

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT JINJA
HIGH COURT CIVIL SUIT NO. 19 OF 2010

ADUPE ONEN ROSE.....: **PLAINTIFF**

VERSUS

UMEMELIMITED.....: **DEFENDANT**

JUDGEMENT

BEFORE: HER LORDSHIP HON. JUSTICE EVA K. LUSWATA

1.0 Introduction and brief facts

1.1 The Plaintiff brought this suit against the defendant for damages in trespass, and breach of contract. She in addition seeks declaratory orders, interest and costs.

1.2 Prior to June 1993, the Plaintiff was resident at plot No.17 **Grant Road Jinja** (hereinafter referred to as the Grant Road premises) where she had a contract with the then Uganda Electricity Board (hereinafter referred to as UEB) for supply of power to the said premises under **A/C NO. 690055766**. She subsequently vacated the Grant Road premises on 19/6/1993, and through Coffee Marketing Board Limited (hereinafter referred to as CMBL), paid the outstanding power bill for the said house in full. She then relocated to, and entered into another contract for supply of power on **Plot 110 Nile Avenue** (hereinafter referred to as the Nile Avenue premises) under **A/C NO. 690057806**.

1.3 The above notwithstanding, the defendant continued to bill the plaintiff for power allegedly consumed at the Grant Road premises even after receiving due notice of the plaintiff's shift and confirming that the meter and other materials with respect to the Grant Road premises had previously been recovered by the defendant's agents.

1.4 That on 20/2/2010, the defendant's agents accessed the Nile Avenue premises, served notice on the plaintiff in respect of an **A/C NO.2001600724**, and a bill for it in the sum of

UGX.5,468,188/= and immediately thereupon, disconnected power to the Nile Avenue premises.

1.5 In defence to the claim, the defendant contended that at the time the power at the Nile Avenue premises was disconnected, there was an outstanding balance of UGX 5,465,188/= accruing on the old account for the Grant Road premises which the Plaintiff refused to pay. That they were entitled as the distributor/licensee to enforce their rights to recover debts incurred by a consumer, by transferring such debts to new accounts opened by the consumer.

1.6 The Plaintiff was represented by M/s Okalang Law Chambers and the defendant were represented by M/s Shonubi, Musoke & Co. Advocates. The matter proceeded by written statements and the witness subjected to cross examination. Both counsel filed written submissions as directed.

2.0 The following were the agreed facts

- i. Two separate contracts to supply power were entered into between the plaintiff and defendant i.e. one on Plot 17 Grant Road under Account No. 2001600724 (formerly 690055766)
- ii. The plaintiff vacated Plot 17 Grant Road on 19/6/93
- iii. Power supply to Plot No. 110 Nile Avenue was disconnected by the defendant's employees in 2010 when Account No. 200159606 relating to the same was fully paid, and after the suit was filed. It was reconnected by the defendant
- iv. That the A/c No. for Plot 110 Nile Avenue is 200159606 and A/c No. for Plot 17 Grant Road is 2001600724
- v. The power to the plaintiff's premises situated on Plot No. 110 Nile Avenue was reconnected by the defendant on 10/5/10
- vi. UGX 5,465,188/= due on account No. 200160724 was adjusted by the defendant to zero balance after the suit was filed

3.0 The following were the agreed issues

- i. Whether the disconnection of power on the plaintiffs A/C NO.200159606 on Plot 110 Nile Avenue was unlawful and illegal.
- ii. Whether the plaintiff was liable to pay shs.5,465,188/= as assessed by the defendant on Account NO.200160724.
- iii. Whether the acts of the defendant's agents entering upon plot NO.110 Nile Avenue and disconnecting the power supply thereto amounted to trespass.
- iv. Whether the Plaintiff is entitled to the remedies sought.

RESOLUTION OF THE ISSUES

4.0 Issue One

4.1 Going by the pleadings and having heard the evidence, I find it necessary to amend the first issue to read instead as follows: **Whether the disconnection of power on the plaintiffs A/C NO.200159606 on Plot 110 Nile Avenue was unlawful and illegal, and amounted to a breach of contract.**

4.2 It was pleaded in the plaint and not denied that the plaintiff as the resident of the Grant Road premises had a contract with the then UEB for power supply to those premises. DW1 did admit in cross examination that the plaintiff entered into a contract of power supply for the Grant Road premises. It was also pleaded that the defendant as the successor of the UEB, took over the mandate of domestic power supply. That mandate would extend to the Nile Avenue premises as well. The defendant did not deny that relationship arguing only that the plaintiff's power supply was disconnected for non-payment.

