



**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL OF KENYA**  
**AT KISUMU**  
**Civil Appeal 147 of 2003**

**HUDSON KISALA LUBANGA ..... APPELLANT**

**AND**

**ASSOCIATED CONSTRUCTION CO. LTD.....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Kakamega (Waweru, J.) dated 27<sup>th</sup> March, 2003*

*in*

***H.C.C.C. NO. 133 OF 1999)***

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**JUDGMENT OF WAKI, J.A.**

I have had the advantage of reading the draft judgment of my brother *O'kubasu, J.A.* I agree that the appeal is for dismissal on the issue of liability and I have nothing useful to add.

I also agree that the appellant shall bear the costs of the appeal.

***Dated and delivered at Kisumu this 25<sup>th</sup> day of April, 2008.***

***P.N.WAKI***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**

**HUDSON KISALA LUBANGA ..... APPELLANT**

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**JUDGMENT OF O’KUBASU, J.A.**

This is an appeal by the unsuccessful plaintiff from the judgment of the superior court (Waweru, J.) delivered on 27<sup>th</sup> March, 2003 at Kakamega in which the learned Judge dismissed the appellant’s suit in that Court.

The appellant herein, **Hudson Kisala Lubanga**, sued the respondent **Associated Construction Co. Ltd.** in the High Court of Kenya at Kakamega vide **Civil Suit No. 133 of 1999**. The salient paragraphs of the plaint stated as follows:-

**“3. The plaintiff was at all material times to this suit the leasehold owner of Kakamega Plot No. 475/111 Canon Awuori Street Block No. 1/56 situate in Kakamega Town.**

**4. The defendant was at all material times to this suit the company contracted to reconstruct and rehabilitate transport infrastructure in Kakamega, Bungoma and Busia under the Kenya Urban Transport infrastructure project.**

**5. On or about 13<sup>th</sup> March, 1999, the Defendant, then working on site in Kakamega negligently and carelessly dug and/or excavated the plaintiff’s verandah on the said plot No. 475/111 Block 1/56 thereby causing the collapse of the said verandah and parts of the building thereto as a result of which the plaintiff has suffered loss and damage.**

**PARTICULARS OF NEGLIGENCE**

- (a) *Excavating directly on the plaintiffs verandah thereby causing the collapse.*
- (b) *Failing to heed or pay any or any attention to the duly approved building plan and the given provision for the road reserve.*
- (c) *Failing to comply with laid down procedures of road construction.*
- (d) *Continuing to excavate and/or digging up the plaintiff’s verandah despite his pleas and protests that the action would grossly affect his building.*

**6. By reason of the matters aforesaid a section of the plaintiffs building and verandah collapsed thereby making the plaintiff to suffer substantial loss and damage.**

**PARTICULARS OF SPECIAL DAMAGES**

- (a) *Loss of earnings in terms of rent unpaid by the tenants whose business premises have been affected by the said collapse Kshs.59,000/= per month from the date of collapse to the time of determination of this case.*

(b) Loss of goodwill at 15% of cost of repair Kshs.540,000/=.

(c) Cost of repair and reconstruction KShs.3,597,151/=.

(d) Quantity surveyors fees KShs.400,000/=.

**7. The plaintiff also claims general damages for mental anguish and embarrassment caused to him as a result of the unlawful demolition.**

**8. Despite demand being made and notice of an intention to sue having been given, the defendant has failed, refused and or neglected to make good the plaintiff's claim.**

**9. The cause of action arose within the jurisdiction of this Honourable Court.**

**REASONS WHEREFORE** the plaintiff prays for judgment against the defendant for:-

(a) Special damages as stated in paragraph 6 herein above.

(b) General damages aforesaid.

(c) Costs of this suit.

(d) Interest on (a), (b) and (c) herein above.

(e) Any other or further relief that the court may deem just and expedient to grant.”

In answer to the foregoing a defence was filed in which it was stated as follows:-

**“3. The defendant denies paragraphs 3 and 8 of the plaint and will put the plaintiff to strict proof thereof.**

**4. The defendant denies any negligence as alleged in paragraph 5 the plaint and states that:-**

(a) The verandah was constructed within the road reserve hence an illegal structure.

