway in this direction because, I have noted from the record that at one point when cross-examining the appellant, counsel for the respondent asked the appellant whether he intended to call the chief and the said James Mwangi as his witnesses. According to the counsel these two witnesses' evidence on the existence of the alleged contract was crucial. When the appellant intimated that he was not going to call any of these people, the respondent took issue with the appellant's failure to call them and took it upon himself to summon the chief who indeed testified on his behalf. I must mention and reiterate here that the burden of proving the existence of a contract between the respondent and James Mwangi was on the respondent and not the appellant and therefore if, in the respondents' view, the two witnesses' evidence was crucial in this respect it was upon him to call them.

Although the respondent faulted the appellant for not calling the chief and James Mwangi, he chose to call the chief only when he had opportunity to call both of them. Having faulted the appellant for not calling them, I could not gather from the record of the proceedings why the appellant chose to ignore James Mwangi whom he claimed was a party to the contract in issue. In my view, in the absence of a written contract, there was no better witness, apart from the respondent himself, who would have confirmed the existence of the contract than James Mwangi who was alleged to have been party to it. The deliberate failure to call his counterpart in the alleged contract can only lead to one conclusion; that had James Mwangi been called his testimony would have been adverse to the respondent's case.

In the absence of any evidence of a contract which could have shed light on the extent of the parties' obligations under that contract, the appellant established on a balance of probabilities that the respondent was liable for the destruction that ensued from the felling of the tree on his land. James Mwangi who felled the tree was not a stranger to him; indeed he had authorised him to cut the tree and he was acting in the scope of the respondent's authority when he brought down the tree. As his principal, the respondent was liable for the consequences that arose out of James Mwangi's actions or omissions. It is beyond dispute that when a principal gives his agent express authority to do a particular act which is tortious or which necessarily results in a tort the principal is liable to third persons for any damage caused thereof and for this reason the respondent was and ought to have been held liable.

Having considered the record from the subordinate court and after considering counsel's written and oral submissions I am convinced that the respondent owed the appellant a duty of care which could not be delegated to James Mwangi. There is no doubt that he was aware of this duty when he not only authorised him to cut the tree but also when he told him to be careful. Speaking of this duty, Lord Blackburn, said in the case of **Hughes versus Percival (1883) 8 App. Cas. 443 at 446 that:**

> ***"The law cast upon the defendant…a duty towards the plaintiff. I do not think that duty went so far as to require him absolutely to provide that no damage should come to the plaintiff's wall from the use he thus made of it, but I think that duty went as far as to require him to see that reasonable skill and care were exercised in those operations which involved a use of the party-wall, exposing it to this risk. If such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and, if they so agreed together, to take an indemnity to himself in case mischief came from that person not fulfilling the duty which the law cast upon the defendant; but the defendant still remained subject to that duty, and liable for the consequences if it was not fulfilled."***

Similarly, as between the appellant and the respondent, it was incumbent upon the respondent to ensure that reasonable care and skill were employed in bringing down the tree on his land so us not to expose the

appellant's property to destruction. While the respondent was at liberty to engage any party to do the cutting, he could not transfer the duty of care he owed the appellant. If there was a contract as he claims, he would still not get rid of this responsibility; the farthest he would go was to seek indemnity in the event a mischief arose, which indeed arose out of the actions or omissions of the other party. As it were, the buck stopped with him.

I have come to the conclusion that the appellant proved negligence against the respondent on a balance of probabilities; the respondent was proved to have failed to exercise care which circumstances demanded. The damage visited upon the appellant's property by the tree that was felled from the respondent's land was reasonably foreseeable; the respondent would have done well to exercise reasonable care to avoid this harm.

There was no dispute that the appellant was entitled to damages which the learned magistrate quantified at **Kshs. 683,994/=** based on the evidence that he was presented with. In negligence such damages are recoverable as there were reasonably foreseeable consequences of the tortious act.

For the reasons I have given, I allow the appellant's appeal and set aside the judgment and decree of the subordinate court in Murang'a in the Senior Principal Magistrates court civil suit number 593 of 2007. Judgment in that suit shall be entered for the appellant against the respondent as prayed and the appellant shall have the costs of the suit and this appeal as well.

Dated, signed and delivered in open court this 7th March, 2014

Ngaah Jairus

JUDGE