

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA SITTING AT ARUA**  
**CIVIL SUIT No. 0022 OF 2015**

**EWADRA EMMANUEL ..... PLAINTIFF**

**VERSUS**

**SPENCON SERVICES LIMITED ..... DEFENDANT**

**Before: Hon Justice Stephen Mubiru.**

**JUDGMENT**

The plaintiff sued the defendant for specific performance of a contract for the excavation of murram, *mesne profits*, general damages for breach of contract, interest and costs. The plaintiff's claim is that on divers days from 22<sup>nd</sup> March 2013 up to 19<sup>th</sup> September 2014, the plaintiff entered into a series of six successive contracts by which the plaintiff permitted the defendant to excavate murram from the plaintiff's land situated at Araa Central village, Pacara sub-county in Adjumani District. The total area of land excavated measures approximately 220 x 370 meters, estimated at three and a half acres in all. One of the terms contained in clause one common to each of the six contracts was that at the end of the contract period, the defendant would "level the area where the murram is excavated with the available material around the area (top soil which is removed) by the end of the agreement." To-date the defendant has failed to honour that contractual obligation and at the end of those contracts, left large pits on the plaintiff's land thereby depriving the plaintiff of gainful utilisation of the land.

Although on 23<sup>rd</sup> November 2015 the defendant was served with summons to file a defence with a copy of the plaint attached, it did not file any defence to the suit. Satisfied with the return of service filed in court on 10<sup>th</sup> March 2016, the court entered an interlocutory judgment against the defendant on the same day and set down the suit for formal proof of damages. At the hearing, the plaintiff testified and tendered in evidence all the six agreements, twelve photographs showing the current status of the land and prayed that although the total value of the murram he sold to the defendant was shs. 29,000,000/=, the defendant should be directed to restore the land to the

original state or pay shs. 280,000,000/= in damages to enable the plaintiff undertake the restoration himself.

Despite the fact that the defendant in this suit did not offer any evidence, the plaintiff still bears the burden of proving his case on the balance of probabilities even if the case was heard on formal proof only (see *Kirugi and another v. Kabiya and three others* [1987] KLR 347). The issues for determination are as follows;

1. Whether the defendant breached any of the contracts.
2. Whether the plaintiff is entitled to any of the remedies sought.

**First issue:** Whether the defendant breached any of the contracts.

The plaintiff tendered in evidence a total of six contracts. None of the contracts is affected by any illegality or other voiding circumstances. Clause one common to the six contracts imposed upon the defendant the obligation to "level the area where the murram is excavated with the available material around the area (top soil which is removed) by the end of the agreement." To-date the defendant has failed to honour that contractual obligation and at the end of those contracts, left large open pits on the plaintiff's land. The large pits are visible in all the twelve photographs tendered in evidence and marked as exhibits P. Ex. 2 A – L. The defendant has clearly failed and / refused to honour this obligation under each of the six contracts and has not advanced any justification for this failure. A breach occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, written or oral, without a legitimate legal excuse. The first issue is therefore answered in the affirmative.

**Second issue:** Whether the plaintiff is entitled to any of the remedies sought.

According to section 64 of *The Contracts Act, 2010*, except where it is not possible for the person against whom the claim is made, to perform the contract; or where the specific performance will produce hardships which would not have resulted if there was no specific performance; or the rights of a third party acquired in good faith would be infringed by the specific performance; or specific performance would occasion hardship to the person against

whom the claim is made, out of proportion to the benefit likely to be gained by the claimant; or the person against whom the claim is made is at the time entitled, although in breach, to terminate the contract; or the claimant committed a fundamental breach of his or her obligations under the contract; or in cases where the breach is not fundamental and specific performance is available to him or her subject to his or her paying compensation for the breach, generally where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract.

The basic rule is that specific performance will not be decreed where a common law remedy, such as damages, would be adequate to put the plaintiff in the position he would have been but for the breach (see *Manzoor v. Baram* [2003] 2 EA 580). On the other hand, the award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission (see *James Fredrick Nsubuga v. Attorney General*, H.C. Civil Suit No. 13 of 1993 and *Erukana Kuwe v. Isaac Patrick Matovu and another*, H.C. Civil Suit No. 177 of 2003).

