IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 044 of 2011

In the matter between

1. TABU LEE DEFOREST }
2. OKWANY JAMES } **PLAINTIFFS**

And

GULU MUNICIPAL COUNCIL **DEFENDANT**

Heard: 21 February 2019

Delivered: 1 April 2019

Summary: Suit seeking damages for demolition of part of a perimeter wall fence.

JUDGMENT

STEPHEN MUBIRU, J.

Introduction:

[1] The plaintiffs jointly and severally sued the defendant for general damages for wrongful deprivation of part of their land located on Toya Kilama Road, Laroo Division in Gulu Municipality. Their claim is that on or about 17th July, 2006 the first plaintiff bought a plot of land measuring 22 metres x 34 metres located in Iriaga Central Sub-ward, Iriaga Parish, Laroo Division, Gulu Municipality from a one Okello Santo. The first plaintiff surrendered the plot to the second plaintiff who constructed a residential house on the plot. With the defendant's permission, the second plaintiff constructed a perimeter wall around the plot. The defendant subsequently issued a notice of demolition of part of that perimeter wall fence on

grounds that it had protruded into an area reserved for Toya Kilama Road. The defendant went ahead and demolished part of the wall fence without offering the plaintiffs any compensation for the portion of his land reserved for Toya Kilama Road and the part of the perimeter wall fence that was demolished.

[2] The defendant filed a bare denial defence in which it contended the plaint did not disclose any cause of action and denied liability for any wrongful action as alleged or at all.

The plaintiffs' evidence:

[3] The first plaintiff Tabu Lee Deforest testified as P.W.1and stated that following the purchase of this 23 meters by 50 metres plot, but before erecting the perimeter wall fence around it, he sought permission from the municipal authorities. The municipal authorities sent two agents to inspect the planned site after which he was advised to pay the requisite fee. He paid the fee on 7th July, 2011 and was issued with a receipt (exhibit P.E.1). On 19th October, 2011 and 26th June, 2012 they received a notice from the defendant (exhibits P.E.2 and P.E.3) requiring them to demolish part of the wall on grounds that it had encroached onto Toya Kilama Road.

[4] P.W.2 Okwany James the second plaintiff testified that before construction of the wall, he sought permission from the defendant Two agents at the Division were sent to the site and inspected the proposed site. He was advised to pay the fee which he did. He constructed the wall along Toya Kilama Road as permitted. Three months later he received a notice from the Town Clerk directing him to demolish the construction. Her went to the defendant's offices and was given site plans (exhibits P.E.4 and P.E.5) from which it was determined his plot was not affected by Toya Kilama Road. He filed a suit. Nevertheless, the defendant demolished the wall and plants in his compound on 28th February, 2013 yet he

had not constructed on Toya Kilama Road, but along the road, fifteen meters away from the road.

The defendant's evidence:

[5] D.W.1 Mukonyezi Evelyn, the defendant's Physical Planner testified that Toya Kilama road has been a planned road since as way back as the 1990s. In the year 2010 the defendant went ahead to open the road according to the planning of the Toya Kilama Road area. They found a wall fence encroaching into the road by ten metres. It belonged to the first plaintiff. The planned road is on The sheet No. is 21 / NE/2 that was made in 1990 by the Department of mapping and surveys in Entebbe, as part of the planning scheme (exhibit D. Ex.2). The scheme for Gulu Town was first made in 1950. It has been revised several times since then the latest being in 1997. The road is toward the right hand lower corner of the map. The road is straight until that point when there is a protrusion. As a result of the protrusion, the wall fence had to be demolished because the width of the road is 20 metres according to the plan. The Physical Planning Committee of the defendant inspected the land and then held a meeting in 2007 under minute 21 PPC (physical planning committee) 2011 and resolved that the Town Clerk should write to the second plaintiff to remove the illegal development encroaching into the road. The Town Clerk on 19th October, 2011 wrote a notice of demolition of an illegal perimeter wall along Toya Kilama Road Laro Division. It was addressed to the second plaintiff. It required the second plaintiff to remove the illegal perimeter wall within fourteen days at his cost. He did not remove the wall. The defendant then took enforcement officers onto the ground to demolish the perimeter wall. The second plaintiff came to court to seek an injunction stopping the construction of the road but the application was dismissed (exhibit D. Ex.1).

[6] D.W.2 Nyeko Charles, the defendant's Senior Accounts Assistant testified that he prepared (Exhibit P.E.1) which bears his signature and is in his handwriting. It is

dated 7th July, 2011. It a receipt for payment of fees for permission to construct a wall fence along Toya Kilama Road in Eriaga Parish Laroo Division. The instructions by the engineer are not written on the receipt. The receipt means that Toya Kilama Road is a planned road. The construction was to be along the road where the plot is located. It is not intended to be done on the road. It is wrong for someone who has paid to construct on the road instead.

