

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KABALE
LAND CIVIL SUIT NO. 0021 OF 2017

5 1. MARGARET RWEGYEMERA
 2. HERBERT RWIGYEMERA -----PLAINTIFFS

VS

10 REYNOLD CONSTRUCTION COMPANY LTD-----DEFENDANT

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

JUDGMENT

15 The Plaintiffs' claim against the Defendant is for special, general and aggravated damages for trespass to land. They also sought mesne profits and costs of the suit.

Plaintiffs' facts

The 1st Plaintiff, Mrs. Margaret Rwegyemera is the registered proprietor of Ndorwa Block 3 Plot 245 Kazigizigi Cell, Karubanda Ward, Southern Division Kabale Municipality. The
 20 2nd Plaintiff, Herbert Rwegyemera, is her son. On or about the 12th January 2014, the Defendant, without any claim of right or the permission of the 1st Plaintiff, entered into her land, established a borrow pit, KM 142 + 400 RHS Kabale Katuna Road Section, and started extracting earth therefrom, damaging structures and plantations on the land.

Mrs. Rwegyemera complained to the Defendant, who promised to compensate her but
 25 has never done so. Instead, they continued the trespass. She has since suffered special damages for extracted earth; UGX 138, 240,000/=; damaged structures, UGX 12, 650,000/= and spoiled plantations UGX, 1,200,000/=.

In addition, she claims general damages for; use of her land without her consent and illegal entry into her land. And aggravated damages for violation of her constitutional rights to property for the arbitrary, high handed and illegal acts of the Defendant.

5 Mr. Herbert Rwigyemera denied entering into the agreement dated 12th January 2014, with the Defendant company. He stated that the signature on the document purported to belong to him, is a forgery. His mother and himself have at all times opposed the Defendant's illegal entry and use of the suit property and their claim stands.

Defendant's Facts

10 The Defendant company, Reynolds Construction was represented by its public relations officer, Mr. Amos Muriisa. He testified that on the 12th January 2014, the Defendant's project manager received a letter from the Chairperson of Kazigizigi Local Council 1, Kabale Municipality introducing the 2nd Plaintiff to the Defendant, and requesting the Defendant to excavate the 2nd plaintiff's land at no cost.

15 On the afternoon of the 12th January 2014, the Defendant took machines to the suit land to commence clearing the land for marram. The 2nd Plaintiff showed up at the site and requested a sum of UGX 500,000/= (Five Hundred Thousand Shillings) to enable him fence off the land after the excavation.

20 An agreement dated 12th January 2014, was executed between the 2nd Plaintiff and the Defendant's project manager, Mihail Garachinov, in the presence of the Chairperson Kazigizigi, LC1 among others.

It was only after execution of that agreement, with the consent of the 2nd Plaintiff that the Defendant entered onto the suit land and excavated the earth. No property of the Plaintiffs was damaged and therefore no trespass was occasioned to the Plaintiffs.

25 Should this court find that the Defendant was liable for trespass, the Defendant would seek indemnity from the 2nd Plaintiff as per the terms of the agreement.

A letter dated 4th May 2014 authored by the 2nd Plaintiff and addressed to the Defendant's resident engineer confirms the agreement of January 2014.

After the trial, the court visited the locus in quo in the company of the parties. Additional evidence was taken from the witnesses to clarify on their testimonies in court.

Mr. Kenneth Mutungi for the Plaintiff and Mr. Raymond Ndyagambaki for the Defendant filed submissions in this matter for which I am grateful and which I have duly considered.

