

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CA – 0002 OF 2015)

(Arising from FPT – 01 – LD – CA – 005 of 2007)

KISOMORO SUB-COUNTY LOCAL GOVERNMENT.....APPELLANT

VERSUS

LEO GAMUKAMA.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE.

Judgment

This is an appeal against the decision of His Worship Oji Phillips Magistrate Grade one at Fort Portal delivered on 17/12/14.

Background

The Respondent instituted a Civil Suit against the Appellant a body Corporate as a Local Government and his claim was for a Declaration that the Respondent is the legal and beneficial owner of the suit land; an injunction; general and special damages and costs.

The Plaintiff avers that he is the owner of customary lands at Nyakigumba Trading Centre, Kisomoro Sub-County in Kabarole District and has a number of buildings and vacant Plots around which he planted trees by way of a fence. That in a bid to boost the sales of his business at the trading Centre, he allowed a market to be erected and operated on part of his land and had the said market demarcated off by a hedge/fence.

In December 2006 and early 2007, the Respondent sought to carry out some developments on the suit land by constructing a house and a latrine on one of his vacant Plots on the suit land but was stopped from carrying out the said developments by the Sub-County Officials claiming that the land is owned by the Sub-County. That his property was in 2006 and 2007 destroyed by the Appellant's Officials and some tools taken away in order to deprive him from further constructions. That in the circumstances the Respondent suffered losses and

inconvenience for which he sought special, exemplary, and general damages, a permanent injunction and costs.

The Appellant on the other hand denied all the contents of the Plaint and made a counter-claim against the Respondent for general damages for trespass, inconvenience, mesne profits, a declaration that the suit belongs to her, an eviction order, vacant possession and a permanent injunction restraining the Respondent from further acts of trespass or interference with the Appellant's land.

Issues raised for determination in the lower Court were;

1. Who of the parties is the owner of the suit land?
2. Who of the parties trespassed on the suit land?
3. Is the suit land a wet land and if so did the Plaintiff interfere with the alleged or any wet land?
4. What remedies are available to the parties?

The trial Magistrate on evaluating all the evidence on record and visiting the locus – in – quo found that the suit land belonged to the Respondent, the Appellant was a trespasser, and that no technical witness was produced to prove that the suit land was a wet land. The trial Magistrate rejected the issue of time limitation on ground that it does not apply to customary land. An eviction order was issued, Counter-claim was dismissed, general damages of UGX 19,000,000/= and UGX 1,000,000/= as exemplary damages were awarded and costs. The Appellant being dissatisfied with this decision lodged this appeal whose grounds are;

1. That the learned trial Magistrate Grade one erred in law and fact when he failed to properly evaluate the evidence on record and as a result he came to a wrong decision.
2. That the learned trial Magistrate Grade one erred in law and fact when he held that the Respondent's suit/claim is not barred by limitation.
3. That the learned trial Magistrate Grade one erred in law and fact in awarding excessive general damages of Shs. 19,000,000/= and exemplary damages of Shs. 1,000,000/= which were not supported by evidence.

Counsel Ahabwe James appeared for the Appellant and Counsel Cosma Kateeba for the Respondent. By consent both parties agreed to file written submissions.

In the case of **Banco Arabe Espanol versus Bank of Uganda, SCCA No.8 of 1998**, Order JSC held that;

“The first Appellate Court has a duty to re-appraise or re-evaluate evidence by affidavit as well as to evidence by oral testimony, with the exception of the manner and demeanour of witnesses, where it must be guided by the impression made on the trial judge.”

Resolution of the grounds;

Ground 1: That the learned trial Magistrate Grade one erred in law and fact when he failed to properly evaluate the evidence on record and as a result he came to a wrong decision.

Counsel for the Respondent in his submissions rightly noted that this ground is too general and offends the provisions of **Order 43 Rule 1(2)** of the Civil Procedure Rules in so far as it does not precisely and concisely specify the point which is said to have been wrongly decided. (See: **Attorney General versus Florence Baliraine, Court of Appeal Civil Appeal No. 79 of 2003**). I think Counsel is on a fishing expedition. This ground is therefore dismissed.

Ground 2: That the learned trial Magistrate Grade one erred in law and fact when he held that the Respondent’s suit/claim is not barred by limitation.

Section 5 of the Limitation Act is to the effect that, no person shall bring an action to recover land after the expiration of 12 years from the date the cause of action accrued to him or her.

Counsel for the Appellant submitted that in the instant case the cause of action arose in 1975 or 1980 which was disregarded by the trial Magistrate. He went on to state that the trial Magistrate relied on an outdated authority in regard to limitation on customary land. Counsel cited the case of **Henry N.K Wabuli and Another versus Rogers Hanns Kiyonga Delingu and Others, Civil Suit No. 102 of 2009**, where it was stated that; the Limitation Act itself made it an exception and that since no exception was made for customary land holding, the Limitation Act would still apply to land held under customary tenure. That in the circumstances the suit was time barred.

