



IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE No. 335 OF 2011

*Between:*

GERALD KANYERERE

PLAINTIFF

AND

BLANTYRE WATER BOARD

DEFENDANT

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JUDGMENT

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The plaintiff, Mr. Gerald Kanyerere, commenced this action in October 2011 claiming damages for nuisance, negligence and costs. The plaintiff alleges that the water from the defendant's water reservoir completely damaged his brick oven. The defendant owns a water reservoir at South Lunzu, Machinjiri where it stores its pumped water for distribution to its customers within the City of Blantyre and surrounding areas, as mandated under the Waterworks Act.

In terms of the pleadings, the statement of claim reveals that the plaintiff was at the material time a private owner of a parcel of land at Machinjiri Area 6 and is suing in that capacity. The plaintiff avers that he erected a brick oven on his parcel of land and prepared the same for baking. It is alleged that on or about 6<sup>th</sup> October 2011 the defendant's servants or agents who were engaged in maintenance works at the water reservoir permitted a large volume of water to leave the said water reservoir and flow without control and in the process encroach onto the plaintiff's land, destroying the plaintiff's brick oven and thereby constituting nuisance. The plaintiff attributes the damage to the oven to the negligence of the defendant. The plaintiff claims that the oven of the collapsed and he suffered damage.

In the amended defence, whilst the defendant admits owning a water reservoir and carrying out a clearing exercise on or about 6<sup>th</sup> October 2011, it denies committing nuisance and being negligent. The defendant avers that it constructed waste water drainages to control any water overflow from the reservoir and that the plaintiff's alleged damage was caused most probably by rains.

### *The Evidence*

To establish whether the defendant owed the plaintiff a duty of care and that the defendant breached that duty by committing nuisance and was negligent in the management of his water reservoir, the plaintiff called three witnesses.

The first witness was Mr. Gerald Kanyerere, the plaintiff himself. His evidence was that he commissioned Mr. Hassan Bob and Mr. Jonathan Bob to mould bricks and prepare a brick oven for their baking on or about 6<sup>th</sup> October 2011. He stated that the artisans alerted him and alleged that the brick oven was destroyed by waters which came from the defendant's reservoir. He stated that the reservoir is located on the hill overlooking the plaintiff's piece of land, on which the plaintiff had erected the brick oven. The witness visited the site and took pictures of the damage and the pictures were presented in court as documentary evidence and were marked exhibits GK 1 to GK 7. In cross examination, the witness denied the allegation that there was rain or that the brick oven was destroyed by rain water, since the top part of the oven was not damaged. The witness insisted that there was no rain at the material time and that the brick oven was destroyed by water which came from the defendant's reservoir. In re-examination the witness stated that the defendant's reservoir has no proper drainage system and the water from the reservoir damaged his brick oven before the bricks were baked.

The second witness called by the plaintiff was Mr. Hassan Bob. After adopting his witness statement he stated that, at the material time there was no rain and that the defendant did not have a drainage system to control any water flow from their reservoir. In cross examination he emphasized that there was no rain on the night before the event and the oven brick was soaked from bottom up as proof that the water which damaged the oven was flowing on the surface and not falling from the sky. The witness stated that the efforts by his colleague Jonathan Bob and him to redirect the water proved futile as the oven was collapsing. That further efforts to climb onto the oven to salvage the bricks on top were impossible as the oven was too shaky to support the witness on top. In re-examination the witness confirmed that as there were no rains at the time, it was water from the defendant's reservoir which damaged the plaintiff's brick oven.

Jonathan Bob was the third witness to be called by the plaintiff. His testimony was the same as what the plaintiff and second witness had already told the court. This third witness claimed to have been resident near the area where the oven was mounted. He informed the court that there was no warning from the defendant that



water would flow from the reservoir. In cross examination the witness also confirmed that there was no rain at the material time and that the water from the reservoir was over-flowing all over the place and following any path down the hill as there was no proper drainage system. This witness's inspection of the source of the water revealed that the water was coming from the pipe which released the water from the defendant's reservoir on to the fields. This witness corroborated the second witness when he stated that diverting the water to mitigate the damage was impossible as the oven was soaked from bottom up and about to collapse. In re-examination the witness confirmed that the brick oven was damaged by the water flowing on the surface and not rains.

