

THE REPUBLIC UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NOT. 0224 OF 2011

MOHANLAL KAKUBHAI RADIA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

WARID TELECOM UGANDA LTD.::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT

The Plaintiff brought this suit against the Defendant for orders of eviction, the removal of unauthorized structures on the Plaintiff’s land, special and general damages for trespass and blockage of the access road to Plaintiff’s plot of land, and loss of income and business opportunity as a result of the Defendant’s unlawful actions. Before the hearing of the case, the Defendant relocated its tower (mast) and associated facilities, and hence the Plaintiff abandoned the prayer for an order of eviction and the removal of the Defendant’s structures but maintained the claim for special and general damages, interest and costs.

Background.

The Plaintiff is the registered proprietor of property comprised of in **LRV 2620 Folio 5** known as **Plot No. 106B, 5th Street Industrial Area, Kampala** ((hereinafter referred to as the “suit land”). The property was his proportionate share of the property formerly known as **Plot No.104/106, 5th Street Industrial Area, Kampala** which was owned by M/s.Uganda Shoe Co. Ltd (*hereinafter referred to as the “Company”*) in which he was one of the share holders and Director.

On 01/08/2007 the Defendant, a telecommunications operator, leased a piece of land for the construction of a telecommunication antennae tower (mast) and associated facilities from the Company, the proprietor of an adjacent plot known as **Plot No.106A, 5th Street Industrial Area, Kampala**. The Plaintiff's claim is that the Defendant in the process of the construction encroached upon the Plaintiff's adjacent piece of land in **Plot No.106B**, thereby blocking its access road. When the negotiations with the Defendant for an amicable settlement became futile the Plaintiff filed this suit.

The Defendant denied the Plaintiff's claims and stated that on 01/08/ 2007 it acquired a lease from the Company for the construction of a mast. That much as the Lease Agreement indicated that the mast was to be set up on **Plot No. 106A**, the Directors of the Company later acquiesced to the location of the mast on **Plot No.106B** and partly on the access road to **Plot No.106B** which was not in use then and is still not used up to the time of filing the suit. That upon being requested by the Plaintiff, the Defendant relocated the mast and its accessories from the Plaintiff's land to an area within **Plot No. 106A**, and the exercise was completed in the mid December 2011.

In their joint Scheduling Memorandum, the parties agreed on the following issues for determination by this court.

- 1. Whether the Defendant trespassed upon the Plaintiff's land/property and if so from what period?**
- 2. Whether the Plaintiff incurred damages as a result of the Defendant's actions and if so, how much?**
- 3. Whether the Plaintiff is entitled to damages incurred by the Defendant's actions and if so from when?**
- 4. What remedies are available to the parties?**

Resolution.

Issue No.1: Whether the Defendant trespassed upon the Plaintiff's land/property and if so from what period?

Counsel for the Plaintiff, Mr. Johnson Kwesigabo of ***M/s Kwesigabo, Bamwine & Walubiri Advocates***, submitted that trespass to land occurs when a person makes an unauthorized entry upon another's land and thereby interfering with another person's lawful possession of the land. For this position Counsel cited the case of ***Justine E.M.N Lutaaya v. Stirling Civil Eng. Civ.Appeal No. 11 of 2002 9*** in which the Supreme Court cited with approval ***Moya Drift Farm Ltd. v. Theuri (1973) E.A 114 Spray V.P at page.115.*** Counsel submitted that the case also supports the position that possession does not mean physical occupation but includes constructive possession.

Mr. Johnson Kwesigabo further submitted that it is not disputed that the Defendant encroached on ***Plot No.106B*** belonging to the Plaintiff the registered proprietor, which he acquired as his share from Company in 1998. That in June, 2000 the Plaintiff lodged a caveat on the title to protect his equitable interest, which in essence served as notice to everyone of the Plaintiff's interest in the land. Counsel argued that while the legal title at the time vested in the Company, the Plaintiff was a beneficial owner recognized in equity, and that the standing to sue accrued to him in 1998 when the land was allocated to him, and that he could claim for the period. To fortify these arguments Counsel relied on ***Sentongo Godfrey v. Mukono Industries (U) Ltd., H.C.C.S No. 55 of 2012.***

Mr. Kwesigabo also submitted that ***Exhibit P5/D2***; a copy of the Board Resolution shows that the Company specifically authorized the leasing of ***Plot No.106A*** to the Defendant for the construction of its mast. Similarly, that ***Exhibit P6/D1***, a copy of the Lease Agreement between the Company and the Defendant stipulates that the land leased was in ***Plot No.106A***. Further, that in constructing the mast the

Defendant encroached upon **Plot No.106B**, thereby completely blocking its access road. The Plaintiff contends that this entry on his land was unauthorized and without any legal justification, and interfered with his proprietary and equitable rights over the suit land, and amounted to trespass.

