

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA NAIROBI
CIVIL APPELLATE DIVISION
HCCA E427 OF 2023

SINHYDRO CONSTRUCTION LIMITED.....1ST
APPELLANT

VERSUS

FRONTIER OPTICAL NETWORKS LIMITED.....
RESPONDENT

JUDGMENT

1. This is an appeal arising out of the decision of the lower Court in which the Appellant lost. The brief history of this matter is that the Respondent laid down unground Fibre optic cables running parallel to a number of major roads network in Kenya including Nairobi. The Appellant on or about the 21st day of April 2011 while doing some construction work at various locations along Thika road at Roysamb KPLC area negligently and maliciously damaged the plaintiff's Coptic Fibre cable belonging to the Plaintiff while digging up trenches without due regard to the existing cables below. The defendant denied knowledge of the allegations and added that if indeed the Plaintiff had installed the cables underground, it did so negligently. This matter proceeded to full hearing with both

parties testifying in Court. I have read the testimony on record and taken into account all relevant factors. I wish to note the following with a view to disposing off this Appeal;

2. Lawful installations of the underground cables. The Respondent did not provide licenses to install cables along a road reserves. These Licences are normally obtained from KURA, KENHA and KERRA. The lower court did not find these Licences important in this case but I disagree because such installation would amount to an illegality which normally bars compensation of this nature although the Court may sometimes find liability in instances of this nature if negligence is proven for example where there is prove that the Appellant in this case knew that there were cables underneath along the road reserves. The witness who testified on this matter did not install the first cables which were destroyed but his testimony is based on the repair of the destroyed cables such that there was no witness to clearly testify that anyone working on the said road reserves would easily know that there were cables underneath.

Joinder of parties;

3. The Appellant did not join KURA, KEHNA or KERRA to this suit yet it manages Kenya roads. If indeed these bodies knew that there were underground cables, they ought to have warned the Appellant on the existence of the underlying cables and so it is difficult to tell if this warning was delivered or not. In

case they knew that these cables were there but did not warn the Appellant, then they ought to be liable. There is no available reason as to why these bodies were not enjoined to this suit and no adequate prove that the Appellant knew the presence of these cables. Ordinarily, it would be expected that the Appellant would start constructing on the road reserve after consultation with the Government on what lies beneath the reserve.

Road reserves;

4. Regulations of road reserves are statutory and failure to obtain adequate licenses will certainly create chaos and danger to other subsequent licensed users along the road as it is difficult to know or see what lies beneath. The Respondent does not dispute that the Appellant was undertaking a road construction long Thika road on behalf of the Government but its main contention was that it was negligent.

Testimony by the Respondent

5. The respondent procured a witness who repaired the cables and there is no prove on how much the previous work cost in terms of actual receipts and photos of clear photos of mangled cables. The person who did the first installation did not testify and even though this cannot be fatal to the Respondent case, it denies the court the opportunity of comparing the first installation and the Second one. One

would then ask himself what if there was no first installation at the first place, how would the Respondent prove that it was there?

6. The conclusion of the above is that this Appeal is merited. I will not belabor with prove of quantum because the Respondent has not proven its case on a balance of probability. The appeal is allowed and the lower Court judgement is set aside. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF APRIL 2026.

**L. P. KASSAN
JUDGE**