

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL APPEAL NO. 019 OF 2008

SENABULYA FRANCIS }
T/A JUNIOR TRADERS } ::::::::::::::::::::::::::::::::::::::::::::::::::::::::::::APPELLANT
NIGHT PARKING }

VERSUS

THOMAS CONNINGHUM::::::::::::::::::::::::::::::::::::::::::::::::::::::::::RESPONDENT

*[Appeal from the Judgment of Her Worship Ms. Kiti, (Magistrate G.1), in Njeru Civil Suit
No.0025 of 2007]*

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arose from the decision of Ms. Kiti sitting as the Grade 1 Magistrate in the Chief Magistrates Court of Mukono sitting at Njeru where she dismissed the plaintiff’s suit on the ground that he had no cause of action against the defendant and granted no costs.

The facts from which the suit arose as stated in the plaint can be summarised as follows. The plaintiff was a tenant in premises known as Kyaggwe Block 293 Plot 430 at Njeru West in Mukono District. He was also the proprietor of a business engaged in providing parking space for motor vehicles in the road reserve adjacent to and directly in front of the said premises. His business included a washing bay from which he collected charges for washing each motor vehicle that was parked in the parking yard. It was the plaintiff’s case that on the 3/03/2007 he renewed his trading licence for the year 2007-2008 and it was to run for the period July 2006-June 2007.

On the 24/05/2007, the defendant wrote to the plaintiff notifying him that ownership of the property known as Plot 430 at Njeru had changed. The plaintiff wrote back accepting to pay rent to the defendant but in spite of that, on the 18/09/2007, by a warrant to give vacant possession issued by the Magistrates Court at Njeru, the defendant caused the eviction of the plaintiff from the house and took over the parking space for his own business. The plaintiff thus claimed special damages for loss of earnings from the parking business at the rate of shs 100,000/= per day from the 15/5/2007 to the date of filing suit, general damages, interest on the two heads of damages at court rate from the date of filing suit till payment in full, and the costs of the suit.

The defendant filed a defence in which he asserted that the plaintiff's suit was frivolous and vexatious, baseless and unfounded. He stated that he was the undisputed proprietor of the premises known as Kyaggwe Block 293 Plot 430 at Njeru and comprised in LRV 3164 Folio 9, and that as such he had the right to have the plaintiff evicted from the premises for non payment of rent. Further that when he was evicted from the suit premises the plaintiff ceased to have a right to the parking space which comprised of an easement to the said premises. The defendant further stated that Njeru Town Council had no control of the property which was private and the licence that the plaintiff relied on had expired by the time of the eviction. That by reason thereof, the plaintiff was not entitled to any of the reliefs claimed in the plaint.

The suit was set down for hearing on the 21/01/2008 and the defendant was served with a hearing notice but failed to attend the hearing. By virtue of an affidavit deposed in that regard, the suit proceeded *ex parte* under the provisions of Order 25 rule 20 of the Civil Procedure Rules (CPR) and judgment was entered in default against the defendant. The plaintiff then proceeded to prove the damages he claimed by himself testifying in court. Subsequently, his lawyers M/s Mangeni, Wafula & Co. Advocates filed written submissions on his behalf.

The court framed two issues for determination, i.e. whether the plaintiff had a cause of action against the defendant, and if so whether he was entitled to the damages he claimed. In spite of the fact that the plaintiff's suit proceeded *ex parte*, the trial magistrate found in favour of the defendant. She ruled that no right of the plaintiff was violated and it was possible that he was a trespasser on the land. She thus declined to enter judgment for the plaintiff and awarded no costs to either party.

The plaintiff (now the appellant) appealed to this court and raised 3 grounds of appeal as follows:

1. The learned trial magistrate erred in law and fact when she failed to properly evaluate the evidence on record and thereby causing (sic) a miscarriage of justice.
2. That the learned trial magistrate erred in law and fact when she held that the plaintiff had no cause of action against the defendant.
3. That the learned trial magistrate erred in law and fact when she stated that the defendant had filed a WSD yet not and failed to pass default judgment in favour of the plaintiff.

When the parties' advocates appeared before me on the 7/09/2009, I ordered that they file written arguments in the appeal. The appellant's advocates M/s Wafula & Co. filed written argument on the 25/09/2009 while the respondent's advocates, M/s Habakurama & Co. Advocates filed written arguments on the 13/11/2009. I have ignored the complaint that appellant's counsel filed his submissions later than had been ordered by court and caused the respondent's counsel to file a reply thereto later than had been ordered by court because it is within court's discretion to do so. This will ensure that justice is not only done but it seen to have been done. I shall therefore consider all the written arguments that were advanced by the advocates for both parties to the appeal.

