REPUBLIC OF KENYA

COURT OF APPEAL KISUMU

CIVIL DIVISION

CIVIL APPEAL 298 OF 2004

KENYA SHELL LIMITED ..... APPELLANT
AND
MILKAH KERUBO ONKOBA ..... RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kisii (Wambilyangah, J.) dated 25th September, 2003

borehole. Following the alleged leakage, the appellant company made effort to clean her borehole but their effort was unsuccessful and the water in the well remained unclean for a long time after the leakage and as a result, the appellant or its agent made an effort to supply her with water for two weeks only and thereafter stopped, forcing her to seek an alternative supply at the rate of Kshs.800/= per day. The respondent's claim was for general and special damages occasioned by the escape of diesel from the appellant's diesel tank. She claimed special damages of Shs.800/= per day from 2nd February, 1997 until the date the respondent would successfully clean the borehole or the appellant would be in a position to sink an alternative borehole for the respondent.

By a defence filed on 25th September, 1997, the appellant denied liability and in particular that the diesel had *"escaped"* into the respondent's borehole and that in the alternative, if any such damage as alleged had occurred, it had occurred naturally or occasioned by an Act of God. By way of a further defence, the appellant pleaded that the diesel tank had been maintained for the common benefit of both parties and that no special damages had been incurred by the respondent as alleged or at all.

After a full hearing where the respondent testified but the appellant failed to offer any evidence in rebuttal, the superior court found the appellant liable to the respondent for the contamination of her borehole and awarded her a global sum of Kshs.600,000/= as general damages for what the court called the *"proven tort"* together with interest from the date of judgment and costs of the suit.

The appellant has this appeal citing the following grounds of appeal:

"1. The Learned Judge gravely erred in law and in fact whereby in contravention of well established principles and rules of procedure he awarded general damages of Kshs.600,000 against the appellant after he had found that the borehole/ well the subject of the respondent's complaint, cost Kshs.6,000 to construct.

2. The Learned Judge misdirected himself in failing to

consider the principles upon which he could hold the appellant to have contaminated the respondent's well.

3. **The Learned Judge erred in failing to apply to the provision of law that the respondent must prove his case on a balance of probability and in laying the burden of proof on the appellant right from the start.**

4. **The Learned Judge erred in completely disregarding the appellant's defence.**

5. **The Learned Judge erred in believing the respondent's witnesses and their evidence when they had clearly shown them themselves not to be creditworthy.**

6. **The learned judge erred in not finding that the respondent had been unable to establish his loss in that:**

   (a) After the plaintiff failed to establish her claim for special damages, the judge used the selfsame facts that the respondent had testified to in her evidence to calculate the general damages awardable.

   (b) There was no evidence whatsoever adduced that would have assisted the court in determining the general damages awardable.

7. **The Learned Judge erred in law in failing to adequately deal with the issue of mitigation of damages".**

When the appeal came up for hearing before us on 17th June, 2010, the appellant company was represented by ***Mr. Lungaho Siganga***, advocate, while the respondent was represented by ***Mr. G. J. M. Masese***, advocate.

Mr. Siganga's submissions were that neither the plaint nor the proceedings disclosed the specific tort which had been committed by the appellant and consequently the award of general damages was wrongful. In addition, the respondent had not proved special damages and the court should not have used the special damages allegedly incurred per day as a benchmark or the basis for awarding general damages. He further contended that no evidence was adduced on the inconvenience suffered and that the superior court did shift the burden of proof to the appellant and that there was no nexus between the alleged damage and the appellant and if there was any such leakage, it must have been an act of God for which the appellant was not responsible. Finally, the appellant's counsel

submitted that the respondent had a duty to mitigate any loss and had not done so yet this factor was not taken into account by the court when awarding damages. To illustrate the point, counsel informed the court that after the incident, the appellant had made an out of court settlement offer of Kshs.35,000/= and provision of water to the respondent pending the construction of a new borehole but the respondent failed to take up the offer.

