

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
CIVIL SUIT NO 86 OF 2012

MUGERWA SULAITI ::
PLAINTIFF

VERSUS

UMEME LIMITED ::
DEFENDANT

JUDGMENT

BEFORE HONOURABLE JUSTICE EVA K. LUSWATA

1.0 Introduction and brief background.

1.1 The Plaintiff brought this suit against the Defendant in trespass and negligence, with a claim for loss of earnings, general damages and costs.

1.2 The plaintiff contended that during October 2009, the defendant's employees laid electric wires over his residence in Buloba Village, Wakisi Sub County in Buikwe District and as a result, him and his family were exposed to danger of electrocution and death. That his verbal and written complaints to the defendant's area manager, solicited no response. Eventually, after writing to the defendant's managing director, the laid wires were removed overnight without notice to him and one Godfrey Ndyamutunga, the defendant's employee, had his employment terminated in connection to the said irregular connection. The plaintiff claims to have incurred damages in lost rental income and

inconvenience during the period that the impugned wires remained on his land, and contended that the actions of the defendant's agents were negligent and a contravention of the Electricity Act. Cap 145 LOU.

1.3 The defendant denied all the claims in negligence and stated, that they did not trespass upon any land / house owned by the plaintiff and none of their employees ever erected any electricity wires over the plaintiff's house and therefore, could not be held responsible for the plaintiff's failure to utilize his property. They claimed to have proper way leaves in the area where the electricity wires were placed and denied ever receiving any complaints from the plaintiff regarding the alleged trespass. They further denied the allegations that an employee had been terminated in connection with the alleged trespass.

1.4 After the plaintiff stated their case, opportunity was given to the defendant to prepare and present their defence. On 12/04/18 defendant's counsel indicated that her client had failed to produce a witness. Her prayer for an adjournment was denied and the matter proceeded on order of Court under **Order 17 Rule 4 CPR** by a direction that the defence be closed without any evidence from them. My decision will therefore be principally based on the pleadings of both parties and evidence presented by and for the plaintiff.

2.0 The following were raised as agreed issues to be resolved:-

- a) Whether the laying of electric wires over the plaintiff's premises constituted trespass?

- b) Whether the defendant's agents, employees and /or servants acted negligently while laying electric wires over the suit premises?
- c) Whether the defendant is vicariously liable for the acts of its servants/ agents?
- d) Whether the plaintiff is entitled to the remedies sought for?

3.0 Resolution of issues.

Whether the laying of electric wires over the plaintiff's premises constituted trespass?

- 3.1 A leading decision on the matter described trespass to land as follows:-

“Trespass to land occurs when a person makes an unauthorised entry upon land and there by interferes, or portends to interfere with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass” See **Justine E.M.N Lutaaya Vs Stirling Civil Engineering Company Civil Appeal NO.11 OF 2002 (SC)**. I would add that possession is not limited to physical possession as any amount of possession would suffice.

- 3.2 On the other hand, **Section 67(1) of the Electricity Act Cap 145**, (hereinafter referred to as the Act) provides that *‘a licensee authorized by the authority either generally or on a particular occasion may place and maintain electric supply lines in, over or upon any land and for that purpose it shall be lawful, upon written authorization by the authority, for the licensee or his or her representative-*

- (d) *To perform any activity necessary for the purpose of establishing, constructing, repairing, improving, examining,*

altering or removing an electric supply line, or for performing any other activity under this Act. (Section 67 (1) (d))

According to Section 67(4) *A licensee shall except for maintenance or repair of an electric supply line, before entering any private land for the purposes specified under sub section (1), give sixty days' Notice to the owner of the land , stating as fully and accurately as possible the nature and extend of the acts intended to be done''*

- 3.3 PW1 testified that sometime in 2009, he returned home from work to find electricity wires placed and hanged over his house. He confirmed the wires to be connecting electricity to the house of Mukoza Godfrey his immediate neighbour. Since he had not consented to the wires being placed there, he took photographs of the wires and in 2010, wrote to defendant's area manager with a complaint about the wires but received no response. That again on 18/01/2011, he wrote to the defendant's managing director, and on the same day, the defendant's agents entered upon his land and removed the wires at about 8pm in the night. **PW2** supported that evidence by stating that he himself saw the wires which remained on the plaintiff's land for two years and that it was upon his advise, that the plaintiff wrote to the defendant's managing director. He arrived just after the defendant's agents had removed the wires and saw the wires on their vehicle.
- 3.4 The plaintiff claimed that entry on to his land without consent to overlay electric wires and entry to remove the wires amounted to trespass. In defence, it was contended that since the wires were removed before the suit was filed, the plaintiff could not maintain an action in trespass.
- 3.5 It was an agreed fact that the plaintiff owned a residential house in Buloba Central Zone, Wakisi over which electricity

wires were laid. It was the plaintiff's testimony that he was neither notified nor requested before the wires were laid and was not present during the exercise. The defendant who did not in evidence contest laying the lines, adduced no evidence to the contrary. The plaintiff's complaints and letter to the defendant protesting the presence of the wires is an indication that he did not authorise the entry by the defendant's agents on to his land to place the lines or maintain them there. The actions of the defendant's agents would thus be trespass under both common law and statute. In particular their entry offended Section 67(4) of the Act.

