

# Bester Chungano vs China Railway 20 Bureau Group and Roads Authority Civil Cause Number 383 of 2022

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<b>Court:</b>	High Court of Malawi
<b>Registry:</b>	Civil Division
<b>Bench:</b>	Honourable Justice Allan Hans Muhome
<b>Cause Number:</b>	Civil Cause Number 383 of 2022
<b>Date of Judgment:</b>	April 01, 2025
<b>Bar:</b>	For the Claimant: Mr. Hope Mvonye For the 1st Defendant: Mr Alfred Lungu For the 2nd Defendant: Mr Bruno Matumbi and Mr Lovemore Chikopa

## Head Notes

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**Law Of Evidence** -Credibility of witness – Court may find one expert's evidence more credible than a lay person's

**Law Of Torts** - Nuisance – Vibration from construction works – Claimant must provide direct evidence linking damage to the works

**Civil Procedure** – Burden of proof – Claimant must prove their case on a balance of probabilities

## Summary

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The Claimant, a homeowner, commenced an action against the 1st Defendant, a contractor, and the 2nd Defendant, a statutory body, seeking costs for repairs and damages. The Claimant alleged that vibrations from the Defendants' heavy machinery used in the construction of the Nsanje-Marka Road caused extensive cracks and damage to his house. The Defendants denied the claims, asserting that the vibrations were not powerful enough to cause the alleged damage given the property's distance from the road. The Defendants also argued that the Claimant's refusal to allow a monitoring team access to the property made it difficult to ascertain if the cracks were pre-existing. Furthermore, the 1st Defendant contended that as a mere contractor, any compensation should be borne by the Government of Malawi and the 2nd Defendant.

The Court had to determine whether the Claimant had proven, on a balance of probabilities, that the Defendants' construction activities were the direct cause of the damage to his property. The Court also had to assess the credibility of the evidence presented by both parties.

The claims were dismissed in their entirety. The Court held that the Claimant had failed to prove his case on a balance of probabilities, finding no direct evidence to link the cracks to the road works. The Court found the evidence of the 2nd Defendant's witness, a Project Engineer, to be more credible, accepting his opinion that the vibrations were within acceptable levels and would have dissipated before reaching the Claimant's property. The Court also agreed that the cracks could have been caused by other factors, such as the use of heavy railway steel in the construction of the house, which could have overburdened the structure. The Court ordered each

party to bear their own costs.

## Legislation Construed

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Roads Authority Act (Cap. 69:07) (s 3(1))

## Judgment

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The Claimant is the owner of a house in Marka Village, in the area of Traditional Authority Ndamera in Nsanje District (the property). The Defendant is a statutory body created under section 3(1) of the Roads Authority Act, Cap. 69:07 of the Laws of Malawi (the Act) and was responsible for the construction of Nsanje – Marka Road which was contracted out to the 1st Defendant. It is alleged that the 1st Defendant used machines and trucks that caused earth tremors and the said vibrations have caused extensive damage to the property. Particulars of the damage were cited. The Claimant, therefore, commenced this action claiming the cost of repairs and damages for breach of the right and freedom to peaceful enjoyment of his property, including inconvenience and costs of this action.

The Defendants deny all the claims stating, among others, that the vibration caused by the machinery was not powerful enough to cause the said cracks as the Claimant's property was about 50 meters away. That following a stakeholders meeting, a monitoring team was instituted to check whether the cracks were being caused by the vibrations, however, the Claimant refused them access to the property. This meant that it was highly likely that any alleged cracks may have been in existence before the construction commenced. In particular, the 1st Defendant stated that the reliefs

sought by the Claimant can only be against the Government of Malawi and the 2nd Defendant as they were mere contractors.

The Claimant testified that the Defendants heavy machinery caused the damage to his property. He produced exhibit BC 1, being video clips depicting the cracks to the property. That he reported the matter to the District Commissioner through his letter exhibited as BC 2, to which he did not get a response, hence these proceedings. He stated that at some point all stakeholders met, per minutes exhibited as BC 5, and it was agreed, among others, that a team would be instituted to observe if the machines were causing the vibrations complained of by the Claimant.

In cross-examination, the witness stated that he did not take images or video clips before the commencement of the construction works but only afterwards. He stated that qualified persons built his house but he did not bring evidence of their qualification. He accepted that railway steel was used in some parts of the building and that the building had a ring beam. In re-examination, he insisted that there were no cracks before the commencement of the works.

The 1st Defendant called their Foreman, Dani Simbi, who testified that the Claimant's house did not develop cracks during compaction. An inspection of all the nearby houses was done and concluded that there were no houses affected by the vibrations. That in case some properties were affected, it was the responsibility of the Government of Malawi to compensate the victims and not the 1st Defendant, who was a mere contractor.

In cross-examination, he admitted that vibrations were caused and a meeting of stakeholders was held to observe. However, the observations never took place as the Claimants house was away from the standard distance. However, an inspection was done after the construction when cracks were observed. In re-examination, the witness emphasised that if the cracks were caused by the vibrations, the compensation ought to be borne by the Government.

The 2nd Defendant called Chimwemwe Chirambo, their Project Engineer, who supervised the works together with a full time consulting firm engaged by the 2nd Defendant. He testified that the vibrations caused by the equipment on site could not cause a house to develop cracks. Before commencement of works the 1st Defendant conducted an assessment identifying properties that lay within the road reserve that would be affected by the construction. That the Claimant's property was way outside at about 32 meters. However, a complaint was received from the Claimant that his house had developed cracks, per images exhibited as CC 1. The witness inspected the house and noted that structures closer to the construction site were in sound shape. That the Claimant's property could have developed cracks due to other factors such as the fact that the Claimant's house was saddled with railway steel which is significantly heavier than standard construction-grade steel. The weight and rigidity of railway steel could overburden the concrete, causing the structure to crack.

The witness testified further that the construction vibrations were within acceptable levels of less than 5mm/s or 0.19685 inches per second and considering that the Claimant's property was located about 32 meters from the centre of the road, the strength of vibrations would dissipate before getting to the house. He opined that the cracks could have been caused by many other reasons such as poor quality building

materials; environmental factors such as changes in temperature; absence of ring beam and degradation of building materials.

In cross-examination and re-examination, he stated that he was not always on site, but the consultant. He admitted that vibrations can cause cracks however insisted that the machines used on site could not have caused the cracks as the Claimant's house stood about 32 meters away.

At close of trial, the Court received written submissions from Counsel, for which the Court is grateful. The standard of proof in civil matters is on a balance of probabilities and the burden of proof lies on he who asserts the affirmative, in this case the Claimant: *see Commercial Bank of Malawi v Mhango* [2002-2003] MLR 43 (SCA).

The Court has analysed the evidence before it and forms the opinion that the Claimant has failed to prove his case on a balance of probabilities. According to Justice Chimasula Phiri in *F.A. Mlombwa t/a Umodzi Transport v Cotam Transport* Civil Cause No. 1890 of 1996, 'Findings of Courts are based on facts as proved by the evidence and not mere assertions or allegations which are unsubstantiated.' In the present matter, there is no direct evidence linking the cracks to the road works. Considering that the distance from the centre of the road to the property is about 32 meters. This Court has examined the images and video clips of the property and is not convinced that the cracks could have been caused by the vibrations.

This Court finds the evidence of the 2nd Defendant's witness more credible than that of the Claimant. It is more probable than not that the construction vibrations were

within acceptable levels and would dissipate before reaching the Claimant's property which was located about 32 meters from the centre of the road. More importantly, this Court agrees with the 2nd Defendant that the cracks could have been caused by many other reasons such as structural design and environmental factors. It is obvious that railway steel that the Claimant used in the construction of his house heavier than standard construction steel and might have caused the cracks. This Court is therefore left in doubt which must be decided in favour of the Defendants.

The claims are therefore dismissed in their entirety. Each party shall bear their own costs.

Made in Open Court this 1st day of April, 2025.