

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL SUIT NO. 124 OF 2003

MATHIAS LWANGA KAGANDA :::::::::::::::::::::PLAINTIFF

VERSUS

UGANDA ELECTRICITY BOARD ::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR JUSTICE BASHAIJA K. ANDREW.

JUDGMENT

MATHIAS LWANGA KAGANDA (hereinafter referred to as the “*plaintiff*”) is the registered proprietor of the suit property, and the **UGANDA ELECTRICITY BOARD (UEB)** (hereinafter referred as the “*defendant*”) is a statutory corporation in liquidation. The plaintiff brought the present action for trespass, claiming compensation, special and general damages for rendering 5.2 acres of his land redundant because of the defendant’s 132 KV power line passing through the land. He also claims compensation for fish ponds, crops, land and interest, and costs of the suit.

The defendant represented by Mr. P. Ahimbisibwe of ***M/s Kateera & Kagumire Advocates*** opposed the claim contending that the defendant company did not trespass through the plaintiff’s land because it had

statutory authority, and that compensation was made for the crops and developments, and that no fish ponds existed at the time of their entry, and that the plaintiff's suit is time barred.

The agreed issues which were framed at the commencement of the trial, and are on the court record, are as follows:

1. *Whether the suit is time barred.*
2. *Whether there were fish ponds at the time of laying of the lines.*
3. *The quantum of damages.*
4. *Any other relief available to the parties.*

Both Counsel, however, framed the issues differently from those agreed upon at the commencement of the trial. Mr. John Matovu of *M/s Matovu & Matovu Advocates* Counsel for the plaintiff framed five issues as follows:

1. *Whether the suit was time barred.*
2. *Whether there were fish ponds before the construction of 132 KV.*
3. *Whether the plaintiff had title of the suit land*
4. *Whether the plaintiff was given full compensation for the corridor of 5.2 acres on the suit land by the Defendant.*
5. *Whether the plaintiff is entitled to the remedies prayed for*

Counsel for the defendant framed three issues as follows:

1. *Whether the suit can be sustained.*
2. *Whether the suit is time barred.*
3. *Whether the plaintiff is entitled to the remedies prayed for.*

The above sets of issues are evidently dissimilar in form and also, to some extent, in substance. Nonetheless, both Counsel submitted on all the sets of issues. Counsel for the defendant raised his first issue of whether the suit can be sustained as a preliminary point of law. Similarly, the issue of whether the suit is time barred raises questions of law. To that extent, both issues will be resolved in the first instance; just in case they may dispose of the entire suit.

Issue 1:

Whether the suit can be sustained.

This issue particular was not framed at the Scheduling Conference or during trial, but it came up in the submissions of Counsel for the defendant as a preliminary point of law. Counsel argued that this is an issue on a point of law, which can be entertained at any time whether or not it was pleaded, and whether such an issue was brought to the attention of court by the parties or not. For this proposition, Mr. Ahimbisibwe relied on ***Ndaula Ronald v. Haji Nadduli Abdul, Election Petition No. 20 of 2006***, where the Court of Appeal held, *inter alia*, that:

“On points of law, it is settled by the courts that illegality of an issue is a question of law which can be raised at any time or at any stage of the proceedings, with or without prior knowledge of the parties.”

In the above case, the Court of Appeal cited with approval the statement by Scrutton L.J. in ***Phillip v Copping (1935) 1 KB*** that:

“It is the duty of the court when asked to give a judgment which is contrary to a statute to take the point although litigants may not take it.”

Counsel for the plaintiff responded that the issue is a departure from the pleadings, as it was never raised during the trial, and that there is no pleading to that effect.

The *Ndaula Ronald v. Haji Nadduli Abdul case(supra)* in my view, encapsulate the correct position of the law as it relates to issues that raise points of law. They can be raised at any time and/or at any stage of the proceedings, with or without prior knowledge of the parties. Therefore, Mr. Matovu’s argument that it is a departure from the pleadings, and that there is no pleading to that effect, is unsustainable. Court is thus enjoined to try the issue regardless of whether it was raised before or not.

Counsel for the defendant submitted that **Section 56** (but the correct section is actually **S. 55 (1)**) of the **Electricity Act (Cap. 144)** (now repealed) which was the subsisting Law in 1995-1997 at the time the power lines in question were erected and/or way leave created provided that if the Board in exercising its duties as provided, among others, in *Part IV* of the Act caused any damage than in such an instance:

“... an action shall not lie but that person shall be entitled to be paid compensation thereof by the Board ...”

Counsel further submitted that under **Section 55 (3) (supra)** any such dispute and/ or liability of the Board to pay compensation was by law to be determined by the District Commissioner exercising the authority in the area where damage occurred, and where any such person is dissatisfied by the District Commissioner's decision, then the dispute would be referred to the Minister as defined under the Act.

Furthermore, that *Part IV* of the said Act referred to matters of way leaves, such as in the instant case, where the Board (defendant) would enter upon any land and erect or place any electric line, and that **Section 55(supra)** was couched in mandatory terms that no action, such as the instant one, could lie against the defendant, and hence this suit brought by the plaintiff seeking compensation for damage allegedly suffered by him for the 132 KV power line erected on his land is improperly before this court, and ought to be dismissed.

Mr. Matovu John responded to this particular point submitting that the plaintiff is not suing for "damage" on the property, but for compensation for loss of use of the suit land and all economic activities on it, and trespass, and that these claims are clearly outside the scope of actions barred by **Section 55 (1)(supra)**.

Counsel for the plaintiff further submitted that the foregone provision envisages damage under *Part IV* of the Act **Section 36 and 37** i.e. in the course of erecting a line or some other act for purposes of distribution of electricity. Counsel gave examples to include broken concrete, cut trees, excavation of soil, and such other collateral damage.

Mr. Matovu John then advanced the view that this suit is sustainable in any case because the Constitution states that the High Court has unlimited original jurisdiction to hear all matters and cases in Uganda, and that the provisions of **Section 55 (1) (supra)** cannot override the Supreme Law of the Land.

The Act does not define the term “damage”. Accordingly, the term should be assigned its ordinary dictionary meaning. **The Oxford English Mini Dictionary (7th Edition)** defines “damage” to mean physical harm, reducing the value or usefulness of something. **Blacks’ law Dictionary (8th Edition)** similarly defines the term “damage” to mean loss or injury to persons or property.

The plaintiff in the instant case maintains that he is not suing for “damage” on the property, but for compensation or loss of use of the suit land and all economic activities on it. In my view, the loss of use of the suit land and all economic activities due to the erection of the 132 KV power line on the plaintiff’s land qualifies as “damage” in the ordinary parlance.

Section 55 (1) (supra) provides that the Board’s servants or agents in the exercise of the powers conferred under *Part IV* of the Act, shall do as little damage as possible; and where any damage is so caused to any person, an action or suit shall not lie, but that person shall be entitled to be paid compensation for the damages by the Board.

The Act does not in anyway specify as to what class of damages are barred or not. “Where any damage is so caused . . .” as used in the Act, in my view, is an all inclusive expression of such losses as would arise out of the use of the land and all economic activities as such damage envisaged in the Act, and are thus barred. Had the Legislature intended to exclude any specific “damage” such as would be occasioned by the particular activities of the defendant, it would have expressly stated so. It did not, and this puts to rest the issue of whether or not the claim of compensation by the plaintiff is outside the scope of actions barred by **Section 55 (1) (supra)**.

On the issue which was raised by Counsel for the defendant as regards the unlimited jurisdiction of the High Court and the supremacy of the Constitution, I believe Counsel was referring; not only to **Article 2(2) (supra)** but also to **139 (1)(supra)** which vests the High Court with unlimited original and appellate jurisdiction.

In the context of the instant case, however, there is a clearly marked distinction between a situation where jurisdiction in particular instances is taken away by an Act of Parliament other than the Constitution, and one where the right of a party to sue or bring action is being curtailed and/ or delimited by Act of Parliament.

What is in issue in the instant case is simply whether the plaintiff has the right to maintain an action of this nature on these particular facts against the defendant in light of the provisions of the Act which bar the action. There is no inconsistency whatsoever as between the provisions of the

Act and Constitution; which renders the argument about the unlimited original jurisdiction of the High Court quite unobtainable. The net effect is that the suit is not sustainable against the defendant.

Issue 2

Whether the suit is time barred.

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To determine whether a claim for compensation in trespass is barred or not, the starting point is to appreciate the nature of the tort of trespass generally. Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, even though no actual damage is done. A person trespasses upon land if he or she wrongfully sets foot on it, rides or drives over it or takes possession of it, or expels the person in possession, or pulls down or destroys anything permanently fixed to it or fixes anything on it or in it. See ***Halsbury's Laws of England (4th Ed.) para. 1384.***

In the tort of trespass to land, therefore, the operative word/ phrase is “unlawful entry.” The word “unlawful” is an adjective meaning that which is contrary to the law. “Unlawful entry” simply denotes that such entry is contrary to the law for which the trespasser is ultimately liable.

The reading of the proceedings, particularly the contents of ***Annexure UEB1 (Exhibit D2)*** dated 18/08/1995, shows that actually the plaintiff consented to the defendant coming on to the suit land, and carrying out the activities in issue. An extract from the said ***Exhibit D2*** is instructive and states as follows:

“In response to your notice to me dated 15/08/95 regarding proposed Jinja / Lugogo 132 KV power supply line.

I am hereby giving consent for the works to proceed.”

Matia Kaganda (the plaintiff) signed the above consent as the land owner. This, in my view, is sufficient material evidence showing that the defendant came on to the land, and has ever since lawfully been there and hence cannot be sued in trespass.

In addition, under ***Section 36 (1) (a) (supra)*** it is stipulated that the Board (defendant) may place any electric line below ground across any land, and above ground across any land not covered by buildings. This provision makes it lawful for the defendant to enter upon and place any electric line below ground across any land, and above the ground across any land not covered by buildings without committing any tort of trespass to land.

The suit land is such land as contemplated under ***Section 36 (1) (a) (supra)***, and within the terms of ***Section 55 (1) (supra)*** the plaintiff is precluded from challenging the defendant’s actions as trespass to his land because the defendant is there under the authority of the law. It is open for the plaintiff only to claim for compensation for the damage due to the erection of the 132 KV electric power lines upon his land as stipulated under the Act, but no action or suit should lie.

Having stated that no action can lie in trespass against the defendant, it follows logically that there can be no continuing tort, and thus any other

action by the plaintiff would necessarily be delimited. On facts of the case, it seems clear to me that the plaintiff can only sustain action in contract, since there is a consent (agreement) as between the parties as per **Exhibit D2**. The plaintiff's action is purely for a claim of compensation for the way leave created in his land, which he says denied him use of the said land and affected his other economic activities.

Section 3 of the Limitation Act is to the effect that no action founded in contract shall be brought after the expiration of six years from the date on which the cause of action arose. The plaintiff avers in his pleadings that the defendant's actions occurred sometime in July and August 1997; which gives the basis for computation of the time from when the cause of action arose. The instant suit was filed on 10/12/2003. Taking even the last date of the latest month of August, 1997, it puts the plaintiff's action clearly out of time prescribed by the **Limitation Act (supra)** for bringing an action based on contract. The suit is evidently time barred.

The effect of filing actions out of time stipulated by the statute of limitation was succinctly stated in **Ndaula Ronald v. Haji Naduli Abdul (supra)** that:

“...it makes good logic to recognise that rules are made to be observed and must not be taken for granted. Clearly non compliance with both substantive law and procedural rules is an illegality and cannot be overlooked as mere technicalities...”

Considering the effect of *Section 3 of Limitation Act (supra)* and *Order 7 rr.6&11 CPR*, the court of appeal for Eastern Africa in *Iga v. Makerere University (1972) EA 66* had this to say:

“A plaint which is barred by limitation is a plaint barred by law. Reading these provisions together, it seems to me that unless the appellant in this case had put himself within the limitation period showing the grounds upon which it could claim exemption, the court shall reject the his claim. The appellant was clearly out of time. He did not show the grounds of the grounds he relied on, presumably because none existed...when a suit is time barred the court cannot grant the remedy or relief.”

The plaintiff in the instant case is caught up by the Law of limitation, and no matter how weighty the merits of the case, it is expressly shut out by the operation of the law, and the plaintiff’s action cannot be entertained. For the foregone reasons it is also not called for to delve into the other issues which were framed; for to do so would only be indulging in a purely academic pursuit; which the court is enjoined not to do. See *Hon. Justice R. Okumu Wengi v. Attorney General, High Court Misc. Appl. No. 233 of 2006 per Musoke – Kibuuka J.* The suit is accordingly dismissed with costs.

BASHAIJA K ANDREW

JUDGE.

25/02/2013