

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT GULU
HCT – 02 – CV – CS – 0066 – 2002

1. **ONEGI OBEL**
2. **ACHWA VALLEY RANCH LTD):.....:PLAINTIFFS**

VERSUS

1. **THE ATTORNEY GENERAL**
2. **GULU DIST LOCAL GOVT):.....:DEFENDANTS**

BREFORE: HON AUGUSTUS KANIA

JUDGMENT

The first plaintiff, Onegi Obel is the registered proprietor of the land comprised in Lease hold Register vol 902 Folio 7 at Alero in West Acholi herein after referred to as the suit land. The second plaintiff Achwa valley Ranch Limited of which the first plaintiff is a share holder and chairman, carried on the business of ranching and general agriculture on the suit land. The two plaintiffs bring this suit against the Attorney general in his representative capacity for illegal compulsory acquisition of and trespass to the suit land and they seek the following relief;-

- a) General and special damages for trespass and breach of Laws to the first plaintiff.
- b) Compensation or damages in lieu thereof.
- c) General and exemplary damages.
- d) Declaratory Judgment and orders that
 - i. The plaintiffs are entitled to notice prior to the construction of the road on the private property in the suit land.
 - ii. The act of constructing a road and taking over the plaintiff's private bridge is in violation of the plaintiff's fundamental rights and freedoms.
 - iii. The plaintiffs are entitled to compensation and for vacant possession of the premises.
 - iv. A declaration that the acts of the defendant in constructing the road as he did are illegal and contrary to law.
- e) Costs of the suit.

The back ground of this suit is briefly as follows; - The first plaintiff acquired and became the registered proprietor of the suit land in 1975. He later helped to incorporate the second plaintiff

company with himself and his wife as shareholders. The first plaintiff then permitted the second defendant to carry on the business of ranching and general farming on the said suit land. The 2nd plaintiff then constructed on the land a farm house a cattle dip, a rice mill, under ground fuel tanks and a bridge and stocked his farm land with 1000 boran animals. Some time in the wake of the insurgency in the Acholi sub region some of the above infrastructure on the suit land was destroyed, vandalized and looted. About 2001 the Ministry of works constructed a public road through the suit land nearly cutting into half and the Ministry of works did this without the consent of the plaintiffs. The plaintiffs complain that by constructing this road the defendant turned the private bridge into a public utility, rendered the farm house, the cattle dip and the rice mill useless because the said road passed too close to them. They also complained that by the road passing through the suit land the animals would be exposed to diseases as passing of both people and animals would not be controlled. The plaintiffs aver that by the acts of the defendant they have suffered loss and damages hence this suit.

The defendant filed a written statement of defence in which he made an outright denial. When the case came up for hearing before me on the 6.07.2004 I ordered the hearing to proceed ex-parte because the defendant or his representative was not in court though the defendant had been duly served with the hearing notice for the day. Even when the matter had been heard ex-parte, the plaintiffs decided to accommodate the defendant and the parties fixed the hearing by consent for the 25th November 2004 to enable counsel for the defendant cross examine the plaintiffs, key witness PW1 Onegi Obel On that day the counsel for the defendant was again absent without an explanation. Consequently the hearing of the suit proceeded ex-parte up to the end.

At the commencement of the hearing of the suit, the following issues were framed for determination namely

1. whether the defendant trespassed on the plaintiff's suit land.
2. whether the defendant is in breach of statutory duty.
3. whether the plaintiff's constitutional property rights have been violated.
4. whether the plaintiffs have suffered loss.
5. whether the plaintiffs are entitled to remedies and if any which remedies.

To prove their case, the plaintiffs called two witnesses, the first plaintiff who testified as PW1 and PW2 Openytha Francisco Pinchwa.

With regard to the first issue whether the defendant trespassed on the plaintiffs suit land, PWI Onegi Obel the first plaintiff testified that he is the registered proprietor of the suit land the Certificate of title of which is exhibit P.3 on the court record. Some time in the 1970's he gave the land to Ms. Achwa valley Ranch Ltd of which he now is chairman to conduct the business of ranching and general agricultural farming. The Incorporation Certificate of the said company was tendered and marked Exhibit P .1.

In 2001 he learned that the defendant was constructing a road running North/South – South/West through the suit land without his consent. He wrote exhibit P.2 to the Executive Engineer of the Ministry of Works Complaining of unauthorized construction on his land. This was to no avail as the defendant Continued with constructing the said road right up to his private bridge which he had build at the Southern end of the suit land.

