**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

*(Coram: Cheborion Barishaki, Nambayo Esta & Musa Ssekaana, JJA)*

**CIVIL APPEAL NO. 058 OF 2020**

*(ARISING OUT OF HCCS NO. 494 OF 1995)*

**STIRLING CIVIL ENGINEERING LIMITED ..... APPELLANT**

**VERSUS**

1. **ABRAM KITUMBA PETER MULANGIRA LUTAYA**
2. **NAMAKULA BAIGA STELLA**
3. **BELINDA NAKIGANDA LUTAYA**

**(Administrators of the Estate**

**of the Late Justine E.M.N Lutaaya) ..... RESPONDENTS**

*(Appeal from the Decision of the High Court of Uganda at Kampala (Land Division) before Hon. Mr. Justice Henry I Kaweesa delivered on 28th August 2019 in HCCS No. 494 of 1995)*

**JUDGMENT OF COURT**

**BACKGROUND**

[1] The Respondents are the Administrators of the estate of the late Justine E.M.N. Lutaaya (hereinafter referred to as "the Original Plaintiff"). The

Original Plaintiff filed Civil Suit No. 494 of 1995 in the High Court but later died and her Administrators (the Respondents) were substituted as Plaintiffs.

[2] In the said suit, the Original Plaintiff sought damages for trespass on her land comprised in Kyaggwe Block 191 Plot 34 at Gwawaya, Kapeeka, Mukono district. The High Court dismissed the suit, holding that the Original Plaintiff lacked *locus standi* on the ground that she was not the owner of the suit land at the time she filed the suit. On appeal, the Court of Appeal upheld the decision of the High Court but, on further appeal, the Supreme Court allowed the appeal and reversed the decisions of the lower courts. The Supreme Court found, *inter alia*, that the Original Plaintiff was entitled to damages for the trespass which occurred during the time when she was still the owner of the suit land. The Supreme Court also found that the act of trespass had been admitted. In 2003 the Supreme Court referred the file back to the High Court to determine the appropriate remedies.

[3] According to the plaint, the case was filed against a company called Stirling Civil Engineering Company Limited. When the suit came back before the High Court, the Appellant raised a preliminary objection that it was a wrong party to the suit. It was argued by the Appellant's counsel that at the time of the trespass, the Appellant was not in existence, having been registered in 2002. The learned trial Judge overruled that objection and held that the Appellant was the right party to the suit and that the issue of liability had already been decided by the Supreme Court which remitted

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the file back to the High Court only for determining appropriate remedies. The learned trial judge then proceeded to assess damages and awarded both special and general damages, interest on damages and costs of the suit to the Plaintiffs/Respondents.

[4] The Appellant was dissatisfied with the said decision of the learned trial judge hence this appeal seeking for orders that the appeal be allowed and costs be awarded to the Appellant.

**GROUNDS OF APPEAL**

[5] The Appellant raised two grounds of appeal:

1. *That the learned trial judge erred in law and in fact when he overruled the preliminary point of law on the legal existence of the defendant (now Appellant) who as of 1995 was legally non-existent.*
2. *That the learned trial judge erred in law and in fact when he awarded 18% annual interest on special damages from the date of filing the suit till the date of judgement which interest is harsh and excessive in the circumstances.*

**REPRESENTATION**

[6] On appeal, the Appellant was represented by Mr. Absalom Mubangizi and Mr. Milton Zziwa both of M/s BKA Advocates. Mr. Joseph Luswata of S & L Advocates appeared for the Respondents. Both counsel adopted their written conferencing notes as their submissions.

**DUTY OF THIS COURT AS 1ST APPELLATE COURT**

[7] This being a first appeal, this court is under a duty to assess the evidence and make its own conclusions. The court must, however, keep at the back of its mind that the trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. See ***Mbogo v. Shah [1968] EA 93)***. This Court will be guided by the same principles in resolving this appeal.

