



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAJIADO

ELC CASE NO. 820 OF 2017

DR. ALI KOLELA MONTET.....PLAINTIFF

VERSUS

CHINA ROAD & BRIDGE CORPORATION (K).....DEFENDANT

JUDGMENT

The Plaintiff's claim against the Defendant is as follows;

- a) A permanent injunction to restrain the Defendant by itself, its agents, assignees, or employees from carrying out blasting activities at its quarry site located at Ngong Veterinary Farm,
- b) Special damages of Kshs. 770,000/=
- c) Costs of the suit
- d) Interest of (b) and (c)
- e) Any other relief

The Plaintiff's case is as follows;

He is the registered proprietor of L.R. NGONG/NGONG/ 21558. He has built residential houses on the land. He is also an immediate neighbor of the Defendant at Ngong Veterinary Farm Quarry where blasting and excavation works have been ongoing.

As a result of the blasting and excavating works by the Defendant, the Plaintiff's property developed cracks on the walls, the foundation and the perimeter wall.

The Plaintiff complained to the Defendant who visited the site through its representatives. The damage to the Plaintiff's property was assessed by the Defendant who promised to repair the damage or compensate the Plaintiff and other members of Kerarapon Residents Association.

The Plaintiff later instructed Frandma Supplies System, a qualified firm of surveyors to repair the damage which they did at a total cost of Kshs. 700,000/=.

The Plaintiff submitted the bills of quantities to the Defendant but no action was taken in this regard. Again the Defendant made a false promise to send its structural engineer to carry out an assessment and verification with a view for compensation of the claim but no compensation took place inspite of the assessment and verification.

At the time the Plaintiff recorded his witness statement on 19th October, 2018, heavy blasting was continuing, causing more damage to the Plaintiff's property. The defendant did not show any sense of obligation or remorse. It is for the above reasons that the Plaintiff filed this suit.

In support of his case, the Plaintiff filed the following documents;

1. Title Deed for L.R. NGONG/NGONG/21558
2. Assessment and valuation report

3. Demand letter

4. Receipt for repairs

The Defendant, through counsel on record filed a Written Statement of Defense dated 28/3/2018.

It is the Defendant's defence that it was contracted by the Government of Kenya to construct the Nairobi Southern Bypass Road.

In order to carry out the project, the Defendant has been extracting building materials from the Ngong Veterinary Farm Quarry in Ngong. The extraction of the said materials involved blasting and excavation works at the quarry.

Before quarrying, the Defendant obtained all the requisite licences from National Environment Management Authority, license to manufacture explosives from the Ministry of Mining, authority to conduct blasting from the Ministry of Environment and Mineral Resources, occupational Health and safety audits from the relevant authority, five Safety Audits from the relevant body and a Certificate of Registration of workplace from the relevant body.

In June 2015, the Defendant received complaints from the Plaintiff regarding the blasting activities and engaged its quantity surveyor to assess the damage to the Plaintiff's property.

The value of the damage came to Kshs. 453, 310/=.

In support of its defence, the Defendant filed the following;

- (1) A witness statement by one William Ouko
- (2) Copy of Environmental Impact Assessment Licence from NEMA
- (3) Certificate of Registration of Workplace
- (4) Licence to manufacture explosives
- (5) Licence to store blasting explosives
- (6) Authority to conduct blasting
- (7) Occupational Health and Safety Audits
- (8) Defendant's Quantity Surveyor's Report

At the trial, the Plaintiff and a witness named Joseph Mukwanga testified. In cross examination Joseph was put to task over his qualification to prepare a bill of quantities when he is not a quantity surveyor. He was also cross-examined on why the report was not signed.

According to the first Defendant's witness, the Plaintiff has not proved that the damage to his premises was caused by the Defendant's activities.

The second Defendant's witness Philip Odep said that only a qualified Quantity Surveyor can sign a Bill of Quantities and the Plaintiff's Witness by the name Joseph Mukwanga not being a Quantity Surveyor could not sign a bill of quantities.

Counsel for the parties filed written submissions. The Plaintiff's submissions are dated 3/3/2020 while the Defendant's are dated 27/11/2021.

The Plaintiff urges that damages of Kshs. 770,000/= have been pleaded and proved.

On the other hand, the Defendant's Counsel raised the following issues with the Plaintiffs case.

Firstly, Counsel said that the pleaded damages are Kshs. 770,000/= while those proved by the Plaintiff's receipt dated 20/10/2015 amount to Ksh. 700,000/-.

Secondly, Counsel took issue with failure by the Plaintiff to file a receipt of Kshs. 770,000/= and filing an invoice instead. Citing authorities like *Swaleh C. Kariuki & another –vs- Viloet Owiso Okuyu(2021) eKLR*, Counsel urged that an invoice is not proof of payment and only a receipt is and one produced at the trial should be excluded.

Thirdly, the Defendant challenged the Plaintiff's BQs as having been signed by an unqualified person and therefore inadmissible in evidence.

I have carefully considered all the evidence adduced by the Plaintiff and the Defendant including the witness statements, documents and oral evidence at the trial.

I find that the following issues arise.

Firstly, was there any damage to the Plaintiff's property namely NGONG/NGONG/21558?

Second, can the damage be attributed to the activities of the Defendant?

Finally, what is the value of the damage?

On the first issue, I find that there was indeed damage to the Plaintiff's property. This is clear from the Plaintiffs own evidence and even from the evidence of the Defendants second witness Philip Odep.

On the second issue, I find that the damage is attributed to the activities of the Defendant. It is in the Plaintiffs evidence which I find credible that the blasting activities by the Defendant caused the damage.

I find that had there been no blasting activities, no damage would have occurred.

On the final issue, I find that the value of the damage as per the evidence of the Plaintiff is not proved.

I agree with the Defendant's submissions that the witness called by the Plaintiff to prove the damage was not qualified.

However, since the Defendant's first witness accepted the value of the damage to be Kshs. 453, 310/-, I find this to be a fair and just compensation for the damage.

For the above stated reasons, I enter Judgment for the Plaintiff against the Defendant for Kshs. 453, 310/= (four hundred and fifty three thousand, three hundred and ten only), cost of the suit and interest.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF JANUARY, 2022

M.N. GICHERU

JUDGE