



**Registered Trustees of the Missionary Sisters of the Precious Blood of  
Kenya v Goodman Agencies Ltd & another (Environment & Land Case  
750 of 2012) [2022] KEELC 2755 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2755 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 750 OF 2012**

**BM EBOSO, J**

**JULY 22, 2022**

**BETWEEN**

**REGISTERED TRUSTEES OF THE MISSIONARY SISTERS OF THE PRECIOUS  
BLOOD OF KENYA ..... PLAINTIFF**

**AND**

**GOODMAN AGENCIES LTD ..... 1<sup>ST</sup> DEFENDANT**

**PARBAT SIYANI CONSTRUCTION LTD ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff is a body corporate, initially incorporated under The Land [Perpetual Succession] Ordinance. It currently exists as a body corporate under the Trustees [Perpetual Succession] Act. It owns Land Reference Number 1870/X/1, located along David Osieli Road, Westlands, Nairobi. The 1st defendant, is a limited liability company and owns Land Reference Number 1870/X/2, which abuts the plaintiff’s land. Developed on the plaintiff’s land is a residential house together with what was described in the subsequent approved development plans as “Additional Sisters Accommodation.” The actual development approval described the additional developments as “Domestic Building – Additions to House”.
2. Developed on the 1st defendant’s parcel of land is a multi-storeyed office block that was described in the approved development plans as “Office Development.” The plaintiff’s developments preceded the 1st defendant’s development. The cause of action in this suit arose during the defendant’s construction of the multi-storeyed office block on its parcel of land. The construction started in or about October 2012.



## Plaintiff's Case

3. Through a further amended plaint dated 24/10/2012 [the plaint was initially dated 25/10/2012 and first amended on 13/10/2014] the plaintiff contended that the 1st defendant engaged the 2nd defendant to undertake construction works on its behalf on land parcel number 1870/X/2. The works had been approved to last for 82 weeks from 1/10/2012. Upon commencement of the works, the 2nd defendant "excavated deeply onto the plaintiff's border" to create an underground parking. As a result of the excavation, the plaintiff's boundary wall developed visible cracks and ultimately collapsed. The plaintiff added that on 23/10/2012, due to the excavation, its garage collapsed.
4. It was the case of the plaintiff that owing to massive vibrations, its chapel and garage were abandoned during the construction period. Further, seventeen (17) of its rooms were vacated. The plaintiff added that, vide a technical report dated 8/11/2012, its engineer recommended that the 17 rooms be vacated with immediate effect due to noise, dust and risk of collapse due to the visible cracks that had already manifested in the building as a result of the massive vibrations.
5. The plaintiff contended that the defendants' actions amounted to gross negligence and misconduct and were in blatant breach of the law. The plaintiff itemized various particulars of gross negligence and "misrepresentation." Further, the plaintiff contended that as a result of the above actions by the defendants, it suffered economic loss and damages which it itemized in the pleadings, aggregating Kshs 33,896,904. In addition, the plaintiff averred that, as a result of the defendants' actions, it incurred expenses in form of professional fees relating to various technical reports, aggregating Kshs 719,101.
6. Consequently, the plaintiff sought the following reliefs against the defendants, jointly and severally:
  - a. General Damages – Kshs 33,869,904
  - b. Special Damages – Kshs 719,101
  - c. A permanent injunction restraining the defendants either by themselves, their servants, agents, employees or any other person acting for or on their behalf from excavating, erecting a wall, building and/or dealing in any manner of construction whatsoever on LR. No 1870/X/2 pending the hearing and determination of the suit. [sic]
  - d. A declaration that the 1st and 2nd defendants' action of excavating underneath the plaintiff's boarder line and subsequently the collapse of the garage wall is illegal, unjustified and a violation of the plaintiff's quiet enjoyment to its property [sic].
  - e. Costs of the suit and interest.
  - f. Any other relief this honourable court may deem fit to grant.