In his submission, Mr. Charles Wafula who represented the appellant abandoned the third ground of appeal and addressed grounds 1 and 2 together. He argued that the trial magistrate wrongly came to the conclusion that the dispute was about ownership of the suit property yet the appellant's claim was in respect of loss of a business that he operated on the road reserve by virtue of a licence that he had paid for and obtained from Njeru Town Council. He argued that the Council had had authority over the space in dispute. That up until the time of the suit, the same space was a parking yard that was operated by the respondent who had not paid for a licence. He further submitted that the appellant had used that same space for a period of 6 years before he was evicted by the respondent. Mr. Wafula asserted that the trial magistrate had avoided the issue of the licence and decided to hide behind the question of ownership of the property adjacent to the parking yard because it was she that issued the warrant of eviction

against the appellant. He concluded that the appellant had a cause of action against the respondent and thus the trial magistrate erred when she failed to find so.

In reply, Mr. Habakurama argued that the Trading Licence that the appellant sought to rely on conferred no rights on him to use the parking space in front of the respondent's property because it had long expired by the time the appellant was evicted from the adjacent property. Secondly that the licence had no force of law to confer rights on the appellant because the space in dispute was an easement appurtenant to and for the benefit of the respondent's land. Mr. Habakurama further submitted that the authority in charge of this space was not Njeru Town Council but the Ministry of Transport and Communication because the road was maintained by Government of Uganda and not the Town Council.

Mr. Habakurama further submitted that the ejectment of the appellant from the space which he had transformed into a parking space was lawful because the appellant was for all intents and purposes a trespasser on the respondent's premises. He relied on the decision in the case of **Joy Tumushabe & Another v, Anglo African Limited, S/C Civil Appeal No. 7 of 1999** for the submission that it is a principle that if a trespasser peacefully enters or is on land, the person who is in it, or entitled to possession of it may request him to leave, and if he refuses to leave, that person may remove him from the land, using no more force than is reasonably necessary. Mr. Habakurama concluded that the trial magistrate was right when she ruled that the appellant had failed to prove that he had a cause of action against the respondent. He thus prayed that the appeal be dismissed with costs.

I am of the view that the advocates did not address me on the crucial issue which led the appellant to file his suit against the respondent. But that may be so because the trial magistrate also ignored it. After she found that the appellant had not cause of action against the defendant she still ought to have considered the issue whether the plaintiff had proved the damages that he had prayed for and tried to prove by his evidence. This is required of a court of first instance because if damages are assessed at the stage, where the appellate court finds in favour of the plaintiff on his/her appeal, it need not send the matter back to the trial court for assessment of damages. {See **A. K. P. M. Lutaya v. Attorney General, S/C Civil Appeal No. 10 of 2002**, Per Tsekoko JSC, Odoki, CJ; Mulenga, Kanyeihamba and Oder, JJSC concurring.} I will therefore address two questions in order to dispose of this appeal as follows:

1. Whether the trial magistrate failed to evaluate the evidence on record and thus erred when she found that the appellant had no cause of action against the respondent.
2. Whether the appellant was entitled to damages; and if so, what would be the quantum of damages?

1. *Whether the trial magistrate failed to evaluate the evidence on record and erred when she found that the appellant had no cause of action against the respondent.*

While resolving this issue, the trial magistrate relied on the decision in **Auto Garage v. Motokov (No. 3) [1971] E.A. 514**, an authority which was first cited by counsel for the appellant in his submissions before her, and she ruled as follows:

“In resolving the issue, it appears that the contention is on ownership of the property described as Block 293 Plot 430 West Njeru. What court can deduce from the (value) evidence, facts and pleadings of the plaintiff is that the defendant took possession of the hereinabove described property and also took over the premises (on which) the plaintiff was operating business.

Indeed Annexure “C” a warrant of eviction and vacant possession issued by Njeru Court on 18/9/2007 shows that the defendant had a claim of right over the property. That being the case, the court finds that the cause of action is not correctly disclosed. There is an underlying issue of land ownership. Once the issue of ownership of the property is not resolved, the loss of income cannot be tackled.

...

Now although the plaintiff claims the premises where he was operating a parking yard did not comprise a block the defendant bought, his contradiction in Annexure “B” shows it did comprise. If it was not, why was he begging for the rent collectors – Gandesha to accept rent?

Acquisition of a trading licence from Njeru Town Council does not constitute ownership of premises hence no claim of damages.”