The defendant called one witness, Mr. Chimphepo, the water supply Supervisor at Blantyre Water Board, who was responsible for South Lunzu, Machinjiri Area. Mr. Chimphepo stated that on or around 6<sup>th</sup> October 2011 the defendants were cleaning South Lunzu reservoir. The reservoir drain valve was opened to allow the waste water flow to the drainage for waste water. According to this witness they did not observe anything abnormal as the water was flowing within the waste water drainage and they did not receive any complaint from people living close to the reservoir. In regard to the waste water, he stated that the letter of demand from the plaintiff's lawyers was only received some days later. Mr. Chimphepo informed the court that he visited the site but did not find any brick kiln that was damaged by water. The witness alleged that at around the period in issue, from around 1<sup>st</sup> October 2011, the area of South Lunzu had been experiencing heavy rains which he strongly believed caused the damage to the plaintiff's bricks. According to the witness some of the pictures taken by the defendant showed that the damage started from the top and that the bricks that were at the base were those falling from the top, which was consistent with damage by the rains. The witness stated that if the waste water from the reservoir had caused the damage, the damage would have started from the bottom where the water would have weakened the foundation and pillars of the kiln causing the kiln to fall at once and it would not have taken the days that lapsed from 6<sup>th</sup> October 2011. The witness alleged that the defendant constructed waste water drainages through which the water flows and that the defendant took all reasonable steps to manage water flowing from its reservoir. In cross-examination the witness stated that it was possible that some water over flowed. He stated that he stays in Nkolokoti which was closer to Limbe than South Lunzu and that when the reservoir was being cleaned he was at the office but people

would have been found at the reservoir if there was anyone to complain. His observation in regard to exhibit marked GK 3 was that the bricks cracking is a sign of rain hitting from above. He also noted that the bricks are not baked, as baking hardens them. According to this witness, heavy rains soak the top layer of bricks. The witness alleged that it rained for a while in South Lunzu although he could not tell on the number of days. The witness informed the court that he was only told by his officers about the rain, but he did not go to see for himself that it had rained. He stated that after the defendant received the letter from the plaintiff they went to visit the site, but he stated that it was possible that they went there when it was late. In re-examination the witness stated that as an engineer what would cause bricks to fall would be force from above and he was doubtful that the base would cause it. He stated that when cleaning the tank the water is not forceful enough to destroy and that there was a drainage system so that the water could not overflow where they did not want it. The end of the evidence from this witness also marked the closing of the trial.

*The arguments of the parties*

The plaintiff argues that the defendant by accumulating water on the hill in the reservoir took upon themselves the duty to make sure water is safely kept. That where the water escapes and causes damage to the neighbour's property the principle in law of *res ipsa loquitur* applies. The plaintiff contends that it was the water from the reservoir of the defendant which went down uncontrolled and damaged the plaintiff's brick oven. The plaintiff asserts that the defendant failed to keep any worthwhile water drainage system to control the down flow of the water. That due to the defendant's actions and omissions, the plaintiff's brick oven was totally lost and he has suffered harm and damage. The plaintiff submits that the defendant's allegation that there was rain was not supported with any evidence. It is the view of the plaintiff that through witnesses and provision of documentary evidence, the plaintiff has proved on a balance of probability that he suffered harm on account of the defendant's breach of duty and the court should find the defendant liable in negligence.

On the other hand, the defendant argues that the plaintiff has failed to prove on a balance of probabilities that the defendant committed nuisance and that his agents were negligent which resulted in damage to his brick oven. The defendant contends that the plaintiff did not plead the particulars of the alleged nuisance by the defendant and that he did not adduce evidence to prove the allegation of the nuisance.