## Defendant's Case

7. The defendants contested the claim through a joint further amended defence dated 15/7/2016 [the defence was initially dated 24/9/2014 and was first amended on 22/10/2014]. The defendants' case was that the 1st defendant's project was duly approved by the relevant regulatory bodies. They added that the plaintiff was not permitted to manage and maintain a commercial guest house or garage in the premises. They put the plaintiff to strict proof of the legality of the alleged use of the premises for commercial purposes. They added that, contrary to the approved development plans, the plaintiff had erected a perimeter wall, a guest house and a garage on its premises. They further contended that, despite the plaintiff's wall and garage being of low quality and having failed to meet the criteria for



construction, they built for the plaintiff a perimeter wall of modern standards, duly approved by the regulatory authorities.

8. The defendants added that their construction works did not affect the plaintiff's buildings, contending that the plaintiff's buildings were still intact. They further averred that the excavation works were carried out in accordance with the standards set by the regulatory bodies. It was the case of the defendants that the recommendations or suggestions to the plaintiff to vacate their premises were misplaced and ill-conceived because the construction works site did not cause damage to the plaintiff's buildings, contending that the plaintiff continued to utilize their buildings. They added that the vibration emanating from the construction was within limits permitted by the law and were necessary. They denied the plaintiff's contention that they had suffered loss as a result of the construction. They denied the itemized loss and put the plaintiff to strict proof. They denied liability in total.

### **Plaintiff's Evidence**

9. The plaintiff called four witnesses. Sister Rosemary Kagwiria Gituma testified as PW1. She adopted her written statement dated 17/6/2016. She produced 21 documents out of the 34 documents that were contained in the plaintiff's bundle. She testified that the plaintiff lost income because they were forced to stop using 17 of the rooms in their premises due to the construction works that the defendants were undertaking. It was her evidence that their engineer advised them to vacate the rooms and the garage because there was a potential risk of them collapsing. She added that there was unbearable dust and noise coming from the construction site. She stated that the chapel was similarly affected.
10. In her evidence during cross-examination, she testified that the approval granted to the plaintiff to develop their land was in respect of domestic premises and that there was no approval for development of commercial premises on the land. She stated that they did not have an approval for commercial premises or for change of user of the premises. She added that the collapsed wall was replaced by the defendants in tandem with the consent court order dated 7/11/2012. She could not recall when the wall was replaced by the defendants. It was her evidence in cross-examination that they continued to reside in the premises during the entire period of construction. She confirmed that there was a signage on the 1st defendant's property before the defendants commenced construction works. She further stated that the plaintiff had not undertaken any repair works on their premises. She added that there were cracks in the plaintiff's premises. Pressed further, she stated that some pipes and solar equipment had been replaced. PW1 added that the defendants had redone the extreme left of the plaintiff's garage. It was her evidence that the plaintiff did not complain to the National Environment Management Authority or to the City Council/County Government of Nairobi about excessive noise and dust. She added that the plaintiff did not hire an alternative garage during the construction. She further stated that the plaintiff did not hire an alternative chapel during the construction.
11. Evans Collie Goro testified as PW2. He stated that he was a Civil Engineer specializing in geo-technical engineering which deals with foundations for buildings, roads etc. He was a registered engineer at the time of testifying. His evidence was that in November 2012, he was instructed by M/s Mugambi Advocates to inspect "the premises". He booked an appointment with the defendants. He visited the "premises" and prepared a report dated 8/11/2012. He produced the report as an exhibit. He added that in April 2016, he was retained again to inspect the premises and prepare a report. He visited the premises and prepared a report dated 20/4/2016. He similarly produced the said report, dated 20/4/2016. In summary, he attributed the collapse of the plaintiff's boundary wall to the defendant's failure to do underpinning to protect the boundary wall prior to commencing excavation works. He recommended underpinning in his first technical report. He further recommended that pending



proper underpinning and securing procedures of all the neighbouring properties, the properties were to be vacated.

12. During cross –examination, he stated that he first visited the site on 8/11/2012 which was at the point of commencement of excavation. He confirmed there was a signage on the site, showing details of the project and the necessary approvals. He further confirmed that the development approval authorized construction from beacon to beacon. He added that the plaintiff’s boundary wall collapsed because the ground caved in. The portion of the plaintiff’s land which had collapsed into the excavated area was approximately two (2) metres.
13. Cyprian Kibera Riungu testified as PW3. He stated that he was a registered and licensed valuer. He was a fellow of the Institute of Surveyors of Kenya. His evidence was that the plaintiff, through their advocates, instructed him to inspect Land Reference Number 1870/X/1 with a view to advising them on the amount of claim to make for compensation in relation to environmental degradation, loss of use of 17 rooms in the guest house, re-installation of eight water tanks, and replacement of damaged equipment arising from the construction on Land Reference Number 1870/X/2. He inspected the premises and prepared a report dated 2/5/2016. He produced the said report as an exhibit.
14. In his evidence during cross-examination, he stated that the instructions he received were oral. He visited the premises thrice. He first visited the premises when the defendants were doing the foundation. He did not know the exact date when underpinning was done by the defendant. He confirmed that the plaintiff’s premises were to be vacated until completion of underpinning. When he visited the property on 13/4/2013, underpinning had not been done. When he visited the property the second time on 2/7/2013, underpinning had been done. He stated that his reports contained only three inspection dates, namely 2/7/2013; 10/7/2013; and 22/4/2016. He confirmed that his reports did not allude to any inspection made on 13/4/2013. He added that his report did not indicate that the underpinning had not been done at any of the visits. The last picture he took in relation to the claim was on 2/7/2013 and it reflected galvanized sheets “inadequately serving the neighbouring property.” He confirmed that the picture showed that the height of the galvanized sheets used for hoarding shielded the windows of the plaintiff’s property. He added that during the visits, he did not take pictures of the underpinnings and the securing procedures put in place although the technical advice received from the engineer was that the plaintiff’s property was to be vacated pending completion of underpinning and securing procedures.
15. PW3 confirmed that he was an expert under NEMA Regulations and that there was a NEMA Licence displayed at the defendants’ site. He further stated that he did not make a report on dust and noise at the defendants’ site. Similarly, he did not make any reference to dust and noise in his report. He further testified that the plaintiff did not give him receipts relating to past usage of the chapel, the rooms, and the garage, adding that the only documents which were given to him by the plaintiff were the ones attached to his report. He further stated that he was not involved in the replacement of the items that he recommended to be replaced and that he did not see any item that had been replaced.
16. PW3 added that his fee note was based on the value in the valuation report. He added that there was an error relating to the date of the fee note. He confirmed that when he visited the site in 2016, construction works had been completed. He added that in July 2013, the underpinning had been done. He further stated that the period of 82 weeks on which he based his calculation was based on the date when the project started and the date when the galvanized hoardings were removed. He did not, however, know the exact date when the project started and the exact date when the galvanized hoardings were removed. Lastly, he stated that his report was not in tandem with the advice given by the structural engineer with regard to occupation of the plaintiff’s premises.



17. Dennis Wambua Kimani testified as PW4. He was a certified public accountant and a partner in the firm of D K Wambua & Associates. His evidence was that in 2016, the plaintiff approached him and requested him to carry out an audit review of their books for the period 2011 to 2016. They carried out the task and prepared a report dated 22/7/2016. He produced the said report as an exhibit.
18. During cross-examination, he stated that his report was prepared in 2016 when this case was pending. It was his evidence that with or without the impugned construction works, the plaintiffs were required to have a financial report every year and that the report he prepared was not a “statutory report” which the plaintiff was required to prepare every year. He added that his report only related to the guest house and the garage.

### **Defendant’s Evidence**

19. Ravi Bala testified as DW1. He adopted his written statement dated 26/9/2014. He stated that he was a graduate engineer specializing in civil engineering. In October 2012, he worked for the 2nd defendant as a general manager. He was the site manager of the 1st defendant’s construction site on Land Reference Number 1870/X/2 for a period of one month. His evidence was that the 1st defendant’s construction works were duly approved by the City Council of Nairobi and NEMA. Prior to commencement of works, the defendants commissioned surveyors who surveyed the premises and established the beacons relating to the 1st defendant’s property. During the excavation, the defendants surveyed the soil beneath and carried out necessary reinforcement, including reinforcing the plaintiff’s perimeter wall.
20. DW1 added that the cause of the collapse of the plaintiff’s perimeter wall was an open disused sewer line that was beneath the floor of the plaintiff’s garage and the defendants were not aware of the said disused open sewer line until after heavy rainfall caused the perimeter wall to cave in due to the existing open disused sewer line. He added that, as a good neighbour, the 1st defendant brought down the wall and erected a new wall based on approved drawings.
21. It was the evidence of DW1 that during excavation, they protected the plaintiff’s perimeter wall through shot-creting. He added that during survey, they established that the plaintiff’s garage had encroached onto the 1st defendant’s land but they did not bother with the encroachment. Excavation works went on smoothly until the night of 22/10/2012 when there was heavy rain which caused the soil at the corner of the plaintiff’s garage to collapse. When they went to inspect the garage, they found an underground drainage under the garage. They also established that all the water on the plaintiff’s land was draining towards the garage. Their search in the City Council Offices did not reveal existence of any lawful storm water drainage. He added that the collapsed wall did not have a proper foundation. It was his evidence that the plaintiff’s other structures were not affected. He produced the documents itemized as 1 to 6 and 8 in the defendants’ bundle of documents.
22. During cross-examination, he testified that it was a requirement that prior to commencing construction works, neighbouring properties were to be protected. He added that there was no technical report prepared in relation to the shot-creting which the defendants carried out. Shown the letter dated 26/11/2012 from M/s Civil Engineering Design (K) Ltd, he stated that through the said letter, the said firm sought approval to erect a common permanent boundary wall. Shown the 1st defendant’s surveyor’s report, he confirmed that the surveyor’s report had confirmed that all beacons were found to be in their correct positions. He added that the disused sewer line was inactive and was beneath the plaintiff’s garage. He stated that the collapse of the boundary wall was caused by heavy rains and a combination of factors.



23. In re-examination, he stated that at the commencement of excavation, there was no need for hoarding because there was an existing boundary wall separating the two properties. He added that during excavation, they used to water the site to ensure there was no dust. Shown the plaintiff's building plans, he stated that the plans had provision for a parking bay far away from the boundary but did not have provision for a garage near the boundary. He added that the drawings differed with what was on the ground. He further stated that the unit marked "Domestic Quarter" did not exist on the ground.
24. Santokh Singh testified as DW2. He stated that he was a general foreman of the 2nd defendant. Together with DW1, they worked at the 1st defendant's site. He was involved in the supervision of the construction works from the start. As a foreman, his work involved reading drawings and executing the actual construction works. He had served as a foreman for 52 years. He adopted his witness statement dated 8/5/2017. His evidence was that all requisite approvals relating to the development were obtained and displayed at the site prior to commencement of works. Prior to commencing of works, they carried out a survey to establish the beacons. They were not informed about a disused sewer line that was in the plaintiff's property. They secured the soil on the abutting plots using concrete and wire (grid) and this was done on all the neighbouring properties. He attributed the collapse of the plaintiff's wall to water in the underlying soil/ground and contended that the water was from the disused sewer line on the plaintiff's property. He disputed the contention that the collapse of the plaintiff's wall was caused by the excavation on the 1st defendant's property. He added that they were not informed about damage to any machinery.
25. DW2 added that as soon as they finished the foundation, they re-did the perimeter wall separating the two properties. He stated that no damage was caused to the plaintiff's premises and no repair works had been done because repairs were not necessary, contending that only the perimeter wall collapsed due to the wet ground resulting from the disused sewer line. DW2 added that they secured the plaintiff's premises while doing the basement and as soon as they finished the basement, they erected a perimeter wall. It was his evidence that the plaintiff's garage was right on the wall. He stated that the site was protected against dust with green netting for the entire period of construction and that the noise from the construction site was within the normal limit. He added that the plaintiffs did not vacate their premises during the construction. He stated that they did not receive any complaint relating to noise or dust. He produced the picture of the completed development on the 1st defendant's property as Defence Exhibit No 7.
26. In cross examination, he stated that neighbours were informed about the construction through erection of signage. He did not know if individual notices about the construction were served. He added that the disused sewer line did not have human waste. He stated that excavation on the 1st defendant's land was done from beacon to beacon. Shown the letter dated 26/11/2012 from M/s Civil Engineering Design (K) Ltd, he stated that the letter indicated that the wall collapsed due to exceptionally heavy rains. He stated that the approval to redo the wall was given on 30/11/2012.
27. DW2 stated that they did not do underpinning; adding that they opted for shot-creting. He added that they were not aware of the disused sewer line. DW2 further stated that the plaintiff's wall collapsed after they had excavated between 3 and 4 metres. It was his evidence that the plaintiff continued with their activities on their property during the entire construction period.
28. In re-examination, he stated that the excavation did not affect the main building on the plaintiff's property, adding that the other properties abutting the 1st defendant's land were not affected.



