THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[LAND DIVISION]

CIVIL SUIT NO. 333 OF 2017

SANJAY DATTA:: PLAINTIFF

VERSUS

1. KADIC HOSPITAL KAMPALA
2. UMC VICTORIA HOSPITAL:: DEFENDANTS

BEFORE: HON. JUSTICE JOHN EUDES KEITIRIMA

JUDGMENT

The Plaintiff's claim against the defendants(**Kadic Hospital Kampala** and **UMC Victoria hospital** hereinafter referred to as the 1st and 2nd defendants respectively) jointly and severally is for a declaration that the defendants trespassed on the plaintiff's land and that they also acted negligently in excavation of the adjoining land. The plaintiff is also seeking for an order to direct the defendants to construct a gabion wall. The plaintiff is also seeking for a permanent injunction restraining the defendants, their agents, servants and all others claiming under them from further trespass and wrongful excavations, general damages, interest and costs of the suit.

The facts constituting the plaintiff's cause of action are that:

1. The plaintiff is the registered proprietor of the Land in dispute comprised in **Plot 36 Naguru, East Road, Kampala City** and has been residing on the suit property for 7 years. A copy of the certificate of title was attached to the plaint and marked as Annexture "A".

2. One of the plaintiff's neighbour was the 1st defendant until around February 2017 when the 2nd defendant took over the said premises.

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3. The plaintiff contends that the topography of the plaintiffs and defendants land is a hilly terrain, with the plaintiff's land being located higher up on the hill and the defendants land is on the lower end of the hill below the plaintiff's land.

4. The plaintiff further contends that the plaintiff's land and the 2nd defendant's land is adjoined by a reserve directly below high voltage electricity power lines and the said adjoining line is owned by Uganda Electricity Transmission Company limited(UETCL).

5. The plaintiff alleges that between 2012 and 2016, the 1st defendant without authorization from UETCL and without approval from KCCA carried out excavation works on the adjoining land exposing /removing the support to the plaintiff's land that had previously been provided by the adjoining land.

6. The plaintiff further contends that the 1st defendant during excavation on the adjoining land, without the plaintiff's permission, cut and encroached on the plaintiff's land by approximately 14.75m. A copy of a report of a survey commissioned by the 1st defendant was attached to the plaint and marked as annexture "B".

7. The Plaintiff further alleges that in an attempt to retain the soil from the plaintiff's land, the 1st defendant constructed a retaining wall but the said wall was from the onset incompetent to hold back the soil from the plaintiff's land by virtue of its makeup. That the wall has since developed several cracks and a portion of it has collapsed. A copy of a technical report on the structural integrity of the 1st defendant's retaining wall was attached to the plaint and marked as annexture "C".

8. The plaintiff further contends that he has made efforts to stop the defendants' actions by reporting the matter to the Directorate of Physical Planning, Kampala City Council Authority (KCCA) and in response KCCA took action stopping the defendants from conducting further works on the site. A copy of a letter from the Ag. Director

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Physical Planning was attached to the plaint and marked as annexture "D".

9. The plaintiff further contends that in spite of the directive from KCCA stopping further works on the site, on or about the 26th January 2017, the defendants continued with the work on the site.

10. The plaintiff avers that he has without much success made every effort to amicably resolve this matter with the defendants and even presented to the defendants' quotations from professionals regarding the construction of a suitable retainer wall or gabions. Copies of the quotations were attached to the plaint and marked annexture "E".

11. The Plaintiff further states that as a result of the defendants' excavation works, the support to the plaintiff's land has been compromised, unabated soil erosion has cut gullies into the plaintiff's land further cutting into the plaintiff's land and making it impossible for the plaintiff to build a retainer wall on his land and has generally left the plaintiff's property exposed.

12. The plaintiff further contends that the defendants' excavation works have caused running water that has a more eroding impact on the plaintiff's land.

13. The Plaintiff further contends that he has suffered great inconvenience and emotional distress being the result of direct and indirect consequences of the defendants' actions.

14. The plaintiff further avers that the defendants' actions have devalued his land and has made it unsafe.

15. The plaintiff further contends that the defendants by their actions and conduct have deprived him of his right to quiet possession and

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enjoyment of his property and he has suffered loss and damage for which he claims general damages.

