THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

C IVIL APPEAL NO. 68 OF 2011

(*Arising from BUS -00- CV- CS - No. 320 of 2007)*

BUSHENYI – ISHAKA TOWN COUNCIL ……. APPELLANT

VERSUS

MAFRED MUHUMUZA & 2 OTHERS……. RESPONDENTS

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

Background:

The Respondents herein, who are administrators of the estate of the Late Emmanuel Muhumuza,filed a suit vide***BUS -00- CV- CS - No. 320 of 2007*** against the Appellant claiming general damages for trespass to land, mesne profits and costs of the suit. The Respondents alleged that the Appellant wrongly took over their late father's land without paying any compensation to them. On the other hand the Appellant contended that the takeover of the suit land was lawful and that appropriate compensation for the developments on the land had been made. The Appellant also contended that the suit was time barred.

The lower court held in favour of the Respondents, and ordered the Appellant to pay Shs.45,000,000/= as general damages with interest at a rate of 12% from the date of filing the suit until payment in full, and costs of the suit. Dissatisfied with the judgment and orders of the lower court the Appellantfiled this appeal and preferred the following grounds:

1. ***The learned trial Chief Magistrate erred in law when he awarded damages and interest beyond his pecuniary jurisdiction.***
2. ***The learned that Chief Magistrate erred in law when he awarded damages and interest beyond his pecuniary jurisdiction.***
3. ***The learned trial Chief Magistrate erred in law and fact and contrary to evidence on record when he held that the Respondent had not been compensated.***
4. ***The learned trial Chief Magistrate erred in law, and acted speculatively in awarding general damages of Shs.45,000,000/= which had not been proved; and retrospective interest of 12% which had not been prayed for in the plaint.***
5. ***The learned trial Chief Magistrate erred in law and fact when he held that the procedure for the acquisition of the dispute land had not been complied with.***

Consideration.

Ground 1 and 4:

I have decided to consider the two grounds together because they concern the award of general damages and interest which the trial court decreed to the Respondents. Counsel for the Appellant relied on ***Section 207(1) and (4) Magistrates Courts Act*** and submitted that the interest of 12% per annum accumulated would be over Shs. 41,000,000, and that when added to the general damages would be over Shs. 80,000,000; which is beyond the trial court's pecuniary jurisdiction of Shs. 50,000,000/=. Further that Shs. 45,000,000 awarded as general damages had not been prayed for in the plaint.

In reply, counsel for the Respondents submitted that the trial court awarded general damages after considering the period the land had been taken without the Respondents using it, mental anguish and suffering occasioned to the Respondents, and that the trial court correctly awarded Shs.45, 000,000 as general damages, which is well within its jurisdiction, and that ***Section 207(4) MCA*** applies to cases where the value of the subject matter is impossible to establish.

Section 207(1) (a) MCA provides that;

> ***"Achief magistrate shall have jurisdiction where the value of the subject matter have unlimited jurisdiction in disputes relating to conversion, damage to property or trespass."***

In the instant case, the Plaintiffs'/Respondents' claim against the Defendant/ Appellant was, *inter alia,* for general damages for a tort of trespass to land, the Chief Magistrate's Court has unlimited jurisdiction in such cases involving trespass. Therefore, the award of Shs. 45 million as general damages was well within the jurisdiction of the trial court; and even so the trial court could award more general damages if the circumstances of the case were as such without being limited by the subject of the suit which is a tort of trespass.

In ***Uganda Commercial Bank Ltd. v. Yolamu Twala, H.C. Civ.Rev. No. 16 of 1998(unreported)*** it was held that interest awarded by court on the decretal amount is not to be taken into account while valuing the subject matter for the purpose of pecuniary jurisdiction of a court. However where interest is claimed in its own right, it contributes to the value of the subject matter while reckoning the pecuniary jurisdiction of a court.

In awarding the general damages in the instant case, the trial court gave the basis for the same that;

"…given the period the matter has taken without them using the land, the mental anguish and suffering. I find that general damages of 45 million shall be adequate to compensate the plaintiff."

Clearly, the trial court premised its finding for general damages on the Respondents' evidence that they had lost a lot, and never had any where to get from school fees from, and lived on hand outs from relatives and had nowhere to stay, and this wouldqualify as "mental anguish and suffering". Accordingly the trial court did not proceed on a wrong principle or misapprehended the evidence in arriving at general damages.In the case of ***Matiya Byabalema & O'rs v. Uganda Transport company (1975) Ltd., S.C.C.A. No. 10 of 1993 (unreported)*** it was held, inter alia, that:-

"It is now a well settled principle that an Appellate court may not interfere with an award of damages except when it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on a wrong principle or that he misapprehended the evidence in some material respect, and so arrived at a figure, which was either inordinately high or low ...General damages are compensatory. The person injured must receive a sum of money that would put him as good but not in worse position before the wrong was committed …."

Regarding the aspect of the rate of interest awarded, ***Section 26(2) Civil Procedure Act*** provides that;

"where and in so far a decree is for the payment of money, the court may, in the decree, order interest at such rate <u>as the court deem reasonable to</u> be paid on the principal sum adjudged from the date of the suit to the date of the decree…" [Emphasis added]

Clearly the award of interest is in the discretion of the court, and in the instant case the trial court properly exercised its discretion in awarding the interest, as it did, on the amount of general damages. The Respondents needed not to have prayed for interest since it could be awarded by court exercising its discretion.

