IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 61 OF 2010

BETWEEN

HAROUN O. NYAMBOKI.....APPELLANT

AND

THE CATHOLIC UNIVERSITY OFEASTERN AFRICA (A.M.E.C.E.A).....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi

(Ojwang', J.) dated 31st August, 2009

in

H. C. C. C. No. 248 of 2002)

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JUDGMENT OF THE COURT

1. The appellant and respondent are registered proprietors of adjacent parcels described as L.R No. 12767/11 and L.R No. 6861/5 respectively. The parcels are situated on a sloppy terrain with the respondent's parcel lying on a higher gradient than the appellant's. The appellant developed residential premises on his parcel while the respondent constructed four hostel blocks on its parcel. Initially, the respondent had constructed sewer lines to service the hostels but following complaints by the appellant, it discontinued their usage. On or about August, 1999 the respondent introduced a new system of waste disposal by erecting a sewerage plant comprising of a septic tank, a gravel bed, hydroponics system and two maturation ponds.

2. Thereafter, the appellant begun to notice seepage of what he believed was storm water mixed with raw sewage at his car park and the entrance to his house. He attributed the seepage to the respondent's plant and informed it of the same. The respondent, with the approval of the appellant, engaged water treatment specialists to investigate the claim. Samples were taken from different points of the affected areas and tested. The tests revealed that the seepage was indeed contaminated; however its source was unknown.

3. Be that as it may, the respondent engaged other specialists with a view to investigating the matter further, and to offer better solutions. All the measures taken by the respondent to control and stop the seepage did not seem to yield any fruits. Eventually, in August 2001, the respondent disconnected the

PVC pipe which passed on the appellant's land, and which was used for draining the effluent from the plant, drained the maturation ponds, filled them with soil, and installed two new pumps. The pumps were meant to pump the raw sewage from the septic tank and dispose the same a considerable distance away from the appellant's property. To the respondent, that sorted the issue. Nevertheless, there was still seepage on the appellant's property.

4. Convinced that the respondent had not done all it could to stop the seepage, the appellant filed suit in the High Court. The appellant's stand was that not only did the respondent construct the sewerage plant without consulting him but also in contravention of the law. He alleged that the respondent had interfered and diverted the natural course of storm water causing the said water to pass through his sewage ponds and mix with the raw sewage; the raw sewage percolated on his land rendering it uninhabitable. Thus the appellant sought, *inter alia*-

> ***a) An injunction restraining the defendant (the respondent herein) whether by itself, its servants, agents and/or employees and persons acting under it, from letting, allowing and/or permitting raw sewage, sewage water, unpleasant smell, gases, and/or fumes from its land to seep onto, spill, flow, enter into or in any other way interfere with the plaintiff?s (appellant herein) enjoyment of his land or the environment thereon.***
>
> ***b) An injunction restraining the defendant whether by itself, its servants, agents and/or employees from repeating or continuing the said nuisance or nuisance of any kind and/or interfering with the natural water courses and the environment.***
>
> ***c) An order compelling the defendant whether by itself, its servants, agents and/or employees to restore the environment as near as it may be to the state in which it was prior to the construction and use of the sewage plant by preventing its further use and ordering its removal.***
>
> ***d) Damages.***
>
> ***e) Costs and interest.***

In response, the respondent alleged that the nuisance, if any, caused by the sewerage plant was stopped in August, 2001 when the plant was decommissioned.

> In any event, the source of the seepage on the appellant's property was unknown; owing to the terrain, it was highly likely the same originated from any of the parcels which were further up the gradient. Consequently, liability could not attach against the respondent.

6. Upon considering the case on merit, the trial Judge (Ojwang', J., as he then was) by a judgment dated 31st August, 2009 dismissed the appellant's suit with costs and awarded interest thereon at court rates. It is that decision that has provoked this appeal wherein the appellant in challenging the entire decision, complaining that the learned Judge erred in law and fact by:

> ***a) Failing to make findings on all the prayers sought.***
>
> ***b) Failing to find that the sewerage plant was a nuisance.***
>
> ***c) Holding that the origin of the seepage was unknown contrary to the evidence on record.***
>
> ***d) Misapprehending the applicability of the Environmental Management and Co-ordination Act.***
>
> ***e) Awarding interest on costs and directing the same to be calculated from the date the suit was filed.***

At the hearing of the appeal, there was no appearance for the appellant despite the hearing notice being served upon his advocate. Mr. J. O. Okeyo appeared for the respondent and relied on the written

submissions which were on record. We note that the appellant's written submissions were also on record and we have considered the same in arriving at this decision.

