

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

HCT - 00 - CC - CS - 190 - 2008

KASOMA JOHN BOSCO PLAINTIFF

VERSUS

- 1. SALINI CONSTRUCTION**
- 2. PARAMOUNT MOTOR CRAFTS LTD.DEFENDANTS**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

The plaintiff filed this suit against the defendants jointly and severally for special damages of Ushs. 51,000,000/= being the value of the damage occasioned by the defendants to the plaintiff's premises, Ushs. 1,000,000/= being the cost of valuation, general damages, exemplary damages and interest on special damages, exemplary damages and costs arising from breach of care and negligence of the defendants which resulted into the destruction of the plaintiff's premises.

The case for the plaintiff is that the 1st defendant and its subcontractor the 2nd defendant, during the period of April 2005 to June 2006 were extracting rock and hard core stones using explosives in the Nansana area. The plaintiff avers that the rocks blasted flew on his house, damaging the iron sheets on the roof of the house, which is within the range of 15 meters from the activities of the defendants. The plaintiff avers that as a result of the blasts, the structures of the main house, servant's house and latrine cracked while the underground water tank also collapsed. The plaintiff further avers that the defendants' failure to notify him of the blasts, control the flying rubble on the rooftop of his house and control or prevent the damage to his property amounted to negligence and breach of the duty of care on the part of the defendants. In its written statement of defence, the 1st defendant contends that the plaint discloses no cause of action against it as the 2nd defendant was contracted by Sterling Civil Engineering Ltd to supply hard-core rock. The 1st defendant contends that the alleged damage to the plaintiff was occasioned in the course of the 2nd defendant's execution of their contract with Sterling Civil Engineering Ltd and not them as they have never been involved in the excavation of hard core rock in the neighbourhood of the plaintiff and therefore denied any damage suffered by the plaintiff as a result of their activities.

On the other hand, the 2nd defendant in their defence contends that the plaintiff and the 2nd defendant through the mediation by Road Agency formation unit agreed that an independent valuation be commissioned to assess the plaintiff's loss. That on or about 17th October 2005, Dr. Cooper of the Road Agency Formation Unit (Ministry of Works, Housing and Communication)

wrote to the 2nd defendant enclosing names of five independent valuers and subsequently on 17th October 2005, the 2nd defendant replied to the said communication, indicating that it had chosen M/S Resco Property Consultants Surveys to carry out the valuation. The 2nd defendant further contends that on 24th October 2005, the plaintiff wrote to it accepting the request for the visitation of valuers to value the damage to his property. The 2nd defendant contends that M/S Resco Property consultants valued the loss by the plaintiff at Ushs. 4,500,000/= and on 19th July 2006, the 2nd defendant wrote to the plaintiff offering to pay the sum of Ushs. 4,500,000/= as compensation, which the plaintiff rejected hence the suit.

The defendants and their Counsels attended the pre trial hearing/scheduling conference

The parties filed a Joint Scheduling Memorandum on the 16th March 2009 signed by all counsels and agreed on the following issues for trial:-

- 1. Whether the plaint discloses a reasonable cause of action against the 1st defendant.**
- 2. Whether the 2nd defendant is liable for the damages caused to the premises.**
- 3. What is the quantum of compensation payable if any?**
- 4. Whether the plaintiff is entitled to the remedies.**

At the hearing, the plaintiff was represented by Mr. Akile, Mr. Alunga represented the 1st defendant, while the 2nd defendant was represented by Ms. Nabunya. The plaintiff called 3 witnesses; Ronald Menya (PW1), Damulira Idrisa (PW2) and John Bosco Kasoma the plaintiff (PW3). The second defendant did not attend court for the formal hearing of the matter neither did they file submissions on the issues to be resolved.

Pre trial hearing/Scheduling conference

At the pre trial hearing/scheduling conference held on 2nd April 2009 all the parties agreed to a new valuation of the damage allegedly caused to the plaintiff's property. An instruction letter dated 13th May 2009 was then drafted and signed by all the parties appointing M/s Proman Consult Ltd. (herein after called "the consultants"). The consultants filed their report with the Court on the 29th June 2009 (Exhibit P1).

At a further Pre trial hearing/ Scheduling conference on the 24th August 2009 the plaintiff and the first defendant company entered into a consent judgement to have the 1st defendant withdrawn from the suit upon payment of Ushs. 5,000,000/= to the plaintiff as full and final settlement of the suit on their part which Court accordingly entered. This settlement resolved the matter against the first defendant and the balance of the suit against the second defendant was set down for trial.

Issue one: Whether the 2nd defendant is liable for the damages caused to the premises.

Counsel for the plaintiff submitted that the 2nd defendant in its written statement of defence does not deny liability but only disputed the amount sought by the plaintiff as compensation and therefore on the strength of this pleaded admission, Counsel submitted that the 2nd defendant was liable for the damage caused to the plaintiff's property.

I agree with counsel for the plaintiff that in its written statement of defence, the 2nd defendant admits liability for the damage caused to the plaintiff's house and was willing to pay the plaintiff the sum of Ushs. 4,500,000/= (see letter dated 19th July 2006 Annexure G to the defence of the second defendant), as determined by M/S Resco Property consultants as the loss occasioned to the plaintiff's property.

This is indicative of the fact that the 2nd defendant admits liability for the damage caused to the plaintiff's property. What is in issue is the amount assessed by the plaintiff as the loss occasioned by the 2nd defendant to his property. I therefore find that the 2nd defendant is liable for the damages caused to the plaintiff's premises.

Issue three: What is the quantum of compensation payable if any?

Counsel for the plaintiff submitted that they jointly instructed valuer of the parties, Mr. Menya Ronald (PW1) a cost consultant with Proman Consult Ltd. testified that the amount of Ushs. 40,092,700/= was commensurate to the damage caused to the plaintiff's property. Counsel for the plaintiff submitted that the court should rely on the findings of the expert witness and award the plaintiff the sum of Ushs. 40,092,700/= as compensation.

The appointment of the consultant was agreed to and signed up by all the parties in this suit. This is a process that empowers the parties to reconcile and agree to submit a technical part of the dispute to an independent expert to give an opinion on the dispute. This is in conformity with Article 126 (2) (d) of the Constitution 1995 which enjoins the Court to promote the principles of reconciliation.

Indeed technical opinions such as these are of great assistance to the Court in evaluating technical evidence and should be used more often. Actually section 26 of the Judicature Act (Cap 13) empowers this Court to refer to an official or special referee for inquiry any question arising from a cause or matter (other than a criminal proceedings) and to report to it. The Court may then adopt the report wholly or partly in making its Judgment. Questions of law or fact may also be stated by the parties as issues with a signed agreement as to the outcome under Order 15 rules 6 and 7. All of this is to help improve on case management and make trials more efficient and effective.

The Court unless the process is manifestly flawed will give effect to the above techniques.

In this case I have pursued the report of the consultant and the evidence of Mr. Ronald Menya who represented them and find the report to be credible.

Mr Menya testified that Ushs. 40,092,700/= was assessed by the consultants as the damage occasioned by the 2nd defendant to the plaintiff's property. In the premises, I find that, the amount of Ushs. 40,092,700/= is acceptable as the amount for which the 2nd defendant is liable to pay as compensation for the loss occasioned by its activities, to the plaintiff's property.

Issue four: What are the remedies available to the plaintiff?

Having found for the plaintiff in the issues above, I find that the plaintiff is entitled to special damages of Ushs. 40,092,700/= being the value of the damage caused by the 2nd defendant to the plaintiff's house.

Additionally, the plaintiff is entitled to the sum of Ushs. 1,000,000/= being the value of the amount spent by the plaintiff for the valuation as proved by the receipts marked Annexure B.

The plaintiff also prayed for general damages. Again the consultant recommended in his report general damages at 20% of the special damages for disturbance and inconvenience valued at Ushs. 8,018,540/=. I find this to be a reasonable suggestion and I hereby award it.

The plaintiff also prayed for exemplary damages. It is trite law that exemplary damages should only be awarded in exceptional circumstances over and above compensatory damages, where aggravated circumstances have been created such as the conduct of the defendant. Exemplary damages are not intended to enrich the plaintiff but to punish the defendant and deter him from repeating his wrongful conduct. (**OKELLO JAMES V AG** (HCCS No. 574 OF 2003),

In the case of **KASULE V MAKERERE UNIVERSITY** [1975] HCB 276, the court lays down the circumstances upon which exemplary damages may be awarded. It states that, they are awarded in exceptional circumstances,

- “(a) Where there is oppressive, arbitrary or unconstitutional activities on the part of the defendant***
- (b) Where the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff.***
- (c) In a case in which exemplary damages are expressly allowed by statute.”***

I have not found any exceptional circumstances upon which an award for exemplary damages may be premised as provided in the cases above. In the premises, the plaintiff is not entitled to exemplary damages.

I award the plaintiff interest on special damages at 21% pa from the date of filing the suit until payment in full and 8% pa on general damages from the date of Judgment until payment in full.

I award the plaintiff costs of the suit.

.....
Geoffrey Kiryabwire
JUDGE

Date: _____

21/08/12

3:21 p.m.

Judgment read and signed in Court in the presence of;

- S. Akile for the Plaintiff

In Court

- None of the parties
- Rose Emeru – Court Clerk

.....

Geoffrey Kiryabwire

JUDGE

Date: 21/08/2012