REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. E121 OF 2024

ANNAH KWAMBOKA NYANGAU (Suing as legal representative of the estate of JOHN MOMANYI NYANGAU)…… APPELLANT

VERSUS

JEREMIAH MATOKE NYAGWARA…… 1ST RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of Hon. PK Mutai (PM) court delivered on 1.07.2024 in Kisii CMCC No. 473 of 2018. The appellant was the plaintiff. the court heard the matter and dismissed the suit.

Pleadings

2. The Appellant filed suit against the Respondent vide a plaint dated 23.07.2018, which was later amended on 18.9.2018. The Appellant claimed damages for an accident pleaded to have occurred on 10.11.2016 when the deceased was in his rented house on land Parcel No. Kisii Town/block/III/236. The said house collapsed causing the deceased fatal injuries. The Appellant set forth particulars of negligence and injuries and pleaded Ksh. 120,000/= as Special Damages.

3. The Respondent filed his amended Defence dated 5.10.2018. He denied the particulars of negligence as pleaded by the Appellant and averred that the house was then still under construction, and he did not have the capacity to let the house. The collapse was due to a bomb for which the Respondent cannot be held liable. What is not clear from the defence was whether the respondent was averring that the deceased was alive or did not die in the premises.

4. Such a defence offends the tenets set out in the case of **Mugunga General Stores v Pepco Distributors Ltd** [1987] KECA 68 (KLR), where the court of appeal[HG Platt, JM Gachuhi, FK Apaloo], succinctly described a mere denial defence.

> First of all, a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.

5. The lower court considered the matter and dismissed the Appellant's suit for failure to prove the case to the required standard. The Appellant, being aggrieved, filed a

Memorandum of Appeal dated 10.07.2024 and set out the following grounds of appeal on both liability and quantum:

a) The Learned Magistrate erred in law and fact in dismissing the Appellant's case against the weight of evidence.
b) The Learned Magistrate erred in law and fact in failing to hold the Respondent 100% liable.
c) The Learned Magistrate erred in law and fact in solely relying on the Appellant's testimony.
d) The Learned Magistrate erred in law and fact in disregarding the evidence and submissions by the Appellant on liability.

6. The matter was last in court on 17.12.2025, but the judgment could not be ready since the court noted that the file required a bit more research than usual. The paucity of the parties' submissions in a matter of this monumental proportion informed the decision. The delay is nevertheless regretted.

Evidence

7. PW1 was Annah Kwamboka Nyangau. The deceased was her son. She adopted her witness statement dated 20.7.2018 and produced the documents listed in her documents dated 20.7.2018. She produced inter alia the grant of letters of administration ad litem and the copy of records. She produced receipts for special damages. She stated that the deceased died while at the respondent's premises on land Parcel No. Kisii Town/block/III/236.

8. She blamed the respondent for failing to take care of the occupiers. The deceased was said to be 38 years at the time of death. She sought compensation for the death of her son, who was said to be a breadwinner. On cross-examination, she testified that the deceased was 38 years old in business. He earned Ksh. 120,000/= per day from a business the deceased inherited from the father. The deceased is said to have a hotel named Product Hotel, at the Silver Building. She stated that the building was not in a good state, but had not carried pictures. It was her case that the Hotel was not situated on the land Parcel No. Kisii Town/block/III/236 was on re-examination. She stated that the hotel was on the Silverline Hotel.

9. PW2 was No. 24726 PC Moses Otieno. He testified that he was attached to Kisii Central Police Station, performing general duties. He recalled receiving information that a building had collapsed in Kisii town, and he visited the scene and saw that a multi-storey building had collapsed. It was down with debris spread. The deceased herein was among three adults who died. It came out that the owner was the respondent herein.

10. On cross-examination, it was his case that he had discovered that there was a criminal case against the Respondent as the first accused person, and the Respondent was acquitted under Section 215 of the Penal Code. The

cause of the injuries was blunt force trauma to the chest. He stated that ammonium nitrate was detected in a corner of the building that was blown up. he was not sure if all approvals were obtained. He was not sure if an action was taken against Sunrise Company Limited.

11. DW1 was the Respondent. He adopted his witness statement dated 23.7.2019. He stated that he was not the owner of the land Parcel No. Kisii Town/block/III/236 and the building on it. He denied being a landlord of the deceased herein. However, he confirmed, in a rather cryptic way that all construction was done up to standard and quality materials were used. The building was not ready for occupation and the appellant could not remotely be a tenant. He produced a list of documents dated 20.11.2023.

12. On cross-examination, he stated that he wrote a letter dated 8.2.2016 for the DCI admitting to being the owner. That was, according to him, confirmation of ownership. He stated that he was not at the scene when the building collapsed. He said that the letter dated 21.3.2017 shows the presence of explosives.

13. He testified that the building was situated on Kisii Town Block III/236. Explosives were involved. He was charged but acquitted on all counts in the criminal case on the basis that he was not the owner of the building. On re-examination, he stated that the owner was Sunrise Group Limited, who

ought to be sued. He stated that the report concluded that there was nothing to show that explosives were used.

14. DW2 was Catherine Morambi. She was the Government Analyst. She produced the report by her senior, Simon Nandi. It was dated 12.3.2017. Soil samples were collected and analyzed. Ammonia nitrate was found. Explosives were detected. ammonia was detected in 2 samples and not in others. there was no ammonia on the debris.

Submissions

15. The Appellant filed submissions dated 15.9.2025. It was submitted that trial court in making assumptions that a person cannot blow up his own building, disregarded all evidence on record to the effect that no definitive evidence was placed on record reliably demonstrating that the building collapsed as a result of an explosion. The mere fact that ammonium nitrate was found in some debris at the scene is not proof that the building's collapse was caused by an explosion.

16. The Appellant also submitted that the Appellant proved his case on a balance of probabilities. Reliance was placed on the case of Amuga and Company Advocates v Kisumu Concrete Products Limited [2021] eKLR.

17. Further, it was submitted that owners of buildings who fail to tender plausible explanation as to the cause of injurious building accidents are liable. Reliance was placed

on **M N K (a minor suing through her father and next friend) Patrick Kyalo Maundu v Joseph Mwaura [2017] eKLR** as follows:

> Superior courts have indeed in several similar cases correctly imputed liability on owners of buildings who fail to tender plausible explanation as to the cause of injurious building accidents;
>
> We in this respect make reference the high court's detailed pronouncements in M N K (a minor suing through her father and next friend) Patrick Kyalo Maundu v Joseph Mwaura [2017] eKLR are conclusive of the issues arising herein:
>
> -104. … They had no control over the manner in which the building was being constructed or had been constructed. The defendant owed a duty of care to the tenants, visitors, and non-visitors alike, to his building.
>
> 108. Therefore, in the absence of any evidence to the contrary; this court infers that the accident was caused by the negligence of the defendant developer failing to secure the balconies to prevent children from falling.
>
> 127. The Occupiers Liability Act Cap 34 Laws of Kenya covers all the lawful occupants, visitors, and trespassers. The plaintiff is not expected to plead the law but facts and submit on the law which her counsel did, in this case, to the satisfaction of the court.

128. In Halsbury's Laws of England (VOL. 48 5th Edition 2010), it is stated:

> The common duty of care is a duty to take such care as in all circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> The relevant circumstances include the degree of care; which would ordinarily be looked for in the visitor so that, for example, in proper cases, the occupier must be prepared for children to be less careful than adults……

18. The Appellant also submitted that it is trite law that a Trial Court ought to assess the damages even if it finds that liability has not been established.

    Reliance was placed on Frida Agwanda & Ezekiel Onduru Okech vs Titus Kagichu Mbugua [2015] eKLR.

19. On their part, the Respondents did not file submissions.

Analysis

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

21. This Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its

decision is clearly wrong. In the case of **Mbogo and Another vs. Shah** [1968] EA 93 the court stated:

> ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

22. The duty of the first appellate court was set out in the case of **Selle and another Vs Associated Motor Board Company and Others** [1968]EA 123, where the court in their usual gusto, held as follows;-

> .. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-subordinate and the Court of Appeal is not bound to follow the subordinate Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.

23. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the subordinate court that has

observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of **Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017)eKLR**, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

24. In Prudential Assurance Company of **Kenya Limited V Sukhwender Singh Jutney and Another,** Civil Appeal No. 23 of 2005 the Court citing a passage in *Odgers Construction of Deeds and Statutes* (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> It is a familiar rule of law that no parole evidence is admissible to contradict, vary or

> alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.

25. It is a strong thing for an appellate court to depart from the factual findings of a trial court. This is especially so where those findings are based on the trial judge's assessment of the credibility and demeanor of witnesses, having had the distinct advantage of seeing and hearing them testify. An appellate court must therefore exercise great caution before interfering. It should only do so where the findings are plainly wrong, unsupported by the evidence on record, or are based on a misapprehension of the law or the evidence. In the case of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> **It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…**

26. The lower court dismissed the suit. The onus was on the Appellant to prove the case on a balance of probabilities. It

is not lost on this court that a party who alleges must prove. Negligence is a question of fact to be deduced from the circumstances of the case. The Court of Appeal discussed the legal burden of proof in the case of **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334,** as follows:

> As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

27. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in **William Kabogo Gitau vs. George Thuo & 2 Others [2010]** 1 KLR 526 as follows:

> In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has

established that it is probable than not that the allegations that he made occurred.

28. On the burden of proof, the position is well settled. A party need only establish their case to a reasonable degree of probability, that is on a balance of probability. The standard is not as demanding as that in criminal proceedings. In civil matters, it is sufficient to show that the facts asserted are more likely true than not. In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another** (2015) eKLR, the judges of appeal held that:

> Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.

29. However, the matters for determination were not matters for the faint-hearted. the matter for determination is not ordinary negligence. The appellant's case was an occupiers' liability case. Therefore, the issues to be determined are the following.

i. Whether the respondent is the owner of the suit land
ii. Whether the deceased was an occupier of land parcel no. Kisii town/block/iii/236.
iii. Whether there was a breach of a duty of care.
iv. Whether occupiers' liability arose as a result.
v. Damages
vi. Who is to bear costs

30. The appellant pleaded that he was a tenant on the suit land. PW2 confirmed that the deceased died on the suit land when the building in question collapsed. Whether he was a tenant, an illegal occupant, a trespasser, or even a passerby, it is irrelevant under occupiers' liability. An owner of a parcel of land has a duty to have the natural use of it. However, should he decide, as he may; to have unnatural use, the owner is under a duty to protect the effect of unusual usage of land so as not to affect neighbours.

31. The natural use of land is to grow natural trees and grass. He may also place a simple structure for the shelter. However, once he decides to build a house or a storey building at that, then he is under duty to protect the occupiers and every person, on whom the effect of the unnatural use may affect him. the principle was long

established in the old English case of **Rylands v. Fletcher** (1868).Rylands)UKHL1. Where a person, for his own purposes, brings or keeps on his land anything likely to do mischief, if it escapes, is prima facie answerable for all the damage which is the natural consequence of its escape.

32. The owner of the building decided to cut the grass and build an 8-story building on the land. It was an unnatural use. therefore, any collapse, even without negligence of the owner, prima facie, draws the consequence of strict liability. the court was plainly wrong in requiring proof of negligence. The only requirement to prove strict liability is unnatural use.

33. The next question, then, is who the owner is. I have looked at the defence evidence with great amusement and trepidation. the level of lies in it is more a sense of comedy than pity. When a man, decides to lie, he must lie intelligently and have regard to the persons listening to him. It is insulting to consider the evidence the respondent tendered. First, he denies being the owner of both the land and the building. Secondly, he denies being a landlord. Fourth, in a rather pedestrian way, he attempts to tender evidence on how he was able to complain to DCI and the complaint letter was specifically for the DCI. His ownership for other purposes is not in the picture. A letter admitting ownership remains good until it is shown that it was a lie or overtaken by an event.

34. Further, in another Machiavellian move, slightly before closing his evidence, he alleged that the owner is Sunrise Company Limited. he then conveniently forgets that some of the documents produced show that he is the sole director and shareholder of the company.

35. Be it as it may, the burden of proof is not absolute or beyond a reasonable doubt. it is on a balance of probability. This is not a criminal trial. It is a civil trial where the court has to find for one party or another on a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 as follows:

> **"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51%** as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

36. This was further enunciated in the case of **Palace Investments Limited v Geoffrey Kariuki Mwenda & Dollar Auctions [2015] KECA 616 (KLR),** where the

Court of Appeal [J Karanja, GG Okwengu, CM Kariuki, JJA] stated as follows:

> The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs- Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

37. The first peremptory position is that land is documented. Once documented, interests that are created must be documented equally, unless they fall within a category of overriding interests. Therefore, the primary route is to find the registered owner and trace the ownership of a building to that owner. If any interest is created, the person with that

interest must provide evidence, as it is solely within their special knowledge. Section 112 of the Evidence Act provides proof of special knowledge in civil proceedings. The same provides as follows:

> In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

38. As a rider, it must be remembered that the owner of the land is also the owner of everything growing thereon. If there is another unregistered interest, it is the duty of the registered owner to join them to the suit. In this case, there was no evidence of the land having created another interest. Ipso facto, the owner of the land is the owner of the building unless special evidence is tendered after pleadings to that effect. **Muhuyi v Mulinya** [2025] KEHC 2310 (KLR), A. C. BETT J, posited as follows while addressing the question of ownership of items on a parcel of land:

> The legal maxim "*quid quid plantatur solo, solo cedit*" defines the principle that anything growing from the land, belongs to the land. In light of the aforementioned legal maxim, it follows that any crop growing on a specific parcel of land is presumed to legally belong to the owner of the land. Additionally, the common law doctrine of "Cujus est Solum et usque ad coelum et ad inferos" which literally means "whoever owns [the] soil, [it]

is theirs all the way [up] to heaven and [down] to hell applies to land ownership in our legal regime.

24.The principle of ownership of whatever is affixed to the land was expounded by the Court of Appeal in the case of Waribu Chongo v. Benson Maina Gathithi [2014] KECA 769 (KLR) when it stated thus:-"The dispute in this appeal relates to ownership of trees on land. It is trite law that whatever is permanently attached to the soil becomes part of the soil and runs with the land; it matters not who affixed or embedded the object. This is captured in the latin maxim quicquid plantatur solo, solo cedit. The owner of the land becomes the owner of the soil and all objects permanently affixed or embedded thereto. In a conveyance or sale transaction, all objects affixed and embedded to the land at the time of the contract of sale must be left for the purchaser unless otherwise agreed. In law, a sale agreement is effective to pass objects permanently affixed to the soil without express mention (see Dibble Ltd v Moore, [1970] 2 QB 180)."

39. While addressing the rights of a registered land owner, Thande J, posted as follows in the case of In r**e Estate of Margaret Muthoni Chokwe (Deceased)** [2025] KEHC 10277 (KLR):

It is common ground that the mast is on the Kilifi/Roka/1490. A copy of the exhibited title

indicates the proprietor thereof to be the deceased, Margaret Muthoni Chokwe as guardian and trustee for Timothy C. Mwinga, Margaret M. Chokwe, Timothy T. M. Chokwe and William M. Chokwe, who are the Applicants herein. Section 24(a) of the Land Registration Act provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. This must of necessity include the right to all that is on the property in line with the common law concept of land expressed in the Latin maxim, *cujus est solum ejus est usque ad coelum* which means that 'whose is the soil, his is also that which is above it'.

40. Therefore, the next question is to find who the owner of the building is that caused the death of the deceased herein. It must be remembered that this court is not settling the use and occupation of, and title to, land provided under Article 162 of the Constitution. The ownership, however defective, shall be for the prima facie owner. He is at liberty to contest his title elsewhere.

41. From the copy of records, the respondent was registered as an owner of land Parcel No. Kisii Town/block/III/236.

42. There was an approval for the Sunrise Group for the development of plots KMC/570 and 571. However, NEMA

approval was given to the respondent to develop on 4.07.2011. The respondent was warned not to start development until communication was received from the professional director of the environment on the same. Conditional approval was given on 8.09.2011, for land Parcel No. Kisii Town/block/III/236, to the respondent by the provincial director of environment as promised in the letter of 4.07.2011.