**Ground 1- The learned trial judge erred in law and in fact when he overruled the preliminary point of law on the legal existence of the defendant (now Appellant) who as of 1995 was legally non-existent.**

**APPELLANT'S SUBMISSIONS**

[8] Counsel for the Appellant submitted that it did not assume the liabilities of Stirling International Civil Engineering Limited which is the entity that admittedly trespassed on the suit land. Counsel further submitted that the two entities are separate legal persons who ought to have been treated as such by the learned trial Judge. Secondly, that the evidence adduced at the trial showed that the Respondents and the Original Plaintiff held negotiations with the hope of settling the dispute not with the Appellant but with the said Stirling International Civil Engineering Limited. Counsel referred to Exhibit DE 5 and DE 6 at page 107 of the Record of Appeal. That the Appellant was surprised when the Respondents turned around and sued it. In counsel's view, the learned trial judge ought to have been

guided by the above exhibits to conclude that the suit had not been brought against the Appellant but against the said Stirling International Civil Engineering Limited which the Original Plaintiff and the Respondents attempted to negotiate with.

[9] Counsel further submitted that legal capacity to sue or be sued is a question of law and cannot be acquired through acquiescence or estoppel. The fact that the suit had always been defended since its filing cannot fill the legal gap of suing a wrong party as the trial judge held. That suing a wrong party goes to the root of the suit and negates the cause of action itself.

[10] Finally, on this ground, counsel submitted that once an illegality is brought to the attention of court, the same cannot be condoned because illegality overrides all questions of pleadings including all admissions made therein. Counsel relied on the case of ***Makula International v. His Eminence Cardinal Emmanuel Nsubuga & Another (1982) HCB 11*** and ***NSSF v. Alcon International, SCCA No. 15 of 2009.*** He relied on these authorities to further submit that the learned trial judge ignored this position of the law when he downplayed the significance of suing a non-existent party. That a proper evaluation of the Appellant's uncontroverted evidence including DE 7 and DE 9 which show that the Appellant was only registered in 2002 should have convinced the learned trial judge to strike out the suit.

**SUBMISSIONS OF THE RESPONDENTS**

[11] In response to appellants submission on ground one, counsel for the Respondents submitted that the trial court found that the Appellant defended the suit for so long and was acting in bad faith to assert the defence of a non-existing party at this stage. Secondly, counsel submitted that the Supreme Court had found the Appellant liable to the Original Plaintiff and the objection could not be entertained by the High Court as doing so would mean altering the Supreme Court judgement.

[12] Counsel for the Respondents argued that the trial judge's Ruling on the preliminary point of law was not included in the Record of Appeal. He pointed out that the said Ruling cannot be included in the record by a supplementary record of appeal. That this same point of law had already been decided by the Supreme Court when the Supreme Court dismissed Civil Application No. 4 of 2004 when the Appellant filed Misc. Application No. 502 of 2004 before the High Court. That Misc. Application No. 502 was annexed to Supreme Court Civil Application No. 4 of 2004. Counsel argued that in 2011, the Supreme Court dismissed Civil Application No. 4 of 2004 thereby dismissing Misc. Application No. 502 of 2004 which had been annexed. He submitted that when the suit came up for hearing again, the Appellant insisted that Misc. Application No. 502 was unresolved but the High Court dismissed it.

[13] The Appellant rejoined that the Supreme Court did not decide the issue of the existence of the Appellant at the time of filing the suit. According to counsel, the Appellant's previous lawyers only attempted to annex High

Court Misc. Application No. 502 of 2004 to the Application in the Supreme Court (SCCA No. 4 of 2004) but this did not succeed. That the Supreme Court did not even refer to Misc. Application No. 502 of 2004.

[14] The Appellant's Counsel further argued that when the suit was originally filed in 1995, it was filed against a company that existed at that time, Stirling International Civil Engineering Limited. He stated that the latter company was later wound up in 1999. That the Appellant company only purchased some assets of the said Stirling International Civil Engineering Limited. Counsel reiterated that the Appellant did not exist at the time of filing the suit as it was only registered in 2002. He further argued that the shareholding of the two companies was different.

