REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 216 of 2008

MWITA MERENGO ……..……..…..……. APPELLANT
AND

JOSEPH TUNEI MARWA …….. 1ST RESPONDENT

JOSEPH SIGIRIA ……..…….. 2ND RESPONDENT

MAITARIA SIGIRIA ……...……. 3RD RESPONDENT

(Being an appeal from the judgment and decree of original Kehancha RMCC No.33 of 2007 – J.R. Ndururi, RM)

JUDGMENT

1. The appellant filed a plaint in civil suit No.33 of 2007 dated 25th September 2007 and filed in court on 11th October 2007 by M/s Kerario Marwa & Co. Advocate by which he prayed for judgment against the respondents jointly and severally for:-

(a) *Kshs.43701/= being the assessed damages.*

(b) *Kshs.2000/= per month being loss of earnings.*

(c) *Cost of this suit.*

(d) *Interest on (a) and (b) above at court rates.*

(e) *Any other relief this Honourable Court may deem fit to grant in the circumstances.*

2. The appellant averred that on or about 25th June 2007, the respondents jointly and severally fell a tree from a nearby plot and the tree landed on the appellant's house, thereby causing serious damage. In consequence of the matters aforesaid, the plaintiff suffered loss and damages for which he held the respondents liable.

3. The 1st respondent filed a written statement of defence dated 29th October 2007 and denied that he, 2nd and 3rd respondents felled a tree from a nearby plot at Taranganya market thereby causing serious damage as alleged in the plaint. He further denied that the estimated cost of repair was worth Kshs.43,701/= and that the respondents were vicariously or otherwise liable for the cost and omissions of the damage incurred, the loss of income to the tune of Kshs. 2000/= per month. He averred that the

assessment done by the Ministry of Public works from Kuria District was false and defective. He also denied any receipt of any demand or notice to sue.

4. The 2nd and 3rd respondents also filed their joint written statement of defence dated 1st November 2007 in which they denied that they felled a tree from a nearby plot at Taranganya market thereby causing serious damage to the appellant's house. They also denied the particulars of damage and estimated cost of repair of Kshs.43,701/= and loss of income at the rate of Kshs.2000/= per month. The 2nd and 3rd respondents further jointly denied the assessment done by the Ministry of Public Works Kuria District averring that the same was false, malicious, defective and they put the appellant to strict proof.

5. When the matter came up for hearing interpartes, it was the appellant's testimony that he stays in Taranganya and that on 28th June 2007 his neighbour the 1st respondent cut a tree on his plot, which the tree fell on the appellant's house, thereby damaging it extensively. He reported the matter to the police and the police in turn referred him to the Public Works Ministry. The latter assessed the damage at Kshs.43,701/=. He produced as an exhibit the report by the Public Works Ministry as **P. Exhibit 4**. He further testified that the house was photographed. He produced the photographs as **P. Exhibit 2A, B, C** and **D**. He also stated that the first respondent did not offer any apologizies and did not respond to his demand. He prayed that the respondents be ordered to repair the house or pay for the damage and costs for the case.

6. On cross examination, he stated that he did not produce any title document for the house and that he was not present when the tree was felled. He stated that he knew the owner of the tree which was on the boundary of his plot and that of the 1st respondent. He further stated that he did not know when the tree was planted nor did he know the person who had planted it. He further stated that he had not repaired the house yet though the valuation of the estimated cost of repair was done by someone from the Ministry of Public Works who came to the scene. In conclusion, he stated that though he had no title deed, he had other documents to prove ownership.

7. PW2 was one Emmanuel Mogori Magita. He testified that he stays in Taranganya and he is a village elder and knew the parties to the suit but was related to none of them. He further testified that on 28th June 2007 he was in the chief's office when the 1st respondent called him and others to his gate and requested them to hold a tree that was tied up with a rope. He further testified that when the fundi told the 1st respondent that the tree may fall on someone's house, the 1st respondent told him to nevertheless cut the tree which eventually led to the tree accidentally falling on the plaintiff's house. The house was damaged and the wall cracked.

