

**THE REPUBLIC OF UGANDA  
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CORAM: HON. JUSTICE L.E.M. MUKASA KIKONYOGO, DCJ**

**HON. JUSTICE A. TWINOMUJUNI, JA**

**HON. JUSTICE S.B.K. KAVUMA, JA**

**CIVIL APPEAL NO.2 OF 2005**

**A.K.P.M. LUTAYA .....APPELLANT**

**VERSUS**

**ATTORNEY GENERAL..... RESPONDENT**

**[Appeal from the judgment/decree of  
the High Court of Uganda at Kampala (Katutsi, T)  
dated 14th December 2004 in HCCS 301 of 1996]**

**JUDGMENT OF TWINOMUJUNI, JA**

This is an appeal against the judgment and decree of the High Court of Uganda in which the trial judge awarded special damages of Ug.shs.156,200,000/ = and general damages of shs 1,000,000/= for trespass to the appellant's land. The trial court declined to make an order for costs in favour of the successful party nor did he award interest on the decretal award.

The background to this suit is as follows:-

In 1996, the appellant filed a civil suit in the High Court of Uganda claiming for general and special damages from the respondent alleging that since February 1995 soldiers of UPDF had invaded his tree plantation covering 300 acres and had destroyed it for purposes of making charcoal and collecting timber for construction of huts and firewood. He also claimed damages for destruction of crops which were then growing on that land. The suit was dismissed on the grounds that the appellant had failed to prove that the respondent was vicariously liable for the acts of the UPDF soldiers. The appellant appealed to this court which upheld the decision of the High Court. The appellant made a further appeal to the Supreme Court which overturned both

decisions of the Court of Appeal and the High Court and held that the evidence on record was sufficient to prove that the respondent was vicariously liable for the acts of the UPDF soldiers. The Supreme Court allowed the appeal and set aside the orders of the courts and remitted the record to the trial judge to assess and award damages for: -

(a) trespass to land,

(b) special damages.

The court awarded the appellant costs in the High Court and in the Court of Appeal and ordered that the taxed costs would carry interest at 6% p.a. from the date of judgment till payment in full.

Back in the High Court, Hon. Justice J.H.Ntabgoba, P.J. (as he then was) who had originally heard the suit, had retired from the judiciary when the case came up for assessment damages. It was placed before His Lordship

Justice J.B.A. Katutsi, J. He assessed the special damages at Ug.shs.156,200,000/, general damages at Ug.shs.1,000,000/= and declined to award costs or any interest on the decretal amounts as already mentioned earlier.

The appellant appealed against these orders. The Memorandum of Appeal contains ten grounds of appeal as follows:

- 1. The learned judge of the High Court erred in law and fact in assessing the damages based on the plaint dated 20/6/1996 claiming shs.156,200,000/ while there was an amended plaint on record dated 10/2/1997 claiming shs.389,400,000/.**
- 2. The learned judge of the High Court erred in law and fact when he neglected to assess the damage caused by the annual loss caused by the continuous trespass of the UPDF/NRA soldiers on the appellant's land as pleaded.**
- 3. The learned judge of the High Court erred in law and fact when he awarded only shs.1,000,000/= as nominal damages for a case where extensive expertise evidence was adduced to prove enormous commercial loss to a commercial farmer (the appellant).**

- 4. The learned judge of the High Court erred in law and fact when he held that the UPDF/NRA soldiers were camped only at Mpoma Satellite and did not trespass on the appellant's adjacent land.**
- 5. The learned judge of the High Court erred in law and fact when he failed to assess the damage occasioned by the loss of the appellant's crops in addition to the loss from forest products which is the only type he assessed for award.**
- 6. The learned judge of the High. Court erred in law and fact when he held that the evidence adduced by the expert witnesses was speculative and mere estimates.**
- 7. The learned judge of the High Court erred in law and fact when he held that the forest destroyed by the UPDF/NRA soldiers was of mere sentimental value and failed/neglected to assess its commercial value.**
- 8. The learned judge of the High Court erred in law and fact when he failed/neglected to rely on the evaluation of evidence by the original trial judge and thus came to a wrong conclusion while assessing damages.**
- 9. The learned judge of the High Court erred in law and fact when he failed to award costs of their suit to appellant as ordered by the Supreme Court.**
- 10. The learned judge of the High Court erred in law and fact when he did not specify the rate of interest awarded to the appellant.**

It seems to us that HCCS No.30 1 of 1996 was commenced by a plaint dated 20th June 1996. That the plaint is not on the Record of Appeal now before us. There is an amended plaint dated 10th February 1997. Whereas in the plaint dated 20th June 1996 the plaintiff/appellant claimed for special damages of Ug.shs.156,200,000/, in the plaint of 10th February 1997 he claimed UJ.shs.389,400,000/ presumably after taking into account valuation reports of experts who carried out the exercise after the original plaint was filed. The record shows that the trial before Hon. Justice Ntabgoba proceeded on the basis of the amended plaint not the original plaint. The trials in the Court of Appeal and the Supreme Court were conducted on the basis of the amended plaint. It came to us as a surprise when we found that His Lordship, Hon. Justice Katutsi purported to carry out the orders of the Supreme Court using the original plaint dated 20th June 1996 instead of the Amended plaint, dated 10th February 1997. As a result and with great respect to the learned trial judge, his entire judgment on assessment of damages is erroneous as it is

based on a document which was nullified when the amended plaint was filed and accepted by the High Court. We considered that the correct procedure in the circumstances would have been to remit, once again, the file to the High Court for assessment of damages on the basis of the correct pleadings. However, given that this suit is almost ten years old, and that we have the full powers of the High Court to assess the damages, we decided to proceed with the assessment of damages on the basis of the Amended Plaint, the Written Statement of Defence to the amended plaint and the evidence and submissions on record. Accordingly, what follows is my own assessment of the damages. In doing this, I have completely ignored the judgment of Hon. Justice J.B.A. Katutsi, J for the reasons I have already given above.

In my attempt to do the best of a very difficult job of making an accurate assessment of the damages which were caused by the trespass of 300 UPDF soldiers and their families for two years and another uncertain duration after filing of the Amended Plaint, I have followed the guidelines of the Supreme Court contained in the judgment of Tsekooko, JSC in which he stated as follows: -

**“The appellant in this appeal pleaded special damages in his amended plaint. He adduced (exh.P.4) evidence to prove this. The learned Principal Judge said the evidence was ‘based on quantitative and market speculation.’ I guess that he means the loss was exaggerated. In the case of Kampala City Council vs. Nakaye (1972) E.A. 446. The respondent as plaintiff claimed special damages arising from her damaged house and properties. The trial court accepted her oral evidence (receipts were lost) as to her loss and her claim. The amount claimed was more than the value of property lost. On appeal in the E.A. Court of Appeal it was found that there was an error in the value of the properties lost. That court (page 449) corrected the amount and upheld the award of special damages but reduced the amount. In principle I see no distinction between the claim in these proceedings and the claim in Nakaye case.**

**Because of the holding which I have just quoted, the learned Principal Judge awarded no damages. He said nothing about the prayer for an injunction It is a well established judicial practice that in this type of cases, a trial court should indicate what it would have awarded**

as damages if the plaintiff had established his claim: See National Enterprises Corporation & 2 Others vs. Nile Bank Ltd, Civil Appl No.17 of 1994 (unreported). If the learned Principal Judge had assessed the damages, I would have considered his estimate of the damages on the matter.

