REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. E060 OF 2024

FRANCIS OMANYALA…….
APPELLANT

VERSUS

NAOMI NANCY WANYONYI……RESPONDENT

(Being an appeal against the decision delivered by Hon Caroline Cheruiyot on the 20th March, 2024 in Kakamega SCCC No, E026 of 2024)

JUDGMENT

1. This is an appeal arising from the judgment of Hon. Caroline Cheruiyot delivered on 20th March 2024 in Kakamega SCCC No. E026 of 2024. The trial court entered judgment on liability at 100% in favour of the claimant and awarded Kshs. 79,402/= as damages together with interest and costs. The appellant challenges that decision in its entirety.
2. The Respondent and the appellant own adjacent parcels of land. On 31st July 2023, the appellant undertook blasting of underlying rock using dynamite on his parcel, having secured permits from the County Government and approvals from the National Environment Management Authority.
3. The respondent alleged that the blasting caused structural cracks on her two-storey house. A quantity surveyor prepared an assessment

attributing the cracks to vibrations from the blasting. The appellant countered this position, arguing that:

a. The house already had cracks before commencement of blasting;
b. The National Environment Management Authority conducted public participation, including a pre-inspection;
c. The claim was res judicata because similar issues had been raised in Butali PMCC No. E120 of 2023;
d. Causation of damage was not proved;
e. Bill of quantities constituting the Kshs. 79,402 claim was hearsay and not backed by invoices or proof of repairs.

4. The issues for determination are:
   a. Whether the claim was res judicata.
   b. Whether the trial court properly analyzed causation and liability.
   c. Whether the award of Kshs. 79,402 was proved.
   d. Whether the trial court considered the appellant's evidence and submissions.
   e. Whether the judgment should be upheld, varied, or set aside.

Analysis

5. This being a first appeal, it is the duty of the court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In **Mutisya v Autosprings**

Manufacturers Limited (Appeal 7 of 2022)[2023] KEELRC, this principle was relied upon thus:

"On the role of Court on first appeal, it is that the Court will revaluate the evidence before the trial court and make its own conclusions bearing in mind that it is the trial Court which took the evidence and the appellate Court does not have that direct benefit of the trial Court. The Court will not interfere with the trial Court's findings unless it is shown that there exists an error or misdirection in principle on the part of the trial Court."

6. Whether the claim was res judicata, section 7 of the Civil Procedure Act requires the following elements:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

7. In Butali SPMCC No. E120 of 2023, the respondent sought injunctive orders preventing the appellant from blasting. The matter was struck out for want of jurisdiction, with directions that environmental issues fall within the National Environment Management Authority framework under the Environmental Management and Coordination Act.

8. A suit struck out for want of jurisdiction does not constitute a determination on the merits. The question that arises is whether a suit dismissed or struck out for want of jurisdiction can ground a plea of res judicata. The general principle is that a court without jurisdiction cannot make a determination on the merits of a dispute, and its decision cannot constitute a final judgment for purposes of section 7 of the Civil Procedure Act. This position was affirmed in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, where the Court held that:

" …jurisdiction is everything; without it, a court has no power to make one more step."

9. The plea of res judicata fails. The present claim for damages is distinct and was not adjudicated in Butali SPMCC No. E120 of 2023.

10. On liability and causation, the respondent's claim relied partly on the doctrine in **Rylands v Fletcher (1868)**, that one who brings a dangerous thing onto land and it escapes is strictly liable for foreseeable damage. Blasting using explosives is inherently hazardous.

11. The test for determining whether an activity is abnormally dangerous was laid out by the Supreme Court of Kansas , quoting an excerpt from **THE RESTATEMENT OF TORTS, 519AND 520:**

"(a) existence of a high degree or high risk of some harm to the person, land or chattels of others;

(c) inability to eliminate the risk by the exercise of reasonable care;

(e) inappropriateness of the activity to the place where it is carried on”

12. However, strict liability still requires proof that the hazardous act caused the damage. The Respondent’s surveyor’s report stated that cracks were structural in nature and their probable cause was vibrations from blasting near the building. However, the Respondent’s house had been inspected by immediately after the public participation meeting on 9th June 2023 before blasting commenced, and that inspection allegedly found pre-existing cracks arising from workmanship. The appellant produced minutes of the public participation meeting and the permits showing regulatory approval.

13. The surveyor who testified for the Respondent did not inspect the house before blasting, nor did they rule out pre-existing causes with certainty.

14. The connection between blasting and the damage therefore needed to be proved on a balance of probabilities. The trial court did not meaningfully interrogate:

a. whether the cracks were new or pre-existing;

b. whether the surveyor considered pre-blast inspection reports;

c. whether the type of explosives used were capable of causing the specific structural failures identified.

Finding

15. The trial magistrate did not properly evaluate the central question of causation. The judgment simply accepted the respondent's report without addressing the conflicting pre-inspection evidence. An appellate court may interfere with factual findings where the trial court failed to properly evaluate evidence. In **Makube vs Nyamiro 1983 KLR 403**, it was held that:

"… a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

Accordingly, liability was not proved on a balance of probabilities.

16. A bill of quantity is an estimate, not evidence of loss. In the case of **David Bagine v Martin Bundi [1997] eKLR**, the Court of Appeal stated as follows:

"It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v City Council of Nairobi [1982-88] IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was

stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:… Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

17. The trial court awarded the precise estimated figure despite the absence of confirmation that the figure reflected actual damage. The magistrate misdirected herself by treating an unproved bill of quantity as proof of loss, hence the award cannot stand.

18. Whether the trial court considered the appellant's evidence, the judgment did not meaningfully analyze:

a. National Environment Management Authority inspection findings;

b. Expert contradictions;

c. The existence of pre-existing cracks;

d. The permits and regulatory compliance;

e. Causation concerns raised in submissions.

19. An appellate court is entitled to intervene where a trial court fails to consider material evidence. In the case of **Selle & Another v. Associated Motor Board Company Ltd. [1968] EA 123**, where the Court stated as follows:

"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the 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, the 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 demeanor of a witness is inconsistent with the evidence in the case generally."

Conclusion

20. Having re-evaluated the evidence, this court finds:

a. The suit was not res judicata.

b. Liability against the appellant was not proved to the required standard.

c. The award of Kshs. 79,402 was unproved and cannot be sustained.

d. The trial court failed to properly evaluate material evidence.

e. The appeal therefore has merit.

Orders

21. The appeal is allowed.

22. The judgment and decree of Hon. Caroline Cheruiyot delivered on 20 March 2024 in Kakamega SCCC No. E026 of 2024 is hereby set aside in its entirety.

23. The respondent's suit in Kakamega SCCC No. E026 of 2024 is dismissed.

24. Costs of this appeal and of the trial court are awarded to the appellant.

25. Right of Appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF DECEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Ms. Manyawa holding brief for Mr Ochieng for the Appellant present online.

Mr. Chirchir holding brief for Mr. Kigen for the Respondent present online.