43. The appellant paid for the approval for the project on land parcel no. Kisii Town/Block/III/236 vide receipt number 37774 of 4.06.2011. Rates were equally paid by or due from the respondent for land parcel no. Kisii Town/Block/III/236. The payment for building plans was issued to land parcel no. Kisii town/Block/III/236 on. 13.11.2014. Fees for the building were charged on the respondent oof a sum of 89, 908 for plot land Parcel No. Kisii Town/block/III/236.

44. The inscription card for land Parcel No. Kisii Town/block/III/236 was also in the name of the Respondent. It shows approval up to the 5th floor as of 5.12.2012. A notice was issued to the respondent by the Kisii County government on 25.09.2014, stopping construction because the building had reached the 8th floor instead of the 4th, effectively changing it to commercial. It was noted in that letter that the structural approvals had not been submitted.

45. The respondent relied heavily on the criminal proceedings. When the proceedings are looked at in

contrast with the documents produced in the case, there is no doubt that the owner of the land and building is the appellant. The story of Sunrise Group was contrived to hoodwink the criminal court. Whether the appellant was acquitted, the said court found that he had a prima facie case. the court was not dealing with ownership but personal criminal liability.

46. The net effect is that the appellant provides that the respondent was the owner of the building that collapsed. The deceased died therein as an occupier. it is unnecessary to find whether the was just an occupier or a tenant as the question is not relevant. The respondent owed the occupiers a duty of strict liability for their safety.

47. The letters from the count government showed how many loopholes the respondent was trying to jump over to evade the law. The collapse of the building was indeed foreseeable; the respondent had even forged letters of engineers, as was clear in the criminal case.

48. I decline to deal with the question of sunrise group company for three reasons. first, there were no pleadings to that effect. Parties are bound to plead their cases fully. In the case of **Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018]** eKLR, Justice A C Mrima stated as doth: -

> 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for

rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.

In the case of **Malawi Railways Ltd vs Nyasulu [1998] MWSC 3**, **Malawi Supreme Court of Appeal** stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled The Present Importance of Pleadings published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is

equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called Any Other Business in the sense that points other than those specific may be raised without notice.

49. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in an election petition: -

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither

desirable nor permissible for a court to frame an issue not arising on the pleadings…

50. Secondly, a party that wishes to have another party be held liable must join the said party as a third party. This is clear in cases where the alleged third party is not a registered owner. in the case of **Fred Ben Okoth v Equator Bottlers Limited** [2015] KECA 253 (KLR), the court of appeal[Musinga, Gatembu & Murgor, JJ.A] posited as follows:

> n Ballard vs North British Rail Co. Ltd [1923] S C (HL) 43 it was posited that, it is not sufficient for the defendant to advance some hypothetical cause, as to the reason for the accident, but it must be able to demonstrate that the accident did not occur due to its own negligence.
>
> Similarly, mere denial or speculation that a third party may have been responsible, will not be enough to absolve the defendant from blame. The defendant must demonstrate that some other party was responsible for the accident, failing which the onus rests upon him to disprove liability.

52. In fact, the court in the case above continued as follows:

> In a claim for negligence, since the renowned UK case of Donoghue vs Stevenson [1932] All ER 1, where similar issues were in contention, it is

settled law that, in order for a claimant to satisfy a claim for negligence, they must prove that firstly, the defendant had a legal duty of care, that secondly, the incident occurred that caused the defendant injury, and that thirdly, the injury was due to the defendant. Coca-Cola, a soft drink is a widely consumed beverage, and when the prerequisites of the principles set out in Donoghue vs Stevenson are applied to the circumstances of this case, it is evident that the manufacturer of such a product owes a duty of care to consumers.

There are however instances where the plaintiff can prove that the accident occurred, but cannot prove how it occurred so as to demonstrate that the defendant was responsible. This is where the maxims res ipsa loquitar comes into operation.