Further, the defendant asserts that the plaintiff has failed to prove that the damage that was occasioned to his oven was caused by water from the defendant's reservoir. The defendant contends that in terms of location of the plaintiff's land in relation to the defendant's, it is not as pleaded in the statement of claim that it is next to or adjacent to or within a few feet from his parcel of land but the evidence reveals that the plaintiff's land is far from the waste water drainage. After considering the long distance of the land and other properties between the plaintiff's land and the defendant's water reservoir, the defendant argues that it is unlikely that water from the defendant's reservoir destroyed the plaintiff's oven. The defendant asserts that the plaintiff has failed to prove his allegation contained in paragraph 3 of the statement of claim that at the material time there existed a large volume of water in the defendant's water reservoir which could have created the damage portrayed by the plaintiff. The defendant also contends that none of the plaintiff's witnesses saw the defendant's agents permitting a large volume of water or water gushing from the defendant's water reservoir down without control and coming out and flowing over the oven. The defendant also notes inconsistencies in the evidence of PW 2 and PW 3, PW 1 in regard to the day and time the water was permitted to flow without control. The defendant also note that PW 2 and PW 3 lied that the bricks had all soaked and could not be salvaged and that by the time the plaintiff arrived the oven had collapsed because the pictures exhibited in court by the plaintiff and defendant were taken by the plaintiff and that at that time only a small fraction of the bricks had fallen off. PW 1 testified that the whole oven collapsed after 4 days of taking the pictures; although there was no supporting evidence.

The defendant argues that the absence of the defendant's agents at the water reservoir when PW 2 and PW 3 allegedly visited the reservoir is also inconsistent with the version that the water gushed out in the morning. The defendant is of the view that a study of the surrounding areas in the exhibits shows that rains had fallen in the area. According to the defendant exhibit GK 5 is stagnant water and not flowing water as the rest of the gully is dry. The defendant alleges that the gullies in exhibits GK 6 and GK 7 were not created by waters from the defendant's water reservoir and that rain water could be the most probable cause. The defendant contends that it took steps to build waste water drainage to control any water over flow and the defendant owed the plaintiff no duty of care as the defendant's land is further from the defendant's water reservoir and the defendant could not reasonably foresee that its actions or omissions would directly affect the plaintiff. The defendant

contends that the plaintiff has failed to prove that the damage he suffered was a result of the negligence by the defendant's agents and his action must be dismissed.

### *The decision*

The plaintiff's action is based on the tort of negligence and nuisance. In respect of nuisance the law demands that every person owes a duty to others not to commit nuisance and if he breaches this duty he does so at the peril of a criminal indictment or of a civil action by the one who has suffered special damage: *Mwase v Lilongwe City Council* [1991]14MLR 327. Liability for negligence is based on the common law concept of the duty to take care which every person owes to his neighbor to avoid causing injury to the neighbour: *Mwase v Lilongwe City Council* [1991]14MLR 327. At common law a person is said to have been negligent when he fails to take reasonable care to avoid acts or omissions which one can reasonably foresee would likely injure persons who are so closely and directly affected by one's act that one ought to reasonably have them in contemplation as having been so affected when doing the act: *Donoghue v Stevenson* [1932] AC 562; *Tembo and others v Shire Buslines Ltd* [2004] MLR 405. In this case the duty owed by the defendant was that of reasonable care in execution of their duties of handling and controlling water works. The burden of proving these civil claims, which is on a standard of proof on a balance of probabilities, rested on the plaintiff.

The pleadings reveal the following issues which have to be resolved: first, whether or not the defendant's agents or servants committed nuisance; the second issue is whether or not the defendant's agents or servants were negligent in the way they handled water from the water reservoir during the time they were cleaning it and the third issue is whether or not the doctrine of *res ipsa loquitur* is applicable in the present case.

The general averment of nuisance in the pleadings must have been particularised and evidence should have been led to support it. This court is of the view that that the defendant is right in his contention that the claim for nuisance should be dismissed as the plaintiff did not plead the particulars of the alleged nuisance by the defendant and that he did not adduce evidence to prove the allegation of the nuisance. I find that on the pleadings and evidence as they stand the claim for nuisance cannot be sustained and is dismissed for the abovementioned reasons.

