IN THE SUPREME COURT OF NIGERIA

Suit No: SC129/2001

Petitioner: Universal Trust Bank of Nigeria
And
Respondent: Fidelia Ozoemena

Date Delivered: 2007-01-26

Judge(s): Idris Legbo Kutigi, Umaru Atu Kalgo, George Adesola Oguntade, Mahmud Mohammed, Ikechi Francis Ogbuagu

Judgment Delivered

By a writ of summons issued out of Onitsha High Court by the respondent as plaintiff, she claimed against the appellant as defendant, the sum of N2,000,000.00 (Two million Naira) being special and general damages for nuisance and negligent destruction of her landed property and materials by the defendant.

Pleadings were ordered, filed and exchanged between the parties. Paragraph 14 of the respondent\'s (Plaintiff) Statement of Claim, which sets out the particulars of claim read:-

\"14. Wherefore the plaintiff has suffered damage and claims against the defendant the sum of N2, 000, 000,00 (two million Naira) being special and a general damages for the nuisance and negligent destruction of her property and materials by the defendant\".

Particulars of special and general damages:-

\"(a) Special damages:-

1. Cost of 15 bundles of corrugated iron sheets N75.000.00
2. Cost of 50 planks of timber N10, 000.00
3. Cost of 50 sheets of asbestos and ceiling boards N15, 000.00
4. Cost of 10 door frames N10,000.00

Total N110,000.00

(b) General damages:-

1. Estimated cost of rebuilding the house N1, 700,000.00
2. Loss of earning in rent and other inconveniences N190.000.00

Total N2,000,000.00

The appellant (Defendant) denied all the claims of the respondent and in paragraph 16 of its statement of defence averred as follows:

\"16 The defendant vehemently denies paragraph 14 of the Statement of Claim and states that it is not liable to pay N2,000,000 (two million naira) to the plaintiff as categorized in the said paragraph 14 and will urge the court to dismiss the plaintiffs' action as it is frivolous and an abuse of court process.\"

At the trial, the respondent gave evidence as P.W.1 in support of her case and called two witnesses. The appellant called two witnesses in defence.
At the end of the evidence of witnesses, the addresses of counsel were heard and judgment in the case was reserved.

In a considered judgment delivered on 25th November, 1997, the learned trial Judge Ibeziako J, found in favour of the respondent and ordered the appellant to pay her

\"(1) the sum of N110, 000.00 as special damages for the loss of her building materials destroyed by fire on 21/1/95;

(2) the sum of N1,890,000.00 as general damages, and

(3) N1, 000 being cost of this action.\"

The appellant was not happy with this judgment and it appealed against it to the Court of Appeal on 16th December, 1997. In the Court of Appeal, the appeal was allowed in part and the award of N1, 890,000.00 as general damages was reduced to Nl, 000,000 and N2, 000 costs were awarded to the appellant.

The appellant was still dissatisfied and it further appealed to this Court and the respondent cross appealed against the reduction of the general damages awarded to her by the trial court. Written briefs were filed and exchanged by the parties as required by the rules of this Court.

In the appellant\'s brief, the following issues for the determination of trial Court were formulated-

\"1. whether the learned Justices of the Court of Appeal were right in coming to the decision that negligence had been established against the defendant/appellant.

2. whether the learned Justices of the Court of Appeal were right in affirming the award made by the trial court of the special damages claimed.\"

The respondent also raised 2 issues which read-

'(1) whether the Court below was right in concurrently holding that Appellant was liable in negligence and nuisance and what is the attitude of this Court to such a concurrent finding.

(2) whether the Court below was right in concurrently awarding special damages to the Respondent and what is the attitude of this Court to such a concurrent finding.\"

And for the cross appeal, the respondent\'s sole issue also reads:-

\"whether the lower court was right in reducing the general damages awarded to the cross Appellant by the trial court and failing to give effect to an uncontraverted evidence.\"

The facts giving rise to this case are very simple and straightforward. The respondent, a widow, was the owner of a 5 bedroom house at No.29, Ezekwesili Street Amafor Nkpor, Anambra State. The appellant was her neighbour and owned a vacant plot of land behind its office at No.39 New Market Road, Nkpor. The appellant\'s plot of land was at all material time unoccupied but was fenced by a surrounding wall and secured by an iron gate. There was thick growth of bushes and grasses on the said plot and there was a fire outbreak which caught the grasses and the bush in the plot and burnt down the respondent\'s house. The respondent filed this action in the trial High Court Onitsha, alleging that the appellant had committed a serious act of nuisance by allowing the grasses and bushes to grow on the plot and negligently allowed it to catch fire as a result of which her house was burnt. She alleged that the appellant was in breach of the duty of care to her as her close door neighbour separated only by a fenced wall, and she claimed N2,000,000 (two million naira) against the appellant. The details of the claim are as stated in paragraph 14 of the statement of claim set out earlier in this judgment.

In their briefs of argument, both parties raised 2 issues each for the determination of this court in the main appeal. I have examined the issues and find them to be substantially similar and the same in all respects and effects. I will therefore consider the issues formulated by the appellant.

The first issue is whether the Court of Appeal was right in coming to the decision that negligence had been established against the defendant/appellant at the trial. This, in my respectful view, is the most important issue in this appeal and once it is established or resolved, the case is settled, as all respondent\'s claims must depend on it. It is essential therefore; at the very beginning to understand what \"negligence\" is, in the circumstances of any case, and what has to be proved in court in order to succeed.

Negligence has been defined in Oxford Advanced Learner\'s Dictionary 5th edition as \"lack of proper care and attention, careless behaviour.'

Negligence is a tort and it is complete when three conditions are satisfied. These are:

1. The defendant owes a duty of care to the plaintiff;

2. The defendant has acted or spoken in such a way as to break that duty of care;

3. The conduct of the defendant was careless.

See Clerk and Lindsel on Torts 14th Edition, page 474. Agbonmagbe Bank Ltd V. C. F. A. O (1966) 1 All NLR 140; Oyidiabu V. Okechukwu (1972) 5 SC 191, Orhue V. NEPA (1998) 9 NWLR (pt. 557) 187.

The tort of negligence is traditionally described as damage which is not too remote and caused by a breach of duty of care owed by the defendant to the plaintiff. The established legal position is that the onus of proving negligence is on the plaintiff who alleges it and unless and until that is proved, it does not shift. In other words where a plaintiff pleads and relies on negligence by conduct or action of the defendant, he or she must prove by evidence the conduct or action and the circumstances of its occurrence, giving rise to the breach of the duty of care. It is only after this that the burden shifts to the defendant to adduce evidence to challenge negligence on his part. And what amounts to negligence is a question of fact not law and each case must be decided in the light of its own facts and circumstances. See Kalla V. Jarmakans Transport Ltd (1961) All NLR 747; Ngilari V. Mothercart Ltd (1999) 13 NWLR (pt. 636) 626.

For a plaintiff to succeed in an action for negligence, he or she must plead all the particulars in sufficient detail of the negligence alleged and the duty of care owed by the defendant and all these must be supported by credible evidence at the trial. See Koya V. U.S. A (1997) 1 NWLR (pt 481)251.