In the case of Wahindi vs Pharmaceutical Manufacturing [1994] KLR page 206, this Court citing Charlesworth & Percy on Negligence 7th edition at page 350 outlined the pre requisites for invoking the maxim and stated thus;

“(1) on proof of the happening of an unexplained occurrence;

(2) when the occurrence is one which would not have happened in the ordinary course of things

without negligence on the part of somebody other than the plaintiff; and

(3) the circumstances point to the negligence in question being that of the defendant rather than any other person."

The effect of properly invoking the maxim res ipsa loquitar shifts the burden of proof to the defendant to show that the accident did not occur due to its negligence.

51. If the respondent wished that some other party be held liable, then they ought to have applied under Order 1 Rule 15 of the Civil Procedure Rules to join the third party. The said rule provides as follows:

(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)-
(a) that he is entitled to contribution or indemnity; or
(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 defendant and the third party or between any or either of them,
>
> He shall apply to the Court within fourteen days after the close of 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.

52. The court cannot go into deciding who, between the registered owner of the land and non-parties, is to blame. being strict liability, the respondent is to blame.

53. Lastly, the approvals were given to the appellant. He did not tender evidence on any transfer to a non-party. Further, he admitted to a public office to be the owner. He cannot run away from the admission. Section 24 of the Evidence Act provides the effect of admission as follows:

> Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

54. There is no evidence tendered to show that the estoppel under section 24 was displaced. The court cannot continue chasing a wild goose when the respondent domesticated the ownership by his letter dated 08.02.2016, together with the NEMA approvals.

55. Lastly, the respondent attempted to show that explosives were used in the building. He did not plead particulars that will show that he was not aware of the explosives kept at the corner of the building. From their own evidence, the building was not blown up, but collapsed due to the respondent's negligence. He built an 8-story building while approvals were for the residential 4-storey building. Consequently, the appeal is allowed.

56. In the circumstances, the court below was plainly wrong in dismissing the appellant's suit. The order dismissing the suit is hereby set aside. in lieu thereof, I substitute with an order finding the respondent 100% liable for the death of the deceased.

57. The court below was in error by failing to assess damages. It is not the last court. It must assess damages even where it dismisses a case. This guidance was given to the lower court by A Mabeya in the case of **Lei Masaku v Kalpama Builders Ltd** [2014] KEHC 1196 (KLR) as follows:

There is the issue of failure to assess damages. It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and fail to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable, and the Appellate Court needs to know the view taken by the court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behoves this court to assess quantum.

58. No single case is typically identical to the other. **In Penina Waithira Kaburu v LP** [2019] eKLR, the Court stated thus on the issue of award of general damages –

> While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere,

if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.

59. The principle on the award of damages is settled. In **Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another** [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

2) The award should be commensurable with the injuries sustained.

3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

5) The awards should not be inordinately low or high.

60. Equally, it is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of

H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> …but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional…..

61. The lower court ought to have assessed damages for pain and suffering, loss of expectation of life and loss of dependency as well as special damages that would be adequate if negligence had been proved. Under the head for pain and suffering, in Civil Appeal No. 42 of 2018 **Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased)** paragraph 21 the Hon. Odunga J (as he then was) observed: -

> The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away

> the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness… a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal. (emphasis mine).

62. The death certificate produced in evidence; the deceased died on the day the building collapsed being 10.8.2021. In **Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR** it was observed that:

> The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages

being awarded if the pain and suffering was prolonged before death.

63. In this case, Ksh. 50,000/= would, be adequate compensation for pain and suffering if negligence had been established.

64. On loss of expectation of life, the deceased was said to be 38 years old. PW1 also described him to have left his mother (PW1) and sister as the only dependants. He was said to have been of good health. Therefore, Ksh. 150,000/= would have been adequate compensation.

65. On loss of dependency, the deceased had his mother and sister as te named dependants. However, PW1 testified that the deceased earned between Ksh. 120,000/= - Ksh. 150,000/= per day from a hotel business, no evidence was tendered to prove this income. In the absence of prove of income and the source of income, the global approach method would be mist suitable in assessing loss of dependency. I am fortified by the reasoning of the court in the case of **China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR** as follows;

> On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better

> served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the Fatal Accidents Act.

66. The deceased did not have a wife at the age of 38. The mother did not indicate her age both in pleadings and in evidence. In the circumstances, a global sum of Ksh. 1,000,000/= would be an adequate compensation for the deceased herein.