Although the plaintiff established that he suffered injury in that his brick oven was damaged the question is did the defendant breach its duty of care? It is noted



that in regard to the claim for negligence there are several shortcomings between the pleadings and the evidence: first, the plaintiff alleges but does not prove that his piece of land where his kiln was constructed was either next to or adjacent to or within a few feet from the defendant's water reservoir. None of the pictures exhibited supports this assertion and the defence actually claimed that when they visited the site, they did not see a brick oven, meaning that the plaintiff's land is far from the waste water drainage. Secondly, the plaintiff failed to prove that at the material time there existed a large volume of water in the defendant's water reservoir which could have created the damage portrayed by the plaintiff. Ordinarily it is normal to have water in a field and in ridges when it is raining as shown in Id 8 and as the defence witnesses stated. The levels of water shown on the ridges in Id 8 does not look like of a large volume and worse of all a close examination of exhibits marked GK1, GK2, GK3 and GK6 shows that there is hardly any water around the brick oven. Exhibit marked GK 4 does not show any water either at the drainage site of the water reservoir. Thirdly, there is no evidence that anyone of the plaintiff's witnesses saw the defendant's agents permitting a large volume of water or water gushing from the defendant's water reservoir down without control and coming out and flowing over the oven. Fourthly, the defendant's observations about inconsistencies in the evidence of PW 2 and PW 3, PW 1 in regard to the day and time the water was allegedly permitted to flow without control is also worth noting. Fifthly, the plaintiff alleges but does not prove that the entire oven collapsed. All the documentary evidence shows the oven was still intact. Despite the highlighted shortfalls in the evidence the plaintiff is capitalising on the fact that the defendant's agents or servants were cleaning the water reservoir to argue that the defendant is to blame for the collapsing of his brick oven.

If the plaintiff is truthful in his evidence that he knew that the defendant's reservoir had no proper drainage system then it is only proper to construe that it was negligent on the part of the plaintiff to deliberately proceed to commission the moulding of bricks and mounting of a kiln in readiness for baking in the vicinity of the water reservoir. The defence witness was clear in his testimony that the defendant regularly embarks on the cleaning of the water reservoir once or twice a year and this is an activity which should have been known to the plaintiff and his artisans who were resident in the area. What the plaintiff forgot and did not tell the court is that he should have foreseen this harm to himself, as he should have anticipated that

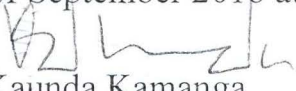
constructing a kiln in the area where there was a water reservoir which is cleaned twice a year could result in water from the tank overflowing and damaging his kiln.

However, for the reason that it is not contested that the defendant's staff were cleaning their reservoir at South Lunzu at the material time and that in course of this exercise they released water, and the photos from the plaintiff show that there was water around the field where the kiln was mounted and the defendant merely alleged but it did not prove that there was rain at the material time then the court draws an inference that the defendant's agents or servants must have been negligent and the defendant will be held partly to blame for the damage to the plaintiff's oven, thereby causing the plaintiff harm. Therefore, the defendant breached the duty of care it owed in that the defendant failed to implement adequate measures to ensure that the water drained from the reservoir did not destroy property of the plaintiff that was located downhill from the reservoir. I enter judgment for the plaintiff on the issue of liability on a partial basis. The plaintiff should bear and be responsible for half of his proved loss and damage, which is put at 50 per cent. While the defendant is liable to the extent of 50 per cent of the damages proved. The damages are to be assessed by the Registrar.

The doctrine of *res ipsa loquitur* only applies on proof of happening of accident and with no other causes: *John v Agri-Cola* [2011] MLR 110. This court finds that the doctrine of *res ipsa loquitur* is not applicable in this matter because the cause of the accident is known as it partly occurred because the defendant's agents or servants were cleaning a water reservoir and the plaintiff had a brick oven in the vicinity and the court had to decide whether on the facts there was negligence on the part of the defendant.

In terms of the costs of the action, the defendant is to pay 50 per cent of the plaintiff's costs which are to be taxed by the Registrar.

Delivered in open court this 7<sup>th</sup> day of September 2018 at Chichiri, Blantyre.

  
Dorothy nyaKaunda Kamanga

JUDGE

*Case Information:*

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Ms. Mdolo,  
Mrs. Ndunya,  
Mr. Chitatu/ Ms. Million,

Counsel for the Plaintiff.  
Counsel for the Defendant.  
Senior Personal Secretary.  
Court Clerks.