Counsel for the Defendant, Mr. J.B. Mudde of **M/s. Katende, Sempebwa & Co. Advocates, Solicitors & Legal Consultants**, refuted the Plaintiff's claims and submitted that the Defendant acquired a lease from the Company for the construction of its mast on 1/08/ 2007. That in as much as the Lease Agreement indicated that the mast was to be set up on **Plot No. 106A**, the Directors of the Company later acquiesced to the location of the mast partly on the access road to **Plot No.106B**, and that as such there was no trespass. To buttress this view, Counsel cited **Halsbury's Laws of England (3 Ed) Volume 38 at 749 paragraph 1226**, and the case of **Kalinga v. Kalumwana [1990-1994] EA 137 (C.A.TZ)** to the effect that it is a defence against an action for trespass for a defendant to claim that it had a right to the possession of the land at the time of the alleged trespass or that it acted under the authority of some person having such a right.

From the evidence and arguments the Plaintiff brought action in trespass essentially because he considers the Defendant's entry on to **Plot No.106B** as unauthorized, legally unjustified, and therefore an interference with his equitable and proprietary rights. The Plaintiff refutes the Defendant's claims that it had the authority and consent of the Company to enter his plot of land and erect a mast therein. The Defendant on the other hand contends that it entered the suit land with the authority and consent of the Company as the landlord and registered proprietor thereof, and that the Company agreed to the site lay out plan and the exact spot where the mast was to be constructed. Premised on that the Defendant contends that it had a claim of right on the suit land and hence trespass does not arise.

After the evaluation of the evidence, a number of findings clearly emerge which have profound bearing on the parties' respective claims. The first one is that at the time the Company granted lease to the Defendant, the Company was not seized of any such a right or power to authorize or consent to the Defendant's location of its mast on **Plot No.106B**. The Plaintiff was the beneficial owner with equitable interest therein. It was his proportionate share after the subdivisions were made of the land formerly owned by the Company comprised in **Plot 104/106 5th Street Industrial Area, Kampala** in 1998. This is evident from the testimony of PW1 which is corroborated in that material particular by evidence of PW2 Dr. Nasan Batungi, the surveyor who was instructed by the Company to make the subdivisions. Three plots were created and allotted to the shareholders as follows; Mr. Kayondo with 40% shares took **Plot 106A**, Mr. Walugembe with 37.5% shares **Plot104**, and Mr. Radia(Plaintiff) with 22.5% **Plot 106 B**.

The second finding is that the shareholders were not immediately issued with titles for their respective subdivisions. Therefore the Company all the while since 1998 when the subdivisions were created had nominal legal title to the land, and held **Plot No.106B** in trust of the Plaintiff, and indeed in trust of other shareholders, who had equitable interest therein as the beneficial owners of their respective proportionate shares.

The third finding is that **Plot No.106B** at the time the subdivision were made had tenant on it managed by the Company, but after the decision in **H.C.C.S. No. 274 of 2005 (Exhibit P12)** in which the Plaintiff successfully sued the Directors for having unfairly excluded him from the management of the Company affairs, the tenant was transferred to the Plaintiff. This was in recognition of the Plaintiff s equitable interest in the very suit land as a beneficial owner, and that he had constructive possession through his tenant thereon.

Also, in June 2000, the Plaintiff lodged a caveat on the title in order to protect his interest in the suit land. The caveat invariably served as a notice *in rem* that the suit land was encumbered and ought not to be dealt with whatsoever without prior notification of the Plaintiff. It would be presumed that anyone intending to deal with the suit land was duly put on notice of the Plaintiff's interest therein. Therefore, simple due diligence would have undoubtedly served to inform the Defendant of the Plaintiff's existing interest in the suit land, and the Defendant ought to have exercised due caution.

