IN THE COURT OF APPEAL

AT MALINDI

CORAM: WAKI, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 97 OF 2016

BETWEEN

HAKIKA TRANSPORTERS SERVICES LIMITED.....APPELLANT

AND

ALBERT CHULAH WAMIMITAIRE.....RESPONDENT

(Being an appeal lodged pursuant to leave granted to the Appellant on 14th October, 2016 in Civil Application No. 1 of 2016, against the whole of the Judgment and decree of the High Court of Kenya at Mombasa,(Omollo,J.), dated and delivered on 8thOctober, 2015

in

High Court ELC Case No. 214 of 2011)

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JUDGMENT OF THE COURT

[1] This is an appeal against the judgment of Omollo J., dated 8th October, 2015 in Mombasa HCCC No. 214 of 2011. In that case Albert Chulah Wamimitaire (respondent) sued Hakika Transporters Services Ltd, (appellant) claiming a sum of Kshs. 3,400,000 being the current market value of a residential house on Plot No. **L.R No. 267/V/Mainland North** within Jomvu area, Mombasa (suit premises); together with damages for loss of rental income thereon. According to the respondent, he purchased the said house under a phenomenon known as *'house without land'* which is a common practice within the coastal area. Under such arrangement, a purchaser only acquires the house and not the land where the house is built. According to the respondent, he purchased the house from one Jared Aginga *(a third party)*, way back on 1st September, 1993 and thereafter, he re constructed a total of 15 rental rooms which he was leasing out at a monthly rate of Kshs. 1,800 per room.

[2] Notwithstanding that the respondent had physical possession of the suit premises sometime in January, 2010 the appellant purchased the suit premises and constructed a perimeter wall as a consequence thereof, sewage water was diverted to the respondent's house, causing a foul stench and subsequent breakout of cholera and other diseases to the tenants of the said houses who were forced to vacate the suit premises and went to live in other safer places. This led to loss of income and the investment in the suit premises. Further, that following a complaint by the respondent, the appellant's agents or supervisors offered to pay him Kshs. 800,000 as the estimated value of the property that was destroyed by the foul sewage; a sum which the respondent rejected as too low, because according to his valuer, the market value of the house at that time was valued at Kshs. 3,400,000. The appellant was, however, unwilling to settle the amount assessed as the market value, prompting the respondent to file suit not only for the value of the house, but for damages for lost income and costs.

[3] The suit was defended, vide an amended statement of defence filed on 11th October, 2012, in which the appellant denied having had anything to do with the alleged perimeter wall. On a without prejudice basis, the appellant added that if at all its agents had put up the wall, then the same was legitimately done and as a matter of fact, the respondent's complaint had no basis as his alleged house was an illegal structure that in any event could have been subjected to criminal sanctions. Consequently, that the respondent had no enforceable claim and the suit was an abuse of the court process.

[4] The suit proceeded for hearing with each party calling three witnesses who gave evidence in support of the claim or against it respectively. Upon considering the evidence and by a judgment dated the 8th October, 2015 the subject matter of this appeal, **Omollo J.,** found the respondent had proved his claim and awarded him Kshs. 2,500,000 as compensation for the house and Kshs. 270,000 being one years' worth of lost income.

[5] Dissatisfied with the said judgment, the appellant lodged this appeal, in which it faulted the learned Judge for; failing to appreciate the case, the evidence and issues before her; shifting the burden of proof to the appellant; failing to find that the appellant had no nexus with the alleged house and/or perimeter wall and; failing to hold that the respondent's suit was founded on an illegality.

[6] With leave of court, both parties filed their respective submissions, and counsel made some oral highlights during the plenary hearing of the appeal. According to **Mr. Onyango,** teaming up with **Mr. Anyonje** both learned counsel for the appellant, submitted that the respondent failed to prove the perimeter wall complained of was constructed by the appellant on the plot where is house was; the respondent failed to adduce any evidence in respect of the allegation that the suit premises described as LR No 267/V Mainland North was the one bought by the appellants while there was cogent evidence the appellants' land was originally Plot 442/V/MN subdivision No. LR 2621/V/MN. In addition, it was stated, even the respondent's claim that he had purchased the suit premises from a third party by the name Jared Aginga turned out to be false, as the evidence by the respondent's own witness (DW 3) revealed it was never owned by the said third party but belonged to Bwanakombo Bin Athman.

[7] Counsel for the appellant further submitted that the evidence tendered by the appellant's witnesses was largely ignored, yet the said evidence clearly demonstrated that the appellant had no connection with the suit premises and that the construction of the perimeter wall was in fact commissioned by individuals who had no affiliation or connection with the appellant. Accordingly, therefore, the burden was upon the respondent to prove on a balance of probabilities, not only that it was theappellant who constructed the wall, but that the said wall caused the damage and migration of the respondents tenants. Consequently, counsel faulted the learned Judge for shifting the burden of proof upon the appellant for it to prove that it was not responsible for the construction of the alleged wall and that it was not the owner of the suit premises. Counsel made reference to the decision of this Court in the case of~~;~~ **Muhiddin Mohammed Muhiddin (suing for and on behalf of the Estate of Mohammed Muhiddin Mohammed Hatimy) v. Jackson Muthama& 168 others** [2014] e KLR. Where this Court, differently constituted, emphasized that the only person who could confer rights in respect of land is the registered owner. This therefore brought the legality of respondents' claim of the suit premises into question.

