

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. E063 OF 2022

COSTWISE LIMITED.....PLAINTIFF **ELECTRICALS**
-VERSUS-
ENGINEER EVANS C. GORO.....1ST
DEFENDANT
GORO CONSULTANTS LIMITED.....2ND
DEFENDANT

JUDGMENT

Background

1. **Costwise Electricals Limited**, the Plaintiff, filed the present suit against **Engineer Evans C. Goro** and **Goro Consultants Limited**, the 1st and 2nd Defendants, vide a Plaint dated 14th April 2022. The suit is founded on the tort of professional negligence. The Plaintiff is seeking a declaration that the actions taken by the 1st Defendant were professionally negligent in nature; an order compelling the Defendants to pay him a sum of Kshs. 22,934,610/- being the inflated cost of the foundation works for the project on account of the 1st Defendant's negligence together with interest thereon; general damages for negligence and costs of the suit.

2. The 1st Defendant is sued in his capacity as a structural engineer, carrying out his professional services through his company the 2nd Defendant.
3. It is pleaded in the Plaint that sometime on or about 2021, the Plaintiff through its co-directors engaged the professional services of the 1st Defendant for the construction of a shopping mall on all that parcel of land known as Plot LR No. 13330/354 situated along Thika Road (the site); that pursuant to the aforesaid engagement, the Plaintiff paid a sum of Kshs. 1,250,000/- to the 1st Defendant; that the 1st Defendant undertook preliminary tests on the site in a bid to establish the depth of the excavation to be carried out on the site's foundation, thereby resulting in preparation of a geotechnical report and that however, the 1st Defendant failed to disclose the results of that report with the Quantity Surveyor and main Contractor who had similarly been retained for purposes of undertaking the construction project.
4. The Plaintiff has pleaded, further, that subsequently, on or about 15th March 2022 the 1st Defendant instructed the main Contractor to excavate the site until the red soil or murrum

level was attained, which excavation was later discovered to have been in excess of what would have sufficed for the construction project. As such, the Plaintiff would be forced to incur additional costs to the tune of Kshs. 22,934,610/- arising from the excess excavation which was carried out pursuant to the instructions of the 1st Defendant.

5. The Plaintiff therefore attributes the increased cost of foundation works to negligence on the part of the 1st Defendant, as set out in the particulars in the Plaint.
6. The record shows that the 1st and 2nd Defendants entered appearance through their advocates appointed on 18th May 2022 as shown in the Notice of Appointment of that date. The 1st and 2nd Defendants however failed to file their statements of defence within the prescribed timelines. Consequently, an interlocutory judgment was entered against the said defendants on 27th November 2024 leading to a formal proof.
7. The record further shows that the firm of Nyiha Mukoma & Co. Advocates, who were at all material times acting for the Defendants herein, filed an application dated 27th May 2025 to cease acting for the defendants for want of settlement of legal

fees. That application was allowed. There is on record an affidavit of service sworn by Court Process Server, one Samwel Kinyua Ndege on 16th June 2025, evidencing service of the said application upon the Defendants, through the 1st Defendant. The defendants did not attend court for the hearing of the application or the formal proof.

The Plaintiff's case

8. The Plaintiff testified on 19th May 2025. He relied on the witness evidence of its proprietor, Mwangi Murachia, who testified as **PW1**. The witness adopted his signed witness statement dated 13th April 2022 (**P. Exhibit 1**) as his evidence-in-chief and Plaintiff's list and bundle of documents dated 14th April 2022 as **P. Exhibits 2 to 8**, all inclusive.
9. It is the evidence of the Plaintiff that he is a businessman; that he had instructed the 1st Defendant to undertake the structural engineering works on behalf of the Plaintiff for construction of a shopping mall at the site; that the 1st Defendant visited the site and instructed the main Contractor to undertake an excavation of 4 metres depth in excess of 1.5 metres required

for the project and that in the end, the Plaintiff decided to abandon the project as the same proved to be costly.

10. It is the testimony of **PW1** that while the initial Bill of Quantities for the foundational works estimated at a sum of **Kshs. 40,225,750/-**, upon the excess excavation, the total cost of foundational works would now come to **Kshs. 70,160,360/-**. That the Plaintiff was unprepared to incur the additional costs and therefore opted to cancel the project. The Plaintiff urged the court to allow the Plaint as prayed.

Written Submissions

11. In addition to the evidence adduced at the trial, the Plaintiff filed written submissions. Reliance was made on the case of **Yanda v Kenya Wildlife Services [2024] KEHC 16063 (KLR)** on the ingredients of a claim founded on negligence. The Plaintiff's submitted that it has established the existence of the duty of care since it has been demonstrated that the Plaintiff had engaged the professional services of the defendants through the 1st Defendant, to assist in the structural aspects of the construction project on the site and

that the 1st Defendant received a sum of Kshs. 1,250,000/- in that respect.

12. The Plaintiff also relied on **CFC Stanbic Bank Limited v Kenya Haulage Agency Limited [2025] KECA 1034 (KLR)**

where it was stated that a duty of care arises where a person possessing specialized skills applies the said skills in assisting another.

13. It is the Plaintiff's submission that the actions by the 1st Defendant fell short of the professional standard of care owed and therefore constitute a breach of the duty of care. More specifically, the Plaintiff has faulted the 1st Defendant for allegedly failing to disclose pertinent geotechnical data obtained from his test investigations and that the 1st Defendant by way of the written instructions, advised the main Contractor to undertake an excavation of 4 metres deep whereas the Bill of Quantities availed, which was guided by the standard industry assumptions, indicated an approximate depth of 1.85 metres.

14. It was submitted that the 1st Defendant failed to amend the structural drawings to reflect the revised depth and its

consequences and that the 1st Defendant subsequently became hostile and unprofessional during his interactions at the site.

15. The Plaintiff has argued that the third ingredient for negligence; namely causation, has also been established. The Plaintiff has elaborated that had it not been for the excess excavation undertaken upon the 1st Defendant's instructions, the Plaintiff would not have incurred the additional cost of **Kshs. 22,934,610/-** on the foundational works. The Plaintiff relied on **Kiplagat v Kwambai & another [2025] KEHC 1856 (KLR)** where it was held that a plaintiff ought to establish a causal link between the defendant's negligence and the resulting harm.

16. Flowing from the foregoing, it is the Plaintiff's contention that the claim for negligence has been proved to the required standard thereby entitling it to an award of special damages to the tune of **Kshs. 22,934,610/-** as well as general damages. The Plaintiff has equally sought costs of the suit, pursuant to Section 27 of the Civil Procedure Act (CPA).

Analysis and Determination

17. Before determining this matter, I wish to point out that after the conclusion of taking evidence on formal proof on 16/6/2025, Judgment was reserved for delivery on 7th August 2025. However, the defendants filed an application dated 1/8/2025, in which they sought setting aside of the interlocutory judgment entered on 27/11/2024; that the defendants be allowed to file their defence and that delivery of the judgment scheduled to be delivered on 7/8/2025 be arrested pending the hearing and determination of that application.

18. That application was filed during the August Court Recess and was placed before the Duty Judge, Hon. Lady Justice Mulwa. She granted the prayer seeking to arrest the delivery of the judgment scheduled for 7/8/2025.

19. Consequently, the matter was placed before me on the 7/8/2025. I did not deliver judgment because of the existing order arresting the delivery of that judgment. I proceeded to determine the remaining prayers in the application dated 1/8/2025 ultimately dismissing that application vide a ruling

delivered on 28/1/2026 paving the way for the delivery of the judgment in this matter.

20. I have read and considered the pleadings, the evidence on record and the Plaintiff's submissions. While alive to the fact that an interlocutory judgment has been entered against the 1st and 2nd Defendants and that the defendants did not call any evidence to controvert the Plaintiff's case, the legal principle remains that the burden of proof lies with the Plaintiff to prove, to the required standard, his claim of negligence on the part of the defendants.

21. In that regard, I have considered the applicable law relating to the burden of proof, being **sections 107, 108 and 109** of the **Evidence Act**. In civil disputes, the standard of proof is 'on a balance of probabilities. The Court of Appeal in **Mumbi M'Nabea v David M. Wachira [2016] eKLR**, while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will

assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:

“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 exists.” The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that

the proof of that fact shall lie on any particular person.”

.....”

22. Further, the same Court in **Karugi & Another v Kabiya & 3 others [1987] KLR 347** noted that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

23. I have identified the following as the issues that arise in this matter for determination:

a) Whether the Plaintiff has made a case for professional negligence as against the 1st and 2nd Defendants; and

b) Whether the Plaintiff is entitled to the reliefs sought in the plaint.

24. The claim by the Plaintiff against the defendants is anchored on alleged professional negligence. I hold the view that the general principles of negligence would still apply in this case. For the Plaintiff to succeed in a claim against the defendants, it would be required to establish the pertinent ingredients associated with negligence as laid out in the case of **Yanda v Kenya Wildlife Services** where it was held that:

“17. According to Clerk & Lindsell on Torts 18th Edition the elements of negligence were discussed thus: “There are four requirements for the tort of negligence namely; -

1. the existence of law of a duty of care situation i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in suit on the class of person to which the

claimant belongs by the class of person to which the defendant belongs is actionable.

2. breach of the duty of care by the defendant, i.e. that it failed to measure up to the standard set by law;

3. a causal connection between the defendant's careless conduct and the damage;

4. that the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote. When these four requirements are satisfied the defendant is liable in negligence."

25. Regarding the first ingredient on an existing duty of care, it is clear from the pleadings and evidence tendered that the Plaintiff had previously engaged the professional services of the 1st Defendant in his capacity as a Structural Engineer, for purposes of participating in the construction project on the site. Given that no written agreement was tendered in evidence to that effect, it would seem that the engagement was oral in nature. Be that as it may, it is also apparent from the record that the 1st Defendant carried on his business, at all

material times, through the 2nd Defendant. I am satisfied from the evidence tendered that there existed a professional duty of care on the part of the defendants towards the Plaintiff.

26. Regarding the second ingredient touching on breach of the said duty of care, it is the Plaintiff's assertion that the breach herein arose from the 1st Defendant's alleged failure to disclose pertinent geotechnical data obtained from his test investigations as well as his decision to advise the main Contractor to undertake an excavation of 4 metres depth whereas the Bill of Quantities availed indicated an approximate depth of 1.85 metres as well as his failure to amend the structural drawings to reflect the revised depth and its consequences.

27. From my examination of the evidence tendered, in particular **P. Exhibit 2**, a letter dated 11th April 2022, written by Quantity Surveyor Joan Wairimu Mbugua and addressed to the Plaintiff, the 1st Defendant shared the structural drawings that were used in preparing the Bill of Quantities, which drawings mentioned that the excavation depth of the construction project would be determined on site. The said letter further

stated that in the absence of the geotechnical reports, it would have been difficult to come up with an estimated excavation depth before the excavation works commenced. Consequently, the Quantity Surveyor relied on the structural drawings in preparing a Bill of Quantities on the assumption that the excavation depth would be approximately 1.85 metres.

28. The aforesaid letter equally stated that the foundation works commenced on 14th March 2022 and the excavation was done at 1.50 metres, upon which the main Contractor contacted the 1st Defendant with a view of inspecting and ascertaining whether the excavation undertaken was satisfactory. In response, the 1st Defendant visited the site on the following day and gave written instructions to the main Contractor, that a further excavation be done until the red soil/murram level is reached.

29. The letter further detailed that neither the geotechnical drawings nor the trial pits indicated in the structural drawings had been shared with the Quantity Surveyor. However, the letter stated that it remains unclear whether the excavation undertaken was excessive in nature.

30. Upon a further examination of the evidence on record, I have observed that the Plaintiff tendered as **P. Exhibit 3** copies of the structural drawings prepared by the 1st Defendant. However, no expert witness or witness at all, was called to decipher or explain the contents thereof. Similarly, the Plaintiff tendered a copy of the written instructions by the 1st Defendant, referenced hereinabove, as **P. Exhibit 5**.

31. I have also examined the contents of **P. Exhibit 4** being a copy of a letter prepared by the Contractor (Johgab Construction Co. Limited) dated 13th April 2022 confirming the instructions by the 1st Defendant, save to add that before undertaking the actual excavations, the main Contractor undertook its own pit trial to confirm the likely depth of the excavation works, and arrived at a depth of 4 metres.

32. From an analysis of the totality of the evidence tendered, I am of the view that while it may be apparent that there was a likely communication breakdown amongst the various professionals undertaking the construction project, nothing credible has been tendered to necessarily infer a breach of duty of care on the part of the 1st Defendant. From the record,

it is apparent that while it is stated that the said Defendant had indicated that the excavation depth would be determined on site, the Quantity Surveyor relied on an assumption to prepare the initial Bill of Quantities containing the estimated excavation costs, which Bill the Plaintiff is now relying on.

33. Similarly, I have not come across any evidence indicating the initial agreed excavation depth, if any, prior to the excavation works being undertaken. There is also no credible material on record to support the conclusion by the Plaintiff, that the excavation works undertaken pursuant to the instructions of the 1st Defendant, were necessarily excessive in nature.

34. It is my considered view that there is no sufficient evidence tendered to demonstrate the manner, if any, in which the actions by the 1st Defendant fell short of professional standards in order to constitute a breach of his professional duty of care.

35. On the third and fourth ingredients concerned with causation and damage, from my examination of the totality of the evidence on record, I find it insufficient to support the

averments by the Plaintiff that any loss or damage suffered can directly be attributed to the 1st Defendant.

36. In my view therefore, the Plaintiff did not prove its case to the required standard. Specifically, the Plaintiff has failed to prove the manner in which the actions or otherwise of the 1st Defendant on his behalf and on behalf of the 2nd Defendant, failed to meet the relevant professional standards leading to professional negligence on the defendants' part. I am satisfied on the second issue for determination, that the Plaintiff has not met the threshold on a balance of probabilities to warrant an entitlement of any of the reliefs sought in the Plaintiff.

37. While alive to the fact that there exists an interlocutory judgment, I take the view that the Plaintiff has failed to formally prove his claim against the defendants, and therefore, the Plaintiff's suit fails and is hereby dismissed, with the consequence that the interlocutory judgment entered on 27/11/2024 cannot stand.

38. I make no order as to costs.

39. Orders shall issue accordingly.

Dated, signed and delivered this 11th February, 2026.

**S. N. MUTUKU
JUDGE**

In the presence of:

1. Ms Kipkesei for the Plaintiff
2. Mr. Aguti for the 1st and 2nd Defendants

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