It is also important to note that in 2007 at the time the Defendant and the Company executed the Lease Agreement, the Plaintiff had been excluded from the management of the Company affairs by the Directors who succeeded the original Directors and share holders. This exclusion lasted from 1997 until 2008 when the Plaintiff successfully sued the Directors and the High Court in ***H.C.C.S. NO. 274 of 2005*** (in *Exhibit P12*) declared their actions invalid. This meant that even the purported authority and consent the Directors may have given to the Defendant in 2007 over the suit land could not remain unaffected by the Court orders.

A finding was also made regarding the Defendant's contention that the Company agreed to the exact spot where the mast should be constructed in accordance with the site lay out plan. The said *site lay out plan* makes no reference to plot numbers on the ground, and by this the Defendant sought to prove the authority and consent of the Company for construction of a mast on ***Plot No.106B***, which would legally justify the Defendant's claim of right over the suit land and thus defeat the Plaintiff's claim in trespass.

However, after evaluating the evidence of both sides on the issue, I find the Defendant's claim of right to be wholly unsupported. The Board Resolution, *Exhibit P5/ D2* , and Lease Agreement, *Exhibit P6/D1* which are prime documents in the transaction between the Company and the Defendant show that the only land

leased to the Defendant was **Plot No.106A** and not **Plot No.106B** or both for that matter. In addition, DW1, Patrick Kiracho who testified for the Defendant, weighed in on this point and stated that the decision to lease **Plot No.106A** was made by the Company Board meeting, and that he was not aware of any other Board meeting that authorized the Defendant to construct its mast on **Plot No.106B**.

Clause 31 of *Exhibit P6/D1*, the Lease Agreement is also quite instructive on this point. It restricted any variation of the lease terms and stipulated that any variation would not be binding on the parties unless it was made in writing. There is no evidence suggesting that any variation was ever made by the parties to amend the Lease Agreement to indicate that the Defendant would now include part of **Plot No.106B** into their construction or site lay out plans. Logically, it meant that even the exact spot the Company Directors and the Defendant agreed to had to be within the leased **Plot No.106A** that belonged to the Company, and not in **Plot No.106B** the land of the Plaintiff.

There is yet another crucial piece of evidence in *Exhibit P7*, which is a letter dated 08/06/2011 written by the Chairman/Director of the Company Mr. Kisekka George William, specifically addressed on the issue. The letter unequivocally contradicts the view that the Company consented and authorized the Defendant to construct its mast on the Plaintiff's plot of land. The letter states that the Defendant was availed all the necessary facts and documents pertaining to the land, including the survey prints that show the all the access roads. The Company denied any responsibility for the Defendant's actions on the Plaintiff's land. *Exhibit P7* also contradicts evidence of DW2, Ndawula Henry, one of the Directors in the Company who attempted to advance the view that the Company consented the Defendant constructing its mast in **Plot No.106B**.

Mr. J.B. Mudde, Counsel for the Defendant, strenuously sought to exclude *Exhibit P7* on the ground that it was written “without prejudice” and that it ought not to be admitted in evidence, because its author is not precluded from relying on any other defences available to him, and that its contents must be regarded without prejudice, and would not necessarily be taken as truth. Counsel cited ***Katumba Ronald v. Kenya Airways, S.C.C.A. No.9 of 2008*** to back his argument.

Mr. Johnson Kwesigabo Counsel for the Plaintiff responded that a letter written “without prejudice” can be admitted under certain circumstances. Counsel cited ***East African Underwriters v. Civil Aviation Authority, C.A.C.A No.08 of 2002*** where it was held that letters written “without prejudice” can be admitted to show whether or not there is a binding agreement between the parties, and that similarly in the instant case the letter could be admitted to show that there was no agreement between the Company and Defendant to build on ***Plot No.106B***.

Correspondence “without prejudice” means without prejudice to the position of the writer if the terms proposed therein are not accepted. If the terms proposed in the letter are accepted, a complete contract is established and the letter, although written without prejudice, operates to alter the old state of things and to establish a new one. A contract is thus constituted in respect of which the relief by way of damages or specific performance would be given. See: ***Walker v Walker (1889) 23 QBD 335 at 337, C.A, per Lindley L.J.*** In that case correspondence “without prejudice” would be relied upon in litigation to prove existence of the contract between the parties.

