



**IN THE COURT OF APPEAL OF KENYA
AT NAKURU
Civil Appeal 193 of 2001**

AMOSAM BUILDERS DEVELOPERS LTD.....APPELLANT

AND

BETTY NGENDO GACHIE.....1ST RESPONDENT

NAKURU MUNICIPAL COUNCIL.....2ND RESPONDENT

JOHN NJOROGE KARUA.....3RD RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Rimita, J) dated 26th

January, 2001

in

H.C.C.C. NO. 104 of 1992

JUDGEMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court dated 20th January 2001, in which that court gave judgment for Betty Ngendo Gachie, the 1st respondent, for a total sum of Kshs 2,013, 537.30 being the placement value of a house, special damages and refund of rent for a period of 11 years at the rate of Kshs. 900 per month. The appellant Amosam Builders & Developers Limited, was the 1st defendant in that suit with Nakuru Municipal Council as the 2nd defendant.

This is a first appeal. That being so it behoves us to consider all the evidence that was presented to the trial court, analyse it and come to our independent conclusions in light of the pleadings without overlooking the conclusions reached by the trial court. In doing so we are obliged to bear in mind that unlike the trial court we did not have the advantage of seeing and hearing the witnesses testify. We must, however, do the best we can and come to certain conclusions on the various issues raised in the appeal.

The 1st respondent averred in her plaint that she bought a completed residential house from the appellant at an agreed price which she paid in full. The house was situated within Nakuru Municipality and was standing on L.R. No. Nakuru Municipality/Block 3/293 measuring 0.0296 hectares. She took possession of the house in 1988, but within a period of about six months of taking possession the house developed structural defects on the walls, roof and floor and was thus rendered uninhabitable. The walls developed

vertical and horizontal cracks; the roof started caving in and the floor slab developed big cracks. There were other defects of a structural nature. It was the respondent's case that the defects stated above, were caused solely by poor workmanship and gross negligence on the part of the appellant and the Municipality of Nakuru. The 1st respondent set out in her plaint particulars of negligence for each defendant.

On the basis of the alleged acts of bad workmanship and negligence the respondent claimed damage as follows:-

- (a) Cost of putting up a similar house**
- (b) General damages for loss of use**
- (c) Special damages in the sum of Kshs. 94,737 comprising of the valuation fees, advocates fees, repair charges, mortgage repayment for a designated period at the rate of Kshs, 1,300 per month,**
- (d) Mortgage interest repayment,**
- (e) Taxable benefits on loan**
- (f) Domestic package insurance policy for 1988-91 and mortgage protection policy**

In its defence, the appellant while admitting that it sold a residential house to the appellant, denied allegations of bad workmanship and gross negligence. It averred that if there were cracks, they were caused by latent land faults which could not be detected applying reasonable diligence.

Issues were agreed. In her evidence the 1st respondent testified that she was the first occupant of the house. It was while she was living in the house that she noticed cracks developing. She notified the Municipal Council about the problem. She also consulted Mr. Jack Awuor, a structural Engineer Assistant, who inspected the building. He formed the opinion that the house was not built in accordance with the building plans which she obtained from the Municipality of Nakuru. The plan had been submitted to the Municipality for approval. A fee had been paid for such approval and a separate fee for inspection of the construction. For his services, Jack Awuor was paid Kshs. 35,000/- Loise Kaira Njoroge, a quantity surveyor did a valuation of what it would cost to put up a similar building. In her view, it would cost Kshs. 2,251,000/- to construct a similar house in February, 1996. She was paid Kshs 27,560 for her work.

The house was insured, but the insurance company refused to settle a claim for it by the respondent arguing that the loss was not covered. Before she vacated the house for fear of it collapsing on her, the 1st respondent had made several attempts to repair the cracks on the building. For those repairs the respondent spent about Kshs. 10,000/-. When she vacated the house she was forced to employ a watchman at the rate of Kshs. 600 per month. As at the date of the suit, she had spent Kshs. 16360/-. She was also forced to rent accommodation for her own occupation. For the accommodation she was paying a monthly rent of Kshs 900 with effect from 1990, and by March 1996 when this suit first came for a hearing she had spent about Kshs 44,590. The 1st respondent was at the same time servicing a loan she had taken to buy the house. The foregoing are the major claims for which the respondent sought reliefs but as this appeal is mainly on the issue of liability, we do not wish to itemize all the various claims and the amounts thereof.

