

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

CIVIL SUIT NO.15 OF 2016

DAVID MELVIN ARYEMU OCHENG

(Suing through His Lawful Attorney

AGNES OCHENG MUKUPE):::PLAINTIFF

VERSUS

UMEME LIMITED :::DEFENDANT

BEFORE HON. MR. JUSTICE SSEKAANA MUSA

JUDGMENT

The Plaintiff filed this suit through his lawful Attorney Agnes Ocheng Mukupe seeking orders from this honorable court that the installation of transformer No.11/2556/100 on land comprised in Kyadondo Block 203 Plot 6 land at Nansana is unlawful, illegal and amounts to trespass; an order to remove the transformer and electric poles from the plaintiffs land; an order for account; a permanent injunction against further trespass; general and punitive damages and costs of the suit.

The plaintiff is the registered proprietor of the suit land and has been in effective occupation of the land that comprises the family home of the late Daudi Ocheng. It is contended by the plaintiff that sometime in 2000 or thereabout, the

defendant company, without the requisite notice and consent, shifted and or placed the Transformer from its original position/location at the edge of the land to the middle of the land, rendering the property unusable and curtailing any further development of the property for the plaintiff's benefit.

The Plaintiff alleged that he is the registered proprietor of the suit land comprised in Kyadondo Block 203, Plot 6 land at Nansana, Wakiso District which he acquired from his late father, Daudi Okech Ocheng. He claimed that the defendant unlawfully installed transformer No.11/2556/100 on the suit land and connected thereon dangerous overhead power lines without his consent which amounted to trespass. He sought an order to remove the transformer and the lines. He also sought an order of account from the proceeds earned by the defendant from the transformer and lines and the same be shared equally with him (Plaintiff) in addition to general damages and costs of the suit.

The Defendant on the other hand denied the plaintiff's claims of trespass and stated in its written statement of Defence that the transformer and power lines on the suit land were placed there by Uganda Electricity Board in the 1960s with the consent of the plaintiff's late father, Daudi Okech Ocheng.

ISSUES FOR DETERMINATION

At scheduling the following issues were framed for determination by the Honorable court;

- i. Whether the Defendant is a trespasser on the suit land?*
- ii. Whether the Defendant is in breach of its statutory duty?*

iii. *What remedies are available to the parties?*

DETERMINATION OF ISSUES

Whether the Defendant is a trespasser on the suit land?

Counsel for the Plaintiff submitted that the defendant's acts and omissions of shifting the transformer from the edge to the middle of the land without prior notice and consent of the landlord amounts to trespass and breach of statutory duty. It is not disputed that the suit land comprised in Kyadondo Block 203 Plot 6 is registered in the names of the plaintiff as the proprietor. The certificate of title was admitted in evidence as PEX 1. As the proprietor, the plaintiff is entitled to enjoy peaceful and quiet benefit of his property in exclusion of all third parties. The defendant is limited liability company incorporated in Uganda conducting the business of distributing hydroelectricity within Uganda for gain and is licensed so to do by the electricity regulatory authority. It is contended by the defendant that it is a successor company of UEB and only inherited its assets and not liabilities. The impugned transfer of the transformer was done in 2000 way after the defendant company came into existence. In exercising its business the defendant erects poles and transformers to supply electricity to its users and this is done by planting poles on landed property. It has been demonstrated by the plaintiff that sometime in 2001, the defendant company transferred its transformer that was placed on the plaintiff's land from the edge of the land to the middle without attaining approval by the landlord. This action amounts to trespass which is actionable in law as a tort.

Plaintiff's counsel further submitted that trespass refers to the unjustified entry onto the land in another's possession, that is to say, entering onto the land without permission or refusing to leave when permission has been withdrawn. My lord, trespass to land occurs when a person makes an authorized entry upon land and thereby interferes or portends to interfere with another person's lawful possession of the land. *See case of Justine E.M. N Lutaya Vs. Stirling Civil Engineering Co. Ltd, SCC.A No.11/2002.*

Counsel for the Plaintiff finally submitted that the plaintiff is the owner of the suit land as registered proprietor and was in effective use of the same until the unauthorized transfer of the transformer from its original place to the middle of the land, rendering the whole piece of land unusable. The Defendant witness at cross examination was asked whether they had attained any consent from the plaintiff at the time of relocating the transformer but could not produce any documentary proof of the said consent and or approval for the transfer of the transformer from its original place. It is not denied that there exists a transformer on the suit land and that there are several low lying wires over the suit land as is seen in PEX4. It was their submission that by so acting, the defendant infringed and or violated the plaintiff's possessory rights over the suit land and should be found culpable in law as a trespasser thereon. It is settled law that trespass is actionable per se and is a continuous tort.