PWI Onegi Obel also testified that as a result of the construction of the bridge on his land he could not control the passage of the Public through the suit land and this greatly disrupted the farming and ranching activities of the second plaintiff in several ways. The cattle were put at risk of contracting animal diseases due to uncontrolled movement of animal and people along the said road, the farm house became inhabitable because the road passed too close to it and the cattle dip was likely to be silted from the dust from the said road. The witness also testified that he as the registered proprietor of the suit land sustained loss and damages because the defendant excavated murrum in seven spots on the suit land and left the area uncovered thereby depreciating the value of the suit land. It was PWI Onegi Obel's evidence that the fact that the road complained of was constructed right to the bridge means the defendant has in fact taken over and converted what was a private bridge into a public property. He reiterated that the construction of the said road was done without his notice and he was informed by the Chief Engineer Northern Region that it was the Ministry of Works of the Government of Uganda responsible for the construction and that the permanent secretary Ministry of Local Government in his letter dated 30.11.2001 admitted the road project was wrongly handled.

Mr. Madrama, learned counsel for the plaintiffs, submitted that under the provisions of section 72 of the land Act Cap 227 where any officer of Government has necessarily and unavoidably has to enter private property in order to carry out his/her duties notice of not less than three days has to be given to the owner or occupier of the proposed entry. He also pointed out that Government has to pay a fee to the owner or occupier of the land for the time spent by such officer on the land.

Counsel submitted that under section 73(1) of the land act where it is necessary to execute public works on any land, the authorized under taker shall enter into a mutual agreement with the owner of the land regarding the execution of the public works on the land. He pointed out that Public works as defined in section I of the land act includes roads. He argued that though under the provisions of Article 26 of the Constitution prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property is a condition to the compulsory acquisition of an individual's property, in the instant case this condition was not met. Mr. Madrama submitted that in as far as there was no notice to the plaintiffs, no mutual agreement was arrived at with the plaintiffs prior to the execution of the road works, and the construction of the road was unlawful. The said construction of 8 kilometres of Public road through the private property of the first plaintiff without involving or seeking his consent and the consent of the 2nd plaintiff amounted to unlawful interference and constituted unlawful ingress into and trespass to the suit land.

After referring to the definition of trespass as contained in **Salmonds Law of Torts Nineth Edition etc par 207 and 211** Mr. Madrama submitted that the evidence adduced by PWI Onegi Obel proved that;

- i. The entry was a wrongful entry.
- ii. The first plaintiff is the registered proprietor of the land and the second plaintiff is in occupation of the suit land for purposes of ranching.
- iii. Construction of a road by excavation or grading is a trespass by infringement of the horizontal boundary of the land.
- iv. There was entry by the defendant's servants on the plaintiffs land without any authority or permission contrary to what is stipulated by the land Act.

Mr. Madrama also submitted that the title of the first plaintiff as the registered proprietor of the suit land can not be impeached and that under section 59 of the Registration of Titles Act Laws of Ugandan 2000 the production of the Certificate of Titles is a conclusive of evidence of ownership as was held in the case of **Kampala Bottlers Limited Vs Damanico (U) Ltd SCCA No. 22/1992**. He concluded that in the instant case the first plaintiffs by producing the Certificate of title to the suit land based, Exhibit p.3 had conclusively proved his unimpeachable title to the suit land. This right of ownership was abridged by the activities of the defendant on the land that tended to lower the value of the suit land. Counsel invited Court to answer the first issue in the affirmative.

Trespass to land is defined in **Salmonds Law of Torts Ninth Edition at page 207** in the following terms;-

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

Further at page 211 paragraph 8 the learned author stated that any entry above or below the surface of land constitutes trespass;-

“In general he who owns or possesses the surface of land owns possesses all the underlying strata also. Any entry beneath the surface therefore, at what ever depth, is an actionable trespass; as when the owner of an adjoining coalmine takes coal from under the plaintiffs land. When the possession of the surface had become separated from the sub-soil (as by a conveyance of the sub soil for mining purposes, reserving the surface) any infringement of the Horizontal boundary thus created is trespass.”

It is trite that trespass is interference with right of occupation and not the interference with ownership, ownership alone unaccompanied by possession is protected by different remedies. A land lord therefore has no cause of action in trespass unless he can prove actual harm inflicted on the property of the sort as to affect the value of his reversionary interest in it. **See Salmonds Law of Tort Ninth Edition page 214 Para 48.**

In the instant case the first plaintiff is the registered proprietor of the suit land as evidenced by the Certificate of title which is exhibit P.3 on the Court record. It is claimed the defendant constructed an eight Kilometer Public road across the suit land and excavated murrum and carried away the same leaving the spots uncovered and therefore a hazard for the cattle. It is contended that by constructing the road through his land the suit land was reduced by the said size of the said road and therefore its value was also affected. The first plaintiff also argued that the excavation of murrum in the seven spots on the suit land rendered the suit land in those areas infertile and the uncovered spots became hazards to animals grazing on the land as well as to people. Thus affecting the value of the suit land.

I agree that the size of the suit land was indeed reduced by the land or land area that was used to construct the eight kilometre long road. I also find in making this road and the bridge at the end of the suit land Public the value of the suit land was affected.