The plaintiff in paragraphs 4, 5 and 6 of the Statement of Claim pleaded that '

\"4. The defendant occupied a fenced up parcel of land behind its office at No. 39 New Market Road, Nkpor and this fenced up parcel of land is surrounded by other buildings including the building owned by the plaintiff.....

5. The defendant committed a terrible act of nuisance on the said fenced up parcel of land belonging to him by allowing a very thick dry bush to grow on the same and negligently left the said parcel of land all through the harmatan periods in spite of the incessant fire outbreaks during these periods and in breach of his duty of care to the plaintiff whose landed property at No. 29 Ezekwesili Street, Nkpor shares a common boundary with the fenced up parcel of land belonging to the defendant.

6. On or about 21/1/95 the said thick dry bush negligently maintained by the defendant caught fire and totally burnt down the plaintiffs building with appurtenances which was made up of four bedrooms with appurtenances and a fifth room which the plaintiff used as a store and in which said store the plaintiff kept 15 bundles of corrugated iron sheets, 50 (fifty) planks of timber, 50 (fifty) sheets of asbestos ceiling boards and 10 (ten) doors frames which she intended to use in the expansion of the building to accommodate her. All these materials were equally burnt and damaged and the plaintiff will at the trial tender and relies on all the cash sales invoices with which she purchased these materials\".

The appellant as defendant also pleaded in paragraphs 4, 6, 7, 8 and 9 of Statement of Defence that -

\"4. The defendant denies paragraph 4 of the statement of claim and puts the plaintiff to the strictest proof of the allegations contained therein.

6. In further answer to paragraph 4, the defendant owns an undeveloped fenced piece of land within the vicinity of its 39 New Market Road, Nkpor property.

7. The defendant denies paragraph 5, of the Statement of Claim and states that the said Defendant\'s piece of land had always been under safe control by the Defendant since its purchase in 1996 and had never constituted nuisance to adjoining neighbours.

8. Save that on 21/1/95 the Defendant\'s undeveloped plot was broken into by unknown persons and set ablaze, which said fire affected an adjoining property, the defendant denies all other allegations contained in paragraph 6 of the statement of claim. . . .

9. In further answer to paragraph 6 of the Statement of Claim, the Defendant states that the incident would have been avoided if not for the negligent act of the plaintiff who in building did not keep to the allowable air space as specified by the building regulations.\"From the pleadings of the parties, it is abundantly clear that the parcel of land from where the \"nuisance\" emanated was fenced and that it belongs to the defendant. The defendant/appellant denied occupying the plot at the material time and that the fire which caused the nuisance was set ablaze by unknown persons and not themselves or any one authorized by them. Therefore, for the plaintiff/respondent to succeed in this action, she must prove that the defendant/appellant was negligent as defined earlier in this judgment. At the trial, the plaintiff/respondent (hereinafter referred to as \'respondent\') gave evidence for her and called 3 other witnesses in support. She as P.W 1. Testified (page 30-31 of the record) that:-The defendant also owns another piece of land which has a common boundary with my land at No 29 Ezekwesili Street, Nkpor. The defendant\'s land is behind my land at No.29 Ezekwesiii Street in Nkpor. The said defendant\'s said land is walled round and it has an iron gate. It is sand Crete blocks used for the wall. The gate is locked with chains and padlock key. There is no building on that defendant\'s land.\" (Underlining mine)In cross-examination, P.w. 1 was asked whether she knew who set the bush in the defendant/appellant\'s house on fire and she replied -\"It was Universal Trust Bank Ltd.\"She explained on further questions that she was told by her tenants that it was the defendant who set the bush on fire.Pw. 2 was only a photographer who photographed the respondent\'s house after the fire incident and tendered them in court. He said nothing about the cause of the fire. Pw. 3 was a tenant of the respondent at the time the fire broke out in the respondent\'s house. He told the court that he was not present in the house when the fire broke out. He was told by a boy and he rushed to the house when the fire was still burning, removed his property from the house and went to the respondent and informed her of the incident. That was all he knew about the matter.From the testimony of the respondent and all her witnesses, there is no evidence at all to support the allegation that it was the appellant who set the bush in their plot on fire which affected the respondent\'s house. In fact, the respondent herself in her evidence conceded and admitted clearly that the appellant\'s said plot which has a common boundary with her said house was fenced with sandcrete blocks and the gate chained with padlock and keys. There was no evidence to show or even suggest that the wall was broken in any part to allow entry therein and the appellant did nothing about it.The appellant, as defendant, admitted owning the plot at No 29 Ezekwesili Street, Nkpor but that it was an empty plot not occupied by anybody and no building on it at the time material to this case. D.W. 2, who was then the manager of its Onitsha Branch, testified that the plot was fenced round with sandcrete blocks with iron gates securely locked to stop trespassers from going in it. He said that at one time when it was broken into, he got an iron welder to work on the gates which were properly secured and he placed a sign board warning trespassers from interfering with it. He also reported this to the Police. This was not denied or even challenged by the respondent at the trial.It is very clear from the evidence elicited above, that the appellant was not responsible directly or indirectly for setting ablaze the grass or bush in its parcel of land on the day in question. On the contrary, it was clearly and abundantly shown and proved, even with the admission of the respondent herself that the plot in question was sandcrete-walled and its gate padlocked at the material time. There is no doubt however that the appellant\'s and respondent\'s land had a common boundary separated by wall. Therefore because of this proximity, the law assumes that they are both neighbours in law and in contemplation of each other. Each owes a duty of care to the other so as not to do anything that can likely injure the neighbour or cause any damage thereto as a result of any act or omission.The learned counsel for the appellant in his brief of argument on this

issue conceded that the appellant was neighbour in law to the respondent and owed her a duty of care not to do anything or cause anything that could injure or damage her property. Counsel however submitted that the appellant had done all what was reasonably necessary and expected of them to prevent the happening of anything on their plot which would adversely affect their neighbours. He submitted that the Court of Appeal was wrong when it said in its judgment on page 154 of the record that:-\"The Appellant kept unmaintained dry bush on its piece of land in such a condition that if it got ignited, fire would likely spread to its neighbours. It did so in the course of some non-natural use. The thick bush got ignited and fire spread to cause havoc on the Respondent\'s nearby building. The appellant was rightly held liable in negligence/nuisance.\"Learned counsel explained further on page 5 of his brief the position of the appellant when he said:-\"But an unmaintained dry bush on one\'s land is certainly not a thing likely to catch fire without a miscreant setting it on fire. And the Appellant did all that was reasonably necessary to do as to prevent ingress by unauthorized persons into the said land.\"He went on to say:-\"Indeed the Appellant had excelled in his duty of care to the respondent by carefully securing properly the compound against intrusion by unauthorized persons by erecting sandcrete blocks round the compound with the gate locked with chains and a pad lock key.\"Counsel finally submitted after citing a plethora of decided cases in support that the Appellant is not liable for an escape of fire which is due to the negligent act of strangers to its property.For the respondent, it was submitted by learned counsel in the brief, that the appellant knew and has reason to know that it is not safe to leave or grow the kind of bush or forest found on their fenced up parcel of land especially during harmatan season in the face of incessant fire outbreaks, and that the defence that the fire incident was caused by trespassers does not hold any water. It was also contended for the respondent that the non-natural use of the land by the appellant constituted a nuisance in the built up area of Nkpor and the appellant breached its duty of care to the respondent resulting in the damages complained of. Counsel also cited some decided cases in support and finally submitted that the appellant was negligent on the evidence before the court and that the trial court and the Court of Appeal are perfectly right in finding the appellant liable in this case.In an action for negligence, a plaintiff can only succeed if in addition to pleading it and particulars thereof, he or she must also show the duty of care owed to him or her by the defendant and the breach of that duty by the defendant. It is not enough to allege all these in pleadings without establishing them by credible and reliable evidence at the trial.In the case of Anyah V. Imo Concorde Hotels Ltd & 2 ors (2002) 18 NWLR (pt. 799) at page 377, this court held- \"For the defendant to be liable for negligence there must be either an admission by him or sufficient evidence adduced to support a finding of negligence on his part.\"And it went further to hold - \"The most fundamental ingredient of the tort of negligence is the breach of the duty of care which must be actionable in law and not a moral liability. And until a plaintiff can prove by evidence the actual breach of the duty of care against the defendant, the action must fail. See Benson V. Utubor (1975) 3SC 19; Okoli V. Nwagu (1960) SC NLR 48; (1960) 3 FSC 16; Nigerian Airways Ltd V. Abe (1988) 4 NWLR (pt. 90) 524; Strabag Construction (Nig) Ltd V. Ogarekpe (1991) 1 NWLR (pt. 170)733.\"From the evidence of witnesses and the pleadings of the parties examined earlier in this judgment, the appellant did not admit any item of negligence on its part in this case. In fact it denied everything thereon and put the respondent to the strictest proof thereof. But has the respondent proved negligence in evidence' My answer to this question is in the negative. It was not proved by evidence that the appellant directly or indirectly caused the bush in its fenced plot to catch fire. It was not shown that it kept any thing combustible in the fenced plot which could cause the fire without more. It was not proved that the appellant was careless in leaving his plot wide open for any trespasser to go into and put fire to the bush alleged to be inside the plot. Rather, it was clearly shown, and even confirmed by the respondent herself, that the plot at the material time was fenced with sandcrete blocks all round and had an iron gate which was secured with chains and pad lock key. Therefore, it is my respectful view that the appellant had done everything necessary that a reasonable person would do to prevent the reasonable possibility of entering the plot and setting fire to the grass or bush in the plot concerned.If this happened, it cannot be within the reasonable contemplation of the appellant and the appellant cannot in my view, be held responsible for this and be found to have breached the duty of care to the defendant. Therefore, based on the evidence given at the trial as stated above, the findings of the trial court that the appellant was liable in negligence, is in my view perverse and the confirmation of the findings by the Court of Appeal wrong in law. I accordingly so hold. I therefore resolve this issue in favour of the appellant.The 2nd issue arising in this appeal raised by the appellant deals with the award of special damages as a result of the fire incident. Having found that the appellant was not in breach of the duty of care to the respondent as it did all that was reasonable in the circumstances, I do not think it is necessary for me to consider issue 2 in this appeal. If there is no liability for the negligence, that is the end of the whole case and the question of any damages resulting there from does not arise.The cross-appeal of the respondent also raised only one issue pertaining to the general damages awarded to her in which the Court of Appeal reduced the amount. This does not also arise as a result of my finding that the appellant was not negligent in what gave rise to the whole claim. I accordingly so hold.

Therefore from all what I have said above, I find that this appeal is meritorious. I accordingly allow it set aside the decision of the Court of Appeal and dismiss the cross-appeal. In the circumstances of this appeal, I do not find it necessary to award any costs against the respondent. Each party is to bear its own costs.

Judgment delivered by
Idris Legbo Kutigi, J.S.C.

I have had the privilege of reading in advance the judgment just delivered by my learned brother Kalgo, JSC. I agree with his reasoning and conclusions. I am clearly of the view that based on the evidence led at the trial, there was nothing to show that the Defendant/Appellant was negligent or in breach of its duty of care to the Plaintiff/Respondent. Both the trial High Court and the Court of Appeal were therefore in error when they found otherwise. That finding was in my view perverse as it was not supported by evidence. The appeal therefore succeeds and it is hereby allowed. The cross-appeal must of necessity therefore fail. It is dismissed. The judgments of the lower courts are set aside. And in their places an order dismissing Plaintiff/Respondent\'s claims is substituted. I also make no order as to costs.

Judgment delivered by
George Adesola Oguntade, J.S.C.

The respondent/cross-appellant was the plaintiff at the Onitsha High Court of Anambra State where he claimed against the appellant (as the defendant) the sum of two million Naira being special and general damages for nuisance and the negligent destruction of her landed property.The facts relied upon by the plaintiff may be briefly stated as these: The plaintiff owned a building at No. 29 Ezekwesili Street, Nkpor. The defendant owned an office at 39 New Market Road, Nkpor. Behind the said office, the defendant owned a parcel of land, which it fenced. There were buildings surrounding the fenced parcel of land one of which was plaintiffs building at 29 Ezekwesili Street, Nkpor. The defendant allowed a thick bush to grow on the enclosed land during harmattan period in spite of fire outbreaks occurring during such harmattan period. On or about 21/1/95, there was a fire outbreak in the bush in the defendant\'s compound. The plaintiff building was in the process burnt down. The plaintiff as a result claimed damages as earlier stated.The defendant denied liability to the plaintiffs claim. It pleaded that it owned the undeveloped land from which fire outbreak started on 21/1/95. The land was under safe control. The land was broken into on 21/1/95 by children who were attempting to kill rabbits. The defendant denied being the cause of the fire outbreak which destroyed the plaintiff's house.The case was tried on this state of pleadings by Ibeziako J. On 25/11/97, the trial judge in his judgment made awards in favour of the plaintiff in these words:

\"In conclusion, I order the defendant to pay to the plaintiff:

(1) the sum of N 11 0,000.00 as special damages for the loss of her building material destroyed by fire on 21-1-95.

(2) the sum of N1, 890,000.00 as general damages and

(3) N1, 000.00 being costs for this action.\"

Dissatisfied, the defendant brought an appeal against the judgment of the High Court before the Court of Appeal, Enugu. (Hereinafter referred to as \'the court below\'). On 5/12/2000, the court below in a unanimous judgment allowed the appeal on damages. It awarded a total sum of one million Naira as special and general damages as against the sum of two million Naira awarded by the trial court. Still dissatisfied the defendant has come before this Court on a final appeal. The plaintiff has also filed a cross-appeal.

In the appellant\'s brief filed, the issues for determination in the appeal were identified thus:

\"(i) Whether the learned Justices of the Court of Appeal were right in coming to the decision that negligence had been established against the defendant/appellant.

(ii) Whether the learned Justices of the Court of Appeal were right when they held that purchase receipts are enough evidence of damage allegedly destroyed by fire.

(iii) Whether the award of damages which was confirmed by the Hon. Justices of the Court of Appeal even though reduced was justified in law.\"

Following the filing of an additional brief, the appellant raised one extra issue which reads:

\"Was the respondent entitled to the award of general damages in the sum of N 848,000.00 at all.\"

The respondent raised three issues for determination namely:

\"(1) Whether the court below was right in concurrently holding that appellant was liable in negligence and nuisance and what is the attitude of this court to such a concurrent findings (sic)'

(2) Whether the court below was right in concurrently awarding special damages to the respondent and what is the attitude of this Court to such a concurrent finding'

(3) Whether the court below was right in concurrently finding the appellant liable in damages and what the attitude of this Court to such findings is.\"

Were the two courts below right to have found the defendant liable for nuisance/negligence on the facts pleaded by parties' In answering this question, it is necessary to examine the nature of the torts of nuisance and negligence. The trial judge correctly captured the common law meaning and nature of the two torts at pages 73-74 of the record in his judgment where he said:\"I shall now deal with the law of negligence and nuisance. Negligence has been described as being the omission to do something which a reasonable man would do, or the doing of something which a reasonable man would not do. (per Alderson B. Blyth v. Birmingham Waterworks Co. (11856) 11 Ex at 784, cited by Lord Reid in Bolton v. Stone (1951) A.C. at 865, and applied in Prosser v. Levy (1955) 1 W.L.R. 1224. to maintain an action for negligence it must be shown (a) that there was a duty on the part of the defendant towards the person injured (b) that the defendant negligently performed or omitted to perform his duty (c) that such negligence was the effective causes of injury of damage to the plaintiff. See Mc Dowall v. G. W. Ry (1903) 2 K.B. at page 338. The onus of proving that the result of the negligence was the effective cause of the injury is upon the plaintiff. See Ruoff v. Long (1916) 1 K.B. 152. The defendant is responsible for all the consequences he could foresee or reasonably be expected to foresee as the natural result of his negligent act or his negligent act or omission See Clark v. Chambers (1878) 3 Q.B.D. 327. The defendant is also liable for all the direct physical consequences even though they could not have been foreseen. See Ire Polemis and Rurness Withy (1921) 3K.B. 560. The statement of claim \'ought to state the facts upon which the supposed duty is founded and the duty to the plaintiff with the breach of which the defendant is charged\'. Particulars must be given in the pleading showing in which respect the defendant was negligent, and the details of the damage sustained. An express allegation of duty on the part of the defendant is a mere inference of law.On what constitutes a nuisance, it must appear that physical injury is inflicted on the plaintiffs' property, or that the ordinary use or the plaintiffs' property is materially interfered with. However whether anything is a nuisance is to be determined not merely by an abstract consideration of the thing itself, but with reference to the locality, the duration, and all the circumstances.\"The Torts Law of Anambra State 1986 Cap. 135 would appear to have encapsulated the common law principles of torts and nuisance. Sections 217, 218 and 251 of the aforesaid Torts Law provide:

\"Section 217 of the said Torts Law provides on negligence as follows:

217. Negligence as civil wrong shall consist of breach of a legal duty to take care which results in damage, which may not have been desired or even contemplated by the person committing the breach, to the person to whom the duty is owing.

218. Subject to this Law, every person shall have a duty to take reasonable care to avoid any act or omission which he is reasonably expected to foresee as likely to injure persons who are so closely and directly affected by his acts or

omissions that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to any such act or commission.

On nuisance, Section 251 of the Torts Law, (supra) provides:

251. A person who does an act or makes an omission or otherwise creates a condition which unreasonably interferes with another person\'s use or enjoyment of land, or of a right over or interest in land shall subject to this part of this Law, be liable to such other person for a civil wrong known as nuisance.

Under Section 254 of the torts Law, \'In order to constitute a nuisance, there must be-

(a) a wrongful act or omission.

(b) Damage actual or presumed;

2. Whether an act or omission constitutes a nuisance depends on the circumstances of the particular case including the time of the act complained of, the place and manner of its commission, and whether it is transitory, permanent, occasional or continuous.

3. A malicious motive may sometimes make an act unreasonable and therefore actionable as a nuisance.\"It ought generally to be borne in mind however that negligence is a question of fact not law, and each case must be decided in the light of its own facts. See Kalla v. Jarmakani Transport Ltd. [1961] All N.L. R. 74. It is also settled principle of law that in an action based on the tort of negligence, the plaintiff must show that the defendant owed him a duty of care and that he suffered damage in consequence of the defendant\'s failure to take care. See Agbonmagbe Bank Ltd. v. C.F.A. O. Ltd. [1967] N.M.L.R. 173.Now, on the facts pleaded and the evidence led in this case, was the defendant in breach of the common law and statutory duty of case owed to the plaintiff' I think not. The evidence is that the defendant owned and had under its control a parcel of land upon which grass or shrubs had grown. It was undisputed that the land was fenced. It was also not disputed that a fire which was caused by the activities of persons who were neither servants nor agents of the defendant spread from the said land to damage plaintiffs adjoining property. It seems to me that a reasonable person could not have foreseen the possibility that an unknown outsider hunting for rabbits would cause a fire outbreak on the defendant\'s property.A person who carries on himself or causes to be carried on by his servants, agents or independent contractors any operation which involves the creation of fire is under a duty to see that the fire is harmless to third parties. See Honeywill & Stein Ltd. v. Larkin Bros. Ltd. [1934] 1 K.B. 191; The Pass of Ballates [1942] P. 112 115-116. But a man could not prevent a fire about which he knew nothing of, or which he could not have known OF even with reasonable care: See Green v. Fibreglass [1958] 2 Q.B. 245.In the same way, a person who is not responsible for causing the act which is the foundation for an action in nuisance could not be liable to a third party. The defendant in this case was shown to be a banker not a rabbit hunter. The use of small fires to catch rabbits does not fall within its daily routine. It seems to me that it could not therefore be held liable for a nuisance caused by strangers.It was argued successfully in the two courts below that the defendant had a very thick dry bush on its land and that it ought to have known that in the harmattan season such bush is easily combustible if fire is set to it. That argument in my view is an attempt to underplay the fact that a very thick dry bush on its own does not catch fire during the harmattan season. To cause a fire outbreak, it will still be necessary to introduce a spark of fire. It is the introduction of a spark of fire that can be accepted as the effective cause of the fire outbreak.I entirely agree with the lead judgment by my learned brother Kalgo JSC. I would also allow this appeal and set aside the judgments of the two courts below. Plaintiffs' claims are dismissed. I subscribe to the order on costs. I also dismiss the cross-appeal.

Judgment delivered by
Mahmud Mohammed, J.S.C.

This appeal is against the judgment of the Enugu Division of the Court of Appeal delivered on 5-12-2000 reducing the amount of damages awarded to the respondent as plaintiff by the trial Enugu High Court against the appellant as the defendant. The damages were awarded in consequence of the loss suffered by the respondent when her house was destroyed by fire which started from a plot owned by the appellant on 25-1-1995. The negligent act complained of

against the appellant was its failure to take proper care and management of its plot of land adjoining the respondent\'s property. The appellant who still disputes its liability to the reduced damages awarded against it has further appealed to this court. The respondent, who was also dissatisfied with the decision of the Court of Appeal reducing the amount awarded as damages to her by the trial High Court, has cross-appealed against the judgment.
The principal issue arising for determination in this appeal is whether the loss suffered by the respondent as the result of the destruction of her property by fire was caused by the negligent act or conduct of the appellant. The respondent in her claim against the appellant relied heavily on the principle of liability in tort of negligence as expounded in the well known English case of Donoghue v. Stevenson (1932) A.C. 562 which was enacted in section 218 of the Torts Law of Anambra State as follows :-\"Subject to this law, every person shall have a duty to take reasonable care to avoid any act or omission which he is reasonably expected to foresee as likely to injure persons who are so closely and directly affected by his acts or Omissions that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to any such act or omission.\"The claim of the respondent having been brought under the provision of this law, the respondent as plaintiff has the onus and duty of not only pleading the relevant facts showing the appellant was negligent in causing the act of the outbreak of fire that caused damage to the respondent\'s property but also of leading credible and admissible evidence in proof of the facts pleaded. The general principle of law regarding the tort of negligence is that it arises when a legal duty of care owed by the defendant to the plaintiff is breached. To succeed in the action for negligence, the plaintiff must prove by preponderance of evidence or the balance of probabilities that-

(1) The defendant owed him a duty of care;

(2) The duty of care was breached;

(3) The defendant suffered damages arising from the breach.

See Agbonmagbe Bank Ltd v. C.F.A.O (1966) 1 All NLR 140 at 145. The most important of these ingredients to prove by the plaintiff, is the breach of the duty of care by the defendant. Unless this ingredient is proved against the defendant the action of the plaintiff must fail. See Benson v. Utubor (1975) 3 SC 19.In the instant case, the respondent as the plaintiff neither pleaded nor led admissible and credible evidence connecting the appellant with any act or omission that caused the fire outbreak on its walled and properly secured plot of land which caused damage to the respondent\'s property. The very thick dry bush which the appellant was accused of allowing growing on its land is not inherently dangerous in causing fire outbreak without an intervening factor which the respondent as the plaintiff failed to identify in order to link the appellant with the negligence in causing her to suffer the loss for which she went to court. Therefore the respondent having failed to prove her case against the appellant as required by law, her action ought to have been dismissed. The court below was thus in error in affirming the judgment of the trial court with reduction in damages only.In the result, I entirely agree with my learned brother Kalgo JSC in his judgment allowing the appellant\'s appeal. I also allow the appeal and set aside the judgment of the lower court. Respondent\'s suit is dismissed. I abide by all the orders in that judgment including the order on costs.

Judgment delivered by
Ikechi Francis Ogbuagu, J.S.C.

This is an appeal against the Judgment of the Court of Appeal, Enugu Division delivered on 5th December, 2000 finding the Appellant liable in negligence/nuisance. It however, reduced the award made by the trial court on the ground that it was based on an erroneous finding/footing.Dissatisfied with the decision of the Court of Appeal (hereinafter called \"the court below\"), the Appellant has appealed against the entire Judgment (although it is not indicated in the Notice of Appeal, whether or not the appeal is against \"the whole Judgment\" or part of it as required or provided by a Notice of Appeal). But the Reliefs sought in the said Notice, are for the Court to allow the appeal and set aside the said Judgment of the court below. There are three grounds of appeal. The Respondent, also aggrieved/dissatisfied with the part of the decision reducing the award made to her, has cross-appealed to this Court on three (3) Grounds of Appeal. Without their particulars, they read as follows:

'(1) The learned Justice of the Court of Appeal erred in law when they awarded damages which were never raised by any of the Grounds of Appeal.

(ii) The Learned Justices of the Court of Appeal erred in law when they failed to give effect to uncontroverted evidence by the plaintiff on the estimated cost of rebuilding her house but moved in to reduce the awarded damages to the barest minimum.

(iii) The Learned Justices of the Court of Appeal misdirected themselves in law and fact when, in the face of clear evidence to the contrary, they held that the building was not completely destroyed by fire.\"

For the avoidance of doubt, I will also reproduce, without the particulars, the Appellant\'s Grounds of Appeal. They are as follows:\"The Learned Justices of the Court of Appeal erred in law when they held that the Appellant/Defendant was liable in negligence for an outbreak of fire which was due to the negligence of strangers/third parties.\"I note that this ground was/is not numbered. You only see thus: 2 'Grounds of Appeal'

\"2. The Learned Justices of the Court of Appeal erred in law in coming to the decision that purchase receipts are enough evidence of damage to property allegedly destroyed as a result of the outbreak of fire.

3. The Court of Appeal proceeded on a wrong principle of law when it awarded the sum of N 848,000.00 to the Respondent vis a vis the award of N 1.7Million made by the lower court without stating how it arrived at such a figure.\"In its Amended Brief of Argument filed on 4th October, 2005, the Appellant formulated three (3) issues for determination, namely:

\"(1) Whether the learned Justices of the Court of Appeal were right in coming to the decision that negligence had been established against the Defendant/Appellant Ground 1.

(ii) Whether the learned Justices of the Court of Appeal were right when they held that purchase receipts are enough

(iii) Whether the award of damages which was confirmed by the Hon. Justices of the Court of Appeal even though reduced was justified in law - Ground 3.\"In its Additional Appellant\'s Brief, one (1) Issue for determination is formulated. It reads thus:

\"2.00 Was the Respondent entitled to the award of general damages in the sum of N848, 000.00 at all (Ground 3).'The Respondent, in her Brief of Argument, formulated three (3) Issues for determination, namely,

\"(1) Whether the court below was right in concurrently holding that Appellant was liable in negligence and nuisance and what is the attitude of this Court to such a concurrent findings (sic)'

(2) Whether the court below was right in concurrently awarding special damages to the Respondent and what is the attitude of this Court to such a concurrent finding'

(3) Whether the court below was right in concurrently finding the appellant liable in damages and what is the attitude of this Court to such findings\"'The Respondent on 10th May, 2006, filed a Notice of Preliminary Objection as to the competency of Grounds 1, 2 and 3 of the Grounds of Appeal of the Appellant. The grounds of objection, according to the Respondent, \"for the proposed preliminary objection\", are \"inter alia\":

\"(a) Grounds 1, 2 and 3 of the Grounds of Appeal are, at best, of mixed law and facts as well as on concurrent findings of fact made by the Trial Court and the Court of Appeal.
The said grounds are therefore incompetent in that:

(i) The appellant did not seek for and obtain the leave of the Honourable Court before filing the said grounds of Appeal.

(ii) Failure to comply with the requirements, as set out in paragraph (b) above is fatal to the said

(i) The said issue does not arise from the said Ground of Appeal.

(c) Ground 3 is equally incompetent as no valid issue was formulated from it.

(d) Issues 1 and 2 formulated from grounds 1 and 2 are equally incompetent.\"

Reliance is placed on the provisions of Section 233 (1) of the 1999 Constitution of the Federal Republic of Nigeria, Order 2 rule 32 of the Rules of this Court and the cases of Ferodo Ltd. & anor. v. Ibeto Industries Ltd. (2004) 5 NWLR (Pt.866) 317 @ 344 (it is also reported in (2004) 2 SCNJ. 77 and (2004) 2 S.C. (Ptl) 1) and Onifade v. Alhaji Olayiwola & ors. (1990) 7 NWLR CPt.161) 130 @ 154 (it is also reported in (1990) 77 SCNJ. 10).

At the hearing of the appeal on 30th October, 2006, Mr. Oguji amplified their Brief. While Amene, Esqr, urged the court to allow the Appeal and dismiss the objection, Oguji, Esqr, urged the Court to hold that the Appeal is incompetent and dismiss the Appeal and allow the Cross-Appeal. He stated that there was no ground of appeal on the award of damages.

That the court below raised the issue suo motu.

Frankly, in my respectful view, it seems to me that the entire complaint in this objection is to the effect that the said grounds of appeal, are on concurrent findings of facts by the two lower courts and that they were filed without leave. This proposition or argument with respect, seem strange to me. This is because, I know of no law which says that an Appellant requires the leave of court before filing an appeal against the concurrent findings of two lower courts. Sometimes, this Court does not interfere and in some other appropriate cases, it interferes in concurrent findings of facts by the two lower courts.It is settled law as rightly submitted in the Appellant\'s Reply Brief to this objection, that a ground of appeal complaining of the wrong application of the law by the court below to the findings of fact made by it or to admitted facts, is a ground of law. This is what I discern from the three grounds of appeal of the Obatoyinbo & anor. v. Oshatoba & anor. (1996) 5 SCNJ. 1 @ 16 - per Ogundare, JSC and Olanrewajui & anor. v. Ogunleye (1997) 1 SCNJ. 144.Also settled, is that a ground of appeal showing that a trial or Appellate Court, misunderstood the law or misapplied the law to proved or admitted facts, is a ground of law. See Alhaji Maigoro v. Alhaji Jibrin Carba (1999) 10 NWLR (Pt.624) 555 @ 568-569, 570 (1999) 7SCNJ. 270 citing several other cases therein.On the authorities and in my humble and respectful view, the three (3) grounds of appeal cannot be said to be of mixed law and facts. I hold that they are grounds of law. I accordingly overrule the objection which 1 hereby dismiss.I will however, pause here, to comment on the submission in the Reply to the Preliminary Objection to the effect that the Respondent, did not file as an addition, (sic) an affidavit in support of the Notice. That the \"application\" - i.e. the Notice of Preliminary Objection, cannot stand on its own, without an affidavit, as according to the learned counsel, \"it is not based on law alone but also on facts\". That since it is not having a supporting affidavit, the court is urged to discountenance the same for being incompetent and therefore, to strike it out. Reliance is placed on the case of Attorney-General of the Federation v. ANPP & ors. (2003) 8NWLR fPt.351) 82 ratio 10 (it is also reported in (2003) 12 SCNJ. 67).For the avoidance of any doubt, Order 2 Rule 9 of the Supreme Court Rules under which the Preliminary Objection is also brought provides as follows:\"A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing, setting out the grounds of objection, and shall file such notice together with ten copies thereof with the Registry within the same time

[the underlining mine]

(2) If the respondent fails to comply with this rule the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit.\"

I do not see in the above provision, where the question or issue of any affidavit or additional affidavit in support, is ever stated in the above sub-rule 9(1) & (2) of the said Rules. In the above case, Chief Afe Babalola (SAN), made at the time the appellant in the case appealed, the office of the Attorney-General, was vacant and that meant that the Attorney-General was legally \"dead.\"

Tobi, JSC, in re-acting to Chief Afe Babalola (SAN\'s) submission, stated as follows at page 207, as follows:

\".....With respect, he cannot carry me along in that submission. Preliminary objection, by its very nature, deals strictly with law and there is no need for a supporting affidavit. In a preliminary objection, the applicant deals with law and the ground is that the court process has not complied with the enabling law or rules of court and therefore should be struck out. It could be an abuse of court process. If the preliminary objection is successful, the court will not hear the merits of the matter as it will be struck out. However, if a preliminary objection leaves the exclusive domain of law and flirts with the facts of the case, then the burden rests on the applicant to justify the objection by adducing facts in an affidavit. The applicant, in that circumstance, stands the risk of his objection being thrown out or rejected, if he fails to satisfy the court of the facts he has relied upon\".

[the underlining mine]

From the above pronouncement, can it be seriously contended as the Appellant\'s learned counsel has done, that the Respondent left the exclusive domain of law and was/is flirting with the facts of the case' I think not. I therefore, find no substance in this submission and the reliance in the above case for the said submission. I reject the same.

Now, to the merits of the appeal. The facts briefly stated, are that the plaintiff, now the Respondent, sued the Appellant at the High Court of Anambra State holden at Ogidi in the Idemili Judicial Division, claiming damages in the sum of N2, 000.000.00 (two million naira) as special and general damages \"for the nuisance and negligent destruction of her landed property and materials by the defendant\". After the trial, the learned trial Judge - Dr. Ibeziako J. found in favour of the Respondent in his considered judgment delivered on 25th November, 1997 and awarded to her, the full sum of N2m (two million naira) claimed by her.

Aggrieved by the said judgment, the Appellant, appealed to the court below. In its Judgment delivered on the 5th December, 2000 - per Fabiyi, JCA, awarded to the Respondent, the sum of N1,000,000.00 (one million naira) made up as follows:

\"N110, 000 for loss of goods in the burnt store

N42, 000 for loss of rent and

N848,000 as general damages.'

The court below, found as a fact, that it was not the whole/entire house or building/bungalow that was burnt down.

The trial court, had awarded the sum of N1, 700.000 (one million, seven hundred thousand naira) as general damages which the court below, described as a staggering amount. It found that the claim of N110, 000.00 (one hundred and ten thousand naira) for special damages, was well made and awarded as they, according to it, were strictly proved.

Dissatisfied with the said judgment, the Appellant has appealed to this Court while the Respondent, Cross-Appealed. Without much ado, what is the evidence before the trial court' I or one may ask. The court below inter alia, at page 143 of the Records, stated the background facts leading to the appeal before it, as follows:

' The Respondent maintained at the trial court that the said vacant piece of fenced land was not properly maintained by the Appellant as the same was over-grown with grasses and a big forest during the peak of harmattan period. The unmaintained or badly maintained land is within a densely populated area. The Respondent stated that on 21/1/95, the said vacant piece of land caught fire which affected her said bungalow and according to her, it totally got burnt down as a result.

The Appellant maintained that the said land was at all times material to the matter secured by a high fence kept under lock and key. The appellant confirmed the fire incident and that the Respondent\'s house was badly damaged. She

confirmed that investigation carried out after the fire incident revealed that the said piece of land was, around the material time, broken into by unknown persons. As well, neighbours heaped rubbish on the vacant piece of land. Investigations also revealed that children hunting for rabbits set fire and holes were dug on their vacant piece of land.

This assertion is contained in paragraph 13 of the statement of defence\".

(the underlining mine)

Or one may ask in the circumstance, is a concurrent finding of fact, enough' Can this Court, infer from such said evidence, nuisance or negligence on the part of the Appellant' With profound respect and humility, I think not. The land was fenced with high fence. There is no evidence from the records, that the Respondent ever complained to the Appellant, about the alleged nuisance, or draws the Appellant\'s attention as to the state of the piece of land. Again, there is no evidence that she ever mitigated the nuisance by trimming or cutting the overlaps of some of the trees into her own premises.

What is Nuisance' 1 or one may ask. The learned trial Judge at page 74 of the Records referred to and reproduced section 251 of the Torts Law of Anambra State of Nigeria, as follows:

\"A person who does not act or makes an omission or otherwise creates a condition which unreasonably interferes with another person\'s use or enjoyment of land, or of a right over or interest in land shall subject to this part of this Law, be liable to such other person for a civil wrong known as nuisance\"

Now, Section 254 of the Tort\'s Law provides as follows:

\"In order to constitute a nuisance, there must be -

(a) a wrongful act or omission.

(b) damage actual or presumed.

(c) whether the act or omission constitutes.

..... circumstances\".

Note: At page 74 of the Records, the last two lines are erased/blurred and not legible at all. The attention of the Litigation Officer was drawn by me to this fact.

'(2) Whether an act or omission constitutes a nuisance depends on the circumstances of the particular case, including, the time of the act complained of, the place and manner of its commission, and whether it is transitory, permanent, occasional or continuous.

(3) a malicious motive may sometimes make an act unreasonable and therefore actionable as a nuisance.\"

As regards negligence, Section 217 of the Torts Law provides as follows:

\"Negligence as civil wrong shall consist of breach of a legal duty to take care which results in damage, which may not have been desired or even contemplated by the person committing the ''

\"Subject to this Law, every person shall have a duty to take reasonable care to avoid any act or omission which he is reasonably expected to foresee as likely to injure person who are so closely and directly affected by his acts or omissions that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to any such act or omission\"

Nuisance is concerned with conditions or activities which unduly, interfere with the use or enjoyment of land. In respect to negligence, the foundation of the modern law appears to be the pronouncement of Lord Atkin, in the case of Donoghue v. Stevenson (1932) A.C. 562, 581-582 also cited in the Appellant\'s Brief thus:

\"..... Who then is my neighbour' The answer seems to be persons who are so closely and directly affected by any act that 1 ought reasonably to have them in contemplation as being so affected when I am directing my mind to the act or omissions which are called into question.\"

The duty of care so stated, is said to be based on the existence of a danger of physical injury to persons or property. It seems there is no general liability in tort, for pecuniary loss dissociated from physical damages. See Bullen & Leake & Jacobs Precedents of Pleadings 13th Edition page 671. As the existence of a duty of care will ultimately depend on the facts of each case, then, it seems that there can be no precise exposition of the current scope of the modern concept of a duty of care in negligence.

I or one may ask, from Lord Atkin\'s above pronouncement and the provisions of Section 218 of the Torts Law reproduced herein above, could it be honestly and seriously contended, that the Appellant, by or through its officers, servants or agents, (since it operates through human beings) could have reasonably foreseen, that unknown person or persons, (strangers or trespassers), would have unauthorized by them, entered into the fenced property, and set fire therein' Speaking for myself, I think not. This is what I understand to be the forcibility test in Lord Atkin\'s pronouncement and section 218 of the Torts Law. It seems to me, that the two lower courts did not avert their \"minds\" to this well laid down test.

In my respectful view, a holding by the court below, that by the Appellant, keeping an unmaintained dry bush on its said property, that \"if it got ignited, it was by fire from Respondent\'s nearby building\", with respect, is no evidence that the Appellant, set the fire through or by its servants or agents or played any part, in fire gutting down part of the Respondent\'s said building. A court is not entitled to assume or speculate anything. It is dangerous and unfair to do so. Often times, it leads to a miscarriage of justice as appears in the instant case.

I wish to pause here to state that the facts of the case of Mason v. Levy Auto Parts of England Ltd. 0967) 2 AH E.R. 62 relied on by the court below and which it stated that \"The Appellant is caught by the web of the factors laid down\" in the case, are distinguishable by the instant case leading to this appeal. As a matter of fact, the facts are diametrically apart, so to speak. They are not the same at all. Surely, grasses, trees or thick bush\", in my respectful view, cannot be equated with or described as \"combustible or inflammable material\" that any reasonable man, would have anticipated to be responsible for the destruction of part of the Respondent\'s said building.

As a matter of fact, it is stated that in forensic speech, negligence has three (3) meanings - i.e. - (i) a state of mind in which it is opposed to intention (ii) careless conduct and (iii) the breach of a duty of care imposed by common law and statute resulting in damage to the complainant. It seems to me that the Respondent anchored her claim, on breach of the duty of care. For a thorough exposition and discussion of the subject-matter of negligence, the Book Authority of Charlesworth on Negligence 4th Edition, will be handy and perhaps, helpful to the reader. However, since there appear to be three (3) essentials of actionable negligence - viz -

(a) The existence of a duty to take care owing to the complainant by the defendant.

(b) Failure to attain the standard of care prescribed by the law, thus committing a breach of the duty of care prescribed by the law, thus committing a breach of the duty of care and

(c) damage suffered by the complainant which is casually connected with the breach of duty to take care,

it is my respectable but firm view, that the Respondent, did not establish at the trial court, conclusively and equivocally, all the above ingredients or essentials.

I must confess that I am in sincere sympathy with the Respondent for part of and this settled, negligence, is not

established by proving that the loss (or here the fire), might have possibly and with extra ordinary foresight and prudence, been avoided.

In the case of Wema Bank Ltd. v. B B C Brown Boveri (Nig.) Ltd. (1996) 6 NWLR. (Pt.454) 364 @ 381 C.A. also cited and relied on in Appellant\'s Brief, negligence was defined and therein, it was stated that the general concept of reasonable foresight, is the criterion of negligence. That the application of foreseability is fluid and that it has to be fitted to the facts of the particular case. That negligence is never established by proving that the loss sustained by the plaintiff, might possibly and with extraordinary foresight and prudence, have been avoided by the defendant.

Learned counsel for the Appellant, has cited and relied on the English cases of Rofhschild (not Rothschild as appears in Appellant\'s Brief) v. Royal Mail Stream Packet Co. (1851) 18 L T. 334 (not 81 LT. 334 as appears in the Appellant\'s Brief) and Hart v. Land and Yorks Raff Co. (1969) 21 LT. 261 (not Lanes and not (1968) 21 LT. 261 as appears in the Appellant\'s Brief).

Note: It is disgusting to me to observe that learned Counsel did not take pains to cross-check the cases and the references as appear in the said Reports.

See Bingham\'s Motor Claims 7th Edition page 4 where the passage in Wema Bank Ltd, case making references to the above cases, are contained or cited.

More succinctly, in the case of H & N. Emmanuel Ltd, v. C L C Co. & anor. (1972) II All ER. (sic) 835 @ 838 - 839 wrongly cited and relied on in the Appellant\'s Brief and not very correctly reproduced, (it is V. Greater London Council & anor. (1971) 2 All E.R.L it was held that an occupier, was liable for the escape of fire caused by negligence not only of his servant, but also of his independent contractors and anyone else who was on his land with his leave and licence. That the only occasion when the occupier would not be liable for negligence, was when the negligence, was the negligence of a stranger.

Lord Denning at page 839, for this purpose held that a \'stranger\', would include a person on the land with the occupier\'s permission who, in lighting a fire or allowing it to escape, acted contrary to anything which the occupier could consent. Surely and certainly, where a stranger who in lighting a fire - (either to chase out an animal or animals from a bush), or allowing it to escape, acts contrary to anything which the occupier could anticipate that he would do, such an occupier, in my respectful view, would not be liable for such act.
In order to buttress or underscore my view in this case leading to the instant appeal, the material pleading and evidence of the Respondent and P.W. 2, are pertinent. In paragraph 5 of the Statement of Claim at page 6 of the Records, the Respondent, pleaded that the Appellant committed a terrible act of nuisance on the said fenced up parcel of land belonging to him (sic) (meaning it) by allowing a thick dry bush to grow on the same and negligently left the said dry bush to stay on the said parcel of land all through the harmattan periods in spite of incessant fire outbreaks during these periods and in breach of his duty of care to her whose property shares a common boundary with \"the fenced up parcel of land belonging to the Appellant\".

From the above pleading, the Appellant is charged or accused by the Respondent, of committing a terrible nuisance and negligence in breach of a duty of care. Firstly, I observe that in her evidence in-chief at pages 30 to part of 34 of the Records, she never talked about any nuisance. More importantly, she gave her said evidence not on oath, on 29th April, 1997. There is no reason in the Record for this. It was only on the second occasion at pages 34 to 38 when she testified and was later cross-examined, that she testified on oath.

However, at page 31 of the Records, she testified, inter alia, as follows:

'..... The said defendants said land is walled round and it has an iron gate. It is sandcrete blocks used for the wall (sic). The gate is locked with chains and a padlock key. There is no building (sic) on that defendants land. Rather it contains (sic) a big forest or bush. The walled land of the defendant is also sharing a common boundary with the land where the defendant has its bank. But that defendant unbuilt up land is behind the defendant\'s bank premises.'

On 21/1/95, my house at No. 29 Ezekwesili Street, Ngor, was burnt down to ashes. My house was set ablaze because the bush behind my building was burning and from there fire got to my house. The land from which the fire got to my house is owned by the defendant. His happened on 21\\1\\95 it was in the middle of Harmattan.

(the underlining mine)

Under cross-examination, the Respondent denied that in her evidence at a previous trial at the Onitsha High Court, she swore that she did not tell that court, that she did not know who set her house on fire. She maintained that it was the Appellant who set the bush on fire. She had earlier stated that she was told by one of her tenants - one Omekannaya Okeke on the very day of the fire. She later stated that her tenants informed her that the fire extended and came from the property of the Appellant into her own house. Exhibit J. is a certified copy of the proceedings before Ofomota, J. on 25th July, 1996.

In Exhibit \"J\", on oath, the Respondent, testified under cross-examination, on 25th July, 1996, inter alia, as follows:

\"I was not there when my house started burning for I do not live in the house ..... I am a witness of truth. 1 do not know who set the house ablaze. What I know is that the fire which gutted my house came from the plot of land of the defendant.\"

[the underlining mine]

Now, one of the tenants - Omekannaya Okeke is the P.W.3. On oath, at page 39 lines 19 to 29 of the Records, testified in his evidence in-chief inter alia, as follows:

\"..... I was a paying tenant ..... I am no longer living there. I moved away from the house because the house was burnt down, I was not there when the fire started. I was in the market at Nkpor main market when the house caught fire. I knew of the fire, because a small boy living in our premises came to me at the market and told me of the fire. I do not remember the name of the boy. When I came to the house, it was not yet on fire but the bush near our house was on fire.....\"
[the underlining mine]

He did not say that the boy whose name he did not disclose, told him, how and who started the fire. The boy merely told him, according to the witness, of the fire. So, there was/is no eye witness, of how the fire started or who set the fire in the bush. So, in the face of the fact, that there is no evidence of any eye witness, of how and who started the fire, surely and certainly, the two lower courts, were not justified to have held the Appellant liable for nuisance/negligence.
The basis for such holding in my humble but firm view is on presumption.

I have taken pains to examine the evidence of the Respondent and one of her witnesses in order to underscore my view that there is no how on the evidence and the law, the Appellant could have been held liable in negligence and/or nuisance for the fire that burnt the house (part or whole) of the Respondent, by the trial court which finding was affirmed by the court below. I so hold.

This brings me to the fact that in spite of the pleading in paragraph 14 of the Respondent\'s Statement of Claim, the trial court, awarded a lump sum of N1, 890,000.00 (one million eight hundred and ninety naira) at page 808 of the Records part of which the court below, described at page 158 of the Records as \"a staggering amount\" as general damages for two separate torts. 1 had noted that in the said paragraph 14 of her Statement of Claim, she claimed N2 million naira \"for nuisance and negligent destruction of her landed property and materials by the defendant. In my respectful view, since these are different types of tort, separate amounts, ought to have been claimed and the trial court, should have awarded separate amount for each proven tort of nuisance and negligence.

Having found as a fact and held that the two lower courts were/are wrong in law and in fact to have found the Appellant liable for nuisance and negligence, it is no longer in doubt that they were not justified to have so held. The concurrent finding of fact, in the circumstance, is of no moment in my respectful view. This is because, an Appellate Court can

interfere with concurrent findings where the error in law is substantial (as in the instant case leading to this appeal) and that it has occasioned a miscarriage of justice. See the cases of Ukejianya v. Uchendu 13 WACA 45 @ 46: Onajobi v. Olanipekun (1985) 3 S.C (Pt.2) 156 (d) 163; Abiodun Amurati v. Madam Agbeke (1991) 6 SCNJ. 54 @ 64 and Azuelenma Ike & ors. v. Ugboaja & ors. (1993) 6 NWLR (Pt. 201) 539 @ 536; (1993) 7 SCNJ. 402 just to mention by a few. How could the Appellant, on the admission in the said evidence of the Respondent that the Appellant\'s said land, was walled round with sandcrete blocks and with an iron gate which was locked with chains and padlock key, be found liable for the said fire' I or one may ask. I hold that it was a miscarriage of justice to have found the Appellant liable in the damages that were the issue of award of damages in favour of the Respondent, become and will amount to an exercise in futility by me.

But for the records, in respect of Ground 2 of the Appellant\'s grounds of appeal and its issue (ii), it has been held, that there is strict proof of speed damages where there is a production of receipt as evidence of payment without oral evidence of the maker. See Eluwewe v. Elder Dempster Agencies Ltd. (1976) 6 U.T.L.R. (University of Ife Law Report) (Pt.11) 225. So, was I to consider that issue, my answer would have been in the affirmative - i.e. that the court below, was right when it held that purchase receipts, are enough evidence of damage to property allegedly destroyed by fire.

In the final result, it is from the foregoing and the fuller reasons in the lead Judgment of my learned brother, Kalgo, JSC that I too, allow the appeal which is meritorious. I too set aside the judgments of the courts below in their entirety. I too dismiss the cross-appeal. I abide by the order in respect of costs.

Counsel

A.O. Amene, Esq ..... For the Appellants

T.U. Oguji, Esq ..... For the Respondent