29. During trial, the court visited the locus in quo and made the following observations:

“An inspection and overview tour of the plaintiff’s property is made. Walls allegedly affected by the construction works are noted. The new wall is also noted. The guest rooms allegedly affected are noted. Roof drainage noted.

An inspection and general overview of the defendant’s adjacent property is made. Basement 3 is visited. It is alleged that beneath Basement 3 is natural underground water which has to be continuously pumped out into a reservoir tank.

The visits are made in the company of the above counsel, PW2 and Mr. Santok Singh, intended DW1.

The court has noted accordingly.

SIGNED 28/2/2019”

### **Plaintiff’s Submissions**

30. The plaintiff filed written submissions dated 24/9/2021 through the firm of M/s John N Mugambi & Associates. Counsel for the plaintiff identified the following as the issues that fell for determination in the suit: (i) Whether there was any negligence on the part of the defendants on any aspect of the construction works undertaken on L R No 1870/X/2 and consequently whether the plaintiff’s property was damaged? (ii) Whether the plaintiff suffered loss of income due to any negligent acts of the defendants?; (iii) Whether the plaintiff suffered any other losses due to the negligent acts of the defendants?; (iv) Whether the plaintiff has proved its claim for special damages being the professional fees incurred in preparation of the expert reports?; (v) Whether the plaintiff is entitled to costs of the suit and interest?
31. On the question as to whether or not there was negligence on the part of the defendants in any aspect of the construction works, counsel cited, among others, the English decision in *Donoghue v Stevenson* [1932] AC 562 and submitted that the defendant owed the plaintiff a duty of care to the extent that they were legally obligated to ensure that the construction works did not in any way adversely affect the plaintiff’s adjacent property. Counsel added that the plaintiff had, through evidence, established that there was a breach of the duty of care by the defendants. Counsel contended that the defendants did not comply with the requirements of the British Standard Code of Practice for Foundations (BS 8004:1986). Counsel argued that the defendants failed to: (i) undertake proper notification to owners of adjoining properties; (ii) submit structural designs for underpinning; (iii) undertake proper underpinning to protect the plaintiff’s existing property; (iv) undertake geo-technical survey; (v) undertake site survey; and (vi) protect the adjoining properties against excessive vibration and dust.
32. Counsel added that the plaintiff had demonstrated that they were forced to stop using 17 of their guest rooms leading to loss of income assessed at Kshs 18,442,620 due to the defendant’s negligence. Counsel added that the plaintiff had, through evidence by experts, demonstrated that they suffered loss of use of the chapel assessed at Kshs 256,368 as lost profit; and loss of use of the garage assessed at Kshs 470,400 as profit.
33. Counsel contended that it was “common knowledge” that profit would ultimately be re-invested to generate more income and profit. Counsel argued that PW3 had demonstrated that had the plaintiff invested the sum of Kshs19,169,388 they would have earned a return on investment in the aggregate sum of Kshs 33,180,294 under the heads of loss of income and investment on income.



34. Counsel for the plaintiff further submitted that the plaintiff had suffered costs totaling Kshs 689,610 due to the damage occasioned to their movable properties. Counsel added that the plaintiff had demonstrated that due to the defendants' breach of duty, they had suffered special damages totaling Kshs 719,101, being professional fees paid to the engineer, the valuer and the auditor/accountant.
35. On costs of the suit, counsel cited Section 27 of the *Civil Procedure Act* and submitted that costs follow the event. Counsel urged the court to award costs of the suit to the plaintiff. Lastly, counsel urged the court to award the plaintiff interest from the date of filing suit.