[7] D.W.3 Nyadru Richard Anyama, the defendant's Principal Health Inspector testified that (exhibit P.E.2) dated 19th October, 2011 is a notice of demolition. It was written by the Office of the Town Clerk Gulu Municipal Council. The Town Clerk was Augustine Rukiika Ojara. It was to notify Mr. Okayi to demolish an illegal perimeter wall he was erecting on Toya Kilama Road. He was instructed to demolish it within two weeks, at his cost from the date of service. He did not remove the wall. The defendant went ahead to remove the wall. He then filed a suit. The procedure for such developments is that the property owner should request for approval of the plan. A physical Planning Committee is convened to scrutinise the request and approves or rejects in accordance to the land use, the plans of the area and ownership. The first plaintiff attached an un-surveyed document for erecting a wall in that area. The Committee allowed him to erect along the road reserving the road and its reserves. Approval can only be given when the plot is surveyed. Permission to construct the wall is based on proof of ownership of the construction of for protection of the a plot. It is meant to be temporary. Approval of construction of a permanent building requires; a building plan and surveyed plot. The issue of the wrongful construction came before the Planning Committee again under minute 21/PPC/2011 of 9th September, 2011. The Physical Planning Committee resolved that the illegal structure be removed at his cost (exhibit D. Ex.3). The Committee recommended that the Town Clerk should write to Mr. Okway James to remove the illegal wall fence encroaching into the road reserve. This was under minute 21/PPC/2011. The Town Clerk acted on that recommendation (exhibit P.E.2 dated 19th October, 2011). Toya

Kilama road is classified as a 20 meter road, the road reserve inclusive. The setback is five feet or 1.5 metres.

The court's visit to the *locus in quo*;

[8] The court subsequently visited the *locus in quo* where each of the parties and their witnesses demonstrated the location of Toya Kilama Road and the part of the wall that was demolished. The demonstration by the defendant was of an approximately twenty meters wide road with a dead end just past the plaintiffs' plot. There are two other plots with a total of four permanent buildings abutting onto the dead end of the road, East of the plaintiff's plot. Save for a temporary bathe shelter and a grass thatched hut on a neighbour's plot just at the boundary of the plaintiff's plot, there are no other structures within the area reserved for the road, West of the plaintiffs' plot. On the Northern side of the road is another neighbour's perimeter wall fence running within a foot of the edge of the road reserve, along the road. Within the contested area, are remnants of the plaintiffs' brick wall on the Eastern side, and a collapsed bamboo fencing on the Northern and Western side. There also are a few mango trees, pawpaw trees, an avocado tree and banana stems. The plaintiffs' residential house on the plot is to the South and lays outside the contested area. These items are more specifically represented on the sketch map that was prepared during the proceedings threat.

The parties' final submissions;

[9] In his final submissions, counsel for the plaintiffs M/s Donge & Co. Advocates argued that the wall was constructed after consultation with the Division authorities who assured the plaintiffs that the road reserve would not affect the wall. The purported plan for a road was made in Entebbe and was never customised by the Division. The plaintiffs were never informed of the planed road and ought to be compensated for it deprives them of their property. The plaintiffs

were never given an opportunity to be heard before the demolition notice was issued to them.

[10] In response, counsel for the defendant M/s Oyet & Co. Advocates argued that none of the plaintiffs undertook inspection of the planning scheme before purchase of the plot. The plan for the road existed before the purchase. An actual road existed on the ground and they ought to have established the planned width. The permission granted to them was for construction along the road not on the road.

Issues for determination;

[11] At the scheduling conference, the following issues were agreed upon;

1. Whether plaintiffs illegally constructed the perimeter wall fence on Toya Kilama Road.
2. Whether the notice of demolition of the perimeter wall fence was lawfully issued to the plaintiffs.
3. What remedies are available to the parties?

First issue; Whether plaintiffs illegally constructed the perimeter wall fence on Toya Kilama Road;

[12] Item one of the First Schedule of The *Town and Country Planning Act 1951, Cap 246,* (its Commencement date is 13th September, 1951) categorised Gulu Town as planning area. According to D.W.1 Mukonyezi Evelyn, the defendant's Physical Planner, it has been revised several times since then the latest being in 1997. Toya Kilama Road is a planned road reflected on Sheet No. is 21 / NE/2 that was made in the 1990s by the Department of mapping and surveys in Entebbe, as part of the planning scheme (exhibit D. Ex.2).

