

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL APPEAL NO. 42 OF 2016

(ARISING FROM MAKINDYE CHIEF MAGISTRATE'S COURT CIVIL SUIT. NO. 343 OF 2011)

LUKANGA MUHAMMEDAPPELLANT

V

MUSA JUUKO.....RESPONDENT.

BEFORE HON. LADY JUSTICE H. WOLAYO

JUDGMENT

The appellant appealed the judgment of HW Watyekere George grade one magistrate dated 7. 3. 2016 on two grounds of appeal as follows:

1. The learned trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record thereby reaching a wrong decision that the appellant did not have a cause of action in negligence against the respondent.
2. The learned trial magistrate erred in law when he dismissed the suit.

The appellant was represented by Lukwago & Co. Advocates while the respondent was represented by Lubega, Babu & Co. Advocates.

Both counsel filed written submissions that I have carefully considered.

The duty of the first appellate court is to re-evaluate the evidence adduced in the lower court and arrive at its own conclusions on issues of law and fact.

For ease of reference, I will refer to the parties as they appeared during the trial, appellant as plaintiff and the respondent as defendant.

The plaintiff sued the defendant for negligent use of his land that adjoined the plaintiff's land causing damage to the plaintiff's perimeter wall. Particulars of negligence were that the defendant, after constructing two storeyed buildings, failed to trap rain water which dropped onto the plaintiff's wall thereby weakened it and led to its collapse.

The defendant denied the claim and contended, inter alia, that the wall was constructed on tilted land without drainage for running water which led to the collapse of the wall.

I have re-evaluated the evidence on record and arrived at the following conclusions on issues of law and fact.

The suit was in negligence in which case, the plaintiff had to prove on a balance of probabilities that the defendant owed him a duty of care, that duty was breached and he suffered damage.

A closer examination of the evidence reveals that the claim is for the tort of nuisance. A nuisance is a type of tort where an owner of land uses his land in a such a way that it affects his neighbour's enjoyment of his land. It is defined as an unreasonable interference with the plaintiff's enjoyment of the land. **Howarth David, Textbook on Tort, Butterworths (1995:499)** refers. The author explains that liability of the neighbour lies not so much in the intention to cause the nuisance but whether the plaintiff's enjoyment of his property should outweigh the defendant's activity complained of.

Bulen & Leake & Jacobs on Precedents and Pleadings Sweet & Maxwell, 1990:700 and 701 states that

'nuisance is concerned with conditions and activities which interfere with the use or enjoyment of land', and that

'courts balance the competing interests of neighbouring land owners and adjust their respective rights and privileges'(p. 701)

This position is echoed in American jurisprudence. In an article by **Stimmel, Stimmel and Smith Law Office** found at <http://stimmel-law.com>, the authors state that

'a landowner is relieved from liability for injuries caused to an adjoining owner if the landowner makes a "reasonable use" of his/her property. However, the rule which allows a person to use his/her own property in such a manner to cause injury to another's property without any liability will be limited and is carefully defined in the courts and by statute.

A landowner's use of his/her property becomes unreasonable and unlawful if it constitutes an appropriation of the adjoining land and if it deprives the reasonable enjoyment of the adjoining owner of his/her property to a material degree. Brownsey v. General Printing Ink Corp., 118 N.J.L. 505 (Sup. Ct. 1937).

It seems that a reasonable use of land that leads to injury does not per se attract liability but if the use denies the adjoining owner reasonable enjoyment of his land and is due to activities, then the defendant is liable.

In the instant case, the plaintiff complains that the defendant failed to control rain water that bounced off the roof of his storeyed house which then caused damage to the plaintiff's wall over time.

The defendant denied this analysis and maintained through his testimony and his witnesses that other factors caused the wall to collapse including the plaintiff's car washing bay, the sloppy terrain that caused water to flow towards the wall together with debris, and failure of the plaintiff to provide sufficient outlets in the wall to running water. The defendant also testified that the wall was structurally weak that contributed to its collapse.

