

IN THE HIGH COURT FOR ZAMBIA
AT PRINCIPAL REGISTRY
LUSAKA
(Civil Jurisdiction)

2011/HP/1256

BETWEEN

KAMODY CHUUKA
ANGELA HANINGA
CABRINE KAYWALA



1ST PLAINTIFF
2ND PLAINTIFF
3RD PLAINTIFF

AND

KONKOLA COPPER MINES PLC

DEFENDANT

Before the Honourable Mr. Justice C.F.R. Mchenga SC

For the Plaintiffs: K. Mweemba, Legal Aid Counsel, Legal Aid Board

For the Defendant: K. Soko, Malambo and Company

J U D G M E N T

Cases referred to:

1. Zambia Railways Limited v Pauline S Mundia [2008] Z.R. 287
2. Blyth v Birmingham Waterworks, [1856] Exch

3. *Barnet v Chelsea and Kensington Hospital Management Committee*
 [1969] QB 428

Works referred to:

1. Clerk and Lindsell on Torts 18th Edition
2. Halsbury laws of England, 4th Edition, Volume 33
3. Charlesworth & Percy on Negligence, [London, Sweet & Maxwell, 2010]

The Plaintiffs, by writ of summons, seek the following reliefs:

1. *Damages for cracks caused to their houses;*
2. *Alternative houses;*
3. *Costs of and incidental to the action; and*
4. *Any other relief the court may determine.*

The evidence of Kamody Chuuka, the 1st Plaintiff, was that in October 2008, between 10 and 11 hours, she was in her house, No. 7, Tapseme Compound, Nampundwe, when she heard a bang. The house shook and the wall cracked on the left side. The ceiling board also fell. She came out of the house and found that the blast was set off by the Defendant's workers who were constructing a road. She said she found the Defendant's workers in her yard and told them that her house had developed cracks after blasting.

She also said she invited them into the house to see the crack but they said they were on duty and they would come back later. The

Defendant's workers went away and shortly afterwards she heard them blowing whistles as they carried flags. They retreated until they reached her house where they stopped and she heard another blast. The second blast caused the house to develop a big crack on the right side. It also suffered a crack in the middle and on the floor. She also testified that the men set off a total of four blasts and at the end of the blasting, they came to check on the damage to her house. They entered the house and recorded the damage. She said she also showed them the damage to house number 8 and 9 in the same compound.

The 1st Plaintiff also testified that around 14 hours, mine police officers also came to check on the damage and she was told that they would be contacted after further inspection. When nothing happened, in the company of the other Plaintiff's, they went to the Defendant's plant in Nampundwe in 2010 and met Mr Kunda and Mr Sikananu. They were informed that the matter had been referred to Chingola. They subsequently contacted the area member of parliament and came to court.

She said she first occupied the house in 2005 when her husband used to work for the Defendant. At that time, it was not damaged and she is

seeking compensation for the damage caused by the Defendant and the cost of valuation.

When cross-examined, she said the partitions in the house are made from concrete blocks but the outer wall is built of tapseme which are prefabricated slabs. She maintained that a crack formed immediately after the 1st blast. She admitted that there was a row of houses in front of where her house is. She admitted not taking any photographs after the blasting and that the valuation and photographs she presented to court was done in 2012. She said it was Mr Kunda and Mr Sikananu who informed them that they would be compensated.

In re-examination, the 1st Plaintiff said the valuation was done four years after the event because the Defendant initially accepted liability but later did nothing. She said the letter denying liability was only written on 18th March 2011.

The second witness was Angela Haninga, the 2nd Plaintiff and her evidence was that in 2005 she bought house number 8, Tapseme Compound, Nampundwe, from one Teddy Namakando and at the time she bought it was intact. She said in October 2008, her tenant called her and she went there after 3 days. She discovered that the house had suffered damage,

the ceiling board had fallen and it had also suffered cracks on the walls.

In 2010, her tenants vacated the house because there was a danger of it collapsing and in November 2010, she went to occupy it in order to maintain it.

When cross examined, she admitted not staying in the house at the time of the blasting in 2008. She said the house was prefabricated and that there were other houses between her house and where the blasting was taking place.