Therefore the landlord the 1st plaintiff is entitled to sue as it has been shown that the acts complained about affected the value of the suit land.

The uncontested evidence for the plaintiff is that the suit was put at the disposal of the second plaintiff for the purpose of running a ranch. From the uncontradicted evidence of PWI Onegi Obel the 2nd plaintiff constructed on the suit land a farm house a cattle dip, rice and grain mill and stocked the said suit land with 100 boran heads of cattle. The second plaintiff as proved by the above evidence was in occupation of the suit land and therefore it was entitled to bring this present suit in trespass.

What needs now to be determined is whether the defendant committed acts of trespass against the interest of the plaintiffs.

As far as the interests of the 1st plaintiff as the registered proprietor and the land Lord are concerned, the uncontested evidence of PWI Onegi Obel is that the defendant on getting onto the suit land, through the Ministry of works, constructed an eight Kilometer road across the suit land. This said road was made a public road, thus taking away that part of the land which is covered by the road from the ownership and control of the first plaintiff. This I find had the effect of reducing the size of the land comprised in LHR Vol 902, Folio 7 at Alero over which the first plaintiff has a lease by taking out of the suit land that piece of land which now constituted the said road had also the effect of reducing the value of the suit land.

PWI Onegi Obel testified that in the process of constructing the road, the contractors employed by the defendant dug out murrum from the various parts of the suit land leaving pools of water which are a hindrance to the movement of animals and people. By this exercise the defendant took out soil from the suit land and left the resulting holes and ditches not sealed in seven different spots of the suit land. The act of excavating murrum from the suit land and of leaving the holes created thereby unsealed the value of the suit land was degraded. For these reasons, though the first plaintiff was not in occupation at the time of the trespass, actual harm was inflicted on the suit property as to affect the value of his reversionary interest in it and therefore the first plaintiff has an action in trespass against the defendant. **See Salmonds Law of Torts Ninth Edition page 214 Para 48 (Supra).** The first issue must be answered in the affirmative.

With regard to the second issue whether the defendant is in breach of statutory duties in executing the public works on the plaintiffs land. Mr. Madrama submitted that whereas under section 72 of the Land Act it is required that notice of encampment on private property be given by an officer of Government at least three days before encamping on private property, no such notice was given in the instant case. He also pointed out that contrary to the provision of section 72(3) of the Land Act the defendant did not pay promptly a reasonable fee to the occupier of the land. Counsel further argued that contrary to the provisions of Section 73 (1) of the Land Act, the defendant did not enter into a mutual agreement with the owner of the land for the execution of public works on the land. Lastly counsel referred to the constitutional provision which enjoins the Government and any Public authority not to deprive a citizen of property rights of any kind without first;-

- (a) Ascertaining that such acquisition is necessary for public use or in the interest of defence, public safety order or morality or public health.
- (b) The taking over is made under a Law that caters for payment of a fair and adequate compensation prior to the act of the authority.

Mr. Madrama submitted that the defendant in not complying with the above statutory requirements is in breach of statutory duty to the prejudice of the plaintiff.

Breach of Statutory duty is a tort in Common Law which entitled the plaintiff to damages or and an injunction. The Law in this regard is that Public bodies representing the public are not liable to be sued by an individual member of the public who has sustained injuries in consequence of the omission of such a body to perform a statutory duty created for the benefit of a class of which such a person is one. However the public body may be liable if by its acts, it alters the normal condition of something which it has a statutory duty to maintain and in consequence some person of a class for whose benefit the statutory duty is imposed is injured. The cause of action in breach of statutory duty is far misfeasance and not for nonfeasance. The law in this regard is eloquently stated in the case of **Vermeulen Vs Attorney General & Ors [1986] L.R.C C Const. 786 thus;-**

“The basis for these claims is the tort of misfeasance in public office, there can be no doubt that this tort does not exist as a separate basis for legal liability and there are many academic writings supporting this view. However within the context of judicial precedent, the extend of the nature of the tort has been defined in authoritative terms by

the Privy Council in *Dunlop vs. Woollahra Municipal Council* [1982] AC 158 where this species of wrong was described as:-

“The well established wrong of misfeasance by a public officer in the discharge of his duties, the act complained of must be either an abuse of power actually possessed or an act which is a usurpation of authority which is not possessed, but the essential ingredient of the tort is the presence of malice in the exercise or purported exercise of statutory power. Malice obviously includes a state of mind representing malice in the popular scene namely an attitude of ill - will or spite against the plaintiff, and then there is the different situation where an official acts beyond his jurisdiction with knowledge of that fact. But there can be no difference between those two motivations in so far as this particular tort is concerned. It is to be emphasized that malice in this context will include a situation where there is no element of personal spite or ill will. It includes the case where a person is actuated by reasons which are collateral to and not authorized by the rules of the conduct by which he is bound. In a case of this sort a public officer may exercise his official powers against another person for reasons devoid of ill will but motivated by the desire to reach a result not comprehended by the power of decision or the power of discretion with which he has been vested”

Under Section 72(1) of the Land Act where any officer of Government necessarily and avoidably in order to carry out his or her duties needs to enter private land, he or she may enter giving not less than three days notice of the proposed entry to the owner or occupier of the land.