8. According to the appellant, the construction of the sewerage plant and subsequent alterations thereon by the respondent were the cause of the continuous seepage of raw sewage onto his property. To him, the respondent had conceded as much in a letter dated 8th June, 2001. Further, the report prepared by Mr. Kenneth N. Rurung'a, a civil engineer, engaged by the appellant confirmed that the source of the seepage was the respondent's plant. It was submitted that the respondent acted negligently by constructing a defective plant without the approval of the then City Council of Nairobi and ignoring the appellant's concerns. The appellant maintained that the seepage was a foreseeable consequence of the respondent's actions.

9. Imputing nuisance on the part of the respondent, the appellant relied on the definition given in the ***Black?s Law Dictionary, 8th Ed.*** at page 3386 thus,

> ***"A condition, activity, or situation (such as a loud noise or foul odor) that manifest with the use or enjoyment of property;…"***

Sedleigh Denfield -vs- O?Callaghan [1940] 3 ALL ER 349 was also cited wherein Lord Atkin expressed that,

> ***"Nuisance (can be) sufficiently defined as a wrongful interference with another?s enjoyment of his land or premises by the use of land or premises either occupied – or in some cases, owned - by oneself. The owner or occupier is not an insurer. There must be something more than the mere harm done to the neighbour?s property to make the party responsible. Deliberate act or negligence is not an essential ingredient, but some degree of personal responsibility is required, which is connoted in my definition by the word „use?. This conception is implicit in all the decisions which impose liability only where the defendant has cause or continued the nuisance."***

10. The appellant argued that the respondent's actions infringed on his right to a clean and healthy environment and interfered with the use of his land. He prayed for damages and mandatory injunction compelling the respondent to restore the area as it was before the construction of the plant.

11. Last but not least, the trial Judge was faulted for finding that the ***Environmental Management Co-ordination Act, 1999 (EMCA)*** was not applicable in this case. In doing so, the appellant urged that the Act came into effect on 14th January, 2000 hence, the subsequent alterations to the plant which were the cause of the ongoing seepage were subject to the provisions of the Act.

12. Making reference to ***Rylands -vs- Fletcher [1861-73] ALL ER REP 1***, it was stated that one of the prerequisites of establishing nuisance is that the defendant ought to have made a 'non-natural' or 'special use' of his land. As far as the respondent was concerned, once it erected the hostels on its parcel, it followed that it would construct a waste management system thereon. Consequently, the construction of the sewerage plant was a natural use of its parcel.

13. The respondent contended that from the onset of construction of the plant, the appellant raised complaints to which it took necessary corrective measures. Owing to the sloppy terrain it was inevitable that water would flow downwards and accumulate on parcels on the lower gradient. To hold the respondent liable for matters which could be considered as an 'Act of God' would be unjust. In any event, the source of the seepage onto the appellant's property could not be established.

14. With regard to ***EMCA,*** the respondent's position was that the same was not in force when the cause of action arose in the year 1999. In the respondent's view, the trial Judge properly exercised his discretion in awarding interest.

15. We have considered the record, submissions made on behalf of the parties and the law. Our primary

role as the first appellate court is to re-evaluate the evidence and come to our own conclusions. However, we caution ourselves that in doing so, we must bear in mind that we did not hear the witnesses nor observe their demeanour. Consequently, we may only interfere with the findings of the trial Judge if the judge failed to take into account particular circumstances or based his impression on demeanour of witnesses which was inconsistent with the evidence. See ***Neepu Auto Spares Limited -vs- Narendra Chaganlal Solanki & 3 Others [2014] eKLR.***

16. In our view, this appeal turns on three issues namely, whether the evidence on record established the tort of nuisance as against the respondent; whether ***EMCA*** was applicable in the circumstances of this case; and whether the trial Judge exercised his discretion properly in awarding interest on costs.