Accordingly, this court will not disturb the award of general damages and interest by the trial court exercising its discretion merely because this court could have exercised it differently. As was held in ***Twaiga Chemicals Ltd. v. Viola Bamusede t/a Triple B Enterprises. S.C.C.A No. 16 of 2006,*** an appellate court will not interfere with exercise of discretion unless there has been a failure to take into account a material consideration or taking into account an immaterial consideration or an error in principle was made. I believe this puts to rest ground 1 and 4 of the appeal, which fail and are dismissed.

Ground 2:

The Appellant faults the trial court for deciding in favourof the Respondent in a matter which was time barred. Counsel for the Appellant contends that the suit land was taken over in 1990 and that the suit was filed in 2004, when the Appellant had been in adverse possession of the suit land for over fifteen years. That the provisions of ***Section 5, 6, 11, 14, 15 and 16 of the Limitation Act*** read together show that the Respondents' suit was time barred.

In reply the Respondents submitted that there was unchallenged evidence of the Respondents that following their protest to take their land, through their advocate, wrote a letter to the Appellant and part of the land was released and the developed land retained, but with the promise to release the same or pay compensation. That this was in 1999, and that in 2004, the Respondent challenged the unlawful actions of the Appellant in court which was only after four years.

Section 5 of the Limitation Act (Cap. 80) stipulates that;

> "***No action shall be brought by any person to recover any land for the expiration of 12 years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims to that person***.*"*

In the instant case, the Appellant claims that the land was taken over in 1990, while the Respondents state in their evidence that the suit land was taken over in 1993/4. Regardless of the period the suit land could have been taken over, it is important to establish whether the Appellant was in adverse possession of the suit land because it is on that basis that a party must prove to have both factual possession and the intention to possession.

Factual possession entails exercise of sufficient physical control over the entire land which can be established by proof, for example generally dealing with the land as an intention to possessto the exclusion of everyone else; including the land owner. The limitation time begins to run against the party to bring an action to recover the land when first the land accrues to him or her or to the person through whom he or she claims.

In the instant case, the Respondent's advocate in 1999 wrote a letter to the Appellant demanding for compensation for the land taken. The Appellant released part of the land which was not developed to the Respondents and the rest of the land remained in possession of the Appellant. In this regard, under ***Section 22(1) (a) of the Limitation Act (supra)***once the Appellant released part of the land to the Respondents in 1999, they acknowledged the Respondents' right over the suit land, and as such, the limitation period began to run afresh in 1999.Since the suit was filed in 2004 five years after part of the land was released to the Respondents, the action by the Respondents was not time barred. Accordingly ground 2 fails and it is dismissed.

Ground 3:

In this ground the Appellant faults the trial court for finding that the Respondents had not been compensated. Counsel for the Appellant submitted that the evidence on record established that the late Emmanuel Muhumuza, from whose estate the Respondents based their claim, was paid for the developments he had on the suit land at the time of its takeover by the Appellant. Further, that ***Article 237 of the 1995 Constitutional*** vesting land in citizens, which is operationalized by***Section 2 of the Land Act,***had not been passed into law, and that according to the then ***Constitution*** and the ***Land Reform Decree***, ***1975***, land belonged to the Government, and that under ***Section 13***thereof, a person affected by land takeover such as the Respondents' father was entitled to compensation for developments and not land.

Counsel for the Respondents' countered arguing that the trial court relied on the evidence of PW1, who testified that the Appellant took over their land, and by then their lat father was still living, and that the Appellant promised to pay them compensation. DW1 told court that there are available records to prove that the late Muhumuza was compensated, but when asked to produce them, none was available. That there is no evidence from the Appellant at all to show that the late Muhumuza Emmanuel was ever compensated.

According to the evidence on record, PW1 (Jafari Basajjabalaba) at page 11 of the record of proceedings testified, among other things, that;

> ***"Town Council took it and failed to compensate them. The late Muhumuza came to me as chairman complaining about the Town Council for failure to compensate him for his land ……."***

This evidence was not rebutted by the Appellant during cross examination.Further, DW1 (Byabagambi Francis) during cross – examination, at page 13 of the record of proceedings, testified that;

> ***"The Plaintiff was compensated in 1992 …The late was compensated 500,000/= plus…They carried out a valuation and a report was done by the Assistant District Executive Secretary Mr. Tumwine. I have not come with the valuation report ... <u>I do not have any acknowledgement from the Plaintiffs' late father."</u>***[Underlined for emphasis]

The trial court in its judgment, at page 3,indeed found that there was no evidence that compensation to the Respondents, or how the figures were arrived at , and on a balance of probabilities found it more probable than not that the Respondents were not compensated.

Section 101 of the Evidence Act stipulates that;

> ***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person who would fail if no evidence at all were given on either side."***

In the instant case, since the Appellant alleged that the Respondents had been compensated it was its duty to prove the same to the trial court, which it failed to do. The trial court, therefore, rightly found that the Respondent had not been compensated. Ground 3 fails and it is dismissed, and it disposes of ground 5;whose resolution would only be academic. The net effect is that the entire appeal fails and it is dismissed with costs.

BASHAIJA K. ANDREW

JUDGE

27/08/2013.