

The parties in their scheduling memorandum agreed on the following issues for determination by court;

- (i) ***Whether the Plaintiff's cause of action is barred by limitation, if not;***
- (ii) ***Whether the Plaintiff is entitled to the damages.***
- (iii) ***Who is entitled to costs?***

Mr. Didas Nkurunziza instructed by *M/s. Ruyondo & Co Advocates* represented the plaintiff while *M/s. Birungyi, Barata & Associates* the defendant. Both Counsel filed written submissions which are on court record. I will therefore not reproduce them in this judgment. They also furnished copies of authorities they relied upon to court and I thank them for that

From the outset it is noted as per the court record that *Issue No.1* was conclusively determined by the court as a preliminary point of law earlier on 09/12/2011, and the suit proceeded only on the unresolved issues of special and general damages, *mesne* profits and costs. I therefore agree with submissions of Counsel for the plaintiff in rejoinder that the issue of limitation of action is *res judicata*. As was held in the case of ***Kamunye v. Pioneer Assurance Ltd [1977] E.A 263***, where a matter is *res judicata* the parties are principally precluded from subsequently litigating over the same issue in the same matter once again. It was thus erroneous for the Counsel for the defendant to attempt to resurrect and address the issue once again.

I also find that the prayer as regards an order for the defendant's handing over of the certificate of title to the plaintiff was also determined by court earlier on 9/12/2011 and found to have been satisfied. There is therefore no need to go over it again. The only outstanding issues relate to damages, *mesne* profits, and costs of the suit.

(a) Special damages.

The position of the law as was stated in. ***Strom Brucks Aktie Blog v. Hutchinson (1905) AC 525 – 526; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, SCCA No.7 of 1995; Dr. Godwin Turyasingura v .Wheels of Africa, H.C.C.S.No. 485 of 1995; Musoke David v. Departed Asians Property Custodian Board [1990 – 1994] E.A. 219*** is that special damages must be specifically pleaded and strictly proved.

The plaintiff in the instant case claims for special damages of Shs.285, 250,198/= as the value of lost benefits based on rental income attainable from 1988 to 2010 from the suit property. Testifying as PW1 the plaintiff, Mr. Fred Kamugira, stated that when he took possession of the suit property, it was not in a very good tenantable condition and needed quite extensive

renovations to it to bring it up to a rentable standard, but that he could not renovate it because the defendant failed on quite a number of times to handover the certificate of title which was a precondition by the Planning Authority, the Kampala City Council then, for obtaining permission to carry out any developments on the suit premises.

The plaintiff further testified that he sanctioned an evaluation to be carried out on the property to ascertain its rental income receivable with effect from 1988 up to 2010 when the title was eventually handed over; which rent he lost had as a result of failure to renovate the property which was a direct consequence of the delay to hand over to him the title by the defendant company. The evaluation report authored by *M/s. Bageine & Company Valuers & Surveyors* dated 11/03/2010, shows that the terms of reference were;

“To undertake a valuation of the above property with the view to ascertaining its RENTAL INCOME RECEIVABLE WITH EFFECT FROM 1988.”

The report gives a total figure of UGX 285,250,198/= as benefits lost based on rental income attainable from 1988 to 2010. The plaintiff also claims as special damages UGX.2, 850,000/= as valuation fees, and he attached a debit note from *M/s. Bageine & Company Valuers & Surveyors* to his pleadings to prove that item. He further claims the cost of weekly telephone calls for the last twenty - four years totaling to UGX.1,152,000/=; and transport to and from the defendant company’s premises also for the last twenty-four years for a monthly interval totaling to UGX. 28,000,000/=, but did not attach any supporting documents for these two items.

With due respect, I find that other than simply attaching to his pleadings copy of the valuation report and debit note, the plaintiff did not adduce evidence to support the figures claimed therein. The position of the law as stated in the authorities cited above is that special damages must be specifically pleaded and strictly proved. Simply attaching the valuation report and debit note to pleadings does not amount to strictly proving the claims, but only amounts to “specifically pleading” the special damages.

The valuation report and debit note are said to have been authored by *M/s. Bageine & Co. Valuers & Surveyors*, a firm of valuers. No person was called from this firm to give evidence on the report and debit note and to be tested on the report’s veracity through cross – examination. In fact during the scheduling stages of the case, Counsel for the Defendant put the plaintiff on notice that they would only admit to the tendering in of the valuation report but not its veracity which they would challenge during cross –examination. The valuation report and debit note

essentially remained only as part of the pleadings with no supporting evidence to prove them. To that end the case of *Annet Zimbiha v Attorney General HCCS No 0109* which Counsel for the plaintiff sought to rely upon was quoted out of context. In that case it was held, *inter alia*, that where evidence in chief is not challenged by the opposite party on a material or essential point either through cross – examination, or put in issue by the opposite party who had opportunity to do so, it leads to the inference that the evidence is accepted. This basically means that there must be evidence in chief on a material or essential point in the first place which the opposite party fails to challenge through cross – examination before such an inference can be drawn. In this case, however, no evidence in chief of the author of the report and debit note was adduced upon which the witness would be cross - examined before the inference could be drawn. The valuation report and debit note remained just “stand alone” documents.

Apart from the above, the “debit note” of UGX 2.8 million claimed as professional fees for the valuation is not proof of payment. A debit note ordinarily does not represent the amount expended, but is simply the expressed sum chargeable as due and owing to the holder of the account. Therefore, like was in the case of the valuation report, the debit note attached to pleadings is not proof of the special damages of the amount stated therein, but is just an unproven part of the plaintiff’s pleadings.

In holding as above I am acutely alive to the position in the case of *Administrator General v. Bwanika James & O’r, S.C.C.A. No.7 of 2003* to the effect that agreed facts and documents at scheduling conference form part of the evidence on record and are to be evaluated along with other evidence on record before judgment is given. In the instant case, however, the valuation report was not an agreed document but only admitted so that it could be challenged for veracity, but no such opportunity arose since no evidence in chief was ever adduced on the report by the plaintiff or his witnesses.

It needs to be emphasized that pleadings and attachments thereto are not; and do not amount to evidence (unless of course they are conceded to as such by the opposite party and admitted as exhibits by court) nor do they serve the purpose of evidence. Under *Order 6 r.1 (1) of the Civil Procedure Rules*, pleadings are simply written statements of material facts on which the party pleading relies for a claim or defence, as the case may be. The purpose of pleadings is not to prove the respective claim or defence of the party to a suit, but to give fair notice of the case which has to be met so that the opposite party may then direct his or her evidence to the issues

disclosed by the pleadings. See: ***Reiding v. Skyline Advertising (U) Ltd. [1971] HCB166; Bisuti v. Busoga DA [1971] ULR 179.***

On the other hand, evidence broadly defined is the means from which an inference may logically be drawn as to the existence of a fact; that which makes evident or plain. Evidence is the demonstration of a fact; it signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other. In legal occupation, the term 'evidence' includes all means by which is submitted any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. See: ***Black's Law Dictionary (8th Ed) at page 595.***

Under ***Order 6 r.2 CPR (supra)*** evidence must support the pleadings or so is adduced on the basis of the pleadings at trial. Even where there are attachments to pleadings which the party intends to rely on as evidence during the trial they remain as part of the pleadings and do not amount to evidence until they are exhibited and admitted as such at the trial. Given this position, therefore, it would follow that special damages have not been strictly proved by the plaintiff, and court will be reluctant to award them.

Even if it were granted that the valuation report and debit note amounted to evidence, which they are not, they would still fall far too short of proof of the claimed losses. It is important to note that at the time of entering into the contract of sale the parties did not mutually agree, as part of the terms of the agreement, that the suit premises would be put up for rental purposes. The specific term of the agreement which was known at the time, and which is ordinarily a usual term for such agreements, was for the defendant to hand over the certificate of title for the property to the plaintiff within a reasonable time from the time of purchase. The defendant breached this particular term of the agreement for which the plaintiff would be entitled general damages. However, the defendant cannot be found liable for the plaintiff's failure to rent the suit premises as such purpose was not in the contemplation of the parties' agreement. To hold otherwise would be to give effect to speculation which is too remote in as far as the parties' agreement was concerned.

Regarding the cost of weekly telephone calls for the last twenty - four totaling to UGX.1,152,000/=; and transport to and from the defendant's premises also for the last twenty-four years for a monthly interval totaling to UGX. 28,000,000/=, once I also find that the plaintiff did not adduce any oral or documentary evidence to support the figures he claimed as

special damages. I am acutely alive to the position in *GAPCO (U) Ltd. v.A.S Transporters Ltd., S.C.C.A No. 07 of 2007*, which also cited the case of *Kampala City Council v. Nakaye (1972) EA 446; Hororanto Busulwa Ssalongo v. Abdu Senabulya & 5 Others, H.C.C.A. No. 7 of 2002* that special damages need not always be proved by production of documentary evidence, and that cogent verbal evidence can do.

According to *Black's Law Dictionary,(8th Ed) at page 276*, the term “cogent” means “compelling or convincing”. When used in reference to evidence the term means that the evidence must be convincing and compelling as regards the fact in issue for the court to act on it. In the instant case other than merely pleading special damages in paragraph 5(iii) and (i) of the plaint there was no cogent evidence adduced to support the claims. Court therefore has no basis to award the amount claimed as cost of telephone calls and transport as special damage.

(b) Mesne profits.

The plaintiff took vacant possession of the suit premises on 25/04/1988 and has since been in occupation. It is not true that the defendant has been in possession of the suit premises, whether actual or constructive, as argued by Counsel for the plaintiff. *Section 2(m) of the Civil Procedure Act (Cap. 71)* defines mesne profits as:

“...those profits which the person in wrongful possession of the property actually received or might with ordinary diligence have received from it together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession”.
[emphasis mine]

In the case of *George Kasedde Mukasa v. Emmanuel Wambembe Or's, H.C.C.S No. 459 of 1998* Mukiibi J. re-echoed the position of the above provision thus,

“ It is settled that wrongful possession of the defendant is the very essence of a claim for mesne profits. See: *Paul Kalule v. Losira Nonozi [1974] HCB 202 Saied J. (as he then was)...The usual practice is to claim for mesne profits until possession is delivered up, the court having power to asses them down to the date when possession is actually given. In *Elliott v. Boynton [1924] I Ch. 236 (C.A) Warrington, L.J, at page 250 said:“Now damages by way of mesne profits are awarded in cases where the**

defendant has wrongfully withheld possession of the land from the plaintiff.”
[emphasis mine]

From the above authoritative decisions, it is clear that for *mesne* profits to accrue, the defendant must be in wrongful possession of the suit property as against the plaintiff and deriving profits from the property together with interest on the profits. Applying the test to the facts of the instant case, I find that *mesne* profits do not arise owing to the fact that the defendant was not in any way whatsoever in possession of the suit property. The plaintiff was right from the outset in possession and is not entitled to *mesne* profits.

(c). General damages.

The settled position of the law is that the award of general damages is in the discretion of court and is always as the law will presume to be the natural consequence of the defendant’s act or omission. **See: James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993.** It was also held in **Robert Cuossens v. Attorney General, S.C.C.A. No. 08 of 1999** that;

“The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered....”

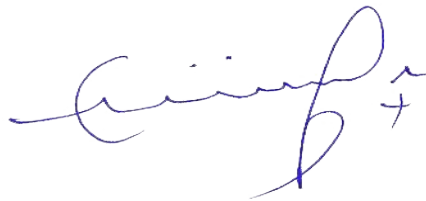
Therefore, in the assessment of the quantum of damages courts are mainly guided by the value of the subject matter, the economic inconvenience that the party was put through at the instance of the opposite party, and the nature and extent of the breach. See: **Uganda Commercial Band v. Kigozi [2002] 1 EA. 305.** 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 in had she or he not suffered the wrong. See: **Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992.** Furthermore, the party claiming general damages is expected to lead evidence or give an indication that to what damages should be awarded on inquiry as the quantum. **See: Robert Cuossens v. Attorney General, S.C.C.A No. 8 of 1999; Ongom v. Attorney General. [1979] HCB 267.**

In the instant case, I have found that there was a breach of a specific term of the agreement by the defendant company by failing to handover to the plaintiff the certificate of title within reasonable time. The defendant’s Counsel attempted to justify the delay, particularly in his submissions, that the lease of the suit property expired and it took some time for the defendant

company to process the renewal. However, I find no merit in such an argument given that from 1988 to 2010 is a period of about twenty - three years; inordinately too long for the processing of the renewal of a lease. It simply manifests unjustifiable delay on part of the defendant company meeting its part of the bargain under the agreement for which the defendant company would be found liable in general damages.

Having stated as above, I find that whereas the plaintiff was able to show that he suffered injury at the instance of the defendant, he did not lead evidence as to the quantum of damages he suffered as a result of the defendant's failure to handover the certificate of title to him for the said period. He simply averred in his pleadings in the plaint that he claims for general damages. In *Bhadelié Habib Ltd v. Commissioner General, URA [1997 -2001] UCL 2001* a similar situation arose where no indication was given by the plaintiff as to what quantum of general damages ought to be awarded. Ogoola PJ (as he then was) held that in a situation where court was left on its own devices it could apply its discretion. In that case Shs.20m/= had been claimed as general damages without the plaintiff showing how he had arrived at the figure, and the court awarded Shs.5m/=.

Similarly in the instant case, taking into account the long period taken by defendant to handover the title, and generally the inconvenience ordinarily occasioned in circumstances of such cases as stated by the plaintiff, I award the plaintiff UGX. 5,000,000= per year from 1988 to 2010 totaling to **UGX.115, 000,000/= (One hundred and fifteen million only)** as appropriate general damages. Regarding the issue of costs of the suit, **Section 27(2) Civil Procedure Act (Cap 71)** is to the effect that costs follow the event unless for good reason court directs otherwise. **See: Jennifer Behange, Rwanyindo Aurelia, Paulo Bagenze v. School Outfitters (U) Ltd., C.A.C.A No.53 of 1999(UR)**. The plaintiff is the successful party in the suit and is awarded costs.



BASHAIJA K. ANDREW
JUDGE
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