[13] This implies that by the time the plaintiffs acquired the plot in 2016, the planning scheme for Gulu Town had been in place and available for inspection for over

sixty five years and specifically that relating to Toya Kilama Road for over ten years. From the plaintiffs' testimony, it is clear that the plaintiffs did not undertake any inquiries, elaborate or otherwise, with a view to establishing existing planned developments over that land under the updated planning scheme, yet the plans were available for inspection. Had they undertaken a proper search, on sheet No. 21/NE/2 and 22/2/NW/1 they would have discovered that part of the area of land they were about to purchase, was designated as Toya Kilama Road. They thus had constructive knowledge of the existence of that road reserve.

[14] Constructive notice is the knowledge which the courts impute to a person upon presumption so strong of the existence of the knowledge that it cannot be allowed to be rebutted, either from his knowing something which ought to have put him on further enquiry or from wilfully abstaining from inquiry to avoid notice (see *Hunt v. Luck (1901) 1 Ch 45*). The presumption is so strong of the fact that due diligence would have readily disclosed the existence of the plan that constructive knowledge of this fact cannot be allowed to be rebutted by their abstaining from making the necessary inquiry.

[15] The construction of roads within a Municipality or Division of a Municipality is an aspect of physical planning. Section 37 (5) of the *Land Act*, empowers an Urban Councils within whose jurisdiction land in an urban area is situated, to restrict and regulate physical developments, subject to any existing scheme approved under the *Town and Country Planning Act* (which has since April 2011 been repealed and replaced by *The Physical Planning Act, 8 of 2010*). The question then follows whether any of the plaintiffs' property rights were violated.

[16] Under item 4 of part 2 (Functions and services for which district councils are responsible) of the second schedule of *The Local Governments Act, Cap 243*, District Councils are responsible for the construction, rehabilitation and maintenance of roads not under the responsibility of the Central Government. Under item 20 of part 4 (functions and services to be devolved by a district

council to lower local government councils) of the same schedule, District Councils are required to devolve to lower local government councils, the maintenance of community roads (*Bulungi Bwansi* roads) and specifically under item 21 of Part 5. (B) (Functions and services to be devolved by a city or municipal council to divisions) the repair of murram and earth roads is entrusted to Municipal Councils and Divisions. From the above provisions, the appellant's authority in matters of related with roads is limited to the repair of murram and earth roads within its area of jurisdiction. It may engage in activities of construction of such roads possibly as an agent of the District Council.

[17] By virtue of section 2 of the *Roads Act*, *Cap 358*, the Minister may by statutory instrument declare an area bounded by imaginary lines parallel to and distant not more than fifty feet from the centre line of any road to be a road reserve. According to item 3 (e) of the first schedule and item 2 (d) of the second schedule to *The Roads (Road Reserves) (Declaration) Instrument, S.1 358—1*, roads under the mandate of the local governments in Gulu Municipality will either have reserves bounded by imaginary lines parallel to and distant fifty feet from centre line or parallel to and distant thirty feet from centre line.

[18] By way of comparison, *The National Physical Planning Standards and Guidelines, 2011* published by the Directorate of Physical Planning and Urban Development of the Ministry of Lands, Housing and Urban Development, at page 26 recommend the following road reserves for urban roads; 30 metres for Secondary Distributor Roads and 18 metres for Tertiary (Local Distributor) roads. These are roads which link locally important centres to each other, to more important centres, or to higher class roads (rural / market centres) and linkage between locally important traffic generators and their rural hinterland. Their major function is to provide both mobility and access. Therefore, at 20 metres inclusive of its reserve, Toya Kilama Road as illustrated on sheet No. 21/NE/2 and 22/2/NW/1 and as elaborated by D.W.3 Nyadru Richard Anyama, the defendant's

Principal Health Inspector, is within both the statutory maximum and the recommended national standards.

[19] In relation to any road within or passing through any government town, section 4 of the *Roads Act*, *Cap 358* authorizes the Minister, subject to provisions of the *Public Health Act* or any regulations or orders made under the *Public Health Act* or any scheme made under the *Town and Country Planning Act*, by an order published in the Gazette to prescribe the line in which buildings shall be erected in such town or area; or to prescribe the distance from the centre of the road within which no building shall be erected in such town or area. This is technically known as the road setback. These are the minimum distances a building must be set away from the boundaries of a plot for reasons of health, safety, maintenance and amenity. In absence of a duly gazetted order of the Minister designating the setback for Gulu Municipality, I have sought guidance from *The National Physical Planning Standards and Guidelines, 2011* which is a policy statement published by the Directorate of Physical Planning and Urban Development of the Ministry of Lands, Housing and Urban Development. At page 3 it provides as follows;

> 2.3 BUILDING LINES
> Buildings must be set back from plot boundaries for reasons of privacy, amenity, health and safety. The walls of the building must be on or behind the specified building lines detailed in table 1, subject to all other standards being met.