**ANALYSIS AND DECISION**

[15] The Appellant contends that it was wrongly sued as the company did not exist at the time of filing the suit. The Respondents, on the other hand, agrees with the trial judge who found that the Appellant was rightly sued and was already found liable by the Supreme Court. While dealing with this issue, the learned trial judge held thus:

> *"I note, however, that in defence submissions, the same matter was raised under issue (ii) framed as;*
>
> *ii) Whether a successor company is liable for tortious liability by the predecessor.*
>
> *As noted above, this issue, though framed by the parties has already been determined by this court, it having been raised by the*

*Defendant herein as a preliminary point of law. On 12th April 2018, counsel Patrick Alunga for the Defendant raised this same matter. The court determined the preliminary objection and ruled that in its opinion the Supreme Court had conclusively determined this matter and forwarded the file for only determining of an appropriate remedy. To raise the same issue here is an exercise in futility.*

*I accordingly find that this issue is unnecessary and is already settled by the findings under the preliminary objections earlier raised by the Defendants in this case, as pronounced on 3rd May 2018. The Defendant is rightly before this court as the right party to be sued."*

[16] In his submissions, the Respondents' counsel agreed with the learned trial judge and submitted that the Supreme Court had already found the Appellant liable to the Original Plaintiff. On his part, counsel for the Appellant submitted that this issue was never decided by the Supreme Court. He said that this issue was raised for the first time in 2004. It appears this is when the Appellant filed Misc. Application No. 502 of 2004 in the High Court. Counsel submitted that the attempt to annex this Application to another Application in the Supreme Court; SCCA No. 4 of 2004 had failed and that the Supreme Court did not make any ruling or reference to the issue whether the Appellant was wrongly sued.

[17] The Appellant's counsel maintained that when the case was initially filed in 1995, it was filed against a different company which later wound up.

Counsel referred to the certificate of registration of the Appellant company which appears on page 128 of the Record of Appeal to support his assertion that at the time of filing the suit the Appellant was not yet in existence and could not have committed the trespass.

[18] The question before this court, therefore, seems to be whether the issue addressed in ground one of this appeal, namely, whether the Appellant is a wrong party to the suit, has already been determined or ruled on by the Supreme Court thereby rendering it res judicata.

[19] We have looked at the judgement of the Supreme Court. That Court allowed the appeal by finding that the original plaintiff was entitled to claim damages for the trespass which occurred during the time when she still owned the suit land. Regarding the act of trespass and liability, the Supreme Court found that the same had been admitted by the Defendant. Accordingly, the matter was referred back to the High Court to determine the appropriate remedy.

[20] There is nothing in the judgement of the Supreme Court which relates to the issue of whether the Appellant was rightly sued or whether the Original Plaintiff had sued a wrong party.

[21] Counsel for the Respondents asserted that this issue was resolved by the Supreme Court when High Court Misc. Application No. 502 of 2004 was annexed to SCCA No. 4 of 2004. Counsel did not provide proof that indeed Misc. Application No. 502 of 2004 was annexed to the Application in the Supreme Court. He also did not provide a copy of the Ruling in SCCA No. 4 of 2004 to confirm that the issue was resolved.

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[22] In the circumstances, this court is inclined to agree with counsel for the Appellant that if any attempts were made to annex High Court Misc. Application No. 502 of 2004 to SCCA No. 4 of 2004, those attempts failed. Otherwise the learned trial judge would not have considered this issue again when it was raised. In absence of the Ruling of the Supreme Court on the issue, this court cannot assume that the Supreme Court pronounced itself on the issue.

[23] It is clear that the first time the issue of the Appellant being wrongly sued was raised after the matter had been referred to the High Court. The record shows that the issue was first raised by the Appellant's counsel in 2004, vide Misc. Application No. 502 of 2004. It is not clear from the record whether this Application was ever disposed of as the proceedings before Justice Opio Aweri are not part of the Record. Nevertheless, the issue was raised again before the learned trial judge, Justice Henry I. Kaweesa who disallowed it as recounted above.