8. On cross examination, PW2 maintained that he was not related to any of the parties, and that the 1st respondent had called him to assist in the pulling of the tree as it was being cut. He testified that the tree belonged to the 1st respondent. He also mentioned the three people he was with were Thomas Matiko, Charles Maseno and Mabinda Mwita among others.

9. DW1, 1st respondent testified that on 28th June 2007 he was in Nairobi. He did not cut a tree which fell on the plaintiff's house but admitted that the appellant was his neighbour. He further testified that the appellant did not spend Shs.40,000/= on repairs and that it was not true that he was getting Kshs.2000/= per month as rent. It was his testimony that he did not know the first and second respondents. That the tree was on his plot, he is not the one who cut it but had sold the tree to one Abdi Hassan from Isebania. On his return from Nairobi, he was informed that the tree was cut and fell on appellant's sukuma wiki. He also averred that the plaintiff had chased away Abdi and resold the tree. He further testified that he did not receive a demand notice from the appellant. The 1st respondent produced bus tickets to prove that indeed on the material day he was away on safari. He prayed that the appellant's suit be dismissed with costs.

10. On cross examination, the 1st respondent maintained that the tree was on his plot but that he had sold it, that only the plaintiff's vegetables were destroyed and that the appellant denied him permission to

come and assess the damage and the appellant sold the tree. The 1st Respondent also stated that he was to be paid for the tree after the tree had been cut.

11. DW2, the 2nd respondent testified that he was a farmer staying in Nguku Mahando. He did not know the appellant and that on 28th June 2008 he was at his home and did not know where the appellant stays. He further testified that he did not fell any tree which fell on the appellant's house. He also said he did not know the value of the appellant's house. He saw the appellant producing a receipt in court and that he did not receive any demand letter. He prayed that the suit be dismissed with costs.

12. On cross examination, he maintained that Abisai & Co. advocate was his lawyer. He was a farmer not a fundi and only received summons but no demand letter.

13. DW3, the 3rd respondent testified that he was a farmer living in Nguku Mahando. He averred that he did not know the appellant herein. He further testified that he saw the plaintiff for the first time in court. On 28th June 2007 he said he was at home weeding cassava and that the plaintiff's allegations were not true because he did not cut any tree. He further testified that he did not know where the tree was and that the plaintiff had not produced any receipt to show he paid Kshs.43,701/= to repair the house. He asked the trial court to dismiss the appellant's suit. 14. On cross examination the 3rd respondent maintained that he did not know the appellant, that he did not cut a tree or cause it to fall on the appellant's house neither did he receive any demand letter but only summons.

14. In his judgment, the learned Senior Resident Magistrate held:-

"The plaintiff did not present any evidence that the 2nd and 3rd Defendants were present or even participated in the felling of the tree. He did not mention them at all in his evidence.

To prove that the tree damaged his house, the plaintiff produced some photographs and a report prepared by the Ministry of Public Works. These photographs and the said report did not indicate on which plot the house is located. Bearing in mind that the plaintiff did not identify his plot by number or otherwise, and given the fact that the 1st defendant has denied both in his statement of defence and in his testimony that the plaintiff's house was damaged, I find the said photographs and report insufficient to prove on a balance of probabilities that the house described therein is the one on the plaintiff's plot.

In any case, even if the said house is indeed on the plaintiff's plot and was so damaged, there is the question of liability. In his plaint, the plaintiff merely stated that the tree was cut and that it fell on his house. He did not plead that the defendant was negligent nor did he give any particulars of negligence. He did not plead strict liability. Having failed to do so, no liability can attach on the 1st defendant-----.

On a balance of probability, I find that the appellant has failed to prove the allegations contained in the plaint. Therefore I decline to hold any of the respondents liable and to give the orders prayed in the plaint. I do proceed to dismiss the suit and order that the appellant bears the cost of the suit."