On the other hand, under section 61 (1) of *The Contracts Act*, 7 of 2010, where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. For a loss arising from a breach of contract to be recoverable, it must be such as the party in breach should reasonably have contemplated as not unlikely to result. The precise nature of the loss does not have to be in his or her contemplation, it is sufficient that he or she should have contemplated loss of the same type or kind as that which in fact occurred. There is no need to contemplate the precise concatenation of circumstances which brought it about (see *The Rio Claro* [1987] 2 Lloyd's Rep 173).

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed (see *Robinson v. Harman* (1848) 1 Exch 850 at 855, [1843-60] All ER Rep 383 at 385 and *Kibimba Rice Ltd v. Umar Salim*, S.C. Civil Appeal No. 17 of 1992). Damages are designed to compensate for an established loss and not to provide

a gratuitous benefit to the aggrieved party. There is no doubt therefore that wherever it is reasonable for the innocent party to insist upon re-instatement the courts will treat the cost of reinstatement as the measure of damage (see *East Ham BC v. Bernard Sunley & Sons Ltd* [1965] 3 All ER 619 at 630, [1966] AC 406 at 434-435). This does not mean that in every case of breach of contract the plaintiff can obtain the monetary equivalent of specific performance. It is first necessary to ascertain the loss the plaintiff has in fact suffered by reason of the breach. If he has suffered no loss, as sometimes happens, he can recover no more than nominal damages. For the object of damages is always to compensate the plaintiff, not to punish the defendant.

In *Minscombe Properties Ltd v. Sir Alfred McAlpine and Sons Ltd* (1986) 2 Const LJ 303, O'Connor LJ applied the test of reasonableness in determining whether the cost of reinstatement of land to its contracted for condition should be recoverable as damages. That in deciding between diminution in value and cost of reinstatement the appropriate test was the reasonableness of the plaintiffs desire to reinstate the property and remarked that the damages to be awarded were to be reasonable as between plaintiff and defendant. If to award the notional cost of reinstatement would be unreasonable in that it would put the plaintiffs in a far better financial position than they would have been before the breach, the cost of reinstatement of land to its contracted for condition will not be recoverable as damages. If it is unreasonable in a particular case to award the cost of reinstatement it must be because the loss sustained does not extend to the need to reinstate.

By allowing his land to be excavated for murram, the plaintiff must be deemed to have foreseen and accepted that his land would lose some aesthetic value. In any event, the plaintiff has not proved that he suffered any monetary loss in the reduction of value of his land. If the court were to award him the sum of shs. 280,000,000/= yet the total contract price for the murram that was excavated was only shs. 29,000,000/=:, the plaintiff would have recovered, not compensation for loss but a very substantial gratuitous benefit, something which damages are not intended to provide. It would put the plaintiff in a far better financial position than he would have been before the excavation occurred. The plaintiff did not adduce any evidence as to how he came to that figure and I am therefore not satisfied that it represents the cost of restoration of his land in accordance with clause one common to the six contracts.

By way of comparison, in *Wodero v. Lunco Contractors Ltd, H. C. Civil Suit No. 82 of 2001*, the plaintiff entered into an agreement with the defendant to sell and buy murram at a cost of 2000/= per a trip of a tipper lorry. Following that agreement the defendant excavated heaps of murram over an area measuring one acre when they suddenly stopped and left the rest of the murram amounting to 1000 trips on the land. The plaintiff contended that the land where the murram was excavated from is a waste as it was useless for any agricultural venture. His repeated demands for the defendant to restore his land had been in vain. In its judgment delivered on 5<sup>th</sup> September 2002, the court found that much as the particular loss of 5,000,000/= was pleaded in the pleadings, there was no attempt to prove it from the meagre evidence given. For that reason the court awarded general damages in the sum of shs 2,000,000/= for breach of contract with interest thereon at the rate of 8% from the date of judgment until payment in full.

In another case of *Dr. Henry Kamanyiro Kakembo v. Roko Construction Limited, C. A. Civil Appeal No. 05 of 2005*, the respondent was allowed to excavate murram from the appellant's land. As a consequence of the excavation of murram a pit was created on the said land measuring approximately 0.40 hectares or just about one acre. The appellant demanded that the respondent restores the land. The respondent agreed to do so and in fact made effort to fill up the pit created by the excavation of murram. The appellant was dissatisfied with the manner in which the pit had been refilled and filed a suit. In that suit the appellant claimed for Shs. 45,000,000/= as compensation, general damages. The learned trial judge found the respondent liable for the damage to the land and awarded the appellant shs.5,000,000/= as general damages. On appeal, the court observed that the appellant should have ascertained the cost of restoration of his land. He should have produced evidence to show how much it would cost him to restore his land to the state in which it was before excavation of murram by the respondent. This would then have formed the basis of his claim either for general or special damages. In its decision delivered on 4<sup>th</sup> April 2014, the Court of Appeal upheld the award on grounds that the appellant having failed to prove his case in respect of damages, the learned trial judge was justified in awarding him general damages the way she did

I have confined my citation of authority to cases involving the excavation of murram, since that is the subject matter of the present dispute. Although it is always necessary to exercise the

greatest care before applying the reasoning in one case to a different factual situation, and this is particularly true in the field of damages, I find that similarly in the instant case, the plaintiff did not adduce any evidence regarding how much it would cost him to restore his land in accordance with the terms of the six contracts. A purported valuation was filed in court after close of the plaintiff's case. Since it was not adduced under oath as part of the plaintiff's evidence during the trial, it has no evidential value and has been disregarded. This is a case where the court has nothing but its commonsense to guide it in fixing the quantum of damages.

In the assessment of general damages, the court should be mainly guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered (See *Uganda Commercial bank v. Kigozi* [2002] 1 EA 305). Furthermore that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale* (1894) 9 Exch 341; *Charles Acire v. M. Engola*, H. C. Civil Suit No. 143 of 1993 and *Kibimba Rice Ltd v. Umar Salim*, S. C. Civil Appeal No. 17 of 1992). General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *Storms v. Hutchinson* [1905] AC 515; *Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd* [1981-1982] HCB 74 and *Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government* H. C. Civil Suit No. 186 of 2006). All this is subject to the duty to mitigate. At common law, the plaintiff had a duty to take all reasonable steps to mitigate the loss sustained (see *African Highland Produce Ltd v. Kisorio* [2001] 1 EA 1).

Taking into account the acreage of land that has to be levelled, the depth and span of the excavated gullies and having formed the opinion that, using heavy earth movement equipment, the work would not take more than four days, I consider a sum of shs.12,000,000/= to be a more reasonable estimate as an award of damages that would place the plaintiff in the position he would have been if he had not suffered the wrong, inclusive of the cost of restoration of the plaintiff's land in accordance with clause one common to the six contracts.

The Plaintiff's contention is that the defendant breached clause one common to the six contracts by failing to level the ground and to backfill the same with top soil and overburden. It was the responsibility of the Defendant to restore and rehabilitate the suit property after excavating the murram. It would be unreasonable of the plaintiff to claim an expensive remedy if there is some cheaper alternative which would make good his loss. Since under each of the six contracts the defendant has no duty or obligation to go out and look for more top soil and overburden to level the area for use by the plaintiff, for that reason an order of specific performance hereby issues directing the defendant, within thirty days from the date of this judgment and at its cost, to backfill and level the area on the plaintiff's land from which it excavated murram, with top soil and overburden which it removed before it started the extraction of murram.

In the event of the defendant's failure to comply with the above order, then there will be no other alternative course which will provide what the plaintiff requires, or none which will cost less. In that case the plaintiff will be entitled to the cost of repair or reinstatement of his land even if that is more expensive. Therefore if after thirty days from the date of this judgment the defendant will not have restored the plaintiff's land in accordance with the provisions of clause one common to the six contracts, then in that case there is no other alternative which will provide that which the plaintiff contracted for, the plaintiff will proceed to recover the alternative award of shs. 12,000,000/= as general damages to be applied towards that expense. Consequently, Judgment is entered for the plaintiff against the defendant in the following terms;

- a) An order of specific performance of clause one common to the six contracts by requiring the defendant within a period of one month from the date of this judgment, to level that area on the plaintiff's land from which it excavated murram with top soil and overburden which it removed before it started the extraction of murram.
- b) In the event of the defendant's failure to comply with the order in (a) above, to pay the plaintiff a sum of Shs. 12,000,000/= as general damages.
- c) Upon the award in (b) becoming operative, interest thereon at the rate of 15% p.a. from the date of judgment until payment in full.
- d) The costs of the suit.

Dated at Arua this 12<sup>th</sup> day of October, 2017

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Stephen Mubiru  
Judge, 12<sup>th</sup> October, 2017.