[24] This court can therefore determine whether the learned trial judge was right to disallow the preliminary objection.

[25] Counsel for the Appellant submitted that originally the suit was filed against an existing entity; Stirling International Civil Engineering Limited. He submitted that that company later wound up in 1999. The Appellant in this case was registered in 2002 while the case was filed in 1995, seven years earlier.

[26] The record of proceedings shows that the Plaintiffs (Respondents) amended their plaint twice. First, they filed an Amended Plaint on 8th December

2017 and later filed a Further Amended Plaint on 1st March 2018 as seen at page 95 of the Record of Appeal.

[27] This court has looked at both the Amended Plaint and the Further Amended Plaint. The first amendment of the plaint appears to have been intended to substitute the current Respondents as administrators of the estate of the Original Plaintiff. However, under paragraph 2 of the Further Amended plaint, the Respondents stated that:

> *"The Defendant is a limited liability company incorporated in Uganda and the successor in title of another company called Stirling International Civil Engineering Limited."*

[28] When the Respondents filed this Further Amended Plaint, the Appellant filed what it called a "Written Statement of Defence to the Further Amended Plaint" and stated inter alia that:

*"3. Paragraphs 1 and 2 of the Further Amended Plaint are noted. In specific response to the Defendant being a successor to Stirling International Civil Engineering Limited, the Defendant contends that it took over specific assets and NOT tortious liability."*

[29] This pleading in the Further Amended Plaint that the Appellant is a successor in title of the company called Stirling International Civil Engineering Limited was neither among the Supreme Court's findings nor directions.

[30] It appears, therefore, that the first issue in counsel's submissions before the learned trial judge was raised pursuant to the Respondents' own

pleading in the Further Amended Plaint. This court, therefore, finds that apart from the objections raised by the Appellant before the High Court, the issue of a wrong party having been sued was not decided by the Supreme Court. Secondly, the Respondents by their Further Amended Plaint admitted that the Appellant was a separate entity although they claimed it was a successor in title of another company, Stirling International Civil Engineering Limited.

[31] The learned trial judge ruled that the issue of the Appellant's liability was already decided by the Supreme Court but, based on the foregoing analysis, it was clearly not the case. While the Supreme Court determined the liability of the original Defendant which the Respondents admit was Stirling International Civil Engineering Limited, the issue of liability of the Appellant as a successor in title of that company was never considered. The learned trial judge also found that the Appellant defended the suit for long. This finding is not supported by evidence given the clear evidence of the Appellant's registration in 2002.

[32] It is not clear what the difference was between "Stirling Civil Engineering Company Limited" and "Stirling International Civil Engineering Limited" the predecessor in title of the Appellant. What is clear is that the Appellant did not exist at the time of filing the suit or at the time when the trespass was committed.

[33] With due respect, the learned trial judge erred in holding that the Appellant company, which presented evidence of its registration in 2002, had been rightly sued in 1995. The learned trial judge was also wrong to

hold that the issue had been decided by the Supreme Court. While the Supreme Court determined liability for trespass, it did not decide that the Appellant, which did not exist at the time the trespass was committed, was responsible for the trespass as that issue did not arise. The issue having been raised before him, the learned trial judge had a duty to decide it based on the evidence presented. Resolving this issue does not in any way amount to altering the judgement of the Supreme Court which was pronounced against a different entity altogether.

[34] By their own admission in the Further Amended Plaint, the Respondents conceded that the company that was originally sued had ceased to exist. There was no evidence adduced to prove that the Appellant took over all liabilities including tortious liabilities of the original defendant. If the company wound up as suggested by counsel for the Appellant, the Respondents had a right to proceed against it in liquidation which they did not do.