(b) The verandah collapsed due to the fact that it did not comply with the basic constructions requirements.

**5. In the alternative and without prejudice to the foregoing the defendant says that if any loss or damage was occasioned (which is denied) it was because of the negligence and willful neglect of the plaintiff.**

#### **PARTICULARS OF NEGLIGENCE**

The plaintiff was negligent in that he:-

(1) Built the collapsed verandah without proper approved designs or supervision by the Municipal Council.

(2) Constructed the collapsed verandah within the road reserve.

**6. In answer to paragraph 6 of the plaint the defendant denies that the plaintiff has suffered any loss or damage as alleged and will put him to strict proof thereof.**

**7. The defendant denies paragraphs 7 and 8 of the plaint and will put the plaintiff to strict proof thereof.**

**8. Save as aforesaid the defendant denies each and every allegation against him as though the same were set out herein and traversed specifically.”**

After the close of pleadings the hearing of the suit commenced before Waweru, J. on 11<sup>th</sup> July, 2001 when the appellant (as the plaintiff) gave evidence. It was his evidence that he was the leasehold owner of **plot No. 475/111/Block 1/56** situated at the corner of Canon Awori Street and Were Street within Kakamega Municipality and that the respondent company was contracted to rehabilitate transport infrastructure within the Municipality and that the workers of the respondent excavated the ground below the appellant’s verandah which collapsed. The appellant further testified that he had tried to stop the respondent from carrying out excavation works but to no avail. The appellant maintained that the verandah was not built on the road. The appellant called **Patrick Sagwa Kisa (PW2)** a Consultant Quantity Surveyor based in Nairobi, **Timothy Adeya Mulinya (PW3)** a Senior Public Health Officer employed by Kakamega Municipal Council, and **John Oyier (PW4)** a Senior Roads Foreman working with Kakamega Municipal Council as witnesses to support his case.

The respondent on its part called the following five witnesses:-

- 1) **Constance Wanyama Musabi (DW1), a Surveyor/Draftsman with Kakamega Municipal Council.**
- 2) **Paul Mandila Injendi (DW2), an Administration Officer at the Kakamega Municipal Council, whose evidence was cut short by the respondent’s counsel who was of the view that the evidence that this witness would give could be given by other witnesses.**
- 3) **Sukhdev Singh Virk (DW3), a Civil and Building Engineer working with the respondent company.**
- 4) **Abraham Ochieng Owino (DW4), a Civil Engineer working with East Africa Engineering Consultants.**
- 5) **Leah Luchivya Shilinango (DW5), the then Acting Town Clerk of Kakamega Municipal Council.”**

The learned Judge considered the evidence of all these witnesses from both sides and came to the conclusion that it was the appellant’s own negligence that ultimately led to the collapse of his verandah and hence the defendant was not to blame for the collapse of that verandah. Hence on the issue of liability, the learned Judge dismissed the appellant’s suit. The learned Judge went into the issue of quantum of damages but he similarly dismissed the appellant’s claim. It is from the foregoing that the appellant now comes to this Court by way of appeal.

This being a first appeal it is in the nature of a re-hearing. It is our duty to re-evaluate the evidence, analyse it and come to our own conclusions but in doing so we must give allowance to the fact that we have neither seen nor heard the witnesses – see **PETERS V. SUNDAY POST LTD. [1958] E.A. 424, SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD. & OTHERS [1968] E.A. 123, WILLIAMS DIAMONDS LTD. V. BROWN [1970] E.A. 1** and **KOGO V. NYAMOGO & NYAMOGO ADVOCATES [2004] 1 KLR 367.**

When this appeal came up for hearing before us at Kisumu on 6<sup>th</sup> March, 2008 Mrs. Wilfrida Osodo, appeared for the appellant while Miss R.N. Munyasi, appeared for the respondent.

