

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL SUIT NO. 161 OF 2013

PETER MUKASA KAKEMBO T/A BASKON HOSTEL :::::::::: PLAINTIFF

VERSUS

1. TOM OYET T/A SUNWAYS HOSTEL
2. KOBUSINGE IREEBA ANNET ::::::::::: DEFENDANTS

BEFORE: HON. LADY JUSTICE CORNELIA KAKOOZA SABIITI

JUDGMENT

- 29/10/21*
1. The Plaintiff's claim against the Defendants jointly and/or severally was for;
(a) a declaration that the Defendants trespassed onto his land; (b) an order for demolition of all the structures of Sunway hostel establishment which trespassed onto the Plaintiff's land, and rectification of the Plaintiff's land to the status quo prior to encroachment/trespass; (c) special damages of Ug.shs. 108,481,000/= as detailed in paragraph 15E of the amended plaint; (d) general and punitive damages; (e) interest on (c) and (d) above at 26% per annum from the date of judgment till payment in full; (f) costs of the suit and interest thereon of 26% per annum from the date of judgment till payment in full; and (g) any other relief that the court deems fit.

2. The Plaintiff contended that he is the registered proprietor of land and developments (Baskon hostel) comprised in Kibuga block 3 plot 154. The 1st Defendant is the registered proprietor of land comprised in Kibuga block 3 plot 870 and the 2nd Defendant is the registered proprietor of land comprised in Kibuga block 3 plot 869. All these plots are in Makerere along Sir Apollo Kaggwa road. In 2010, the Defendants commenced construction of Sunways hostel on Kibuga block 3 plots 869 and 870, encroaching and trespassing on the Plaintiff's plot 154. The Defendants damaged the already existent structure comprised in Baskon hostel. The Plaintiff had left a strip of land after his perimeter wall neighboring plots 869 and 870 to allow him carry out maintenance works on the perimeter wall which was blocked by the Defendants. This destroyed the Plaintiff's property as listed in paragraph 5 of the amended plaint. The trespass was confirmed by M/s. Geoteal Ltd in their report of 6th September 2012, after opening boundaries and M/s. Terrain Consult in its report of 5th October 2012.

3. The particulars of trespass pleaded include; (a) setting part of the foundation of Sunways hostel building in the part of the Plaintiff's land and building pillar bottoms and structures thereon; (b) clearing part of the Plaintiff's land and putting pavement blocks thereon to create more parking area for Sunways hostel; (c) digging sewerage trenches along the boundary wall of Baskon Hostel and thereby weakening it; (d) placing timber poles onto the boundary wall of Baskon hostel to support the construction and finishing of upper floors of Sunways hostel thereby weakening it; (e) constructing part of Sunways hostel just next to the Plaintiff's sewerage installations for Baskon hostel and discharging/diverting rainwater and other water with debris from Sunways

hostel into the Plaintiff's sewerage tank through the manhole thus making it regularly overflow and damaging it; (f) blocking the Plaintiff's access to the lower side of his plot by constructing a small gate onto the Plaintiff's land; (g) trespassing on a portion/strip of the land left after the Plaintiff's perimeter wall off plot 154; (h) shifting the mark stones demarcating the boundaries of the plots to justify the encroachment.

4. Further that the Plaintiff had on various occasions sought the Defendants to rectify their unlawful acts of trespass but they have ignored him. The Defendants actions amount to continuous trespass and their conduct was sufficiently outrageous and vindictive. As a result, he has been deprived of use and enjoyment of his land and placed at great loss and inconvenience for which he sought payment of damages.
5. In their joint written statement of defence, the Defendants averred general denials and added that at the start of the construction of the hostel, the Plaintiff had already demarcated his land through the construction of a perimeter wall and hence could not have trespassed on his land intentionally as alleged.
6. In his reply to the written statement of defence, the Plaintiff averred that a survey boundary mark determined the extent of his boundaries and not the perimeter wall. He reiterated that he suffered loss as a result of the Defendants actions for which he seeks special, general, exemplary and aggravated damages.
7. On 21st June 2018, the court endorsed a partial consent judgment on admission entered by the parties wherein the Defendants admitted trespassing onto the

