

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
CIVIL SUIT NO. 010 OF 2021

MULHUBIRA DAVID ::: PLAINTIFF

VERSUS

AMBITIOUS CONSTRUCTION CO. LTD ::: DEFENDANT

HON. MR. JUSTICE VINCENT EMMY MUGABO

JUDGMENT

The case for the plaintiff as gathered from the plaint is that he is the registered proprietor of land comprised in FRV KBO45 Folio 17 Bukonzo Block 26 Plot 267 at Kambukamabwe II in Kasese district (the suit land). That around March 2021, the defendant trespassed on the suit by depositing unwanted soil with broken glasses, stones and murram from a nearby construction site where the defendant was contracted by the government to construct a border post. The plaintiff avers that the unwanted deposit on his land has substantially affected his use of the land and wants to restore it to its original state. He prays for a declaration that the defendant is guilty of trespass, compensation to enable him restore the suit land to its original state before the trespass, a permanent injunction, general damages, exemplary damages, interest and costs.

In its written statement of defence, the defendant denied ever depositing any soil on the plaintiff's land. The defendant averred that while it was carrying out construction of the border point, several people approached it and asked to use the excavated soil from the construction site of the defendant. The defendant offered the several individuals the soil who took the same to their respective homes for use and that the defendant has

never trespassed on the plaintiff's land. Later in the witness statement for the defendant, DW1, Miiro Tony testified that upon the request of many locals including the plaintiff, the defendant dumped soil on the respective locals' lands including that of the plaintiff.

Representation and hearing

The Plaintiff was represented by Mr. Mishelle Geoffrey of Bagyenda & Co. Advocates while the defendant by Mr. Osinde Nathan of OSH Advocates. At the hearing, the plaintiff led evidence of three witnesses. The plaintiff as PW1, Geoge Kaima Bamwite as PW2 and Muhindo Rahab as PW3. The Defendant led the evidence of one witness, Miiro Tony as DW1. The hearing proceeded by witness statements and cross examination on the same.

At the close of the defence case, it was agreed by counsel for both parties that a locus visit was not necessary owing to the fact that the facts that court could have discovered during the locus visit were themselves not in disputed. Court agreed with both counsel. Advocates for both parties filed written submissions which I need not reproduce but note that they have been considered herein.

In their joint scheduling memorandum, the parties agreed to the following issues for court's determination.

1. Whether the defendant trespassed on the plaintiff's land
2. What remedies are available to the parties?

Burden and standard of proof

It is trite that in civil matters, the burden of proof rests on that person who desires any court to give judgement as to any legal right or liability

dependent on the existence of facts which he or she asserts exists and would fail if no evidence is given on either side unless it is provided by any law that the proof of any particular fact shall lie on any particular person. See **Section 101 - 103 of the Evidence Act Cap 6.**

The standard of proof is on a balance of probabilities.

Court's consideration

Issue 1: Whether the defendant trespassed on the plaintiff's land

Trespass to land occurs when a person directly enters upon land in possession of another without permission and remains upon the land, places or projects any object upon the land (see ***Salmond and Heuston on the Law of Torts, 19th edition (London: Sweet & Maxwell, (1987) 46***). As such, in order to disclose a cause of action of the tort of trespass to land, the plaintiff has to plead facts to show that; (a) he was in possession of the suit land at the time of the entry complained of; (b) there was an unlawful or unauthorised entry by the defendant; and (c) the entry occasioned him damage.

All the plaintiff's witnesses testified that the defendant's lorries deposited soil onto the plaintiff's land in early March 2021. Ownership and possession of the suit land at that material time is not disputed. It is an agreed fact that the plaintiff is the owner of the suit land. In his witness statement however, **DW1** states that the deposit of the soil on the plaintiff's land was requested for by the plaintiff. Further that, during the deposit and levelling of the plaintiff's land, the defendant's servants were stopped by the district environment officer to avoid contamination of the nearby river Mpondwe, by which time, the defendant had already levelled the biggest chunk of the plaintiff's land.

DW1 testified that the stoppage in depositing and levelling annoyed the plaintiff who demanded that the defendant completes the levelling which they could not do due to the orders of the environment officer. The defendant relied on **DEX1** which is an agreement between Bwambale Abdul and the defendant for the defendant to deposit excavated materials on the former's land. **DEX2** is an agreement between the defendant and Baluku Robert in the same terms. **DEX3** is written permission from Mpondwe-Lhubiriha Town Council to the defendant to deposit the excavated material on Baluku Robert's land. **DEX4** is an LC1 letter authorising the defendant to deposit the excavated material on Bwambale Abdul's land and lastly, **DEX5** which is an extract of minutes of the locals who had agreed to allow the defendant deposit the excavated materials on their respective pieces of land.

In all the documentary evidence of the defendant, none refers to the plaintiff authorising the defendant to deposit excavated materials on his land. During cross examination, **DW1** confirmed that the defendant has never removed the material from the plaintiff's land because the case is still in court but that the defendant would be willing to abide by the outcome of the judgment.

This is a clear case of trespass. The defendant, without authority placed excavated material upon the suit land owned by and in the possession of the plaintiff. Trespass is actionable per se and the plaintiff needs not prove damage. Even when that is the case, **PW3**, a son to the plaintiff testified that he was growing crops on the suit land when the defendant dumped the soil on the suit land, his crops to wit, yams were destroyed. **PW1** also testified that he intended to construct an arcade on the suit land before the defendant deposited the unwanted excavated material thereon. He

relied on P ID1, a building plan that was allegedly approved by the Mpondwe-Lhubiriha Town Council in November 2020.

I find that the plaintiff has on a balance of probabilities proved that the defendant trespassed on his land and this issue is answered in the affirmative.

Issue 2. What are the remedies available to the parties?

The plaintiff is successful in this suit. He made the following prayers;

- a. A declaration that the defendant trespassed on the suit land. It is hereby declared so.
- b. **Compensation** in the sum of UGX 500,000,000/= to enable the plaintiff restore the suit land to its original state.

No submissions were made by counsel for the plaintiff in this regard. The plaintiff relied on **PEX3**, a receipt for the sum of UGX 46,500,000/= from LB Construction Co. Ltd for hire of an excavator for 21 days starting from 16th November 2020. He also relied on **PEX4**, fuel receipts purportedly issued by Shell Kasese during the time he was using the earth moving equipment.

During cross examination, the plaintiff noted that he would be okay if the plaintiff removed the soil from his land and that he (the plaintiff) would start on his plan. I also find that the receipts the plaintiff relies on were discredited during cross examination. The discrepancies in the numbering of the receipts by the purported issuer and the respective dates on which they were purportedly issued were not sufficiently explained.

I would be hesitant to grant this prayer but order the defendant to remove all the excavated material that it deposited on the suit land with immediate effect.

c. General damages

General damages are usually awarded at the discretion of the court.

In the case of **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305** court held that;

“in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered”.

The award of general damages is normally 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**

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**

It was submitted for the plaintiff that the plaintiff would not be able to use the suit land until at least after ten years when the soli is expected to have properly compacted. Also that it would cost the plaintiff about UGX 500,000,000/= to remove the unwanted soil from the suit land. Counsel suggested a sum of UGX 500,000,000/= to be awarded in general damages.

Counsel for the defendant prayed that the plaintiff's attempts to justify the high general damages should be disregarded. He noted that the plaintiff has not been deprived of his land and nothing was adduced in evidence to indicate that the excavated material contained any glass or dangerous material as alleged by the plaintiff.

I note that it is now approximately twenty months since the defendant deposited the unwanted excavated material onto the plaintiff's land. The plaintiff has not used the suit land for his intended purposes ever since or for any other purpose. Ordinarily, he has lost use of the suit land for that time. In such a circumstance, I would award the plaintiff a sum of UGX 50,000,000/= in general damages.

d. Punitive damages

Counsel for the plaintiff relied on the case of ***Kanji Naran Patel Vs Noor Essa & another [1965] 1 EA 484*** to argue that exemplary damages would be awarded if trespass is accompanied by aggravating circumstances, if there is oppressive, arbitrary and unconstitutional conduct by a servant of government or in cases where the defendant's conduct has been calculated by him to make a profit for himself. Counsel argued that large sums of money are allocated to contracts like the one held by the defendant to cater for deposit of excavated material yet the defendant chose to deposit on the plaintiff's land which is calculated to make a profit for the defendant. Counsel proposed an award of UGX 200,000,000/= in exemplary damages.

Counsel for the defendant argued that the defendant did not do any arbitrary or high handed act that would warrant the grant of exemplary damages. Further that exemplary damages should not be used to enrich the plaintiff but to punish the defendant. That court should be pleased

not to award exemplary damages, but if it is inclined to make an award, it should not be excessive.

Punitive damages are intended to punish the defendant for the wrong done to the plaintiff and for acting as a deterrent. See ***Rookes vs Barnard & Others [1964] AC 1129***

In the case of ***Obongo vs Municipal Council of Kisumu [1971] EA 91*** the court held that; *“It is well established that exemplary damages are completely outside the field of compensation and although the benefit goes to the person who was wronged, their object is entirely punitive”*.

I have looked at the evidence of both parties and I note that the plaintiff complained to the defendant on the wrongful deposit of the excavated material on the suit land in March 2021. Nothing was done to correct the wrongful deposit. No steps were taken to avert the likely consequences of the unwanted deposit of excavated material for this long. This behavior is unwarranted and ought not to go unpunished. I would in these circumstances award UGX 5,000,000/= in exemplary damages to the plaintiff.

e. **Interest**

The basis of an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly see ***Harbutt’s Placticine Ltd v. Wayne tank and Pump Co Ltd [1970] QB 447***.

An award of interest is discretionary. Courts in determining a just and reasonable rate of interest, take into account the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of

interest that takes into account the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due see **Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011** and **Kinyera v. The Management Committee of Laroo Boarding Primary School H. C. Civil Suit No. 099 of 2013**.

Interest on general damages is awarded from date of Judgment until payment. See **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd No.2 [1970] EA 469**. Counsel for the plaintiff sought a rate of 40% per annum on the decretal sums. I find this rate on the high end and I accordingly award interest at 8% on general and punitive damages.

In the final result, this suit succeeds and I make the following orders;

- i. The defendant shall forthwith remove all the excavated material it deposited on the suit land
- ii. A permanent injunction is issued to restrain the defendant from committing any further acts of trespass on the suit land
- iii. The plaintiff is awarded general damages in the sum of UGX 50,000,000/=
- iv. The plaintiff is awarded exemplary damages in the sum of UGX 5,000,000/=
- v. Interest on i & ii above is allowed at 8% p.a from the date of this judgment until payment in full
- vi. Costs of the suit are awarded to the plaintiff.

I so order

Dated at Fort Portal this 25th day of November 2022.



Vincent Emmy Mugabo

Judge

The Assistant Registrar will deliver the judgment to the parties



Vincent Emmy Mugabo

Judge

25th November 2022.