[20] Table 1, at page 8 of the Guidelines specifies Site Standards for Residential Development and provides for the following setbacks at the front of a plot; 8 metres for Low Density areas, 6 metres for Medium Density areas, 3 metres for Detached High Density areas and 3 metres for Semi-Detached High Density areas. In the instant case, there was no evidence adduced at the trial that the Minister prescribed any road setback inconsistent with the current development scheme for Gulu Municipality. A setback is measured from the point where the road reserve ends. This particular road falls under the category of roads in respect of which item 3 (e) of the first schedule to *The Roads (Road Reserves)*

(Declaration) Instrument, S.1 358—1, allows a road reserve (an area on either side of the road set aside for future expansion) that runs parallel to and distant fifty feet (approximately fifteen metres) from the centre line. Therefore, in respect of Toya Kilama Road, the total area allowed for both the road reserve and the setback was 20 metres. That being the case, the respondent was liable to observe the road reserve and setback dimensions that were indicated on Sheet No. 21/NE/2 and 22/2/NW/1 for Toya Kilama Road.

[21] Although the second plaintiff P.W.2 Okwany James testified that he had not constructed any part of the perimeter wall to his plot on Toya Kilama Road, but fifteen meters away from the road, along the road, when the court visited the *locus in quo* it was established that 12 meters of the perimeter wall had protruded into the area planned for the road. Part of it lay within the road reserve while another part lay within the road setback.

[22] According to Regulation 2 (1) of *The Town and Country Planning Regulations, S.I 246-1* after any area has been declared to be a planning area, no person may erect any building or develop any land in that planning area unless he or she first obtains from the Planning Committee permission so to do. Regulation 5 (1) mandates the Planning Committee to approve any application made under the Regulations unless the application contravenes any provision contained in any outline scheme or detailed scheme then in preparation or already approved. Regulation 36 (1) of *The Public Health (Building) Rules, S.I 281—1*, permits Local authorities to grant permits for erection of temporary buildings, regulation 36 (2) forbids the grant of such permits for a building any of the walls of which are to be constructed wholly or partly of stone, brick or concrete.

[23] Section 61 (4) of *The Physical Planning Act, 2010* saved statutory instruments made under *The Town and Country Planning Act, Cap. 246* which continue in force if it is not inconsistent with the Act, until they are revoked or until

Regulations are made under the Act. Accordingly, Regulation 2 (4) of *The Town and Country Planning Regulations S1 246-1*, provides that any person who erects any building or develops any land in a planning area, after the area has been declared to be a planning area, without first obtaining from the Planning Committee, permission so to do, commits an offence and is liable upon conviction to a fine not exceeding one thousand shillings or in default of payment to imprisonment for any period not exceeding four months and in the case of a continuing offence was liable to a further penalty not exceeding twenty shillings for each day during which the offence continued after written notice of the offence has been served on the offender.

[24] The permission granted to the plaintiffs (exhibit P.E.1 a receipt dated 7th July, 2011) was for construction of the wall "along Toya Kilama Road, Iriaga." It was not permission for construction within the road reserve. In *Turner v. Ringwood Highway Board [1870] LR 9 Eq 418 1870*, it was decided that once a highway exists the public has a right to use the whole of the width of the highway and not just that part of it currently used to pass or re-pass. In *Regina v. Pratt (1855) 4 E B 860*, Crompton J, Erle J held; "I take it to be clear law that, if a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and re-passing, he is a trespasser." Therefore, the plaintiffs' construction of part of their perimeter wall within the road reserve extending up to a distance of twelve meters from the centre line contravened section 3 of the *Roads Act* which provides as that; "subject to any order which may be made under section 4, no person shall, except with the written permission of the road authority, erect any building or plant any tree or permanent crops within a road reserve."

Second issue; Whether the notice of demolition of the perimeter wall fence was lawfully issued to the plaintiffs.

[25] There are two options available to municipal authorities who intend to demolish illegal structures. The first one is provided for under section 66 of *The Public Health Act*. Where in the opinion of a local authority, a nuisance exists with respect to premises which, in its opinion, are so defectively constructed or so situated that repairs to or alterations of the premises are not likely to remove the nuisance, the local authority may apply to a Grade One Magistrate's Court for a demolition order; and, upon the court being satisfied that the nuisance exists, and that repairs to or alterations of the premises are not likely to remove the nuisance, the court may order the owner of the premises to commence to demolish the premises on or before a specified day, being at least one month from the date of issuing the order and to complete the demolition and to remove the materials which comprised the premises from the site before another specified day.

