THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(Coram: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL N0. 0050 of 2007

(An appeal from the judgment of the High Court of Uganda before Her Lordship Arach Amoko, J. (as she then was) delivered on 17th May, 2007 in Civil Suit No. 341 of 2002)

1. **ISAAH KABALI**
2. **HAKIM SEREBE::APPELLANTS**

VERSUS

ATTORNEY GENERAL:::RESPONDENT

JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment of my learned my sister, Elizabeth Musoke, JA and I concur with her findings and conclusion with nothing useful to add.

Dated at Kampala this.........12th.......day of..............Nov...................2019.

....

Hellen Obura

JUSTICE OF APPEAL

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(An appeal from the judgment of the High Court of Uganda at Kampala before Arach Amoko, J. (as she then was) delivered on 17th May, 2007 in Civil Suit No. 341 of 2002)

CORAM: HON. MR. JUSTICE F.M.S EGONDA NTENDE, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE HELLEN OBURA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA.

This is an appeal from the judgment of the High Court wherein Arach Amako, J. (as she then was) entered judgment in favour of the appellants, awarding them specific damages, general damages and costs.

Brief Background

The appellants and the respondent were the plaintiffs and the defendant, respectively in the High Court. The appellants instituted Civil Suit No. 341 of 2002 in the High Court against the respondent seeking for the following reliefs:

- Return of or compensation for 620 pieces of Panel Mahogany timber.
- Return of 3 timber saw machines in their original conditions.
- Damages for trespass and/or conversion.
- Loss of business earnings, incidental expenses, interest and costs.

The respondent did not file a defence and the matter in the trial Court proceeded exparte. The relevant facts as accepted by the learned trial Judge were as follows:

At the material time, the 1st appellant, a business man involved in the timber business went to the Democratic Republic of Congo to cut timber after obtaining the relevant licence. He intended to sell this timber for a profit. He employed workers who cut 620 pieces of timber (Panel Mahogany timber) using 2 power saws which he had bought for the purpose and a third one which he borrowed from his brother for the same purpose.

Around October 1999, when the timber was ready to be transported to Kampala, Police Officers from Arua Police Station impounded it. This followed a complaint from one Pitlas Dis Petros, a Greek National that the timber in question was his property and the appellants were unlawfully claiming it. The appellants tried to reason with the Police Officers but were rebuffed on several occasions. They then tried to return to the Democratic Republic of Congo to rescue their workers and the power saws which were used for cutting the timber cutting but they were arrested at the border and their power saws were confiscated.

Upon arrest, the appellants were taken to Arua Police Station, where they met the said Greek National who pinned them for stealing his timber. The Police attempted to force the appellants to sign a document saying that they were indebted to the said Greek National to a tune of Ug. Shs. 5,000,000/=, but they refused to do so. Thereafter, after seeking several fruitless interventions from the Resident District Commissioner and the Inspectorate of Government to cause the Police Officers to release their property (the timber and the power saws), the appellants filed High Court Civil Suit No. 341 of 2002. The learned trial Judge entered judgment in the appellants' favour on the following terms:

"1) **Shs 2,010,000 for the saws.**

2) **Shs 4 million general damages.**

3) **Interest at Court rate from date of judgment till payment in full.**

4) **Costs.**"

Being dissatisfied with the decision and orders of the High Court regarding the award of damages, the appellants lodged this appeal in this Court on the following grounds:

"1) **That the learned Judge erred in law and fact in holding that much as the appellants had proved ownership and loss of timber no award could be made for the same.**

2) **That the learned Judge erred in law and fact in failing to award the appellants the price of the 3rd power saw yet the same had been pleaded and proved."**

Representation

When this appeal last came up for hearing, Mr. Geoffrey Lukwago Mpamulungi, learned Counsel, appeared for the appellants while counsel for the Respondent was not present. However, as counsel for both parties had earlier appeared before another panel which had ordered them to file written submissions, the said written submissions were accordingly adopted by Court at the request of Counsel.

Appellant's case.

On ground 1, counsel for the appellants faulted the learned trial Judge for failing to order the respondent to pay to the appellants the value of the timber which had been converted by the respondent's agents. He pointed out that the appellants had specifically pleaded that they would have earned Ug. Shs. 16,740,000/= had they sold the 620 pieces of the timber in issue; and that during the trial, the 1st appellant (as PW1) had proven the value of the said timber when he testified that the prospective buyer of the timber in question had promised to pay him at a rate of Shs. 27,000/= per piece, for the 620 pieces which would have amounted to Ug. Shs. 16,740,000/= as pleaded. He relied on **A.K.P.M Lutaya vs Attorney General, Court of Appeal Civil Appeal No. 2 of 2005**, for the proposition that special damages need not be specially proved by only documentary evidence, submitting that facts can be proved by oral evidence like PW1 did in this case when he testified about the value of the timber in question. Counsel further submitted that as the learned trial Judge had found the respondent liable for the unlawful confiscation of the timber in issue, the appellants were entitled to some sort of compensation though the said compensation need not be the exact figure which they claimed in their pleadings. He relied on **Kampala City Council vs Nakaye (1972) EA 446** for the preceding proposition.

Furthermore, counsel submitted that the learned trial Judge erred to disallow the appellant's claim for special damages under the head of expenses for the reason that they had not adduced documentary evidence to prove that claim. He contended that the appellants were put to expenses totaling to Shs. 8,294,000/= and that the appellants had tendered in evidence exhibit P7 which was an outline of the said expenses. In counsel's view, the foregoing evidence sufficiently proved the expenses' claim by the appellant and if the learned trial Judge was of the opinion that the claim in question was exaggerated, she would have awarded what she believed was reasonable rather than disallowing the entire claim. He then invited this Court to award the said claim to the appellants. However, the foregoing complaints were not raised as ground of appeal in the memorandum.

On ground 2, counsel faulted the learned trial Judge for failing to award the price of the third power saw to the appellants solely for the reason that it was not the property of any of the appellants. Although he conceded that the learned trial Judge had rightly found that the third power saw belonged to the 1st appellant's brother, counsel contended that at the relevant time, it was in the possession of the 1st appellant. To support the preceding contention, counsel pointed out that it was at the appellant's behest that the said saw was taken to the Democratic Republic of Congo to be used by the appellants' workers for cutting the timber in issue which proved that the appellant had physical possession of the power saw in question at the material time. He then invited this Court to find it fit to compensate the appellants for the loss of the third power saw at its current market value of Ug. Shs. 4,000,000/=.

All in all, counsel prayed to this Court to allow this Appeal with costs and to set aside the judgment and orders of the learned trial Judge.

Respondent's case

On ground 1, counsel for the respondent supported the findings of the learned trial Judge and urged this Court not to interfere with the same. He/she cited **Uganda Telecom vs. Tanzanite Corporation SCCA No. 17 of 2004** for the proposition that the Appellate Court is always reluctant to interfere with the discretion of the trial Court as well as **Twiga Chemical**

Industries vs Viola Bamusedde SCCA No. 16 of 2004, for the proposition that an Appellate Court will not interfere with the exercise/discretion of the trial Court unless it failed to take into account a material consideration or that it took into account an immaterial consideration or made an error in principal. Counsel then pointed out that the 1st appellant (PW1) had made unproven allegations that the timber in issue would have cost Ug. Shs 16,740,000/= based on an alleged sale agreement with a prospective buyer which was not produced in Court. Counsel contended that the learned trial Judge was aware of the foregoing evidence but was unimpressed by the testimony and had even warned the 1st appellant (PW1) of the insufficiency of the testimony. Counsel then supported the decision of the learned trial Judge and invited this Court to uphold it.

On ground 2, counsel supported the findings of the learned trial Judge on the issue, submitting that the third power saw belonged to one Mugalula, a younger brother of the 1st appellant who was not a party to the suit from which this appeal arises. In counsel's view, as there was no evidence that the said Mugalula had given the appellants power to sue on his behalf, the appellants did not disclose any cause of action regarding the said power saw and could not be awarded damages for loss of that power saw.

All in all, counsel invited this Court to dismiss this appeal with costs and uphold the judgment of the trial Court.

Resolution of Court

I have carefully considered the submissions of both counsel, perused the court record and authorities and the law cited. I am alive to the duty of this Court as a first appellate court to reappraise the evidence and draw its own inferences. **See: Rule 30 (1) of the Judicature (Court of Appeal Rules) Directions S.I 13-10**. The duty of the first appellate court was aptly summarized in **Kifamunte Henry vs Uganda, Supreme Court Criminal Appeal No. 10 of 1997** as follows:

> **"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate**

Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."

I will now proceed to consider each ground of appeal in turn.

Ground 1.

The question for determination under this ground of appeal is whether the appellants sufficiently proved their claim for special damages (in relation to the timber in question and the expenses they had allegedly incurred). It was the submission for counsel for the appellants that they had sufficiently proved their entitlement to **Ug. Shs. 16,740,000/=**, being the cost of the timber which had been converted by the respondent's agents.

I observe that the appellants had adduced evidence to show that they expected to be paid the sum in question from a prospective buyer, with whom they had an agreement in place. However, they did not adduce any evidence of the said written commitment and they asked the trial Court, as they ask us now, to rely on the aforementioned oral evidence.

In **Mutekanga v Equator Growers (U) Ltd [1995–1998] 2 EA 219 at page 227, Oder JSC** observed that:

"Again, it is trite law that special damages and loss of profit must be specifically pleaded, as it was done in the instant case. They must also be proved exactly, that is to say, on the balance of probabilities.

This rule applies where a suit proceeds inter partes or ex parte. It follows that even where as in the instant case, the defendant neither enters appearance nor files a defence, the plaintiff bears the burden to prove his case to the required standard. The burden and standard of proof does not become any less..."

In Miller vs Minister of Pensions [1947] 2 ALLER 372, Lord Denning had this to say on the degree of evidence required to satisfy the standard of balance of probabilities:

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "We think it more probable

than not," the burden is discharged, but, if the probabilities are equal, it is not."

Further, the **Black's Law, Dictionary 8th Edition**, defines "balance of probabilities" sometimes referred to as the "preponderance of evidence" as follows:

> **"The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other..."**

The above authorities are to the effect that special damages must be specifically pleaded and proven to the requisite standard (on a balance of probabilities), bearing in mind the nature of special damages as was explained in **Musoke v Departed Asian's Property Custodian Board and another [1990–1994] 1 EA 419 at page 421** as follows:

> **""It is clear that special damage, as was claimed by the plaintiff to have been suffered, is such a loss as the law will not presume to be the consequences of the defendants' act. Such damage, as the learned editors of Odger's Principles of Pleading and Practice (21ed) point out; (at 164):**
>
> **...depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct..."**

The evidence required to prove special damages must show that it was more probable than not that the specified loss was incurred. Usually evidence that only reveals that there was only a possibility that the said loss occurred would be considered insufficient and the claim would be disallowed.

I observe that Isaah Kabali, the 1st appellant, testifying as PW1 in the trial Court at **pages 39** to **40** of the record had this to say:

> **"Ct: Supposing the timber is not there, what would like (sic) the Court to do for you?**

PW1 (A): I pray that Court orders them to pay the equivalent.

Ct: What is the equivalent?

PW1 (A): Shs. 16 m

Ct: How many pieces were there?

PW1 (A): 620 pieces.

Ct: What type of timber?

PW1 (A): It was mahogany.

Ct: What size?

PW1 (A): 12" by 2 by 14.

Ct: And how much is each piece?

PW1 (A): Shs. 27,000/= per piece at that time.

Ct: Where? Which market? Nateete?

PW1 (A): Even if you brought it Ndeeba.

Ct: This is the retail price?

PW1 (A): Whole sale.

Ct: How do you get this figure?

PW1 (A): From the order of those people who wanted to buy from me, we had already agreed at that price. (Shs. 27000 per piece.)

Ct: Where is the paper?

PW1 (A): He was supposed to give me the paper after I had delivered the timber.

Ct: Since you were told that you were going to get this amount of money, it will have to be at the rate which is used in the open market. So you have to prove to this Court the exact rate. You cannot sit here and imagine your rate. If you don't prove it, it is up to you it is your case.

PW1 (A): That was the rate at that time, now it has risen up to shs. 35,000/= per piece.

Ct: How do you know?

PW1: Those who are still doing the business are telling me that's the price My Lord."

From the evidence on record, what the appellants managed to prove was a mere possibility that they would have earned Shs. 16,740,000/= from the prospective buyer. They said that they had an agreement in place with the said buyer but never adduced evidence beyond their allegations. In my view those allegations were insufficient and failed to prove that it was more probable than not that they would earn that exact amount of money from the said prospective buyers. I am therefore in agreement with the learned trial Judge that the appellants failed to prove their entitlement to the shs 16,740,000/= being the market value of the timber which was converted. It's not up to the Court to speculate as to the cost of the timber. I too would disallow that claim.

The other claim under this ground of appeal was for expenses which the appellants had incurred in the ill-fated business enterprise. Those expenses, per the 1st appellant's testimony included:

- Payment for workers ..... Shs. 900,000/=
- Payment for those who ferried the timber..... Shs.930,000/=
- Food for the workers..... Shs 400,000/=
- Transportation costs from DRC to Uganda border....Shs 1,200,000/=
- Deposit on transport from border to Kampala.....Shs. 1,500,000/=
- 6 Jerrycans of new oil.....Shs. 360,000/=
- 4 drums of petrol (at $240 per drum)..... $960
- Total: .....Shs.5,290,000/= and $960 at the exchange rate in 1999.

In October 1999, the exchange rate was 1533 Uganda shillings for 1 dollar. Therefore $690 would equal to Uganda shillings 1,471,680. In total the appellants, by their oral testimony managed to prove loss of Shs. 6,761,680/=.

Regarding the appellants' claim to a refund for expenses incurred, the learned trial Judge said that they had provided no evidence. She reasoned that the appellants had only produced a mere list of expenditure for work, which in her view was insufficient; and that the said list could not prove the

expenditure in question in the absence of any receipts or record book. In the **Mutekanga case (supra)** at **page 227**, the Court observed that:

> **"...However with proof as with pleadings, the Courts are realistic and accept that the particularity must be tailored to the facts.**
>
> **In one of the leading cases on pleading and proof of damages, namely, Ratcliffe v Evans [1892] 2 QB 524, Bowden LJ, said this at 532-533:**
>
> **"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done must regulate the degree of certainty and particularity with which the damage ought to be proved. As such, certainty must be insisted on in proof of damage as is reasonable, having regard to the circumstances and the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pandatory."**

Most of the expenses incurred by the appellants in this case, are of the kind that is not often documented with receipts. In the circumstances, cogent evidence (albeit oral in nature) would be admitted to prove those claims. I would therefore have allowed all those claims by the appellants which were well elaborated in their oral evidence. As I have found earlier, the total under the claims for expense incurred is Shs. 6,761,680/= and I would award the quantum of those claims to the appellants as they were sufficiently proved.

However, as I noted earlier, there was no ground of appeal in the relevant memorandum concerning the expenses incurred by the appellants in the timber cutting venture in issue. For that reason, I was initially inclined not to award the appellants the special damages under the expenses head. However, upon perusal of the relevant pleadings in the trial Court, I find that the expenses in question had been pleaded in the appellants' plaint. As such there was material for the trial Court to consider in order to exercise its discretion appropriately.

By extension, that material is available to this Court by virtue of section 11 of the Judicature Act, Cap. 13 which gives this Court the powers of the High Court for purposes of hearing and determining an appeal. The 1995 Constitution enjoins the courts to always ensure that adequate compensation

is always awarded to victims of wrongs (Article 126 (2) (c)) and to administer substantive justice without undue regard to technicalities (Article 126 (2) (e)). Therefore, I would award Shs. 6,761,680/= being the claim for expenses by the appellants which was pleaded and sufficiently proven.

Ground 1 would, therefore, be resolved accordingly.

Ground 2.

Under this ground, counsel for the appellants criticized the learned trial Judge for failing to award damages for the confiscated third power saw mainly for the reason that it belonged to the appellant's brother. In my view, that criticism has some merit. Although the said power saw belonged to the appellant's brother, at the material time it was under the possession and control of the first appellant and it was being used by the 1st appellant's workers to cut the timber in question. I would therefore award him with the cost of that power saw given that it was unlawfully confiscated by the respondent's agents.

Counsel for the appellants submitted that the damages should reflect the current market value. I cannot accept those submissions, because special damages by their nature are awarded for losses incurred prior to the institution of court litigation. Special damages are those that are alleged to have been sustained in the circumstances of a particular wrong. **(See: Black's Law Dictionary, 8th Edition at page 1179).** In the circumstances of this case, the evidence on record shows that the power saw in question cost Shs. 1,200,000/=. I would award that sum to the appellants. Ground 2 therefore succeeds.

The above findings would prompt me to set aside the judgment of the learned trial Judge and substitute therefor orders for the following:

a) Ug. Shs. 3,210,000/= as special damages for the three power saws unlawfully confiscated from the appellants by the respondent's agents.

b) Ug. Shs. 6,761,680/= as special damages for expenses incurred in the business enterprise in issue by the appellants.

c) I would uphold the general damages of Ug. Shs 4,000,000/= awarded by the learned trial Judge.

d) Interest on the total amount awarded in (a) & (b) above at 10 percent per annum, from the date of filing of the suit till payment in full, and interest on the amount in (c) above at 10 percent per annum from the date of judgment in the lower court till payment in full.

e) Costs in this Court and the Court below to be paid to the appellants.

This appeal would be disposed of accordingly.

Dated at Kampala this ..... 12th ..... day of ..... Nov. ..... 2019.

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Elizabeth Musoke

Justice of Appeal

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL FOR UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musoke and Obura, JJA]

Civil Appeal No.50 of 2007

(Arising from High Court Civil Suit No.341 of 2002)

BETWEEN

Isaah Kabali==========Appellant No.1

Hakim Serebe==========Appellant No.2

AND

Attorney General==========Respondent

(On Appeal from a judgment of the High Court of Uganda (Arach-Amoko, J.,) delivered on 17th May 2007.)

Judgment of Fredrick Egonda-Ntende, JA

[1] I have read the judgment in draft of my sister, Musoke, JA. I agree with it and having nothing useful to add.

[2] As Obura, JA., agrees this appeal is allowed in the manner proposed by Musoke, JA., including the orders she proposes.

Dated, signed, and delivered at Kampala this 12th day of Nov. 2019

Fredrick Egonda-Ntende

Justice of Appeal