5 **ISSUES**

1. **Whether the Defendant trespassed on the suit land?**

2- **Whether the Defendant damaged any structures or buildings on the suit land?**

3. **Whether the Defendant is entitled to indemnity from the 2nd Plaintiff?**

4. **What remedies are available to the parties?**

10 **RESOLUTION**

In Onegi Obel and Achwa Valley & Ranch Limited v Attorney General and Gulu District Local Government (HCT-02-CV-CS-0066-2002), the learned trial judge relied on Salmonds Law of Tort, Ninth Edition at pg 207 to define Trespass to Land as follows;

1. *The wrong of trespass to land consists in the act of (a) entering upon land in the possession of the Plaintiff of (b) remaining on such land or (c) placing any material object upon it in each case without lawful justification.*
2. *Trespass by wrongful entry. The commonest form of trespass consists in a personal entry by the defendant, or by some other person through his procurement, into land or building occupied by the plaintiff. The slightest crossing of the boundary is sufficient...nor indeed does it seem essential that there should be any crossing of the boundary at law provided that there is some physical contact with the plaintiff's property.'*

Further, trespass to land was defined in the Supreme Court decision of Lutaaya v Stirling Civil Engineering Co. Ltd C.A NO.11 of 2011 where Mulenga JSC at page 8 held that;

'Trespass to land occurs when a person makes an unauthorised entry upon land and thereby interferes or portends to interfere, with another person's lawful possession of that

land; it is committed against a person in possession. Needless to say, the tort of trespass to land is committed not against the land but against the person who is in actual and constructive possession of the land'

5 PW1, Margaret Rwegyemera categorically stated that she has never authorised the PW2, her son to enter into agreements or transactions on her behalf. And she had personally never granted permission to the Defendant to enter her land and excavate earth. Mr. Herbert Rwegyemera likewise denied executing any agreement with the Defendant company, allowing them to excavate earth on the suit land.

10 According to Lutaaya v Stirling Civil Engineering Co. Ltd C.A NO.11 of 2011, supra, the tort of trespass is committed against a person in actual and constructive possession of the land. PW1, testified that she was not around when the Defendant came onto her land. She was sick in Nairobi. On the other hand, PW2, was resident on the suit land at the time. He is a biological son to PW1 and it is his testimony that is the foundation of the
15 claim against the Defendant. Salmond on Torts, 15th Edition, page 57, '*A trespass is actionable only at the suit of him who is in possession of the land, using the word in its strict sense...*'

PW2, testified that he lived on the suit land in 2014 when the trespass complained of occurred. While he denied entering into any agreement with the Defendant, PW2 admitted
20 that the Defendant excavated numerous trucks of earth from the land in his presence for two whole months. When this court questioned PW2 as to why he did not stop the Defendant from continuing with the trespass, he simply stated that he objected and they refused. There is no evidence of a police report filed by PW2 if at all he was convinced that the Defendant was acting in a defiant and arbitrary manner. Instead, PW2 stood by
25 and watched.

Trespass is a tort. It is an unwelcome, unwanted and intolerable entry on a person's property. The reactions of PW2 in response to the Defendant's activities on the suit land, were not the actions of an injured party. They were the actions of a man who had invited the Defendant on his mother's land. Exb. D.1, dated 12th January 2014, was the invitation.
30 Having opened the door to let the Defendant in, PW2 executed Exb. D.2, dated 12th

January 2014, with the Defendant's project manager. And it was this agreement that made PW2 sit back and watch while the earth left the land. Finally, being aggrieved by the delayed payments, PW2 wrote Exb. D.3, on the 4th May 2014, to implore the Defendant's engineer to ensure that he was paid.

5 Counsel for the Plaintiffs submitted that a copy of PW2's National Identity card, Exb. P.2, bore PW2's signature and was tendered to prove that the signatures on the agreements were forgeries. And went ahead to add that the Defendant had failed to prove that the signatures were genuine. Under section 101 of the Evidence Act, cap 6, he who alleges must prove. It is a fact that neither the Plaintiffs nor the Defendant submitted evidence of
10 a handwriting expert's report to support their respective claims.

