Exemplary damages

Damages against

oppressive conduct

D.A. for eviction

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE.

CIVIL SUIT NO. 28 OF 1992

1. SOYEKWO MURUME
2. HAJI YUNUSU MUSIWA ..... PLAINTIFFS

VERSUS

1. JOHN R. BUTIME
2. YOVAN KUKO ..... DEFENDANTS.

BEFORE: THE HONOURABLE MR. JUSTICE S.G. ENGWAU.

J U D G M E N T.

The two plaintiffs in this suit claim that they own two adjoining pieces of land separately but situate in Chebany village, Kaptanya Sub-County in Kapchorwa District on which they have homes and grow diverse crops including coffee, wheat, maize, beans etc, (hereinafter called "the suit property").

Both plaintiffs testified that they have owned their parcels of land for very long. In fact at the hearing, each plaintiff put his age at over 80 years old. Their evidence is that in September, 1992, the 1st Defendant in his capacity as the District Administrator invited both the 1st plaintiff and the 2nd Defendant and their witnesses, if any, for a meeting regarding the suit property. The plaintiffs went and arrived for the said meeting at about 9.00 a.m. but the meeting did not take place until about 4.00 p.m. and continued even after 7 p.m. whereby "tadoba light" was used. The accusation against the 1st plaintiff was that he had refused to vacate the 2nd Defendant's land. The 1st Defendant informed the plaintiffs of the claim and ruled that the suit property belonged to the 2nd Defendant despite their protest and explanation and ordered the 1st Plaintiff to vacate the suit property within 30 days from the 2.9.92, the day of the said meeting or else he would be forced out.

The plaintiffs being not satisifed with the ruling and order of the 1st Defendant, sought legal and administrative assistance. Their Lawyers and the N.R.M. Secretariat wrote to the 1st Defendant advising him not to evict the 1st Plaintiff (refer to Exhibits P1 and P2).

An extract of the letter written by their advocates in part points at the following:-

> "The fact of the matter is that Mr. Yovan Kuko has no legal claim whatsoever over our clients' land and even if he ever had (which is denied) the same would have been extinguished by the effluxion of time as clearly provided by the Limitation Act (Cap. 70).

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> Consequently as instructed we would suggest that your "eviction order" be withdrawn as it amounts to an usurpation of the Courts jurisdiction and Mr. Kuko be advised to follow the due process of law instead of involving your august office in his private civil issues. We are instructed to inform you that if you do not do so we shall as instructed and without further notice institute legal proceedings against you in your individual capacity as your office clearly has no powers to take over the adjudicatory functions of the courts of law and hold you liable for the costs thereof."

In addition to the above, National Resistance Movement Secretariat wrote Exhibit P2 to the 1st Defendant in part as follows:-

> "Unfortunately, Chamonges Chemukany died before Sayekwo Mirime was evicted from the disputed land. Yovani Kuko (alleged heir to Chemonges Chemukany) then sought to evict Sayekwo Mirime and actually evicted him from the land (wrongly or rightly) on the 24/5/81 the result of High Court Civil Suit No. 161/85.
>
> That case is still pending before Mr. Justice B.J. Odoki and therefore the High Court has yet to decide whether it was a wrongful eviction or not. You will please note that it is sub judice for any person or authority to tamper in a matter that is already before court.
>
> The purpose of this letter therefore is to direct that you should not give any orders/ directives until you finally hear from our courts of law ....."

The 1st Defendant did not heed the advice but instead wrote a letter, Exhibit P3 on the strength of which the 2nd Defendant with his family accompanied by the local chiefs, R.Cs and others on 6.10.92 entered upon and took possession of the suit property which included not only the land and crops belonging to the 1st Plaintiff as originally claimed but also land and crops belonging to the 2nd Plaintiff. In the process, a lot of crops belonging to the plaintiffs and the houses of the 1st Plaintiff were destroyed.

From the above evidence, the plaintiffs' claim is that in October, 1992, the 1st Defendant unlawfully deprived them of the suit property and caused the 2nd Defendant to take possession of the same and in the process some of their crops were destroyed. They therefore pray for injuction restraining the defendants from tresspassing on, alienating the suit property or from interfering with the plaintiffs' quiet and peaceful possession of the suit property. They also pray for a declaration that the suit property belongs to them and for damages for tresspass and for the damaged crops with interest and costs of the suit.

The suit was filed in court on 15.10.92 and on 20.10.92 both defendants were served with Summons to Enter Appearance. Affidavit of service sworn on 22.10.92 is on court record. Both defendants failed to enter appearance within the prescribed period or at all. The suit was fixed for hearing on 21.1.93 and despite the failure to enter appearance and file written statements of defence, both defendants were served with Hearing Notices on 29.12.92. Affidavit of service sworn on 12.1.93 to that effect is on court record. When the suit came up for hearing on 21.1.93, both defendants were absent and were not represented. As a result, the hearing proceeded ex-parte for formal proof only.

In his written submission, the learned Counsel for the plaintiffs stated inter alia that the plaintiffs' evidence ought to be believed. It is credible and was given in a straight forward manner. There is nothing suggestive of any falsehood or exaggeration in the testimony. What is more the plaintiffs' evidence was not contradicted in any way, neither in pleading nor in evidence, both defendants having chosen not to defend the suit.

The plaintiffs have testified that they own adjoining parcels of land at Chebany village in Kaptanya Sub-County, Kapchorwa District where they had homes and grew diverse crops including wheat, coffee, maize, beans etc. They have owned the land for very long. In 1959, the 1st Plaintiff had a dispute with the father of the 2nd Defendant, one Chemonges, over a piece of land to the east of the suit property. The dispute was heard by different courts and was finally resolved in favour of Chemonges. Boundary marks between that piece of land and the present suit property were established. Subsequently, Chemonges gave that piece of land to his heir one Salimo Maigut who later sold it to another person, one Hajji Cheboi. That piece of land is outside and not part of the present suit property.

In 1981 the 2nd Defendant together with a Court Broker by the name of Suleiman Boola went to the home of the 1st Plaintiff and unlawfully destroyed his houses together with those of his sons purportedly in execution of a warrant under the 1959 case. The 1st Plaintiff sued the 2nd Defendant and the said Court Broker in the High Court at Kampala vide Civil Suit No. 161 of 1985. This suit has not yet been disposed of. Apart from that incident the 1st Plaintiff has never had any land dispute with the 2nd Defendant in any court. Similarly, the 2nd Plaintiff in the present suit property has never had any land dispute with the 2nd Defendant in any court warranting his eviction and the destruction of his crops from the suit property.

It is the contention of the learned Counsel that on the evidence before the court both defendants are jointly and severally liable for the acts complained of. It was on the 1st Defendant's unlawful orders and instructions that the plaintiffs were deprived of their land and crops and the 2nd Defendant took possession of the same. Although the 1st Defendant reproduced the contents of the alleged warrant in the letter, i.e. Exhinit P3, it is not suggested in the letter or otherwise that the actual warrant sealed with the court seal and signed by the Magistrate was forwarded to the Chief.

Be that as it may, in order to avoid liability, it was incumbent upon the defendants to show that the acts complained of were done in execution of a lawful court order. They did not as they chose not to defend the suit. What is more the alleged Court Warrant is clearly fictitious and/or null and void on the grounds that there has never been any court case between the 1st Plaintiff and the 2nd Defendant. The Civil Suit No. 113 of 1959 was between one Chemonges Chemukan and Soyekwo Murume and the decision therein was implemented and abided by. The decision could not be enforced at the instance of the 2nd Defendant who was not party to it. Moreover, under section 4(3) of the Limitation Act, Cap. 70, execution of a judgment/decree is time barred after 12 years. It would not be lawful for the Magistrate's Court to issue the alleged Warrant in 1991 in respect of a judgment/decree passed 32 years earlier. The Warrant, if any was issued, would be null and void.

Finally, Mr. Mulenga for the plaintiffs submitted that he is abandoning the prayer for special damages of Shs 6m/- as it became impossible for the plaintiffs to prove that item strictly as required by law. However, this is a proper case where the Court should grant an order for permanent injuction because the 2nd Defendant has shown unrelenting desire to grab the land in question using unscrupulous means and at times, such as in the instant case, extra-judicial means. The plaintiffs need the protection of the court so that they are not compelled to have to institute fresh suits every time the defendant finds his way to grab possession of the suit property.

A declaration that the suit property belongs to the plaintiffs be made. In addition, the plaintiffs are entitled to general damages for tresspass which on principle is actionable per se.

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In the instant case however, the plaintiffs have proved to have suffered damage. They were evicted from their respective parcels of land and deprived of the use thereof as well as the use of their crops, a lot of which crops were destroyed or damaged. Besides as elders in society the plaintiffs suffered, humiliation by being evicted from their land as if they were lawless aggressors. Indeed the 1st Defendant referred to them as wrong elements! (See Exhibit P3). All these matters call for an award of aggravated damages. Having regard to the conduct of both defendants, it is further submitted that this is a proper case where exemplary or punitive damages should be awarded. It clearly falls within the two categories of "the rare cases" where exemplary damages are still awarded: Rooks Vs. Barnard (1964) A.C. 1129 as confirmed in Charles Katende Vs. Attorney General (1974) ULR 264.

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The conduct of the 1st Defendant, a Government servant was clearly oppressive, arbitrary and unconstitutional. The 2nd Defendant's conduct on the other hand was calculated by him to make unjustifiable profit for himself not only by grabbing the land but also literally by seeking to reap where he did not sow. Besides the conduct of both defendants is further aggravated by arrogant and obstinate defiance of court process. Not only did they fail to enter appearance and defend the suit but they also ignored the temporary court injuction issued against them.

Having regard to the foregoing, it is submitted that an award of shs 10m/- with interest would be appropriate. It is also submitted that the defendants should be condemned in costs.

From the evidence of the plaintiffs, the court has considered the following issues among others:-

In the first place, whether or not the 2nd defendant has ever had any court case with the 1st plaintiff. According to evidence on record, the answer is in the negative. Similarly there has never been any court case between the 2nd defendant and the 2nd plaintiff.

Secondly, however, evidence on record reveals that there was a Civil Suit No. 113 of 1959 between the late Chemonges Chemukan and Soyekwo Murume. The late Chemonges Chemukan in that case was the father of Yovan Kuka now 2nd defendant in this present case.

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In that case of 1959, the plaintiffs hereof agree that the late Chemonges Chemukan won the case and that the decision therein was implemented and abided by. That piece of land is east of the suit property. The boundary marks between that land parcel and the present suit property were established. The late Chemonges Chemukan gave the said land to his heir one Salimo Maigut who later sold it to another person one Haji Cheboi.

In view of the evidence on record regarding those two issues, I am inclined to hold that there has never been any land dispute between either the 2nd defendant and the 1st plaintiff or between the 2nd defendant and the 2nd plaintiff in any court of law and that the decision in the 1959 case between the late Chemonges Chemukan and the 1st plaintiff was already implemented and abided by and the boundary was established. That piece of land is outside and not part of the present suit property. I so hold in the absence of the defence story.

The third is therefore as I hold that since the 2nd defendant was not a party to Civil Suit No. 113 of 1959 between the late Chemonges Chemukan and the 1st plaintiff, he has no locus standi to execute the judgment/decree in that case unless he had obtained letters of Administration or Probate. There is no evidence to show that the 2nd defendant ever obtained any Letters of Administration or Probate as he chose not to defend the instant case.

The fourth issue for consideration is that even if the 2nd defendant was a party to the 1959 case or had obtained Letters of Administration or Probate, could he execute the judgment/decree 32 years later in that case. Under section 4 (3) of the Limitation Act, such judgment/decree is time barred after only 12 years. In the premises, it is my well considered view that it would be unlawful for the Magistrate's court to issue the alleged Warrant in 1991 in respect of a judgment/decree passed 32 years earlier. The Warrant would be null and void and I so hold. Moreover, there is no evidence from the 2nd defendant as to when he became the legal heir, to the estate of his late father Chemonges Chemukan which is denied by the plaintiffs in the instant case.

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Now, the fifth issue is whether both defendants are joinly and severally liable for the acts complained of. It was incumbent upon the defendants to show that the acts complained of were done in execution of a lawful court order. They did not as they chose not to defend the suit. In consequence thereof, I am in agreement with the contention of the learned Counsel for the plaintiffs that both defendants are jointly and severally liable for the acts complained of. So I hold that it was on the 1st defendant's unlawful orders and instruction that the plaintiffs were deprived of their pieces of land and crops and the 2nd defendant took possession of the same. Had the 1st defendant heeded the advice of the National Resistance Movement Secretariat as per exhibit P2, he would have been in a better position to advise the 2nd defendant to follow proper procedure. The 2nd defendant was duty bound to establish that he was a party to Civil Suit No. 113 of 1959 before any execution of judgment/decree in that case could take off the ground. If he was not a party, it was necessary for him to establish that he had obtained Letters of Administration or Probate to the estate of his late father Chemonges. It was also incumbent upon the 2nd defendant to show that execution of the judgment/decree in the original Civil Suit No. 113/59 was carried within 12 years as provided in section 4 (3) of the Limitation Act, Cap. 70.

It follows therefore that this unfortunate situation would not have arisen if both defendants had heeded to the advice rendered to them in both exhibits P1 and P2 above. In the absence of defence explanation as they chose not to defend the case, I hold that both defendants are jointly and severally liable for the complaints complained of by the plaintiffs. The 1st defendant here is liable in his individual capacity on the account that I have accepted advice contained in exhibits P1 and P2 to him but ignored.

Now, what remedies are open to the plaintiffs in the instant case:

In the first place, both plaintiffs pray that a declaration that the suit property belongs to them be made. As the defendants chose not to defend the case even after being served to Enter Appearance and thereafter file their Written Statements of Defence, if any, it is deemed that they either accept the claim or have no defence to it.

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In the absence of defence story to the claim, now before court, I am inclined to declare that the suit property belongs to the plaintiffs and it is so declared.

It follows therefore that until the 2nd defendant proves that ownership of the suit property is vested in him, both defendants shall be estopped from trespassing or alienating and interfering with quiet possession and ownership of the suit property by both plaintiffs. An injunction order hereof to that effect is made.

As regards general damages for trespass on the suit property, it is trite law that it is actionable per se. However, in the instant case, there is evidence on record that the plaintiffs suffered damage. They were evicted from their respective pieces of land and deprived of the use thereof as well as the use of their crops, a lot of which crops were destroyed or damaged.

When the plaintiffs testified that since their eviction from the suit property, the 1st defendant with Security personnel at his disposal, threatened to use force should they appear on the suit property. In that regard, the Counsel for the plaintiff requested court to use an independent person to go and assess the damage on site.

As a result of the request, the court sent Magistrate Grade 1 of Kapchorwa to check on the alleged damage. On the 3.2.93 the learned Magistrate went to the suit property and at the locus in quo made the following observations:-

(i) A garden about 4 acres size, marked "X" on sketch map from which maize had been harvested.

(ii) A garden about 3 acres size with coffee stumps mixed with remains of banana plantains which had been cut - marked "Y" on the sketch map. He counted the coffee stumps with the assistance of court clerk/interpreter and they totalled 314. The remains of banana plantains were 259.

(iii) Just near the coffee and banana garden was a newly established homestead which was said to belong to Yavan Kuka, 2nd defendant. When they moved into the homestead, the learned Magistrate saw that the 2 huts therein had been built using coffee trees as poles. One of the huts was of diameter of about seven metres and the smaller one was about 4 metres diametre.

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(iv) A garden with wheat straw which was alleged to have been harvested by the 2nd defendant and his sympathisers. It was part of a big chunk of wheat plantation. The part was about 2 acres size.

The above was the report compiled on 5.2.93 with sketch map attached. Besides as elders in society I agree with the plaintiffs' Counsel that the plaintiffs suffered humiliation by being evicted from their land as if they were lawless aggressors. It is also submitted that having regard to the conduct of both defendants this is a proper case where exemplary or punitive damages should be awarded as explained in Winfield and Jolowicz on Tort, 12th Ed. pp. 616 - 620 which was confirmed in the case of Charles Katende Vs. Attorney General (1974) ULR 264.

I concede that the instant case falls within the two categories of "the rare cases" where exemplary damages are still awarded as explained in Winfield and Jolowicz on Tort (supra). The conduct of the 1st defendant, a Government servant was clearly oppressive, arbitrary and unconstitutional. The 2nd defendant's conduct on the other hand was calculated by him to make unjustifiable profit for himself not only by grabbing the land but also literally by seeking to reap where he did not sow. Besides, I do agree with the plaintiffs' Counsel that the conduct of both defendants is further aggravated by arrogant and obstinate defiance of court process. Not only did they fail to enter appearance and defend the suit but they also ignored the temporary court injunction issued against them.

Having regard to the foregoing, it is submitted that an award of Shs 10m/- with interest would be appropriate. It is also submitted that the defendants be condemned in costs. However, after considering the evidence before me on this issue, exemplary damages of Shs 1.5m/- against each defendant with interest would in my humble view be appropriate in the circumstances of the case to make a total sum of U. Shs 3m/- with interest. I so award and in addition, the defendants are to pay costs of this suit.

S.G. ENGWAU

JUDGE

12.5.93.

12/5/93: The 2 Plaintiffs present.
Mr. Davies Ndyomugabe for Mr. Joseph Mulenga
Judgment read in open court.