Section 72(3) of the Act provides for a reasonable fee for every day spent on the land in issue by such an officer and for compensation for any damages caused to the land in issue.

Section 73 of the same land Act further provides that where it is necessary to execute public works on any land, an authorized undertaker shall enter into mutual agreement with the occupier or owner of the land in accordance with this act, and where no agreement is reached, the Minister may compulsorily acquire land in accordance with section 42.

Public works as defined under section I (a) of the land Act includes roads which in the instant case was the Public works carried out on the suit land.

It is also a fundamental property right as enshrined in Article 26(2) of the Constitution that no one shall be compulsorily deprived of property or any interest in or right over property except only when:-

- (a) The taking of the possession or acquisition is necessary for public use or in the interest of defence, public safety public order, public health; and

- (b) The compulsory taking of possession or acquisition of property is made under a law which makes provision for;-
 - (i) Prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property.
 - (ii) a right of access to a court of law by any person who has an interest or right over the property.

Section 72 of the Land Act envisages a situation where an officer of Government encamps on the land of an occupier for purposes of carrying out his duties. It does not cater for a situation like the present one where a Government authority executes a Public works on an occupiers' land and in the process expropriates the land as part of it. I accordingly don't find section 72 of the Land Act relevant for the instant case.

From the evidence for the plaintiff it is clear that the defendant in constructing a road through the land of the plaintiff for the use of the general public was executing a public works within the context of section 73(1) of the Land Act. That section provides as follows;-

“73(1) where it is necessary to execute public works on any land an authorized undertaker shall enter into mutual agreement with the occupier or owner of the land in accordance with his act, and where no agreement is realized the Minister may compulsorily acquire land in accordance with section 42 of the Act.”

In the instant case the Ministry of Works which was the authorized undertaker in this case got onto the land and executed public works by constructing a road without entering into a mutual agreement with the occupier. This act by the Ministry of works was contrary to and in breach of section 73 (I) of the Land Act.

As if that was not enough the constructing of the said public works and turning it into a public road had the effect of depriving the plaintiff of his land.

Article 26 of the Constitution and section 42 of the land Act empowers the Government to compulsorily acquire the property of any body if such acquisition is necessary for public safety, public morality or public health. In the event of such acquisition the Government is bound to pay adequate compensation prior to the said acquisition.

In the instant case there is nothing to show that the land of the plaintiff or the road constructed thereon were necessary for public use, in the interest of defence,public safety, public morality, or public health nor did the Government pay any adequate compensation or at all prior to

taking over the plaintiff s land. By both provisions of section 73(1) 43 of the land Act and Article 26 of the Constitution the Government is bound by statute to show that the property it intends to acquire compulsorily is necessary for defence public security, public health or public morality and to pay adequate compensation prior to such acquisition. In the instant case the defendant failed to prove the plaintiffs land was necessary for public safety, public morality or public health and to pay adequate and prompt compensation as required by the land Act and the Constitution. I accordingly find that the defendant is in breach of statutory duty, the second issue is answered in the affirmative.

This now takes me to the third issue which is whether the plaintiff s constitutional property rights have been affected. Regarding the issue, Mr. Madrama submitted that under the provisions of Article 237 (1) of the Constitution, all land belongs to the citizens of Uganda and shall vest in them in accordance with the land tenure system provided for in the Constitution and that Article 237(2) of the same Constitution provides that the Government or Local Authority may subject to Article 26 of the Constitution acquire land in the public interest and that the condition governing such acquisition shall be prescribed by parliament. Counsel also argued that article 26(1) of the Constitution protects every persons right to own property individually or in association with others, Article 26(2) prohibits a person being compulsorily deprived of property or interested in or right over property except when;-

- a. The taking of possession or acquisition is necessary for public se or in the interest of defence, public safety public order, public morality or public health.
- b. The compulsory taking of possessions of property is made under a law which makes provisions for;-
 - i. Prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property and
 - ii. A right of access to a court of law by any person who has an interest or right over the property.

Relying on the decision of the cases of **Society United Docks & Ors Versus Government of Mauritius Marine Works Unions & Ors Versus Mauritius Authority & Ors [1985] IAU .E.A 864**, Mr. Madrama submitted that in law, loss caused by deprivation is the same in effect as loss caused by compulsory acquisition. He contended that the property rights of the plaintiff were affected by the Government constructing an eight kilometer long and 20 wide road across the Plaintiffs' land. Apart from the actual road there is a 50 feet road reserved on either side of the road running from the centre of the width to the road which forms part of the

road in that no persons is allowed to carry out any activity on it. He contended that since the roads act in section 5(1) makes it an offence for any person to connect the road with any cattle path bicycle track, side road or entrance to a dwelling or other premises, the land or that part of the land covered by the road and its road reserve has been taken away from the plaintiff, he has been deprived of it and his property rights over it have been affected.