17. Private nuisance usually occurs when the consequences of a person lawfully utilizing his land extends beyond his land onto his neighbour's land causing either damage thereon or interference with the enjoyment/utilization of the same. Liability for such acts was set out in the celebrated case of ***Rylands -vs- Fletcher (supra)*** wherein Blackburn J. in his own words stated:

> ***"…. and it seems but reasonable and just that the neighbour 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 neighbour'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 no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. On authority this, we think, is established to be the law, whether the thing so brought be beasts or water, or filth or stenches."***

18. It is not in dispute that there was seepage of contaminated water on the appellant's property which occurred from time to time. The bone of contention was whether the respondent caused it and if so, the extent of its liability. Regarding liability in ***Rylands -vs- Fletcher (supra)*** one must prove the following:

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

b) The use of land must be unnatural;

c) The thing must escape; and

d) As a result of the escape it must cause foreseeable damage.

19. In this case the respondent erected a sewerage plant on its parcel for purposes of waste management. We are of the view that putting up of the plant was a natural use of the respondent's parcel in light of the hostels erected thereon. However, was the respondent culpable for the nuisance caused by the percolating effluent on the appellant's property? Not unlike the trial Judge, we find that there was no evidence to prove that the contaminated water came from the respondent's plant. We say so because firstly, reports by the water specialists engaged jointly by the parties were categorical that the origin of the contaminated water was uncertain. In fact, the report which was prepared by Mr. Kenneth N. Rurung'a, a civil engineer engaged by the appellant, contrary to the appellant's assertion, was not clear on the source of the seepage. Furthermore, the appellant conceded that the samples which the said civil engineer relied on, were collected in the absence of the respondent and it was also not possible to tell where the samples were collected from.

20. Secondly, we note from the record that the appellant would complain of seepage during the rainy season. As such, it was highly likely that based on the topography of the land, the seepage could have emanated from parcels of land of a higher gradient. It was Brother Julius Otieno's (DW1) uncontroverted evidence that at one point the appellant had requested him to speak to the sister in charge of St. Clare's hostel, situated higher up the gradient than the parties' parcels, with a view to finding a solution to prevent the washing down of contaminated water from the said parcel to the parties' parcels. He also gave evidence that the said hostel was experiencing sewage problems.

21. Thirdly, from the record it is clear that when the appellant sought the intervention of the then City Council of Nairobi, the council inspected the respondent's plant and found the same to have been properly constructed. Consequently, the allegation that the respondent had constructed the same negligently lacks any basis.

22. In as much as the respondent made numerous attempts to stop the nuisance on the appellant's property, we find that the attempts on their own did not amount to admission of culpability on the part of the respondent. The respondent was merely acting on suspicion that the seepage could have been from its plant. However, the numerous tests and measures taken by the respondent made it clear that the origin of the effluent was unknown and could be from other parcels on the sloppy terrain. In ***Lalji Bhimji Sanghani & Another -vs- Chemilabs [1978] eKLR*** Law JA observed that:

> "***I do not see how the appellants can be said to have "caused" the nuisance. Nor do I see how they could be said to have "continued" it. A person can only be said to "continue" a nuisance, in Lord Atkins? word, "if he knows that it is operating offensively, is able to prevent it, and omits to prevent it."*** Emphasis added.

Further, in ***St. Anne?s Well Brewery Co. -vs- Roberts [1928] ALL E.R. Rep 28 at 33***, part of the ancient city wall of Exeter collapsed and damaged the claimant's inn which adjoined it. The cause of the collapse was obscure and the owners of the wall were held not liable. Scrutton L.J. expressed,

> ***"It appears to me that the cardinal thing which would have to be proved to establish any liability against anybody would be knowledge of the defect which ultimately resulted in the fall, or failure to acquire knowledge because he had failed to use reasonable care to ascertain what he should have ascertained."*** Emphasis added**.**

23. Having perused the record, we note that the appellant's cause of action was based on the construction of the sewerage plant, which he alleged was the cause of nuisance to him. We also note that at the trial court, the appellant did not attribute subsequent measures taken by the respondent as contributing to the nuisance. The appellant was adamant that the plant was constructed in contravention to the provisions of ***EMCA***. However, we are of the view that this ***EMCA*** was inapplicable to this case, as action arose in 1999 upon construction of the plant. EMCA came into force on 14th January, 2000.

24. On the issue of interest, ***section 27 (2)*** of the Civil Procedure Act is clear that-

> ***"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."***

This power is discretionary and ought to be exercised judiciously. We see no reason to interfere with the trial Judge's award with respect to interest.

25. The upshot of the foregoing is that the appeal herein lacks merit and is hereby dismissed.

Dated and delivered at Nairobi this 10th day of February, 2017.

ALNASHIR VISRAM

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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