Mr. Masese for the respondent urged the court to note that it was only the respondent and two of her witnesses who had testified but the appellant had declined to do so. Consequently, the court did make a finding on the issue of liability, on the basis of the evidence adduced by the respondent. In addition, the fact that the appellant had tried to clear the borehole after the event was an admission of liability. He further submitted, that the water from the respondent's borehole was analyzed by experts from the Kenya Bureau of Standards on 17th October, 2002 and it was confirmed that an underground oil tank had leaked and oil had seeped into the plaintiff's borehole. The same report did confirm that the borehole water did contain oil and grease and was unsuitable for consumption. He submitted that in the circumstances liability could not be in dispute as the experts report had been exhibited in Court. Concerning the respondent's duty to mitigate her loss he stated that although the appellant had supplied her with water for two weeks the supply was stopped, forcing her to look for an alternative supply at the rate of Kshs.800/= per day.

Regarding the duty to mitigate the loss incurred, we note that the respondents obtained water from other sources and in our view, it is the only way she could have mitigated her loss in the circumstances.

Although there was no dispute that the cost of sinking a new borehole was Kshs.6,000/= the respondent's abortive efforts to clean the borehole confirmed the continuing pollution of the respondent's land and for this reason, it would not have been reasonable to expect the respondent to mitigate her loss by sinking a new

borehole at that cost until such time that the appellant would either repair the leak or remove the underground tank. There is no record that the appellant had embarked on any of these options of preventing the escape. Although this was not raised by counsel, the leak had an environmental dimension. It is a cardinal principle of environmental law that the polluter must pay. Viewed from this standpoint, the global amount awarded of Kshs.600,000 does in our view cushion the respondent against loss the full extent of which was not as at the time of hearing ascertainable due to its continuing nature. We consider that the respondent had discharged her duty to mitigate.

On the issue of liability, we agree with the respondent's counsel that the same had been admitted by the appellant by its conduct and in particular the supply of water for two weeks; and the unfruitful effort to clean the respondent's borehole.

Turning to the issue of damages, we consider the averments in the plaint as sufficiently clear to have indicated to the court that the tort perpetrated was that under the rule in ***Rylands –vs- Fletcher [1868] LR 3H.L.330*** and we do not think that failure to specify the actual tort is fatal to the claim since the particulars given in the plaint pointed to the tort. Again, the escape of the diesel from an underground tank into the neighbour's borehole was clearly established vide the Kenya Bureau of Standard's expert report.

It follows that the Rule in ***Rylands –vs- Fletcher*** (supra) is applicable to the situation before us. It is a rule of absolute or strict liability recognized by our law – one of the chief instances in which a man acts at his peril and is responsible for accidental harm, independently of the existence of the wrongful intent or negligence. The rule has been formulated in ***Salmond on Torts, 15th Edition by Houston at page 401*** as follows:

> **"The occupier of land who brings and keeps upon it anything likely to do damage if it escapes in bound at his peril to prevent its escape, and is liable for all the direct consequences of its escape, even if he has been guilty of no negligence".**

In the case of ***Rylands –vs- Fletcher*** the defendant's constructed a reservoir upon their land in order to supply water for their mill. When the reservoir was filled, the water escaped down the shaft into the plaintiff's mine which it flooded, causing damage estimated at £937. Blackburn, J. for the Court of Exchequer Chamber, held the defendants liable and formulated the principle as we know it today. The judge recognized only two defences – if the escape was owing to the plaintiffs default; or, perhaps, that the escape was the consequence of *vis major* or the Act of God.

In the situation before us although counsel for the appellant has put up a defence of an Act of God, it is clearly not borne out by the evidence. The underground diesel tanker did not leak due to an Act of God, and in the circumstances, as the appellant opted not to give evidence in the superior court, it did not explain the leakage at all. On our part, there cannot be a better application of the principle in the ***Ryland –vs- Fletcher*** case than in the circumstances before us. Blackburn's judgment has been hailed as a master piece and we have no hesitation in applying it here.

We have reflected on the award of Kshs.600,000/= and are of the view that there are no valid reasons for this Court's intervention with the superior court's exercise of its discretion in the circumstances.

In the result, the appeal is dismissed with costs to the appellant.

Dated and delivered at Kisumu this 24th day of September, 2010.

S. E. O. BOSIRE
.....
JUDGE OF APPEAL

P. N. WAKI
.....
JUDGE OF APPEAL

J. G. NYAMU
.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR