THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0183 OF 2013

ENERGO (U) CO. LTD::APPELLANT

VERSUS

1. GEOFFREY RUBARAMIRA
2. ATTORNEY GENERAL::RESPONDENTS

(Appeal from the decision of the High Court of Uganda at Fort Portal before Chibita J., (as he then was) dated the 13th day of June, 2012 in Civil Suit No. 0036 of 2005.)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE STEPHEN MUSOTA, JA.
HON. MR. JUSTICE REMMY KASULE, AG. JA.

JUDGMENT OF ELIZABETH MUSOKE, JA.

I have had the advantage of reading in draft the lead judgment in this matter prepared by my learned brother Hon. Justice Stephen Musota, JA. I agree with it, with nothing useful to add.

As Hon. Justice Remmy Kasule, Ag. JA. also agrees, the disposition of this appeal shall be in the manner proposed in the lead judgment of Hon. Justice Stephen Musota, JA.

Dated at Kampala this 7th day of Aug 2020.

....

Elizabeth Musoke

Justice of Appeal

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VERSUS

1. GEOFFREY RUBARAMIRA
2. ATTORNEY GENERAL :::::::::::::::::::::::: RESPONDENTS

(Appeal from the judgment and orders of Justice Mike J. Chibita in High Court (Fort Portal) Civil Suit No. 036 of 2005 Dated 13.06.2013)

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, AG JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA.

This appeal arises out of the judgment and orders of Hon. Justice Mike Chibita vide Civil Suit No. 036 of 2005.

Background

The 1st respondent is the registered proprietor of land situate at Rwibaale village, Kyenjojo district and on the 3rd of February 2004, he entered into a contract with the appellant to use a portion of the 1st respondent's land to extract murram for road works by digging a burrow pit. The land the subject of the murram extraction was called "Mugo Hill" which was accordingly surveyed and demarcated by the defendants' surveyors and measured 2 acres. The 1st respondent

emphasized that the tea plantation and forest should not be destroyed due to its economic value and also so as to prevent soil erosion. However, the appellant's workmen in extracting the murrum went beyond the agreed acreage and encroached on the 1st respondents trees and uprooted them. The 1st respondent sued the appellant for general and special damages which the trial Judge granted. The appellant was dissatisfied with the decision of the trial court and filed this appeal on the following grounds;

1. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he erroneously held that the appellant trespassed on the 1st respondent's land and excavated murram from an area other than the agreed one.
2. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he erroneously held that the appellant destroyed the 1st respondent's trees and tea.
3. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he held that the appellants' execution of the Kyegegwa-Kyenjojo Road Tarmacking Project was a frolic of the appellant's own.
4. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he set up his own theory and failed to hold that the 1st respondent could not approbate and reprobate the agreement between him and the appellant.
5. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he did not hold that the 1st respondent negated the alleged trespass, if any, or acquiesced in the same and his suit was a mere speculation for money.
6. The learned trial Judge erred in law and fact when he held that trespass if any, exempted the 2nd respondent from its statutory obligations as the authorized undertaker executing public works and its contractual obligations as an employer to indemnify an independent contractor.

7. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he did not hold that the 1st respondent had no locus standi to oppose the appellant's case against the 2nd respondent.
8. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he did not hold that the 2nd respondent had no role to support the 1st respondent's case.
9. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he did not hold that the respondents had departed from their respective pleadings.
10. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he did not hold that the appellant has the burden to analyze and justify the 1st respondent's claims of damages.
11. The learned trial Judge erred in law and fact and a miscarriage of justice was occasioned when he awarded an amount of damages so extremely high as to make it an entirely erroneous estimate of the damages.

The 1st respondent filed a cross-appeal on the grounds that;

1. The learned trial Judge erred in law and fact in reducing the life span of the tea bush from 90 years to 20 years provided for in the technical report of PW2 in Exhibit PE4.
2. The learned trial Judge erred in law and fact in finding that the 1st respondent/ cross appellant would have mitigated the loss by replanting tea bushes.
3. The learned trial Judge erred in law and in fact when he awarded inordinately low special and general damages.

Representation

At the hearing of the appeal, Mr. Amos Arinaitwe appeared for the appellant while Mr. Mwebaze Ndibarema appeared for the 2nd respondent. Paul Byaruhanga filed submissions for the Ist respondent.

Appellant's submissions

Counsel for the appellant submitted that the trial Judge accepted the 1st respondent's case because of the weakness of the appellant's case and not the strength of the 1st respondent's claim. Counsel argued that even though DW1 did not visit the site after excavation, there was prior approval of the site and material by the 2nd respondent's agent, the Resident Engineer. The 1st respondent approbating the agreement between himself and the appellant by taking full benefit of it and then seeking to reprobate the same by alleging that it was breached was an error.

Counsel submitted that the incidents of trespass did not exist and relied on the Supreme Court decision in **Justine E. M Lutaaya Vs Stirling Civil Engineering Company Ltd Civil Appeal No. 11 of 2002** on what amounts to trespass. The appellant's case is that the agreement they had with the 1st respondent was for land that had trees thereon and this was proved by the testimony of the 1st respondent. In order for extraction of murram to be done, vegetation had to be removed. The respondent is estopped from approbating the result of the contract and reprobating it by submitting that it was a result of the appellant's frolic of his own.

Counsel further submitted that trespass did not exempt the 2nd respondent from liability to indemnify the appellant. The 2nd respondent is the authorized undertaker executing public works and bore the statutory duty to do the Kyegegwa-Kyenjojo Road with all the ancillary works such as establishment of burrow pits. The relationship between the appellant and the 2nd respondent is that of employer and contractor.

1st respondent's submissions

Counsel submitted that from the evidence of PW1, PW2 and PW3, the appellant's agents created a burrow pit from which murram was extracted but that this particular area from which the burrow pit was created and murram extracted was not the agreed site. Exhibit PE5 shows a surveyed area which was clearly marked out and pole stamps and a stone planted. The testimony of PW1 was that the appellants' excavation and extraction done on 21st March 2004 was done 80 yards beyond the demarcated area thus encroaching on the tea whose total area was 4.1 acres. PW1, PW2 and PW3 indicated the loss and injury to the 1st respondent's crops. Any activity done outside the agreed and marked out area was trespass on the 1st respondents land.

The issue of whether the appellant was on a frolic of his own in execution of the Kyegegwa-Kyenjojo road tarmacking project was a misconception of the appellant and was nowhere in the judgment of the learned trial Judge. What the trial judge found was that the appellant was on a frolic of his own when he excavated murram beyond the point agreed. The 1st respondent had nothing to do with the appellant's execution of the Kyegegwa-Kyenjojo road tarmacking project.

While arguing the cross-appeal, counsel submitted that it was an error on the on the part the learned trial Judge to reduce the life span of the tea bush from 90 years to 20 years.

2nd respondent's submissions

Counsel for the second respondent submitted that the evidence of PW1 clearly states that the appellant extracted murram from an area beyond the agreed upon portion. The learned trial Judge held that the appellant was not entitled to any indemnity from the 2nd respondent because the extraction of murram was not carried out

from the area designated by both parties and the 2nd respondent's engineer did not consent to the extraction in the area where it was carried out. The dispute between the appellant and the 1st respondent is not for breach of the original contract between the Government of Uganda and the appellant on construction of Kyegegwa-Kyenjojo road and as such, there is no cause of action against the 2nd respondent. Counsel relied on the case of **Edward Kironde Kagwa Vs Costaperaria and another (1963) E.A 213** on the right to indemnity which exists where the relationship between the parties is such that either in law or in equity, there is an obligation upon one party to indemnify another.

Consideration of the appeal

I have considered carefully the submissions of both counsel and I have also read the record and the authorities cited.

As a first appellate court I have a duty to reappraise the evidence and to make our own inferences, on both issues of fact and law. This I am required to do under Rule 30 of the Rules of this Court. The duty of the first appellate court to reappraise the evidence has long been established. A number of authorities in this court and in the Supreme Court have laid down this duty. Justice Joseph Mulenga JSC in the case of **FR. Narsensio Begumisa and others versus Eric Tibebaga (Supreme Court Civil Appeal No. 17 of 2002)** (unreported) restated the above principle in the following words:-

> *"It is a well-settled principle that on a 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 that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.*

See also **Bogere Moses vs Uganda (Supreme Court Criminal Appeal No. 1997) and Kifamunte Henry vs Uganda (Supreme Court Criminal Appeal No. 10 of 1997).**

As to grounds 1 and 2: whether the appellant trespassed on the 1st respondent's land by excavating murram outside the agreed area thereby causing destruction of crops and trees, the evidence of PW1, PW2 and PW3 was that the agents of the appellant created a burrow pit from which murram was extracted but the particular area from which the burrow pit was created and murram was extracted from a site different from the agreed upon site. Exhibit PE5 was exhibited showing a surveyed area which was marked out and stones planted and also shows a shaded area where excavation was done which was outside the agreed area. PW1 testified that together with the company surveyors and his sons, they demarcated the area of murram excavation and it was demarcated with tree stumps and poles.

However in March 2004, PW1 was called by his wife who informed him that the Energo workers had started excavating murram from the top moving downwards beyond the demarcated area encroaching on a natural forest, destroying trees and pushing the trees, top soil and debris over the tea plantation. He testified that the tea was almost two years old at harvestable stage measuring 2.3 acres with 7360 plantlets. Photographs of the destruction were taken and tendered in court.

PW2 was a District Production Officer at Kyenjojo and is the one who assessed the extent of destruction.

DW1 argued that he surveyed the site and that excavation was done in the agreed area. DW1 admitted to having surveyed the land prior to excavation. However, he never went back to verify that the murram was excavated from the agreed site. DW1 testified in cross-examination that he did not go back to the site after excavation was done.

Trespass occurs when a person makes an unauthorized entry upon land and thereby interferes, or portends to interfere, with another person's lawful possession of that land. See **Justine E. M Lutaaya Vs Sterling Civil Engineering Ltd, Supreme Court Civil Appeal No. 11 of 2002**.

It is not in dispute that the 1st respondent entered into an agreement with the appellant company to excavate murram from a certain demarcated area. The appellant however went beyond the agreed upon area and trespassed into the 1st respondent's tea plantation.

From the evidence on record, I find that the 1st respondent produced enough evidence to show that the appellant trespassed and caused destruction on the 1st respondent's property. Grounds 1 and 2 are therefore resolved in favour of the respondents.

Grounds 3 and 6: whether the appellant was on a frolic of his own in execution of the Kyegegwa-Kyenjojo road tarmacking project.

The learned trial Judge held at page 408 of the Record of Appeal that;

> *"I am persuaded by learned counsel for the 3rd party that indemnity cannot cover instances of trespass and other illegal activities. Indeed, as he submitted, the dispute between the defendant and the plaintiff is not about the agreement between the defendant and the plaintiff. By committing the tort of trespass as already resolved by issues one and two, the defendant was on a frolic of his own. The 3rd party cannot be held liable for liabilities incurred while the defendant was on such a frolic."*

From the above excerpt, the learned trial Judge held that the appellant's act of trespass was done on a frolic of the appellant's own and not the execution of the Kyegegwa-Kyenjojo road tarmacking project. The agreement between the 1st respondent and the appellant had nothing to do with the Kyegegwa-Kyenjojo road tarmacking project. Whereas the 2nd respondent had a statutory obligation as the authorized undertaker executing public works, it had no contractual

obligation to indemnify. Exhibit PE1 was signed between the 1st respondent and the appellant with the 1st respondent as landlord and the appellant as tenant of the land where the burrow pit for the excavation of murram was to be done. The agreement was for excavation of murram on the 1st respondent's land and not for the Kyegegwa-Kyenjojo road tarmacking project. Ground 3 and 6 are therefore a misconception of the trial Judge's finding and the 2nd appellant could not indemnify the 1st respondent for the appellant's act of trespass. The two grounds therefore fail.

Grounds 4 and 5: whether the 1st respondent approbated and reprobated the agreement between him and the appellant thereby negating the alleged trespass.

The doctrine of approbation and reprobation reflects the principle whereby a person cannot both approve and reject an instrument most commonly described as blowing hot and cold. The appellant's claim is that the 1st respondent approbated and reprobated the agreement between him and the appellant. The 1st respondent argues that approbation and reprobation are different from the claim of trespass and breach of the agreement in relation to the exact place or site where murram was to be excavated.

PW1 testified on page 211 of the record of appeal that;

> *"On 8th May, 2004 Mr. Taremwa came for me to go and receive my payment. I was informed that they would pay the balance later. I don't remember how much it was.*
>
> *On 13th June they called me for more payment and paid me for all the murram taken but never compensated for the destroyed property. I started sensing foul play of not paying for the destroyed property."*

At the commencement of the agreement, the murram collected by the appellant was to be paid for per trip of 20 tonne truck. The testimony of PW1 is that he was paid for all the murram taken but was never

compensated for the tea destroyed by excavation outside the agreed site. Murram was to be paid for, irrespective of where it was being excavated from as long as it was within the perimeters agreed upon by the appellant and the 1st respondent. It is my considered view that the doctrine of approbation and reprobation does not arise here.

The 1st respondent was paid for the murram excavated and not the tea and trees that were destroyed by the trespass of the appellant. Grounds 4 and 5 are therefore also resolved in favor of the respondents.

Grounds 7 and 8: whether the 1st respondent had *locus standi* to oppose the appellant's case against the 2nd respondent [3rd party]

Civil Suit No. 036 of 2005 was brought by the 1st respondent against the appellant and the 2nd respondent was brought in as the 3rd party. The claim was for torts committed on the 1st respondent's land which the appellant denied and claimed that the 3rd party (2nd respondent) was liable. The 1st respondent had a duty and burden to prove his claim against the appellant. The 2nd respondent put up its defence and denied liability. The 1st respondent had the duty to show that it is the appellant who occasioned the loss and not the 3rd party who had been invited into the proceedings by the appellant. In proving the 1st respondent's case, proof of liability of the appellant in the tort of trespass negated liability on the 3rd party.

As already stated above, the agreement was between the appellant and the 1st respondent and the act of the appellant trespassing on the 1st respondent's land was not to be indemnified by the 3rd party. The 1st respondent, in proving the case against the appellant had to oppose the case against the 3rd party to place liability on the appellant. Grounds 7 and 8 accordingly fail.

Grounds 10 and 11 (cross-appeal): Whether the damages awarded by court were extremely high.

PW2 found in Exhibit PE4 that the life span of the tea bushes is at 90 years. But the learned trial Judge reduced the life span to 20 years and awarded Shs. 134,448,000/= as special damages for the destroyed tea plantation and trees and Shs. 20,000,000/= general damages for trespass. An award of general damages is to give the plaintiff compensation for the damage, loss or injury he has suffered. It is trite law that an appellate court can interfere with the exercise of discretion of the trial Judge only where he has acted on a wrong principle or where the award is manifestly low or high as to occasion a miscarriage of justice. See **Mbogo Vs Shah (1968) E.A 93**

While awarding damages, the learned trial Judge held at page 409 of the record of appeal that;

> *"According to the technical formula the figure of 90 years was used as the life span of a tea bush. This number of years did not take into account mitigation of damage.*
>
> *I would therefore reduce the number of years to 20 and assume that as a prudent citizen the plaintiff would re plant the tea instead of continuing to try and bemoan the loss. I have arrived at the 20 years by adding the number of years it would take tea to mature from today.*
>
> *That would mean the yield of tea bush per year 6kgs x 20 years x shs 140 = 16,800/*
>
> *16.800 x 7360 (number of tea bushes) = 123,648,000/=*
>
> *Therefore shs 123,648,000/ would be the expected income from the tea for 20 years since destruction. To this add the shs 10,800,000/= being the value of the destroyed trees.*
>
> *This brings the total to shs 134,448,000/= as special damages.*
>
> *I would award general damages of shs 20,000,000/= for trespass and breach of contract."*

I find the learned trial Judge's award of general and special damages well thought out and appropriate in the circumstances and as such, I find no reason to interfere with the said award. Grounds 10 and 11 constituting the Cross-Appeal therefore fail.

Having found as I have above, the appeal stands dismissed and similarly, the cross appeal is also dismissed for lack of merit. The judgment and orders of the learned trial Judge are upheld.

As to costs, the respondent is to have the costs of the dismissed appeal while the appellant is to have the costs of the dismissed Cross-Appeal. The orders of the learned trial Judge as to costs in the court below remain unaltered.

It is so ordered.

Dated this 7th day of Aug 2020

Stephen Musota, JA

THE REPUBLIC OF UGANDA

In the Court of Appeal of Uganda

At Kampala

Civil Appeal No. 183 of 2013

(Arising from the Judgment and Orders of Justice Mike J. Chibita in High Court (Fort-Portal) Civil Suit No. 036 of 2005 dated 13 June, 2013)

Energo (U) Co. Ltd :: Appellant

Versus

1. Geoffrey Rubaramira
2. The Attorney General ::Respondent

Coram: Hon. Justice Elizabeth Musoke, JA
Hon. Justice Stephen Musota, JA
Hon. Justice Remmy Kasule, Ag. JA

Judgement of Hon. Justice Remmy Kasule, Ag. JA

Having carefully considered the lead draft Judgment by His Lordship Justice Stephen Musota, JA, I agree with the reasoning and conclusion His Lordship has reached of dismissing the appeal of the appellant and the counter-claim of the respondents.

I also agree with the orders he proposes as to costs.

I have nothing useful to add.

Dated at Kampala this ..... Day of ..... 2020.

Remmy Kasule
Ag. Justice of Appeal