The purpose of correspondence “without prejudice” is to safeguard the position of the author who in that case would not be necessarily compromised by the contents of the letter. Without prejudice correspondence is privileged and the general rule is that it is inadmissible in any subsequent litigation as it not necessarily the whole

truth. The author reserves the right to invoke other defences available to him or her. See: ***Katumba Ronald v. Kenya Airways,(supra)***. However, where the negotiations are successful and the without prejudice correspondence constitutes a binding contract, the correspondence may for that reason alone be produced in evidence to prove that such a contact has been entered into. See: ***East African Underwriters v. Civil aviation Authority (supra)***.

In the instant case *Exhibit P7* would be treated rather as an exception to the general rule for a number of reasons. The first and most important is that it was admitted in court proceedings pursuant to the consent of both parties at the Scheduling Conference. In my view the doctrine of estoppel encapsulated in ***Section 114 Evidence Act*** would operate as against the Defendant from turning around to say that after all the letter should not be looked at. The letter would be properly relied upon to prove the existence of the fact in issue as to whether there was in fact agreement between the Company and the Defendant for the latter to construct a mast in ***Plot No.106B***. The available evidence has amply demonstrated that the answer is in the negative.

The second reason is that letter *Exhibit P7* was admitted in addition to other material evidence proving the same fact in issue. As already pointed out the Board Resolution, Lease Agreement, and oral testimony of DW1 Patrick Kiracho; all go to prove that no authority or consent was ever granted by the Company to the Defendant over ***Plot No.106B***. Therefore, where correspondence “without prejudice” forms part of a series of circumstantial proof of a fact in issue, such correspondence could be relied upon in litigation. See: ***Imelda Bazikoraho v. Stanbic Bank (U) Ltd & 2 Others, H.C.C.S. No.566 of 2003 per Kwesiga J.***

It also noted from the evidence that at the time the respective subdivisions were created ***Plot No.106 B*** in particular did not have direct access to the 5th Street, Industrial Area. PW2 Dr. Nasani Batungi the surveyor testified that he was

instructed by the Company to seek the required permission from the planning authority; which he did and carried out the survey and created subdivisions. An access was created specifically for **Plot No.106B** and included in its title - *Exhibit P1*. Both parties agree that in process of construction of its mast the Defendant encroached on **Plot No.106B** effectively blocking the access road.

The inevitable conclusion from all the above findings in the evidence of both parties is that the Defendant's entry on to **Plot No.106B** was neither authorized nor consented to either by the owner the Plaintiff or by the Company through whom the Defendant claimed a right to the possession of the suit land. On that account alone the Defendant's action amounted to trespass on to the Plaintiff's land. This was besides the illegalities that would arise as a consequence of violation of the planning and building regulations. The encroachment on **Plot No.106B** and blockage of the access road by the Defendant plainly amounted to trespass on to the Plaintiff's property, and therefore the answer to the first part of Issue No. 1 is answered in the affirmative.

The next aspect of *Issue No. 1* to consider is from what period did the trespass on **Plot No.106B** occur? Counsel for the Plaintiff submitted that it was from 2007 when the Defendant encroached on the Plaintiff's plot of land. Counsel for the Defendant denied that there was any trespass at all.

It has been established both legally and factually that the Company could not give authority or consent for activities of the Defendant on the land that it did not own. The Defendant entered the suit land without Plaintiff's consent or anybody authorized by him or under any legal justification. It also evident that the Plaintiff's interest in **Plot No.106B** was brought to the attention of the Defendant. The Defendant was made aware of the existence of the court case and the caveat which pre-date the Defendant's entry on to the suit land in 2007. Therefore, the trespass on to the Plaintiff's plot of land by the Defendant commenced on

01/082007 when it entered the land until mid December, 2011 when the mast was relocated to **Plot No.106A**.

Issue No.2: Whether the Plaintiff incurred damages as a result of the Defendant's actions, and if so how much?

Counsel for the Plaintiff Mr. Johnson Kwesigabo, relied on ***Halsbury's Law of England 3rd Edition Vol. 38 paragraph 1222*** which was cited and relied upon in ***Placid Weli v. Hippo Tours & 2 Others H.C.C.S. No. 939 of 1996*** for the proposition that trespass is actionable per se even if no damage was done to land. That a plaintiff is entitled to recover damages even though he has suffered no actual loss, but that if trespass has caused the plaintiff loss, the plaintiff is entitled to receive such an amount as will compensate him for the loss. Further, that the purpose of damages is to put the plaintiff in as good a position as he would be if the trespass had not occurred.

Counsel submitted that the Plaintiff's claim is for both special and general damages, and the expenses incurred in pursuing this matter. The expenses include the cost of engaging a surveyor Dr. Batungi (PW2) who made the report *Exhibit P8 (a)* after reopening the boundaries and establishing the extent of the encroachment, at Shs.5million. Shs.11, 800,000/= (*Exhibit P13 (b)*) as being the cost of engaging a lawyer to conduct negotiations with the Defendant for an out-of-court settlement which were long and extensive but ultimately fell through. US\$ 500 as cost of an air ticket for PW1 as the attorney travelling to London, UK to consult with the principal, and telephone charges all totaling to approximately to Shs.4,500,000/=. Further, that the Plaintiff lost the monthly rent of Shs.5million when the tenant left, for a period of 12 months when the Defendant continued to block the road totaling to Shs. 60million lost rental income. The tenancy agreement (*Exhibit P.9*) was adduced in evidence. The total claim by the Plaintiff for special damages is Shs.81,300,000/=..

Counsel cited the case of *Hororanto Busulwa Ssalongo v. Abdu Senabulya & 5 Others, H.C.C.A. No. 7 of 2002* where it was held that special damages must be strictly proved although they need not be proved by documentary evidence in all the cases. He argued that in this case special damages were specifically pleaded and evidence was adduced, and the evidence of the expenses incurred or income lost were not specifically challenged by the Defendant. As such, Counsel submitted that the Plaintiff discharged the burden of proof and the special damages should be allowed by this court as pleaded.

Regarding general damages, Counsel relied on evidence of PW1 who testified that the Plaintiff had received an offer to sell the property at US\$.1, 690,000= which he had accepted but lost the opportunity because the property's access road had been blocked by the Defendant. That this was corroborated by evidence of PW3, Mr. Manharalal Thakkar, the prospective buyer at the time. He testified that he had to withdraw his offer to buy the land when the Plaintiff failed to have the access road unblocked, and he invested in another property in Mbuya owned by National Housing & Construction Company Ltd (NH&CCL), and elsewhere. He further testified that property prices have currently plummeted due to the prevailing unfavorable economic situation.

Counsel further submitted that the Plaintiff has failed to secure another buyer at the price of US\$1,690,000 or better because of the depressed current market and economic conditions that have affected the property prices. Counsel submitted that PW3 is a wealthy man who has invested extensively in real estate in Mbarara, Kampala and elsewhere, who demonstrated that he had capacity to buy the property as some banks occupy his buildings as tenants, and that he would have raised the purchase price easily, but that when he could not acquire the property, he bought property of NH&CCL, and that the Plaintiff lost a valuable business opportunity to sell the property at a good price which is lost forever because the

Plaintiff is fragile and of advanced age and may not live to realize the sale of his property, given the current depressed market conditions.

Counsel also submitted that as a result of the Defendant's trespass, the Plaintiff lost tenants, and that even when they occupied the property the rent paid was much below the market price. That **Plot No.106B** is located in a strategic business area and that the trespass for over 54 months caused substantial economic and business loss to Plaintiff, while on the other hand the Defendant was greatly benefiting economically from the occupation of the Plaintiff's land. That as a result of the above, the Plaintiff incurred a very big loss.

To further buttress his arguments on general damages, Counsel cited the case of ***Emmanuel Turyamuhika Kikoni v. Uganda Electricity Board; HCCS No. 05-0021-2004***, where it was held that damages were award as recompense. Citing with approval the English case of ***British Transport Commission v. Gourley [1956] AC 185 at page 197*** the court held that the broad general principle which should govern the assessment of damages is that the tribunal should award such a sum of money as will put the injured party in the same position as he would have been if he had not sustained the injuries. Counsel opined that the Plaintiff would be reasonably compensated for an amount of Shs.1, 000,000,000/= (Shillings One Billion).

In reply Mr. Mudde J.B Counsel for the Defendant refuted the Plaintiff's claims and submitted that the Plaintiff did not suffer any damages since there was no trespass. Counsel maintained that special damages must be specifically pleaded and strictly proved. To support this position he cited a plethora of authorities among them ***Stroms v Hutchinson (1905) AC 515; Dr. Godwin Turyasingura v. Wheels of Africa HCCS 485/1995***. Counsel also relied on the case of ***Musoke David v. Departed Asian's Property Custodian Board [1990 – 1994] E.A, 219*** to the effect that due to their peculiar nature the law requires that a plaintiff gives

warning in his pleadings of the item constituting his claim for special damages with sufficient specificity in order that there may be no surprised at the trial.

Counsel submitted that the Plaintiff failed to justify his claim for special damages by not producing receipts or documentary proof of the claims such as Air Tickets, phone bills, and others. Also, that the alleged offer of sale of the plot at US\$ 1,690,000 is untenable and rather speculative, and that it appears to have been a mere offer with no evidence to prove that it was accepted. Further, that whereas the letter of offer was addresses to Mohanlal Radia, it was discovered that PW3 had not actually talked to the Plaintiff as he had claimed in the letter, and hence the offer should be disregarded as being untruthful and a mere concoction.

The law governing the assessment of quantum and award of general and special damages has been correctly stated by both Counsel. The settled position 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 and probable consequence of the defendant's act or omission. See: ***James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993; Erukan Kuwe v. Isaac Patrick Matovu & A'nor H.C.C.S. No. 177 of 2003 per Tuhaise J.***

Also, in the 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. See: ***Uganda Commercial Bank 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 if she or he had 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.*** It is also the established the law that special damages must be specifically pleaded and strictly proved, but that strictly proving does not

mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example by evidence of a person who received or paid money or testimonies of experts conversant with the matters. See: ***GAPCO (U) Ltd. v. A.S. Transporters (U) Ltd, C.A.C.A. No. 18 of 2004.***

Given the above position of the law, the Defendant's view that the Plaintiff did not justify his claims for special damages with documentary evidence is not entirely correct. Circumstances do exist under which documentary evidence may not be called for as proof of special damages. The particular items which the Defendant's Counsel pointed out as requiring documentary proof which the Plaintiff did not avail are PW1's Air Ticket travelling to London UK, and phone bills which the Plaintiff had put at Shs. 4,5m/=. However, it would appear that US\$500 is reasonably the usual air travel fare from Uganda to the UK. Regarding telephone bills, I have taken note of the protracted nature of this case right from institution in 2011 to completion in early 2014. Long distance calls from the Agent (PW1) in Kampala to consult the principal in London, UK over the period would reasonably come to the figure of Shs 4.5m/= proposed by the Plaintiff.

Regarding Shs.5m/= the surveyor's fee, there is evidence to support the claim as per *Exhibit P.8 (a)* and being professional job the figure is justifiable. Similarly, the lawyers bill for negotiating an out – of – court settlement, of Shs.11.8 m/= is also justifiable as per *Exhibit P13 (b)*. Shs 60m/= which a total loss of rent for 12 months by the Plaintiff of the monthly rent of Shs.5m/= from his property is evident from the Tenancy Agreement (*Exhibit P9*). On the whole, I find that the Plaintiff has proved and justified the claim of Shs.81, 300,000/= as special damages.

Regarding general damages, PW1 adduced evidence that the Plaintiff was not a beneficiary of the payment of rent by the Defendant out of the suit land for the 54

months. Further, that due to the blockage of the access road, the Plaintiff could not sell or develop his land or let it out at market rate. PW1 further stated that he had secured a buyer (PW3) for the property at price of US\$.1,690,000 as per copy of the offer letter **Exhibit P11**, and that this was a reasonable offer which he had accepted, but that the prospective buyer had to pull out when the Plaintiff failed to secure the access road to the property because the Defendant had blocked it.

PW1 also stated that as a result of the Defendant's action the Plaintiff lost a great business opportunity in that he wanted to use the proceeds to renovate his premises on **Plot 4 Kampala Road** and reinvest the balance of the proceeds from the sale in a fixed income generating asset at a return of not less than 10%. That because of the unfavorable market conditions, he has tried to sell the property but has not attracted buyers at a reasonable price. PW1 contended that the net effect is that the Plaintiff has suffered a lot of inconveniences and stress which negatively impacted on his fragile health given his very advanced age.

PW3, Manharalal Thakkar, the prospective buyer corroborated evidence of PW1 on the issue of the purchase offer which fell through. He testified that he indeed offered to purchase the property at US\$.1,690,000 which the Plaintiff accepted, but that he pulled out when the Plaintiff failed to resolve the issue of the access road as he had promised. PW3 further testified that he acquired another property from NH&CCL as per **Exhibit P11**. PW3 maintained that there was no direct access to the property at the time, and that one had to pass through other people's land to access the suit land, and that this was the reason why he could not buy it.

Counsel for the Defendant disputed the Plaintiff's claims. He argued that the alleged offer of purchase of the plot at US\$ 1,690,000 is untenable and rather speculative, and that it appears to have been a mere offer with no evidence to prove that it was accepted. Furthermore, that whereas the letter of offer was addressed to Mohanlal Radia, it was discovered that PW2 had not actually talked to the Plaintiff

as he had claimed in the letter, and hence the offer should be disregarded being untruthful and a mere concoction.

I find the attack by Counsel for the Defendant on the evidence of the Plaintiff's witnesses relating to the failed purchase rather unjustified. It is not clear as to why Counsel for the Defendant considers the offer of US\$ 1,690,000 for purchase of the Plaintiff's land untenable and speculative. Counsel did not come out clearly as to whether the Defendant considers the figure untenable because it is inordinately too high or low given other comparable prices of properties in the same range, or because they believes no such price was ever offered. No reasons whatsoever were assigned.

In absence of contrary evidence to show that the figure as presented in the testimony of the Plaintiff's witnesses was untenable, the evidence of PW1 and PW3 on the matter remains unassailable on the matter. It cannot be whittled away merely by Counsel's unsubstantiated and unsupported assertions. I am also unable to find any evidence or reason to support the view that the price was speculative. The offer was made by the prospective buyer and accepted by the Plaintiff, but due to the unresolved accessibility issues with the suit land the potential buyer pulled out. These facts were canvassed in evidence at trial by the witnesses whose credibility was not impeached at all. I could find no fault in the evidence of witnesses regarding the failed purchase and the ultimate financial and economic loss it generally exacted on the Plaintiff.

An argument was raised by the Counsel for Defendant concerning the alternative access route to the suit land that passed through **Plot No.106A** belonging to the Kayondo family which was stated to be still in use even up the time of filing this case The Defendant contended that the tenant that operated a Car Bond (Tiga) existed before under the Company and operated using that alternative access road. Further, that the Plaintiff still uses the same alternative access road to his plot

despite the fact that the mast was removed from its previous location, and that this has the effect of watering down the Plaintiff's claims of loss, if any, arising from non-access to his plot.

After evaluating the evidence of both parties on the issue, I entirely agree with the version of the Plaintiff that the so - called alternative access road is not planned and approved by the controlling authority. As such it cannot be used as a basis for the long term developments of the Plaintiff's land. Indeed no building plans of such developments would be approved without the approval or planned access road. Apart from the foregone, the access road passes through **Plot No.106A** which is private property of another person. It is not in evidence that the Kayondo family, the registered proprietor, had agreed to a permanent road on their land. There is also no evidence to suggest that one such access road has been planned or approved. This renders the so – called alternative access road legally unsustainable for the Plaintiff to rely on for the long term development plans of his plot of land. The net effect of the findings in the evidence is that the trespass and blockage of the access road to **Plot No.106B** occasioned both direct financial loss and also economic loss in terms of lost business opportunities of profound magnitude for which the Plaintiff ought to be entitled to commensurate general damages.

In arriving at the quantum of damages, this court has been guided by the principle enunciated in **Uganda Commercial Bank v.Kigozi(supra)** as to the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the injury suffered. Also court has followed the principle enunciated in **Charles Acire v. Myaana Engola (supra); Kibimba Rice Ltd. v. Umar Salim (supra)** that 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 he or she had not suffered the loss or injury.

The Plaintiff adduced evidence to prove the economic and financial loss he has suffered due to the Defendant's actions on his land. He was able to demonstrate that he lost great economic opportunity of selling his land at a price of US\$ 1,690,000 because of the encroachment and blockage of the access road by the Defendant. He is no longer able to get another buyer at a reasonable price due to the current depressed value of real property obtaining in the market. The Plaintiff proved that he lost yet another great opportunity of reinvesting proceeds he would have got from the sale of his land. The Defendant's trespass basically set in motion a series of chain reactions with negative economic and financial repercussions of great proportions on the Plaintiff. This is of course not to mention of the physical and psychological stress all this has exerted on the Plaintiff who is a fragile and very old man.

As was stated in *Takiya Kashwahiri & A'nor v. Kajungu Denis, C.A.C.A. No. 85 of 2011*, general damages should be compensatory in nature in that they should restore some satisfaction, as far as money can do it, to the injured plaintiff. Based on the evidence adduced on the matter as to the magnitude of the loss suffered and the applicable principles of law, I am satisfied that Shs. 1,000,000,000 (One Billion) general damages would be sufficient to atone for the loss and injury occasioned to the Plaintiff by the Defendant over the time and restore to the Plaintiff some satisfaction, and I accordingly award the same to the Plaintiff.

Issue No.3: Whether the Plaintiff is entitled to damages as a result of the Defendant's actions, and if so from when?

The first part of this issue is simply a culmination of the findings in *Issue No.1*, and 2 above. It would be tautological to go over them again. The second part of the issue concerns from when the Plaintiff would be entitled to recover damages. This too has been put to rest in *issue No.1 and No.2* above. Clearly the Defendant is to pay the damages for the trespass it occasioned since 2007.

Issue No.4:What remedies are available to the parties?

It has already found that the Plaintiff is entitled to the award of general and special damages as pleaded and proved. Counsel for the Plaintiff prayed for interest of 24% per annum on general damages from the date of judgment, and the same rate for special damages from the date of filing till the date of pay in full. There was no justification provided by Counsel for the award of interest let alone the rate that he suggested.

The guiding principle, however, is that interest is awarded at the discretion of court. See: ***Uganda Revenue Authority v. Stephen Mbozi (supra)*** but like in all other discretion court must exercise it judiciously taking into account all circumstances of the case. See: ***Liska Ltd. v .DeAngelis [1969] E.A 6; National Pharmacy Ltd v. KCC [1979] HCB 256; Superior Construction & Engineering Ltd v. Notay Engineering Ltd. HCCS No. 24 of 1992.*** Further, ***Section 26 CPA (supra)*** is to the effect that where interest was not prior agreed as between the parties the court could award interest that is just and reasonable. See also: ***Mark Extraction Enterprises Ltd. v. M/s Nalongo Orphanage, H.C.C.S No. 04 of 1996.***

A just and reasonable interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A plaintiff ought to be entitled to such a rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against the any 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. In that regard I would consider a commercial rate of interest of 23% per annum to be just and fair. It shall be applicable to the general and special damages respectively.

On the issue of costs, it is the established law, under **Section 27(2) CPA(supra)** that costs are awarded at the discretion of court and follow the event unless for some good reasons the court directs otherwise. See: **Jennifer Rwanyindo Aurelia &A'nor v. School Outfitters (U) Ltd., C.A.CA No.53 of 1999; National Pharmacy Ltd. v.Kampala City Council [1979] HCB 25.** In the instant case, the Plaintiff has succeeded on all the issues, and there is no compelling and justifiable reason to deny him costs of the suit. The plaintiff is accordingly awarded costs of this suit.

Accordingly, it hereby ordered as follows;

- 1. The Defendant pays to the Plaintiff Shs.81, 300,000/= as special damages.**
- 2. The Defendant pays to the Plaintiff Shs. 1,000,000,000/=(One Billion) as general damages.**
- 3. The amount in (1) above shall attract an interest rate of 23% per annum from the date of filing till the date of payment in full.**
- 4. The amount in (2) above shall attract an interest rate of 23% per annum from the date of this judgment till the date of payment in full.**
- 5. The Plaintiff is awarded costs of this suit at Court (interest) rate of 6% per annum from the date of taxation till the date of payment in full.**

BASHAIJA K. ANDREW

JUDGE

25/02/2014

Mr. Johnson Kwesigabo Counsel for the Plaintiff: present.

Mr. J.B Mudde Counsel for the Defendant : present.

Ms. Justine Namusoke Court Clerk: present

Ms. Hasipher Nansera: Transcriber: present

Court: Judgment read in open court.

BASHAIJA K. ANDREW

JUDGE

25/02/2014