

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO. 477 OF 2018**

HARRIET NTARE NABATANZI ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

UMEME LTD ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this suit seeking for a declaration that the defendant breached its statutory duties, mesne profits, general damages, special damages, punitive damages, interest and costs of the suit arising out of trespass on the land comprised at Kyadondo Block 272 Plot 913 and 914 at Mutungo, Wakiso District.

The plaintiff alleges on or about 2014, the defendant encroached on her land without a licence or her consent and erected electrical installations thereon for the purposes of supplying electricity to its customers. She alleged that by encroaching on her land, the defendant caused the plaintiff to suffer loss and damage. The plaintiff contends that the defendant breached its statutory obligations as a licensee when it operationalized and commissioned electrical installations that were erected contrary to the law and that this was done illegally.

The defendant filed its written statement of defence wherein it denied all the allegations made by the plaintiff and stated that the plaintiff was not entitled to any of the reliefs sought. The defendant stated that it shall raise a preliminary point of law that the plaint is baseless, without merit, defective, incompetent and discloses no reasonable cause of action against.

The defendant further denied encroaching on the plaintiff's property and responsibility for electrical installations. The defendant contended that in July, 2009, it received a request from M/s Power Africa Uganda Limited to undertake construction works for power supply lines to MTN Base transmission site at Kigo accompanied by a copy of a supply and works agreement between MTN Uganda limited and Power Africa Uganda Limited. According to the supply and works agreement, the scope of work included conducting surveys of areas through which MTN Uganda required to pass, design, supply and install materials and set up utility power lines to the MTN base transmission site.

The defendant contends that the construction was undertaken by M/s Power Africa Uganda Limited and completed upon which the contractor notified it. The defendant stated that the meters were duly installed and the lines energized in August, 2009 based on representation that all issues relating to easements of way leaves along the corridor of the new line had been cleared.

The defendant stated that there was no complaint made by the plaintiff or any other person whatsoever to the defendant related to the wayleaves all through the period of construction of the line up to the time it was energized. The defendant therefore alleged that the responsibility for obtaining way leaves did not fall on it and that the installations complained of were made long before the plaintiff acquired the suit property. The defendant further denied any breach of statutory duty and illegalities raised.

The parties filed a joint scheduling memorandum where they raised several issues for determination by this court which are as follows;

- 1. *Whether the defendant is liable for trespass on the plaintiff's land.***
- 2. *Whether the defendant breached its statutory duties.***
- 3. *What remedies are available to the parties?***

The plaintiff was represented by *Mr. Rutisya Paul* whereas the defendant was represented by *Mr. Kabayo Alex*.

The parties were ordered to file written submissions which were considered by this court in resolution of the issues. The parties raised other issues in their submissions

which I believe are encompassed in the issues raised above and shall accordingly be resolved.

DETERMINATION

Whether the defendant is liable for trespass on the plaintiff's land.

The plaintiff submitted that it is not disputed that the suit land is registered in the names of the plaintiff as the proprietor. Counsel stated that the defendant's acts and omissions of entry, placing power lines through the suit land without prior notice and consent of the landlord amounts to trespass and breach of statutory duty. As the proprietor, the plaintiff is entitled to enjoy peaceful and quiet benefit of his property in exclusion of all third parties.

Counsel submitted that the defendant erects power lines for the supply of electricity to its users and this is done with consent of affected land owners through whose land the power crosses. Counsel relied on the survey report dated 30th May, 2017 which shows that the defendant's electric power lines crossing through the plaintiff's land. The plaintiff testified that the power lines were placed on her land without approval and consent which amounts to trespass which is actionable in law as a tort. Counsel relied on the case of ***Justine E.M.N Lutaaya vs Stirling Civil Engineering Co. Ltd SCCA No. 11 of 2002.***

Counsel submitted the defendant's witness during cross examination failed to produce any documentary proof for consent or approval from the plaintiff. He further submitted that even at the time of hearing, the electric wires were and to date still crossing over the suit land infringing and violating the plaintiff's possessory rights over the suit property and thus the defendant should be found as a trespasser.

Counsel stated that for trespass to succeed, the Court of Appeal in ***Sheikh Muhammed Lubowa vs Kitara Enterprises Ltd*** observed that one must prove that the suit land belongs to the plaintiff, defendant had entered upon it and that the entry was unlawful in that it was made without permission. He therefore prayed that the court finds that defendant entered the plaintiff's and connected and energised power lines affecting the plaintiff's use and enjoyment of her land.

Defence counsel submitted that under section 101 of the Evidence Act which provides that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which she asserts must prove that those exist. He further cited ***Sebukira vs Cooperative Bank Ltd [1982] HCB 129***, where it was held that the burden of proof in civil proceedings lies upon the person who alleges.

While relying on ***David Melvin Aryemu Ochieng vs UMEME Ltd Civil Suit No. 15 of 2016***, counsel stated that trespass to land occurs when a person directly upon another's land without permission and remains upon another's land, places any object on the land. He further cited ***Omito Luka & 5 Ors vs AG*** where it was held that an action for trespass to land in tort is perceived as a wrong against possession, no ownership of the land. Only the person who has exclusive possession or immediate right to possession of the land can sue.

The defendant submitted that PW1 stated that she purchased the part of the land measuring approximately 0.50 acres from the customary tenant Kalyamagwa Kiberu on 19th February, 2019 and acquired mailo ownership of the kibanja from Magdalene Nabizizi Kalibala on 26th February, 2010. Counsel submitted that it is clear from her evidence that in 2009, the plaintiff was not the owner or occupant of in possession of the land when the line was constructed.

Counsel further submitted that DW1 led evidence to show that the impugned electricity line was constructed by Power Africa Limited for MTN (U) Ltd and thereby adduced the supply and works agreement. He further submitted that DW1 led evidence to show that the installation works of this impugned line were completed in August, 2009 and that all this evidence was uncontroverted by the plaintiff.

Counsel submitted that the plaintiff's claim as against the defendant is misconceived as it was Power Africa (U) Ltd that constructed the power line and thus the defendant did not enter upon the plaintiff's land. He therefore prayed that court finds that the defendant did not trespass on the plaintiff's property and has no cause of action in trespass.

Analysis

In order to establish a tortious action in trespass to land, the plaintiff must show that;

- (a) The defendant committed an act of interference with the plaintiff's land;
- (b) The act was voluntary and direct; and
- (c) The land was in the possession of the plaintiff.

The plaintiff must be a person who has possession of the land at the time of trespass. The plaintiff's acts of enjoyment of the land constituted prima facie evidence of possession. The rightful plaintiff may include an owner of the land, a tenant having exclusive possession, an owner with equitable interest (lawful or *bonafide* occupants) and exclusive possession of the land and in, exceptional circumstances, a person with no proprietary interest over the land but who has exclusive occupation of the premises.

The plaintiff's claim is for trespass by the defendant erecting, installing and commissioning the erection and installation of electrical installations over the suit land without her consent. The Supreme Court in the case of ***Justine E.M.N. Lutaaya vs Sterling Civil Engineering Co. SCCA No.11 of 2002*** held that trespass to land occurs when a person makes an unauthorised entry upon the land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. The Court further noted that the tort of trespass is committed not against the land, but against the person who is in actual or constructive possession of the land.

The Supreme Court held that at common law, the cardinal rule is that only a person in possession of the land has the capacity to sue in trespass. Where trespass is continuous, the person with the right to sue may subject to the law of limitation of actions, exercise the right immediately after the trespass commences, or at any time during its continuance or after it has ended.

In order to succeed in this case, the ***Court of Appeal in Sheikh Muhammed Lubowa versus Kitara Enterprises Ltd CA No. 4 of 1987*** observed that one must prove;

- i) That the disputed land belonged to the plaintiff
- ii) That the defendant had entered upon it, and

- iii) That entry was unlawful in that it was made without permission or that the defendant had no claim or right or interest in the disputed land.

The plaintiff, PW1 testified that she went to her land in 2014 for an inspection and found the defendant's electricity poles carrying high voltage power lines erected without any license or her consent. She further testified that the defendant continues to operate the said electrical installations to her detriment.

The defendant's witness DW1 in his statement testified that the defendant's area manager retail services granted M/s Power Africa Uganda Limited permission to carry out the construction of the power lines and upon completion notified the Defendant. During cross examination, the DW1 testified that he only verifies where the lines pass and if it's to affect then they have to get consent. He testified that the line was not passing through anybody's land in 2009. He further stated that he was informed and there was no need for wayleaves and no person was affected.

From the evidence on the court record, the defendant's exhibits show that the power line were installed in 2008 and 2009 and there is a supply and works agreement between MTN Uganda Limited and Power Africa (U) Ltd. The defendant as the service provider connected MTN on the electricity greed after the power lines had been laid. The existence of the power line is undisputed; what is disputed is who is liable for its existence on the suit land. DW1 stated in his witness statement that the defendant's manager granted M/s Power Africa Uganda limited the permission to carry out the construction works and the latter notified it upon completion. He further testified that he has the mandate to verify where the line passes and at the time, the line was not passing through anybody's land.

The plaintiff in this matter testified that she acquired this land as a kibanja from Rogers Kalyamagwa Kiberu who was a customary tenant on 19th February 2010 as per the plaintiff's exhibit. Thereafter the plaintiff acquired the legal interest when she bought the land from Mrs. Magdalene Nabizizi Kalibala who was the registered proprietor on 26th February, 2010. The plaintiff became a registered proprietor of the said land much later after the defendant had installed connected the power lines.

The plaintiff contended in her evidence that when she relocated to Uganda in 2014, she inspected the land and to her surprise and shock, she found defendant's electricity poles carrying high power voltage power lines erected on her land rendering the land unusable. The said electricity poles were erected without any licence and consent from herself.

It would appear the plaintiff or her agents never inspected the said land at purchase since the said power lines existed at the time and were not erected in 2014 as she contends. It is also surprising that the plaintiff who found the poles in 2014 never complained at the moment but rather complained of the alleged trespass on 10th April 2018 after about 5 years.

Trespass means unlawful or authorised entry upon the land in possession of another person or a direct and immediate interference with another person's possession of the land. It is the person in actual possession of the land and the person entitled to possession of the land that can sue for trespass to land. The plaintiff acquired interest on this land after the power lines or electricity poles had been installed on the land. Therefore, at the time she had not acquired any possessory rights from first the kibanja owner who was in possession and also from the mailo interest owner who possessed the land title.

A party who acquires interest after the electricity poles are installed equally has a duty to establish how they were erected on the land instead of assuming that the same were erected without any permission or consent. Such a person like the plaintiff acquires an interest subject to the equities on the land like the wayleaves. The plaintiff tried to shift the burden to the defendant to prove that they had obtained the wayleaves from the previous owner. A plaintiff who cannot prove that he was in possession of the land at the time of the trespass must of necessity fail in the action.

This is inclined to believe the defendant's version of evidence that MTN Uganda had sorted out all issues relating to easements for wayleaves along the corridor of the new line had been cleared. All through the period of construction of the power lines until when it was energized there was no complaint ever made by anyone whatsoever to UMEME or other body related to wayleaves.

The plaintiff's right and enjoyment of her land must be balanced against the defendant's right to conduct his activities which are intended for the benefit of the public and society. The defendant's use of the land for the erection of power lines is a public benefit and there is need to take into account the social cost of the activity. In this case the power lines were being extended to facilitate telephone masts in order to facilitate telephone connectivity in the entire area. The plaintiff will equally benefit from the electricity connectivity and the improved telephone connectivity and network.

I therefore find that the defendant did not trespass on the suit land by commissioning the construction of the power lines since the plaintiff had not acquired any interest in the said land in 2009. The persons who were in possession then have not come to this court to deny any wayleaves.

This issue is therefore answered in the negative.

Whether the defendant breached its statutory duty?

Counsel submitted that the plaintiff testified that the defendant trespassed, breached the statutory duty and committed an illegality on the plaintiff's land when it commissioned installation of electric wires over the suit land which in result caused great inconvenience to the plaintiff. Counsel relied on section 2 of the Electricity Act to define electric supply line and installation. He submitted that the defendant did not attain wayleaves any approval or consent.

While relying on section 67 (1) of the Electricity Act, the plaintiff submitted that it is only the defendant with authority in its duty of distribution of electricity in Uganda to commission power lines and connection. He noted that the no consent or approval by the land owner was produced by the defendant at trial.

Counsel therefore submitted that the defendant was in breach of failure to obtain such consent and thus breach of statutory duty hence causing her inconvenience and depriving her proper usage of the land. Counsel relied on ***Mahmood Said Saad vs A.G*** where court held that breach of statutory duties is a tort or misfeasance in a public office and is actionable at common law in a claim for damages or an injunction or to both. He therefore prayed that the court finds that the defendant

in breach of statutory duty for its actions of commissioning power lines over the plaintiff's land without wayleaves is illegal.

Defence counsel while relying on **David Melvin Aryemu Ocheng** (*supra*) stated that the breach of statutory duty constitutes the elements that; the statute must impose a duty, there must be breach of that duty, that breach must result into damages to the claimant and there must be a breach or connection between the breach of a statute by the defendant and the damage the claimant has suffered.

Counsel submitted that under section 3 of the Limitation Act, an action founded on tort is not to be brought after expiration of 6 years from the date on which the cause of action arose. He stated that the line was completed in August, 2009 and it's a presumption that the breach occurred then.

He further submitted that notwithstanding the fact that the plaintiff was not an owner or in possession of the land at the time, any cause of action would have accrued in 2009 and a suit filed in 2018 would be statute barred.

Counsel while citing **X (Minors) vs Bedfordshire County Council [1995] 2 AC 633**, noted that the house of lords held that a breach of statutory duty does not automatically give rise to a private law cause of action and will only do so if the statutory duty protects a limited class and if parliament intended a private law right to arise. He noted that section 67 (1) (d) does not provide for the operationalization and commissioning of electrical installations and reference to it by the plaintiff is misconceived.

Counsel submitted that the statutory duty to obtain consent on the part of the licensee is provided for under section 67 (2)(a). Counsel submitted that at the time the electricity supply line was constructed, the plaintiff was not the owner of the land which is alleged to have been constructed. Counsel further submitted that the plaintiff does not fall under the Lonrho exceptions as she was not an owner of the land in 2009 when the impugned electricity supply line was operationalized and commissioned and is therefore unable to sustain the cause of action.

The defendant submitted that DW1 testified that when he inspected the land before commissioning the line, he established that the line was not affecting

anyone's property. Counsel therefore submitted that there was no breach of duty and the defendant's actions could not have resulted into damage to the plaintiff.

On illegality, the defendant submitted that PW1 led no evidence of encroachment and that the erection of the line was done by Power Africa Limited. Counsel stated that there is no law that imposes an obligation on the defendant to notify an owner of land before commissioning. He further submitted that the line was commissioned in 2009 when the plaintiff did not own or occupy the land and would not have been compensated.

Analysis

An action for breach of statutory duty is separate and independent from the tort of negligence, though it is possible for the same damage to arise from either action. It should be highlighted that careless performance of a statutory duty does not in itself give rise to a cause of action unless it falls within breach of statutory duty *simpliciter* or the tort of negligence.

The general approach towards the requirement of a private right of action in breach of a statutory duty differs from that in the tort of negligence. *Lord Steyn* in ***Gorridge v Calderdale Metropolitan Borough Council [2004] 1 WLR 1057*** stated the distinction as follows:

"In a case founded on breach of a statutory duty the central question is whether the provisions and structure of the statute an intention can be gathered to create a private law remedy? In contradistinction in a case framed in negligence, against the background of statutory duty or power, a basic question is whether the statute excludes a private law remedy."

The court has found that there was no trespass on the suit property by the defendant who gave consent for the construction, installation and commissioning of the power lines on the plaintiff's land. In the case of ***Mahmoud Saad Said vs AG; Misc. Applic. No. 1023***, the high court held that breach of statutory duties is a tort or misfeasance in a public office and is actionable at common law in a claim for damages or an injunction or to both. According to the book; ***Winfiled & Jolowicz***

on Tort, 17 Edn at pgs. 352-354, breach of statutory duty constituted the following elements;

- a) The statute must impose a duty
- b) There must be a breach of duty.
- c) The breach must result into damage to the claimant
- d) There must be a breach of connection between the breach of statute by the defendant and the damage the claimant has suffered.

It is not disputed that the defendant is regulated by the Electricity Regulatory Authority under the Electricity Act. As such, it is important to understand the powers of a licensee to use land which is provided for under section 67 of the Act.

Section 67 (1) of the Electricity Act provides that a licensee authorised by the authority either generally or on a particular occasion may place and maintain electric supply lines in, over or upon any land and for that purpose it shall be lawful, upon written authorisation by the authority, for the licensee or his or her representative—

- d) to perform any activity necessary for the purpose of establishing, constructing, repairing, improving, examining, altering or removing an electric supply line, or for performing any other activity under this Act.

Section 67 (2) of the Act also provides that a licensee shall not, in the exercise of the powers conferred under this section, except with the consent of the owner of the land under, over, along, across, in or upon which any electric supply line is placed acquire any right other than that of the user of the land under, over, along, across, in or upon which an electric supply line or post is placed and for the reason of that exercise.

Section 67 (3) of the Act further provides that a licensee shall do as little damage as possible to the land and to the environment and shall ensure prompt payment of fair and adequate compensation to all interested persons for any damage or loss sustained by reason of the exercise of the powers under this section.

The plaintiff must show that the defendant had failed to fulfil the statutory duty. The statutory duty is regarded as strict without any intentional or

negligent conduct. The defendant's statutory duty was properly executed and the alleged breach has not been proved before this court

In the circumstances, the plaintiff led evidence to show that the defendant commissioned the installation of power lines over her land. DW1 testified that the defendant issued consent that the power line be constructed over the plaintiff's suit property. This happened after MTN Uganda who are responsible for the said power lines confirmed that there were no issues of wayleaves. The former owners have not denied giving any wayleaves and the plaintiff cannot impute that there were no wayleaves simply because he never inquired from the former owners of the land.

I therefore find that the defendant was not in breach of its statutory duty

For the foregoing reasons, this suit fails and is dismissed with costs.

I so order.

SSEKAANA MUSA

JUDGE

29th September 2023