Cabrine Kaywala, the 3rd Plaintiff also gave evidence. She testified that in October 2008, her house was damaged by the Defendant's workers. She said in October 2008, she was in the 1st Plaintiff's house when they heard a blast and the ceiling board collapsed. They ran out of the house and found the Defendant's workers who were blasting the roads. After a second blast, she decided to check her house and she discovered cracks from the roof to the floor. She also discovered that the electricity tube had stopped working and the glass on the TV stand had cracked.

She said when the Defendant's workers finished blasting, they went and checked the houses. They also recorded the damage. Later, mine police officers and an inspector came to inspect the houses. They lodged a claim for compensation for the damage at the Defendant's Nampundwe plant and they continued checking every three months. In 2009, nothing happened and they decided to report the matter to the area member of Parliament. At a meeting between the Member of Parliament and the Defendant, they were advised that the matter would be looked into and when nothing happened they decided to sue. She also said that since the incident, no one has leased the house for a long period as tenants fear that it will collapse.

Under cross-examination, she said she bought the house in 1992 and she occupied it up to 2011. She said during the period when she occupied it there was no need for her to maintain it because it was in a good condition. She also said the house is divided by blocks inside but the outer wall is made of tapseme. She denied the suggestion that some similar houses were demolished because of being uninhabitable.

The Plaintiff's 4th witness was Lawrence Chatendwa (Pw4), an assistant valuation surveyor from BM Valuation Surveyors. He said he is a holder of a certificate from the Institute of Rating, Revenue and Valuation

in the United Kingdom and has been conducting valuations since 1986. He said he received instructions and value of three houses in Nampudwe, these were houses No. 7, 8 and 9. He said they were informed that the valuation was for compensation purposes. He said there are many reasons for cracks including free roots, or earth tremors.

It was his evidence that after assessing the properties, he came to a conclusion that the damage they had suffered was because of blasting since they were located in a mining area and there is blasting. The damage was not as a result of lack of maintenance or negligence and the gable in House No. 9, could not have fallen because of the failure to maintain. He also said he did not believe that the owners of the houses could have failed to maintain them. He said the cracks are structural and no maintenance would have prevented them.

When cross examined, Pw4 admitted only visiting the houses in 2012 and not knowing what they looked like in 2008. He admitted not conducting a structural survey and said he came to the conclusion that the damage was due to blasting because they are in a mine area. He came to that conclusion because in a mining area there are earthquakes and earth tremors as a result of ground blasts. In addition, there were no trees nearby whose roots could have caused the damage. He admitted that poor workmanship can result in the floor and walls cracking.

When re-examined, he said as valuation surveyors, they do not conduct structural surveys.

The Plaintiff's 5th witness was Mutumwa Inambao (Pw5). Her evidence was that in 2009 she used to work as an administrative assistant at Mwembeshi constituency office. In 2009, the 1st Plaintiff lodged a complaint about the damage of a house after blasting by the Defendant and she was instructed to go and inspect the damage. She inspected the damage and reported to the area member parliament who came and also inspected the house. Thereafter, a meeting was convened by Defendant and some directors inspected the house. The Defendant's chief executive officer indicated that the Defendant had no problem with the 1st Plaintiff's claim and they would pay her.

When cross-examined, she said she could not recall the date when 1st Defendant came to make the report at her office. She said after the 1st Plaintiff had reported, two of her neighbours also came to make reports. She said she inspected the 1st Plaintiff's house and saw the damaged wall and floor but could not tell what had caused it. She said the Defendant's chief executive officer Mr. Kumar, did not indicate who was going to make the payment.

Mutumwa Inambao (Pw5) was the Plaintiff's last witness and the Plaintiffs' closed their case after her testimony.

The 1st witness for the Defendant was Stephen Banda (Dw1), a mining engineer. His evidence was that in 2008, he was head of mining at the Defendant's Nampundwe mine. One of the Defendant's responsibilities was to maintain the roads to and from the mine. On the material day, he instructed the magazine master to blast two rocky outcrops on the road. One of them was 25 centimetres by 30 centimetres while the other was 15 centimetres by 25 centimetres. He said because there was a residence 300 meters away, they reduced the amount of explosives. On the 1st outcrop a 210 mm long explosive was cut into two and one half was used the first time and the same amount was used the second time. On the 2nd outcrop, they did the same thing, the explosive was cut into two. In both cases the rock did not break and that is why they had to blast twice.

Dw1 also testified that before conducting any blasting, they covered the outcrop with mud and truck tyres. He said there were no complaints after blasting but a week later they received complaints. The mine manager, the head of mining, security and human resource manager went to verify claims that the blasting had damaged three houses. They went

to the concerned houses, which were built with prefabricated materials. The houses were built by Zambia Consolidated Copper Mine (ZCCM) in the 1970s and were not intended to last for more than 3 years. Their ceiling boards were infested with termites and the floors had cracked on account of having weak foundations.

He also testified that there were two rows of houses from the blasting area. The first row was 270 metres from the area while those in the 2nd row were 350 meters away. It was also his testimony that they calculated that the blast should not have any impact 50 meters from the point but still made sure that there was nothing within a circumference of 100 metres. He referred to pages 2 to 28 of the Plaintiff's bundle of documents and testified that the damage they observed when they inspected the houses could not have been caused by a day's blasting. He said Defendant never accepted liability for causing damage to the houses and that no one else complained about damage to their houses other than the 3 Plaintiffs.

When cross examined, Dw1 said he did not conduct the actual blasting, it was done by a magazine master. He said they blasted the rocks four times and that it could have caused damage to property if it was carelessly done. He admitted not seeing the houses before the

blasting. He also said had they not taken precautions, the houses would have been damaged. He said the cracks on the floors were as a result of the weaknesses in the foundation.

On being re-examined, the witness said he was not there at the time of the blasting but the quantity of explosives used had very little impact. He also said he has worked as a mining engineer for 21 years and said when calculating the amount explosives to use they consider factors including the distance from the nearest structures. He said had there been any vibration as a result of the blasting, it could have cracked the windows but there was no such complaint. He said the surveyors did not indicate in their report how they came to the conclusion that blasting caused the damage to the houses.

Friday Simuni (Dw2), a blasting licence holder, was the 2nd witness for the Defendant. His evidence was before conducting the blasting, they warned the public. He said they used two 50 X 270 mm gelignite pieces of explosives which were each cut into two pieces. The blasting point was at 50 metres and they worked with a safety radius of 100 metres. The first blast was 350 meters from the houses while the 2nd was at 260 meters. After the blasting, they checked and found that all was well; they never received any complaint.

He also testified that after sometime, people came to complain and when they went to inspect the houses and found that they were poor quality prefabricated houses. Two had already been demolished. He said there were no complaints from house holders of the 1st row and the complaints only came from those in the 2nd row. He said it was not possible for houses in the 1st row to escape damaged and only for those in the 2nd row, which were 310 metres away, to get damaged. He said the 1st row had new houses while the 2nd row had old houses.

When cross examined, he said he was a holder of a blasting licence and was working as a magazine master. He said they covered the rocky outcrops they were blasting with mud and tyres and there where were no complaints. He said though he investigated the complaints he did not prepare any report. He said the two houses where demolished in 2007. He admitted not having evidence to show that the houses in 1st and 2nd row were there of the same type.

When re-examined, he said at the time of the blasting most of the houses were in a bad state.

The 3rd witness for the Defendant was White Simwanza (Dw3). His evidence was that he started living in Tapseme Compound in 1993. He said the houses are made from tapseme which is a mixture of grass and

cement. Some of them were built in 1990 but the older ones were built in 1982. He said after the blasting he heard that there were complaints as some houses in the 2 road had cracked. It was his evidence that nothing happened to his house as a result of the blasting but its ceiling has collapsed because the timbers had been eaten by termites. He said no houses fell after the blasts.

When cross examined, he said he was a contractor for the Defendant and he used the work for them at the time of the blasting. He maintained that he came to the area in 1993 and his house was built in 1990. He said the houses in the 2nd row were built in 1982. He said his house is in a good condition but the ceiling was eaten by termites.

When re-examined, he said some houses were poorly built and they have issues with their roofs. He also said 2 houses in the 2nd row collapsed before the blasting.

Charles Sheeba, the Defendant's 4th witness (Dw4) is also a resident of Tapseme Compound in Nampundwe. He has lived there since 1993 and his house is in the second row, the same row as that of the 3 Plaintiffs. His evidence was that the walls of the houses are made of a mixture of cement and compressed wood. He said even when they were built, the

roofs of some of them were warped and the pillars in their structure were supposed to be locked and that was not done. As a result, they have come apart and the walls have cracked. The ceiling boards have also been eaten by termites.

Dw4 also testified that in October 2008, he was living in area and is aware of the blasting that took place in that month. He said he did not notice anything in his house but heard complaints. He said that the sides to the 1st Plaintiff's his house had fallen and they were repaired with asbestos sheets before the blasting, it is therefore not true that the cracks in the houses were not caused by the blasting. He said that it is possible that the blasting would have aggravated the cracking and that he was at work when the blasting was taking place.

When cross-examined, Dw4 said his house is number 11 and house number 10 collapsed but he could not say when. He said the blast did not reach the area where his house is. He said part of his house fell before the blast and maintained that the houses were poorly built. He said when the houses used to be owned by the mines, they used to repair them when a report was made.

Both parties were given time to file in written submissions and at the end of the prescribed time, the only submissions received were those filed on behalf of the Defendant.

Submitting on behalf of the Defendant, Ms Soko referred to the case of **Zambia Railways Limited v Pauline S Mundia (1)** and submitted that the Plaintiffs have failed to discharge the burden of proving their case on a balance of probabilities. She submitted that though they have alleged that their houses were damaged as a result of the Defendant's negligent acts, the evidence before the court, shows that damage was probably because they were poorly constructed prefabricated houses. Further, they have not led any evidence of the houses condition prior to the blasting and the pictures of the damages that have been presented to court were taken four years after the event.

Counsel referred to **Clerk and Lindsell on Torts (1)** at paragraph 704 and submitted that there are four requirements to proving negligence:

1. *The existence in the Law of duty of care situation i.e. one in which the Law attaches liability to carelessness.....;*
2. *Breach of the duty of care by the Defendant, i.e. that he failed to measure up to the standard set by law;*
3. *A casual connection between the Defendant's careless conduct and the damage; and*
4. *That the particular kind of damage to the claim is not so unforeseeable as to be too remotes.*

She also referred to Halsbury's laws of England (2) at page 476 where it was stated as follows:

"The burden of proof in an action for damages negligence rests primarily on the Plaintiff, who, to maintain the action must show that he was injured by a negligence act or omission which the Defendant is in law responsible. This involves proof of a duty owed by the Defendant to the Plaintiff, some breach of that duty, and an injury to the Plaintiff between which and a breach duty, a causal connection must be established. Therefore, it is insufficient for the Plaintiff to prove a breach of duty to a third person, or breach of duty without proving injury or to prove injury without breach of duty or injury which may not be caused by breach of duty."

Further, Ms Soko referred to the case of **Blyth v Birmingham Waterworks**, (2) and submitted that the Defendant did not breach any duty to the Plaintiff's as their blasting work did not cause any damage to the property of any people living the surrounding area. She also submitted that the 2nd Plaintiff did not show proof that she owned the property No. 8 at the time of the blasting.

In addition, counsel referred to the case of **Barnet v Chelsea and Kensington Hospital Management Committee** (3) and submitted that the test for causation is whether "loss could have been achieved but for Defendant's negligence." She submitted that in this case, the cracks on the houses were there even before the blasting took place because of the materials used to build them. Ants had also eaten the ceiling boards. Finally, she submitted that the damage to the houses, cannot

wholly be attributed to the Defendants, and where there is such doubt the action fails.

I am indebted to counsel for her submissions and I have taken them into account in arriving at my decision.

The authors of *Charlesworth & Percy on Negligence*, paragraph 6-14 at page 410, as regards a claim for damages for negligence, note as follows:

"The claimant must lead either direct or circumstantial evidence tending to establish both facts necessary to establish a breach of duty and any additional facts required to establish causation of loss. To take a basic example, in an accident claim the evidence must demonstrate both how an accident happened and how, as a result, injury and other damage was sustained. The evidence must also be sufficient to show that, on a balance of probabilities, the most likely cause of both was the negligence or breach of statutory duty of the Defendant, or some person for whose negligence the Defendant is responsible in law. If the claimant fails to establish the fact that the Defendant caused the harm of which the complaint is made, or some part of it, then the action will fail."

It follows, that for the Plaintiffs' claims to succeed, their evidence must prove, on a balance of probabilities that the Defendant breached a duty of care when they set out blasting the rock outcrops on Nampundwe road and that the Defendant's negligence was the likely cause of the cracked walls and floors their houses suffered.

From the evidence before me, I find that it is not in dispute that in October 2008, the Defendant's workers carried out some blasting on rocky outcrops on a road that is close to the Plaintiffs' houses. The road, which leads to the Defendant's mine in Nampundwe, is not far from the Plaintiffs' houses which are houses number 7, 8 and 9 Tapseme Compound, Nampundwe. I also find that between the Plaintiffs' houses, which are in the same row with Dw4's house, house No. 11, and the road the Defendant's workers were working on, there is a row of houses built of similar materials as those of the Plaintiffs'. It is my finding that though the houses in the row between the Plaintiffs' houses and the road that was being worked on were built of the same materials, the Plaintiffs' houses were built earlier. It's also not in dispute that subsequent to the blasting, the Plaintiffs' reported to the Defendant that their houses had suffered damage. What is disputed is when the damage to the houses was reported.

I find that in June 2012, BM Valuation Surveyors, carried out valuations of houses No. 7, 8 and 9, Tapseme Compound, Nampundwe, that respectively belong to the 1st, 2nd, and 3rd Plaintiff's. The assessment of house No. 7, which is at pages 3-9 of the Plaintiff's Bundle of Documents, found that it was "badly damaged by the ground blasting by the mine". The assessment also established that it had cracked walls and a cracked floor.

In the case of house No. 8, in the valuation report, which is at pages 10-16 of the Plaintiff's Bundle of Documents, it was found that it was also "badly damaged by the ground blasting by the mine and needs to be replaced". It had cracked walls and floor. Finally, house No. 9, was according to the valuation report at pages 19-31 of the Plaintiffs bundle of documents, found to be "badly damaged by the ground blasting by the mine". Similarly, its walls and floor were found to be damaged due to ground blasting.

What is contentious is whether the Defendant's blasting, in October 2008, caused the damage set out in the valuation reports. Further, the Defendant disputes the claim that the damage to the houses was reported on the date of the blasting and their workers confirmed the damage. Also in dispute is the claim that the Defendant's chief executive officer accepted liability and promised that the Defendant would make good of the damage.

I agree with the Defendant's submissions that for this claim to be sustained, I must find that a duty of care situation existed between the Plaintiffs and Defendant when the Defendant set out to blast the rocky outcrops on the road. I must also find that the Defendant breached that duty when they failed to put in place measures that

would prevent damage to the Plaintiff's houses as they were carrying out the blasting of the rocks. Finally, I must find that the Defendant carelessly conducted the blasting resulting in the damage the Plaintiffs' houses suffered and that the damage was reasonably foreseeable.

I have no difficulty in finding that the Defendant had a duty of care to the Plaintiffs when they set out to blast the two rocky outcrops that were 270 and 350 metres from the Plaintiffs' houses. The distance of the out crops from the Plaintiffs' houses required the Defendant to take measures that would prevent or minimise any damage that would be occasioned by the blasting. They should have ensured that the right amount of explosives were used; an amount that would have broken the rocky outcrops but not damaged the houses in the vicinity either through earth movement or vibrations caused by the explosives or flying rock.

I am satisfied that the Defendant's workers took steps to prevent damage from flying rock by placing tyres and mud on the rocks they were blasting. Notwithstanding, I must still consider whether the Defendant's workers calculations were correct and the amount of explosive used could not have caused the damage now complained of.

According to 1st and 2nd Plaintiffs the blasting by the Defendant's workers in October 2008, caused the walls and floors of their houses to crack. The ceiling board in the 1st Plaintiff's house also fell soon after the blasting. It was also the 3rd Plaintiff's evidence that the glass on her television stand cracked and that when the Defendant's workers inspected the houses soon thereafter, they confirmed the damage.

On the other hand, Dw3, who was responsible for the blasting, denied the claim that the walls and floor cracked because of that blasting. His evidence was that a single day of blasting could not have caused such damage. He said the houses' walls and floors cracked because they were made of poor quality materials. This was supported by Dw4, whose house was in the same row as that of the Plaintiffs' and was built at the same time. His evidence was that 1st Plaintiff's house, like many other houses in the area, had started coming apart even before the blasting. Further, Dw1 and Dw3 said after making calculations, they used explosives that could not cause damage beyond 50 meters. The cutting of the explosives into two, greatly reduced their impact, they even failed to crack the rock on which they had been placed. They had to blast both rock outcrops twice. It was also Dw1's evidence that had the impact reached the houses, the windows would have broken. There is

also evidence from Dw2, who lived in a house in the row between the Plaintiff's houses and the road, that neither did his house or the house of anyone in his row suffer damage as a result of the blasting.

As was held in the case of *Zambia Railways Limited v Pauline S Mundia (1)* the burden of proving a claim in a civil case rests on the Plaintiff and the burden is discharged proving their case on a balance of probabilities. As previously indicated, the 1st and 2nd Plaintiff testified that the walls cracked after the blasts. In support of their evidence they called Pw4 who produced reports. At pages 6, 14 and 21 of the Plaintiff's Bundle of Documents, the reports which Pw4 and his colleagues compiled indicates that "..... we did not carry out any structural survey of properties" The report also indicates that "..... Therefore we cannot give any guarantee in these respects" They also reported that "... our inspection which was limited to invisible and readily accessible parts ..." from his evidence is clear that the expert only looked at the houses and considered their location. He came to the conclusion that since they were in a mine area, the damage should have been caused by mining activities.

The finding of the valuation reports is not helpful to the Plaintiffs. No enquiry was conducted to support the conclusion that the blasting of October 2008, caused the cracks in houses' walls and floors they

observed in 2012. Instead, they found that because there were no trees near the houses and since they were located in a mining area, the damage could only have been caused by the tremors and earth movements associated with blasting in a mining area. This finding is not supported by any credible evidence and I do not accept it.

There is still the evidence of the 1st and 2nd Plaintiff who were present when the blasting took place. They say the walls and floors cracked soon after the blasting. If that is what really happened, what is the explanation for the houses in Dw2's row, which were nearer to the blasting than that of the Plaintiffs' houses, not suffering any damage? Though none of the householders, other than Dw2, in the row where Dw2's house was, were called as witnesses, I am satisfied that their houses, like that of Dw2, did not suffer any damage. If it had been the case, just like the Plaintiffs, they would have complained, but they did not.

I am satisfied that the Plaintiffs' evidence was "coloured" when they claimed that the floors and walls came apart as the blasting went on. Had it been the case, the house in the row where Dw2 lived would have suffered worse damage or at least suffered some damage. I also accept Dw1's evidence that if the blasting had caused the walls and floor to crack instantly the houses would have suffered damage to the windows

but they did not. Consequently, I don't believe the Plaintiffs' evidence that the damage shown in the reports pages 2 to 29 of the Plaintiff's Bundle of Document's can be attributed to the blasting. I believe Dw4's evidence that the houses were damaged prior to the blasting. I have also taken into account his opinion that if anything, the blasting could have only aggravated the situation. But there is no evidence to support this proposition, I do not accept it.

As regards the questions whether the Plaintiffs reported the damage to their houses soon after it was occasioned, I believe the evidence of Dw1 and Dw3, that on the date of the blasting, no complaint was made. The earliest complaint was made at least 1 week after the blasting. I also do not believe their claim that the chief executive officer of the Defendant accepted liability for the damage their houses allegedly suffered as a result of the blasting. I find no credible evidence to support the claim. Considering the evidence before me, I find such admission of liability as being inconceivable.

Having found that the Defendant's blasting did not cause damage to the Plaintiffs' houses, their claim for damages for cracks caused to their houses fails. So do their claims for alternative houses. The first two

claims having failed, their claims for costs of and incidental to the action and any other relief the court may determine, fall off.

This Plaintiffs' action is dismissed with costs.

Delivered in Open Court at Lusaka this 2nd day of June, 2015



C. F. R. MCHENGA SC
JUDGE