67. With special damages, the rule is strict and somewhat mathematical. The court has to discern the pleaded damages and proceed to find the proof. It is not based on estimates. The Court of Appeal in **Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177** where it was stated that:

> The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.

68. Special damages are thus particular and constitute a liquidated claim which must be pleaded and proved. In **Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J** held that:

> In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred…Special damages and general damages are used in corresponding senses. Thus in personal

injury claims, ‘special damages’ refers to past expenses and lost earnings, whilst ‘general damages’ will include anticipated loss as well as damages for pain and suffering and loss of amenities…Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading…There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by

the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly…Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages… General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages has become crystallised and concrete since the wrong the defendant could be surprised at the trial by the detail of its amount.

69. Regarding proof of loss, while it is true that special damages must not only be specifically pleaded but also strictly proved, what amounts to strict proof must depend

on the circumstances that is to say, the character of the acts producing damage, and the circumstances under which those acts were done. See **Nizar Virani T/A Kisumu Beach Resort vs. Phoenix of East Africa Assurance Company Limited Civil Appeal No. 88 of 2002 [2004] 2 KLR 269**, **Gulhamid Mohamedali Jivanji vs. Sanyo Electrical Company Limited Civil Appeal No. 225 of 2001 [2003] KLR 425; [2003] 1 EA 98**, **Coast Bus Service Ltd vs. Sisco E. Murunga Ndanyi & 2 Others Civil Appeal No. 192 of 1992.**

70. On special damages and funeral expenses, the Appellant pleaded Kshs.120,000/=. Though funeral expenses are special damages, there is no strict rule regarding them. The appellant did not lead much valuable evidence on these expenses. However, they must have been incurred. In the case of **Jacob Ayiga Maruja & another v Simeon Obayo** [2005] eKLR, the court stated:

> Funeral expenses and other expenses" were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses.

> Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.

71. Further, in the case of **Premier Diary Limited v Amarjit Singh Sagoo & another** [2013] KECA 95 (KLR), the Court of Appeal [Onyango Otieno, Azangalala & Kantai, JJ. A] addressed funeral expenses and their notoriety in Africa as follows:

> In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to

award that sum without in any way breaching the general rule we have referred to on the issue of special damages.

72. A sum of Ksh 20,000/= was for the obtaining of letters of administration. This is the amount given to the appellant. The same is not awardable. A sum of Ksh 15,000 was for the coffin and postmortem report; the same is allowable. This leaves a sum of 70,000/= as funeral expenses. these are reasonable.

73. Consequently, a sum of Ksh 100,000/= is awarded as funeral expenses and special damages.

74. This leaves the question of costs. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or

other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

75. Costs are generally discretionally. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> "It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

76. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

> 18.It emerges that the award of costs would normally be guided by the principle that “costs

follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.

22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

77. Costs follow the event. The event is allowing the appeal. In the circumstances, the appellants are entitled to costs in this court and the court below. A sum of Ksh 115,000/= will suffice in this court.

Determination

78. The upshot of the foregoing is that I make the following orders:

a) The appeal is allowed.
b) I set aside the order dismissing the suit. In lieu thereof, I enter judgment for the appellant against the respondent at 100% liability.
c) I enter judgment on quantum as follows;
    a. General damages for loss of dependency -Ksh. 1,000,000/=.
    b. Funeral expenses and special damages -Ksh 100,000/=
    c. Pain and suffering - Ksh. 50,000/=.
    d. Loss of expectation of life -Ksh 100,000/=
    Total -Ksh 1,250,000/=.
d) The Appellant to have costs and interest of the suit.
e) Interest on funeral expenses to apply from the date of filing, 31.07.2018
f) Interest on other damages from the date of judgment in the lower court, 1.07.2025.
g) Costs of Ksh. 105,000/= to the appellant for the appeal.
h) 30 days stay of execution.
i) File is closed.
j) Right of Appeal 14 days

DELIVERED, DATED and **SIGNED** at **NYERI** on this **29th** day of **January 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the Presence of:-

Mr. Nyaberi for the Respondent

Court Assistant – Michael