**Evidence shows that the soldiers trespassed on the appellant's land. In that respect, he is entitled to some damages for trespass. Also he would be entitled to the grant of the prayer for a permanent injunction, if the soldiers are still trespassing on the land. I agree that the damages for timber, charcoal and fruits may have been exaggerated. But since there is evidence of damage, and figures are given, some amount should be awarded. This court is not in a position to the assess damages now. This should be done by the trial court."**

In summary,

(a) The Supreme Court did not accept the original trial judge's holding that the appellant's evidence was **'based on quantitative and market speculation'**. However, it accepted that damages for timber, charcoal and fruits might have been exaggerated.

(b) If the learned principal Judge had indicated what he would have awarded if the plaintiff had established his claim, this court would have had a duty to consider it taking into account the above Supreme Court guidelines. Since both trial judges did not assist us in that regard, we have no choice but to apply the Supreme Court guidelines as reasonably and fairly as is possible.

(c) Evidence on record shows that the soldiers trespassed on the appellant's land and therefore he is entitled to damages. Though some claims may be exaggerated, there is evidence of damages and the figures are given, therefore some amount should be awarded.

Both parties made very detailed submissions addressing the ten grounds of appeal. It is not possible or even desirable to address each and every detail in order to arrive at a reasonable and just assessment of the damages. There is on record the evidence of expert valuers whose evidence was challenged by the respondent but was not rebutted. There is the evidence of the appellant and his witnesses which was challenged but not rebutted. In his submissions in this court, Mr. Wamambe invited us to take into account the following matters:-

(a) There are contradictions between the testimony on oath and the figures in the pleadings. The ones in the plaint appeared exaggerated. This court should evaluate the evidence and award realistic figures.

(b) In awarding damages against the respondent, the court should take into account other players who also caused damage e.g. villagers, Itongwa rebels, workers, the appellant himself and the soldiers. The court should portion the loss accordingly.

(c) All the five players should bare a portion of the loss. It is not realistic to is blame only UPDF when the evidence shows that there were other players.

(d) Although the appellant pleaded that the trespass took one year, on appeal he departs from the pleadings and claims that the trespass is continuing. The court should evaluate the evidence and determine the truth as it is bound to have an impact on the quantum of damages.

(e) The evidence of experts should not be treated as gospel truth. Some of it is exaggerated and is even contradicted by the appellant's witnesses. Some of that evidence was rejected at the trial by the trial judge.

It is the duty of this court to evaluate all the evidence which was before the trial judge and to come to its own conclusion as to what the correct assessment of damages it should award. In doing so, this court must not lose sight of the guidelines of the Supreme Court, the submissions of counsel and all relevant authorities. Bearing all this in mind, I will now proceed to address the grounds of appeal.

The Memorandum of Appeal is an attack of the judgment of His Lordship Justice J.B.A Katutsi. As I have already observed, the judgment was entirely based on nullified pleadings. Therefore all his findings were erroneous. Therefore, the only ground of appeal which deserves consideration is ground one which states:

**“The learned judge of the High Court erred in law and fact in assessing damages based on the plaint dated 20/6/1996 claiming shs.156,200,000/= while there was an amended plaint on record dated 10/2/1997 claiming shs.389,400,000/=.”**

This ground of appeal must succeed because of the reasons I have already given. Also the ground states the truth. The rest of the grounds of appeal will not be considered because the judgement being criticised is being altogether ignored in this judgment. It is now my duty to make an assessment of special and general damages in this case.

### **SPECIAL DAMAGES**

I take into account the pleadings, the evidence on record, the guidelines of the Supreme Court and the arguments of counsel for both parties. The appellant claims shs.389,400,000/= each year for two years, i.e. 1995 and 1996.

However, this is not clear in the amended plaint. What is clear in the plaint is that at the time of filing the amended plaint in February 1997 the trespass was still going on. The claim for two years is, therefore, implied. Also it is not clear when the trespass actually stopped. It could have continued for another few months or years. Given those uncertainties, I would accept the estimate of the appellant's loss for two years at (shs.389,400,000/= x 2) shs.788,800,000/=. I will then take into account that **damages for timber, charcoal and fruits may have been exaggerated** as the Supreme Court found. It is not clear to what extent this exaggeration could have been done. However, the appellant went out of his way to employ expert valuers. The respondent was given opportunity to cross-examine them. The respondent also had opportunity to call upon such experts from the government valuation departments to rebut the appellant's evidence. Though the respondent challenged the appellant's evidence, it did not rebut the evidence.

Taking all the circumstances of this case into account, I would award a figure of Ug.shs.600,000,000/= as special damages for:

- (a) loss of timber,
- (b) loss of trees for charcoal burning,
- (c) loss of fruits and other garden fruits.

This loss must be borne by the respondents alone because it was caused by the soldiers of the UPDF. If other players came in afterwards, it was a result of the chaos that was introduced when the UPDF invaded the area.

### **GENERAL DAMAGES**

I must take judicial notice of the fact that it takes a lot of years and immense expense to put up an agro-forestry farm of 300 acres of the type under consideration in this case. Since 1995 the appellant has been put to great inconvenience of running around seeking help from whoever could help to no avail. The appellant has been in courts at great expense and time wastage since 1995. There is no doubt that his life has been disorganised permanently and from Ugandans experience, he is likely to chase the proceeds of this decree for yet many years to come. He deserves substantial general damages. Doing the best we can in the circumstances of this case, I would award Ug.shs.100,000,000/= as general damages for this very vicious and notorious trespass.

### **INTEREST**

Again taking into account all the circumstances of this case, I would order that:

- (a) The decretal special damages shall bear interest of 17% p.a. from the date of filing of the suit till payment in full.
- (b) The decretal general damages shall bear interest of 17% p.a. from the date of this judgment till payment in full.
- (c) The respondent shall pay the taxed costs of the assessment of damages proceedings, both here and in the High Court.
- (d) The taxed costs will bear interest at the rate of 6% p.a. from the, date of this judgment till payment in full.

I would propose that this appeal be allowed in the terms proposed above.

I would summarise the award as follows:

- (a) Special damages Ug.shs.600,000,000/.



- (b) General damages Ug.shs. 100,000,000/=.
- (c) Interest on special damages at 17% p.a. from the date of filing the suit till **payment** in full.
- (d) Interest on general damages at 17% p.a. from the date of this judgment till payment in full.
- (e) Costs to the appellant of taxed costs of assessment of damages proceeding here and in the High Court.
- (f) The taxed costs to bear interest at the rate of 6% p.a. from the date of this judgment till payment in full.

**JUDGEMENT OF THE HON. JUSTICE L.E.M. MUKASA-KIKONYOGO, DCJ**

I have had the advantage of reading in draft the judgement prepared by Amos Twinomujuni JA and I concur that the appeal must succeed. I also agree with the awards of both special and general damages and other orders proposed in his judgement.

I have nothing useful to add.

As Kavuma JA also agrees this appeal is allowed. The judgement and orders of the trial court are hereby set aside; and substituted with the following:

**a) special damages in the sum of Uganda shillings- 600.000.000/=**

Further it is hereby ordered that: -:

b) General damages in the sum of shillings 100.000.000/=

i) Interest on special damages be fixed at 17% p.a and payable from the filing of the suit till payment in full.

ii) Interest on general damages is 17% from the date of judgement till payment in full.

iii) The appellant be paid costs of taxed assessment of damages proceedings here and in the trial court. The taxed costs will bear interest at the rate of 6% p.a. from the date of judgement till payment in full.

**JUDGMENT OF S.B.K. KAVUMA, JA.**

I have read in draft the judgment of A. Twinomujuni, JA.

Dated at Kampala this 21<sup>st</sup> day of December 2005

Hon. Justice A.Twinomujuni

**JUSTICE OF APPEAL**

L.E.M. Mukasa-Kikonyongo

**HON. DEPUTY CHIEF JUSTICE**

S.B.K. Kavuma

**JUSTICE OF APPEAL**