Plaintiff's land by 32.72 square meters by; (i) setting part of the foundation of Sunways hostel building and building pillar bottoms and other structures thereon; (ii) clearing and putting pavement blocks thereon to create more parking area for Sunways Hostel, which extent was to be verified at the locus-in-quo visit; (iii) digging sewerage trenches along the boundary wall of Baskon hostel; and (iv) blocking the access way of the Plaintiff to a strip of land on the lower side of the property in constructing and fixing a small gate. What is left for the court to determine is the reliefs sought by the Plaintiff.

Issues:

The only issue left to be determined among those under the joint scheduling memorandum is Whether the Plaintiff is entitled to the reliefs sought in the plaint.

Witnesses

- CV 828/2016
20/10/2017
8. The parties had earlier proceeded by oral testimony. The Plaintiff led seven witness. Mr. Mpwabe Mugooda Charles a quantity surveyor who prepared a bill of quantities for the boundary wall demolition and renovation (exh P1) testified as PW1. Mr. Ezra Nayoga, a civil engineer who prepared a structural integrity report (exh P2) was PW2. Mr. Charles Lwanga Njuki, a plumber testified as PW3. The Plaintiff testified as PW4. Mr. Kennedy Sentogo, a surveyor under SM Geoteam Ltd testified as PW5. PW6 was Ms. Joyce Gunze Nabaasa a land surveyor with Terrain Consult and PW7 was Gasaza Constant, a photographer who took the photos exhibited as exh P11. The Defendants led four witnesses. Mr. Samuel Nathan Serunjogi, a surveyor testified as DW1. DW2 was Mr. John Ngirabakuuzi, the supervisor of the building of Sunways.

The second Defendant testified as DW3 and the 1st Defendant testified as DW4.

Locus Visit

The Court visited the locus on 12th January 2021 to familiarize itself with the physical layout of the respective properties.

Representation

9. The Plaintiff was represented by M/s. Enoth Mugabi Advocates & Solicitors and the Defendants were represented by M/s. Katongole Yiga & Masane Advocates & Solicitors.

Written submissions were filed by counsel for the all parties.

10. The principle of law is that “special damages must be specifically pleaded and proved, but that strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example by evidence of a person who received or paid or testimonies of experts conversant with the matters”. See **Gapco (U) Ltd Vs A.S. Transporters (U) Ltd CACA No. 18/2004 and Haji Asuman Mutekanga Vs Equator Growers (U) Ltd, SCCA No.7/1995.**

11. The Plaintiff tendered 7 receipts from Charles Young Limited to prove special damages of constructing another sewer line to wit, receipt No. 316 dated 3rd January 2011 for Ug.shs 5,025,000/= (exh P 5B); receipt No.337 dated 14th February 2011 for Ug. Shs. 5,025,000/= (exh P5C); receipt No. 341 dated 28th March 2011 for Ug.shs. 10,000,000/= (exh P5F); receipt No. 347 dated 11th April 2011 for Ug.shs. 10,500,000/= (exh P 5G); receipt No.350 dated 25th April 2011

for Ug.shs. 7,320,000/= (exh P5H); receipt No.325 dated 17th January 2011 for Ug.shs. 10,000,000/= (exh P5P); and receipt No.339 dated 21st March 2011 for Ug.shs.14,000,000/= (exh P5D). All these receipts add to Ug.shs. 66,845,000/=. He also tendered a receipt No. 141 dated 6th March 2012 from S.M. Geoteam Ltd (exh P12) for Ug.sh 4,500,000/= as payment for boundary opening. This totals to Ug.shs. 71,345,000/= and the same is awarded as special damages. The claim by the Defendants in their submissions that the Plaintiff had to change the sewer line because the population overwhelmed the one that was already in place and not because of the damage occasioned by the Defendants is rejected because it was not proved to the satisfaction of court.

12. Basing on the evidence as a whole and specifically that of PW1 and PW2, this court is satisfied that the Defendant's actions weakened the Plaintiff's perimeter wall. To that extent, the Plaintiff prayed for Ug.shs. 37, 136,000/= as special damages for repairing the wall as prepared in the bill of quantities for the boundary wall demolition and renovation (exh P1). However PW1 who prepared exh P1 testified that the existing wall was not painted so items G on page 3 (un numbered) (assigned Ug.shs. 3, 195,000/=) and E on page 3 (assigned Ug.shs. 1,800,000/=) were not on the existing wall fence. He further testified that he prepared a standard document with margin of error being +15% or – 15%. On item I (assigned Ug.shs. 500,000. =) on page 3, he testified that although the site is not water logged, it may rain after excavation so it was incorporated to remove the water. Item J (assigned Ug.shs. 500,000/=) on page 3 was necessary because the depth of the foundation requires plunking as it is between two buildings.

13. Further that item G (on page 2) (assigned Ug.shs. 1,440,000/=) was painting at the foundation level though the one at the site did not have it. In regards to item

H (on page 3) (assigned Ug.shs. 800,000/=), he testified that the site has strained barbed wire. In re-examination, he testified that he had prepared a document to replace exactly what was on site. However when working out the actual works, he immediately included those that are standard, kopping, painting of the foundation and the wall generally. Items I and J are standard but they were not on site.

14. Because item I is speculative, it cannot be awarded as special damages. In the same way, items G both on pages 2 and 3 and item E can't be awarded because they were not on site before the trespass by the Defendants. Because the site had strained barbed wire, only Ug. Shs. 400,000/= will be awarded to the Plaintiff under item H. The deductions total to Ug.shs. 7,335,000/= leaving a balance of Ug.shs. 29,801,000/= which is awarded to the Plaintiff as special damages under exh P1. Therefore, the Plaintiff is awarded a total sum of Ug. shs. 101,146,000/= as special damages.

15. It is trite law that "measurement of the quantum of damages is a matter for the discretion of the individual Judge which of course has to be exercised judicially with the general conditions prevailing in the country and prior decisions that are relevant to the case in question". Refer to **Moses Ssali a.k.a. Bebe Cool & Others v. Attorney General & Others HCCS 86/2010** where the case of **Southern Engineering Company v. Mutia [1985] KLR 730** was considered. In assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered". See **Uganda Commercial Bank Vs. Kigozi [2002] 1 EA 305**.

16. In his submissions, the Plaintiff prayed for Ug. Shs. 300,000,000/= as general damages on the basis that the Defendants trespassed on his land, constructed part of Sunways Hostel next to his sewerage installations which caused damage, caused him to engage services of surveyors to open boundaries, putting up a small gate blocking the Plaintiff's access to the lower side of his land and forcing him to divert the sewer line. The Plaintiff relied on **Nabukeera Getrude v. Kawombe Memorial Secondary School HCCS No. 10 of 2012** for the amount. On the other hand, the Defendants argue that a grant of the general damages sought would amount to unjust enrichment by the Plaintiff.

17. General damages are compensatory in nature. To this end, most of the reasons fronted by the Plaintiff for seeking 300 million are covered and compensated by the special damages already awarded. In addition to that the facts in the Nabukeera case that the Plaintiff seeks to rely on are very different from his case and therefore distinguishable. I do agree with the Defendants that an award of the amount sought as general damages would amount to unfair enrichment to the Plaintiff. However because of the inconvenience and suffering occasioned to the Plaintiff by the Defendant's actions, and the fact that the suit property trespassed on is used by the Plaintiff for business purposes, he should be awarded general damages. I therefore award the Plaintiff general damages of Ug.shs. 100,000,000/= (Uganda shillings one hundred million).

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18. The Plaintiff also sought exemplary and aggravated damages on the basis that the Defendants caused the trespass to procure some benefit to themselves and the manner in which the Defendants trespassed was malicious and deliberate with arrogance. Aggravated damages are "extra compensation to a Plaintiff for injury to his feelings and dignity caused by the manner in which the Defendant acted.

Exemplary damages, on the other hand, are damages, which in certain circumstances only, are allowed to punish a defendant for his conduct in inflicting the harm complained of. Per McCarthy J. in *Huljich V. Hall* [1973] 2 NZLR 279 at 287; a case from New Zealand.

19. The distinction between aggravated and exemplary damages was explained in *OBONGO v. KISUMU COUNCIL* [1971] EA 91, at page 96 as “the distinction is not always easy to see and is to some extent an unreal one. It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the Defendant and this injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and, although the benefit goes to the person who was wronged, their object is entirely punitive”

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20. In the partial consent, the Defendants admit to “blocking the access way of the Plaintiff to a strip of land on the lower side of the property in constructing and fixing a small gate”. As the owner of the suit property, the Plaintiff had the right to access his property as and when he wished. By affixing this gate without his consent, and blocking access to his property, the Defendants violated his right to property and the enjoyment of the same. This to me is an aggravating factor in the circumstances of this case which warrants an award to aggravated damages to the Plaintiff. The Plaintiff is therefore awarded aggravated damages of Ug. Shs. 30,000,000/=. (Uganda shillings thirty million). Having awarded aggravated damages, I decline to award exemplary damages.

21. The Defendants are also ordered to immediately demolish and/or remove the said gate to restore the Plaintiff's access to his land. Since the Defendants argued that the small gate was installed for security reasons, they should liaise with the Plaintiff on an agreeable means to maintain the security.

22. The Plaintiff sought an order for demolition of all the structures of Sunway hostel establishment which trespassed onto his land, and rectification of his land to the status quo prior to encroachment/trespass. In his submissions the Plaintiff sought in the alternative Ug. Sh 24,000,000/= as an annual fee in payment of rent by the Defendants for the encroached area if the court allows the structures to stay. The 1st Defendant testified that Plaintiff's sewer pipe is exposed and is in his land, a fact admitted by the Plaintiff during the locus visit by court.

23. In the spirit of good neighbourliness, it would be unfair to order the Defendants to demolish his buildings. Be that as it may, because the Defendants trespassed on the Plaintiff's land and will derive benefit from the said building, it is only fair that they pay rent for the same. I find the 24 million to be high and therefore award Ug.shs. 12,000,000/= as annual rent to be paid by the Defendants to the Plaintiff from 21st June 2018 when the consent judgment was endorsed by court wherein the Defendants admit to trespassing on the Plaintiff's land till when the trespass will be rectified by the Defendants. The Plaintiff is also awarded costs of the suit.

24. In finality, the Plaintiff's suit succeeds with the following declaration and orders:

- i. The Defendants trespassed on the Plaintiff's suit land.
- ii. The Plaintiff is awarded special damages of Ug. Shs.101,146,000/=.
- iii. The Plaintiff is awarded general damages of Ug. Shs. 70,000,000/=.

- iv. Aggravated damages of Ug.shs, 30,000,000/= are awarded to the Plaintiff.
- v. The Plaintiff is awarded Ug.shs. 12,000,000/= as annual rent to be paid by the Defendants from 21st June 2018 till when the trespass will be rectified.
- vi. The Defendants are ordered to immediately demolish and/or remove the small gate and restore the Plaintiff's access to his land.
- vii. The Plaintiff is awarded costs of the suit.

It is so ordered.



CORNELIA KAKOOZA SABIITI
JUDGE

Date: 29th October 2021