IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Madan, Law and Potter, JJ.A)

CIVIL APPEAL NO. 41 OF1981

BETWEEN

KENYA PORTS AUTHORITY...............................APPELLANT

AND

EAST ATRICAN POWER &

LIGHTING COMPANY IIMITED........................RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Mombasa (Kneller J) dated 15th June, 1981

In

CiviL Suit No.353 of 1980)

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JUDGMENT

Law JA This appeal arises out of a suit filed in the High Court at Mombasa by the Kenya Ports Authority as plaintiff against the East African Power and Lighting Co Ltd as defendant, claiming damages of Kshs 33,628.45 incurred in cleaning up an oil leak into the harbour for which the defendant was allegedly responsible. The cause of action was stated in the plaint as follows:

> "3. At all material times to this suit the defendant was operating and maintaining a power station inside the port of Mombasa on plaintiff's land under a licence from the plaintiff.
>
> 4. In the premises it was the duty of the defendant therefore to attend to all Oil Pipes connected to or serving the said power station to avoid oil leakage and consequent pollution of the Port.
>
> 5. Between December 4 and 7, 1977 and in breach of the said duty, the defendant caused oil and mixture to leak from a broken supply pipe thereby polluting the Shimanzi Creek.
>
> 6. On discovering the source of the leakage and to avoid combustion the plaintiff conducted clean up operations.
>
> 7. In the premises the plaintiff suffered loss and damage."

The defence consisted of a denial of the contents of paragraphs 4, 5 and 6 of the plaint, and pleaded that the suit was misconceived and that the alleged loss and damage were not recoverable in law. At the hearing of the suit the preliminary objection was taken by Mr IT Inamdar for the defendant that the plaint disclosed no cause of action and he asked that it be dismissed. Mr Shields for the plaintiff asked for judgment as prayed in the plaint; and these preliminary matters were to be decided on the basis that the allegations of fact contained in the plaint were true. It was agreed that the breach of duty pleaded in paragraph 5 of the plaint involved two causes of action, the first in negligence and the second in strict liability under the rule in *Rylands v Fletcher* (1868) 37 LJ Ex 161.

The learned judge held that the only damage proved to have been caused by the oil leak was to the sea water in the harbour, that the plaintiff did not own that water, that the plaintiff had not suffered any damage to its property, and that in consequence the plaintiff's claims both for the tort of negligence or breach of the rule in *Rylands v Fletcher* failed. He also expressed the view that in bringing oil to its land in the port area, the defendant was not making a non-natural use of the land, but held that he must assume, for the purposes of the preliminary question of law, that the opposite was the case, as it had been pleaded in the plaint.

On appeal to this court, Mr Shields for the plaintiff/appellant challenged all the learned judge's holdings set out above. He submitted that the plaintiff had a sufficient proprietary interest in the water in the harbour area to maintain trespass, and that as the water had admittedly been damaged by pollution, the defendant was entitled to damages in negligence. He also submitted that the defendant was also entitled to damages under the strict liability rule enunciated in *Rylands v Fletcher*. In this particular case, Mr Shields submitted, the defendant manufactured electricity and used oil for the purpose. This was a non-natural user of the land, so that the defendant was under an absolute duty not to allow the oil to escape and to do damage. If oil escapes, it is likely to do damage, and in this case it could only be kept on the land at the owner's risk, being something which is not naturally on the land, and he submitted that as it did in fact escape, the defendant was liable for the consequence of that escape, and he relied on *Read v Lyons (J) & Co Ltd* [1944] 2 All ER 471 and *Prosser (A) & Son Ltd v Levy & Others* [1955] 3 All ER 577. In *Prosser's* case, actual damage was done to the plaintiff's property by an escape of water, and *Read's* case, as I understand it, warns against extending the strict liability principle to cases where injury is sustained or damage suffered by reason of the escape of a dangerous substance at the place where the plaintiff is working. In such a case, negligence must be proved, as there is no escape of matter from the place.

Mr Inamdar for the defendant/respondent submitted that proof of actual damage was an essential ingredient of the tort of negligence, and that there is no cause of action in negligence, or in cases involving strict liability, unless actual physical damage is done to the person or property of the plaintiff. In the absence of actual damage, economic loss or the costs of preventive measures, Mr Inamdar submitted, are not recoverable in an action in negligence. Recovery of the cost of cleaning up operations, where no damage to property has occurred, is not recoverable at common law.