### **Defendant's Submissions**

36. The defendants filed written submissions dated 18/10/2021, through the firm of Mogeni & Co Advocates. Counsel for the defendants submitted that the cause of the collapse of the perimeter wall was the existing disused, abandoned and/or filled up sewer line or storm water pipe or drainage that existed in the plaintiff's property. Counsel faulted the plaintiff for not disclosing to the defendants or to the local authority the existence of the said sewer line. Citing the decision in *Ryland v Fletcher* [1868] UKHLT, counsel argued that the plaintiff was guilty of nuisance for keeping a disused sewer line/ storm water pipe / drainage on their land. Counsel added that the parties to the suit owed each other a mutual duty of care and that the plaintiff breached the duty of care owed to the defendants by failing to inform the defendants about the existence of the disused, abandoned and/or filled up sewer line /storm water pipe.
37. Citing the Court of Appeal decision in *Fred Ben Okoth v Equator Bottlers Ltd* [2015] eKLR, counsel submitted that there was no basis for concluding that the defendants were negligent. Counsel added that the plaintiff was obligated to demonstrate direct causation on part of the defendant.
38. On the plaintiff's claim for costs for installation of plastic tanks, installation of steel-pressed tanks, plumbing works, repair of drainage system, repair of garage wall and floor, replacement of destroyed equipment and replacement of glass panels, counsel for the defendant submitted that these were special damages which had to be pleaded specifically and strictly proved. Counsel added that the plaintiff had failed to tender receipts and invoices relating to those items.
39. On the plaintiff's claim for loss of income from 17 rooms itemized at Kshs 18,442,620; claim for loss of use of chapel itemized at Kshs 256,368; and loss of use of garage itemized at Kshs 470,400, counsel submitted that no reasonable person in their right frame of mind would close down their operations for 82 weeks and come to court expecting compensation. Counsel added that the claim for Kshs 14,010,906 as loss of investment income was a repetition of the claim under paragraph 16(11) of the further amended plaint. Counsel urged the court to reject the claims for professional fees, contending that they were "misguided". Counsel urged the court to dismiss the plaintiff's suit.

### **Analysis and Determination**

40. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties to this suit did not agree on a common statement of issues to be determined in the suit. Counsel for the plaintiff itemized five issues in their written submissions dated 24/9/2021. Having taken into account the parties' pleadings, evidence and submissions, the following, in my view, are the four key issues that fall for determination in this suit: (i) Whether there was negligence on part of the defendants during their execution of construction works on Land Reference Number 1870/X/2; (ii) Whether the plaintiff's properties were damaged as a result of the alleged negligence; (iii) Whether the plaintiff was authorized to run a commercial guest house and commercial garage on Land Reference Number 1870/X/1; and (iv) Whether the plaintiff is entitled



to the various limbs of reliefs pleaded and prayed for in the further amended plaint. I will make brief analysis and pronouncements on the four issues in the above order.

41. The first issue is whether there was negligence on part of the defendants during their execution of construction works on the 1st defendant's property, LR No 1870/x/2. The plaintiff alleged that the defendant excavated deep onto their land. They contended that the excavation caused their perimeter wall to develop visible cracks and ultimately collapsed. They added that the excavation weakened their entire building. They contended that their garage collapsed due to the excavation. The defendant contested the above allegations and attributed the collapse of the perimeter wall to a disused sewer line beneath the plaintiff's garage.
42. I have considered the rival positions and the evidence tendered during trial. The court visited the locus in quo during trial. There is common ground that the 1st defendant's works involved excavation from beacon to beacon. Indeed, the approving authority had authorized that aspect of the works. Secondly, the development entailed excavation to create space for three basement floors. There is no doubt that a beacon to beacon excavation of this nature called for extra duty of care on the part of the defendants to ensure that the existing properties were protected. Indeed, in one of his two technical reports, DW2 who is a civil engineer specializing in geo-technical engineering observed as follows:

“In substructure excavation, the neighbouring areas are supposed to be protected from all effect that might cause damage. In this case the underpinning required was not done.”
43. DW1 and DW2 testified that, to protect the structural integrity of neighbouring properties, they carried out shot-creting as opposed to underpinning. PW2's professional view was that the shot-creting was not an effective way of protecting the plaintiff's wall in circumstances of beacon to beacon and deep excavation that the defendants were undertaking. His evidence was not controverted.
44. It does therefore emerge from the totality of the evidence before this court that proper underpinning was required to protect the plaintiff's existing properties, taking into account the depth of the excavation and the fact that the defendants were carrying out a beacon to beacon excavation. They failed to do proper underpinning and instead opted to do shot-creting. The shot-creting failed. When they ultimately did the underpinning, there was no recurrence of the problem. To this extent, the court is satisfied that the plaintiff has proved negligence on part of the defendants.
45. The English locus classicus case of *Donoghue v Stevenson* [supra] captures the extent of the duty of care which the defendants owed the plaintiff in the following words:

“You must take reasonable care to avoid acts or omissions which you can reasonably foresee would likely injure your neighbor. Who, then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.”
46. The plaintiff made a further claim of negligence anchored on alleged excessive noise and dust. No evidence from an environmental expert was led to establish the level of noise and the amount of dust that emanated from the defendants' construction site. Similarly, no evidence was led to demonstrate that the relevant regulatory bodies mandated to deal with noise and air pollution were invited to establish the truth and take appropriate action against the defendants, if indeed there was excessive noise and dust. In the circumstances, this court has no proper basis upon which to hold the defendants liable for negligence anchored on excessive noise and dust.



47. The second issue for determination is whether any of the plaintiff's properties were damaged as a result of the alleged negligence. From the evidence tendered, parts of the plaintiff's perimeter wall and garage collapsed due to the above negligence. The plaintiff invited PW2 to inspect the premises and prepare a technical report. The resultant report was identified as Technical Report No 1 and was produced by PW2. It was dated 8/11/2012. It was noted in the report that a half of the plaintiff's boundary wall had collapsed into the deep excavation. Secondly, the right hand side of the plaintiff's garage wall that was on the boundary line and an extra one metre of the plaintiff's plot area had collapsed into the excavation. Indeed, the above damage was reflected in the photographs forming part of the technical report.
48. The technical report alluded to doors of the plaintiff's building which were said not to be opening properly, suggesting that the door frames could have developed changes in their structure. No more evidence was tendered to establish that there was actual damage to the doors or to the frames. No other damage to the plaintiff's property was noted in the technical report. That means no other damage was observed by PW2 when he inspected the plaintiff's properties. There was no mention in PW2's technical report, of any damage to the structure of the rest of the plaintiff's developments or to any of the plaintiff's movable properties that were near the wall or within the garage. There was no evidence of any other professional report derived from an inspection carried out at the relevant time. The valuation reports by M/s Roma Valuers Ltd was derived from inspection visits carried out on 2/7/2013, 10/7/2013 and 22/4/2016. They did not bear evidence of actual damage to the plaintiff's movable and immovable properties. The reports refer to plastic tanks that were purchased but did not bear evidence of any tank that was damaged as a result of the defendant's negligence.
49. Consequently, the only properties that were established to have been damaged as a result of the defendants' negligence are: (i) half boundary wall; and (ii) the right hand side of the garage wall that was on the boundary line. There was common ground that the two properties were replaced by the defendants.
50. The third issue is whether the plaintiff was authorized to run a commercial guest house and commercial garage on Land Reference Number 1870/X/1. The plaintiff averred in paragraph 7 of the further amended plaint that they had erected a commercial guest house and garage adjacent to the collapsed wall. In their further amended defence, the defendants contended that the perimeter wall, guest house and garage were erected without approval and that the plaintiff was not permitted to manage and maintain a commercial guest house or garage on their premises. The plaintiff relied on Exhibit 6 which consisted of development plans and drawings relating to what was described in the relevant approval as "Domestic Building – Addition to house". Forming part of the structures in the development plans is what is described as "Parking Shed." Also included in the plan was a boundary wall. Nothing in the development plans and in the development approvals suggested permission to develop commercial premises.
51. No evidence was led by the plaintiffs to demonstrate that there was a change of user in respect of what was approved as "Domestic Building – Additions to house", to convert it into a commercial guest house. Similarly, no business licence relating to guest house/hotel business was tendered to demonstrate that the building was being used for commercial purposes at the material time. Similarly, no evidence of change of user was tendered in respect of what was approved as a parking shed. No evidence of any business licence was tendered to demonstrate that the parking shed had been legally changed into a commercial garage.
52. The result is that there was no evidence to prove that the plaintiff was authorized to run a commercial guest house and a commercial garage on its property. That is my finding on the third issue.



53. The fourth issue is whether the plaintiff is entitled to any of the reliefs pleaded and sought in the further amended plaint. The first prayer in the further amended plaint is a plea for general damages assessed at Kshs. 33,869,904. This figure is an aggregate of what is set out in paragraph 16 of the further amended plaint. The first item in paragraph 16 relates to loss of income in respect of 17 rooms, for the entire period of 82 weeks that the 1st defendant's construction was to last. I have made a finding to the effect that there was no evidence to suggest that the plaintiff was authorized to run a commercial guest house on the suit property. I have also made a finding that there was no evidence of legally licensed guest house business on the property. The plaintiff cannot in the circumstances, be said to be legitimately entitled to this claim.
54. Even if I were to be wrong on the above finding, it is noted that the engineer advised that the premises were to be vacated only upto the point when underpinning and hoarding would be in place. None of the plaintiff's witnesses was able to tell the court the exact dates when underpinning and hoarding were put in place after the collapse of the perimeter wall. PW1 could not tell the dates or months. All that PW3 said is that when he went to the premises in July 2013, underpinning had been effected. The court was left to speculate. For the above reasons, this limb of the claim fails.
55. The second item under the limb of general damages is a claim for loss of use of the chapel, assessed at Kshs. 256,368. There was no evidence to suggest that the chapel was damaged. Further, PW1 testified that they stayed in the premises throughout and that they did not hire an alternative chapel. There is therefore no proper basis to warrant an order condemning the defendants to meet this claim.
56. The third item relates to loss of use of the garage, assessed at Kshs. 470,400. I have made a finding to the effect that the plaintiff did not lead evidence to demonstrate that they were permitted to run a garage on the premises. Even if I were wrong on the above finding, the plaintiffs did not lead evidence to establish when underpinning and hoarding were put in place to enable the court assess what they would be legitimately entitled to. The claim fails on the above grounds.
57. Items 4, 5, 6, 7, 8, 9 and 10 are, in essence, special damages claims. No evidence in form of invoices and or receipts was tendered to demonstrate that the costs were incurred by the plaintiff as a result of the above negligence of the defendants. Without the above evidence, the court has no proper basis for condemning the defendants to pay the plaintiff the respective sums.
58. Item number 11 relates to loss of investment on the use of 17 rooms, chapel and garage. This claim is predicated on items 1, 2 and 3. I have made a finding to the effect that those items were not proved. For the same reason, item number 11 fails.
59. Notwithstanding the foregoing, the court is satisfied that the plaintiff suffered inconvenience due to the defendants' negligence which caused the collapse of the perimeter wall and part of the parking shed. The collapse interfered with the plaintiff's quiet enjoyment of their premises. For this reason, I will award the plaintiff general damages assessed at Kshs. 1,000,000 under prayer (a) of the further amended plaint.
60. Prayer (b) relates to special damages in the aggregate of Kshs. 719,101. The figure relates to engineer's fees, valuer's fees and auditor's fees. To the extent that the plaintiff did not establish a proper basis for claiming against the defendants the figures itemized in paragraph 16 of the further amended plaint, I will disallow the claim relating to the valuers fees and the auditor's fees because their services were not necessary in so far as this suit is concerned. I will, however, allow the fees relating to the engineer's services in the sum of Kshs. 319,100 because those services were necessary for the purpose of giving technical advice on the damage done to the perimeter wall and garage.



61. Prayer (c) was a plea for an interlocutory relief. It is now overtaken by events. Prayer (d) will be reframed and granted in terms of a general finding to the effect that the defendants were negligent as found above.
62. On costs, the court takes into account the fact that it has made a finding to the effect that the defendants were negligent to the above extent. The court further takes into account that although the defendants built another boundary wall and repaired the plaintiff's parking shed [garage], this happened after the plaintiff sought redress in court through this suit. For the above reasons, I will award the plaintiff costs of this suit.

### **Disposal Orders**

63. In the end, this suit is disposed in terms of the following orders:-
  - a. It is declared that the defendants' action of undertaking a beacon to beacon excavation to create room for three basement floors without making a proper underpinning along the boundary perimeter wall amounted to negligence against the plaintiff.
  - b. The plaintiff is hereby awarded general damages of Kshs. 1,000,000 for the resultant inconvenience and disruption of their quiet enjoyment of their property.
  - c. The plaintiff is further awarded Kshs. 319,100 being fees paid to their engineer to procure technical services.
  - d. The defendants shall bear costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF JULY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Mwachofi for the Plaintiff

Mr Chacha for the Defendants

Court Assistant: Ms Lucy Muthoni

