

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 1251 OF 1999

SEBUHINGIRIZA RWABITI PLAINTIFF

VERSUS

ATTORNEY GENERAL DEFENDANT

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The plaintiff, Sebuhingiriza Rwabiti, was the registered proprietor of land comprised in LRV 372 folio 2 situated at Chanika Road, Kisoro. The property had a building thereon that was often utilised by tourists. In 1984 the plaintiff sought to develop his land and allegedly accumulated building materials namely sand, soil and gravel stones on the site for that purpose. In 1986 the suit land was occupied by soldiers of the then National Resistance Army (NRA) and to date soldiers from that military outfit's successor entity, the Uganda Peoples Defence Forces (UPDF), is still in occupation thereof. The plaintiff brought the present suit against the Attorney General seeking vacant possession of his land, mesne profits, special and general damages for the continued trespass to the suit land.

On 9th November 2012 the parties entered into a partial consent judgment for mesne profits, lost rental income and general damages. The outstanding issues for consideration by this court arise from the plaintiff's disputed claim for special damages and interest thereon, as well as the continued occupation of the suit premises by UPDF personnel.

Pursuant to a scheduling memorandum dated 9th November 2012 the parties framed the following issues:

- 1. Whether or not the plaintiff is entitled to special damages and interest thereon as claimed.**
- 2. Whether or not the plaintiff is entitled to vacant possession of the suit premises.**

This court observes that the second issue was conceded by the defendant and therefore is no longer in issue.

The plaintiff's claim for special damages and interest thereon was premised on the averments in paragraph 8(i) of his plaint dated 28th September 1999. The plaintiff and a one Joseph Ntahompyaliye testified in support of this claim while no witness was called by the defendant.

The plaintiff (PW1) testified that on various dates in 1984 he did deposit 120 lorry loads of sand, 50 lorry loads of soil and 50 lorry loads of gravel stones each costing Ushs. 50,000/=, Ushs. 50,000/= and Ushs. 70,000/= per lorry load respectively. He did not, however, furnish this court with any receipts or other documentary evidence in proof either of the actual prices paid for each lorry load of materials or, indeed, how many lorry loads of materials were in fact deposited on the suit premises, stating that the relevant receipts had been burnt in his office. Under cross examination PW1 contradicted himself on the costing of the respective lorry loads of materials deposited on the suit land, before conceding that he could not remember the exact monies paid. He was also unable to confirm to this court how much of the materials he allegedly deposited on the land was still there by the time the NRA soldiers took possession thereof 2 years after the event in 1986. Furthermore, PW1 was unable to explain why receipts (or copies thereof) that were allegedly burnt in 2007 long after he filed the present suit had not been availed together with the pleadings. The plaintiff's driver at the time (PW2), on the other hand, testified that he deposited many materials on the suit land but could not recall how many trips he made in respect of each category of materials. He further testified that each lorry load of gravel stones, sand and soil cost Ushs.60,000/=, 50,000/= and 30,000/= respectively.

In written submissions, learned counsel for the plaintiff referred this court to the case of **GAPCO (U) Ltd vs. Transporters Ltd (2009) HCB 6** in support of his argument that special damages need not always be proved by documentary evidence, and in the present suit the oral evidence

adduced for the plaintiff had sufficiently proved the special damages sought. In support of his claim for 30% interest on the special damages from the date the present suit was filed; counsel cited the decision in the case of **Gestion Economique Des Missions Catholique (GEMECA) Rwanda & Another vs. Steel Rolling Mills Ltd & Another (2008) HCB 166** that held that where a person was entitled to a liquidated amount or to specific goods and had been deprived of them through the wrongful acts of another, s/he should be awarded interest from the date of filing the suit. Learned counsel subsequently conceded that the claim of 30% interest was a typographical error that should have read 25% interest.

On the other hand, Ms. Nabakooza took issue with the oral evidence adduced for the plaintiff and contended that the plaintiff had failed to prove his claim for special damages as by law prescribed. Counsel referred this court to the case of **Attorney General vs Lutaaya Civil Appeal No. 16 of 2007 (SC)** in support of her argument that a claim for special damages must be strictly proved and, in any event, an award of special damages must be restricted to what was specifically prayed for in the plaint. Finally, counsel maintained that the issue of interest did not arise as the plaintiff had failed to prove his claim for special damages, but should this court be pleased to award the same then interest at 8% was more reasonable in the circumstances.

Section 101 of the Evidence Act places a general burden of proof on the party that seeks judgment as to any legal right dependant on the existence of alleged facts. It is trite law that in civil proceedings, such as the present suit, the standard of proof on such a party would be by balance of probabilities. See **Sebuliba vs. Cooperative Bank Ltd (1982) HCB 130** and **Miller vs. Minister of Pensions (1947) 2 All ER 372**. The onus therefore lay with the plaintiff to prove his claim for special damages on a balance of probabilities. For present purposes the question would be whether it is more probable than not that the plaintiff did deposit the materials in question on the suit land so as to justify his claim for recompense therefore.

I have considered the plaintiff's evidence on this issue and find that while his evidence and that of PW2 would lend some credence to materials having been placed on the suit land in 1984; their collective evidence fell short on the required proof that the materials were still on the suit land two years later when the NRA soldiers entered occupation thereof or, indeed, that they cost the respective sums of money attributed to each item. In the cited case of **GAPCO (U) Ltd vs. Transporters Ltd** (supra), although it was indeed held that special damages were not provable

only by documentary evidence, it was also held that acceptable oral evidence in proof thereof should, nonetheless, be cogent.

In the present case, the plaintiff's evidence was not cogent raising questions as to its reliability for the strict proof of special damages as by law required. See **Attorney General vs Lutaaya** (supra). The plaintiff attested to the existence of receipts but could not explain why they were never appended to pleadings that were filed in 1999 well before the alleged fire of 2007. With regard to the alleged fire, the plaintiff purported to furnish this court with a document in proof thereof but the subject matter in reference therein was in respect of a break-in of offices not the burning of the building. The only conclusion that can be drawn from this discourse was that the plaintiff did not have any receipts in proof of the alleged materials. He later conceded under cross examination that he did not record or remember the number of trips or lorry loads of materials delivered to the suit land. This was not clarified by PW2 either, who simply attested to ferrying very many materials. What amounts to very many materials is quite relative; certainly it is not useful to the quantification of special damages that require specificity of proof. To compound matters, the plaintiff departed from his pleadings when he testified that each lorry load of sand cost Ushs.60,000/= and not 50,000/= as stated in the plaint, and each truck of gravel stones cost Ushs. 70,000/= and not 60,000/= as pleaded. I am aware of and do respectfully agree with the decision in the case of **Akisoferi Biteremo vs. Damscus Munyanda Situma Civil Appeal No.15 of 1991 (SC)** that supported the view that a party who departs from his pleadings and gives evidence contrary thereto would be deemed to be lying. In any event, even if this court considered the cost of the materials provided by PW2, as posited by learned counsel for the plaintiff, the specific trips against which such sums would be calculated were not proved. I therefore find that the claim for special damages has not been proved as by law required. I so hold.

Having so held, it does follow that the claim for interest thereon would be superfluous. Nonetheless, by way of *obiter dictum*, had this court granted special damages the damages awardable would have been strictly as stated in the plaint, and the interest payable thereon would have been payable from the date of filing this suit till payment in full at court not commercial interest rate.

In the result, I hereby dismiss the plaintiff's claim for special damages and interest with costs to the defendant. I do, however, grant the eviction order sought and duly order that the UPDF personnel on the suit premises vacate the premises forthwith.

Monica K. Mugenyi

JUDGE

20th November, 2012