The plaintiff lists the particulars of negligence on part of the defendants as follows:

a) Failing to exercise reasonable care and skill in conducting excavation works on the adjoining wall.

b) Failing to exercise reasonable care and skill in the construction of the retainer wall on the adjoining land.

c) Acting without due regard to importance of maintaining the support to the plaintiff's land.

d) Acting without due regard to the complexity involved in holding back the plaintiff's land.

e) Omitting to properly secure the plaintiff's land.

f) Acting without approved plans from KCCA.

g) Acting in contravention of KCCA'S directives with regard to the site.

16. The Plaintiff further contends that as a result of the defendant's said acts of negligence, he has suffered great inconvenience, mental suffering and anguish for which he is seeking general damages.

17. The plaintiff contends that the value of the subject matter is above 230,000,000/= (two hundred and thirty million shillings only).

The Plaintiff is now seeking for the following remedies:

a) A declaration that the defendants trespassed on the plaintiff's land.

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b) A declaration that the defendants acted negligently in excavation of the adjoining land.

c) An order directing the defendants to build a gabion wall or pay the plaintiff money to construct the gabion wall.

d) An order for a permanent injunction stopping the defendants, their agents, servants and anyone claiming under them from further acts of trespass.

e) General damages for trespass, damage and inconvenience caused by the defendants' negligence.

f) Interest on (e) above at court rate from the date of judgment until payment in full.

g) Costs of the suit.

In their written statement of defence the 1st defendant avers and contends that:

1. Prior to the plaintiff filing this case, several meetings had been held between the plaintiff and the 1st defendant and lately the 2nd defendant with the view of erecting a retainer wall along the side of the plaintiff's land/boundary. That in those meetings the plaintiff had committed himself to making a contribution to half the construction costs of the said retainer wall since the building of which benefitted both parties. Copies of the meetings and the plaintiff's commitment were attached to the 1st defendant's written statement of defence and marked as annexture "A1".

2. On the 1st February 2016, the plaintiff wrote to the human resource manager of the 1st defendant indicating that he had received a quotation of 47,200,000/= (forty seven million, two hundred thousand shillings only) to build a permanently secured retainer wall. A copy of the letter to that effect was attached to the written statement of defence and marked as annexture "A2".

3. That in light of the above, the plaintiff and the 1st defendant would each contribute 23,600,000/= (twenty three million six hundred thousand shillings) for the construction of the retainer wall.

4. The 1st defendant further contends that on 5th March 2016, the Plaintiff again delivered a letter indicating costs to be between 56,000,000/= to 58,000,000/=and suggested that each party contributes 13,000,000/= (thirteen million shillings) each before 12th April 2016. A copy of the letter was attached and marked as annexture "B".

5. On 11th April 2016, the 1st defendant sent to the plaintiff a quotation for a gabion together with the design of the gabion for the plaintiff's consideration whose estimate was 48,136,706/=. Copies of the design and quotation were attached to the defence and marked as annextures C1, C2 and C3.

6. The 1st defendant further contends that on 22nd April 2016 the plaintiff put the costs of building the gabion at 43,700,000/= (forty three million seven hundred thousand shillings only). The plaintiff was requested to break down the figure for the gabion in an email by counsel for the 1st defendant. The communication to that effect was annexed and marked as "D".

7. On the 29th April 2016 the plaintiff sent an itemized breakdown for the construction of the retainer wall at 47,192,500/=. That this quotation had no design, impression of measurements in terms of lengths and height supplied.

8. On 9th May 2016 a Memorandum of Understanding was sent to the plaintiff whose input was that since the 1st defendant was out of funds for the construction, the plaintiff would initially meet the costs and a payment arrangement was captured in the M.O.U as indicated in annexture "F" to the written statement of defence.

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9. On the 9th May 2016 in an email to the 1st defendant's legal representative, the plaintiff stated that the memorandum of understanding was "vague". A copy of the email to that effect was attached and marked "G".

10. On the 17th August 2016, in a surprise turn of events the plaintiff sent an sms to the Director of the 2nd defendant a one Kotecha indicating that the estimate of building the gabion wall was one hundred and seventy five million shillings (175,000,000/=). A copy of the email to that effect was attached and marked as annexture "H".

11. On 18th August 2016 the legal representative of the 1st defendant wrote to the plaintiff about the said cost and it was suggested that a surveyor be engaged and the 2nd defendant opens the boundaries between the two plots of the plaintiff and the 1st defendant. A copy of a letter to that effect was attached and marked as annexture "I".

