

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CS – 006 OF 2012

5 **MUHEBWA ALEX.....PLAINTIFF**

VERSUS

FORT PORTAL MUNICIPAL COUNCIL.....DEFENDANT

BEFORE: HIS LORDSHIP MR. WILSON MASALU MUSENE.

10 **Judgment**

The Plaintiff Muhebwa Alex instituted a suit against the Defendant claiming inter alia special damages of Shs. 685,150,000/=, an order restraining the Defendant from stopping the Plaintiff from constructing a filling station and general damages.

15 The facts agreed on during scheduling are that, on the 16th January 2008 the Plaintiff was granted permission to put up a filling pump/station at Kisenyi-Mugunu, West Division, Fort Portal Municipal Council. Relying on the said permission, the Plaintiff went ahead and commenced construction and among others inserted two fuel tanks and a kerosene tank.

20 The Plaintiff while doing construction encountered interference from employees/servants of the Defendant who often stopped his workers from proceeding with the construction alleging that the Defendant had not sanctioned the construction works.

On the 23rd October 2011, the Plaintiff received a letter from the Town Clerk of the Defendant informing him that Council had never approved the construction/installation of a filling station and he was stopped from proceeding with the construction of the filling station.

25 The Plaintiff contended that he incurred various expenses in construction and establishment of the said filling station and he lost business and profits which he would have earned from running the said filling station.

The Defendant on the other hand averred that the Plaintiff was permitted to install a fuel station and in the process of installing the same, he diverted from the original plan and started constructing or installing a fuel station in a road reserve hence violating the permission which was given to him.

5 **Issues:**

1. Whether the Plaintiff violated the permission granted to him by the Defendant to install a fuel station?
2. Whether the Plaintiff is entitled to the remedies sought?

M/s Acellam Collins & Co. Advocates represented the Plaintiff and M/s Kaahwa, Kafuuzi, 10 Bwiruka & Co. Advocates represented the Defendant. By consent both Counsel filed written submissions.

Resolution of issues:

Issue 1: Whether the Plaintiff violated the permission granted to him by the Defendant to install a fuel station?

15 Counsel for the Plaintiff submitted that it was the Plaintiff's evidence that on the 16th January 2008 he applied for a temporary permit to install and run a filling pump at Kisenyi Mugunu, West Division located between Bundibugyo Road and Kahungabunyonyi Road at Mr. Rwakahangi's plot. That at the time of the application, an agreement had been reached between the Plaintiff and Rwakahangi to work in front of his premises and the two entered in 20 a tenancy agreement under which he paid rent.

Counsel for the Plaintiff added that the Plaintiff also undertook to repair and construct the culverts on the road to Kahungabunyonyi and an outlet to Bundibugyo Road. Together with the application the Plaintiff presented a sketch showing the layout of the proposed site in relation to existing structures in the area. That the Plaintiff's sketch plan was submitted and 25 approved by the Officers and the area of operation was found suitable for the purpose.

Further, that the Plaintiff also received confirmation from NEMA that the site was outside the reserve width for the proposed upgrading of the Fort Portal Bundibugyo Road which was also approved by the Physical Planner of the Defendant on 20th July 2010.

Furthermore, that the only complaint from the Defendant was by letter dated 12th January 2009 when the Senior Assistant Town Clerk wrote to Rwakahangi Stephen telling him to halt the works in front of his premises because he was never granted permission or his plans and request approved. That the letter did not indicate that the works were being halted because the Plaintiff had diverted from the original plan and the construction was on a road reserve. That the Plaintiff did comply with the original plan and did follow all the required procedures before commencing construction and the site is not a road reserve.

Counsel for the Defendant on the other hand submitted that much as the Plaintiff was granted permission to construct a filling station; he was required to obtain an Environmental Impact Assessment. That the Plaintiff illegally started constructing the filling station and in a road reserve thus, the Defendant halting any further constructions.

Counsel added that DW2 Kugonza Simon Peter told Court that on the 14th December 2011, the Office of the Chief Administrative Officer received a letter from the Defendant requesting for the service of a Senior Staff Surveyor to execute works in respect of opening boundaries of Plot 42, Bwamba/Mugunu road, West Division, Fort Portal Municipality. That he was assigned that duty and introduced to the proprietor of the said property, Mr. Rwakahangi he requested him to cooperate with him and the survey team.

Further, that the surveyor's report was exhibited in Court as Exhibit DE4, where it was found that 3 fuel tanks had been placed in the road reserve outside Plot 42 and this was confirmed by DW2 during cross examination. That this was also confirmed by PW2 Rwakahangi Stephen and that the evidence as given by DW2 is technical and the same was observed during the locus visit.

Furthermore, that **Section 3** of the Roads Act prohibits construction of any structures in a road reserve and the road reserve is defined in the Roads (Road Reserves) (Declaration) Instrument S.I 358 -1and for a road like Mugoma Road or Kahungabunyonyi Road it is 33 feet from the centre line. The Plaintiff started construction without the Environmental Impact Assessment which he obtained after issuance of the letters from the Defendant stopping him from construction because it was illegal. That in the circumstances the Defendant was justified to stop him immediately. Therefore, the Plaintiff deviated from the permission he was granted, he started construction before obtaining an Environmental Impact Assessment and also constructed on the road reserve.

I have considered the submissions by both advocates. I have also read through the record of proceedings. It is not disputed by both sides that the Plaintiff was granted permission by the Defendant to put up a filling pump/station at Kisenyi-Mugunu, West Division, Fort Portal Municipal Council. The other factor is that it is not disputed that the Plaintiff started construction and, in the process, installed two fuel tanks and a kerosene tank. After carrying out all those works the Defendant halted construction and to date, the Plaintiff's properties are still on site. When the Court visited the locus in quo, I confirmed those developments. Whereas the Defendant admitted having permitted the Plaintiff to construct/install a fuel station, in the process they stopped him alleging that he had diverted from the original plan and extended construction into a road reserve. The evidence on record indeed confirms the above developments. As submitted by Counsel for the Defendant, DW1, Ndimio Deo, the Town Clerk of the Defendant stated that;

“On the 6th day of January 2008, the Plaintiff made an application to the Defendant for a temporary permit for installation of a filling pump at Rwengoma A3 in West Division, Fort Portal Municipality. On the 8th day of May 2008, the Town Clerk of the Defendant wrote a letter to the Plaintiff informing him of the Defendant's acceptance of his application to put up a mini filling station on temporary terms. The said letter was tendered in Court and admitted as Exhibit D2 wherein there is a condition that the Plaintiff shall make all such developments within the demarcated plot (condition Number 4).

DW1 added that the Plaintiff was further required to submit an environmental impact assessment and building plans in respect of the said intended developments as required by law.

He concluded that the Plaintiff never submitted the environmental impact assessment and the plans for the intended developments to the Defendant before the developments could commence and the Defendant wrote to him halting the developments. The said letter was tendered in Court and admitted as Exhibit D3B.”

So, whereas the Defendant's case was that the Plaintiff completely deviated from the original request and started construction in a road reserve, and that the evidence of DW1 was never contradicted or discredited, the evidence on record is different. On page 18 of the recorded proceedings, DW1 was asked by Counsel for the Plaintiff whether there was reference to any other road other than Bundibugyo road. DW1's answer was that there was no reference to a reserve of any other road other than Bundibugyo road. And DW1 further confirmed that

permission was granted to the Plaintiff after seeking the advice of the engineer. Further, on page 20 of the proceedings, DW1 testified that he had seen the Certificate of approval from NEMA and that the Certificate of Impact Assessment dated 15/2/2010, (Annexure “C” to the Plaintiff’s statement). And whereas DW1, Ndimio Deo had testified that the road reserve referred to in the conditions to the Plaintiff was in reference to Bundibugyo road, DW2, Kugonza Peter confirmed that his findings were the road reserve was not on Bundibugyo road. At the bottom of page 22, DW2 stated that the developments were on the reserve of another road whose name he could not recall. In the end, DW2 confirmed that the developments were not on the reserve of Bundibugyo road.

10 I therefore disagree with the submissions of Counsel for the Defendant that the evidence of DW1 was not contradicted. It was contradicted by DW2 who confirmed that the developments of the Plaintiff were not on a road reserve of Bundibugyo road. The other factor is that whereas Counsel for the Defendant submitted that the tanks were constructed on a reserve of Mugoma road and outside plot 42 Bwamba road, PW2, Rwakahangi Stephen testified on page 6 of the recorded proceedings that part of his Kibanja from Plot 42 is curved and that **he did not know Mugoma Road**.

PW2 also testified that the Town Council did not give him title on the road reserve.

PW2 added that he was not there at the survey of DW2. I have also seen the letter dated 12/1/2009 from the Senior Assistant Town Clerk to Rwakahangi Stephen, telling him to halt the works in front of his premises and contact the office of the Town Clerk. In my view, that letter should have been addressed to Muhebwa Alex, the Plaintiff. But even then, and as Counsel for the Plaintiff submitted, the letter did not indicate that works were being halted because the construction was on a road reserve. The second letter to the Plaintiff indicated temporarily halted pending submission of the Environmental Impact Assessment, approved plans and a report of the station Engineer regarding the length of the Road reserve. From the evidence on record, the Plaintiff complied with all the requirements but he has never been allowed to continue with his project. The matter of a road reserve was an afterthought on the part of the Defendant. That explains why the survey report was made much later on 22/4/2013, after the Plaintiff had filed this case in 2012.

30 In the premises, I find and hold that the Plaintiff embarked on the development of the site and satisfied all the requirements of the Defendant to develop and run a filling station on Plot 42 Bwamba Road or Bundibugyo road. This is particularly in view of the opinion of the

municipal Engineer, the physical planner and others who approved the suitability of the site for that purpose. And the issue of road reserve was resolved by the station Engineer in his minute on 7th April, 2008 (Annexure D1).

This Court therefore finds and holds that the Plaintiff has proved his case on the balance of probabilities. The Plaintiff did not violate the permission granted to him by the Defendant to install a fuel station. Issue No 1 is resolved in the Plaintiff's favour.

Issue 2: Whether the Plaintiff is entitled to the remedies sought?

Counsel for the Plaintiff submitted that the Plaintiff sufficiently proved that he was granted permission by the Defendant to install a mini filling station only to be stopped by the Defendant without any justification and/or compensation. The Plaintiff fulfilled all the requirements and the acts of the Defendant have subjected him to colossal losses for which he is entitled to special damages.

Further, that Court visited locus and saw for itself the intended developments which are within Plot 42. The owner of the said plot agreed to rent it out to the Plaintiff and confirmed the same in Court as PW2. That the technical team also confirmed that the site was suitable for the purpose and it was on this basis that the Defendant granted the Plaintiff permission.

Furthermore, that even if the permission was rescinded the Plaintiff would be entitled to compensation for the inconvenience suffered. To date the Plaintiff's tanks are still on the site, he has lost business and his life's savings. That this has taken over 10 years and therefore the Plaintiff is entitled to interest.

Counsel for the Defendant on the other hand submitted that the Plaintiff was not entitled to the remedies sought because he is in the wrong and cannot benefit from his own wrongdoing.

Having found and held that the Plaintiff did not violate the permission granted to him by the Defendant to install a fuel station, and there was no wrongdoing on his part as he fulfilled all the requirements and obligations, then he is entitled to remedies. The Plaintiff, after being granted permission by the Defendant, embarked on construction works. He did excavation and installed two fuel tanks and a kerosene tank. All that was required was to install fuel pumps and start supplying fuel to the surrounding community and outgoing traffic to Bundibugyo road.

In paragraph 12 of the Plaintiff, he avers that he has been subjected to heavy losses as a result of the actions of the officials of the Defendant for which he is entitled to special damages.

The special damages are set out and particularised under paragraph 12 of the plaintiff totalling to UGX 685,150,000/=. The same was not challenged. This Court, as already noted, visited
5 the locus in quo and saw those developments on the ground. In my view and in the circumstances, the Plaintiff is entitled to the sum of UGX 685,150,000/= as special damages to be paid by the Defendant, Fort Portal Municipal Council.

Counsel for the Plaintiff also prayed for a sum of UGX 13,200,000/= being rent the Plaintiff paid to Rwakahangi Stephen in respect of Plot 42, Bwamba road. Rwakahangi Stephen
10 testified as PW2 and confirmed that Plaintiff is still his tenant. I accordingly order that the Defendant refunds that amount of UGX 13,200,000/= paid as rent by the Plaintiff.

Finally, since the Defendants admit having given the Plaintiff permission to develop the site into a filling station, after due consultations with its technical staff, consequent upon which the Plaintiff committed his resources to develop the capacity, then the Plaintiff is entitled to
15 general damages.

Counsel for the Plaintiff did not suggest any amount in his submissions but in my view, an award of UGX 50,000,000/= is appropriate as general damages. I also award costs to the Plaintiff.

In conclusion, judgment is hereby entered in favour of the Plaintiff and against the Defendant
20 for:

1. Special damages of UGX 685,150,000/=.
2. The Defendant is hereby restrained from stopping, the Plaintiff with the continuation of the construction of the filling pump/station.
3. A sum of UGX 13,200,000/= as lost rent.
- 25 4. General damages of UGX 50,000,000/=.
5. Interest at Court rate on 1) and 2) above.
6. Costs of the suit awarded to the Plaintiff.

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WILSON MASALU MUSENE

JUDGE

19/12/2018

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