As regards the structural defects it was the 1st respondent's testimony that houses around the subject property are intact and have been standing there for long. She called Jack Awuor to testify on the matter. In his evidence Awuor while acknowledging that the area where the house stood had a substratum which was unstable, he testified that the subject house was built without reinforcing it at appropriate places with steel bars or a BRC mesh. It was his view that the foundation was on loose soil, and that the construction was in breach of building regulations and hence the several cracks. Loise Kaira Njoroge was of the same

view that the cracking and sinking floor was as a result of the fault in the foundation of the building.

A geologist, Harry Maina Ndingirigi was called to give evidence on the geological structure of the area. In his view there was no geological deficit in the area which would have caused the cracks on the house. He attributed the collapse of the building to negligence and bad workmanship.

At the close of the respondent's case the court visited the house with the consent of the parties' respective counsel. The court made the following observations:-

“COURT: Court observed the subject house both inside and outside. Walls are cracked and sinking. The floor has several cracks and sinking. The court visited the neighbouring house both on the South, North and East (West is a road). None of the houses even the storey houses has the type of cracks seen the subject

D.M. RIMITA

JUDGE”

The appellant called Paul Gatambia Kiaraho, a Civil Construction Engineer, as a witness. It was his evidence that he inspected the suit premises and in his view the workmanship was not shoddy, nor were the material used of poor quality; the soil could hold the structure, and the failure of the structure was not as a result of structural deficiency, but because of a geological problem. He conceded that there was no polythene sheet above the floor slab but in his view that did not affect the building. In his view, the absence of a wire mesh did not cause the defects which were noted. Under cross-examination, however, he admitted that the soil in Nakuru needed extra care when laying the foundation. This is what he said in part:-

“One has to establish before whether there are fissures or not. One must restrict the load on the ground, have proper materials, and mixtures. I did not enter the houses neighbouring the subject. I did not enter but could not see cracks. The house was inhabited.”

The other witness the appellant called was Frederick Tithui Theuri, a consultant geologist, and a former Chief Superintendent Geologist with the government of Kenya. His evidence in substance, was that Nakuru West where the subject house stood was not safe for developments. In his view the house was built on a fault. In view of that he did not agree that the cause of the cracks on the building was bad workmanship. He did not, however explain why neighbouring houses did not have similar cracks and yet like the subject premises, they are built on the same fault which he allegedly detected. When asked about this, his response was that all buildings in the area are slowly sinking. He did not, however, rule out the possibility of other causes being responsible for the collapse of the subject building.

David Kinuthia Wahome, a quantity Surveyor was the appellant's third witness. In his view the cost of rebuilding of the subject house, taking into account what could be salvaged, was about Kshs. 1.2 million. He conceded that the cost would go up to Kshs. 4 million depending on the quality of finishes.

Samuel Kahiga Muigai, was the developer who put up the subject house. It was his evidence that he obtained all the necessary consents for the construction of the house, and that the house plans were approved by the Municipal Authority. The Municipal Authority issued the occupation licence. The building contractor who did the works worked with the Municipal Council which inspected the construction at every stage of construction. He blames the council for not excluding the area where the house stands from development, and possibly making it a park.

John Mungai Karua, was the building contractor. It was his evidence that he used the building plan supplied to him and the materials which were therein specified; the project was inspected from time to time by council inspectors who approved what he was doing and issued appropriate certificates of satisfactory work. On the application of the appellant this witness was brought into this suit as a third party. He is the third respondent in this appeal his name in record is John Njoroge Karua. He was found

by the trial court to have done shoddy work and was held to be 30% to blame for the collapse of the subject building. That court found as fact that this party failed to lay a metallic mesh wire to reinforce the floor slab, failed to use metal bars to reinforce beams, and also failed to use polythene paper to protect the floor slab and walls. His appeal, if any, is not before us.

With regard to the appellant, the trial court found as fact that the foundation of the house was not deep enough, it was not reinforced by wire mesh, hard core was poorly laid, the lintel was not reinforced with metal bars, the slab was not to the required thickness nor did it have polythene sheet under it.

As against the Municipal Authority the trial Judge found as fact that it was negligent in supervising and directing the construction work, and failed to satisfy itself that proper building materials were being used at all stages and that the construction work was in accordance with approved building plans. Its appeal, if any, against the decision of the superior court which found it 50% to blame for the collapse of the subject building, is not before us.