12. A survey was carried out which showed that the level of encroachment was 18 meters along the boundary line. On 14th September 2016 the survey report was shared amongst all parties including the Plaintiff. A copy of the survey report was attached and marked as annexture "J".

13. The 1st defendant contends that on the 15th September 2016, a summation of the action plan for construction of the retainer wall was shared amongst all the parties concerned including the Plaintiff. A copy of the summation was attached and marked as "annexture K".

14. The 1st defendant further contends that on 19th September 2016, the Plaintiff was advised that an Engineer would be coming to have a physical inspection of the wall to be built and thereafter generate a design. A copy of the advice was attached and marked as "L".

15. That the Plaintiff was asked to provide approved plans for his retainer wall and he instead supplied expired plans of 2004.

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16. The 1st defendant further contends that on the 28th September 2016, the 1st set of structural designs was served on the Plaintiff and requested to advise on the next step. A copy of the structured designs were attached and marked as "M".

17. That intermediary meetings were held on site and it was agreed with the plaintiff and the 1st defendant and representatives of the 2nd defendant that work should commence.

18. The 1st defendant further contends that on the 7th November 2016, the Plaintiff was advised that the design supplied by him would not be altered based on his hand written recommendation of a solid wall as opposed to the approved wall and grill by KCCA. That the Plaintiff was written to together with Counsel representing the 2nd defendant indicating that the wall shall be professionally constructed. A copy of a letter to that effect was marked as annexture "N".

19. That on its part, the 1st defendant had already contributed fifty million shillings (50,000,000/=) towards the construction of the wall which money is held on account by the 2nd defendant. That the Plaintiff to date has not made a single contribution for his part towards the construction of the wall.

20. The first defendant further contends that on the 11th November 2016, as a means of frustrating the building exercise, the Plaintiff wrote stating that there was a disparity in height saying the wall is between 8-11 meters whereas according to the design , the angle of inclination was 3.7m, 3.7m and 1.5m whose total was 8.9 meters. At this point, the Plaintiff's efforts to fail the commencement of the works began since he had initially indicated that he was interested more in the money paid to him and the construction to be done by him. An email and diagram were annexed and marked as annexture "O" and "P".

21. The 1st defendant further contends that on the 10th November 2016, the Plaintiff was advised that his email was based on estimations and the Plaintiff was advised to come to the site and assist in its supervision. That a one Engineer Kenneth was appointed to supervise the works.

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22. That on the 11th November 2016, a grader was hired by the 1st defendant to start with the excavation works with an aim of commencing the construction of the retainer wall.

23. That on 12th November 2016, the Plaintiff wrote complaining that works had started without his permission and was complaining on how his property was exposed. A copy of the letter to that effect was attached and marked as annexture "S".

24. The 1st defendant further contends that on the 13th November 2016, the 1st defendant was informed that the Plaintiff in an effort to frustrate the construction of the retainer wall had deployed police at the construction site which forced the hired constructor to withdraw his tools thereby causing the 1st defendant a loss of twenty three million seven hundred and eighty eight thousand shillings (23, 788,000/=) being the advance payment to the contractor, a loss which the 1st defendant holds the Plaintiff liable. An email was attached and marked as "U".

25. It is the 1st defendant's case that the Plaintiff's claim is fraudulent and full of misrepresentations. That the Plaintiff has frustrated all the efforts by the 1st defendant to construct the retainer wall for which the 1st defendant demands for special damages.

The 1st defendant lists the particulars of fraud as follows:

a) Presenting unreasoned/concocted and inconsistent construction costs of the retainer wall with the aim of fleecing/extorting money from the defendants. The 1st defendant referred to the disparities in annexture B of the WSD and annexture E of the Plaint.

The Plaintiff also stated the particulars of special damages as follows:

a) Twenty three million, seven hundred and eighty eight thousand shillings (23,788,000/=).

b) One million five hundred thousand shillings (1,500,000/=).

The 1st defendant prays that the suit be dismissed with costs and the following orders be made:

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i. The Plaintiff pays special damages to the 1st defendant to the tune of twenty three million, seven hundred and eighty eight thousand shillings (23,788,000/=) for frustrating the construction works.

ii. The Plaintiff also pays the 1st defendant one million five hundred thousand shillings only (1,500,000/=) for frustrating the correction works ordered by KCCA.

iii. The Plaintiff immediately gets approved plans for the construction of the retainer wall from Kampala Capital City Authority.

iv. That the Plaintiff commits fifty million shillings (50,000,000/=) towards the construction of the retainer wall as per the initial cost sharing arrangement.

v. An order stopping the Plaintiff from using the police to interfere with the professional execution of the construction works.

vi. Interest on 6(a) and (b) above at the court rate.

vii. Costs of the suit.

