



REPUBLIC OF KENYA



KENYA LAW
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**China Railways No. 5 Engineering v Eila (Civil Appeal 2 of 2021)
[2023] KEHC 17985 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 17985 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CIVIL APPEAL 2 OF 2021
JK SERGON, J
MARCH 2, 2023**

BETWEEN

CHINA RAILWAYS NO. 5 ENGINEERING APPELLANT

AND

SYLVANUS ERUKUDI EILA RESPONDENT

*(Being an appeal from the original judgment in the Senior Resident
Magistrate Court at Lodwar civil Case No. 4 of 2020 by Hon. M. K
Mwangi (Senior Principal Magistrate) dated 26th August, 2021)*

JUDGMENT

1. Silvanus Erukudi Eila the Respondent herein filed an action before the Senior Principal Magistrate court whereof he sought for both general and special damages for loss of earnings plus interest and costs vide the plaint dated August 12, 2020.
2. China Railway No 5 Engineering Group Co Ltd, the Appellant herein, filed a defence to deny the Respondent's claim. The Appellant also filed a counter-claim whereof it sought for judgement in the sum 140,000/= for loss of user of two machines namely single roller and double roller.
3. Hon MK Mwangi, learned Chief Magistrate in his judgment delivered on August 26, 2021 gave judgment in the sum of Ksh 70,000/= to the Respondent and dismissed the Appellant's counter claim.
4. The Appellant dissatisfied preferred this appeal and put forward the following grounds of appeal;
 - i. That the learned trial Magistrate erred in law in misapplying the evidence that was adduced before him.
 - ii. The learned trial Magistrate erred in law and fact when he considered extraneous matters in his decision that were not part of evidence adduced by the respondent.



- iii. The learned Trial Magistrate erred in law and fact in finding as he did that the Appellant indeed blocked the Respondents business premises while in fact the Appellants machines were not on the Respondents premises but were carrying out construction works on the designated road reserve.
 - iv. That the learned Judge erred in law and in fact in finding that there was any kind of business going on in the purported show and that the Respondent lost any business at all while in fact no proof of any daily income or loss thereof occasioned by the said blockade was shown to the court.
 - v. That the learned Judge erred in law and fact in dismissing the appellants counter claim.
 - vi. The learned Trial Magistrate erred in law and fact when he failed as he did to properly evaluate the evidence on record thus reaching an erroneous decision.
 - vii. The Trial Magistrate erred in law and fact when he based his decision on irrelevant matters and failing to base his said decision on facts and evidence on record.
5. Though the appellant put forward a total of seven grounds of appeal those grounds may be summarised to two main grounds. The first ground is to the effect that the trial court erred when it gave judgment in favour of the Respondent yet there was no credible evidence tendered to establish the claim. The second main ground of appeal is to the effect that the appellant's counter claim was unfairly dismissed yet the appellant had tendered reliable evidence establishing the claim.
 6. I have re-evaluated evidence that were tendered before the trial court. The Respondent summoned two witnesses in support of his case. Silvanus Erukudi Eila (PW1) the Respondent told this court that the appellant parked two rollers and two caterpillars in his plot for the period between 16th and July 30, 2021 in his plot without his consent therefore he was unable to operate any business on the plot for that period.
 7. PW1 further stated that the two machines blocked his gate and entrance to his business premises where he operated the business of concrete works. He produced a certificate of registration of his business.
 8. The respondent was emphatic that he incurred loss of business and therefore he was entitled to compensation.
 9. Gilbert Olimo (PW2) a construction worker corroborated the evidence of PW1 that the Appellant's heavy machinery were parked in front of the office and gate of PW1 business premises. PW2 also stated that customers could not access PW1's business premises for 14 days hence nothing was sold during that period.
 10. Edward Edung (DW1) testified in support of the Appellant's defence and counter-claim. DW1 stated that the two rollers were actively controlling that section of the road. DW1 stated that the two rollers and 2 dozers were parked at a road reserve and not at the Respondent's plot.
 11. He said that a pro Toyota brand motor vehicle was used to block the heavy machines for whole day. DW1 stated that the Caterpillar costs Kshs 6,000/= to hire per day while the rollers cost Kshs 80,000/= per day. Consequently, the appellant counter-claimed for Kshs 130,000/=.
 12. DW1 averred that the Respondent's motor vehicle Prado KBT was used to block the two rollers and the two caterpillars.
 13. The trial Magistrate considered the competing evidence and came to the conclusion that the appellant parked the heavy machinery on the Respondent's plot without his consent. The trial magistrate also



came to the conclusion that the Respondent suffered loss of business as a result of the blockage. The trial court assessed the loss at the rate of Kshs 5000/= per day for 14 days making a total sum of Kshs 70,000/=. The trial court dismissed the Appellant's counter-claim stating that it was not possible for one to block heavy machinery parked in an open place in a reserve road.

14. Having re-evaluated the case that was before the trial court, I now turn my attention to the substance of the appeal. The first ground is whether the Respondent's claim was proved. I have carefully re-evaluated the Respondent's evidence. It is apparent that the Respondent testified and summoned one independent witness.
15. The two witnesses produced documents showing that the Respondent operated the business of making and selling fencing posts, bricks and ventilators in a business premise - in Kanamkemer area.
16. The witnesses also gave evidence showing that the Appellant parked heavy machinery in front of the business premises of the Respondent thus blocking access to the aforesaid premises for 14 days.
17. The trial magistrate estimated the Respondent's daily loss of business at Kshs 5000/=.
18. On my part I am satisfied that the Respondent gave credible and reliable evidence to prove his claim.
19. I am convinced that the trial magistrate findings are based on strong evidence and cannot therefore be faulted.
20. The second main ground of appeal is whether the Appellant's counter claim was proved.
21. I have already re-evaluated the evidence tendered by the appellant to establish the counter – claim. The Appellant stated that it parked the heavy machinery in a road reserve and that the Respondent used his Prado to block the same from being removed for a day. If the appellant had parked its heavy machinery in an open space in a road reserve, there is no way a Prado can block them from being removed.
22. I am satisfied the learned Chief Magistrate came to correct decision in dismissing the counter-claim. In short, there was no credible evidence to establish the counter-claim. I uphold the dismissal order.
23. In the end I find no merit in the appeal. The same is dismissed in its entirety with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT LODWAR THIS 2ND DAY OF MARCH, 2023.

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J. K. SERGON

JUDGE

In the presence of:

Biwott -Court Assistant

.....for the Appellant

.....for the Respondent

