

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBALE

HCT-040CV-CS-0123/2000

JAMES NAMBALE.....PLAINTIFF

VERSUS

CONSTRUCTION ENTERPRISES

‘PUT’ SARAJEVO LTD.....DEFENDANT

BEFORE: THE HON. MR. JUSTICE RUGADYA ATWOKI

JUDGMENT

The plaintiff in this case sued the defendant for a sum of shs. 33,884,000/- for the damage to the structure arising from the extraction by the defendant of a road side drain which exposed part of, and caused a crack in the foundation of plaintiff’s property at Sironko township.

The simple background to the suit was as follows. The defendant was contracted by the government to upgrade the Kapchorwa to Sironko road to grade I bitumen standard. The plaintiff owned a structure along this road, within the Sironko township, known as plots 40 and 42 respectively. This was on two adjoining plots of land. There was a foundation covering the two plots which was built to DPC level.

In the process of constructing the road, the foundation of the plaintiff on plot 40 was damaged. The plaintiff further claimed that the defendant deposited murrum and rubbish on plot 42 making it impossible to develop that plot, thereby causing him loss. The plaintiff claimed that the damage was caused by the agents or servants of the defendants, and the defendant was therefore liable for damage and loss so caused.

The defendant denied liability, and contended that the foundation on the plaintiff’s plot of land was built in the road reserve, which was unlawful and the plaintiff could not claim damages for any loss occasioned for such unlawful occupation.

During the scheduling conference it was admitted that the plaintiff was the owner of the two plots of land Nos. 40 and 42, hereinafter referred to as suit land. It was further agreed that the plot 40 was developed up to DPC level and there was a culvert running in front of the two plots of the plaintiff.

The defendant admitted that there was some damage caused by his workers on plot 40, but that this was not to the extent claimed in the plaint, and that this did not include the crack in the foundation of plot 40.

The following issues were framed for determination by court.

1. Whether the works by the defendant in upgrading the Sironko – Kapchorwa road were done in accordance with the specifications of the Ministry of works.
2. What was the extent of the damage to the plaintiff's property in execution of the works by the defendant.
3. Who is liable for the damage so caused.
4. The remedies available to the plaintiff.

PW1 Abner Nangwale told court that he was a civil engineer. He was instructed to make an assessment of the damage on the property of the plaintiff in Sironko township. He prepared a report, which was admitted in evidence as PEI.

He however could not ascertain whether or not the foundation on plot 40 was damaged. He told court that the culverts were in the road reserve. In an urban area like Sironko township where the plots were situate, the road reserve would be a total of 30 metres wide. The witness told court that the remedial work on plot 40 would be building the foundation, while on plot 42 it would mean not building the canopy. He did not have or see any site plans for the two plots.

PW2 James Nambale the plaintiff was the second and last witness for the plaintiff. He told court that he constructed two foundations on his two plots Nos. 40 and 42 in Sironko township, along the Sironko – Kapchorwa road.

During the construction of the road, sometime in April 1998 the workmen and machinery of the defendant damaged his foundation on plot 40 and caused a big crack therein. A drain and culvert were put along 42 and murrum dumped thereon.

As a result of the damage, he could not continue with the development of his plots. He instructed PW1 an Engineer to assess the damage on his foundations and this was done the report of the Engineer PW1 was exhibit PE1.

In cross examination he told court that he acquired the plots from Sironko township in 1990. Construction work commenced that same year. The damage was caused in 1998. He left the foundation in order to dry, as this was a swampy area. He denied that he had abandoned the plots.

He obtained plans for the site, and started construction. He was not aware that the construction of the foundation was in the road reserve. The construction had up to that point cost him shs. 18 million. That was the close of the plaintiff's case.

DW1 David Kamau was the Deputy Resident Engineer on the Sironko Kapchorwa road construction project. He told court that he was working for Gibbs E.A Consulting Engineers, who designed and were supervising the contractors, the defendant herein. The defendant contract had to implement to the letter the designs as given to them and the role of the witness was to design and supervise the implementation of these designs.

His work involved being in Sironko township on almost a daily basis. In respect of the construction and upgrading of the road in Sironko township, they followed the Sironko town plans. According to those plans, the construction had to use the existing corridor, which was 20 metres. This was what was followed to the letter.

The witness tendered in evidence the layout plan exhibit DE I, the sketch plan showing the extent of the damage on plots 40 and 42 exhibit DE II, and working plans of the drainage issued by Gibbs (E.A) exhibit DE III (a) and (b). From his own observation these work plans carried out and observed to the letter by the defendant contractor.

He observed that there was slab damage on plot 40. On plot 42 there was no damage. There were some materials on that plot from the drainage, but no damage. He told court that the front part of the foundation was in the road reserve. This was the part which was damaged on plot 40.

Under examination by court, the witness stated that in respect of plot 40 the remedy to the damage caused was to carefully remove the damaged concrete slab and replace it. In respect of

plot 42, the remedy lay in removing the heap of soil there from and that would be it. The encroachment into the road reserve by the foundation of plot 40 was than 0.2 metres. There was no need to overhaul the entire structure on plot 40, as the damage was not structural. The repair if done would enhance rather than reduce the value of the plots.

The court made a visit to the locus. It was observed that 40 had a foundation which was exposed on the front by a water drain and culvert. There was some damage in three places as shown in the sketch plan. There was a tiny crack visible at the lower end of the foundation. The foundation was at 9.8 metres from the centre of the road, and this was demonstrated during the visit to the locus in quo by DW1. This was a very old foundation, which looked like an abandoned plot. There were clear signs of wear and tear visible like the wearing away bricks presumably due to over exposure to the elements for extended periods.

Plot 42 was an empty plot. It was in good condition. At the time of the visit, the heap of soil allegedly deposited thereon by the defendant was not visible. It was a flat empty accessible plot. As a point of fact, that was where the vehicles of the judge, registrar, counsel and witnesses parked during visit to the locus in quo.

I will start with an argument which kept running through the submissions of Counsel for the defendant that the Government ought to have been sued, and not the defendant.

It was open to learned Counsel to take one of a number of steps in order to put to rest his fears about whether or not the defendant was rightly sued. He could have raised the matter of whether the defendant was the right party as a preliminary point of law, and court would have determined the same.

Alternatively, if he felt that the Government was liable to contribute to any damages which the defendant might be found liable to pay, he could have taken out third party notice to the Attorney General, and the issue would have been dealt with as appropriate. He did neither of these things. He instead set it down a one of the issues for determination.

I will deal with the issues in the order as set out there above. The 1st issue was whether the works were done in accordance with specifications of the Ministry of works.

The defendant tendered in evidence exhibits DEIII (a) and (b). these were designs of the road works in the area where suit land was situate. It was not disputed that these were the designs approved by the Ministry of Works for this area. The design showed a drain on or along plot 40 going down to plot 42, with culverts. It showed the distance from the center of the road to the foundation on the suit land as 9.8 metres. The drain did not move exactly up to the foundation. A close examination of exhibit DEIII (a) shows that there was at least 2.48 metres from the sign post to the foundation and this was the area where the drainage and culvert were to be dug and placed. This is the area similar to what constitutes the veranda in the buildings adjacent to the suit land.

The drain had necessarily to move inwards from the line of the building adjacent to plot 40 as it moved downwards away from Sironko for the reason that there was a bus bay right in front of plot 42.

The observation at the scene was that the foundation of plot 40 was 9.8 metres from the centre of the road. This foundation was already in place at the time the designs were made, and construction of the road works started. The designs were therefore made with this foundation in mind, similar to the other building in the township.

It is to be noted that the buildings adjacent to the suit land were constructed less than 10 metres from the centre of the road. That was the design as specified, and shown in exhibit DEIII (a). the constructor therefore had to work within these limitations. From the visit at the locus in quo, there was an attempt to follow these design specifications and the defendant had to work within these limitations. In the process of so doing, the defendant had to ensure that there was no damage to the existing structures, including the plaintiff's foundation.

It was admitted by both parties that there was damage to the plaintiff's foundation on plot 40, caused by the works of the defendant. This therefore means that the defendant did not do works in accordance with the specifications of the Ministry of Works in so far as he damaged the foundation of the plaintiff on plot 40, because the specifications did not include damaging the plaintiff's foundation.

It was submitted for the defendant that the plaintiff's foundation produced into and took up part of the road reserve, which he was not authorized to occupy. Any damage resulting from such encroachment into the road reserve could not be visited on the defendant.

I found the argument not tenable from a legal standpoint, and from the facts on the ground. I will start with the law. The Access to Roads Act in S. 4(1) gives the Minister power to prescribe in relation to a road passing within or through a town, inter alia, the distance from the centre of the road within which no building shall be erected in such town or area.

Such order is given the force of law from the date of its promulgation or publication under S. 4(2) of the same Act. That means there must be an order of the Minister in respect of an area or a town, which specifies the distance from the centre of the road within which it is prohibited to build. Such order becomes effective from the date of its publication or promulgation. The law does not give the Minister the power to make orders under this section, which have a retrospective effect.

S. 101 of the Evidence Act provides that whoever desires to give judgment as to any legal right or liability on the existence of facts which he asserts, he must prove that these facts exist.

The defendant asserted that the plaintiff's foundation was in or encroached on the road reserve as it was not wholly beyond the 10 metres mark from the centre of the road. There was no evidence from the defendant that there was such an order, making 10 metres the distance from the centre of the road within which no building was to be erected in the Sironko township in general and at plot 40 in particular.

The road works started around and went through Sironko township. The Site Engineer DW1 testified to this. He tendered the design specifications in respect of that area, exhibits DEIII (a) and (b). these showed the position of the buildings adjacent to the suit land and those opposite, across the road. All without exception were built, leaving less than 10 metres from the centre of the road. This meant that assuming there was an order making 10 metres from the centre of the road reserve, then each of them would have encroached into the road reserve.

The design specifications as seen from the above exhibits not only acknowledged this state of affairs but took account of the same, such that the road works were carried out with no damage

to those buildings and other structures. The issue of the road reserve was not in this case tenable in fact or in law.

It is therefore no excuse that the plaintiff foundation, which was also in existence by the time the design specifications were made, and which was consistent with, and in line with the existing buildings in the township, was at fault and therefore to blame for the damage caused on his foundation.

The 1st issue is therefore answered in the negative. The 2nd issue was what was the extent of the damage on plaintiff' plot. This to me was to me was the more pertinent issue, considering the earlier admission of the cause of the damage. The fact that the defendant damaged the plaintiff's foundation on plot 40 was not denied. What was disputed was the extent of the damage.

Before going into the damage on plot 40, let me note here that there was no damage to the plaintiff's plot 42, save for the dumping of soil on that plot. Both parties admitted there facts, and they came out clearly in the evidence.

The extent of the damage on plot 40 came from the evidence of the plaintiff and from his witness PW1. The version of the plaintiff was denied by the defendant witness DW1. According to PW1 Engineer Abner Nangwale the damage on plot 40 would require demolishing the whole foundation and building a new one. The monetary requirements were set out in his report exhibit PE1. These included.

1. Demolition of the foundation and reconstruction-----shs 129,000/-
 2. Breakage and waste during demolition-----shs 24,000/-
 3. Professional services for opinion of structural soundness----shs 200,000/-
 4. Loss of construction time expense on both plot-----shs 24,000,000/-
 5. Increased cost of material, transport, labour etc-----shs1,500,000/-
 6. Probable amendment of design, plans for drainage-----shs 800,000/-
 7. Loss of income in rent-----shs 1,440,000/-
- TOTAL** **shs 28,064,000/**

The witness was asked to justify the above figures. His explanation in respect of the 1st three items was premised on the belief that the foundation was structurally damaged. But from his

testimony in court, there was need for further investigations to establish whether that was indeed so. The figure in those items was therefore speculative, and not to be relied on.

The amount in the 4th item was arrived at basing on the existing scales of construction, meaning that this was the amount required to construct the buildings on both plots in an urban area at the rate of 30,000/- per square metre. He assumed that the town plots were standard size of 50x100 feet.

The evidence on record on record was to the effect that the plaintiff stopped construction in 1990. The foundation had since lain idle for 8 years. There was no evidence that the damage to the foundation affected the development of the site, as there was none taking place at the time, in the first place. To talk of loss of construction time was a fallacy, this was borne out from the evidence.

The evidence of DW1 was that when there was damage to the plaintiff's foundation, the defendant offered to carry out repairs as it was known that by the nature of the works, this kind of damage was bound to occur. The evidence of the Site engineer was not controverted that the offer to carry out repairs was made but rejected.

The only explanation for the rejection given by the plaintiff was that he matter was already in court. That to me would not stop a settlement if one was offered and was feasible. I would tend to agree with counsel for the defendant that the plaintiff seemed to press ahead with the claim prepared by PW1, exhibit PE1.

This can be seen more clearly from the fact that in respect of plot 42 where there was no damage, no construction ever took place. The only complaint in regard to that plot was dumping of soil on the plot. That surely would not have deterred the plaintiff from carrying on developments on that plot if he was so disposed.

There was an item for rent income loss. That presupposed that the buildings were completed and the plaintiff would, but for the acts of the defendant, have earned such income. The structure on plot 40 was at foundation level. There was an offer to repair the same, which would have enabled the plaintiff to proceed with his developments, even if he was to insist on payment of damages for the delay or otherwise from the defendant.

The plaintiff did not take up the offer, and cannot be seen to claim for loss of time, let alone income which was not lost due to the acts of the defendant. In the event I found that the assessment of the loss by PW1 in his report exhibit PE1 was not only highly exaggerated, it was not based on actual and realistic loss suffered by the plaintiff as a result of the acts of the defendant. It was at best speculative, based on probabilities and wishful thinking of what might have been, rather than what actually was on the ground, literally.

I had no choice but to disregard that report as unreliable, and not reflecting the extent of the damage on plaintiff's foundation. I stated that there was no damage on plot 42. The damage on plot 40 was in three spots at the foundation. According to DW1, the remedy in such damage lay in removing the slab which was damaged and replacing it. I found his evidence the more reliable in this aspect.

This was what was offered in the first place, but was rejected in favour of an exaggerated claim in PE1. It was submitted for plaintiff that if the offer to repair had been made in monetary terms, it would have been accepted, meaning that the interest of the plaintiff was essentially the monetary gain he hoped to get from the misfortune, rather than being back in the position he was prior to the damage to the foundation.

The answer to the second issue was therefore that the extent of the damage on plaintiff's foundation was such as required only a replacement of the dam more, whatever that amounted to in monetary terms.

The 3rd issue was whether the defendant was liable for the damage to the plaintiff's foundation. I have stated elsewhere in this judgment that the defendant kept referring to the liability of Government in respect of damage or loss. It was submitted that the defendant was an independent contractor, and performed the contract in accordance with the designs and specification given or approved by the Government. Once he performed his contract in terms so given, he was therefore not liable for the damage or loss necessarily occurring from the due and proper performance of the contract. Where there was damage or loss, even if it was negligent, liability was to be borne by the employer in this case the government. The case of *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A. 123 was relied on.

In the *Selle* case (*supra*), the argument was whether the respondent, the owners of boats which were operating for hire at the port and from one of which the appellant sustained injuries as a result of the negligence of the boatmen. The contention was that the boatmen were not servants of the respondent, but rather independent contractors and so the respondents could not be held liable for their negligence.

Sir Clement de Lestang V.P., cited *Boustead on Agency* (12th Ed.), Art. 99 as follows,

“it is stated that the principal will be liable for the wrongful acts of his agent although he was not a servant if it is one of a class of acts within the actual or apparent authority of the agent or if such wrongful act amounts to a breach by the principal of duty personal to himself, liability for non performance or non observance of which cannot be avoided by delegation to another.”

‘As I understand the law the fundamental and well settled rule is that a person employing another is not liable for his collateral negligence unless the relation of master and servant existed between them at the material time.

...it follows from this rule that the relationship of principal and agent will not in itself suffice to render the principal liable for the collateral negligence of the agent unless the agent is also a servant. Where however, a person delegates a task or duty to another, not a servant, or employs another not a servant, to do something for his benefit or the joint benefit or himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty, or act as the case may be.”

I do not believe that the learned VP in holding as he did above intended to do away with the well known rule that a principal will not be liable for the negligent acts of an independent contractor.

Law JA., (at page 130) put the matter in the following words,

“The question now arises whether the boatmen were agents for whose torts a principal would be liable or wholly independent contractors.”

The court had to decide whether they did not fall within the category of agents who perform duties on behalf of a principal in circumstances creating liability on the part of the principal for their negligence in the performance of their duties. After reviewing the circumstances of the case, the Justice of Appeal made the following finding;

‘It seems to me inescapable that under those conditions the boatmen were not wholly independent contractors but were the respondent’s agents in circumstances making the respondents vicariously liable for their negligence.’

In the present case, the defendant was under contract to upgrade the road. They were given designs and specifications for doing so. They used their skills and expertise to carry out the contract. They were not under the direct control or supervision of the Government.

It was admitted that the defendant was indeed an independent contractor, who was under contract to carry out specified acts, and was not a servant of the Government. I find that in the circumstances under consideration, this case is distinguishable from *Selle (supra)*. The defendant was an independent contractor, and liable for his negligent acts in the performance of the contract.

I therefore find the defendant liable for the loss occasioned to the plaintiff. The next issue is the remedy available to the plaintiff. The plaintiff suffered some loss no doubt when the defendant damaged his foundation. I have already held that the assessment in exhibit PE1 is too exaggerated and unrealistic to be of use in this regard.

Damages are discretionary. They are not meant to be a benefit by the plaintiff from the acts of the defendant *Pool Nsuguga V. A.G.* (1993) 1 KALR 33 Okello J., (as he then) held that general damages are within courts discretion and are awarded to put the plaintiff in the position before the wrong. It is common knowledge that special damages must be specially pleaded and specifically proved. *Shamji v. Bhatt* [1965] EA 789.

The repair of the foundation would, in my opinion put the plaintiff in the position he was before the wrong. The time the suit has taken is of his own making as he could have avoided it.

Acceptance of the offer to repair the damage would not have been a bar to his suit for damages in negligence. The repair might have been to him evidence of admission of liability by the

defendant, and to the defendant this would have been a mitigating factor in any award against him.

In the event, I find that the plaintiff is entitled to the repair of the foundation of plot 40 by the defendant. Due to time leg, it may not be practical or order the defendant to effect the repairs directly.

The plaintiff's Engineer PW1 told court that in an urban area, the cost of construction is shs. 30,000/- per square metre. The foundation on plot 40 would, at the every longest in the front part where there was damage, not exceed 50 feet. Because of the upward changes in princes, I will apply the same figure of 30,000/-, which is in respect of square metres on the 50 feet, the width of the plot.

The plaintiff is accordingly awarded shs. 30,000 x 50 a total of shs. 1,500,000/- against the defendant for the repair of the damage to plaintiff's foundation on plot 40. For the dumping of soil on plot 42, which was admitted, but which I found did not cause any damage to the plot I will award only nominal damages of shs. 10,000/-. There was no claim for general damages or negligence and I will not award any.

The plaintiff shall recover the cost of the suit. The amounts herein shall carry interest at court rate from the date of judgment till payment in full.

RUGADYA ATWOKI

JUDGE

22/04/2006.

Court: this judgment shall be read to the parties by the Deputy Registrar.

RUGADYA ATWOKI

JUDGE

22/04/2006