Counsel for the defendant submitted that in paragraph 4(b) of the plaint, the plaintiff alleged that his late father had lodged a complaint through the area LC1 to Uganda Electricity Board (UEB) regarding the lines. He referred to the LC1 letter **(PEX3)**. In paragraph 4(c), the Plaintiff claimed that the lines and

transformer were erected without the consent of his late father. Trespass to land occurs when a person directly enters upon another's land without permission and remains upon the land, places or protects any object upon the land. *See Salmond and Heuston on the Law of Torts, 19th edition (London: Sweet & Maxwell, (1987) 46)*. Trespass to land is committed inter-alia where a person wrongfully or unlawfully sets foot upon, or takes possession of, or takes materials from, land belonging to another person. *See Hannington Njuki v George William Musisi (1999) KALR 779 at 789; George Kasedde Mukasa v Emmanuel Wambedde & others (2004) KALR 551 at 565*. Therefore in order to succeed in the trespass case like the instant one, the Court of Appeal in *Sheikh Muhammed Lubowa v Kitara Enterprises Ltd; CA No. of 1987* observed that one must prove;

- a) *That the disputed land belonged to the plaintiff,*
- b) *That the Defendant had entered upon it, and*
- c) *That entry was unlawful in that it was made without permission or that the Defendant had no claim or right or interest in the disputed land.*

See: Tayebwa Geoffrey v Kagimu Ngudde Mustafa. H.C.C.S No. 118 of 2020.

In the instant case, it is not dispute that there is a transformer and lines on the suit land. However, their being on the land does not constitute trespass. This is because they have been there since the 1960's with the consent of the plaintiff's late father, Daudi Okech Ocheng.

Defence counsel further submitted that the plaintiff being an administrator of the estate of his late father, he inherited the suit land with the wires and lines thereon. Firstly, it is not indicated anywhere in the plaint when the alleged

trespass started. The plaint does not state when the transformer and lines were placed on the land. Secondly, the plaint has glaring false hoods. For instance, in paragraph 4(b) thereof, the plaintiff alleges that his father lodged a complaint through the area LC1 to Uganda Electricity Board regarding the lines. He refers to the LC1 letter (PEX3) of 2001. PW 1, Agnes Ocheng Mukupe testified in court that her father died on 1st June, 1966. (also see PEX1). Therefore a dead person could not have instructed the LC1 to write the letter to UEB in 2001. Further the said letter (PEX3) is proof that the alleged transformer and lines were not placed on the suit land by the defendant. This is because the Defendant was not in existence in 2001. John Muhwezi (PW1) told court that the Defendant was incorporated in 2005. He further submitted that the plaintiff did not complain about the transformer in the said 4-7-2001 letter (PEX3). The plaintiff's complaint was that the then UEB had made new connections without his consent. It does not point out any form of trespass on the suit land. PW1 testified that she did not have any written complaint about the transformer.

In further submission, counsel for the defendant stated that in paragraph 4(c), the plaintiff alleged that the lines and transformer were erected without the consent of his late father, Daudi Okech Ocheng. It is our submission that the Defendant or UEB did not trespass onto the suit land. This is because the transformer and lines were placed on the land with the consent/ permission of the plaintiff's late father. During cross- examination, PW1 admitted in court as follows:

"I know UEB placed the transformer in 1964. UEB lawfully placed the transformer on the land. My late father lawfully consented to the placement of

the transformer on the land despite what is stated in paragraph 3 of the plaint and witness statement."

The plaintiff's own evidence/ admission clearly shows that there is no trespass on the suit land. Also see PW1's letter dated July 29, 2015 (DEX1) where she acknowledges that the transformer was placed on the suit land by her late father more than five decades ago. This clearly shows that the plaintiff's plaint and evidence in chief (Witness Statement) have glaring falsehoods. All this corroborates the evidence of DW1 that the transformer and lines have been on the land since the 1960's (long before the Defendant came into existence) with the permission and consent of the plaintiff's late father.

Counsel for the defendant submitted that PW1 asserted at the hearing that the Defendant diverted the transformer from the original position. The plaintiff's counsel also stated in paragraphs 4.1 and 8.0 of his written submissions that the Defendant shifted the transformer and the lines. The defence counsel contended that the alleged "shifting of the transformer" was not pleaded in the plaint. It was an afterthought that came up during the hearing of the case which explains why the plaintiff sought to amend the plaint at an advanced stage of the case. The plaintiff is departing from his pleadings and should not be allowed to do so. The gist of the plaintiff's case is whether the transformer and lines are lawfully on the suit land. Further, the plaintiff did not lead any evidence to prove that the Defendant diverted or shifted the transformer and lines. In fact, PW1 told court that she does not reside on the suit land. She stated that she last resided on the land between 1961-1966 and that she did not know when the alleged diversion took place and who carried it out. In conclusion of this issue, it was their

submission that plaintiff failed to prove that the placement of the transformer and lines on the suit land was without permission or consent of the then lawful owner, his late father. In fact PW1 admitted that they were placed on the land with the permission of their late father. From the foregoing, the plaintiff failed to prove trespass onto the suit land.

Analysis

In the leading case of trespass *Justine E.M.N Lutaaya vs Stirling Civil Engineering Company Civil Appeal No.11 OF 2002 (SC)* it was held that;

“Trespass to land occurs when a person makes an unauthorized 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”

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) it states that;

“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.”

The plaintiff’s case was that the defendant installed a transformer connected with dangerous overhead power lines on land comprised in Kyadondo Block 203 plot 6 land at Nansana without the consent from the registered proprietor and or execution of way leave form.

The plaintiff does not state in his plaint or witness statement when the said transformer was installed on the said land and it would appear from the certificate of title that the Late Daudi Ocheng was not registered on this land until 1987 when the Administrator (Martin Alikar) obtained a certificate of title which was later transferred in the names of the plaintiff in 1993.

The plaintiff as the successor in title is not conversant with the exact details surrounding the installation of the said transformer and power lines. In the pleadings and evidence they seem to dispute the fact the late Daudi Ocheng applied for power and the same was granted. In addition, they also complain as seen from the pleadings and witnesses statement that the same transformer was transferred from its original position to the current position without their consent or approval.

The plaintiffs have not laid any evidence of shifting the transformer and power lines from the alleged original position to the current position. The photographs exhibited in court do not show when the transformer was transferred but rather shows that there is a new structure that is being constructed under or close to the power lines. The electric poles on which the transformer is standing do not

appear to be new with exception of one electric pole in the middle which appears new because it does not have any black oiling on it.

In 2001, the plaintiff or his agents complained to the defendant's predecessor about the connection from Daudi Ocheng's pole in a dangerous manner because the same is affecting the house under construction as it passed in middle of the structure being put up.

In the case of *Umeme Ltd v Sonko & Anor (MISCELLANEOUS APPLICATION NO. 025 OF 2013) [2014] UGHCCD 172 (24 October 2014)*, court 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.'

With the evidence adduced, this court is therefore satisfied that the plaintiff is in actual possession of the suit land having acquired the same from the late Daudi Ocheng and it is also true that the defendant entered the said land and connected new power lines that affected the plaintiff's use of the land and affected the construction of their house. But I do not agree that the transformer was changed from the alleged original position to the current position since no evidence has been laid before this court. Secondly, connecting other electricity consumers to already existing Electricity system does not require consent from the plaintiff as they had earlier on sought. The defendant has a duty to ensure that the

connection on other consumers on the grid does not affect the other owners of neighbouring plots and in case it does they have a duty to make good the damage or injury.

Whether defendant is in breach of its statutory duty?

Plaintiff's counsel submitted that we have demonstrated that the defendant trespassed on the plaintiff land when it shifted the transformer from its original place, at the edge of the land to the middle, where it has caused great inconvenience to the plaintiff. It is contended by the plaintiff that the defendant did not attain any approval or consent to transfer the transformer from its original place. The defendant is regulated by the electricity regulatory authority established under the electricity act 1999 cap 145 laws of Uganda. It is verily provided under section 67(4) that:-

"A licensee shall accept for maintenance or repair of an electric supply line, before entering any private land for 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."

DW1 admits to the fact that they had no consent or any approval by the land owner although he asserted that it was a requirement to attain such consent from the very land owner whose property is affected by their works. The plaintiff's counsel submitted that this admission is explicit, irreconcilable with the general defense on record and cannot be taken lightly. It is also important to note that the plaintiff did not, at any time given time during the transfer of the transformer,

receive any notification as is stipulated under law. To this extent the defendant was in breach of statutory duty and should be held culpable in law.

Defence counsel submitted that in paragraph 6 of the plaint, the plaintiff stated the particulars of breach of statutory duty to include Defendant's alleged failure to obtain consent before erecting the transformer and lines and the refusal to heed his complaints. It was submitted that the placement of a transformer and lines onto the suit land without consent would constitute trespass and not to breach of statutory duty. The refusal to respond to a complaint cannot also constitute a breach of statutory duty.

Analysis

This issue has a direct bearing on the first issue. The court has found that there is no trespass on the suit land because the transformer and lines were placed thereon by UEB with the consent of the plaintiff's late father (Daudi Ocheng). *In Mahmoud Saad Said v Attorney General; Miscellaneous Application No.1023, Justice Christopher Madrama (as he then was)* held that,

"Breach of statutory duties is a tort or misfeasance in a public office and is actionable at common law in a claim for damages or an injunction or to both. In Dawson vs. Bingley Urban Council [1911] 2KB 149, it was held by Farwell L.J. at page 156 that;

"Breach of a statutory duty created for the benefit of an individual or a class is a tortious act"

According to *Winfield & Jolowicz on Tort, 17 Edition at pages 352-354*, breach of statutory duty constitutes the following elements:

- a) *The statute must impose a duty.*
- b) *There must be a breach of duty.*
- c) *The breach must result into damage to the claimant.*
- d) *There must be a breach or connection between the breach of a statute by the defendant and the damage the claimant has suffered*

In the instant case, the plaintiff's cause of action is founded on trespass and not breach of statutory duty. It is also trite that courts do not admit an action for breach of statutory duty where the claimant has other alternative remedies. Further, the plaintiff's counsel cited section 67(4) of Electricity Act, 1999 but did not explain how the Defendant or UEB had breached it. In any case, the transformer was placed on the suit land in the 1960's, and the burden was on the plaintiff to prove how UEB had breached the statute that was applicable at the time. In any case, the plaintiff's claim or action for breach of statutory duty by UEB would be time barred. It is also important to note that the tort of breach of statutory duty is only applicable to public bodies or corporations and duties and the respective penalties or sanctions for breach. The tort does not apply to the defendant being a private company and not a public corporation established by statute. In sum, the plaintiff did not prove the elements of breach of statutory duty and the submissions of the plaintiff's counsel did not show how the tort was applicable to the Defendant and how the Defendant is liable.

This issue fails.

What remedies are available to the parties?

Plaintiff's counsel submitted that based on the evidence produced by the plaintiff in proof of his claim against the defendant, it is pertinent that this honorable court exercises its inherent jurisdiction and discretion to award the prayers sought by the plaintiff. In the plaint, the plaintiff sought Declaratory orders against the defendant; an order to remove the transformer and electric poles from the plaintiff's land; an order for account for proceeds earned from all clients that have accessed power through the illegal power connection and a percentage share in the proceeds collected therefrom be awarded to the plaintiff for usage of his land by the defendant to generate income; a permanent injunction against further trespass; general and punitive damages and costs of the suit.

The plaintiff's grievance as can be deduced from the pleadings is the transfer of power lines and to avoid the effect they have on the construction of their house and this seems to have been the genuine basis of coming to court. The claims made for sharing proceeds collected from the consumers of power in estimate of 2,396,160,000/= being made by the plaintiff has no basis in law and is very speculative and outrageous.

The plaintiff had never made complaint to the defendant as the successor in title and at least there is no such written complaint in writing. This court would not grant the remedies in the plaint since the plaintiff failed to prove the alleged trespass premised on allegation that the transformer was transferred from the alleged original position to current position.

This court orders that the defendant transfers the power lines under and/or close to the plaintiff's house under construction in order to facilitate the completion of the same. The same should be done at the sole expense of the defendant.

I decline to award any costs to either party since the current parties are not to blame for anything that may have gone wrong. Each party to bear its own costs.

I so order.

SSEKAANA MUSA

JUDGE

15th June 2021