4.3 It was an agreed fact that two separate contracts to supply power were entered into between the plaintiff and defendant with respect of the Grant Road and Nile Avenue premises. Although no contract documents were adduced, the invoices admitted as PEX2, PEX4, PEX5 and PEX 12(a) showed that the defendant was under the obligation to supply power, bill and prepare invoices for the plaintiff's notice and she would in turn have an obligation to make prompt payment. It was held in the case of **Ronald Kasibante Vs Shell Uganda Ltd HCCS**

No.542 of 2006 that breach of contract would be “... *the breaking of the obligation which a contract imposes which confers right of action for damages on the injured party*”.

4.4The defendant admitted disconnecting power supply to the Nile Avenue premises which the plaintiff deemed, unlawful, illegal and a breach of the contract since the disconnection was made when the supply had been paid for in full.

4.5It was an agreed fact that the Plaintiff vacated the Grant Road premises on 19/6/1993 where she had operated **A/C NO.690055766**. She relocated to the Nile Avenue premises and there entered into another contract for supply of power under **A/C NO.690057806**. The defendant disconnected power at the Nile Avenue premises in respect of the old **A/C NO.200160724** at the Grant Road premises claiming that there was an outstanding balance which was not cleared. The Plaintiff claims that **A/C NO.200160724** was a fictitious account which she had never used. That she was only aware of **A/C NO 690055766** which she and her husband had cleared to zero balance before vacating the Grant Road premises. She produced two witnesses to prove her case.

4.6PW1 one Rose Onen, stated in her testimony that before leaving the Grant Road premises, her husband formerly notified Madvani then their landlord of their intended departure. That letter was copied to UEB and National Water and Sewerage Corporation with a request that they adjust their records. That the defendant's bill for that premises under **A/C NO.690055766** was then cleared to zero balance through CMBL. She then entered into a new power supply contract with the Defendant at the Nile Avenue premises to which she and her family had then moved. That notwithstanding, the defendant continued to bill her under **A/C NO.200160724** which she had never used and thus considered fictitious. That she did write to **UEB** asking them to address the anomaly. PW1 continued that on 24/2/2010 the defendant's agents went to her premises on Nile Avenue and relying on **A/C NO.2001600724** which she had never used, disconnected the power without any previous warning.

4.7PW2 Martin Anyara Onen, supported PW1's evidence. He stated that during August 1993, the balance against the Grant Road premises was about shs.670,167/= which was paid off by CMBL, his former employer who kept that bill. That notwithstanding, the defendant stubbornly continued to bill the plaintiff under a fictitious **A/C NO.200160072**. That on

several occasions between June 1993 and November 2009, he wrote and reported to the defendant the wrongful billing. Each time, he was promised that the anomaly would be rectified, which never happened and their power supply was eventually disconnected. That it was only after filing this suit that the defendant reconnected their power.

4.8DW1 Micheal Kabanda, a manager with the defendant was their sole witness. It was his statement that the plaintiff and her husband vacated the Grant Road premises and relocated to the Nile Avenue premises but the defendant had no notification of that fact. That the plaintiff left an outstanding bill at the Grant Road premises which eventually accumulated to Shs. 5,472,251/=and which, in accordance with prevailing regulations, was linked to the account of the Nile Avenue premises and a demand for its payment made. That when the plaintiff failed to pay, the defendant disconnected power to the Nile Avenue premises but eventually, a decision was made for that sum to be written off as a bad debt. He did admit in cross examination that UMEME can still enter into a new contract with a customer even where such customer had an outstanding bill on another premises.

4.9In her testimony, the plaintiff showed that before vacating the Grant Road Avenue premises, she inquired and was informed of the outstanding sum owed to UEB, the defendant's predecessor in title. That evidence was not contested and it is clearly evident in **DEX1** that on 9/9/93, the amount which was outstanding against A/C **NO.690055766**, against a meter on Plot 17 Grant Road, was **UGX607,169/=**. PW2 then testified that sum was paid off by CMBL his former employer, and a receipt issued. It is also evident in **PEX 16 A** and **PEX 16 B** that a sum of **UGX607,169/=** was paid by the CMBL to the UEB and receipted by the latter on 6/12/1993. That payment must have been acknowledged as a final closure of that account and going by the evidence of DW1, the defendant agreed to enter into a new power supply contract with the plaintiff in respect the Nile Avenue premises. **A/c No. 200160724** against which a debt was being claimed did not correspond to any of the two premises. It was never explained in evidence and the plaintiff and PW2 would be correct to state that it was a fictitious account. Even if one was to argue that it ever existed, in PEX 12, on 10/1/2010, the defendant communicated to PW1 that the account was terminated with all arrears being removed. She was in addition cleared of all liability on it.

