

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

HCCS NO. 1605 OF 2000

DR. KAMANYIRO KAKEMBO ::: PLAINTIFF

VERSUS

ROKO CONSTRUCTION LTD ::: DEFENDANT

BEFORE: THE HON. LADY JUSTICE MS. ARACH — AMOKO

JUDGMENT:

The Plaintiff, Dr. Grace Henry Kamanyiro, is a Physician resident in Maryland, USA. The Defendant, Roko Construction Ltd, is a limited liability company, incorporated under Uganda Laws and carrying on business in Uganda. The Plaintiff's claim was initially Shs.30m but later on amended to Shs.45m as compensation for damaged land, general damages, plus interest at 23% p.a from date of Judgment till payment in full. The background giving rise to the claim is as follows. Sometime in 1999, the Defendant excavated murram from the Plaintiff's land comprised in Block 111, plot 496, Mawotto Kiwanga, in Namanve. The Plaintiff alleges that the Defendants employees excavated the murram savagely, maliciously and unlawfully, and damaged the land beyond use. He has a result, suffered inconvenience and loss of income. He has demanded compensation from the Defendant repeatedly, but the Defendant has refused and or neglected to do so, hence this suit.

The Defendant denied the allegations in its written statement of defence and averred that it excavated and paid for the murram on the basis of an agreement with the Plaintiff's brother and agent, one Godfrey Mudima Kakembo (referred to throughout this Judgment as Godfrey Kakembo), who held a Power of Attorney granted by the Plaintiff. The Defendant further averred that when it transpired that the authority of Mr. Godfrey Kakembo over the suit property was disputed by the Plaintiff, the Defendant agreed with the Plaintiff that the land be refilled, which was done. The Defendant also averred that there were other companies apart from itself, that

excavated murrum from the suit property. Lastly, the Defendant prayed for a set of Shs.15m against the Plaintiff's claim, being the cost of refilling the land.

At the Scheduling Conference the agreed facts were that:

1. The land was excavated by the Defendant.
2. The land was partially filled.

The following issues were agreed upon for determination by the Court:

1. Whether Godfrey Kakembo had the Power to enter into the agreement for excavating land.
2. Whether he held out to the Defendant that he had the Powers to enter into the agreement.
3. Whether the Defendant re-filled the land after excavation.
4. Whether the Plaintiff is entitled to the relief sought.

Mr. Peter Mulira represented the Plaintiff, while Mr. Barnabas Tumusingize appeared on behalf of the Defendant. Each side called two witnesses each. Counsel for the Defendant did not file any response to the Plaintiff's counsel submissions.

Nonetheless, I have proceeded to decide the case under the provisions of Order 15 rule 4 of the CPR; which empowers the Court to proceed to decide a suit in circumstances where a party fails to perform an act necessary in the further progress of a suit within the time allowed by the Court, like in the instant case.

I have decided the issues in the same order in which they were framed.

Issue No. us whether Godfrey Kakembo had the power to enter into the agreement for excavating murrum with the Defendant. This issue arose out of paragraphs 5 and 6 of the of the amended written statement of defence where the Defendant pleaded that it entered into an agreement to excavate the murrum on the suit property with one Godfrey Mudima Kakembo brother and holder of a Power of Attorney granted by the Plaintiff and therefore the lawful agent of the Plaintiff to whom it paid consideration. That it later on transpired that the said Godfrey Kakembo's authority was disputed.

Mr. Mulira submitted that the Power of Attorney dated 23/3/84 (Exhibit D1) was indeed signed by the Plaintiff and it gave extensive powers to Godfrey Kakembo, except the power to sell the land.

That his client would have given Godfrey Kakembo the powers of sale if he had intended to do so. He relied on the testimony of the Plaintiff and the said Power of Attorney in his submissions. Secondly, Mr. Mulira submitted that the Power of Attorney was defective in that it was not witnessed by a Notary Public as required by section 83 of the Evidence Act. It cannot therefore be relied on.

Mr. Mulira, submissions raise two points:

1. The legality of the Power of Attorney (Exhibit D1) on which the Defence is based, and
2. The contents.

Regarding the first point, I have carefully perused the Power of Attorney. I must say, I agree with Mr. Mulira that it is defective. It is not disputed that it bears the Plaintiff's signature. It was not however authenticated by a Notary Public. Dr. B. Agyei whose signature appears on the document is merely a witness, and not a Notary Public. It does not satisfy the provisions of S.84 of the Evidence Act which provides that a document purporting to be a Power of Attorney and to have been executed and authenticated is as it purports. It wasn't authenticated. Section 84 provides that:

“84. The Court shall presume that every document purporting to be a Power of Attorney and to have been executed before and authenticated by a notary public, or any court, Judge, Magistrate, or representative of any Government of the Common Wealth, was so executed and authenticated.”

On the second point, having held as I have regarding the first point, I also agree with Mr. Mulira's submission that Godfrey Kakembo had no powers to sell the soil/murrum on the said land. Even if the said Power of Attorney was proper, and I have said it was defective, it did not give Godfrey Kakembo the powers of sale. He was merely to manage the Plaintiff's affairs and to sue for recovery of and debts etc due to the plaintiff. The relevant part says:

“I GM. KAMANYIRO KAKEMBO OF..... DO HEREBY APPOINT GODFREY MUDIIMA KAKEMBO ofto be my lawful Attorney and agent for one in my name, place and stead and on my behalf, to carry on and manage for the purpose aforesaid in my name, place and stead and to appear wheresoever may be desirable or necessary and then and there as my act Attorney and deed, to do all or any of the following matters or things that is to say:

In my name and on my behalf manage, sue for recovery and receive from every person and everybody politic or corporate in Uganda whom it shall concern, all demands for land, debts dues, goods, wares, merchandise chattels effects and things of what nature and description which now are or which at anytime or times during the subsistence of these presents shall or may be or become due, owing, payable, transferable, belonging to me in or by any right, title, ways or means however.”

Clearly, the said Power of Attorney did not give Godfrey Kakembo any power of sale. The first issue is for the foregoing reasons answered in the negative.

The second issue is whether Godfrey Kakembo held out that he had the power to enter into the agreement of sale of murram with the Defendant. Mr. Mulira submitted that this issue be answered in the affirmative, since there is no doubt about it. He did not however elaborate on this point. The Plaintiff did also not testify on this point. The Defendant however, adduced the testimony of Mr. Godfrey Kakembo (DW1) who told Court during his examination in chief, that the Plaintiff, his elder brother did give him a Power of Attorney, (Exhibit D1) which he used to manage the said land. That apart from handling suits in respect of the land, he also allowed several companies to excavate murram from the said land. He singled out Zimwe Construction, Paramount, Roko Construction and Sterling Engineering Company among those companies which excavated murram between 1986 and 1998 before the Defendant Company. He also told Court that he was the main person behind the sale of murram on the said land. DW2, Okello Jimmy corroborated the testimony of DW1. He told Court that he was the Defendant’s Foreman at the material time. His company required murram for construction work at that time. Sterling told him of the good murram at the suit property. He dealt with Godfrey Kakembo. Sterling was also excavating murram at the same time. From this evidence, it is clear that Godfrey Kakembo

held out that he had power to enter the agreement to sell murram to the Defendant. The answer to the second issue is therefore for that reason in the affirmative.

The third issue is, whether the Defendant refilled the land after excavation. The Defendant had pleaded in paragraph 6 of the amended Written Statement of Defence that when it transpired that the authority of the said Godfrey Kakembo over the suit property was disputed by the Plaintiff, the Defendant agreed with the Plaintiff that the land be refilled which was done. However, none of the Defence witnesses confirmed that the land was refilled.

DW1, Godfrey Kakembo stated in cross examination that he was not aware of the agreement between his brother (the Plaintiff) and the Defendant to refill the land. DW2 did not even mention it, although he was the Defendant's foreman at the material time. The Plaintiff on his part testified that he has brought the Defendant to Court because the Defendant excavated soil from his land and left a big pit, so the land has become useless. It cannot be used for anything. That the Defendant had originally said it would fill up the pit, it did so, but kind of half way. Apart from that, the Defendant also filled the pit with concrete and trash, rather than soil. So the land is still unusable. In cross examination, he said if the Defendant were to fill the remaining part he would have no problem with them.

PW2 — Dr. S. Kituuka a Land Economist and Valuation Surveyor with Dingo Professional Services tendered in Court a Valuation Report dated 15/4/2001. (Exhibit P2). He also testified that the plot is unusable because it was only partially filled, and even then, with trash and not soil. On this basis, Mr. Mulira invited the Court to hold in favour of the Plaintiff on this issue. From the evidence on record, that is the evidence of PW1, PW2 and Exhibit P2, it indeed appears that the said land was not properly refilled. Exhibit P2 included (6) coloured photographs of the parts of the excavated pit. I can see parts which show that some excavation was done, leaving a deep pit of red soil on top. The vegetation in this area is scanty as opposed to the original surrounding vegetation which is green and lush. Two of the photographs show an attempt to refill the land. I can see some trash and concrete looking materials on the ground. This testimony was not controverted by the Defendant. I therefore accept it and find that although an attempt was made to refill the land after excavation, it was not fully and properly done. For this reason, I answer the second issue in the negative.

The last issue is whether the Plaintiff is entitled to the reliefs claimed. The Plaintiff claimed:

- a. Ug. Shs.45m as compensation.
- b. General damages.
- c. Interest at 23% p.a from date of Judgment till payment in full.
- d. Costs.
- e. Any other relief.

Mr. Mulira submitted that the Plaintiff is entitled to these reliefs because the Defendant's attempt to refill the land amounted to an admission. He relied on the testimony of PW2 and argued that the land is unusable as it cannot support any structures or yield and crops. The Plaintiff has therefore lost the use of his land and should be compensated. The number of trips taken are also substantial and well documented in annexures to the plaint. The damages awarded should therefore be based on the assessment by PW2.

I have considered the arguments by Mr. Mulira in light of the evidence on record, in particular that of PW2 and Exhibit P2. While I agree with him as earlier stated that the hind was not properly refilled, I have no basis to award the Shs.45m compensation prayed for on the basis of Exhibit P2. This is because Mr. Kituuka confessed that they are not geological engineers. The report is therefore based on assumptions. They assumed that what was dumped on the land cannot be used for either construction or for growing crops. This is after he had stated on page 2 of the report that:

"In response to the above, we note that a few of the instructions could be more appropriately handled especially by mineral surveyors or geologist or a soil engineer (such as the type of refill) and a land surveyor (on the size and volume of the land taken).

We have involved a land surveyor to cover the land surveying aspect, but we have not been able to procure services of a soil expert. Nevertheless, we (humbly) made detailed examination excavation of the soil base and also noted carefully the composite sub soils used in refilling part of the quarry pit."

Secondly the report was made in April 2002. The excavation complained of took place in 1998. A lot of activities must have taken place on the land since then.

Clearly, this report cannot be relied on to prove the inability to use the land because the Report was produced by a land surveyor, who confessed in the Report that he has no expert knowledge of the soil. The Annexures to the plaint cannot also be relied upon since they did not form part of the evidence tendered in Court. On that basis, I find that the Plaintiff has failed to prove his alleged inability to use the land. He is consequently only entitled to general damages for the improper manner in which the land was refilled by the Defendant as clearly shown by Exhibit P2. I accordingly award him Shs.5m as general damages.

In the result, I hereby enter Judgment in favour of the Plaintiff as follows:

1. Shs.5m general damages.
2. Interest thereon at Court rate from date of Judgment till payment in full.
3. Costs of this suit.

M.S. Arach — Amoko

JUDGE

1/9/2004

Judgment delivered in the Presence of:

1. Mr. F. Sentomero for the Plaintiff.
- Mr. Moses Segawa holding brief for Mr. Tumusingize Benard for the Defendant.
3. Okuni — Court clerk.

M.S. Arach — Amoko

JUDGE

1/9/2004