[8]Finally, counsel for the appellant urged us to find the appellant's interest in the suit land was crucial, and since it was not proven, the claim was a non-starter. In the same vein, any party claiming rights in respect of a house without land, it was imperative that they prove their occupation of the land was backed by a lease or a form of authority and consent of the land owner. In this case, counsel for the appellant stated that the respondent failed to demonstrate ownership of the suit premises and failed to prove payment of land rent, which lend credence to the appellant's claim that the respondent's claim was based on an illegal occupation of the suit premises and a claim based on an illegality cannot give rise to damages.

[9] In response**, Mr. Muyala,** learned counsel for the respondentwas emphatic that the issue of construction of the perimeter wall by the appellant was being raised for the first time in this appeal; the appellant never refuted that allegation at the trial stage. Counsel submitted the suit premises was sold to the appellant and soon thereafter, the appellant offered to buy out the respondent's house at Kshs. 800,000 which was the value of the house without land. He added that the respondent's claim was not for proprietorship of the suit parcel but rather, a claim for compensation for the value of the house. As such, proprietorship of the property is immaterial. In conclusion, counsel urged us to find the circumstances under which the respondent acquired the suit premises being a house without land and the evidence that was adduced, the learned Judge cannot be faulted for making the award. Counsel urged us to dismiss the appeal.

[10] This is a first appeal, and that being so, we have a duty to reassess and re-evaluate the evidence tendered before the trial court and reach our own conclusions with the usual caveat that we neither saw nor heard the witnesses who testified before the trial Judge and give due allowance for that. This much was restated in ***Musera -vs- Mwechelesi& Another*** *(2007) KLR 159where the court stated:*

> **"We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion."**

[11] We have considered the entire record of appeal, the grounds and respective submissions by counsel as per the above summary. The core issue that arises for determination is whether, on the evidence on record, the respondent proved his claim for compensation of the rental houses and loss of rental income as sought. Those issues have to be considered against the backdrop of the appellant's postulation that, the respondent failed to prove his case at trial, in particular, that the appellant had put up the offending perimeter wall on the suit premises and that it was responsible for the alleged loss of rent. We think it is necessary to revisit the respondent's case as it was pleaded under paragraph 5 of the amended plaint which encompassed the claim in regard to the perimeter wall that was the cause of damage as follows;

> "**The plaintiff further state (sic) that sometime in January 2010 without his consent and permission the defendant agents and or servants constructed perimeter wall surrounding plot no. 267/V/Mainland North in which the plaintiff (sic) residential house is built which resulted in the flooding of the sewage water into the plaintiff's said residential house".** (emphasis added)

[12] In response thereto, the appellant's amended statement of defence contained a specific denial of that allegation. This is evident in paragraph 4 of the amended defence, in which it was stated that:-

> **"With respect to paragraphs 5, 6, 7, 8, 9 and 10 of the Amended Plaint, the defendant reiterates the averments contained in paragraph 3 and further denies that neither the defendant nor the plaintiff have any relationship, interest, claim and/ or title to Plot No. 267/V/MN and at no time has the defendant carried out any works, development and/ or constructions as alleged neither has the defendant at any time approached or offered the plaintiff any sum of money as compensation payout or otherwise as alleged or whatsoever. Consequently, the averments contained in the aforesaid paragraphs of the Amended Plaint are denied and the plaintiff is put to strict proof…."**(emphasis added)

Given that the appellant out rightly denied having constructed the offending perimeter wall on the suit premises, and by the evidence of DW1 it was indicated the appellants was dealing with original Plot No. 442/V/MN, it was incumbent upon the respondent to not only prove whether the suit premises being Plot No 267/V /MN as pleaded above, was the same as Plot no 442/V/MN which upon subdivision became LR 2621/V/MN and the damage to the rental houses was occasioned, by actions of the appellant and/or its agents. The respondent bore the burden to show that the perimeter wall was constructed by the appellant or with the appellant's authority.

[13] In this case, the respondent went to great lengths to prove his interest in the house as he produced a sale agreement in respect thereof as well as receipts indicative of land rent payments. He also produced a valuer's report to guide the court on the commercial value of the house. However he missed a critical aspect of showing that the exact plot where the perimeter wall was constructed to justify the claim for compensation of the house. This is what the respondent said in his own words;-

> **"…I bought the house, it was makuti house on 1/9/93. I bought for Ksh 40,000/- I bought from Jared Aginga. We had an agreement …the building plans were approved in 1994, the plot was for the owner for Mwanakombo and her husband Kombo. I build on owners land. There were other houses. The house was mine but land belonged to owners. I was paying Ksh 350 per month… In January 2010, the owner of the land sold to Hakika Transporters Services Ltd. When the purchasers bought my house was there, when the plot was sold there were various houses, I do not know whether the others were paid they decided that they would pay me because they had bought the plot where I had built they were to pay me. They called me in their offices at Changamwe. One Francis Kemo called me, there was Abdalla and Francis Kemo, they said they had sat down with their supervisors and said they will give me Ksh. 800,000 I refused, I went to a valuer"**