4.10The reason advanced for disconnecting the plaintiff's power to the Nile Avenue premises was for non-payment of an outstanding bill after demand. The evidence indicates that the plaintiff owned no sum of money on any of the two accounts at the time supply was disconnected. I would thus conclude that the disconnection of power to the Nile Avenue premises by the defendant was wrongful and amounted to a breach of contract by the defendant.

Issue Two

5.0 Whether the Plaintiff was liable to pay UGX5,465,188/= as assessed by the Defendant on Account NO.200160724.

5.11 I have while resolving the first issue, found that the plaintiff was not indebted to the defendant on any of the two accounts. It was the testimony of DW1 that once the debt collector instructed by them confirms that a debt cannot be collected, the defendant would proceed to write it off. The statement of account in the plaintiff's name (**PEX.12 (a)**) indicates that the sum of Shs. 5,472,251/= was written off as a bad debt to UGX 0.05. That statement indicated a zero balance as at 10/1/2011. The contents of **PEX.12 (a)** were confirmed in **PEX.12** dated 10/1/2010 in which the defendant confirmed to the plaintiff that all arrears that had accrued on Account No. 200160724 had been terminated and all arrears that had accrued on it removed and she was therefore not indebted on that account. The submissions by Counsel that a certain unspecified sum was left out of the statement would be evidence given at the bar and I would completely disregard it. The evidence adduced strongly points to the fact that the plaintiff did not owe that sum in the first place. All her accounts being fully paid, the demand against her was made in error.

5.2DW1 testified and it was shown in PEX 12(a) that the outstanding sum was a "*bad debt write off*". However, there was no evidence adduced for the defendant to show that a formal decision of the Board of the defendant was taken to classify that sum as a bad debt. Even if such evidence existed, writing off a debt means either that the alleged debtor did not owe the creditor in the first place or that if they did, the creditor by writing off the debt, they are prepared to forego their right to claim it.

4.3I would therefore resolve the second issue to hold that the plaintiff was not liable to pay the sum of Shs. 5,462,434/= as assessed by the defendant on Account No. 200160724/=.

Issue Three

6.0Whether the acts of the Defendant’s agents entering upon plot No.110 Nile Avenue and disconnecting the power supply there to, amounted to trespass.

6.1The Court in **Justine E.M.N Lutaaya Vs Stirling Civil Engineering Company Civil Appeal NO.11 OF 2002 (SC)** defined trespass to land as follows:

“Trespass to land occurs when a person makes an authorised entry upon land and there by interferes, or portends to interfere, with another person’s lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass” Emphasis of this court.

6.2Defendant’s counsel cited Regulation 23.0 of The Electricity (Primary Grid Code) Regulations 2003 which provides inter alia that “A consumer shall allow a licensee and its equipment safe, convenient, and unhindered access to a consumer’s supply address for the following purposes;

- a. to read the meter at the consumers supply address;
- b. To connect and disconnect supply.

6.3It appears from the above that the right of the defendant (as a licensee) to access any property to which power is supplied, is a matter of law. It would also follow that when one enters into a power supply contract with the defendant, that person automatically permits the defendant to enter upon their premises for purposes of reading the power meter, its connection or disconnection, meter reading and other similar matters connected thereto.

6.4However, the plaintiff’s argument is that the defendant’s entry onto her property was for matters related to A/c No. 200160724 which had no connection to the Nile Avenue premises, which would amount to trespass. She further argued that there was nothing in the contract

between the two parties to permit the defendant to disconnect power supply to one premises with respect of supply to another premises.

6.5 Plaintiff Counsel's submissions would fail under the doctrine of "*Trespass ab initia*". The doctrine stipulate that where the defendant's entry is by authority of law as opposed to the claimant's authority, and the defendant subsequently abuses that right, then they became a trespasser "*ab initio*".(from the moment of entry. However, the rule only applies where the subsequent abuse is a positive wrongful act as opposed to an occasion, **See Six Carpentors case (1610)** 8 CO RCP 146a Quoted in "Law of Tort" by **John Cooke Pearson/** Longman 7th ED at page 295. However, more modern cases appear to have watered down the doctrine for it has been held that partial abuse of an authority does not render everything done under it unlawful. See **Elias Vs. Pasmore (1934) 2 KB 164.**

6.6It is my considered view that the defendant's right of entry is restricted to the actions stipulated in the Regulations. Once any premises is so accesses, the decision to disconnect a supply should be restricted to only those accounts that are outstanding, entry at the voluntary request of the customer, or where it is in the interest of the contract to do so.

6.7The reasons advanced for disconnecting the supply to the Nile Avenue Premises was for the reason of an outstanding balance of UGX 5,465,188 in respect of the Grant Road premises that the plaintiff previously occupied. I have already found that the defendant had on many previous occasions been informed with evidence, that the plaintiff owed no money or any of the two accounts. That information would amount to constructive notice and their own records would be actual notice of that fact. That notwithstanding on 20/2/2010 their agents entered upon the Nile Avenue Premises and disconnected the power supply.

6.8The initial entry of the defendant's agents onto the Nile Avenue Premises could have been lawful. However the act of disconnecting the power supply with no justifiable cause was a positive wrongful act. My conclusion is fortified by their subsequent action to write off that debt.

6.9I accordingly find the defendant to have been in trespass *ab initio* which would entitle the plaintiff in general damages.

7.0 Remedies.

7.1In her pleadings the plaintiff prayed for general and punitive damages particulars of which were given in paragraph 11B. However, I noted that during her testimony, considerable amount of time and effort was spent on details of losses she incurred by hiring an alternative source of power and loss of 2000 chicks for lack of a power supply to her premises. She even produced receipts to prove her actual expenses. I would deduce those to be special damages.

7.2It is an established principle in our law that special damages must be specifically pleaded and proved. It is required of the plaintiff to show sufficiently in their pleadings the sums sought and evidence of that attached to the pleadings and were granted leave, brought later into evidence. I note that there was no specific claim for special damages. Certainly the loss of poultry, costs of poultry feeds and vaccines or the expected income from that venture were never pleaded.

7.3On that point, defendant's Counsel argued that the plaintiff departed from her pleadings and introduced new claims into her evidence and submissions. On the other hand, plaintiff's counsel citing authority, argued that the purpose of damages should be to reinstate an injured party back to their original position and that a court is not barred from basing an award of damages on oral evidence that is reliable.

7.4With due respect, I reject the arguments put forward for the plaintiff. Adducing evidence of receipts at the hearing would not cure the omission to plead and particularize special damages. A statement made in the plaint that "*loss of use of power for both domestic and reading purposes*" would not amount to pleading a special damage within the contest expected of the plaintiff. It was required of the plaintiff to have quoted the actual amounts expended on those items and then followed that up with oral evidence and receipts in actual proof. The reasoning for the strict rule for special damages is to differentiate them from the other type of damages and also give prior notice to the defendant to know the likely amounts being sought, and prepare a defence against them.

7.5The careless drafting by counsel cost his client this claim and that normally cannot be cured even where numerous pieces of documentary evidence were allowed into evidence to prove that specific loss. It was open to the defendant to contest that particular evidence when it was

being brought in or to raise an objection at the point of submissions, which they did. Since the purchase and loss of poultry was incurred before the suit was filed, that evidence should have been available to form part of the pleadings. I fear that it may have been doctored after the event.

7.6 Thus in spite of the well prepared documentary evidence provided at the hearing, the Court is unable to grant the plaintiff special damages for the cost of purchase, treatment, feeding and loss of poultry because they were not specifically pleaded.

7.7 The converse would apply to the cost of hiring a generator for part of the period that the plaintiff's power supply was cut off. A particular claim was made in paragraph 11(B) (3) for outsourcing alternative power with an undertaking to furnish proof during the hearing. The plaint was filed on 26/2/10 well before the generator was obtained and hired. According to PEX.9, on 14/5/10, the plaintiff paid Shs. 14 million as hiring charges for 40 days. The defendant found this to be exorbitant but unfortunately did not provide contrary figures to that effect.

7.8 As I have said, ordinarily special damages must be disclosed when filing the plaint. However, an exception can be allowed in this case. Even after writing off the alleged debt in January 2010, the defendant did not reconnect the plaintiff's power until 10/5/10. It was reasonable for her to seek an alternative supply. Although it is mentioned in PEX10 (dated 30/3/10) that the defendant had offered and the plaintiff declined to have her power re-connected, there was an explanation from her lawyers, that there were demands for payment from the defendant's agent as a condition for re-connection.

7.9 I am thus persuaded on a balance of probabilities that the plaintiff hired a generator for a period of 40 days between 1/4/2010 and 10/5/2010. I thereby allow the claim of hiring charges as special damages of Shs. 14,000,000/=.

7.10 The plaintiff in addition prayed for general damages for embarrassment, mental torture, loss of dignity and loss of use of power for both reading, domestic and related purposes. It is trite law that measurement of quantum of damages is a matter for the discretion of the individual judge which of course has to be exercised judiciously. An appropriate award is guided by the general conditions prevailing in the country and prior decisions that are relevant to the case

in question. See **Moses Ssali a.k.a Bebe Cool & Others Vs A.G and Others HCCS 86 2010.**

7.11In the case of **Uganda Commercial Bank Vs Deo Kigozi 2002 EA 293**, it was held that “*in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience the party may have been put through and the nature and extent of the breach or injury suffered.*” *General damages are those that the law presumes to arise from the direct, natural or probable consequences of the act complained of by the victim, they follow the ordinary course and relate to all other terms of damages. Whether pecuniary or non-pecuniary general damages would include future loss as well as damages for paid loss and suffering*”.

7.12I am prepared to believe that disconnecting the Plaintiffs power caused her and other members of her household considerable inconvenience, and mental torture. In addition was the public humiliation she must have faced for having no power supply yet she was a good customer and fairly reputable person in the area who had cleared all her pending bills. Her evidence is that the disconnection was in place from 24/2/10 to 10/5/10 a period of 76 days. I am persuaded that she had to find alternative sources of power for lighting, cooking, entertainment and other domestic needs. That item has been adequately compensated for in special damages.

17.13However, the various correspondence adduced in evidence show that she and PW2 spent considerable time and effort in following up the matter with the defendant. She and her husband must have been frustrated by their lack of initiative and delay in rectifying the problem up and until she filed this suit. I note however that in PEX12 and PEX8, there was an effort by the defendant to mitigate the plaintiff’s loss by terminating the impunged account and offering to reconnect her power as far back as January 2010. It is evident that power was reconnected on the Nile Avenue premises on 10/5/10 after the intervention of the plaintiff’s lawyer. On the other hand, it is inexcusable that the defendant who was notified of the problematic bill by the plaintiff and DW2 as far back as May 1997 failed to locate and rectify the problem and instead wrongfully disconnected the plaintiff’s power supply.

7.14 Thus taking into consideration all the facts above, the status of the plaintiff as a responsible customer who was badly treated, the amount of time she and family spent without a power supply and had to find alternative sources, I award the plaintiff general damages of Shs 4,000,000/=.

8.0 Punitive damages.

The Plaintiff in addition prayed for punitive damages.

8.1 According to **Blacks Law Dictionary**, punitive damages which may alternatively be referred to as exemplary or aggravated damages, are damages awarded in addition to actual damages when the defendant acted with recklessness, malice or deceit. They are meant to penalize the wrongdoer or making an example to others to deter blameworthy conduct. They are generally not recoverable for breach of contract. They are distinct from general damages and focus on the defendant's misconduct and not the injury or loss suffered by the plaintiff. They are in nature, a fine to appease the victim and discourage revenge and to warn society that similar conduct will always be an affront to society and the courts' sense of decency. In other jurisdictions they are infact described as '*quasi criminal*' and operate as private fines intended to punish the defendant and deter future wrong doing. See **Black's Law Dictionary 10th Edition at Page 474**. In our jurisdiction, a mere prayer for this type of damages will not suffice. They should be specifically pleaded in the body of the plaint together with full particulars.

8.2 I note that a prayer was made in the plaint for punitive damages without any specifics being given for why they should be awarded. I have held that, the defendant was acting within their mandate when they entered upon the plaintiff's property. Their failing was their carelessness in billing a wrong account and proceeding to make what turned out to be a fictitious and unsubstantiated invoice against the plaintiff and then disconnecting her power. However, they did attempt to redeem themselves by reconnecting the power supply after two and a half months and right off the wrong bill all together. This is hardly conduct for which a Court would sanction them heavily in punitive damages. I did agree that the plaintiff suffered loss as a result of breach of the contract, but that loss would and has been catered for under

the award for general and special damages. I therefore decline to heed the prayer for punitive damages and none are awarded to the plaintiff.

8.3In the final result, judgment is entered for the Plaintiff against the defendant in the following terms;

- a. A declaration that the disconnection of the plaintiff's power at Plot 110 Nile Avenue, Jinja was unlawful and amounted to a breach of contract for the supply of power.
- b. The Plaintiff is not indebted to the defendant in the sum of UGX5,465,188/=.
- c. Shs. 14,000,000/= special damages for hiring a generator for 40 days
- d. Shs. 4,000,000/ in general damages
- e. The costs of this suit
- f. Interest on (c) and (d) above at 12.5% per annum from the date of this judgment until payment in full.

I so order

Eva K. Luswata
JUDGE
22/08/2018