15. It is against the above findings that the appellant has appealed to this court. The appellant's appeal is premised on the following grounds:-

1. *The learned trial magistrate misdirected himself on several matters of law and fact.*

2. *The learned trial magistrate misdirected himself in matters of Civil Practice and procedure and in the interpretation of Order XIV rule 1 (3) (4) and (5) of the Civil Procedure Rules.*

3. *The learned trial magistrate erred in law of procedure, practice and evidence in that:*

a) *he unilaterally imported into the case the matter of the registered number of the land in issue*

whereas there was no issue joined on that point as both parties admitted that the tree actually existed and was cut and collapsed on a piece of land known to both parties.

b) *He admitted the valuation evidence on record but refused to admit the report as part of the record without recording that fact.*

c) *He admitted evidence on photographs but refused to admit the same as part of the record and failed to record the refusal or the reason therefor.*

d) *He failed to acknowledge that the appellant had adequately discharged the burden of proving the case on a balance of probability which was not rebutted by the defence.*

4. *The learned trial magistrate erred in law in failing to appreciate that the plaintiff had duly proved all the requisite ingredients of the tort of trespass to land, nuisance and the tort of Rylands and Fletcher.*

5. *The learned trial magistrate erred in law relating to damages in failing to assess the damages payable and in failing to award the proven special damages.*

16. This matter is before me as a first appeal. As the first appellate court, I am under a duty to reconsider and evaluate the evidence afresh with a view to reaching my own conclusions in the matter. I am also under a duty to consider and carefully weigh the judgment of the trial court as a way of gauging whether the findings of the said court can be supported. In exercising this special jurisdiction which in a way requires me to rehear the case, I have no illusion that I do not have the opportunity of seeing and hearing the witnesses who testified before the lower court. What I have is the record, and unless it is obvious to any judicial eye that the findings of the trial court were not well founded, I should exercise caution if I must depart from the findings especially where such findings are based on the observations of the trial court touching on the demeanor of witnesses. See generally **Peters –vs- Sunday Post Limited [1968] EA 424** and **Selle & another –vs- Associated Motor Boat Company Ltd. & others [1968] EA 123**.

17. On 12th February 2012 both counsel recorded a consent to argue this appeal by way of written submissions. I have carefully read through the submissions and also considered the authorities cited.

18. Upon reading the above grounds of appeal 3 questions ring in my mind:

1) *Did the learned trial magistrate error in law of procedure, practice and evidence in record?*

2) *Did the learned trial magistrate error in law in failing to appreciate that the plaintiff had duly proved all the requisite ingredients of the tort of trespass to land, nuisance and tort of Rylands and Fletcher.*

3) *Did the learned trial magistrate error in law relating to damages in failing to assess the damages payable and in failing to award the proven special damages?*

19. With regard to the first question, it is an undisputed fact that the plaintiff tendered in a report by the Ministry of Roads and Public Works showing that cost of repairs of his house amounted to Kshs.43,701/=. The report was signed by one Vitalis Wamburo. The authenticity of the said report is questionable especially owing to the fact that the said author of the report was never called by the appellant as an expert witness to tender in such evidence and also by the fact that PW2's testimony did not support the appellant's testimony as to the extent of damage to the appellant's house. PW2 said that only the walls of the house were damages, while the appellant on the other hand testified that his house was damaged extensively. It is to be noted that PW2 was in court when the appellant tendered his evidence, so that if there was any truth in what the appellant said regarding the extent of the damage, to appellant's house, such a detail would not have escaped PW2's ear. In any event, the testimony of PW2 was not consistent and he contradicted himself in one and the same breath. While PW2 stated that the 1st Respondent was present when the tree was being cut, other evidence on record shows that the 1st respondent was not in his home when the tree was being cut. On the whole, there was no evidence to

support the appellant's claims.

20. With regard to the second issue, I am persuaded that the appellant did not prove his claims in nuisance on a balance of probability. As already stated, it is doubtful whether the tree was cut by the 1st appellant. Further, and as rightly pointed out by the trial court, the appellant neither identified his plot number nor did he plead that the 1st respondent was negligent in the manner he cut the tree or at all nor did he give any such particulars. Nor did the appellant plead strict liability. For reasons, I find no basis for interfering with the findings of the trial court. The appellant was under a duty to prove that the 1st Respondent owed him a duty of care, that there was breach of the said duty and that as a result of the breach, he (appellant) suffered damage. No such particulars were pleaded and/or proved.

21. The tort of nuisance and specifically private nuisance is concerned with unreasonable interference with a person's rights to use and enjoy his land with or without some right connected thereto. Factors to be considered in determining private nuisance are:

a) *The nature of locality – nuisance will be judged according to the area in which it occurs.*

b) *Duration and frequency – the longer and more frequent the interference, the more likely it will be found to be a nuisance. (In the above scenario the cutting of a tree in the 1st respondent's land was a onetime event. It was not always happening.)*

c) *Abnormal sensitivity – in that once the tree was cut, it was the appellant's vegetable garden that was tampered with. Efforts to get the appellant to allow the 1st respondent to see the extent of damage fell on deaf ears. This on its own indicate that the defendant was more than willing to reason with the appellant but the appellant was not ready to reason because it is not out of the ordinary that the tree may have fallen on the 1st respondent's portion of land.*

22. Regarding the tort of strict liability in **Rylands v. Fletcher,** one must prove the following:

a) *That defendant has brought on his land for his own purpose something likely to do mischief*

b) *The use of land must be unnatural.*

c) *The thing must escape.*

d) *And as a result of the escape it must cause foreseeable damage.*

23. In the instant case, it was the appellant's testimony on cross examination that he did not and neither did the 1st respondent plant the tree that was felled. Therefore there was no evidence to show that the 1st Respondent had brought onto his land something for his own purpose and which was likely to do mischief. Secondly the 1st respondent did not use the tree in any unnatural manner. The only thing he wanted was to cut the tree and sell it. Thirdly the tree was not capable of escaping, as water would, onto the appellant's land. It was only after the tree was cut that it fell down. One can argue that the damage from a falling tree was foreseeable damage, but the evidence in this case did not support the appellant's claims. Accordingly, this ground of appeal must also fail because the appellant has not proved his case to be at par with the doctrine of **Ryland v. Fletcher** on strict liability.

24. Thirdly on whether the magistrate erred in law relating to damages in failing to award the proven special damages, it is an undisputed fact that the Ministry of Roads and Public Works' report was not produced by the author thereof. In addition, it is also questionable as to whether the plaintiff's house was damaged at all taking into account the testimony of PW2 which I find was not reliable. The 1st Respondent produced documentary evidence to prove that on the date of the alleged mishap, he had travelled to Nairobi and was thus not at home as alleged by PW2. Further the 2nd and 3rd respondents' evidence that they were not present at the time the tree was felled was also unchallenged.

25. In the premises, the appellant did not prove on a balance of probability that he indeed suffered any damages. Furthermore, the issue of him losing a rent income of Kshs.2000/= had to be specially proved by production of receipts of such rental income. No such evidence was furnished to the court. The appellant was under a duty to do so.

26. In conclusion, I dismiss the appellant's appeal with costs to the 1st respondent.

27. Lastly, the delay in delivering this judgment is very much regretted. At the time it was due, I was engaged in hearing and determining the more than 125 boundary dispute cases filed against the Independent Electoral and Boundaries Commission. Judgment in the said cases was delivered by the 5-Judge Bench on 9th July 2012.

Dated and delivered at Kisii this 11th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. C. Okenye for G.S. Okoth (present) for Appellant

N/A for Respondents

Mr. Bibu present - Court Clerk

RUTH NEKOYE SITATI

JUDGE.