In their written statement of defence, the 2nd defendant avers:

i. That it is a non-existent entity in law.

ii. That the Plaint discloses no cause of action against the 2nd defendant.

iii. That the Plaintiff's case against the 2nd defendant should be dismissed against it with costs.

In the alternative the 2nd defendant contends as follows:

i. The 2nd defendant denies having done the excavation or committed the acts complained of or otherwise trespassed or constructed a retaining wall on the plaintiff's suit land.

ii. That the 2nd defendant was not in occupation or control of the suit premises referred to in the plaint when the alleged trespass and /or excavations occurred.

iii. The 2nd defendant denies the alleged negligence and alleged breach of duty of care and skill as averred in the plaint and the 2nd defendant denies any alleged loss or damage which the Plaintiff may have suffered or sustained occasioned by the alleged acts or matters complained of.

iv. The 2nd defendant further avers that the alleged inconvenience, mental suffering, anguish suffered by the Plaintiff, if any at all, is speculative, too remote and a consequence of the Plaintiff's own actions and or omissions.

In the alternative and without prejudice to the foregoing, the 2nd defendant shall claim full indemnity from the 1st defendant against all the Plaintiff's claims in accordance with the sale and purchase agreement for the assets, land and developments comprised in **Bukoto Plot 86 Kira Road** dated 22nd August 2016.

The 2nd defendant prays that the Plaintiff's claim against it be dismissed with costs.

There was a reply to the 1st defendant's and 2nd defendant's written statement of defences in essence reiterating what was already stated in the Plaint.

At the scheduling conference the following issues were raised for determination:

1. **Whether the acts and omissions of the defendants were negligent.**

2. **Whether the defendants trespassed onto the Plaintiff's land.**

3. **The remedies available to the parties.**

ISSUE ONE: Whether the acts and omissions of the defendants were negligent?

The Plaintiff submitted that the failure to exercise reasonable care, and skill in conducting excavation works on the adjoining land, failure to exercise

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reasonable care and skill in the construction of the retainer wall on the adjoining land , acting without due regard to importance of maintaining the support to the Plaintiff's land, omitting to properly secure the Plaintiff's land , acting without the approved plans from Kampala City Council Authority and acting in contravention of Kampala City Council Authority directives in regard to the site amounted to negligence.

Counsel for the Plaintiff cited the case of ***Donoghue versus Stevenson*-(1932) AC 562** where it was held that in a case of negligence the claimant must prove:

1. **The defendant owed them a duty of care.**
2. **The defendant was in breach of that duty.**
3. **The breach caused damage.**
4. **The damage was not too remote.**

Counsel for the plaintiff further submitted that to prove that there was a duty of care there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by law as one of proximity or neighbourhood and the situation should be one in which the Court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other. Counsel for the Plaintiff cited the case of ***Caparo Industries PLC versus Dickman* -2 AC 605** to buttress his submission.

It was further submitted for the Plaintiff that in the case of ***Donoghue versus Stevenson (supra)*** the word neighbour was defined as persons who are closely and directly affected by the acts of each other and ought reasonably to have them in contemplation as being so affected when directing their minds to the acts or omissions which are called in question.

The Plaintiff further submitted that it is not in dispute that he was the registered proprietor of the suit land as shown in exhibit P1 which is the certificate of title for plot 36. That it is also not in dispute that the 1st defendant was the owner of the neighbouring plot (plot 86) which the 1st defendant sold to the 2nd defendant in 2016 as acknowledged by DW1 in his witness statement.

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The Plaintiff further submitted that the defendants owed a duty of care to the Plaintiff to carry out any excavation works on the adjoining UETCL reserve with approvals from the respective authorities, taking care not to cross into the Plaintiff's land and further more ensuring that such works leave the Plaintiff's land protected from dangers such as erosion.

Counsel for the Plaintiff further submitted that it is a requirement under **Section 3 of the Physical Planning Act 2010** that any person carrying out a development within a planning area should obtain approval from the District Planning Committee. Counsel for the Plaintiff contended that there is no evidence on court record that the defendants obtained approvals from the respective committees. That exhibit P.6 which is a letter from KCCA is evidence that the defendant did not obtain the necessary approval from KCCA. It was the Plaintiff's submission that the defendants owed the Plaintiff a duty to carry out any development with approvals from the physical planning committee.

The Plaintiff further submitted that the 2nd representative, Dr.Chirag testified that the 2nd defendant conducted due diligence before the 2nd defendant purchased plot 86. That he further testified that the boundary opening was done and not all the developments being sold by the 1st defendant were within the boundaries of Plot 86. The Plaintiff contended that the 2nd defendant's representative was fully aware of the dispute between the Plaintiff and the 1st defendant and that he was aware that the dispute had not been resolved at the time the 2nd defendant purchased the plot. That the 2nd defendant had actual notice of the boundary disputes on the land.

The Plaintiff further submitted that on the basis of the principle of ***Caveat emptor,*** the 2nd defendant not only purchased the rights/interests of the 1st defendant, but took the 1st defendant's place in as far as the existing obligations /duties are concerned. That the 2nd defendant owes the Plaintiff a duty to construct a strong gabion wall.

In reply, counsel for 2nd Respondent submitted that in order to ascertain whether the defendant is liable in negligence, the principal in the case of ***Donoghue versus Stevenson (supra)*** should be applied. The cardinal principle of liability is that party complained of should owe to the party complaining a duty of care.

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Counsel for the 2nd defendant contended that the 2nd defendant owed no duty of care to the Plaintiff. Counsel for the Plaintiff stated that it is not in dispute that the Plaintiff is the rightful owner of Plot 36 since 22/09/2011 as per Exhibit P1 and that the 2nd defendant became proprietor of plot 86 on 02/02/2017 as seen in exhibit D2. That the 2nd defendant was not a neighbour to the Plaintiff when the negligence pleaded by the plaintiff arose.

Counsel for the 2nd defendant submitted that during cross examination PWI testified that the dispute arose sometime in 2009 and that in February 2016 the 1st defendant and the Plaintiff reached an understanding on the retaining wall. That this was confirmed by PW1 during cross examination and various email correspondences as shown in exhibits D3, D4, D5,D6,D7 and D8 and the written statement of defence of the 1st defendant. That during cross examination PW1 admitted that the 2nd defendant never agreed to construct the wall and that it was agreed between the Plaintiff and the 1st defendant and therefore the 2nd defendant was not privy to the said discussions or agreements in regard to the retaining wall.

Counsel for the 2nd defendant further submitted that it was important to note that Exhibit P.10, the survey report dated 18/03/2016 and P.ID 2 the report on structural integrity of the wall dated 28th April 2011 and Exhibit P.6 , the letter of complaint about the construction of the retaining wall dated 11/01/2016 pertaining to the retaining wall are all dated prior to the 2nd defendant's purchase of the property. The 2nd defendant contended that she did not owe a duty of care to the Plaintiff as they were not in possession or ownership of Plot 86 at the time of the alleged negligence.

It was the 2nd defendant's submission that the 2nd defendant to be liable must have had a duty of care to the Plaintiff for which they have breached thereby causing damage to the Plaintiff. That as was duly confirmed by PW1 during cross examination, there has been no excavation works or construction works since the 2nd defendant took possession or ownership of the suit property and therefore no negligence arises on his part. Counsel for the 2nd defendant emphasised that there was no relationship of proximity between the 2nd defendant and the Plaintiff and it would therefore be unfair, unjust and unreasonable to impose a breach of duty of care on the 2nd defendant as the

2nd defendant was neither in ownership nor possession of Plot 86 at the time when the negligence alleged was performed. Counsel for the 2nd defendant further submitted that the particulars of negligence pleaded by the Plaintiff allegedly occurred before the 2nd defendant took ownership on the 2nd February 2017 and therefore no duty of care was breached.

Counsel for the 2nd defendant further submitted that as a general tort principle, negligence is not transferable unless it falls under the ambit of vicarious liability. That the facts of the case do not fall within this ambit and therefore the negligence attributed to the 1st defendant cannot be transferred to the 2nd defendant vicariously.

Counsel for the 2nd defendant submitted that it was not in dispute that the 2nd defendant had notice of the boundary disputes on the land, but that this did not create a legal duty of care. That when the 2nd defendant purchased the property they performed all due diligence required and when they became aware of the long standing dispute, they only acted as mediators between the parties as was confirmed in the emails marked as exhibits P2, P4 and P5 and exhibits D9, D10, D11, D12 and D14. That the 2nd defendant even offered his Architect (PW2) and surveyor to professionally advise in regard to the dispute but never took on the responsibility of constructing the retaining wall.

Counsel for the 2nd Plaintiff further submitted that the principle of caveat emptor is not applicable in this case as negligence cannot be transferred. Counsel for the 2nd defendant emphasised that caveat emptor is limited to the rights such as easements, interests including ownership, obligations and duties such as utilities. That in this case all obligations and duties existing prior to the purchase were retained by the 1st defendant by sale and purchase agreement. The 2nd defendant referred to exhibit D1 Clause 11 which provides that ***"the purchaser shall not assume under this agreement, and nothing in this agreement shall operate to transfer to the purchaser or to make either or any of them responsible for debts, liabilities or other obligations of the seller and the company undertakes to discharge or otherwise satisfy all those debts, liabilities and obligations."*** That from the express wording of the agreement, the 2nd defendant cannot be held liable for the obligations/duties and liabilities arising from the acts of the 1st defendant.

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Counsel for the 2nd defendant contended that the 2nd defendant did not breach any duty of care to the Plaintiff as they had no duty at all owed to him and therefore the Plaintiff's claim of negligence against the 2nd defendant should fail as it has no basis in law and in fact.

In his submissions in rejoinder, the Plaintiff contended that the 2nd defendant was part of the ongoing communications regarding excavation works on the suit land until around March 2017.

The Plaintiff further contended that the 2nd defendant falls within the definition of a "neighbour" and therefore owed the Plaintiff a duty of care.

The Plaintiff further contends in rejoinder that the 2nd defendant has not denied having taken on the responsibility to retain some of the money on the purchase price to cater for the building of the gabion wall as shown in exhibit P6 thus showing that they were aware of their duty and responsibility regarding the building of the gabion wall.

The Plaintiff further contended in rejoinder that there was no need to transfer negligence as the 2nd defendant was itself negligent.

On the principle of caveat emptor, the plaintiff emphasised in rejoinder that the purchaser assumes the risk that the product may not meet his expectations. That the 2nd defendant purchased the suit land well knowing that that there was an existing dispute and therefore he took the risk. Further that the suit land is still exposed and continues to erode making this a continuing tort.

The Plaintiff further submitted in rejoinder that he is not a party to the contract between the 1st and the 2nd defendants and therefore not bound by it. That the contract is only relevant to matters between the 1st and 2nd defendants and therefore the failure and or omission of the 2nd defendant being the current owner of plot 86 , to construct a suitable gabion wall to protect the plaintiff's land places the 2nd defendant in breach of its duty of care to the Plaintiff.

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RESOLUTION

Before I proceed with resolving the issues, I will comment on the counterclaim that was raised by the 1st defendant which was imbedded in his written statement of defence.

Order 8 Rule 7 of the CPR Cap 71 provides that ***"Where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he or she shall, in his or her statement of defence, state specifically that he or she does so by way of counterclaim."***

Rule 8 of the said Order provides that ***"Where a defendant by his or her defence sets up any counterclaim which raises questions between himself or herself and the plaintiff together with any other persons, he or she shall add to the title of his or her defence a further title similar to the title in a plaint, setting forth the names of all the persons who, if the counterclaim were to be enforced by cross action, would be defendants to the cross-action and shall deliver to the court his or her defence for service on such of them as are parties to the action together with his or her defence for service on the Plaintiff within the period within which he or she is required to file his or her defence."***

A counter –claim is substantially a cross action, not merely a defence to the Plaintiff's claim. It is a cross claim which the defendant may raise in the very action brought against him by the Plaintiff instead of himself bringing a separate independent action against the plaintiff.

It was therefore erroneous for the defendant to imbed within his written statement of defence, a counter claim without adding a title to their defence a further title similar to the title in the plaint and by not stating specifically that they were raising a counterclaim. The counterclaim raised by the 1st defendant will therefore be struck out for not complying with the provisions of **Order 8 Rules 7 and 8 of the CPR** which are couched in mandatory terms.

It was held in the case of ***Donoghue versus Stevenson*-(1932) A.C 562** that in a case of negligence the claimant must prove:

i. **The defendant owed them a duty of care.**
ii. **The defendant was in breach of that duty.**
iii. **The breach of duty caused damage to the claimant.**

To prove that there was a duty of care in cases of personal injury and property there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by law as one of proximity or neighbourhood and the situation should be one in which the court considers it just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other, see ***Caparo Industries plc versus Dickman*-(1990) 2 AC 605.**

Neighbour is defined as persons who are closely and directly affected by the acts of each other and ought to reasonably have them in contemplation as being so affected when directing your mind to the acts or omissions which are called in question, ***Donoghue versus Stevenson (supra).***

The 1st defendant never led evidence to disprove the claim that was raised by the Plaintiff nor did the challenged by cross examination the evidence that was adduced by the Plaintiff.

The 1st defendant never adduced evidence to show that they never conducted excavation works that exposed /removed the support to the Plaintiff's land that had been previously provided by the adjoining land. The Plaintiff was able to adduce evidence that the 1st defendant did not possess approved plans and that the construction was stopped as a result, see Exhibit P.6.

The evidence of negligence on the part of the first defendant was further buttressed in the report on the structural integrity of the retaining wall dated 28th April 2011 which report was exhibited and marked as Exhibit P.2.

I therefore find that the acts and omissions of the 1st defendant were negligent more so since they never even had approved plans when they embarked on constructing the retaining wall that exposed by removing the support to the Plaintiff's land.

It was held in the case of ***Habre International Company Limited versus Ebrahim Alarakhia Kassam and Others* –S.C.C.A No. 04 of 1999** that where a party fails to challenge evidence that evidence is accepted as true.

It is not disputed that the Plaintiff is the registered proprietor of the suit land as shown in exhibit P1 which is the Certificate of Title for Plot 36. It is also not disputed that the defendants were and are owners of the adjoining suit land of the neighbouring plot 86 which the 1st defendant sold to the 2nd defendant in 2016.

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It is therefore evident that the parties have a relationship as neighbours both in the literal sense and in law.

It is however pertinent to note that the 2nd defendant was not a neighbour to the Plaintiff when the negligence pleaded by the Plaintiff arose. The 2nd defendant became proprietor of Plot 86 on the 2nd February 2017 as shown in exhibit D2.

I agree with the submission of the 2nd defendant that as general tort principle, negligence is not transferable unless it falls under the ambit of vicarious liability. The facts of this case do not fall under this ambit and therefore the negligence attributable to the 1st defendant cannot be transferrable to the 2nd defendant vicariously. The 2nd defendant has not performed any acts or omissions that have led the plaintiff to suffer any damage as the alleged acts of negligence pleaded were committed before the 2nd defendant took over Plot 86.

It is clear from the purchase agreement of Plot 86 that the 1st defendant did not transfer any debts , liabilities or other obligations to the 2nd defendant but expressly undertook to fully indemnify and hold harmless the 2nd defendant against all claims , demands, actions , suits, damages , liabilities , losses, settlements, judgments, costs and expenses.

The doctrine of ***"Caveat Emptor",*** a cautionary phrase meaning ***"buyer beware"*** imposes on the buyer the responsibility to safeguard his or her own interests in the quality and fitness of the subject matter of the contract of sale unless he or she obtains an express warranty as to quality and fitness.

Under Clause 11 of the sale agreement as shown in Exhibit D1, clause 11 expressly stated that ***"the purchaser shall not assume under this agreement and nothing in this agreement shall operate to transfer to the purchaser or to make either or any of them responsible for debts, liabilities or other obligations of the seller and the company undertakes to discharge or otherwise satisfy all those debts, liabilities and obligations."***

The survey report dated 18th March 2016 and the report on the structural integrity of the wall, see exhibits P 10 and P6 were all made prior to the 2nd defendant's purchase of Plot 86.

In his witness statement, the Plaintiff acknowledges that it was the 1st defendant's labourers who were manually digging, cutting through the hill

adjoining to his land and ferrying soil away. He also acknowledges that it was the 1st defendant who was constructing the retaining wall of which the part of it collapsed. The Plaintiff's engagements about the collapsed wall were all with the 1st defendant. Even at the time when the 2nd defendant was purchasing Plot 86 from the 1st defendant, it was agreed that the cost of developing the wall and the design should be borne by himself and the 1st defendant by each meeting 50% of the cost (see paragraph 26 of the witness statement of the Plaintiff). During the scheduling conference it was an agreed fact that it was the 1st defendant who conducted the excavation works and constructed the retaining wall.

The Plaintiff is therefore estopped from laying any claim from the 2nd defendant since he had entered or agreed to enter an arrangement with the 1st defendant in the construction of the retaining wall. The Principle of caveat emptor is not applicable in this case since negligence cannot be transferred. The 2nd defendant cannot be vicariously liable for the negligent actions of the 1st defendant. Besides as already indicated, the 1st defendant undertook to indemnify the 2nd defendant as expressly stated in Exhibit P1.

I therefore find that the Plaintiff has not proved negligence on part of the 2nd defendant.

ISSUE 2: Whether the defendants trespassed onto the Plaintiff's land.

The Plaintiff submitted that the Plaintiff is the registered proprietor of Plot 36 Naguru East Road as evidenced by his Certificate of Title which was marked as Exhibit P1.

The Plaintiff submitted that according to Exhibit P.10 and during PW3's cross-examination, he stated that the retaining wall was constructed on the adjoining land between the properties of the Plaintiff but made an encroachment of 14.75 meters into the Plaintiff's land. That PW3 further stated that it protruded into the Plaintiff's plot by 0.5 % metres in width. That this proved a crossing into the Plaintiff's land without his authorisation hence amounting to trespass.

In reply, counsel for the 2nd defendant submitted that the survey report as shown in Exhibit P10 by Khan Properties that was dated 18th March 2016 was addressed to the 1st Defendant's Advocates and adopted by the Plaintiff. Counsel for the 2nd defendant submitted that the encroachment was minor by 14.75 meters across the boundary line and less than half a meter across.

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Counsel for the 2nd defendant further submitted that the survey report ma rked as Exhibit P8 by Survey Tech dated 3rd October 2017 was a survey report adopted and agreed upon by the Plaintiff, the 1st defendant and the 2nd defendant and considering that it was a more recent report and agreed upon by all the parties to the suit, it should be the survey report adopted by the Court. Counsel for the 2nd defendant contended that as admitted by PW1 in cross examination, the encroachments made were duly stated in paragraph 4.0 on page three of the report and the encroachment was on UETCL land and not the Plaintiff's land comprised in Plot 36.

Counsel for the 2nd defendant further contended that in the alternative, if at all the 1st defendant is found to have committed trespass, the trespass arose out of the actions of the 1st defendant since the 2nd defendant has never excavated or carried out any construction works since they purchased the property. Counsel for the 2nd defendant further emphasised that the 1st defendant undertook to indemnify the 2nd defendant as expressly stated in Exhibit D1.

It was indeed held in the case of ***Justine Lutaaya versus Sterling Civil Engineering Company Limited-*** **S.C.C.A No. 11 OF 2002** that ***"trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, with another person's lawful possession of that land".***

I must add that it doesn't matter the magnitude of the entry however slight it might be, if it is unauthorised by the owner it still amounts to trespass.

In paragraph 3.l of the 1st defendant's written statement of defence the 1st defendant acknowledges that in survey that was carried out, it was found that the encroachment was 18 meters along the boundary line. The survey report that was commissioned by the 1st defendant and which was tendered in court and marked as Exhibit P.10 indicated that the retaining wall had protruded into plot 36 by 14.75 meters. This was confirmed by PW3 when he testified in court to that effect. This evidence was unchallenged by the 1st defendant and I therefore take it as truthful.

The trespass was committed by the 1st defendant and therefore the 2nd defendant cannot be held liable for the actions of the 1st defendant. The 2nd defendant never excavated or carried out any construction works since they purchased the land from the 1st defendant.

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As I have already stated, in the sale and purchase agreement between the 1st and 2nd defendant, the 1st defendant undertook to indemnify the 2nd defendant as expressly stated in Exhibit D1 clause 22.

The 2nd defendant is therefore not liable for the trespass that was done by the 1st defendant on the Plaintiff's land.

ISSUE THREE: Remedies available to the parties.

Basing on the above findings, I will make the following orders:

1. The 1st defendant is to build a gabion wall to support the Plaintiff's land that was affected by the construction of the retaining wall. This should be done within a period of six months from the date hereof.

2. In the alternative, the Plaintiff can construct the gabion wall but at the cost of the 1st defendant. The Plaintiff can only construct the gabion wall if the 1st defendant fails to do so within a period of six months from the date hereof.

3. The 1st defendant is to pay fifty million shillings (50,000,000/=) to the Plaintiff as general damages for negligence and trespass

4. The case against the 2nd defendant is dismissed with costs.

5. The 1st defendant is to pay the costs of this suit to the Plaintiff.

Hon. Justice John Eudes Keitirima

28/02/2020