

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MASAKA  
CIVIL SUIT NO. 36 OF 1999**

**HAJJI BUMBAKALI LUKYAMUZI:..... PLAINTIFF**

**VERSUS**

**PETER MUHAIRWE**

**ELISHA BYOMUKA**

**BERNARD KASAJJA**

**JOSEPH TIRAGALA**

**AMBROSE KIMULI**

**MUHAMED SSEMAKULA**

**G.W. MUTABARUKA**

**WILSON LUTAGIRA**

**ELIAS BULEGYEYA**

**PATRICK KAKUBA**

**JAMAINE BALIKUDEMBE**

**POSIANO TUSABE :..... DEFENDANTS**

**BEFORE: HON. MR. JUSTICE DR FLAVIAN ZEJJA**

**JUDGMENT:**

**HAJJI BUMBAKALI LUKYAMUZI**, (*hereinafter referred to as the “plaintiff”*) brought this suit against **PETER MUHAIRWE, ELISHA BYOMUKA, BERNARD KASAJJA, JOSEPH TIRAGALA, AMBROSE KIMULI, MUHAMED SSEMAKULA, G.W. MUTABARUKA, WILSON LUTAGIRA, ELIAS BULEGYEYA, PATRICK KAKUBA, JAMAINE BALIKUDEMBE**, and **POSIANO TUSABE** (*hereinafter referred to as the “defendants”*) for special and general damages arising from trespass to land, destruction of property and costs of the suit. The plaintiff seeks orders for special damages, general damages, interest, and costs of this suit. It is alleged that on the night of 9<sup>th</sup> April 1992, the defendants trespassed on the plaintiffs land and destroyed his banana plantation. The defendants were arrested by police and charged with the offence of malicious damage to property. They were tried by the Chief

Magistrate's Court of Masaka and found guilty. A fine of 30,000/= or an alternative sentence of 6 weeks imprisonment was handed out to them as a result of the said conviction on the 7<sup>th</sup> day of September 1998. After the said conviction and sentence, the plaintiff filed this case for compensation.

Two issues were framed for the determination at the trial as follows;

- 1. Whether the defendant trespassed on the plaintiff's Kibanja.**
- 2. If so, whether the plaintiff suffered any damages,**

I shall add two more issues

- 3. Whether the suit is barred by limitation**
- 4. Remedies available to the plaintiff**

#### ***Resolution of Issues:***

##### ***Issue No.1: Whether the defendant trespassed on the suit land.***

In his testimony, the plaintiff stated that he has a Kibanja at Lusibo in Masaka District. During the night of 8<sup>th</sup> April 1992, the defendants destroyed the Banana plantation comprising of about 10 acres. They also cut ovacado and mango trees. He used to supply food to Namagunga S.S School and another School on Bombo road which he did not mention. He said he would harvest 500 bunches of Matooke a month and he was selling each at Shs. 2500-3000 per bunch. It took him too years for the cut Banana Plantation to yield again. He prayed for damages and costs of the suit.

PW2 (Bwebare Abdulatifu) testified that he saw those who cut the banana Plantation. He could remember Patrice Kakuba, Muheirwe Peter, Tusaba, Kasaija, Rutagira, Jamaine Balikudembe and Bulegeya. He saw about 40 people cutting the Bananas but he could only recognize those mentioned. He informed PW1 about it. He was able to identify those cutting in his hiding near the banana plantation. He was with someone else called Justus. Though at night, there was moonlight.

PW4 (Mmazempaka Peter) testified that the plaintiff had a dispute with residents over a well in his registered land. PW 4 was a Muluka chief of the area. There was also a dispute over a

football pitch in the plaintiff's land. He held a meeting with the residents over the dispute. His evidence is relevant in as far as understanding the proximate cause but he did not witness any person cutting the banana plantation.

PW5 Ntabi John Baptist is a valuer. He valued the Banana plantation destroyed and the valuation report was submitted in evidence. However, the valuation was carried out in 1999 yet the plantation was cut in 1992. He testified that he used the rates of 1999 to arrive at the values he presented.

The defendants denied ever trespassing on the plaintiff's land and stated that they were not in that village at the time (alibi).

It is provided in the constitution of Uganda that enjoyment of one's property is one of the fundamental rights (God given). It is therefore an offence of trespass to interfere with one's right to property. Trespass to land consists of any unjustifiable intrusion upon or interference with the land in possession of another and can be one of the following:

- i. Entering upon a land in possession of another without permission.
- ii. Remaining on land entered with permission after request to move has been made (e.g. being sent away by a landlord and you refuse to go away, it is trespass to land).
- iii. Placing or throwing away any object upon it without any lawful justification.

The commonest form of trespass to land is the personal entry by the defendant onto the land or building occupied by the plaintiff. The trespass must be voluntarily so that if a person is carried or forced into another land on his part there is no trespass as was held in **Smith Vs Stone**. 08 F.2D 15(9<sup>th</sup> Cir.1962)

Trespass may be committed indirectly through a servant, cattle or some other movable object. According to **Kynoch Limited Vs Lowlands** [1912] 1 Ch 527 trespass may be committed on land e.g. by working over it or under the land by digging it or over the land in the air.

The supreme Court in the case of **Justine E.M.N Lutaaya vs. Stirling Civil Eng. Civ.Appeal No. 11 of 2002 9**, held that trespass to land occurs when a person makes an unauthorised entry upon another's land and thereby interfering with another person's lawful possession of the land.

It should be noted that a person who sues in trespass is a person in possession of the land. Possession may either be possession in law, Possession in fact or immediate possession. In ***Justine E.M.N Lutaaya vs. Sterling Civil Eng (supra)*** it was held that possession does not only mean physical occupation but also includes constructive possession. The plaintiff was therefore in possession and had a right to sue in trespass.

The evidence before me shows that the defendants were charged in a court of law in Criminal Case No MMA 220 of 1992-Uganda Vs Bangayan Dusha and 12 ors, for Malicious damage to property. They were found guilty of cutting the banana plantation of the plaintiff and convicted. They appealed but at the time of hearing this suit, they were not sure what the position of the appeal was. That was 10 years after they appealed. The burden of proof in criminal matters is beyond reasonable doubt. The burden of proof before me is on the balance of probabilities. That burden is far below that of the standard expected in criminal matters. The accused were convicted by a competent court. It should be noted that evidence of a conviction in a criminal matter can be used in a civil matter.

I therefore find that the defendants were trespassers.

***Issue No. 2: Whether the plaintiff suffered any damages.***

Having found that the defendants trespassed on the plaintiff's land, and destroyed the plaintiff's banana plantation, I need to determine whether the plaintiff suffered any damages.

In the case of ***Placid Weli vs. Hippo Tours & 2 O'rsHCCS No. 939 of 1996***, and also ***Halbury's Laws of England, 3<sup>rd</sup> Edition, Vol.38, para 1222***, it was held that trespass is actionable parse regardless of whether damage has been made to the land or not.

The evidence available on record to prove special damages is that of PW5 the assistant surveyor and the plaintiff himself. PW5 submitted a valuation report which in my view leaves a lot of questions than answers. This report cannot be relied upon to determine special damages due to the following reasons

- (a) The estimation of the values was based on the 1999 rates of 1.2 million per acre. He testified that he used the 1999 rates because he did not have the rates for 1992 when the destruction took place
- (b) He did not look at the area destroyed. He based his findings on information provided by the plaintiff.
- (c) He added the rate 30% disturbance allowance on the rates. That was not his duty.

The evidence of the plaintiff who testified that he used to harvest 500 bunches a month at 2500-3000 each may be relevant. I would have expected more evidence, for example from those he used to supply. A contract for the supply of Matooke would have been most appropriate. He also testifies that the Banana plantation took two years to recover. I do not think that the gestation period for a banana is 2 years. One year is appropriate. In the result, a sum of 12,000,000 Million would have been appropriate if the case did not have serious legal issues I'm going to address below.

Regarding general damages, the law is that they are awarded at the discretion of court but they are a natural consequence of the defendant's act or omission and they are intended to compensate the plaintiff for the injury suffered. See ***Robert Cuossens vs. Attorney General SCCA No. 08 of 1999***

In the assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the inconveniences that the party was put through at the instance of the opposite party, and the nature and extent of the breach. See: ***Uganda Commercial Bank vs. Kigozi [2002] 1 EA. 305***. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the injury/damage. See: ***Charles Acire vs. Myaana Engola H.C.C.S No. 143 of 1993; Kibimba Rice Ltd vs. Umar Salim, SCCA No. 17 of 1992***.

In the instant case, PW1 testified that he was supplying food to two schools and he must have been inconvenienced when the Matooke was destroyed. However, the plaintiff did not guide court on the quantum of damages he would have expected. That leaves with court to use its discretion to determine damages. See: ***Robert Cuossens vs. Attorney General, SCCA No. 08 of 1999; Ongomvs. Attorney General [1992] HCB 267***. In ***Bhadelie Habib Ltd vs. Commissioner***

*General, URA [1997 – 2001] UCL 2001, Fred Kamugira vs. National Housing & Construction Co. Ltd., HCCS No. 127 of 2008,*

A sum of 2 million would have been appropriate if the case did not have other legal issues.

### **Issue No 3: Whether the suit is barred by Limitation**

The cause of action in this suit arose on the night of 9<sup>th</sup> April 1992. This suit was filed on the 20<sup>th</sup> of August 1999. That is 7 years and 4 months from the date the event occurred.

The Limitation Act provides that actions in tort shall be brought within the space of 6 years from the date the cause of action arises. It states:

#### **3. Limitation of actions of contract and tort and certain other actions.**

(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose—

(a) Actions founded on contract or on tort;

A plaint which is barred by limitation is bad in law. See also **Iga v. Makerere University [1972] E.A. 65**. The Limitation Act applies to all matters unless the Act itself makes an exception See **Badiru Mbazira v. Abisagi Nansubuga [1992-93] HCB 241**.

My view is that this case was filed out of time. It should be noted that time begins to run from the time the matter accrued. See **Eridad Otabong v. Attorney General S.C.C.A No. 6/1990**. This case is not founded on the decision in the criminal case. In the criminal case, the magistrate did not make any orders as to the plaintiff filing a civil suit. Even if he did, the statement would not afford this case a cause of action. The cause of action in tort arose the night the bananas were cut. It did not arise because the defendants were found guilty. The right to sue for damages to property arises as soon as the property is destroyed. It does not depend on finding the defendant guilty of a criminal offence. There is no need for a declaration by the criminal court for that right to exit. In any case, criminal cases and civil cases on the same matter can run concurrently.

I therefore find that this suit was barred by limitation and the only way the plaintiff could have instituted this suit was to apply for extension of time. This was never done

### **Issues No. 4. What remedies are available to the parties**

In view of the fact that the case is barred by limitation, no remedies are available to the plaintiff.

In the result, this suit is dismissed. I'am reluctant to order the plaintiff to pay costs of this suit given that he should have been advised by his counsel that this suit was barred by limitation. Each party shall bear their own costs.

***Dr Flavian Zeija***

***JUDGE***

***30/10/2017***