It was therefore imperative to look at the evidence a whole to ascertain whether the signatures were genuine or not. DW1, identified the signatures of his colleagues who signed on Exb. D.2 on behalf of the Defendant. Counsel for the Defendant testified the LC1 Chairman who witnessed the document was deceased and could not testify to his
15 own role. PW2 insisted that the signatures on those documents did not belong to him. But this court finds that was no other explanation for his failure to report a police case against the Defendant for the period they were on the suit land save that Exb. D.1, D.2 and D.3 were viable and authentic documents and PW2 had affixed his signature on them all. PW2's acquiescence of the Defendant's activities was proof of the authenticity of the
20 documents.

PW1 testified that she did not authorize her son to enter into any agreements on her behalf. Her son, PW2, held out as authority to permit the Defendant entry upon the suit land as owner of the land under Exb. D.2. It was a straight forward document and having been availed with it, PW1 ought to have taken the matter up with her son. As it stood,
25 PW1 appeared to be using her cloak of ownership of the suit land to cover her son's dishonest actions by joining him as co- Plaintiff in this suit instead of Defendant.

This court finds that there was no trespass on the land, since PW2 held out as owner and allowed the Defendant to come onto the land.

I resolve issue 1 in the negative.

Issue 2

Whether the Defendant damaged any structures or buildings on the suit land?

Before this court could resolve this issue, there arose at locus in quo, the question as to which part of the excavation site comprised the suit land claimed by the Plaintiffs. When this court visited the locus in quo it became gradually apparent that the vast acreage of land where the Defendant excavated earth was not part of Mrs. Rwegyemera's land. Counsel for the Defendant submitted that it was worth noting that Mary Nyakuhirwa's excavation drawing in Exb. P. 4 measures 81.61M in length 67.01M in width and 90.82M in breadth totalling 4,848 square metres being the approximate estimated measurements of the suit land shown to the court during the locus visit. PW3 told this court that he worked under the assumption that all the land the Plaintiffs showed him belonged to them. His assessment of the damage therefore covered the entire land.

This inclusion of land that did not belong to the Plaintiffs in the assessment report, Exb. P.3 which was tendered into evidence through PW3, rendered the entire report unreliable.

Regarding the portion of the land which did belong to the PW1, PW2 testified that structures on his mother's land had been ruined by the Defendant's activity which caused a crack in the existing buildings and damage to property and crops. All this activity, this court has found was initiated, sanctioned and witnessed by PW2 under a legally binding agreement, Exb. D.2. If damage occurred, PW2, bore the primary responsibility for rectifying it.

Issue 3

Whether the Defendant is entitled to indemnity from the 2nd Plaintiff?

This issue relates to indemnity. It would only have been worth resolving had this court found the Defendant liable for trespass. Since this court has found that the Defendant did not trespass on the Plaintiff's land, this issue becomes moot.

Issue 4**What Remedies available to the parties?**

The Plaintiffs did not come to court with clean hands. PW2 especially attempted to have his cake and eat it. Exb. D.2, the agreement that commenced the relationship between PW2 and the Defendant had a short life span of two years' validity and it expired on the 12th January 2016. On the 1st October 2014, when this suit was filed it was still in force.

A perusal of the Plaint makes no mention of forgery of Exb. D.2. The Defendant filed their Written Statement of Defence on the 24th November 2014 attaching Exb. D.2 as an annexure. There was no reply to the WSD attacking the agreements as forgeries. An allegation of forgery is an allegation and it should have been specifically pleaded in the reply to the WSD.

PW2's claim of forgery was an afterthought, a departure from his pleadings. Further, this court has already faulted the veracity of Exb. P.3, the assessment report for the inclusion of chunk of land which is not owned by the Plaintiffs. A transparent attempt to reap where they had not sown.

It is against this background that this court finds, in agreement with Counsel for the Defendant, that the Plaintiffs are not entitled to any of the remedies sought as against the Defendant. If PW1 maintains that her son acted without her authority, she should file a claim against him for the necessary redress.

In conclusion, I dismiss this suit with costs to the Defendant.

.....

Olive Kazaarwe Mukwaya

JUDGE

15th October 2020

Delivered by email to: Mr. Kenneth Mutungi for the Plaintiffs

Mr. Raymond Ndyagambaki for the Defendant