Counsel for the Respondent on other hand submitted that the trespass by the Appellant started in 2006 and not 1975 as alleged by the Appellant. That the Appellant was a licensee on the

suit land and had been given permission by the Respondent to operate a market thereon. The suit was filed in 2007 meaning it was not time barred.

Further, that it is trite law that trespass to land as a tort is a continuous tort with each day of trespass giving rise to a new cause of action from day to day as long as it lasts. Therefore, the Respondent could sue immediately or any time during the continuous or after it had ceased which had not ceased in the instant case as held in **Petero Balaba & Another versus Kagaba Moses & Others, High Court Civil Sui No. 1417 of 1999.**

In my view, the suit was not time barred even though the trial Magistrate relied on a wrong authority to validate his decisions. The trespass arose in 2006 – 2007 when the Appellant destroyed the structures of the Respondent as per his evidence and the suit was instituted in 2007. As submitted by Counsel for the Respondent indeed trespass is a continuous tort for which limitation does not arise.

This ground fails.

Ground 3: That the learned trial Magistrate Grade one erred in law and fact in awarding excessive general damages of Shs. 19,000,000/= and exemplary damages of Shs. 1,000,000/= which were not supported by evidence.

Counsel for the Appellant submitted that the trial Magistrate was not addressed on general damages and therefore could not award them and at that excessively as per the case of **Jack Busingye and 2 others versus T.M.K, Civil Suit No. 15 of 1990.**

Further that, as regards the exemplary damages and the case of **Seraphin Obwolo versus Barclays Bank of Uganda Ltd, Civil Suit, No. 682 of 1985** a claim for exemplary damages had to be specifically pleaded in the body of the plaint together with full particulars of facts relied on to support the claim and not merely the prayer.

Punitive or exemplary damages are an exception to the rule that damages generally are to compensate the injured person. These are awardable to punish, deter, express outrage of court at the defendant's egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct. They are also awardable for the improper interference by public officials with the rights of ordinary subjects.

Unlike general and aggravated damages, punitive damages focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are in the nature of a

fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society and also the court's sense of decency. They may also be awarded to prevent unjust enrichment. They are awardable with restraint and in exceptional cases, because punishment, ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract.

In the case of **Obongo versus Municipal council of Kisumu [1971] EA 91**, court held that;

“It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand, exemplary damages are completely outside the field of compensation and although the benefit goes to the person who was wronged, their object is entirely punitive”.

I agree that exemplary damages are to be specifically pleaded in the plaint and as per Respondent's submissions; the trial Magistrate based his award of exemplary damages on paragraphs 8, 9 and 10 of the plaint. Therefore, I find no fault in the award of exemplary damages, if anything they were even not proportionate to the misconduct of the Appellant's Officials towards the Respondent.

Counsel for the Respondent submitted that the Respondent was greatly inconvenienced by the acts of the Appellant's Officials who interfered with the ownership of the suit land, destroyed property, boundaries, illegally put up structures and even threatened him. That UGX 19,000,000/= as an award of general damages was justifiable.

The decision in **Kampala District Land Board & George Mitala versus Venansio Babweyana, Civil Appeal No. 2 of 2007** is well settled law on award of damages by a trial court. It is trite law that damages are the direct probable consequences of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering.

Hon. Mr. Justice Bart M. Bart M. Katureebe, JSC (as he then was) in his paper entitled “Principles Governing the award of damages in Civil cases”, that he presented at the

induction course of newly appointed Judges of High Court of Uganda, at Entebbe Resort-Beach Hotel, on Wednesday, 18th June, 2008, stated that;

“Assessment of damages is principally the duty of the trial court. Indeed, although appellate courts within the Commonwealth, including ours are by statute enabled to invoke any of the powers of a trial court, in practice, they will not engage in the activity of assessment of damages except in the most exceptional circumstances.”

Further that;

The role of the Appellate Court in the province of damages as articulated by **Greer LJ in Flint Vs Lovell [1935] 1 KB 354**, is the correct statement of the legal principle applicable in the appellate courts of Uganda with regard to damages in civil suits;

“An Appellate Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because it thinks that had it tried the case in the first instance it would have given a greater or lesser sum. In order to justify reversing the trial judge on the question of amount of damages, it will generally be necessary that the appellate court should be convinced that;

- a) *That the trial judge acted upon some wrong principle of law,*
- b) *That the amount awarded was so extremely high or very small as to make it, in the judgment of the appellate court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”*

In the instant case the Respondent was greatly inconvenienced by the acts of the Appellant’s Officials for which the trial Magistrate awarded UGX 19,000,000/= worth of general damages. The trial Magistrate did not act upon any wrong principle therefore I see no reason to vary the award of general damages by the lower Court.

The award of exemplary and general damages is therefore upheld.

This appeal lacks merit and is dismissed with costs.

Right of appeal explained.

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OYUKO. ANTHONY OJOK
JUGDE
15/12/2016

Read and delivered in open Court in the presence of;

1. Cosma Kateeba for the Respondent.
2. The Respondent.
3. Court Clerk – Clovis

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OYUKO. ANTHONY OJOK
JUGDE
15/12/2016