- 3.6 While considering similar facts the Court in **Umeme Ltd v Sonko & Anor (MISCELLANEOUS APPLICATION NO. 025 OF 2013) [2014] UGHCCD 172 (24 October 2014)** found that where the defendant's agents did not enter the suit land for purposes of repair and maintenance but to improve or upgrade power supply, and the Plaintiff had not been given the statutory 60 days' notice, then the entry was unlawful and amounted to trespass. The court considered 'upgrading 'as an exercise involving the removal of whatever existing lines or poles and construction of new and more powerful ones. In their correct view, such an exercise required the consent of the respondent (as the land owner) under the Electricity Act.'
- 3.7 The situation in the above case would be no different to the present facts. The entry into the plaintiff's land during 2009 was not for the purpose of repair and maintenance. The

main purpose was to over lay an electric wire for the benefit of his neighbour. Since the Plaintiff was not given the 60 days' notice as required under the law, then the entry was unlawful and amounted to trespass. I would agree with plaintiff's counsel that an action in trespass can still be maintained at any time even after it has ceased to happen. The Court will take into consideration the period that the trespass happened more so a case likes this one where it was only within the power of the defendant to cease the trespass. I am satisfied with the evidence that the defendant was notified of the offending lines. The plaintiff who had no expertise necessary or equipment could not remove the wires. The evidence that he did not authorize placing of the wires and that they remained on his property between 2009 and January 2011, would constitute a trespass on his land.

3.8 On the other hand, the entry onto the plaintiff's land to remove the offending electric wires would not amount to trespass as the plaintiff did write to the defendant's managing director with a request that they remove the wires which they did. In his letter dated 18/01/2011 and his testimony in Court, the plaintiff requested the defendant to remove the wires from his house because they were dangerous and resulted into loss for the period they remained there. That fact was supported by the evidence of **PW2** who stated that he found when the defendant's agents had already removed the wires and saw the wires on their vehicle and those agents informed him that their master in

Kampala had advised them to remove the wires following the plaintiff's written complaint.

3.9 Thus, the first issue is decided in the affirmative.

4.0 I will resolve issue b and c concurrently.

Issue b: Whether the defendant's agents, employees and /or servants acted negligently while laying electric wires over the suit premises?

Issue c: Whether the defendant is vicariously liable for the acts of its servants/ agents?

4.1 The tort of negligence has been widely defined by Courts. The Court in **Blyth Vs Birmingham Water Works (1856) 11 EX.781**, described negligence to be:-

"..... the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

4.2 The decision in **Donoghue V Stevenson (1932) AC 562** laid out what I would consider to be the ingredients of negligence, i.e.:-

- There existed a duty of care owed to the plaintiff by the defendant.
- The defendant breached that duty.
- The plaintiff suffered injury or damage as a result of the breach of duty.

4.3 How far the courts are prepared to extend this "duty of care" was decided in part by the Court in the **Donogue Vs**

Stevenson case. **Lord Atkin** contented himself with pointing out that in English Law, there must be, some general conception of relations giving rise to a duty of care of which the particular cases found in the books are but instances. He went on to lay down the basis of the present law in the doctrine of the neighbour principle in this much quoted passage;

“The rule that you are to love your neighbour becomes in law, you must not injure your neighbor; and the lawyers’ question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I was directing my mind to the acts or omissions which are called in question”.

- 4.4 The authority provided by defence counsel would in addition be useful. It was stated in **Stanbic Bank (U) Ltd Vrs Tuka Investments Ltd & 4 Ors** (following **Caparo Industries PLC Vrs Dickman (1990) AC 605 (1990) ALLER 568** that:-

To determine whether the ingredients of negligence were proved by the plaintiff, court will take into account the relationship between the parties and the principles established by cases to be taken into consideration to determine whether a duty of care existed. That the principles to determine whether a duty of care exists include foresee ability and harm proximity of relationship and reasonableness.

- 4.5 In the instant case, the defendant as an authorized licensee under the Act was empowered to distribute electricity to Mukooza Godfrey, the plaintiff's neighbor. In doing so, or while executing their mandate, the defendant owed a duty of care to the plaintiff, who owned adjoining premises, as defined by Lord Atkin. They breached that duty because it was reasonably foreseeable that overlaying electric wires, (which are potentially dangerous and harmful appliances) above the plaintiffs house would cause harm to the plaintiff and all other persons residing with him. The proximity of harm to the defendant was both close and foreseeable and because of the nature of their business is laying wires, the defendant ought to have taken reasonable care while laying the wires.
- 4.6 In their submissions, defendant's counsel contended that the plaintiff did not in his pleadings or evidence show that he suffered any injury as a result of the defendant's actions. That in fact, there is no fact of injury suffered but he only that he anticipated to suffer in future and adduced no medical evidence to confirm any health problems as a result of the wires. That is a correct observation but the plaintiff did state in his testimony that the presence of the electric wires on his land were an inconvenience and psychological torture as his family was exposed to danger. He for that reason had to shift to another residence to avoid health problems and for fear of electrocution.

- 4.7 It was an agreed fact that electricity wires were erected at the plaintiff's premises. The health problems associated with close proximity to electricity wires, especially those transmitting power, may not be obvious in the short term. Indeed, the plaintiff provided no evidence of actual harm. However, the danger of electrocution from wires hanging above a house (for example if they break) are obvious. That alone would put any human being in grave danger. I would conclude that there was negligence on the part of the party that placed wires overhead of the plaintiff's house.
- 4.8 It is important in a case of this nature to show that the act complained of was done by the agents of the defendant, in the course of employment. In the case of **Muwonge v Attorney General, 1967 EA** It was held that a master is liable for the acts of his servant committed within the course of their employment. That the master remains so liable whether the acts of the servant are negligent or deliberate, wanton or criminal. That the acts may be so done even though they are done contrary to the orders of the master. The court in the case of **Ketayomba v Uganda Securiko Limited [1977]HCB at 170** was more succinct. The Court declared that *"an employer is still liable for the tortuous acts of his servant if the servant acted dangerously, recklessly or for his own benefit, as long as he was on his master's duty when he inflicted the tort"*

4.9 It was the plaintiff's testimony that the electric wires were laid by one Godfrey Ndyamutunga a surveyor who was at the material time, the defendant's employee. Although by their pleadings the defendants denied that any employee had been terminated as a result of the plaintiff's complaint, no further evidence was adduced to rebut the plaintiff's stated fact that Ndyamutunga was their employee. The plaintiff testified that soon after he reported to the defendant's managing director in Kampala, he was called by someone from the defendant's Jinja offices stating that they were prepared to handle the matter. When he arrived in Jinja, he interacted with people he believed to be employees of the defendant and later in the night at about 8pm, he and PW2 observed people who had removed the wire, loading them on a motor vehicle. PW2 stated that he actually talked to those people who revealed that they had been sent by their "boss" from Kampala to remove the line. PW2 also noted that the motor vehicle onto which the line was loaded, had inscriptions or logo of the defendant.

4.10 It would be too great a coincidence that the line was removed the same day that the plaintiff made a complaint to a top official of the defendant. On an unspecified day during January 2011, the plaintiff travelled to Kampala to deliver his written complaint to the defendant's office in Kampala. On the same day, he interacted with people he believed to be the defendant's agents and later the same day, found people loading the dismantled wire onto a vehicle which PW2

recognized as belonging to the defendant. There was no strong evidence counteracting those facts and I am for that reason persuaded that it was the defendant's agents who laid the wires in 2009 and later returned to remove them in 2001 after the plaintiff's complaint. The ordinary work of a licensee's surveyor would be to survey and analyze a land over which electric poles and lines are to be laid and thereafter, supervise and participate in laying them. I would therefore also conclude that the wires were laid by the defendant's agent/servants/employee(s) in the course of his (their) employment. The defendant would be vicariously liable for the negligent acts of its employee(s).

5.0 Issue Whether the plaintiff is entitled to remedies sought?

5.1 The plaintiff prayed for special damages of **UGX. 36,000,000/= (Uganda shillings Thirty Six Million)** as profit from rental payments for a period of 3years.Both counsel appeared to be in agreement with the principle that special damages must be specifically pleaded and proved. Citing authority, defendant's counsel argued that the plaintiff failed to particularize or plead the special damages in their plaint and even then, failed to show that he lost income in rent and his evidence was mere speculation. In reply, plaintiff's counsel contended that the claim of special damages was clear in the plaint and that it is not in every case that special damages are proved by documentary

evidence but “...*cogent verbal evidence can also do*” See **Gapco (U) Ltd Vrs AS Transporters SCCA No. 7/2007.**

- 5.2 I agree with plaintiff’s counsel. Many courts have taken the liberal view that special damages when pleaded, may be proved by evidence other than primary evidence of documents. In **Stanbic Bank Uganda Ltd Vs Sekalega. (Civil Suit No. 18 of 2009)** the court was of the view that evidence of a person who received or paid money or testimonies of experts conversant with matters in issue, can be sufficient. The court in **Senyakazane -Vs- Attorney General [1984] HCB** was of the same view that although special damages must be specifically and strictly proved, such proof need not be supported by documentary evidence in all cases.
- 5.3 That said, I find that the claim of Shs. 36 million in the plaint lacked specificity. Ordinarily, profits are the result of some mathematical calculation based on percentages off earnings. This was a case that required some documentary evidence to back up the claim. Further, as observed by the defendant’s counsel, the plaintiff who did not have any certified rental value of his house did not show that he was in the business of renting houses. Apart from verbal claims, he led no evidence to show that he had entered into negotiations with a prospective tenant who was turned off by the offending wires. Further, I noted a serious contradiction between the plaintiff’s pleadings and his evidence on this issue. In the plaint he claimed he was offered Shs. 1,000,000

by officials from Bujagali Power Project and in evidence it was Shs. 300,000 per month. It is not even clear what the actual earnings or profits would be. I am more persuaded by the defendant counsel's observations that the plaintiff's testimony strongly pointed to the fact that he used the house not for rental but for residential purposes with his family. For all the fore going reasons, I decline to award any special damages to the plaintiff.

- 5.4 The Plaintiff in addition prayed for general damages for trespass and inconvenience.
- 5.5 It is trite law that measurement of quantum of general damages is a matter for the discretion of the individual judge which of course has to be exercised judicially. The general conditions prevailing in the country and prior decisions on similar facts are relevant to the case in question. See **Moses Ssali a.k.a Bebe Cool & Others Vs A.G and Others HCCS 86 2010.**
- 5.6 In the case of **Uganda Commercial Bank Vs Deo Kigozi 2002 EA 293** it washeld that *"in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience the party may have been put through and the nature and extent of the breach or injury suffered."* General damages are those that the law presumes to arise from the direct, natural or probable consequences of the act complained of by the victim, they follow the ordinary course and relate to all other

*terms of damages. Whether pecuniary or non-pecuniary general damages would include future loss as well as damages for paid loss and suffering". Also see **Storms Vs Hutchinson [1905] AC 515**. General damages are meant to be restitutive in nature that is, to put the injured party back into the position they would have been had they not suffered the wrong by the party against whom the damages are claimed. See for example **Charles Acire Vrs Myaana Engola HCCS No. 143/1993**.*

- 5.7 I have agreed with plaintiff's counsel that the defendant was in trespass when their agent(s) entered upon their client's land and laid the electricity lines. Even without any apparent injury or loss, the plaintiff would be entitled to damages because the tort of trespass is actionable per se even if there is no damage done to the land. See for example **Placid Weli Vrs Hippo Tours & 2 Ors HCCS No. 939/96**. I am in addition persuaded that the plaintiff and his family were inconvenienced and suffered mental torture and fear for their life and safety due to the presence of the lines on his property.
- 5.8 The plaintiff claimed to have been forced to find alternative accommodation for at least two years and returned only after the wires were removed. It is not entirely incredible that under such circumstances one would keep away from such threat of danger. However, the plaintiff was not clear when he left or returned to his home. No evidence was adduced to confirm that he was renting a house elsewhere.

In his testimony, he stated that on the day the wires were removed, he was present in his home, first when he returned from Kampala and later, at about 8 pm just after the defendant's agents removed the wire. Although it was stated by PW2 that the plaintiff had rented alternative accommodation in the same village, it would be such a high coincidence that he was near his home at different times on the same day, one being at night. The only explanation would be that by the time the wires were removed, he had returned and was residing in his house or he infact never left his house at all. The latter would be more credible in the circumstances.

5.9 Taking into consideration the above facts, a sum of **UGX 20,000,000/=** as general damages would be sufficient compensation to atone for the plaintiff's loss and reinstate him back to his position before the trespass and negligence of the defendant occurred. He is in addition awarded the costs of the suit.

6.0 In the final result, judgment is entered for the Plaintiff against the defendant in the following terms.

- a. A declaration that the laying of electric wires over the plaintiff's land amounted to trespass
- b. A declaration that the defendant's agents, employees and/or servants acted negligently while laying the electric wires over the plaintiff's land and the defendant is vicariously liable for their acts.

- c. Shs. 20,000,000/= as general damages.
- d. Interest on the general damages at a rate of 15 % per annum from the date of filing the suit until payment in full.
- e. Costs of the suit.

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EVA K. LUSWATA

JUDGE

28/08/2019