The appellant and the third party were found to be 50% to blame which was apportioned by the trial Judge, with the appellant shouldering 30% of the liability.

The appellant has proffered ten grounds in its memorandum of appeal, but a careful reading of those grounds clearly shows that the appellant's complaint is basically that in view of the evidence given by expert witnesses he called, the learned trial Judge erred in apportioning blame to it.

Mr. Kagucia for the appellant passionately submitted before us that the trial Judge having found that there existed faults on the ground where the house was built, and further, that the Nakuru Municipality failed to properly oversee the construction work, there was no basis for apportioning blame to the appellant.

Determination of the suit depended mainly on evidence which was presented to the Court by professionals. Such evidence is without doubt opinion evidence. **Section 48** of the Evidence Act Cap 80 of the Laws of Kenya makes provision for such evidence. In **Vander Donckt v Tuelluson (1849) 8 C.B. 12**, Maule J said:-

“All persons, I think who practice a business or profession which requires them to possess a certain knowledge of the matter in hand are experts so far as experience is required.”

There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is not binding on the court. The court has to consider it along with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it. (see **C.D. Desouza v B.R. Sharma (1953) 26 KLR 41 at P. 42**). In **C.D. De Souza** the market costs of construction were rejected by a Rent Control Board, whose decision to do so was upheld on appeal.

In the case before us there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it. In a case as this where evidence of experts is conflicting a decision one way or the other depends on the credibility of witnesses. The trial Judge in his assessment of the evidence of experts rendered himself thus:-

“Most of the evidence of the experts was theoretical. But I think PW2 took the necessary practical steps to find out the cause of the problem in the subject matter. I have compared his evidence and that of the other experts. Taking into account all the circumstances of the case I feel and find that PW2 is the man to believe. However, I agree that Nakuru area and especially the area where the subject was built could be an area subject to geological faults. But in view of the fact that other houses in the vicinity including storey houses are in position with one or two with minor cracks I am unable to find that there are major faults under the subject matter. If anything there could

only be minor faults which could be taken care of as suggested by PW2.”

We earlier set out the substance of each witness’ testimony. PW2 was a structural engineer assistant with a diploma in Civil Engineering from Kenya Polytechnic. He gave a detailed account as to why he attributed the collapse of the subject building to negligence and poor workmanship. Other witnesses called by the 1st respondent supported his testimony. One of the appellant’s witnesses, Paul Gatambia Kiaraho, in a way supported PW2’s testimony when he admitted under cross-examination that the house in issue had a structural problem. He added that: “One has to be extra careful with the soil in Nakuru when laying the foundation. One has to establish before whether there are fissures or not. One must restrict the load on the ground, have proper materials and mixtures.”

We have analysed all the evidence on record, and it is our view that the trial Judge came to the right decision that the collapse of the subject house was due to negligence and poor workmanship. It is also our view that his apportionment of blame was based on the evidence which was presented before him, and he cannot be faulted on that score. Moreover, that court’s observation of the subject building confirmed the testimony of PW2.

At the commencement of the hearing of this appeal it was pointed out that the 3rd appellant, John Njoroge Karua, had died and no application had been made for his substitution. Mr Kagucia for the appellant unsuccessfully applied informally, for the consolidation of Civil Appeal No 46 of 2006 pending before this Court relating to the subject property, with this one. Learned counsel hoped to obviate the abatement of the appeal herein against the 3rd respondent as the limitation period for his substitution had expired. The effect of the refusal to consolidate the two appeals is that the appeal against the 3rd respondent has abated. We have no hesitation in so ordering.

We observe that the 3rd respondent was brought into this litigation through a third party notice. That being the case the appellant’s liability to the 1st respondent, Betty Ngendo Gachie is 50%. The apportionment of liability as between the appellant and the 3rd respondent was to make easier for the appellant to know how much it would claim from the 3rd respondent by way of indemnity.

In the result, and for the foregoing reasons, this appeal fails and it is dismissed with costs to the 1st respondent. The 2nd respondent, Nakuru Municipal council, though served did not attend the hearing of the appeal. That being so we make no order as to costs in respect of it it. Order accordingly.

Dated and delivered at Nakuru this 6th day of November, 2009.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR