THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0173 OF 2015

MASAKA MUNICIPAL COUNCIL::::::::::::::::::::::::::::::::APPELLANT

VERSUS

TAKAYA FRANK::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Masaka before Oguli-Oumo, J. dated the 16th day of April, 2015 in Civil Suit No. 040 of 2013)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE CHRISTOPHER MADRAMA, JA.
HON. LADY JUSTICE IRENE MULYAGONJA, JA.

JUDGMENT OF ELIZABETH MUSOKE, JA.

Background.

In about 2013, when the dispute with which this appeal is concerned arose, the appellant was the lower local government authority in then Masaka Municipality. The respondent was the registered proprietor of a piece of land (the suit land) in that Municipality, comprised in Masaka Plot 1735 Block 325 at Kasana. In about 2012, the appellant had commenced on development of the suit land by constructing a building thereon, after he had obtained permission from the appellant for that purpose.

However, subsequently, the respondent's construction project was halted on grounds that it was carried out in a manner that encroached on a road reserve in the area. In a letter of 23rd January, 2013, the Uganda National Roads Authority (UNRA), the statutory body responsible, interalia, for management, maintenance and development of the country's national roads network wrote to the respondent informing him that he had "hoarded a site on the road reserve within the Masaka Municipality area at chainages 2 + 500 RHS along Masaka-Nyendo and 0+000 LHS along Masaka-Bukakata Roads" which was in contravention of the Road Act, Cap. 358. UNRA further informed the respondent that the house he was constructing on the suit land was "set at less than 12 m from the centerline of each of the above said roads" yet the road reserve covered a portion of at least 15m from the

centerline of the same roads. UNRA therefore "advised the respondent to stop and/or demolish the house construction immediately and re-locate it outside the road reserves."

The respondent subsequently commenced proceedings against UNRA and the appellant claiming as against the two bodies jointly and severally for the payment of compensation plus interest and costs of the suit. The respondent also claimed that officials of the appellant had in the days following the UNRA letter gone to the suit land and unlawfully confiscated assorted building materials which he had stored thereon. The respondent also claimed that he had hired a contractor to build the house on the suit land, with whom an agreement for advance payment for the works had been made. The respondent claimed that when the building materials were confiscated by the appellant, the contractor made demands and was paid the agreed upon advance payment. The respondent claimed in his pleadings that he suffered loss and damages due to the appellant's acts in approving the development application on the suit land yet the same was on a road reserve. The respondent never pleaded negligence, but instead alleged trespass or in the alternative deprivation against UNRA and the appellant.

The learned trial Judge, however, found the appellant liable to the respondent in negligence for approving the respondent's building plan and giving the green light for him to proceed with construction of a commercial building on a piece of land within its jurisdiction without informing him that the suit land was situated in a road reserve. This finding was despite the learned trial Judge having earlier in her Judgment made a finding that the suit land was situated on a road reserve; and that if the suit land was not situated on a road reserve, the respondent's construction proceeded in a manner that encroached on the said road reserve, facts which amounted to an illegality.

The learned trial Judge went on to award the following to the respondent for the said appellant's negligence; Ug. Shs. 316,162,000/= as special damages with interest at 30% per annum from 23rd January, 2013; Ug. Shs. 50,000,000/= as general damages with interest at Court rate from the date of the trial Court's judgment until payment in full; and the costs of the suit.

Being dissatisfied with the decision of the learned trial Judge, the appellant appeals to this Court on the following grounds:

"1. **That the learned trial Judge erred in law and fact in awarding the Respondent Ug. Shs. 316,162,000/= in special damages.**

2. **That the learned trial Judge erred in law and fact in awarding the Respondent general damages of Ug. Shs. 50,000,000/=**

3. **That the trial Judge failed to properly evaluate the evidence on record and erroneously awarded the Respondent Ug. Shs. 316,162,000/= and 50,000,000/= in special and general damages respectively.**

4. **That the trial Judge erred in law when she awarded the Respondent costs and interests thereon."**

The appellant prays that this Court allows the appeal and sets aside the judgment and orders of the learned trial Judge awarding the relevant sums of money as general and special damages to the respondent; and requiring the appellant to pay the costs of the suit in the lower Court to the respondent. The appellant also prays that the costs of this appeal be paid to the appellant.

The respondent opposed the appeal.

Representation.

At the hearing of the appeal, Ms. Lubowa Racheal, learned counsel appeared for the appellant. Mr. Ian Mulindwa, learned counsel appeared for the respondent.

Counsel for the appellant made a prayer and the Court granted her leave to rely on conferencing notes filed in Court prior to the hearing date as written submissions for the appellant. On the other hand, counsel for the respondent made a prayer and the Court granted him leave to file written submissions in reply to those of the appellant; Counsel for the appellant was also allowed to file a rejoinder thereto.

Appellant's case.

Counsel for the appellant proposed three issues to guide in the disposition of the appeal as follows: 1) whether the trial Judge erred in law and fact in awarding the respondent special damages, general damages, costs and

interest thereby occasioning a miscarriage of justice; 2) whether the trial Judge failed to properly evaluate the evidence on record when she awarded the respondent 316,162,000/= in special damages, 50,000,000/= in general damages, interest on the special and general damages and costs of the suit; and 3) what remedies are available to the parties? The submissions on issues 1, 2 and 3 have been considered together.

As to whether the damages awarded by the learned trial Judge to the respondent were justified, counsel relied on the authority of **Livingstone vs. Rawyards Coal Co. (1880) 5 AC 25 at page 39** to advance the proposition that in deciding the amount to be awarded as reparation or damages, the Court should as nearly as possible get at that sum of money which will put the party which has suffered, in the same position as he/she would have been in if he/she had not sustained the wrong for which he/she is being awarded compensation. Further, counsel relied on the authorities of **Uganda Breweries Ltd vs. Uganda Railways Corporation Supreme Court Civil Appeal No. 6 of 2001; Kyambadde vs. Mpigi District Administration [1983] HCB 44; and Attorney General vs. Lutaaya Supreme Court Civil Appeal No. 16 of 2007** for the proposition that special damages may only be awarded if they have been specifically pleaded and strictly proved by the plaintiff.

In the instant case, counsel contended that the special damages awarded to the respondent had not been satisfactorily proved. With regards to the award of Ug. Shs. 97,535,000/= being the value of materials and equipment allegedly seized by the appellant from the respondent, counsel submitted that the learned trial Judge erred in relying on a suspicious bill of quantities (Exhibit P.10) to arrive at that award, yet the said document may have been generated by the respondent for Court purposes. Counsel argued that a genuine bill of quantities could only have been generated by a contractor with expertise in construction, yet Exhibit P.10 was generated by the respondent, a lay man with inadequate expertise.

Counsel further submitted that PW2's evidence was that as the building contractor, after an advance payment was made to him with respect to building a house for the respondent on the suit property, it was the respondent who provided him with building materials for carrying out the

job. Counsel submitted that this contradicted the respondent's claims that PW2 had been paid to carry out the job and showed that Exhibit P.10 had been merely generated for Court purposes and was not genuine.

Further, counsel faulted the learned trial Judge for awarding general damages based on her own assessment of the value of the construction works during her visit to the locus in quo, submitting that the assessment did not amount to sufficient proof of the value of the work done.

It was further the submission of counsel that there were glaring inconsistences in the testimony of the respondent with regards to the value of materials allegedly taken from the suit property and loaded on a truck belonging to the appellant, Registration No. LG0003124.

Counsel further contended that whereas it was the evidence of PW2 in cross-examination that the respondent had receipts for the materials which were lost at the construction site, the receipts were neither attached to the pleadings nor exhibited in the trial Court. This showed that the respondent never incurred the expenditure he claimed at all, and the learned trial Judge's award was therefore unjustified.

With regards to the award of special damages as advance payment to PW2 for construction of the respondent's building, counsel submitted that although a receipt to support the said award was tendered in evidence as Exhibit P 5A; at the time of the learned trial Judge's visit to the locus in quo, only dismal work had been done, a fact acknowledged by the learned trial Judge. Photos taken during the visit to the locus in quo, and exhibited as Exhibit P6, showed that only elementary construction work, involving digging of holes for the erection of building columns and pillars had been done, which in counsel's view was not worth Ug. Shs. 200,000,000/= awarded by the learned trial Judge as special damages.

Counsel submitted that the amount the respondent could recover as damages was the value of the works executed by the contractor at the time he was stopped from going on with the relevant construction works. In the alternative, that if the respondent had lost the amount of money awarded by the trial Court, the same ought to have been awarded against PW2, the contractor.

With respect to the special damages awarded as transport expenses incurred by the respondent, counsel submitted that the same were not proven as the respondent failed to adduce evidence to show the particulars of the motor vehicles which were hired for transportation of the building materials to the construction site. Therefore, it was an error for the learned trial Judge to base on assumptions in awarding this head of special damages.

Counsel further faulted the learned trial Judge for awarding Ug. Shs. 5,000,000/= as special damages allegedly incurred by the respondent in paying an architect for building plans, contending that the sum was arrived at injudiciously. The learned trial Judge had based on private knowledge obtained in her consultation with an architect who was not called to Court, which was inadmissible and rendered her decision baseless.

Further with regards to the award of special damages for building expenses, counsel contended that the respondent acted inappropriately when he paid for the relevant building plan with knowledge that it covered a portion of land beyond the suit land. In counsel's view, from the outset the respondent voluntarily assumed loss for which the appellant was erroneously held to be liable.

Further, counsel submitted that the respondent adduced evidence in the trial Court that he had paid Ug. Shs. 400,000/= as fees for approval of his building plan, and in awarding Ug. Shs. 12,000,000/= as building plan expenses, the learned trial Judge acted arbitrarily and in total disregard of the evidence.

In conclusion, counsel submitted that although the respondent pleaded special damages, he did not strictly prove the award of Ug. Shs. 316,162,000/= which the learned trial Judge made, thereby rendering the award to be contrary to the law, and a miscarriage of justice.

With regards to general damages, counsel submitted that the learned trial Judge made a finding that the respondent constructed a house which encroached on a road reserve along Masaka-Nyendo; and Masaka-Bukakata Roads, and that the encroachment was intended to defraud the Government, yet she went ahead to award Ug. Shs. 50,000,000/= as general damages, which was erroneous given that the building construction done for the respondent on the suit land was illegal. Moreover, the quantum awarded as general damages was excessive, and ought to be interfered with by this

Court. Counsel cited the cases of **Joy Trail vs. Henry Mitford Bowker 14 EACA 20**; and **Attorney General vs. Lutaaya (supra)** in support of the proposition that an appellate Court may set aside a trial Judge's award of damages if it is satisfied that in awarding the quantum of damages, the trial Judge acted on a wrong principle of law or awarded an amount which was so high so as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled.

With respect to the rate of interest on the awards of special and general damages, counsel reiterated his earlier submissions that the awards were unjustified and wrong in law, and therefore, the respondent was not entitled to receive any interest thereon.

On the award of costs of the suit to the respondent, counsel relied on **Section 27 (2) of the Civil Procedure Act, Cap. 71** for the proposition that costs of any matter follow the event, unless Court for good reason orders otherwise. He submitted that it was erroneous to award costs to the respondent who had been condemned for constructing on a road reserve, and urged this Court to set aside the learned trial Judge's decision on costs.

Counsel prayed that the Court answers all issues raised by the appellant in the affirmative.

Respondent's case.

In reply, counsel for the respondent supported the learned trial Judge's decision to award general and special damages, submitting that the same was justified because the respondent had incurred some expenses due to the appellant's negligence. The respondent being the registered proprietor of a piece of land within the appellant's jurisdiction had applied for planning permission, which the appellant had granted to him. Having obtained that permission, the respondent engaged a building contractor to construct a commercial building on the land. The respondent then paid a lump sum figure of Ug. Shs. 200,000,000/= to the contractor as remuneration for his services; bought building materials; and incurred expenses in transporting them to the suit land.

Counsel contended that with exercise of proper diligence, the appellant's officials would have rejected the respondent's building plan as it concerned

land in a road reserve; and because they did not, the appellant was rightly held liable to pay damages to the respondent for the inconvenience he suffered.

Relying on **Joy Trail vs. Henry Mitford Bowker 10 EACA 1947** for the proposition that an appellate Court will not interfere with the award of damages by the trial Judge unless it is satisfied that in awarding the damages, the trial Judge acted on a wrong principle or that the amount awarded as damages was so high or so low as to make it an erroneous estimate of the damage, counsel submitted that the appellant had failed in its duty to police building constructions within its area of jurisdiction, and was rightly put on the spot by the learned trial Judge for failing in its supervisory role.

With regards to interest, counsel submitted that the award was not excessive as the learned trial Judge had opted to award interest at commercial rate because the respondent had testified that his building projected was aimed at profit making. Counsel relied on the authority of **Charles Lwanga vs. Centenary Rural Devlopment Bank, Civil Appeal No. 30 of 1999** where it was held that where a cause of action relates to business, interest rate may be awarded on the higher end. Thus, in counsel's view, the order for payment of interest at 30% on the respective awards of special and general damages was reasonable.

On the award of costs by the learned trial Judge, counsel submitted that the same was justified given that costs follow the event, and in each case a successful party is entitled to costs unless the Court for good cause decides otherwise. Counsel submitted that in the present case the learned trial Judge had rightly exercised her discretion, and there was no indication that she had acted on wrong principles in awarding costs.

Counsel prayed that the Court decides the issue in favour of the respondent, finds no merit in the appeal, and dismisses it with costs of the appeal and those in the Court below to the respondent.

Appellant's rejoinder.

Counsel submitted that having made a finding that the respondent's land was on a road reserve and that his construction had encroached on the said

road reserve, the learned trial Judge ought to have decided that the respondent was not entitled to any remedy.

With regards to the advance payment allegedly made by the respondent for the construction of a building on the suit land, counsel submitted that the same should be recovered from the contractor since their contract was frustrated and was not executed at all.

On the special damages awarded for building plan expenses, counsel submitted that the award was not justified because the relevant building plan covered an area of land bigger than the one in the appellant's certificate of title. In counsel's view, that manifested an intention by the respondent to construct his building in a road reserve as a means of defrauding the Government, an act which deserves no award of damages because the respondent did not have clean hands. Counsel urged this Court not to award damages to the respondent as to do so would amount to condoning illegality.

In all other respects, counsel reiterated the submissions made in support of the appeal.

Resolution of the Appeal

I have carefully studied the court record, the parties' submissions and the law and authorities relied on therein. I have also had regard to the law and authorities not cited by the parties but relevant to the determination of the present appeal.

In a first appeal from the High Court, this Court has a duty to reappraise the evidence and draw inferences of fact. **See: Rule 30 (1) (a) of the Judicature (Court of Appeal Rules) Directions S.I 13-10;** and the authority of **Kifamunte Henry vs. Uganda, Supreme Court Criminal Appeal No. 10 of 1997** where it was stated that:

> **"...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. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour the appellate Court must be guided by the impressions made on the judge who saw the witnesses. However, there may be other circumstances**

quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen. See Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire vs Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5."

I observe that the appellant proposed three issues to guide in the determination of this appeal, to which the respondent replied. In my view, however, only one question arises for determination, namely:

"Whether the learned trial Judge's decision to award special and general damages with interest thereon from the date of judgment until payment in full, and costs of the suit to the respondent was justified."

I note that as the award of damages is made in the discretion of the trial Court, an appellate Court may only interfere with it, if there exist reasons justifying such interference. In **Crown Beverages Ltd vs. Sendu Edward, Supreme Court Civil Appeal No. 01 of 2005** the Supreme Court emphasized that:

"...An appellate court will not interfere with the award of damages by a trial Court unless the trial Court acted upon a wrong principle of law or the amount awarded is so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff was entitled."

The reasons presented by the appellant as justifying this Court's interference with the award of damages made to the respondent are considered below:

Firstly, it was stated that the award of damages was based on an illegality and was so tainted that it ought to be set aside. Counsel for the appellant submitted that because the respondent's construction was done on a road reserve in contravention of the law, no damages should have been paid to him. Counsel for the respondent countered that the appellant was negligent in approving the respondent's building plan, yet the same related to land which was in a road reserve, and that the appellant was liable for any loss arising therefrom, notwithstanding any illegality. This was because the respondent started the construction works on the suit land due to the assurance received from the appellant's approval of his building plans.

I note that transactions of sale of land are "caveat emptor". The learned authors of the textbook by **Meggary and Wade titled "The Law of Real Property (8th Edition)**, expressed the following views with which I agree:

> **"The motto of English conveyancing is caveat emptor: the risk of incumbrances is on the purchaser, who must satisfy himself by a full investigation of title before completing his purchase."**

The doctrine of caveat emptor means that any defect concerning land, discovered subsequent to its purchase, will be borne by the purchaser if he/she did not carry out sufficient investigations to discover, for example that part of the land lies within a road reserve, like it was in the present case.

In the present case, subsequent to purchasing the suit land, and embarking on the construction of a commercial building thereon, the respondent was informed by the Uganda National Roads Authority (UNRA) that the construction encroached on a road reserve. When the learned trial Judge visited the locus in quo (the suit land), she observed that the suit land was situated on the road reserve. In a passage from the learned trial Judge's judgment at page 27 of the record it is stated that:

> **"When court visited the locus, it took measurements with the help of a surveyor in the presence of both parties and their Lawyers it was found that the measurement of 15 metres from Masaka-Nyendo and Masaka-Bukakata Road both ended at the same step meaning that the plaintiffs (sic) land was in the middle of the two road reserves. It therefore means that the land of the plaintiff which is on a road reserve does not exist. What is there is a road reserve. If you are to add 3 metres to the building line."**

The learned trial Judge also held that the respondent encroached onto a road reserve when building his commercial building, and/or that the respondent's land was situated in a road reserve, which was illegal. Further, the learned trial Judge also held at page 20 of the record that the architectural plan with respect to the proposed commercial building for the respondent on the suit land measured 342.81 square metres yet the appellant's land measured 0.02 hectares (220 square metres). In my view, the foregoing meant that the respondent presented a false plan to the approving authority. This was contrary to the Physical Planning Act, 2010

which requires a person applying for building permission to attach a plan, which in my view, ought to be accurate in its portrayal of the size of the land. **(See: Section 34 and the Sixth Schedule to that Act)**.

The principle at common law was that:

> **"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." See: Holman v Johnson (1775) 1 Cowp 341, 343 where, Lord Mansfield C.J added the following words:**
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> **"If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."**

In **Patel vs. Mirza [2016] UKSC 452,** Lord Toulson of the UK Supreme Court held that illegality has the potential to provide a defence to civil claims of all sorts, whether relating to contract, property, tort or unjust enrichment, and in a wide variety of circumstances. In the same authority, after reviewing several authorities, Lord Toulson summarized the common law concept of the illegality doctrine as follows:

> **"The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system**
>
> **...**
>
> **In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."**

In **Hall vs. Hebert, [1993] 2 SCR 159, McLachlin J**. writing for the majority of a panel of Judges of the Supreme Court of Canada held that the courts should be allowed to bar recovery in tort on the ground of the plaintiff's illegal or immoral conduct. The basis of the power lies in the duty of the courts to preserve the integrity of the legal system and is exercisable only where the illegality concern was in issue; such as where a damage award in a civil suit would allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. In such instances the law refused to give by its right hand what it took away by its left hand. McLachlin, J further emphasized that:

> **"...to allow recovery in these cases would be to allow recovery for what is illegal. It would put the courts in the position of saying that the same conduct is both legal, in the sense of being capable of rectification by the court, and illegal. It would, in short, introduce an inconsistency in the law. It is particularly important in this context that we bear in mind that the law must aspire to be a unified institution, the parts of which -- contract, tort, the criminal law -- must be in essential harmony. For the courts to punish conduct with the one hand while rewarding it with the other, would be to "create an intolerable fissure in the law's conceptually seamless web". We thus see that the concern, put at its most fundamental, is with the integrity of the legal system."**

Thus, to award damages where the plaintiff has engaged in an illegal act would put an intolerable fissure on the law, and affect the integrity of the legal system. In such circumstances, a Court will be justified in refusing to award damages. In my view, the principles articulated in the above cited cases are applicable to the present case and the learned trial Judge ought to have been alive to them. The respondent's construction project on the suit land was halted because it was being done in contravention of the law, and was thus an illegality. By Section 3 of the Roads Act, Cap. 358, made it illegal to construct a house on a road reserve, as the learned trial Judge found the respondent to have done. There has been no cross appeal against that finding of the learned trial Judge which implies that the respondent accepts the finding.

Thus, the respondent founded his cause of action on an illegal act, and the trial Court was barred from assisting him by awarding him damages for the loss he suffered arising therefrom under the ex turpi causa doctrine. I would

therefore accept counsel for the appellant's submission that the learned trial Judge erred to award the following heads of damages founded on illegality to the respondent: a) Ug. Shs. 200,000,000/= being money allegedly advanced by the respondent to a building contractor to construct a building on the suit land; b) Ug. Shs. 12,000,000/= being the expenses incurred by the respondent in building plan approval; c) Ug. Shs. 627,000/= being transport expenses incurred to transport various material to the suit land.

Having said that, I note that there is a separate award of damages which was founded not on the illegality referred to above, but rather on the alleged unlawful seizure of the respondent's building materials from the suit land by the respondent. If proven to be true, this would constitute a tort against the respondent's goods for which damages would be recoverable. While testifying as PW1, the respondent stated that around early 2013, UNRA served a letter requiring him to halt construction on the suit land because it was on a road reserve. By that time, as the construction was underway, the respondent had stocked building materials on the suit land. The respondent testified that shortly after UNRA asked him to halt construction on the suit land, the appellant's agents allegedly went to the suit land and seized all the building materials there, and put them on a vehicle belonging to the appellant. According to the respondent, the particulars of the seized materials were as follows: 1) 1000 bags of cement; 2) 971 iron bars; 3) 700 y/7 iron bars; 4) 400 iron sheets; 5) 10 spades; 6) 10 hoes; 7) wheel barrow; 8) 20 cement basins; 9) 10 ropes; 2 sacks of nails; among others.

In cross examination at page 50 of the record, the respondent stated that although none of the persons who took the building materials identified themselves as agents of the appellant, he knew each and every one of them, about 10 in number personally, as the appellant's agents; and he knew the area where they were staying.

The respondent further stated that the vehicle on which his materials were loaded, with registration No. LG 0003-124, belonged to the appellant. Although he admitted that he never saw the log book for the said vehicle, he stated that he had observed the vehicle ferrying his materials from the suit land while seated in his vehicle parked in the vicinity. The appellant's

vehicle made several trips until all the materials had been taken from the suit land.

At page 51 of the record, it was put to the respondent that he had said nothing about confiscation of building materials in a letter to UNRA (Exhibit P.E9) written after the said materials had allegedly been confiscated, and he confirmed that he had indeed been silent in that regard. This raised some doubt about the veracity of the respondent's evidence.

The evidence of the respondent has to be considered alongside that of DW2A Lubega Raban, who testified about the vehicle Registration Number LG0003-124 which the respondent alleged had ferried his construction materials from the suit land. He testified that the said vehicle was a garbage truck and did not have the capacity to carry 10 persons as alleged by the respondent. He also testified that he was the only person authorized to drive the vehicle, and that on the material date, he did not drive the vehicle to the building site as alleged by the respondent and his witnesses. This witness's evidence was not seriously shaken in cross-examination.

In view of the above evidence, I hold the opinion that the respondent's assertions that materials had been taken from the relevant building site by the appellant's officials at the suit land were not satisfactorily established. It was one thing for the respondent to bring a list of materials to Court and allege that they were taken from the suit land; but he also had to prove that they were actually taken by the appellant's agents, which the respondent failed to do. As such, the learned trial Judge erred to award special damages with regards to those building materials.

The above analysis is sufficient to dispose of the appeal which would be allowed. However, I wish to make the following further comments. I must observe that the basis of the learned trial Judge's award of damages against the appellant was the alleged negligence of its officials, which in her view arose due to the fact that the appellant's officials approved the building plan submitted by the respondent yet the plan related to a building which was in a road reserve; and that the respondent had started construction on the basis of that approval and incurred expenses, as a result.

I have already held that damages could not be awarded due to the illegality highlighted above, but assuming they could, it would become necessary to

determine whether the learned trial Judge's finding that the appellant was liable in negligence to the respondent was justified. I note that negligence is a tort, the principles in respect to which were developed at the common law. In **Blyth vs. Birmingham Waterworks Company (1856) 11 Ex Ch 781**, it was held that:

> **"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."**

In **Donoghue vs. Stevenson [1932] UKHL 100,** it was held that reasonable care must be taken to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. A person who did not take reasonable care and injury to his/her neighbour resulted could be found liable in negligence and ordered to pay damages. In **Anns v Merton London Borough Council [1977] 2 ALLER 492**, Lord Wilberforce held that:

> **"...in order to establish that a duty of care arises in a particular situation...the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise."**

The above principles of negligence majorly related to private relations, that is, between two private individuals as distinguished from relations between a private individual and a public authority. With regards to the liability of local authorities exercising statutory powers for negligence, Lord Wilberforce in the **Anns authority (supra)** stated that the local authority is a public body, discharging functions under statute; and its powers and duties are definable in terms of public not private law. He further stated that, therefore, the principles applying to a local authority in negligence are not based on the traditional "neighbourhood principle" and, that in determining whether

such a local authority could be held liable for negligence, one had to examine the relevant statutory scheme, under which the authority acts and determine whether the statute imposed a duty on the local authority to do or refrain from doing the acts in issue.

In my view, therefore, a local authority, like the appellant, can only be held liable for negligence, if it has a statutory duty to a person to do an act which it omits to do and damage is occasioned to the claimant as a result. In determining whether that statutory duty exists, one has to examine the relevant legislation, in this case the Physical Planning Act, 2010, by which the appellant council was acting when it considered the respondent's application for building permission.

The long title of the **Physical Planning Act, 2010** provides that the Act is meant, interalia to provide for the making and approval of physical development plans and for the applications for development permission; and for related matters. The Act stipulates for matters such as applications for development permission under Section 34 thereof. It goes without saying that by the time a person applies for permission to develop land, he/she must have concluded the process for purchasing the land, and must have carried out sufficient due diligence to ensure that the land has no "issues". I must also note that there is no statutory duty imposed on a planning authority to ascertain whether or not the land for which an application for development permission has been made has any "issues".

In my view, the primary concern of a planning authority when faced with an application for building permission is to ensure that the proposed user of the land by the prospective developer conforms with the district development plan. Under the fifth schedule of the Physical Planning Act; the planning authority will be aiming to, among other things; ensure that the proposed development maintains the orderly, coordinated, harmonious and progressive development of the area to which it relates in order to promote health, safety, order, amenity, convenience and general welfare of all its inhabitants, as well as efficiency and economy in the process of development and improvement of communication.

Of course the planning authority is expected to exercise reasonable diligence when considering the planning application. This extends to doing such things

as carefully considering the building plans presented to it and identifying anomalies thereon. I have noted the evidence of Mr. Turyabarungi Augustus (DW2B), then the appellant's Principal Executive Engineer; and one of the officials who sat on the committee which approved the respondent's building plan to the effect that the relevant committee did not visit the suit land prior to approving the appellant's plans. The acts of the appellant's officials were thus morally reprehensible in so far as the officials were expected to carry out their duties with more efficiency.

However, it is also clear that by the time a developer presents building plans to the planning authority, he or she would have already concluded the land sale transaction involving the relevant land and must have been diligent in ensuring that he or she identifies the defects with his land. Therefore, if either the whole of the land, or a portion of it is situated on a road reserve in contravention of the law, it is the developer who should face any associated risk and not the planning authority. It is the developer who has the duty to carry out investigations concerning his land to ensure that it is not situated on a road reserve. In the present case, the respondent knew or ought to have known that part of the land on which he was constructing was situated on a road reserve; and that this was an illegality for which he would face repercussions. The respondent must have been aware of the said illegalities long before he submitted the building plans to the appellant for development permission. The appellant owed no legal duty to the respondent to prevent him from building on a road reserve, by, in the present circumstances, carefully scrutinizing the plans submitted by the respondent for development permission in order to discover that the land for which the appellant granted development permission was situated in a road reserve. Thus, the appellant was not liable in damages for any acts or omissions in that regard. Therefore, for the reasons stated above, I would hold that the learned trial Judge erred to award damages to the respondent for the alleged negligence of the appellant in failing to exercise a duty of care to ensure that it did not approve the respondent's development plans for a piece of land located in a road reserve.

Furthermore, I note that the respondent's claim in the lower Court as pleaded was not based on negligence. At paragraph 4 of the plaint at page 74 of the record, it was stated that the plaintiff's (respondent) claim against

the defendants at the trial (including the appellant) was for payment of compensation plus interest and costs of the suit. The respondent did not properly substantiate on the cause of action on which the compensation claim was based. I also note that the prayers in the respondent's plaint included a claim for payment of Ug. Shs. 512,162,000/= without substantiating on its basis. Further prayers were made by the respondent for payment of general damages for trespass or deprivation. Therefore, it can be stated that the respondent's intention as discerned from the pleadings was not to plead negligence. If he intended to do so, then he was prevented from doing so by his poorly drafted plaint.

This begs the question whether the learned trial Judge could proceed to award damages for the appellant's alleged negligence which was not pleaded in the circumstances. I note that the system of pleadings is aimed at setting out the litigant's case, upon which the Court should base its decision. **Oder, JSC** stated in **InterFreight Forwarders (U) Ltd vs. East African Development Bank, Supreme Court Civil Appeal No. 33 of 1992** that:

> **"The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision, the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which court will have to determine at the trial...Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendments of the pleadings."**

In the instant case, the respondent's plaint did not include a claim in negligence. Furthermore, none of the issues agreed for adjudication in the trial Court concerned negligence. Therefore, with the greatest of respect, the learned trial Judge erred when she proceeded to award damages based on a cause of action not pleaded by the respondent. The learned trial Judge ought to have considered the respondent bound by his pleadings.

Accordingly, all the sums of money awarded as damages for the alleged negligence of the appellant highlighted above, including the award of general damages of Ug. Shs. 50,000,000/= cannot be left to stand.

In view of the above analysis, I would conclude that the learned trial Judge's decision to award general and special damages, with the relevant rates of interests thereon was not justified. I would therefore, allow the appeal and set aside the combined award of Ug. Shs. 366,162,000/= as general and special damages made to the respondent; I would also set aside the relevant rates of interest ordered by the learned trial Judge to be paid on those awards of damages; as well as the learned trial Judge's order on costs. I would make no order as to costs.

Accordingly, by majority decision (Musoke and Madrama, JJA) (Mulyagonja, JA dissenting), this appeal is disposed of as proposed hereinabove.

Dated at Kampala this ..... day of.....Feb.....2021.

.....

Elizabeth Musoke

Justice of Appeal.

THE REPUBLIC OF UGANDA,

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 173 OF 2015

(ARISING FROM HIGH COURT CIVIL SUIT NO 040 OF 2013)

(CORAM: MUSOKE, MADRAMA, MULYAGONJA, JJA)

MASAKA MUNICIPAL COUNCIL} .....APPELLANT

VERSUS

TAKAYA FRANK} .....RESPONDENT

(Appeal from the decision of the High Court at Masaka before Oguli – Oumo, J dated 16th April 2015 in Civil Suit No 040 of 2013)

JUDGMENT OF CHRISTOPHER MADRAMA, JA

I have had the benefit of reading in draft the judgment of my learned sister Musoke JA and I concur with her that the appeal should be allowed. I would however add a few words of my own.

I agree with the facts as set out and the sole issue for determination of appeal as set out by my learned sister Musoke, JA in her judgment. There are 4 grounds of appeal and all of them are against the award of special and general damages and costs. There is no appeal against the finding of the learned trial Judge on the causes of action or issues set out for resolution of the suit that led to the award of damages and costs. That being the case, I have deemed it necessary to consider the cause of action as disclosed in the plaint, the issues set out in the judgment of the learned trial Judge for resolution of the suit and any other issues arising. It is averred in paragraph 4 of the Plaint that:

The plaintiffs claim against the defendants jointly and severally is for payment of compensation plus interest and costs of the suit.

It is a further disclosed fact in paragraph 5 of the Plaint that the plaintiff is the registered owner of the suit property situated at Nyendo Trading Centre Masaka Municipality and a photocopy of the title deeds of Mailo Register Buddu Block 325 Plot 1735 measuring 0.022 hectares at Kasana Nyendo Trading Centre, Masaka Municipality was attached. Thirdly, the facts disclosed in paragraph 6 of the Plaint is that the Plaintiff submitted building plans to the Appellant for a proposed commercial building on the suit plot which plans were approved. The plaintiff then engaged a contractor to commence construction of the building. While construction on the building was going on and specifically on 23rd January, 2013, Uganda National Roads Authority stopped the plaintiff from further carrying out construction on the suit property and thereafter the servants, employees or agents of the Appellant came on the suit property and confiscated the plaintiff's building materials and equipment which they took away. It is averred that as a result of the actions of the Appellant's servants, the contractor abandoned the construction and building site and claimed payment from the plaintiff. Most importantly, the particulars of special damages suffered as being the consequence of the action of the Appellant's servants are as follows:

1. Value of land at Uganda shillings 200,000,000/=.
2. Value of materials and equipment at Uganda shillings 97,535,000/=.
3. Advance payment to the contractor of Uganda shillings 200,000,000/=.
4. Transport expenses at Uganda shillings 627,000/=.
5. Building plan approval expenses at Uganda shillings 12,000,000/=.

The total sum claimed against the Appellant in the plaint is Uganda shillings 510,162,000/=.

Issues arise from pleadings and the written statement of defence of the 2nd defendant who is now the Appellant in this appeal discloses in paragraph 5 thereof that the Appellant denies the contents of the plaintiff's plaint and the plaintiff violated and breached the terms of the approved building plans and his construction on the suit property encroached on a road reserve.

The issues set out in the judgment of the learned trial Judge are as follows:

1. Whether the plaintiff's land is on a gazetted road reserve?
2. Whether the plaintiff's construction on the suit property encroached on the road reserve?
3. What remedies are available to the parties?

Issues Nos 1 and 2 as set out above are clearly controversies of fact though the question of whether the suit property encroached on a road reserve can also be determined by how a road reserve is defined in the law.

On the first issue, the learned trial Judge held at page 8 of her judgment as follows:

> Basing on the written laws cited above, my conclusion is that the road reserve is gazetted and I find the first issue in the affirmative that the plaintiff's land is on a gazetted road reserve.

What should have been considered after the above determination is the consequence of finding that the land was situated on a road reserve.

Nevertheless, the learned trial Judge after finding in the affirmative on the first issue, then considered the second issue which is **whether the plaintiff's construction of the suit property encroached on the road reserve**. The learned trial Judge extensively considered the facts and submissions as well as the law and at page 12 of her judgment found as follows:

In conclusion, having listened to the submissions of both counsel, I find that the plaintiff is the owner of land comprised in Buddu Block 325 Plot 1735 measuring 0.022 hectares (220 square meters).

The architectural plans the plaintiff submitted to the second defendant measures 342.81 m^2 (see attachment to the plaint).

It is only logical to conclude that the architectural plan is bigger than the acreage of the land and was therefore meant to sit outside the measurement of the plot in the certificate of title.

Having found in issue No 1 that the land comprised in Buddu Block 325 Plot 1735 is situate on a road reserve and this was confirmed by court's finding during the visit to the locus.

In those circumstances, I therefore find in the affirmative that the plaintiff's construction on the suit property encroaches on the road reserve.

The question that remained to be resolved was the consequence of the above finding.

The third issue the learned trial judge resolved was on remedies available to the parties. I note that the learned trial Judge found against the plaintiff on the first two principal issues. On the issue of remedies, the learned trial Judge first considered whether the plaintiff was entitled to special damages.

The question for consideration *inter alia* was whether materials were taken away by the Appellant's servants. The learned trial Judge found that the claim is not justified as it has not been specifically proved.

Regarding the payment of Uganda shillings 200,000,000/= to the contractor, and transport costs incurred to ferry materials, the learned trial Judge before resolving the question held *inter alia* at page 19 of her judgment that:

The Plaintiff took a risk to buy such land which is on a road reserve and there is nothing to compensate him as his actions all show that he was aware of it.

Having found that there is nothing for which to compensate the Respondent for acquiring land where there is a road reserve, the learned trial judge went ahead to consider the issue of payments made in the course of construction of a building on the site. On the claim for compensation for materials allegedly taken away worth Uganda Shillings 200,000,000/-, the learned trial Judge at page 22 *inter alia* held that;

> I have looked at the claim for materials of 200,000,000 shillings and advance payment to the contractor. Although the plaintiff brought the contractor to confirm the same and this was not challenged by the defendants.
>
> I therefore find that whereas he pleaded special damages, he did not strictly prove them and thus is not entitled to any damages, special or general or otherwise.

Surprisingly, the learned trial Judge at page 24 of her judgment considered the claim of the plaintiff for Uganda shillings 97,535,000/= being the value of materials and equipment. It can be noticed from the above that the learned trial Judge had dismissed the claim for special, general or any other kind of damages in relation to materials and special damages but did not specify whether it was for materials allegedly taken away by the Appellant's servants or materials used in construction of the building structure which had been constructed up to the point when the construction was halted by Uganda National Roads Authority. The learned trial Judge held as follows:

> The Plaintiff also claimed 97,535,000/- the value of the materials and equipment.
>
> When court visited the locus, it saw some work having been done so the claim for 97,535,000/= for materials and equipment is justified.

The above can be deduced as an award for materials used in construction of the existing structure before the construction was halted by the Uganda National Roads Authority.

In relation to the claim for compensation for transport costs incurred in ferrying materials to the site, the learned trial Judge found as follows:

Court did find that the work had commenced and the materials for it must have been transported to the site.

Court is therefore of the opinion that the plaintiff has proved on the balance of probability that he did incur transport costs to ferry material to the site and the 627,000/=, the cost of the materials is therefore proved.

With regard to advance payment to the contractor, the learned trial Judge held that:

> The plaintiff also made a claim of 200,000,000/= as advance payment for the contractor. The contractor was in court and confirmed that 200,000,000/= as advance payment for work.
>
> Both defendants contested this money and when court visited locus it found that some work had been started on the site and finds that it is probable that this money was advanced and passes this amount for the advance payment to the contractor.

Thereafter the learned trial Judge considered the claim for the value of the land.

She found that the plaintiff took a risk to acquire the land for constructing a commercial building when he knew that it was a road reserve and held that:

> The two roads, the Masaka – Nyendo and Masaka – Bukakata were there before the Plaintiff acquired his title. So by the time he got it, he ought to have known that his land was on a road reserve and he ought to have made inquiries before concluding the purchase.
>
> I dismiss his contentions that the defendants ought to have advised him as an afterthought.
>
> In any case, by the time the necessary law was in place and ought to have known that constructing on a road reserve is illegal. He ought to have sought advice from his architect and the technical staff of the second defendant.
>
> Besides that, even if he did not know the Law, it is trite Law that ignorance of the Law is not a defence.

> In this case, the Plaintiff therefore took the risk to acquire this land for constructing a commercial building when he knew that it was a road reserve.

The learned trial judge found that the plaintiff had acquired the land as part of a scheme to defraud the government through acquiring land on a road reserve, drawing plans for a building whose measurements exceeded the land described in the title deed of the suit property. The conclusion of the learned trial judge at page 27 of her judgment demonstrates that she had found the suit against the plaintiff who is the respondent to this appeal when she held that:

> The above all show that the plaintiff set out to acquire the land for speculative purposes and he cannot use court to condone this illegal acts, by seeking compensation.

In stark contrast to the above holding, the learned trial Judge concluded the issue on the claim for special damages as follows:

> In conclusion therefore, court finds that the plaintiff had proved the following special damages,
>
> (a) Advance payment to the contractor – 200,000,000/=
>
> (b) Costs of the plan –
>
> (c) Building plan approval expenses – 12,000,000/=
>
> (d) Value of materials and equipment – 97,535,000/=
>
> (e) Transport expenses – 627,000/=
>
> Total – 316,162,000/=

In relation to the claim for general damages, the learned trial Judge awarded Uganda shillings 50,000,000/= on the ground of negligence of the servants of the Appellant for approving the building plans for construction of the building on the suit property. The learned trial Judge also awarded interest at 30% from 23rd of January 2013 on the special damages and interest on

general damages at court rate from the date of judgment till payment in full. Last but not least the learned trial Judge awarded costs of the suit.

It is difficult to reconcile the finding of the learned trial Judge after she resolved the first two issues at the beginning of the judgment. For instance, the learned trial judge disallowed all the claims of the plaintiff but towards the end of the judgment, she allowed special damages pleaded in paragraph 10 of the plaint save only the claim for the value of the land which she disallowed. In other words, the only item which was disallowed was the value of the land. Secondly general damages were awarded at Uganda shillings 50,000,000/=.

It is my judgment that having disallowed the plaintiff's claim at the beginning of the judgment, the learned trial Judge was *functus officio* and could not reverse the judgment at end of her judgment. Moreover, the learned trial judge found that the plaintiff executed a scheme to defraud the government by acquiring the suit land and drawing a building plan that would occupy more land than what he had acquired. She found that the plaintiff knew that the land was on a road reserve and the whole building scheme was an illegality for which the plaintiff should not be compensated.

The judgment reads like two separate judgments which are fused into one judgment. Further it looks like the latter part of the judgment allowing an award of damages was a superimposition of additional pages to the judgment of the learned trial Judge because it contradicts earlier findings in the judgment. Further, because the judgment was duly certified as the judgment of the learned trial judge, and with due respect, the judgment offends Order 21 rules 4 & 5 of the Civil Procedure Rules which provides that:

> 4. Contents of Judgment.
>
> Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision on the case and the reasons for the decision.

5. In suits in which issues have been framed, the court shall state its finding or decision, with the reasons for the finding or decision, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

Having set out the first two issues at the beginning of the judgment, the learned trial Judge disallowed the plaintiff's suit on the two issues and what was left was the issue of remedies. Having disallowed the plaintiff's main claim on the basis of the framed issues, the learned trial Judge erred in law to come up with other issues and resolve them in favour of the plaintiff. It should be noted that all the awards were made on the last issue which dealt with remedies available. In resolving the 3rd issue, the learned trial judge resolved other issues. These additional issues had not been set out. The plaintiff's counsel had set out and submitted only on the three issues set out by the learned trial judge. The only question was whether the land and construction thereon was on a gazetted land. The Appellant also submitted on the three issues set out by the learned trial judge in the judgment. The main question was whether the land was on a road reserve. What was key for determination after finding that the construction was on a road reserve was whether the plaintiff was entitled to compensation. Further, no issue of negligence of the servants of the appellant was pleaded and no particulars of negligence were disclosed. It was therefore erroneous to make a finding that the building plans of the plaintiff were negligently approved by the Appellant's servants. Order 6 rule 3 of the Civil Procedure Rules requires particulars of negligence to be pleaded because it stipulates that:

3. Particulars to be given where necessary.

In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary, the particulars with dates shall be stated in the pleadings.

The case of the plaintiff presumably would have been that the Appellant's servants ought to have known that the plaintiff's land was on a road reserve and they ought not to have approved the plaintiff's building plans. I note that the awards made in favour of the plaintiff were awards for materials used in construction, awards for the employment of a contractor and lastly an award to compensate for transport costs incurred. The awards flowed from a finding of negligence in approval of building plans by servants of the Appellant and therefore all the awards were erroneous. After all the learned trial judge found that the acquisition of the land was a scheme to defraud and was tainted with illegality.

The above notwithstanding, the question that appears in the judgment of my learned sister Musoke, JA is whether construction can be approved, let alone, commenced on a road reserve. Once a statute forbids construction on a road reserve, the approval of plans or any construction thereof would be an illegality that cannot be sanctioned by the court and no damages may be awarded for any action taken in furtherance of a construction on a road reserve.

Section 3 of the **Roads Act Cap 358** provides that:

> 3. Road reserves to be kept clear.
>
> Subject to any order which may be made under section 4, no person shall, except with the written permission of the road authority, erect any building or plant any tree or permanent crops within a road reserve.

A contract executed in breach of an express provision of statute that forbids the purpose of the contract (such as building on a road reserve) is a nullity. In this case building plans could not be approved for construction of a building on a road reserve except with the permission of the Roads Authority. The Appellant is not the Roads Authority mentioned in section 3 of the Roads Act and the Respondent was not authorized to build on the road reserve.

Similarly, a lease or approval of plans to use land contrary to section 3 of the Roads Act, is a nullity and any contracts for construction thereon are unenforceable.

A court of law cannot award damages for negligence in approval of building plans when the building plan is meant for construction on a road reserve which is forbidden by statute. The principle is succinctly stated in **Bostel Brothers Ltd v Hurlock [1948] 2 All ER 312** where the Court of Appeal of England per SOMERVELL LJ at page 313 held that:

> The principle of law relied on was stated concisely and in a form appropriate to the present issue by Ellenborough CJ in Langton v Hughes (1 M & S 593, 596): "What is done in contravention of the provisions of an Act or Parliament, cannot be made the subject-matter of an action." We are concerned with a defence regulation which has the same force as an Act of Parliament. In Brightman & Co v Tate, the general subject-matter was similar to that in the present appeal. The plaintiff, a builder, claimed for the balance of an account. There was a prohibition of the carrying on of building work above a certain cost without a licence. The defendants asserted that as from a certain date the work done by the plaintiff was outside the licence granted and was illegally performed. It was held that the work in respect of which the claim was made was outside the licence, and having regard to the terms of the Order was illegal, and the sum could not be recovered.

The building plans in question held to be have negligently approved by the Appellant or approved in disregard of the law as well as the actual construction of the building on a road reserve was in breach of section 3 of the Roads Act. Neither the building plans nor the actual construction of a commercial building could lawfully be the basis of an action for damages in a court of law.

This principle was applied in **Kisugu Quarries Ltd v Administrator-General [1999] 1 EA 163** where the Supreme Court of Uganda held that the repossession of property under the Expropriated Properties Act of 1982 was a nullity because the leasehold interest thereof, the subject of repossession

had been executed contrary to section 2 of the Land Transfer Act which prohibited transfer of land to non-Africans without consent of the Minister. They held that a lease executed in contravention of section 2 of the Land Transfer Act is without exception an illegal contract and the court cannot be used to enforce an illegal contract even if both parties executed it willingly.

Mukasa-Kikonyogo JSC at page 170 stated that:

> A court of law cannot sanction what is illegal. The old and well known legal maxim *"Ex turpi causa non octio"* is not confined to criminal cases only but applies to civil matters too.
>
> Hence, Lindley LJ in his judgment in Slaughter and May v Brown Doering MC NAB and Company [1982] 2 QB 728 expressed the view that:
>
> > "No court ought to enforce an illegal contract or allow itself to be made an instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice or the court and if the person invoking the aid of the court is himself implicated in the illegality".
>
> The same principle was again enunciated in the case of Phillips v Copping [1935] 1 KB 15 where Scrutton LJ said at 21 that:
>
> > "But it is the duty of the court when asked to give judgment which is contrary to a statute to take the point although the litigants may not take it".

Further, Mulenga JSC at page 174 held that the grant of the lease was a nullity for breach of a statutory provision when he stated that:

> The Repossession certificate was not in issue, or for that matter, relevant in the determination of the validity or illegality of the lease executed in 1970. It is noteworthy that the Appellant's proposition underlying its first ground of appeal, in this Court, to the effect that the Court of Appeal was precluded from inquiring into the validity of the lease because the repossession certificate was unchallenged, was not canvassed in the lower courts. In my view, however, even if it had been, it is not sustainable in law. If the lease was illegal as contended, it was a nullity ab

initio, namely from its creation in 1970. There is no legal basis for the suggestion that the issuance of the repossession certificate affected that status. The Court of Appeal was under obligation, as the trial court had been, to resolve that contention irrespective of the repossession certificate. No error was thereby made.

In the circumstances of this appeal, the Respondent could not succeed in the cause of action to enforce the terms of the building contract in question or to have a cause of action in negligence for the approval of a building plan to construct premises on a road reserve contrary to section 3 of the Roads Act against the Appellant.

Secondly, any contract with the contractor or a transporter in execution of the building contract is not enforceable for illegality as construction on a road reserve is forbidden by section 3 of the Roads Act.

In the premises, the learned trial Judge erred in law to award damages to the Respondent and I agree with my learned sister Musoke JA, that this appeal be allowed on the terms that she has set out in her judgment and I have nothing further to add.

Dated at Kampala the ___ day of December 2020

8th Feb 2021

Christopher Madrama

Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
Coram: Musoke, Madrama & Mulyagonja, JJA

CIVIL APPEAL NO. 0173 OF 2015

BETWEEN

MASAKA MUNICIPAL COUNCIL:::::::::::::::::::::::::::::: APPELLANT

VERSUS

TAKAYA FRANK:::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Masaka, Oguli-Oumo, J. dated 16th day of April, 2015 in Civil Suit No. 040 of 2013)

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading, in draft, the judgments of my sister Elizabeth Musoke, JA and the concurring judgment of my brother, Christopher Madrama, JA.

I agree with the findings and the orders made therein, apart from the finding that the trial judge erred when she held that the appellant did not properly exercise its functions and so was negligent to that extent. I will lay down the reasons for my departure from the decision of my brother and sister on this point.

The respondent's claim, as pleaded in the trial court, was against the 1st defendant, the Uganda National Roads Authority (UNRA), which was not a party to this appeal, and the appellant, a local authority created by the Local Governments Act. The respondent is the registered proprietor of a piece of land in then Masaka Municipal Council, known as Buddu Block 325 Plot 1735 at Kasana Nyendo Trading Centre, Masaka Municipality, measuring 0.022 hectares. Sometime in 2012,

the respondent who was desirous of building a commercial building on his land, submitted an application for permission to do so to the appellant. In order for his application to be processed, he paid Ushs 400,000/=. The plan was approved and it was adduced in evidence as the basis for the respondent's developments on the land. The plaintiff thus commenced construction of the proposed commercial building, according to the *"approved plan."*

The respondent's complaint before the trial court was that after he started construction, on the 23rd January 2013, UNRA's branch manager in Masaka wrote to him requiring him to stop construction on the ground that his building had encroached on the road reserve. The encroachment was contrary to statutory designations for road reserves under the Roads Act. On the 20th March 2013, the Town Clerk of the appellant Council wrote to the respondent to inform him about the withdrawal of the building plan for the same reason. According to the respondent, this was followed by the appellant's employees going to his land to stop the construction. He alleged that they also seized his building materials and he has never recovered them.

The respondent therefore claimed that he was entitled to compensation in general damages for trespass and deprivation, and special damages for: the value of the land, materials and equipment, advance payment to contractor, transport and building plan approval expenses. The trial judge gave judgment in favour of the respondent with orders that the appellant pays Ushs 316,162,000/= to the respondent as special damages with interest at the rate of 30% from the 23rd January 2013, Ushs 50,000,000/= as general damages with interest at court rate, as well as the costs of the suit.

With regard to general damages, at page 29 of her judgment the trial judge ruled as follows:

"Nevertheless, the 2nd defendant can't avoid responsibility as it abated the actions of the plaintiff when they approved his plans in spite of technical staff at their disposal who could have guided and advised them that the architectural designs of the plaintiff were larger than the acreage of land available in his title and would contravene Building Rule 32 regarding the area which a developer is supposed to utilise while constructing. It is required that not more than 25% of the land should be taken by the construction and the plot was on a road reserve.

It the plaintiff had been properly guided by the officials of the 2nd defendant and they were not negligent in approving his plans which they should not have done, he would not have incurred the expenses he did.

They were so negligent to the extent that they left him to start construction and only jumped in to stop him when the 1st defendant observed that he was encroaching on a road reserve.

They then went to inspect the site and found the plan was over the available land in the title and advised him to adjust his plan to fit the available area ...

However, in the case of general damages, I find that the plaintiff suffered as a result of the negligent acts of the officials of the 2nd defendant in approving his plans and leaving him to commence construction and then confiscating his materials and equipment ...

In that respect, I grant the plaintiff general damages of fifty million shillings (50,000,000/=) instead of 100 million shilling to take into account the fact that his actions in constructing in the road reserve were illegal but he incurred expenses because of the actions of the 2nd defendant's officials who should therefore be responsible for any costs incurred."

It is true that the respondent did not plead negligence as a tort in his pleadings before the trial court. Neither did he use the term at all in his pleadings. His claim in the plaint, specifically, was that:

9. As a result of the actions of the defendants, the plaintiff's contractor was forced to abandon the building site and to claim payment from the plaintiff.

10. As a consequence of the actions of the defendants the plaintiff can no longer utilize his land for the purpose for which he acquired it and he has suffered loss and damages." (sic)

While it is not true that the respondent could not use the land for the purpose for which it was intended because of the appellant's withdrawal

of the plan that he first submitted, I am of the view that the appellants were equally guilty of breaking the law as the respondent was, as is shown herebelow.

The appellant withdrew the plan that it had approved in a letter dated the 20th March 2013 from the Town Clerk, then Baryantuma J. M., to the respondent, whose terms were as follows:

> ***"WITHDRAWAL OF BUILDING PLANS ON BLOCK 325 PLOT 1735***
>
> *This is to inform you that the approved plans for construction in the above Plot have been withdrawn forthwith.*
>
> *The withdrawal arises from the fact that you set the building beyond your plot boundaries and encroached on the Road Reserves and you also interfered with the existing storm water channel.*
>
> *We are in receipt of a copy of a letter you instructed your lawyers to write to the station Engineer Uganda National Roads Authority where in you were emphasizing that the plans were approved by Masaka Municipal Council.*
>
> *The plans approved were supposed to fit in Plot 1735 Buddu Block 325 but not to get beyond by any inch. Now that you violated this requirement and pushed your building beyond your plot boundaries, your plans have been withdrawn.*
>
> *You are instructed to stop any construction works and redesign plans which shall fit within your plot and resubmit it for fresh approval, otherwise Masaka Municipal Council as the controlling authority shall not allow any development encroaching in the road reserves."*

With regard to the encroachment, Turyabarungi Augustus (DW2) testified, in cross-examination, that he came to know about it after UNRA stopped the respondent's building project. Further that he did not visit the site before approval because it was not a requirement that he does so.

Regarding the approval of the plan, DW2 testified that he was the Principal Executive Engineer, Masaka Municipal Council. That he sits on the committee that approves plans. He went on to state that he was one of those who approved the respondent's plan. The plan did not show

that it was approved following a minute of the committee. It simply had stamps recommending approval and finally the stamp and signature of the Town Clerk approving it.

This was clearly contrary to the legal requirements. Section 38 (1) (a) of the Physical Planning Act provides that subject to section 34 of the Act, a local planning committee may grant an application or development permission in the form specified in the Seventh Schedule, with or without conditions. In this case, only the building plan was that was adduced in evidence with certain stamps placed on it by the Town Clerk, District Local Government Land Office and the Senior Land Inspector. There was no evidence that the Physical Planning Committee granted the planning permission as is required by the Act.

DW2 further testified that before commencing construction, the respondent was supposed to notify him that he was going to do so under rule 15 of the Building Rules but he did not. That he only found out that the respondent had started building when he (respondent) went to him to consult about the stoppage of his construction project. That it was then that he advised the respondent to re-submit plans that did not fall within the road reserve for approval.

I am of the view that in order of precedence, the Building Rules come after the Act from which they originate. The appellant had an obligation as the body in charge of the planning committee, through the person of the Town Clerk, to ensure that development permission is granted by the body provided for by the law. That body is constituted, according to section 11 of the Physical Planning Act, by the town clerk (chairperson), urban physical planner (secretary), the municipal engineer, the district environment officer, a land surveyor, an architect and a physical planner in private practice appointed by the council on the advice of the town clerk. It was the intention of the legislature, that with all these

professionals sitting together, there would be a minimum of mistakes made in granting development permissions.

In cross examination, DW2, Turyabarungi stated that the plan in dispute was drawn by one Akabwai. And that in March 2014, after the event complained about, he inquired about whether the said Akabwai was an architect and the Architects' Registration Board informed him that he was not. However, I note that the plan states that it was drawn by Architect Muhoozi Herbert who stamped it with a seal bearing a registration number of the Architects Registration Board, which was not clear in the document produced in evidence in the trial court.

Nonetheless, Mr Turyabarungi further stated in his examination-in-chief that the land in the title was less than the land required for the building in the plan. The plan indicated 342,815 meters yet the land was only 220 square meters. On cross-examination he stated that when a developer submits a plan it is not necessary to visit the place before approval. That he came to know about the disparity between the structure and the size of the land when the respondent went to consult him after his project was stopped. He further stated that he only carries out routine inspections on availability of funds for facilitation, and need. Further that when he was approving the plan, only the plan was considered but they did not consider whether it fell in the road reserve. And that when the plan was approved, they did not have the title for the land; they only had the building plan.

Mr Turyabarungi finally stated that if the plan was in the road reserve, they would not have approved it. That the developer did not submit the land title and they did not ask for it. They only considered the building plan. That, as will be seen later in this judgment, is far below the standard that was set by Parliament in the Act in the process of approving applications for development permissions by the Physical Planning Act.

The respondent submitted his application for permission to develop his land to the appellant according to the Physical Planning Act of 2010. The plan was submitted to Senyange Division of Masaka Municipal Council and a fee of Ushs 400,000/= was paid. Section 32 of the Physical Planning Act provides for the powers of the local physical planning committee as follows:

> **Subject to this Act, each local physical planning committee of a lower local government shall have power-**
>
> a) **to prohibit or control the use and development of land and buildings in the interests of the proper and orderly development of its area;**
> b) **to control and prohibit consolidation of land or existing plots;**
> c) **to ensure the proper execution and implementation of approved local physical development plans;**
> d) **to initiate formulation of by-laws to regulate physical development and**
> e) **to ensure the preservation of all land planned for open spaces, parks, urban forests and green belts, environmental areas, social and physical infrastructure and other public facilities, in accordance with the approved physical development plan.**

It was therefore the duty of the appellant, through the Physical Planning Committee to ensure that it prohibits development that is not in the interests of proper and orderly development in the area, or contrary to the physical development plan for the urban area.

For that reason, the contents of the district, urban and local development plans are provided for by section 26 of the Physical Planning Act. Sub-section (g) thereof provides that the plan shall also consist of *"maps and plans showing the present and future use and development of the area."* This of course includes the position of roads, including national roads which are under the control of UNRA under the Roads Act.

In view of the existence of such plans, the District Planning Committee is assigned the duty of approving development permissions. According to section 34 (1) the application for development permission to be placed

before the Physical Planning Committee is contained in the Sixth Schedule to the Act. The application which is structured according to the Form in the Sixth Schedule must have the plans and or drawings/photographs attached to it. It must also include the acreage of land upon which the proposed development will take place. It should also, when it abuts a road junction as the respondent's land did, *"give details and height of any proposed walls, fence, etc. fronting thereon..."*

The Physical Planning Committee or the Physical Planner, the Architect and the Land Surveyor sitting on that committee, if at all they did, were under the legal obligation to ensure that the plan submitted by the respondent did not fall within land planned for other facilities in the area. They clearly did not do so. If the respondent did not provide them with a copy of the title, they ought to have considered the acreage stated in the application, if there was such an application, before granting the development permission.

I observed that there is a note at the end of the form provided for in the Sixth Schedule to the Physical Planning Act that *"Drawings and specifications must be prepared and signed by a qualified physical planner." However,* the term *"qualified physical planner"* is not described in the Act. Instead there is a definition for "district planner" which means, *"an officer responsible for physical planning in the district."* The drawings submitted by the respondent were supposed to have been prepared, or at least passed by a qualified physical planner. There was no evidence in the documents adduced that this was done.

In view of the provisions of the law laid out above, the testimony of Mr Turyabarungi for the appellant clearly shows that the appellant, through its officers did not follow the law in approving the application for development permission submitted by the respondent. The employees of the appellant were as guilty as the respondent was in contravening the provisions of section 3 of the Roads Act. In view of the

glitches pointed out above, I also came to the conclusion that there might not have been any application for development permission placed before the physical planning committee. Accordingly, I would hold that there was no plan approved by the Town Clerk and Mr Turyabarungi at all, because they did not have the powers to approve applications for development permission apart from the Physical Planning Committee.

Though the final orders in this matter are of course contained in the judgement of my sister Justice Elizabeth Musoke, JA and Justice Madrama, JA agrees with them. However, I have a slightly different opinion about the orders as a result of my findings above.

There is no loss that has been occasioned to the appellant because the respondent could not benefit from his wrongs. No damages, special or general can be awarded to him. However, the courts should not sit back and watch local authorities and their employees blatantly disregard their statutory duties. Disregarding the requirements of the law in the process of physical planning results in great losses of money and time invested by developers. In this case, the respondent did not plead or prove negligence on the part of the appellant. However, it is clear that he sustained losses brought on by himself, with the support of the local authority, or its employees. The local authority has escaped liability because the respondent committed an act that was illegal. But the employees that did not carry out their duties to the required standard should not escape liability for not attending to their duties.

In that regard therefore, I would order that the employees of the appellant, in particular Mr Augustus Turyaburungi, the officer who owned up in his testimony in court that he did not carry out his duties as provided for by the Physical Planning Act, be submitted to the Masaka District Service Commission or its successor in that capacity, for disciplinary action.

Finally, the debacle in this case was brought about by the careless actions of the appellant's employees. The Town Clerk who was the accounting officer and the Chairperson of the Physical Planning Committee did not ensure that he and the relevant employees of the appellant carry out their statutory duties according to the law. For that reason, though costs follow the event according to section 27 of the Civil Procedure Act, I would also order that the costs of this appeal as well as the costs in the court below be borne by the appellant.

Dated at Kampala this 8th Day of February 2021.

Irene Mulyagonja

JUSTICE OF APPEAL