In **Auto Garage & Another v. Motokov** (supra) the Justices of the East Africa Court of Appeal ruled that the question whether the plaint discloses a cause of action is to be decided on the basis of the plaint and any annexures thereto. The court further laid out principles that would enable courts to establish whether a pleading discloses a cause of action as follows:

“What is important in considering whether a cause of action is revealed by the pleadings is the question as to what right has been violated.” {**Cotter v. Attorney General of Kenya (1938), 5 EACA. 18** per Sir Joseph Sheridan C.J. approved.}

In addition, of course, the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable. I would summarize the position as I see it by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible.”

In order to bring clarity to the resolution of this issue, it is pertinent to reproduce the relevant part of the appellant’s pleading in the lower court. In his plaint the appellant pleaded as follows:

3. “The plaintiff’s claim against the defendant is for loss of income and general damages, interest plus costs of the suit. The facts giving rise to the cause of action are stated in the paragraphs herein below: -
4. That on the 31st day of May 2007 the plaintiff renewed his trading licence for the year 2006/2007 in respect of a parking yard near plot 430 Kyaggwe Block 293 Njeru West Mukono District in which he collected money for the parking in respect of the space. (See Annexure ‘A’.)
5. That on the 24/4/2007 there was a letter notifying the plaintiff about change of ownership of the above house on Plot 430 in which the plaintiff accepted to continue paying the required rent to the new owners. (See Annexure ‘B’).

6. That the defendant without notice or any compensation to the plaintiff cause(d) eviction against the plaintiff from the main house and took over operation of the plaintiff's business of parking yard in the open space on the road reserve neat the said plot on 18/9/2007 (see annexure 'C').

7. That the plaintiff avers that as a result of the said eviction by the defendant the plaintiff suffered loss of income and general damages for which the defendant is held liable."

The plaint then went on to particularise the special damages in respect of the loss of income that the appellant claimed to have suffered.

The annexure that were attached to the plaint comprised of a trading licence issued to the appellant by Njeru Town Council on 31/03/2007 (Annexure "A"), a letter dated 15/05/2007 from Nassiwa & Co. Advocates addressed to S.N. Gendesha & Co. offering to continue paying rent for premises on Kyaggwe Block 293 Plot 430 Njeru Town Council (Annexure "B") and a warrant of eviction and giving vacant possession of the same property to the respondent issued by the Magistrates Court at Njeru on 18/09/2007 (Annexure "C1"). The warrant was obtained under the provisions of Order 22 rule 32 of the Civil Procedure Rules in Njeru Miscellaneous Application No. 012 of 2007 between the Thomas Cunningham (sic) (the applicant) and Senabulya Francis (the respondent).

By paragraph 5 of the plaint the appellant disclosed that he was aware that the ownership of the property known as Plot 430 at Njeru West had changed. By Annexure "B" to the plaint he disclosed that he offered to enter into a tenancy agreement with the new owner so that he could start paying rent. The resultant contract would then establish the appellant's right to occupy or trade on the space in dispute. It is a well established principle that a contract is only formed where there is an offer and an acceptance followed by sufficient consideration. In this case, though the plaint disclosed that the appellant offered to enter into a contract it did not disclose that the respondent accepted the offer. Neither did it show that there was sufficient consideration or at all to validate the contract. In the circumstances, the plaint failed to disclose two of the essential elements of a contract. This went to show that on the face of the plaint that there was no

contract between the appellant and the respondent. The appellant therefore had no rights to remain in the suit premises.

However, after the respondent rejected, neglected or refused to accept the appellant's offer to enter into a tenancy agreement with him, the appellant continued to occupy the premises and to carry on his business in front of them up to the 18/09/2007. That was the date when the court issued the warrant to give vacant possession of the premises to the respondent. This means the appellant continued to occupy the suit premises for a further period of 4 months without any contract with the respondent. He also did not pay any rent to the respondent or to S. N. Gandesha his agent. If he made any attempts to pay rent which was rejected as was his testimony in court, that fact was not disclosed by the plaintiff.

In **Auto Garage v. Motokov** (supra), the Justices of the East Africa Court of Appeal were all in agreement that where one of the essential elements of the cause action is not disclosed on the face of the plaintiff it is to be concluded that the plaintiff does not disclose a cause of action. In their view such a plaintiff could be amended in order to disclose a cause of action if the amendment does not introduce a new cause of action not originally pleaded. In Uganda that may be done under the provisions of Order 6 rule 20 which provides for amendment of the plaintiff without leave of court after the defendant has filed a written statement of defence (WSD), or by leave of court. The respondent filed a WSD in which he stated in paragraph 4 that the appellant had no right to continue occupying the suit premises because he had become a trespasser therein due non payment of rent. In spite of this, the appellant or his advocate did not file a reply to the WSD to rebut this fact. Neither did they amend the plaintiff to clarify the facts that gave rise to the appellant's alleged cause of action.

Given the appellant's plaintiff as it stood, on the face of it the appellant had no right to occupy the suit premises. As a result, an essential element that would give rise to the cause of action was never disclosed. The trial magistrate was therefore correct when she came to the conclusion that the appellant was possibly a trespasser on the suit premises and had no right that had been infringed by the respondent.

It was Mr. Wafula's contention that the trial magistrate's analysis of the evidence was wrong because she ignored the appellant's claim about the licence and use of the road reserve but

instead focused on the issue of ownership. Mr. Wafula argued that the trial magistrate hid behind the issue of ownership because it was she that issued the warrant of eviction. I considered his argument but I came to the conclusion that it was not substantiated. The appellant claimed to have established his business in the road reserve because he was a legal occupant of the property on Plot 340 alongside the road reserve. Even if this fact was not specifically pleaded it was to be inferred from the facts pleaded in paragraphs 4, 5 and 6 of the plaint; the appellant's opportunity to continue running that business in the road reserve appurtenant to Plot 430 was premised on his continued occupation of the premises on that plot of land. It is therefore my opinion that the appellant could not by any other means continue his business, right in front of the respondent's premises without his permission or licence or that of the occupiers thereof.

It is also true, as Mr. Habakurama argued that the road reserve besides any plot of land can be viewed as an easement. Osborn's Concise Law Dictionary defines an easement as "*a servitude*". It is a right enjoyed by the owner of land over the lands of another such as rights of way, rights to light, and rights of support or rights to flow of air or water. An easement must exist for the accommodation or better enjoyment of the land to which it is annexed. If the appellant were allowed to continue in his business on the road reserve right in front of the respondent's property, he would definitely diminish the respondent's enjoyment of his land.

It could be inferred from the nature of the business, and it was the appellant's own testimony in court, that his business involved driving 45 vehicles into the parking bay and keeping them there overnight, every day. It was also his testimony that all those 45 motor vehicles were washed in the parking lot each day. It could be inferred from these facts that the appellant's business involved a constant flow of people into the washing/parking bay (i.e. taxi drives and touts, as well as car washers and sometimes even passengers). No doubt the constant activity resulted in noise, the flow of dirty water and dirt on the road reserve right in front of the respondent's premises. There is no doubt that all this activity inconvenience the owner's or occupiers' of the adjacent land and disturbed their quiet enjoyment thereof.

It is a principle of the law of torts that any person who carries out any activity that interferes with an occupier's beneficial use of his land commits a private nuisance. Nuisance extends to invasions by water, noise, smells, vibrations and even high frequency interference with television screens (Fleming on the Law of Torts, 6th Edition, page 384). The action in nuisance is related to

trespass which protects the occupier's related interest in exclusive possession. The trial magistrate therefore came to the correct conclusion that the appellant was a trespasser on the suit premises *ab initio*.

In addition to the above, road reserves are declared by virtue of s.2 of the Roads Act. It is an undisputed fact that the appellant was carrying out his business in the road reserve. Though this had before the licence expired been sanctioned by Njeru Town Council, I am afraid that such license may have been issued contrary to the provisions of the Roads Act, the Traffic and Road Safety Act, the Public Health Act and the Trade Licensing Act.

Section 3 of the Roads Act provides that road reserves are to be kept clear. Although the Act sets down the kind of things that should not be done in a road reserve to include erecting buildings and planting trees or permanent crops therein, I believe this provision is to be read *ejusdem generis*. Any interference with a road reserve without the permission of the road authority (in this case the Minister of Transport and Communication) is prohibited and should be stopped. It is also provided in s.139 of the Traffic and Road Safety Act of 1998 that the responsibility of designating parking places is vested in the Minister who may by statutory order set aside parts of roads as parking places for all or any class of motor vehicles, trailers or engineering plants. I found no statutory order that designated the road reserve in dispute as a parking area.

I have already ruled that the appellant's business constituted a nuisance to the owner's or occupiers' quiet enjoyment of the suit premises. Part IX of the Public Health Act which deals with sanitation and housing specifically prohibits nuisances. S.54 of the Act provides that no person shall cause a nuisance, or shall suffer to exist on any land or premises owned or occupied by him or her or of which he or she is in charge, any nuisance or other condition liable to be injurious or dangerous to health. It is also the duty of any local authority to maintain cleanliness and prevent nuisance under the provisions of s.55 of the Public Health Act. The nuisances envisaged by s.57 of the Public Act include "any street road or any part thereof, any stream, ditch, gutter, water course, drain, sewer ... so foul or in such a state or situated or constructed as to be offensive or to be likely to be injurious or dangerous to health." The road reserve is appurtenant to premises besides which it is designated. It is by no means a place where any person ought to be licensed to carry on the business of a parking lot or vehicle washing bay because such business is by its very nature likely to cause a nuisance. Njeru Town Council

therefore abdicated its responsibility under s.55 of the Public Health Act when it issued a trading license to the appellant.

Moreover, the business of car washing and parking of motor vehicles is not specified as a business which is required to be licensed in the schedule provided for under s.8 of the Trade Licensing Act. The Njeru Town Council therefore may have issued an illegal licence. But even if it were found that the Council had the authority to issue such a licence, the same indicated that it was to run from the 1/07/2006 to 30/06/2007. This means that by the 18/09/2007 when the court issued the warrant to give vacant possession of the suit premises to the respondent the licence had expired and the appellant's right to use it had come to an end. He therefore no longer had any rights to protect and thus no cause of action against any person who prohibited him from using the licensed place of business.

I therefore find that the trial magistrate properly analysed the pleadings as she was required to do and came to the correct finding that the appellant had no cause of action against the respondent. Having found so, the trial magistrate had no obligation to take evidence in the suit but she had already done so when she came to this conclusion. Order 7 rule 11 provides that the plaint "*shall*" be rejected where it discloses no cause of action. In the **Motokov case**, it was held that the provisions of Order 7 rule 11 of the CPR are mandatory. The plaint is accordingly hereby rejected.

2. Whether the appellant was entitled to damages; and if so, what would be the quantum of damages?

I have already ruled that the trial magistrate should have rejected the plaint and I have accordingly rejected it. However, the appellant attempted to prove his claim for special and general damages by leading evidence in formal proof thereof. It is the duty of this court as the first appellate court to rehear the case on appeal by reconsidering all the evidence before the trial court and coming up with its own decision. The parties are entitled to obtain the first appellate court's own decision on issues of fact as well as of law. [See **Pandya v. R [1957] EA. 336**, and **Father Narsension Begumisa & Others v. Eric Tibekinga, S/C Civil Appeal No. 17 of 2002 (unreported)**.] It is therefore my duty to evaluate the evidence in respect of the appellant's claim for damages.

It is a well known principle that special damages must not only be pleaded but they must also be strictly proved. Failure to satisfy these two requirements of law renders the whole claim bad in law {**Perusi Nanteza v. Sugar Corporation of Uganda Ltd. & Another [1997] HCB 65**}. The Supreme Court further held in the case of **Uganda Telecom Ltd. v. Tanzanite Corporation [2002-2005] HCB Vol. 1, 80** that special damage is that damage in fact caused by wrong. The court further ruled that this form of damage cannot be recovered unless it has been specifically claimed and proved or unless the best available particulars or details have before the trial been communicated to the party against whom it is claimed.

In paragraph 7 of his plaint, the appellant stated that he collected shs 100,000/= each day from evening parking. But when he testified to prove the loss of income which is really in the form of special damages, the appellant averred that he used to collect shs 100,000/= per day for night parking and shs 115,000/= or shs 100,000/= per day from car washers as well. It is noted that he did not plead any facts in his particulars of special damage related to car washers. The appellant therefore tried to prove special damages which he had not pleaded contrary to the accepted rules for such claims.

In addition, though the appellant testified that he collected shs 100,000/= each day from evening parking, he produced no evidence to show that he so collected that amount. The appellant was operating a business which involved the bailment of motor vehicles with him or his staff every day and the vehicles appear to have stayed in the yard overnight. It is inconceivable that vehicle owners or drivers left their motor vehicles with him without him issuing any receipts in acknowledgment of the bailment or for the monies paid for the parking. The appellant ought to have produced some books of account (duplicate receipts or memoranda of deposit of the vehicles) to prove the numbers of cars and the monies that he collected. In the absence of such evidence, though the proceedings were *ex parte*, I am inclined to hold that the appellant did not prove the special damages that he claimed to the required standard. He was therefore not entitled to them at all.

In the end result, this appeal had no merit and it fails on both grounds. It is hereby dismissed with costs to the respondent here and in the court below.

Irene Mulyagonja Kakooza

JUDGE

8/02/2010