Mrs. Osodo took us through his ten grounds of appeal some of which were argued together. For example **grounds 1, 2, 3, 4, 6 and 10** were argued together. The gist of Mrs. Osodo’s arguments on these grounds was that the judgment of the superior court was contrary to the weight of evidence tendered. She submitted that although the veranda collapsed due to the rain yet there had been no problem prior to the excavation works carried out by the respondent’s workers. She relied on the English case of **DODD PROPERTIES (KENT) LTD. AND ANOTHER V. CATERBURY CITY COUNCIL AND OTHERS**

**Grounds 5 & 7** related to receipts which were produced in a bid to prove the alleged loss suffered by the appellant.

**Grounds 8 & 9** similarly were on the alleged loss by the appellant as a direct consequence of the respondent's action.

On her part, Miss Munyasi submitted that the learned Judge of the superior court had appreciated the whole case, evaluated the evidence and came to the correct conclusion by dismissing the appellant's suit. She reminded us that the learned Judge saw and heard the witnesses leading to his opinion that the respondent's evidence was preferable to that of the appellant and his witnesses. Miss Munyasi further contended that the appellant was the author of his own misfortune and for that reason the learned Judge ought not to be faulted in his decision. To support her submissions, Miss Munyasi referred us to her list of authorities.

Having considered the genesis of this matter, the decision of the superior court and what has been urged before us by counsel appearing for the parties, I am of the view that this appeal can be determined on the issue of liability, in which case the issue of quantum of damages would be rendered unnecessary. From the evidence tendered before the superior court, it was not in dispute that the appellant was the lawful owner of the **Plot No. 475/111/Block 1/56** situated at the corner of Awori Street and Hassan Were Road within Kakamega Municipality. On that plot there was a commercial building which had been constructed after the approval of building plans by all relevant authorities. Abutting on the building along both streets was a verandah supported by concrete columns and a concrete beam adjoining the columns. The beam was an extension of the concrete lintel that ran round the building and the supporting structure of the verandah was thus constructed as an integral part of the building.

What led to the dispute was the fact that in the course of its road works along Were Street, the respondent made certain excavation within the road reserve without encroaching on the appellant's property. However, after the said excavations, there was heavy rainfall and as a result storm water collected in the excavations. This water invaded and undermined the foundations of the three columns supporting the verandah, leading to their collapse and also collapse of the beam. The learned Judge accepted the evidence of the respondent's witnesses to the effect that the foundations of those columns were so undermined and collapsed because they had not been constructed to acceptable standards. It was the finding of the learned Judge that it was the appellant's own negligence that ultimately led to the collapse of his verandah. He did not find any negligence on the part of the defendant.

From the evidence, the issue in this dispute was whether the respondent could be held liable for the damage caused to the appellant's building. The evidence on record showed that the respondent carried out the excavations in accordance with the contract specifications. Unfortunately, there was heavy rainfall and storm water collected in the excavations. The evidence before the superior court was to the effect that the foundations of the columns had not been constructed to acceptable standards. These were not constructed by the respondent! Hence, the learned Judge was perfectly entitled to conclude that it was the appellant's own negligence that ultimately led to the collapse of the verandah.

This appeal challenges the finding of facts by the learned Judge. As already stated earlier, the learned Judge had the opportunity to see and hear the witnesses. He formed the opinion that having heard all the witnesses he accepted the respondent's version that what caused the collapse of the verandah was negligence of the appellant in the construction of the foundation of the columns.

Having re-evaluated the evidence and considering what has been urged before the Court in this appeal, I have come to the same conclusion as did the learned Judge that the respondent was not in any way negligent and for that reason it could not be held liable for the damage on the appellant's building. In my view it was the appellant's negligence and storm water that led to the collapse of his verandah since the foundations of the columns had not been constructed in accordance with acceptable standards. For those reasons I would not interfere with the findings of the learned Judge and the conclusions reached in

his judgment.

In ***EPHANTUS MWANGI & ANOTHER VS. DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278 Hancox JA*** (as he then was) put it thus at **p. 292** of the Report:-

***“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”.***

The first holding in that case is also relevant, namely, that:-

***“The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanor of material witness was inconsistent with evidence in the case generally.”***

In view of the foregoing, I order that this appeal be dismissed with costs to the respondent.

As **Waki, JA** agrees it is so ordered.

***Dated and delivered at Kisumu this 25<sup>th</sup> day of April, 2008.***

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**