THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

CIVIL APPEAL NO. 05 OF 2005

DR. HENRY KAMANYIRO KAKEMBO
……..APPELLANT

VERSUS

ROKO CONSTRUCTION LIMITED……RESPONDENT

(An appeal from the Judgment of the High Court of Uganda before the Honourable Justice Stella Arach dated 1st September arising of H.C.C.S NO. 1605 of 2000)

CORAM:

HON. LADY JUSTICE FAITH E. MWONDHA, JA

HON. MR. JUSTICE RICHARD BUTEERA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

JUDGMENT OF THE COURT

This appeal arises from the Judgment of Hon. Lady Justice Stella Arach Amoko J (as she then was) in ***High Court Civil Suit No. 1605 of 2000 dated 1st September 2004***.

The brief back ground to this appeal is as follows;

The appellant is the registered proprietor of land comprised in mailo Register Kyagwe Block 111 Plot 496 measuring approximately 60.371 Hectares.

The appellant has been living outside this country for a very long time in fact as early as 1984. He lives in Maryland, United States of America, where he works as a physician.

On 24th March 1984 the appellant appointed his brother one Mudiima Kakembo to be his Attorney. The power of Attorney is a general one.

Sometime in 1999 with the consent of the appellant's Attorney, the respondent was allowed to excavate murram from the appellant's land.

It appears that the Attorney was in fact selling the said murram to the respondent, but the respondent was the one physically excavating the murram from the land.

As a consequence of the excavation of murram a pit was created on the said land measuring approximately 0.40 hectares or just about one acre.

The appellant was unaware of the respondent's activities on the land until sometime in 1999. When he returned to Uganda he confronted the respondent about their activities and demanded that the respondent restores the land. The respondent agreed to do so and in fact made effort to fill up the pit created by the excavation of murram.

The appellant was dissatisfied with the manner in which the pit had been refilled and filed a suit at the High Court of Uganda on 21st November 2000.

In that suit the appellant claimed for Shs. 45,000,000 "as compensation, general damages together with interest at 23% per annum from the date of Judgment until payment in full."

In that suit the appellant contended that the respondent had "maliciously and savagely excavated" murram from his land thereby rendering it barren and un-usable.

The respondent in its defence pleaded that the murram was excavated under a contract signed between the appellant's Attorney and themselves and that consideration for the contract was paid.

The respondent also contended that when it appeared that the Attorney's power was disputed, they refilled the pit. The respondent also contends that the excavation on the land involved other construction companies and not the respondent alone. The respondent also contended that it paid the respondent's attorney for the murram.

The learned trial judge found the respondent liable for the damage to the land and awarded the appellant Ugshs.5,000,000 (Five million Uganda shillings only)as general damages.

The appellant being dissatisfied with the award filed this appeal.

At the hearing of this appeal learned counsel Mr. Fredrick Sentomero appeared for the appellant while learned counsel Mr. Cephas Birungyi and Ms. Diana Nyakato appeared for the respondent.

Both counsel adopted their written submissions as set out at the scheduling conference. They also briefly highlighted the issues already set out in their written submissions.

The counsel for the appellant generally submitted that the learned trial judge erred in law and fact when she held that the appellant had at the trial failed to prove his inability to use the land following the excavation of murram by the respondent.

He submitted that the learned judge ought to have accepted the valuation report submitted by the land valuer a witness for the appellant at the trial. That the report he submitted was to the effect that land had been rendered unusable as it could no longer support any structures or yield any crops.

He submitted that the appellant having proved his inability to use the land, and as such ought to have been awarded shs. 45,000,000 being compensation as claimed in their plaint.

Counsel for the respondent on the other hand submitted that only about 1% of the land had been excavated and as such the excavation could not have rendered the whole land unsuitable for construction of structures or for growing crops.

He generally supported the findings of the trial judge.

We have listened carefully to the submissions of both counsel. We have also read the record of appeal, the conferencing notes and the written submission filed by both parties to this appeal. We have also read the authorities cited and relied upon by both counsel.

This Court is required under ***Rule 30*** of the Rules of this Court to re-appraise the evidence of the trial court and come to its own decision. Rule 30 (1) (a) states as follows:

> *"Power to reappraise evidence and to take additional evidence.*
>
> *3 (1) on any appeal from a decision of the High Court acting in its original jurisdiction, the court may*
>
> *(a) reappraise the evidence and draw inferences of fact"*

The Supreme Court in the case of **FR. Narsensio Begumisa and others versus Eric Tibebaga, Supreme Court Civil Appeal No. 17 of 2002** Mulenga JSC who wrote the lead judgment observed as follows:-

> *"It is a well settled principle that in the first appeal the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make*

due allowance for the fact it has neither seen nor hence the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusion"

We shall therefore proceed to reappraise the evidence and we shall come to our own conclusion as required by law.

The basis upon which the appellants claim was premised at the High Court is not clear to say the least.

It is not readily ascertainable whether the claim is based on contract, tort or land law.

The fundamental rule of the common law legal system of pleading is that *"every pleading must contain and contain only, a statement in summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, but not the evidence by which those facts are to be proved"* see Order 6 Rule 1 of the Civil Procedure Rules.

It is therefore generally unnecessary to state in the pleadings the principle of common law or the contents of a statute. The law need not be pleaded to show that a plaintiff is entitled to a particular claim.

However, it is good practice to specify under which principle of common law or statute an action is based. For example whether the action is tort or contract and if it is based on tort what kind of tort, whether trespass or negligence, or defamation, or any other.

In some cases causes of action need to be specifically pleaded for example where a claim is based on a contract or negligence. In such cases particulars of the contract or negligence are required to be pleaded.

The law of limitation for example applies differently to different causes of action in that regard, it is important to be specific in the pleadings as to the cause of action. Fraud must be specifically pleaded for example, together with facts, and circumstances in support of the allegation.

It is trite that a party to a suit would not be permitted to adduce evidenced to prove facts which have not been pleaded.

The Remedies available to parties flow from their pleadings whether the action is breach of contract, negligence, conversion, detinue, defamation or any other cause of action.

In this particular case the plaintiffs claim is set out as follows in his plaint.

> 3. *The Plaintiff's claim against the Defendant is for Ug. Shs. 30,000,000/= as compensation, general damages together with interest as a rate of 23% per annum from the date of judgment until payment in full.*
>
> *4. The Plaintiff cause of action arose as follows:-*

a). The Plaintiff is the registered proprietor of land comprised in Block 111, Plot 496, Mawotto Kiwanga.

b). That the Defendant's employees, acting within the scope of their employment, maliciously and savagely excavated the Plaintiff's land (mentioned above) for murram thereby rendering it barren and un-usable and as such, the Defendant is vicariously liable.

c). Consequently the Plaintiff has suffered inconvenience and loss of income due to his inability to use his land.

5. Despite repeated demands the Defendant has refused and or neglected to compensate the Plaintiff for his unlawful acts.

The basis of the appellants claim for Shs. 30,000,000 later amended to 45,000,000/= is not clearly set out in the plaint above.

The basis for the remedies sought is also not clearly set out in the plaint. In respect of remedies the plaint stipulates as follows:

"Wherefore the plaintiff prays for judgment to be entered against the defendant for:-

a) Ug. Shs. 45,000,000/= as compensation.

b) General damages

c) Interest at rate of 23% per annum from date of Judgment till payment in full.

d) Costs to this suit.

e) Any other relief this Honourble Court may deem just.

At the trial the thrust of the plaintiffs case was that the respondent unlawful entered his land, excavated murram and thereby damaged his land. That as a result of the unlawful actions of the defendant the appellant suffered loss and damage. Specifically the action of the respondent damaged the appellants land so extensively that it was rendered unsuitable for its original use. That the appellant's land as a result lost 70% of its value. The loss of value was estimated at 45,000,000/=.

The learned trial judge found that the appellant had failed to prove the loss of value to the land. However she awarded him 5,000,000/= as general damages.

We agree with the learned trial judge that respondent did not have any contract with appellant as claimed by the respondent in their written statement of defence.

Although the appellant persued this claim as compensation for loss of the value of land, it clearly appears that such claim was misconceived. The suit was in fact an action in trespass and damage to land, the remedy as the learned trial judge correctly

held, was for general damages and not for “compensation for loss of value” as submitted by counsel for the appellant.

The appellant failed at the trial to prove loss of value to the land. He also failed to prove that the land had been rendered useless up to 70%.

The appellant’s own expert witness conceded that he was not qualified to assess the cost of restoration of the land and could only assess its value. In his own valuation report he states as follows as page 2.

> *“We note that a few of the instruction could be more appropriately handled especially by mineral surveyors or geologist or a soil engineer (such as the type of refill) and a land surveyor (on the size and volume of the land taken)”*

In his testimony in Court the same valuer stated as follows during cross examination.

> *“I said a mineral surveyor or a geologist or a soil engineer would have been the appropriate person to comment on the type of refill”*

We therefore agree with the learned trial judge when she rejected the said land valuers report and evidence. In our view she was correct when in her Judgment at page 10 she concluded as follows;

"Clearly this report cannot be relied upon to prove the inability to use the land because the report was produced by a land surveyor who confessed in the report that he had no knowledge of the soil"

Our considered view is that the appellant should have ascertained the cost of restoration of his land. He should have produced evidence to show how much it would cost him to restore his land to the state in which it was before excavation of murram by the respondent. This would then have formed the basis of his claim either for general or special damages.

In any event under **Sections 67 and 71** of the **National Environment Act (NEA) Cap 153** the respondent would still have been responsible and liable to restore the land back to the state in which it was before the excavation.

The appellant could have applied under section 67 of National Environmental Act (NEA) for a restoration order from National Environmental Management Authority (NEMA) or could have instituted a suit under Section 71 of the same Act for a restoration order against the respondent. The relevant part of Section 67 (1) stipulates as follows;

"***Environmental restoration orders***.

67 (1) Subject to the provisions of this part, the authority may issue to any person in respect of any matter relating to the management of the

environment and natural resources an order in this Part referred to as <u>an environmental restoration order</u>.

2. An environmental restoration order may be issued under subsection (1) for any of the following purposes:-

(a) requiring the person <u>to restore the environment as near as it may be to the state in which it was before the taking of the action</u> which is the subject of the order”

Section 71 (1) stipulates as follows:

“**71. Issue of an environmental restoration order by a court.**

(1) Without prejudice to the powers of the authority under sections 67, 68 and 69, the court may, in any proceedings brought by any person, issue an environmental restoration order against a person who has harmed, is harming or is reasonably likely to harm the environment”

The respondent’s legal obligation to restore the land under National Environmental Act (NEA) still subsists.

We find that the contention by the appellant that he lost 70% of the value of his land is untenable and has neither evidential nor legal basis.

The valuation report submitted by the appellant himself in court states that only 0.4 hectares about one acre of the land was excavated. The whole land measures 40 hectares according to the valuation report but a close look at the title indicates that it measures 60.371 hectares which is equivalent to 149.11 acres. It means therefore the area effected by the excavation is approximately 0.67% of the total land area. It is not possible in our view that such a small area could reduce the total value of that land by 70%.

We agree with the decision of this court in **UGACHICK Poultry Breeders Ltd versus Tadjinkara T/A S.T Enterprises Ltd Court of Appeal Civil Appeal No. 2 of 1997** in which Manyindo DCJ held regarding the evidence of an expert witness that:-

> *"The court is not bound to accept his opinion if it found good reason for not doing so, although to reject expert evidence without giving reason might well be unjudicial. Here the learned trial judge gave reasons for rejecting the opinion"*

In the particular case before we find that the learned trial judge was justified in rejecting the expert evidence and for good reason too. The expert had declared himself unqualified in aspects of the

work he was required to do and his findings did not match his own conclusions.

The case of **Management Training and Advisory Centre Vs Patrick Kakuku Ikanza (1986) 1 HCB 43** is authority for the holding that evidence to prove a case on a balance of probability must be inferred not from pure conjuncture which has no legal value but from reasonable inference.

We find that expert evidence in this case was pure speculation and conjuncture and we accordingly uphold the trial judge's decision to reject it.

The appellant having failed to prove his case in respect of damages, the learned trial judge was justified in awarding him general damages the way she did. Although she did not specifically state so it seems the general damages were awarded not for compensation for the loss of value of the land but for the damage to the land resulting from the trespass.

In the circumstances of this case we find that the learned trial judge was justified in awarding 5 million as general damages. We have found no justification in interfering with the said award, in any case enhancement of damages was not one of the grounds of appeal.

This appeal therefore fails and is hereby dismissed with costs.

Dated at **Kampala** this 4th day of April 2014.

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HON. FAITH E. MWONDHA
JUSTICE OF APPEAL.

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HON.RICHARD BUTEERA
JUSTICE OF APPEAL

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HON. KENNETH KAKURU

JUSTICE OF APPEAL