As regards the sea water in the harbour, Mr Inamdar submitted that sea water, or naturally-flowing fresh water, are "*res nullius*", incapable of ownership at common law, and whatever rights may be vested in governments to the sea-bed in territorial waters, no government or person has any proprietary rights in the water above the sea-bed. No authority was cited by Mr Shields to rebut these propositions, but he submitted that damage to the water in the port represented physical damage to the port and gave rise to a cause of action for damages.

After a careful consideration of all the matters discussed before us, I have come to the conclusion that the learned judge decided the preliminary point correctly, and that Mr Inamdar's submissions in support of that decision are well-founded. I do so reluctantly, because as the learned judge indicated, good sense would seem to require that the plaintiff is not left without a remedy, but that does seem to me to be the position in law. The plaintiff suffered no actual damage to any of its property; to the extent that the water in the port was damaged by pollution, that water was not the property of the plaintiff; pecuniary loss arising out of purely precautionary measures taken to clean up pollution which might cause damage to property is not recoverable at common law. The remedy would appear to be for legislation to be enacted to make the cost of cleaning up pollution recoverable from occupiers of water-side plots as well as from

ship-owners who are responsible for the discharge of noxious matter into territorial waters and harbours.

Mr Inamdar also filed a cross-appeal contending that the learned judge erred in holding that the plaintiff had pleaded that the accumulation of the oil by the defendant on his land was not a natural user of land, and that the court therefore had to assume as a fact that such accumulation amounted to a non-natural user of land. The learned judge did slip up in this respect; the plaint does not mention non-natural user of land at all, although the question did become an issue in the course of argument. However, the judge made it clear that in his view, the storage of oil on land by a person licensed to generate electricity there, the oil being essential for the production of electricity, did not amount to a non-natural user of the land. I agree, especially as the defendant was licensed by the plaintiff who must have known that oil would have to be brought to the land, and stored there, for the purpose for which the licence was granted.

In my view the cross-appeal succeeds. I would dismiss the appeal, and allow the cross-appeal, with costs to the respondent in each case.

Potter JA. I have had the advantage of reading the judgment of Law JA in draft. I agree with it and with the order proposed.

Madan JA. I have had the advantage of reading the judgment of Law JA in draft. I agree with the order proposed by him, both in regard to the appeal and cross-appeal.

It can only be an anomaly, and indeed vindictive, to make a negligent actor responsible to those who do not suffer injury either to their person or property as a result of the negligent act. The sea water that was damaged was a moving, shifting, evaporating, vanishing element which had no fixed abode, nor a fixed area containing it. It was unidentifiable as a fixed property unless put in a bucket or bowser. It was incapable of ownership by anyone. In Shimanzi creek today, away tomorrow, may be many miles away, in another creek, or lapping against different shores, or even rising in waves in the open sea. No ownership, no injury; hence no cause of action.

To use oil to generate electricity does not constitute non-natural user of land, not in this age. I do not want to return to the days of darkness, nor to my student days of a dim, flickering flame from a single, thin Kerosene wick.

One other matter. At the hearing of the appeal, Mr Shields asked for the first time for leave to amend the plaint by introducing an averment to the effect that in allowing the oil to escape into the sea water, the respondent acted in breach of statutory duty under Regulation 67 of the East African Harbours Regulations made under the now extinct East African Harbours Corporation Act (Cap 19) of the Laws of the East African Community, Regulation 67 having been saved and applied to Kenya under section 73 of the Kenya Ports Authority Act (Cap 391). No application to amend was made to the judge in the High Court. Mr Inamdar opposed the application. We did not accede to Mr Shield's request, and said that we would give reasons in our judgment.

There was a reference to Regulation 67 in the very first letter addressed by the appellant to raise its claim against the respondent. The Regulation was also referred to in subsequent correspondence between the parties. The appellant decided to leave it out when filing the plaint in the form in which it did and which Law JA has brought out in his judgment. The appellant was aware of the existence of Regulation 67 when it filed its plaint. The application to amend was made at too late a stage.

Potter JA also agreeing, the order will be in the terms proposed by Law JA.

Dated and delivered at Mombasa this 9th day of March, 1982.

C.B MADAN

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JUDGE OF APPEAL

E.J.E LAW

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JUDGE OF APPEAL

K.D POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR