



REPUBLIC OF KENYA



KENYA LAW
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**Donwoods Company Limited v Mwithiga (Civil Appeal
E037 of 2020) [2022] KEHC 10927 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E037 OF 2020
TW CHERERE, J
JUNE 23, 2022**

BETWEEN

DONWOODS COMPANY LIMITED APPELLANT

AND

ZAVERIO MACHAKU MWITHIGA RESPONDENT

*(Being an appeal from the Judgment and Decree in Nkubu PMCC No.
15 of 2018 by Hon. E.M AYUKA (SRM) on 19th November, 2020)*

JUDGMENT

1. By a plaint dated 22nd February, 2018 filed on 18th December, 2020, Respondent sought against the Appellant special damages in the sum of Kshs. 586,000/- being the value of damaged building of crops; Kshs. 7,500/- per month being loss of rental income until the Appellant vacates its blasting site; costs of the suit and interest.
2. Appellant in its statement of defence dated 16th April, 2018 filed on 18th April, 2018 denied the Respondent's claim and urged that the case be dismissed.

Respondent's case

3. Respondent testified that he was the registered owner of LR. Igoji/Kiangua/2114 as shown on the title deed tendered as PEXH. 1. It was his evidence that around April, 2017 Appellant commenced quarrying activities next to his land as a result his house and crops were damaged. In support thereof, he tendered the Agricultural officer's report dated 18th April, 2017 PEXH. 1 in which the value of the damaged crops was assessed at Kshs. 255,000/- and another dated 16th January, 2018 in which the value of the damaged crops was assessed at Kshs. 170,000/-. A valuation report dated 06th May, 2017 PEXH. 3 assessed the cost in which the value of the damaged house at Kshs. 86,000/- Respondent further



testified that his tenant vacated after the house was damaged and he had lost and continues to lose rent in the sum of Kshs. 7,500/- monthly.

Appellant's case

4. Appellant's witness conceded that the blasting activities had damaged Respondent's house and crops and faulted Respondent for declining the compensation that was offered to him.
5. After hearing both parties, the trial magistrate found the Respondent's case proved and by a judgment dated 19th November, 2020 awarded the Respondent
 - a. Kshs. 586,000/- (loss and damage)
 - b. Kshs. 500,000/- in general damages
 - c. Costs of the suit and interest.
6. Aggrieved by the judgment, Appellant on 18th December, 2020 filed the memorandum of appeal dated 14th December, 2020 raising 6 grounds mainly that:
 1. The Respondent's special damages claim was not strictly proved
 2. The award of Kshs. 500,000/- for general damages is inordinately high
7. On 28th March, 2022, this court directed that the appeal be canvassed by way of written submission which the Respondent dutifully filed.

Analysis and Determination

8. In carrying out its mandate, the appellate court must reconsider the evidence before it, evaluate it and draw its own conclusions.
9. In *John Onyango & another v Samson Luwayi* [1986] eKLR the Court of Appeal expressed itself as follows: -

“This court will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases: Abdul v Rubia 1917/1918 7 EALR 73.”
10. I have carefully perused the record before me, and considered the grounds of appeal and submissions on behalf of the Respondent.
11. It is trite law that "whoever alleges must prove. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya states that:
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
12. Respondent's evidence that his house and crops were damaged was conceded by the Appellant's witness in her testimony before the trial court. The cost of the damage was assessed in three reports to the total sum of Kshs. 511,000/-. I therefore find that Respondent proved special damages in the sum of Kshs. 511,000/- and not Kshs. 586,000/- that was awarded under this heading. The sum for loss of rent was not proved and ought not to have been awarded.



13. Concerning general damages for nuisance and disturbance of peace, I have considered *Clerk and Lindsell on Torts* 7th Edition page 1354 para 24-01 where ‘nuisance’ is defined as
- “an act or omission which is an interference with, disturbance of or annoyance to, a person’s rights used or enjoyed in connection with land. It is caused, usually when the consequences of a person’s actions on his land are not confined to the land, but escape to his neighbors’ land causing an encroachment and causing physical damage or unduly interfering with the neighbours use and enjoyment of his land”
14. The tort of nuisance is actionable upon proof of damage and I find that damages have been proved in this case. At the hearing, Respondent cited *John Chumia Nganga v Attorney General & another* [2019] eKLR where the court awarded Kshs. 1,000,000/- for unlawful excision of land.
15. Quantum is a matter of judicial discretion which can only be interfered with if the court is satisfied that a decision is clearly wrong, because the court has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo v Shah* (1968) EA 93 and *Kemfro Africa Limited t/a Meru Express Services (1976) & Anor. v Lubia & Anor.* No. 2 [1987] KLR 30).
16. I have considered the award of Kshs. 500,000/- awarded to the Respondent and I find no material to suggest that the same was not well founded considering the circumstances of this case.
17. In the end and for the reasons given on the foregoing analysis, the appeal partially succeeds and it is hereby ordered:
1. The award of Kshs. 586,000/- favour of the Respondent as against the Appellants is set aside and substituted with an award for special damages in the sum of Kshs. 511,000/-
 2. The award for Kshs. 500,000/- in general damages is upheld
 3. Each party shall bear its own costs of the appeal

DATED AT MERU THIS 23RD DAY OF JUNE 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Wandati for Kisilu, Wandati & Co Advocates

For Respondent - Mr. Mwirigi for Mwirigi Kaburu & Co. Advocates