The appellant denied all the above, in its statement of defence and also through the witnesses. **According to Clerk & Lindsell On Torts,** 20th. Edition at Page 55 it is stated that:

> **"The burden of proving causation rests with the claimant in almost all instances. The claimant must adduce evidence that is more likely than not that the wrongful conduct of the defendant in fact resulted in the damage of which he complains."**

This position is buttressed by **Section 107** of the **Evidence Act** *Cap. 80,* which states that:

> **(1) - whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist."**

[14] In this case, not only was the appellant's construction of the perimeter wall denied, but at the time of the defence hearing, **Abdalla Chuo Ali** (DW 1), an accounts clerk employed by the appellant stated that sometimes he moonlights as a private land broker, admitted that a perimeter wall was put up by the appellant, but added that the same was confined to appellant's property and had nothing to do with the land occupied by respondent. In further clarification, DW 1 gave a history of the land and stated that the appellant's land was **LR 2621/V/MN** which was as a result of a subdivision from the original being Plot No. **442/V/MN**. According to him, the subdivision of Plot No. 442/V/MN gave rise to LR 2621/V/MN and LR 2622/V/MN. The witness further stated as follows;

> **"I have a transfer in respect of L.R 2621/V/MN. I wish to produce it as exhibit. I also sought approval from NEMA for putting up a perimeter wall. The council also gave its approval for the building plan. I have never been aware of any objection made to the approvals. … It is not true that the wall put up in 2621was built on 267/V/MN. I am not aware of any damage to a house on 267 by sewage…"**

[15] From this testimony, what emerges is that the appellant constructed a wall on its property, which wall was on a different plot from the one complained of by the respondent. If the respondent were to succeed in his claim he needed to provide evidence to prove that the appellant had;

> **"constructed a perimeter wall surrounding plot no. 267/V/Mainland North in which the plaintiff (sic) residential house is built which resulted in the flooding of the sewage water into the plaintiff's said residential house".**

The appellant's pleadings and evidence were consistent that it denied having constructed any perimeter wall on Plot No. 267 as alleged by the respondent and the fact that its interest was on original Plot No. 442. Also the valuation reports by the two valuers instructed by the appellant and respondent were categorical that the house without land was not destroyed but only the tenants vacated due to foul smell brought by sewage and storm water.

[16] In the face of the pleadings and evidence that seemed to have been referring to two different plots, a question is left lingering in our minds whether the perimeter wall was constructed on Plot No 267 where the respondent's house was or it was constructed on Plot No 2621/V/MN by the appellant who is the registered owner. Had the learned Judge considered that aspect perhaps she would have come to the same conclusion as we have that the respondent did not prove his case to the required standard regarding the value of the house and the claim for its compensation. The learned Judge therefore fell in error in appreciating the material before her and went outside the ambit of the pleadings and evidence when she found that the perimeter wall was constructed on plot No. 442 and that the respondent's house is located on that property. What was before court for determination was whether or not the appellant had put up a perimeter wall around ***plot no. 267/V/Mainland North*** upon which, the respondent had claimed his house stood and whether as a result thereof, the respondent had suffered loss and damage. Consequently, as demonstrated above, the claim for compensation for the house without land was not supported by evidence and ought to have failed.

[17] On the issue of compensation for loss of rent for tenants who vacated the suit premises due to nuisance caused by dirty water from the sewage that flooded the respondent's house, there was admission, the appellants constructed a perimeter wall on their plot which is Plot No 2621/V/MN. It was also not denied that after the said construction, water or sewage escaped and caused foul smell and breeding ground for

cholera and other diseases which caused the respondent's tenants to vacate his houses. However some six tenants stayed but the majority moved out due to the inconvenience caused by the storm water and sewerage. We recognize the appellant was entitled to build a perimeter wall in his plot but if foul water seeped or escaped and caused inconvenience or damage to the neighbor's house, the appellant was responsible for the damage. Liability for such acts was set out in the celebrated case of **Rylands -vs- Flecher** [1861 -73] ALL ER REP 1 wherein **Blackburn, J**. stated;

> **"…and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbor's, should be, obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there is no mischief could have accrued, and it seems but just that he should at his own peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. On authority, this is established to be the law, whether the thing so brought be beasts or water, or filth or stenches…"**

In this case we find the foul water cost the respondent his tenants and the award of Ksh 270,000 being lost income as rent for one year was justified.

[18] In conclusion this appeal partially succeeds. We set aside the judgment in respect of the award of Ksh 2,500,000 being the value of the house but uphold the order awarding the respondent Ksh 270,000. The appellant is entitled to costs in the High Court limited to the said sum but we make no order as to costs for the appeal due to its partial success.

Dated and delivered at Mombasa this 8th day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K.KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR