

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0003 OF 2016

DRAZA MOSES **PLAINTIFF**

VERSUS

ADERUBO RICHARD **DEFENDANT**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

The plaintiff sued the defendant for trespass to land, seeking a declaration that he is the owner of land measuring approximately 0.073 Hectares located at plot 88, Ayivu Block 1 at Onduparaka Trading Centre in Arua, an order of vacant possession, a permanent injunction, an award of general, interest and costs. The plaintiffs' case was that by an agreement dated 28th September 1999, he acquired the land in dispute by purchase and thereafter and during or around the month of April 2004, acquired a leasehold title over the land. While the plaintiff was in Sudan, the defendant, who is owner of a plot of land on the Western side adjacent to the plaintiff's, then took advantage of the plaintiffs' absence, removed the survey mark-stones and encroached a distance of up to two metres into the plaintiff's land, by construction of an extension protruding from the defendant's building to abut onto that of the plaintiff. The plaintiff made several attempts to have the dispute settled amicably to no avail, hence the suit.

In his written statement of defence, the defendant contended that it was him who acquired the plot of land now occupied by the plaintiff on the plaintiff's behalf as a friend. At the time he acquired it, there was an incomplete commercial building on the land. The defendant thereafter acquired a plot, which was un-surveyed at the time, neighbouring that of the plaintiff. He developed the plot by construction of a building thereon and eventually obtained a lease title to the land, now known as LRV 3330 Folio 23 plot 87 Ayivu Block 1. He denied ever having removed any survey mark-stones from the plaintiff's land or construction of his building in such a manner as to protrude onto the plaintiff's land.

In his testimony, the plaintiff stated that the dispute between him and the defendant is over a common boundary between his plot 88 and the defendant's plot 87. The plaintiff acquired the plot by purchase from a one Andiko Paulo in 1999. On the plot at the time, was an incomplete commercial building at beam level but the plot was by then un-surveyed. He was able to complete the building and has been occupying it for the last ten years. Later the defendant purchased the then vacant neighbouring plot 87 and constructed a building which during 2007 he extended to abut onto that of the plaintiff without the plaintiff's consent, thereby extending about one and a half metres into the plaintiff's plot. He did all this while the plaintiff was in South Sudan. Upon his return, the plaintiff made attempts to have the defendant amicably remove the offensive extension but the defendant remained adamant. The plaintiff engaged surveyors to re-open the boundaries of his plot and they were able to find all mark-stones save one near the area of the defendant's encroachment. When the initial term of his lease expired on 1st March 2009 he was unable to renew it because of the boundary dispute with the defendant. He attempted to sell of his plot but the prospective buyers were put off by the defendant's extension. The plaintiff therefore filed this suit to have the boundary dispute resolved.

P.W.2 Mr. Andiko Paul testified that he was the owner of the plot now occupied by the plaintiff. Sometime in September 1999, he was approached by the defendant who desired to purchase that plot on behalf of the plaintiff. Later he the defendant came together with the plaintiff and the witness sold the plot to the plaintiff. At the time he sold the plot, he had constructed a commercial building thereon up to beam level. The agreement of sale though did not specify the boundaries since the plot was un-surveyed at the time. The plaintiff completed the building and occupied it. The neighbouring plot was vacant and the defendant subsequently purchased it.

P.W.3 Mr. Nyamua George testified that during 1989, the leadership of Onduparaka Trading Centre developed a planning scheme of the trading centre sub-dividing it into plots which they allocated to various residents. Purchasers of the plots were required as a matter of practice to leave space of at least three metres in-between building constructed on the various plots (1.5 meters taken from each plot at the common boundaries), to allow for easy access to spaces behind the plots by the roadside. He witnessed the plaintiff's purchase of the plot from the original owner to whom it had been allocated, but the agreement of sale did not specify the

boundaries. The distance between his building and that of the plaintiff conforms to the traditional three metres but there is no space between the plaintiff's building and that of the defendant on the opposite side. The plaintiff completed the unfinished structure he found on the plot and occupied it while the defendant constructed a video and disco hall on the neighbouring plot whose front wall sealed off the "customary" three meters that ought to have been preserved between his and the plaintiff's building.

P.W.4 Mr. Trima Adam testified that at the time the plaintiff bought the plot he occupies now, the neighbouring one now occupied by the defendant was vacant. Initially there was space of approximately three metres between the plaintiff's building and that of the defendant but over five years ago, the defendant extended the front wall of his building to abut onto the plaintiff's building, effectively sealing off that space. Although other developers in the trading centre have observed the policy of leaving space in-between their buildings, the defendant violated that policy and did not leave any space between his and the plaintiff's building.

P.W.5 Mr. Angundru James testified that he was engaged by the plaintiff to reopen the boundaries of his plot 88 at Onduparaka Trading Centre. He was unable to complete the exercise because of the defendant's hostility during that process. He was able to observe though that the defendant had sealed off at the front, what should have been a corridor between his building and that of the plaintiff. That was the close of the plaintiff's case.

The defendant testified in his defence and stated that he owns plot 87. Although he has a building on his plot from which he operates a video and disco hall and a bar, it does not encroach onto the plaintiff's land. He did not leave space between his plot and that of the plaintiff because the two plots were initially un-surveyed and the survey came after the two buildings were already in place. At the time the plaintiff bought his plot, the two buildings were already joined at the front. That was the close of his defence.

The court then visited the *locus in quo* where both parties and their witnesses demonstrated the physical aspects of the evidence they had given in court. The area in dispute was inspected and the observations made by court were placed on record. The court as well drew a sketch map of

the area in dispute. The court observed that the distance between the plaintiff's building and that of P.W.3 Mr. Nyamua George was compliant with the three metre space in-between building generally observed within the trading centre, but that between the plaintiff's building and the defendant's on the opposite side was approximately two feet only. Each of the parties left about a foot to the median line that marks the boundary between the two plots. At the front, of what would be the two feet corridor thus created between the two buildings, the defendant constructed an approximately ten foot high wall extending from the defendant's building and abutting onto the plaintiff's thereby effectively sealing off the would-be corridor. It is this two feet in width by ten feet in height wall that the plaintiff is complaining of as an encroachment onto his land.

In his final submissions, counsel for the plaintiff, Mr. Ondoma Samuel argued that the defendant trespassed onto the land. The plaintiff is the owner and in actual possession of plot No. 88 Ayivu Block 1 at Onduparaka Trading Centre which is in Ouva village, Adalafu Parish Pajulu sub-county in Arua District and it measures approximately 0.7 Hectares, 33 metres by 15.3 metres. P. Ex. 1 and 2 support this. All the plaintiff's witnesses support this and the defendant does not dispute ownership of the plot. The defendant trespassed by about one foot onto the plot of the plaintiff, ten feet in height. This was seen at the locus. He extended the wall of his building, attaching it to that of the plaintiff. P.W2 who sold the suit land to the plaintiff told court that he sold the plot in 1999 having acquired it in 1989 and by the time he sold the plot there was a building at beam level and he stated that by the time he built the defendant had no building on the neighbouring land. The defendant said he attached his wall to that of the plaintiff in the year 2000. There is no evidence that his entry onto the plot was with the consent of the plaintiff. This makes his entry unauthorised. Without a bye law it the distance alluded to is a mere practice without the force of law. He prayed that the court finds that the defendant trespassed on the land.

As regards the remedies, he submitted that the plaintiff should be granted the remedies sought. The wall should be removed. There should be a permanent injunction, general damages of shs. 20,000,000/= because the plaintiff had wanted to sell off the land but he could not sell it off to settle his debts. He faced challenges in renewal but could not because the defendant refused to sign because according to him he gave the building to the plaintiff. The vibration gets to the

plaintiff's wall. He prayed for a reasonable amount to enable the plaintiff be put in a position he would have been. He also prayed for the costs.

In response, counsel for the defendant, Mr. Abbas Bukenya submitted that the plaintiff realised that the defendant had attached a wall in the year 2000 yet he instituted the suit in 2016. Therefore his cause of action was time barred. The defendant completed the building in 1997 and occupied it in 2006. He has spent close to 18 years with the wall attached. The defendant knew of the construction and his silence in not stopping him created an estoppel against the plaintiff. He cited *Mitwalo Magengo v. Medard Mutyaba S.C. Civil Appeal No. 11 of 1990* and *Eria Milling Project Limited v. Wade Palms Construction Limited H.C.CS. No. 707 of 1991*; when a plaintiff lets a defendant act on the inactivity of the plaintiff, the law presumes an implied consent which in law equitably estops the plaintiff from claiming to the contrary position. *Mitwalo* was in respect of trespass to land and it went further to indicate that where the extent of land was not initially delineated, then the defendant cannot be called a trespasser.

Exhibit P. Ex.1 read together with that holding, does not describe or give the size of the land purchased by the plaintiff and because of that omission it cannot be said that the construction by the defendant constituted a trespass. Looking at the pleadings by the plaintiff, they reflected an attachment to the extent of two metres which was not the case upon the locus visit. On basis of the locus visit should the court find any trespass, it ought to be limited to ten feet in height and one foot in width. The damages sought whereas they are discretionary, it has not been demonstrated that the attachment caused any quantifiable inconvenience, nor has it been demonstrated that there was loss. It was demonstrated by both parties that each party would in practice have left at least one and a half metres. This attachment is in the area that ought to have been reserved for the corridor. The plaintiff did not leave the required 1.5 metres. The omission by the two parties means that neither party should be condemned. Should the court find that the defendant is a trespasser, he prayed that he be given reasonable time, in the range of 2 – 3 months to systematically have the portion of the wall detached from the building.

At the scheduling conference, the following issues were agreed upon;

1. Whether the defendant is a trespasser on the plaintiff's land.
2. Whether the defendant is entitled to the reliefs sought.

In his submissions, counsel for the defendant raised the question of limitation. Under section 3 (1) (a) of *The Limitation Act*, actions in tort have a limitation period of six years. However, the tort of trespass to land, as opposed to an action for recovery of land, is said to be a continuing tort (see *Polyfibre Ltd v. Matovu Paul and others*, H.C. Civil Suit No. 412 of 2010; *Oola Lalobo v. Okema Jakeo Akech*, H. C. Civil Suit No.20 of 2004; and *Justine Emiru Lutaya v. Sterling Civil Engineering Co. Ltd*, S. C. Civil Appeal No. 11 of 2002). For each day the wrongful entry continues, a new cause of action arises. For that reason the issue of limitation cannot arise for as long as the wrongful act or activities of the defendant complained of continue, except that the damages recoverable are only those arising within the period of limitation. It has not been shown to me that wrongful act or activities of the defendant complained of, did stop at any time during the period running up to the filing of the suit. I therefore do not find merit in this argument.

Regarding the first issue, trespass is unjustified entry onto land in another's possession, i.e. entering onto the land without permission, or refusing to leave when permission has been withdrawn (see *Davis v. Lisle* [1936] 2 KB 434, [1936] 2 All ER 213 and *Justine Emiru Lutaya versus Sterling Civil Engineering Co. Ltd*, S. C. Civil Appeal No. 11 of 2002). A trespasser is one who remains in possession of the land against the will of the owner (see *Christopher Katongole v. Yusufu Ssewanyana* [1990 – 1991] KALR 41 at 43). In the instant case, it is not in dispute that the plaintiff owns and is in physical occupation of plot 88 while the defendant owns and is in physical occupation of the adjacent plot 87. The dispute between them appears to spring from the fact that the two of them acquired their respective plots before the plots were surveyed, they proceeded to develop and occupy their respective building still before the survey and subsequently when each secured his respective title after survey, it turned out that the space reserved between their respective buildings is narrower than the widely observed practice within the trading centre.

During the trial, it became clear that he practice of reserving three metre spaces between adjacent buildings by the roadside within Onduparaka Trading Centre, although well-intentioned, is not

backed by any planning laws or regulations. There was equally no evidence that the practice had gained such wide acceptability over a prolonged period of time as to have become a custom or acquired the force of law. Although it is well intentioned, a good practice, and largely observed by the majority of developers, none of the parties before court can be faulted for their failure to observe it since it lacks the character required to be enforced by court.

The defendant argues that there is no trespass in as much as the survey came after the buildings on the two plots had been constructed. At the time they bought their respective plots as unsurveyed plots, the boundary dispute could be considered in light of the common law practice in relation to the settlement of boundary disputes over land lying between hedges and ditches. In *Alan Wibberley Building Ltd v. Insley* [1998] 1 WLR 881, [1998] 2 All ER 82, a question was raised; where adjoining fields are separated by a hedge and a ditch, who owns the ditch? The issue was whether the boundary was fixed by application of the presumption that the person who dug the ditch dug it at the extremity his land and threw the soil onto his own land to make the bank on which the hedge was planted (as in *Fisher v. Winch* [1939] 1 K.B. 666 and *Davey v. Harrow Corporation* [1958] 1 Q.B. 60), or whether, as the plaintiff contended, that presumption did not arise where the land had been conveyed by reference to the Ordnance Survey map which delineated the boundary.

The court traced the origin of the presumption back to observations of Lawrence J. in the course of argument in *Vowles v. Miller* [1810] 3 Taunt. 137 when he said: - “the rule of about ditching is this. No man, making a ditch, can cut into his neighbour’s soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out, upon his own land; and often, if he likes it, he plants a hedge on the top of it...” the bank and fence were the property of the landowner on whose side of the fence the ditch was not. It was then held in that case that the old presumption as to the location of a boundary based on the layout of hedges and ditches is irrelevant where the conveyance was by reference to an OS plan (Ordnance Survey map). The court observed that the Ordnance Survey does not fix private boundaries. The purpose of the survey is topographical, not taxative. Even the most detailed Ordnance Survey map may not show every feature on the ground which can be used to identify the extent of the owner’s land. Where there is nothing else to identify the boundary and there is a ditch and a

bank, the presumption is that the person who dug the ditch dug it at the extremity of his land and threw the soil on his own land to make the bank. That, of course, is a very convenient rule of common sense which applies in proper cases in regard to agricultural land where there is no other boundary otherwise ascertainable. The presumption only comes into operation in case where the boundary is not delimited in the parcels to the conveyance.

Similarly, Scrutton L.J. in *Collis v. Amphlett [1918] 1 Ch. 232 at 259* stated that “there is undoubtedly a popular belief in some parts of the country which has found its way into books that the owner of a hedge is also the owner of a space outside it; sometimes said to be four feet from the base of the bank on which the hedge stands. I am not aware of any legal authority for this broad proposition.” Goddard L.J. added:-

This matter of the respective positions of the fence and the ditch as affording evidence of the boundary was referred to in the defence and referred to throughout the trial, which I think possibly, explains some of the confusion that arose, as a custom. It is not a custom at all when rightly understood, but it is a mere presumption. It is a very different thing from a custom. This presumption is very often decisive where there is no evidence at all as to what the boundaries are, but, like any other presumption it is rebuttable, and very often it can easily be rebutted by the production of title deeds. In this case, when the title deeds are examined, there is no room for the operation of the presumption at all.

In the case of *Collis v Amphlett [1918] 1 Ch 232*, when the title deeds were examined, the court found that there was no room for the operation of the presumption at all. In the instant case, once each of the parties secured a title deed, the fact that the underlying agreements of purchase, or any of them, did not delineate the plots purchased becomes irrelevant. Their boundary dispute is not to be settled with regard to the largely observed practice of three metre spaces between buildings within the trading centre, but rather on basis of or by reference to the Cartographic Survey map as reflected in the deed plans inserted in the respective title deeds. I am persuaded in this by the decision in *ACCO Properties Ltd v. Severn and Another [2011] EWHC 1362 (Ch)* where the parties disputed the boundary between their respective plots. The court found that in order to determine the exact line of a boundary, the starting point is the language of the conveyance aided, where the verbal description does not suffice, by the representation of the boundaries on any plan, or guided by the plan if that is intended to be definitive. If that does not

bring clarity, or the clarity necessary to define a boundary, recourse may then be had to extrinsic evidence, such as topographical features on the land that existed, or maybe supposed to have existed, when the dividing conveyance was executed. In the instant case, I have not found any other probative extrinsic evidence and therefore have had to rely entirely on the Cartographic Survey map, the observations made at the locus in quo and the testimony of the witnesses.

Relying on the deed plan in the title deed to the plaintiff's plot 88 (exhibit P. Ex.2) which also happens to reflect the adjoining plot 87 belonging to the defendant, matching that with the observations made at the *locus in quo*, and considering the testimonies of the parties and their witnesses, it is clear to me that each of the parties, in constructing or completing their respective buildings placed the outer walls approximately one foot away from the common boundary. This created an approximately two-foot wide corridor between the two buildings. The superstructure of each of the two buildings lies completely within the respective plots and none constitutes an encroachment onto the adjacent plot.

However, at the front of that would-be corridor, the defendant constructed a wall sealing off the corridor. The wall extends from his building and is affixed onto that of the plaintiff with a rough-cast painted finishing on top, such that to a casual observer, without the benefit of peeking behind the wall, the two buildings from their front elevation appear as one and the same building. By that construction, the defendant extended his wall into the area of one foot from the common boundary, into the plaintiff's plot. The area of encroachment therefore is one foot wide, approximately ten feet in height and the size of plastered, rough-cast brick wall in thickness. This intrusion is not justified by law and is unauthorised by the plaintiff. Trespass may be committed even when a trespasser makes a mistake regarding the title or boundaries of his land and undertakes activities on an adjoining neighbour's property thinking he or she is on his or her own property (see *Atlantic Coal Co. v. Maryland Coal Co. (1884)*, 62 Md. 135 at 143; *Gore v. Jarrett (1949)*, 192 Md. at 516, 64 A.2d at 551 and *Barton Coal Co. v. Cox (1873)*, 39 Md. 24 at 29-30). A suit for trespass to land may be maintained whether the defendant committed the entry unwittingly or wilfully and wantonly. Since there is nothing the defendant's defence to suggest that this intrusion was involuntary, for all intents and purposes therefore, the plaintiff has proved

on the balance of probabilities, that the defendant trespassed onto his land. This issue is answered in the affirmative.

In respect of the last issue, trespass in all its forms is actionable *per se*, i.e., there is no need for the plaintiff to prove that he or she has sustained actual damage. But without proof of actual loss or damage, courts usually award nominal damages. Damages for torts actionable *per se* are said to be “at large”, that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. The award of general damages is in the discretion of court in respect of what 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* and *Erukana Kuwe v. Isaac Patrick Matovu and another, H.C. Civil Suit No. 177 of 2003*).

In an action of trespass if proved by the plaintiff, he or she is entitled to recover damages even though he or she has not suffered actual loss. If the trespass has caused the plaintiff actual damage, the plaintiff is entitled to receive such an amount as will compensate him or her for his or her loss. Where the defendant has made use of the plaintiff’s land, the plaintiff is entitled to receive by way of damages such a sum as should reasonably be paid for that use (mesne profits) (see *Halsbury’s Laws of England* 3rd Edition, Vol.38 para.1222). The defendant’s conduct is thus key to the amount of the damages awarded. If the trespass was accidental or inadvertent, damages are lower. If the trespass was wilful, damages are greater. And if the trespass was in-between, i.e. the result of the defendant’s negligence or indifference, then the damages are in-between as well (see *Halsbury’s Laws of England*, 4th edition, vol. 45, at para 1403).

In *Captain Sam Masaba Ronald v. Godfrey Werishe, H.C. Civil Suit No.003 of 2015*, a judgment delivered on 4th November 2016, shs. 4,000,000/= was awarded as general damages and shs. 1,000,000/= as punitive damages to the plaintiff against a defendant whose perimeter wall had encroached on the plaintiff’s land by 2.2 meters making approximately 0.02 acres. In the instant case, by the defendant’s obstinate conduct, the plaintiff was unable to renew his lease and has been denied quiet enjoyment of his plot for nearly or slightly over, ten years. I however have taken into account the diminutive nature of the area of encroachment and consider an award of

shs. 4,500,000/= to the plaintiff to be adequate compensation as general damages for trespass to his land and the plaintiff is hereby awarded that sum as such. The plaintiff is as well awarded the costs of the suit. The defendant is given thirty days from the date of this judgment for him to pull down the offending part of his wall failure of which enforced demolition by court shall ensue. Finally, a permanent injunction is issued restraining the defendants, his servants, agents, successors in title and persons claiming under him from further acts of trespass on the plaintiff's land.

Dated at Arua this 22nd day of June 2017.

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Stephen Mubiru
Judge
22nd June 2017