Earlier in this Judgment on the basis of the Certificate of title Exhibit P.3 which is in the names of plaintiff I found that the first plaintiff is the registered proprietor of the suit land comprised in L.H.R Vol 902 Folio 7 at Alero Gulu District which he owns in accordance with Article 237(3) (d) of the Constitution of Uganda. Article 26 of the Constitution recognizes every person's right to own property either individually or in association with others.

Section 73(1) of the Land Act provides that if it is necessary to execute public works on any land on authorized under taker shall enter into a mutual agreement with the occupier or owner of the land in accordance with this act, and where no agreement is reached the Minister may compulsorily acquire land in accordance with section 42 of the same act. Section 42 thereof refers to Article 26 which for purposes of compulsory acquisition provides that no person shall have his property compulsorily acquired except of such acquisition by Government is for Public use or in the interest of defence, such safety public order, public morality or public health. It also provides that when ones property is compulsorily acquired provisions must be made for prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property and that the right of access to a Court of law by any person with an interest in or right over the property should be provided for;-

In the instant case the defendant moved onto the suit land comprised of LHR Vol 902 Folio 7 at Alero - Gulu District without the consent of the plaintiff who is the registered proprietor thereof. Contrary to the provisions of section 73(1) of the Land Act the defendant commenced and executed public works, a public road, on the suit land without entering into a mutual agreement with the plaintiff. The conduct of the defendant amounted to compulsorily depriving the plaintiff of his property rights over the land comprised in L.H.R Vol 907 Folio 7 at Alero - Gulu District in that by the Force of Section 5 of the Roads Act that part of the property comprising the road and the road reserves is taken out of the control possession and ownership of the plaintiff. The plaintiffs property rights over the suit land is further affected by the fact that contrary to the constitutional protection of an individual's property right in article 26(2) of the Uganda Constitution, the plaintiff was deprived of his interest in and right over the suit land

without compensation. In as far as the Government took over part of the plaintiff s land without promptly paying fair and adequate compensations in breach of the provision of article 26, the plaintiff s constitutional property rights were adversely affected. I accordingly answer the third issue in the affirmative.

With regard to the fourth issue whether the plaintiffs have suffered any damages or loss as a result of the acts of the defendant PWI Onegi Obel and the second plaintiff and its operations as a ranch/farm have been adversely affected by the construction of the road in that;

1. People and animals have unrestricted access into the farm subjecting the farm animals to the risk of disease infection.
2. The road passes only 100 meters away from the cattle dip thus blowing dust into the dip with the danger of eventually silting the dip.
3. The fuel tanks/pumps and rice mills on the farm became too close to the road requiring their relocation at great expense.
4. The ranch was non open to the public for the whole length of the road of 8 kilometres.
5. The farm or ranch house became inhabitable because it was now too close to the road and it now required to be relocated at great costs.

PWI Onegi Obel testified that he himself as the registered proprietor of the suit land suffered damages and loss in the following ways;-

1. The defendant excavated murrum in seven spots on the suit land leaving gaping craters which fill up with water thus becoming a hazard to both animals and people. This degraded and depreciated the suit land.
2. By constructing the road through the suit land the plaintiff lost that part of the suit land covered by road and the road reserve.
3. He lost the bridge he has constructed on the suit land because it became public property as it connected the road built through the suit land.

PW2 Openytho Francisco Pinchwa who did a valuation of the damages and loss sustained by the plaintiffs as a result of the construction of the road through the suit land, the report of which is exhibit P.7 on the court record, testified that in replacement costs of the plaintiffs infrastructure on the suit land destroyed or rendered irrelevant the plaintiff stood to lose as follows;-

- a. Replacement costs of the farm or ranch house shs 112,000,000/=
- b. Replacement cost of two fuel tanks shs 92,195.415/=

- c. Replacement value of the cattle dip
- d. The rice and cereal processing plant - building and machinery shs 60,000,000/=

That Mr. Madrama submitted that the ranch or the second plaintiff was the vehicle of the plaintiffs' dreams after a long dedicated public service. He contended that the way the Construction of the road has affected the first plaintiff evokes in him emotional stress. Counsel argued that the intrusion on the 1st plaintiffs land without compensation makes this all the sadder. He submitted that the acts of the defendant caused the first plaintiff loss and damages.

The only evidence regarding this issue is that adduced on behalf of the plaintiffs by PW1 Onegi Obel and PW2 Openyho Francisco Pinchwa. Except for averring in his WSD that the complainants were compensated. The defendant did not adduce any evidence to contradict the evidence of the two witnesses for the plaintiffs. The only inference to draw is that the plaintiffs sustained damages and loss as a result of the construction of the road through such damages and loss may not measure to the quantum alleged. I also take the view that the first plaintiff as the registered proprietor also sustained damages and loss as testified to by PW1 Onegi Obel
The 4th issue is accordingly answered in the affirmative

This finally brings me to the last issue which is whether the plaintiffs are entitled to remedies and if any, which remedies.

In their amended pleadings, the plaintiffs prayed for the following remedies III paragraph 8:-

- a. General and special damages for trespass and breach of statutory duty to the first plaintiff as in paragraph 7 (i), (ii), (iii), (iv) and (v) of the pleadings.
- b. Compensation or damages in lieu thereof as stipulated in paragraph 7(i)(ii)(iii)(iv) and (v) of the pleadings.
- c. General and exemplary damages under paragraph (vi), (vii) and (viii) of the pleadings to both plaintiffs for arbitrary and unconstitutional behavior and acts of the defendant's servants or as determined by Court and for breach of law generally.
- d. Declaratory judgment and orders that
 - i. The plaintiffs are entitled to notice prior to the construction
 - ii. on the suit property.
 - iii. The act of constructing a road and taking over the plaintiff's private bridge is in violation of the plaintiff's fundamental rights and freedom.
 - iv. The plaintiffs are entitled to compensation and or vacant possession of the premises.

- v. A declaration that the acts of the defendant in constructing the road as the defendant did are illegal and contrary to law.

I shall first of all deal with the remedies in paragraph 8 (d) relating to declaration Judgments and then I shall revert to the prayers in paragraph 8(a) (b) and (c).

The law allows a party to seek and the court to grant a declaratory Judgment or order. That this is the position is to be found in the provisions of order 2 rule 7 of the Civil Procedure Rules which is in these terms;-

“7 No suit shall be open to objection on the ground that a merely declaratory Judgment or order is sought thereby and the Court may make binding declaration of rights whether any consequential relief is or could be claimed or not”

That this court has the power to make declaratory Judgments and orders was expounded by Lindley MR in **Ellis vs. Duke of Bedford [1899] 1 Ch. 494** when interpreting Order XXV rule 5 of the Procedure Rules of England which is pari material with our Order 2 rule 7 when he said at page 514-515;-

“Moreover now, under the Judicature act, actions can be brought merely to declare rights and this is an innovation of a very important kind. I am referring to Order XXV rule 5 which says "No action shall be open to objection on the ground that a merely declaratory Judgment or Order is sought thereby and the court may make binding declarations of right whether any consequential relief is or could be claimed or not". "Having regard to that rule, it appears to me impossible now to say that one grower could not maintain such an action as this, on behalf of himself and all other growers of fruit and vegetables, to assert preferential rights to which he says the whole class of growers are entitled”.

A declaratory judgment according to the authorities can be made in favour of a party whether he shows the existence of a cause of action or not provided that he shows that he is interested in the subject matter of the declaration See **Guaranty Trust Company of New York vs. Hannay & Company LIMITED [1915] 2 K.B. 536** at page 562 where Pickford Lt. held inter alia while interpreting the same rule;-

“-----I think the effect of the rule is to give general power to make a declaration whether there be a cause of action or not and at the instance of any party interested in the subject matter of the declaration. It does not extend to enable a stranger to the transaction to go and ask the court to express an opinion in order to help him in other transactions”.

The effect of Order 2 rule 7 is finally summarized in the above case in the speech of Bankers L.J at page 572 while interpreting the English Judicature Act 1873 S. 100 and the English Order XVI rule 1;-

“In every action there must be a plaintiff who is the person seeking relief (Judicature Statute Act 1873,S.100), or to use the language of Order XVI,r.1, a person in whom a right relief is alleged to exist, whose application to court is not to be defeated because he applies merely for a declaratory judgment or order and whose application for the declaration of his right is not to be refused merely because he can not establish a legal cause of action. It is essential, however that a person who seeks to take advantage of the rule must be claiming relief that relief is not confined to relief in respect of the cause of action it seems to follow that the word itself must be given its fullest meaning. There IS however one limitation which must always be attached to it that is to say the relief claimed must be something which it would not be unlawful or unconstitutional or unequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction”.

In paragraph 8 (d)(l) of the plaint the plaintiffs pray for a declaration that they were entitled to notice prior to the construction of the road on their suit private property. There does not appear to be any legal requirement that prior to execution of public works on private property, the authorized undertaker has to give notice to the owner or occupier of the said property. The only requirement for notice is contained in Section 72(1) of the Land Act relating to an officer of Government who finds it necessary to encamp on private property in order to execute his official duties. In such a case an officer is obliged to give a notice of not less than three days of the proposed entry. In the instant case this was not an encampment by an officer of Government on the plaintiffs property for purposes of carrying out his duties No declaration will therefore issue in respect of this prayer;-

In paragraph 8(d) (ii) of the plaint the plaintiffs pray for a declaration that the act of the defendant of constructing a road on their property and of taking over their private bridge is in violation of their fundamental rights. There is overwhelming evidence the suit land in owned by the first plaintiff as indeed I did find in this Judgment. There is also uncontested evidence that the plaintiffs constructed the bridge for the purpose of better carrying out the operation of their ranch. In discussing issue 3 above I found it as a fact that the construction of the road and the taking over of the bridge by the defendant was in violation of the property rights of the

individual as guaranteed by the constitution in Article 26 and 237. This being the case the plaintiff are entitled to a declaration that the construction of the road and the taking over of the plaintiff's private bridge is in violation of the plaintiff's fundamental constitutional property rights.

The plaintiffs seek in paragraph 8(d) (iii) of the plaint a declaration that the plaintiffs are entitled to compensation and or vacant possession of the property. Article 26(2) (b)(i) of the constitution provides that no person shall be compulsorily deprived of property of any description except where prompt payment of fair and adequate compensation has been made prior to the taking of possession or acquisition of the property. In the instant case though the defendant did not follow the procedure laid down in Section 73(1) of the Land Act and Article 26(2) (a) and (b) (ii) the deprivation of the plaintiff's right in and interest in the suit land amounts to compulsory acquisition for which the plaintiffs have a right to compensation. It is therefore declared that the plaintiffs are entitled to compensation.

With regard to the declaration of the plaintiff's entitlement to vacant possession, PWI Onegi Obel after recognizing that the road is in place and intended to cater for the public expressed the opinion that he would rather opt for damages than vacant possession. The plaintiff having foregone his right to vacant possession a declaration to that effect can not issue.

Lastly in paragraph 8(d) (iv) the plaintiffs pray that a declaration issues to the effect that the acts of the defendant in constructing the road and taking over the bridge are in breach of statutory duty because they were done contrary to the provisions of section 73(i) and 43 of the Land Act and Article 26 and 237 of the Constitution of Uganda. The acts of the defendant are accordingly declared illegal and contrary to law.

I now revert to paragraph 8(a) (b) and (c) of the plaint. In Paragraph 8(a) the plaintiff pray for general and special damages for trespass and statutory breach because as a result of the actions of the defendant;-

- (i) The plaintiffs have to relocate the residence on the ranch, stores and workers quarters.
- (ii) The plaintiffs have to construct a new cattle dip.
- (iii) Have to construct two new fuel tanks at a cost of shs 150,000,000/= to replace t hose affected by the construction of the road.
- (iv) The plaintiffs bridge valued at shs 500,000,000/= was taken over by the defendant.

- (v) The suit property is now open to human traffic leaving it susceptible to annual disease infection and incidences of theft and insecurity. This now necessitates the construction of a shs 100,000,000/= barbed wire fence on both sides of the road.

Except for (v) above which is based on trespass for a claim for general damages the other particulars of damages in (i),(ii),(iii) and (iv) above are claims of special damages. It is now trite that special damages must be specifically pleaded and strictly proved **See Bhagal Vs Barbidge & Anr [1975] EA 11 and Consulting Gas Engineering Co Ltd Vs Bitature & Ano SCCA 36/94.**

In (i) the plaintiff claim that the cost of relocating the ranch house farm structures and workers quarters and averred that Costs would be proved in evidence during the hearing. The plaintiffs by pleading like that failed to plead the special damages specifically. In an attempt to prove what it would cost to relocate the above PW1 Onegi Obel did not suggest a figure, PW2 Openyho Francisco Pinchwa an Engineer who carried out a valuation of the property in question testified that the cost of relocating the ranch house was shillings 112,000,000/=. I am of the view that instances like the present case where a property has been affected by the act of Government or any person for that matter, the measure of damages or compensation would be the value of the property affected but not the project costs of building a similar property in another location. The above aside, the plaintiffs have not pleaded their special damages in connection with the ranch house specifically nor does the valuation of PW2 Openyho Francisco Pinchwa strictly prove it.

In respect of paragraph (ii) above the plaintiff claim the costs of constructing a new cattle dip. The cost of such a dip is not pleaded but is averred in the plaint that the costs would be adduced in evidence at the trial. At the trial PW2 Openyho Francisco Pinchwa did not assign the costs of building a new dip. Special damages can not be awarded when they have not been proved at all nor pleaded.

Paragraph (ii) is in respect of the construction of two fuel tanks. In the plaint the plaintiffs claims their costs to be over shs 150,000.000. PW2 Penyho Francisco Pinchwa in his testimony put the cost of constructing these tanks at shs 92,195,415/=. Here again thought this time the plaintiffs have claimed a figure they have failed to strictly prove that claim.

With regard to paragraph iv the plaintiffs in their pleadings claim shs 500,000,000/= in compensation for their bridge that was taken up by the defendant. PW2 Openytho Francisco Pinchwa in valuation put the amount for compensation at shs 534,336,000/= the figure arrived at by PW2 Openytho in no way strictly proves the special damages which appears to be based on guess work. I besides find a difficulty with the valuation of PW2 Openytho Francisco Pinchwa which again appears to be based on the costs of building a new bridge. In any case the plaintiffs are not claiming that they are going to construct an alternative bridge. The measure of special damages in my view ought to have been the value of the present bridge.

Under (v) the plaintiffs claim shs 100,000,000/= being the costs of building a barbed wire fence on both sides of the road as security for the cattle on the ranch.

They argued that the construction of the road exposed the cattle to human and animal traffic thus making them very susceptible to contracting diseases. Instead of justifying this claim and proving that indeed such a fence would cost the sum claimed, PW2 Openytho Francisco Pinchwa in his valuation report came up with a staggering figure of shs 1,249,387,000/= as the cost of fencing and a proposal that the fence be in chain links a thing the plaintiffs never aimed. Because of this the plaintiffs failed to strictly prove their claim of special damages in this regard.

Paragraph 8(b) which is for compensation or damages for the particulars of damages under paragraph 6(i) - (v) has been covered in that the compensation or damages being claimed are the special damages I have first considered.

I now turn to the claim for general damages contained in Paragraph 8(a) and 8(c) of the plaint. It is now trite that general damages are at the discretion of the court and are intended to place the injured party in the same position in monetary terms as he would have been had the act complained of not taken place. See **Phillip vs. Ward [1956] 1 AU ER 874.**

In the instant case by the wrongful act the plaintiffs were deprived of that land covered by the width and breathe the defendants unlawfully constructed on the suit land. By the construction of the said road the plaintiffs are likely to experience great inconvenience in running their business of ranching, they have to shift the ranch house, dip and fuel station thus incurring expenses of relocation. They had their bridge constructed at one end of their ranch taken over and made public property. For the safety of the cattle on the ranch, the plaintiff will have to incur the expenses of fencing both sides of that road in barbed wire. By the acts of the defendants trespass the plaintiffs have incurred great financial loss and inconvenience besides their constitutional rights of owning property being infringed. In the process the defendant are

in breach of statutory duty which also attracts general damages. To be restored to the position plaintiffs were in before the wrongful acts of the defendant requires an award of damages in monetary terms. I have not made an award in special damages not because these were not incurred but because these were not proved to the required standard. For instance having found the defendant deprived the plaintiffs of a bridge they built, it can not be said the plaintiffs did not incur loss or damages. Taking all these circumstances I award to the plaintiffs by way of general damages shs 650,000,000/= (Six hundred fifty million only).

The plaintiffs' prayer in paragraph 8(c) is for exemplary damages for arbitrary and unconstitutional conduct and acts of the agents of the defendant. An award of exemplary damages is made when the acts complained of are acts of officers of the State done arbitrarily, oppressively and unconstitutionally to the prejudice of the plaintiff. Exemplary damages are not awarded for every wrongful of an officer of state.

In the instant case the officer of the Government namely the Ministry of works, started construction of the road through the suit land and continued with the said works even after being informed the 1st plaintiff was the registered proprietor. This was done in utter disregard of the property rights of the 1st plaintiff. On completion of the road amid protests from the plaintiffs the defendant took over the plaintiff's private bridge and made it public property. All this was done contrary to sections 73 (1) and 42 of the land Act and the provisions of Articles 237 and 26 of the Constitution which recognize the right to property and lay down the procedure to acquire private property. One of the conditions of acquiring private property by Government is to pay prompt fair and adequate compensation to the owner but no compensation was made in total disregard of the plaintiffs' proprietary rights. I find the conduct of the agents of the Government in this regard arbitrary, oppressive, and unconstitutional for which the plaintiffs are awarded the sum of shs 25,000,000/= in exemplary damages.

In the result Judgement is entered for the plaintiffs in the following terms;-

- a. It is declared that;-
 - i. The acts of the defendant of constructing a road and taking over the plaintiffs' private bridge is in violation of the plaintiffs fundamental property rights.
 - ii. The acts of the defendant in constructing the road as he did is illegal and contrary to the law.
- b. The defendant shall pay to the plaintiff in general damages the sum of shs 650,000,000/=.

- c. The defendant shall pay to the plaintiffs, exemplary damages in the sum of shs 25,000,000/=
- d. The defendant shall also pay the taxed costs of this suit.

Signed JUSTICE .A. KANIA JUDGE

5.4.2006

In the presence

Mr. Christopher Madrama - for the plaintiffs.

Mr. Onegi Obel - plaintiff

Mr. Boyi - court clerk