As to whether the wall collapsed due to the rain water bouncing off the defendant's roof is a matter of evidence. PW2 from Kavuma Associates who worked as an engineer assessor and loss adjustor testified principally on the cost of building a new wall but not on the cause of the collapsed wall. DW2 Regina Kitembo an LC official testified that other walls on the hill had collapsed and that this was due to running water flowing downwards during heavy rains and that the water carries with it a lot of debris and stagnates in the plaintiff's land. This fact was alluded to by the defendant who testified that the plaintiff blocked KCCA channel during construction of the perimeter wall.

The trial magistrate found that the cause of the collapsed wall had not been proved to the required standard by the plaintiff.

It seems to me that the wall was weakened by a number of factors

Spread between the plaintiff and the defendant. Water flowed from the plaintiff's own use of the land and ended at the wall. So did rain water from the hill that came with debris. The channel that would have taken the water away quickly had been blocked by the plaintiff.

Rain water from the defendant's roof also contributed to the weakening of the wall.

Both parties were lawfully using their respective plots . Counsel for the appellant argued that the defendant got approval from KCCA for the building on his land after the wall collapsed. By approving the plan, the local government authority retrospectively approved the building. Therefore, the defendant was lawfully using his land when he constructed a storeyed house. What is in issue is whether omission to fix gutters on the roof is the proximate cause of the collapsed wall.

In Dr. Masambu v Kikwe Muusa Mbale Civil Appeal No. 130 of 2014 (Ulii) , where the appellant whose land was on the upper part of the slope complained that the respondent had dug a trench on his land and caused flooding in the appellant's land, I found that the trench was in fact a valley which was the natural route of the rain water and that there was therefore no connection between the respondent's activities on the land and the nuisance of flooding on the appellant's land.

In the instant case, I find that both parties contributed to the nuisance of rain water hitting the plaintiff's wall. However, the defendant's contribution is minimal because it was by omission in not fixing gutters while the plaintiff's contribution was much bigger because of the washing bay and the blocked channel on his land. In other words, the plaintiff's own activities are mostly responsible for the damage to his wall. I assess the defendant's liability at 10%.

The plaintiff adduced evidence showing that it will cost 5,067,000/ to rebuild the destroyed portion. This means the defendant will contribute 1,000,000/ towards the rebuilding of the wall .

Because the defendant's contribution to the damage to the wall is negligible, I find that while the learned magistrate properly evaluated the evidence, he erred when he failed to conclude that the collapsed wall was due to a combination of factors attributed to both parties.

Before I discuss the grounds of appeal, I wish to discuss the issue of locus notes raised by both counsel which the trial magistrate did not record. I have noted that in his judgment, the

trial magistrate made reference to a locus visit . However the notes are missing from the record and so is the sketch map.

While I fault the trial magistrate for his failure to record proceedings at the locus , the testimonies were sufficient to dispose of the appeal. Nevertheless, the omission is regrettable and he will be advised to be more diligent in future. The registrar of this court is accordingly directed to bring to the attention of the magistrate this judgment .

I now turn to the grounds of appeal.

Ground one

The learned trial magistrate erred in law and in fact when he failed to properly evaluate the evidence on record thereby reaching a wrong decision that the appellant did not have a cause of action in negligence against the respondent.

Both counsel belaboured the definition of a cause of action but they missed the point. The problem stemmed from the manner in which the issue for trial was initially framed . It was framed as follows:

Whether the plaintiff has a cause of action in negligence.

The focus should be on ‘negligence and not ‘cause of action’.

That said, I find that the plaintiff had a cause of action in nuisance which is a tort under negligence.

I have re-evaluated the evidence and found that the trial magistrate properly evaluated the evidence except that he arrived at a wrong conclusion.

Ground two

The learned trial magistrate erred in law when he dismissed the suit.

The trial magistrate dismissed the suit because he found no evidence that the collapsed wall was a result of the omission by the defendant to fix gutters.

However, I have found that both parties contributed to the collapse of the wall except that the defendant's liability which I assessed at 10% is minimal.

I allow the appeal in part and make the following orders:

1. The respondent will pay the plaintiff 1,000,000/ as compensation for the damaged portion of the wall.
2. The respondent will pay the appellant 10% of the taxed costs of the appeal and the lower court.
3. Both parties to take corrective steps to remedy the nuisance if they haven't done so already.

DATED AT KAMPALA THIS 13TH DAY OF APRIL 2017.

HON. LADY JUSTICE H. WOLAYO