[26] Under this option, the developer is entitled to service of notice of the application for a demolition order, and he or she may attend and give evidence at the hearing of the application by the court. Under section 66 (3) of *The Public Health Act*, where the developer fails to comply with an order for demolition, the local authority may cause the premises to be demolished and may recover from the owner the expense incurred in doing so after deducting the net proceeds of the sale of the materials which the local authority may sell by auction.

[27] In the instant case, the impugned notice is dated 19th October, 2011(exhibit P.E 2) and is not prima facie issued by court but by the respondent's Town Clerk. The period of notice was only 14 days contrary to the statutory requirement of at least one month from the date of issuing the order. The defect was cured since demolition was after the court dismissed application on 27th February, 2012 and

after the plaintiffs had been heard. It therefore was clearly not issued in accordance with the requirements of section 66 of *The Public Health Act*.

[27] The second option is provided for by section 46 of *The Physical Planning Act, 2010*. When the municipal council invokes this provision, a local physical planning committee may serve an enforcement notice on an owner, occupier or developer of land, where the committee is satisfied that any of the conditions of development permission granted under this Act have not been complied with. The enforcement notice should specify a period within which the owner, occupier or developer shall comply with the notice.

[28] In the instant case, the notice dated 19th October, 2011(exhibit P.E 2) was renewed by another notice dated 26th April, 2012 (exhibit P.E 3) giving the plaintiffs another 14 days to demolish the wall. The court notes though that the specified format in the Ninth Schedule was not used but the content is compliant. According to section 46 (4) of *The Physical Planning Act, 2010*, an owner, occupier or developer of land on whom an enforcement notice is served may, within the time specified in the notice for complying with the notice, appeal against the notice to the next higher physical planning committee. The plaintiffs did not appeal the notice. The second plaintiff P.W.2 Okwany James testified that the defendant demolished the wall and plants in his compound on 28th February, 2013. According to D.W.3 Nyadru Richard Anyama, the defendant's Principal Health Inspector testified that the wall was demolished after expiry of the period of notice. The procedure adopted was therefore consistent with section 46 of *The Physical Planning Act, 2010*.

Third issue; <u>What remedies are available to the parties?</u>

[29] The plaintiffs claimed compensation for the land constituted in the road reserve, for the cost of the wall and crops that were destroyed and for general damages. Under section 66 (4) of *The Public Health Act*, no compensation is payable by

the local authority to the owner or occupier of any premises in respect of its demolition under the Act.

[30] Furthermore, under section 55 (4) of *The Physical Planning Act, 2010*, no compensation is payable in respect of any building the erection of which was begun after the date of the publication of the order declaring a planning area, unless the erection was begun under and erected in accordance with the permission of the board or a committee or a local authority. This is because by necessary implication, an owner or occupier of any land or premises affected by the exercise of a right of entry under the Act is entitled to compensation only for damage caused unlawfully or unnecessarily by the entry upon his or her land or premises.

[31] To the contrary, section 47 (2) of *The Physical Planning Act, 2010,* provides that where the local government enters onto the land following an enforcement notice, the local government may, without prejudice to any penalties that may be imposed, or any other action that may have been taken under this Act, recover from the person on whom the enforcement notice is served by way of a suit, any expenses reasonably incurred by the local government in connection with the taking of those measures. The defendant though did not file a counterclaim and cannot be granted any relief too.

[32] Finally, a party will not be allowed to base its claim on its own wrong (See *Nabro Properties Ltd v. Sky Structures Ltd & 2 others [2002] 2 KLR at page 299* where Gicheru J.A stated that “it is a maxim of law recognised and established that no man shall take advantage of his own wrong”). The plaintiffs having constructed a perimeter wall fence that intruded into a road reserve where the public has a right to use the whole of the width of the highway, and not just that part of it currently used to pass or re-pass. Their use of land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and re-passing, was

technically an act of trespass onto the road. They cannot seek relief founded on t heir own wrongful acts as trespassers.

Order :

[33] The plaintiffs being unsuccessful in their claim, they are not entitled to any of the remedies sought. Since they have failed to prove their case on the balance of probabilities, the suit is accordingly dismissed with costs to the defendant.

_____

Stephen Mubiru

Resident Judge, Gulu

Appearances

For the plaintiffs : Mr. Donge Opar.

For the defendant : Mr. Oyet Moses.