[35] The pleading that the Appellant was the successor in title under paragraph 2 of the Further Amended Plaint had no evidence to support it. The Respondents should have adduced evidence to prove that the Appellant indeed acceded to the tortious liability of the wound up company. This court takes judicial notice of the practice that asset acquisition agreements often place careful restrictions on liabilities existing prior to transfer of the assets. It would be wrong to assume that merely by acquiring assets of a company the purchaser necessarily inherits all liabilities including liability for torts committed by the seller. Asset Acquisition Agreements have

restrictions on the specific assets acquired and which specific liabilities are assumed. Most agreements place a limit on and/or exclude all liabilities incurred before the transaction closing date. The Respondents had the burden to prove, including through discovery, that the Appellant did in fact assume such liabilities including tortious liability.

In the premises, ground one of the appeal succeeds.

**Ground 2: The learned trial judge erred in law and in fact when he awarded 18% annual interest on special damages from the date of filing the suit till the date of judgement, which interest rate is harsh and excessive in the circumstances.**

**APPELLANT'S SUBMISSIONS**

[36] Counsel for the Appellant submitted that the learned trial judge awarded special damages to the Respondents yet the same had not been specifically pleaded in the plaint. Counsel cited the case of Alliance Media (U) Limited V Vivian Metal Projects Limited, SCCA No. 124 of 2014 for the proposition that in order to sustain a claim for special damages a plaintiff must specifically plead special damages by setting out particularized items of what is claimed as special damages in the Plaint. The Supreme Court held in the said case that special damages are liquidated, verifiable and provable sums and that is why they are not presumed by law but are specifically pleaded, particularized and proved.

[37] Counsel further argued that in the original plaint before amendment did not specifically pray for an ascertained amount. Instead, the plaintiff

prayed for orders "for ascertainment of the value of the profits taken out of the land by the Defendant". This prayer was repeated in the amended plaint as seen at page 78 of the record of appeal. Counsel further submitted that since special damages should always be pleaded in the plaint, it was wrong in this case for the learned trial judge to award special damages to the Respondents. Counsel submitted that this is a matter of law which ought to have overruled all evidence adduced by the Respondents in the purported proof of general damages.

[38] Counsel further adverted that the learned trial judge ought not to have entertained any evidence from the Respondents in proof of special damages altogether because no special damages had been pleaded and particularized in the plaint. The learned trial judge ought to have rejected all the evidence adduced by the Respondents in purported proof of the said special damages. Counsel maintained that such evidence constituted departure from pleadings by the Respondents which is not allowed. Counsel sited O. 6 r. 7 CPR and the case of Interfreight Forwarders (U) Ltd v. East African Development Bank, SCCA No. 33 of 1992.

[39] Counsel further submitted that although the Appellant did not raise the above point as a separate ground of appeal, this did not preclude the Appellant from raising it at this stage since points of law can be raised at any time before judgement. He referred to ***Tororo Cement Co. Limited V Frokina International Limited, SCCA No. 2 of 2001*** as the authority to that effect. Counsel added that a point of law which is related to the propriety of the award of special damages was inextricably linked with the

instant ground of appeal which questions the propriety of the award of interest of 18% pa on the impugned special damages.

[40] In relation to the interest rate, counsel agreed that the award of interest is an exercise of court's discretion and referred to section 26 of the Civil Procedure Act. As such, counsel further argued, an appellate court ought to respect the award of interest except if the award was made in disregard of the relevant law or legal considerations.

[41] Counsel argued that in this appeal, the award of 18% annual interest from the date of filing to the date of judgement was made in disregard of two relevant legal considerations governing the award of interest. The first legal consideration which counsel argued and was disregarded is that for interest to be awarded from the date of filing a suit, the interest should be in respect of a sum that was ascertained at the time of filing the suit. Counsel argued that since special damages in this case were not specifically pleaded but were assessed and ascertained by the learned trial judge himself after the hearing, no interest should have been payable on the assessed damages from the date of filing the suit.

[42] Secondly, counsel submitted that as a matter of law, unless the rate of interest is agreed in the contract, the rate of interest ordered by the court ought to be reasonable in the circumstances.

[43] In the alternative, counsel argued that even if the award of special damages was justified, the interest awarded in this case was unreasonable, harsh and excessive and contrary to the relevant principles for determining an appropriate interest rate. Counsel cited the case of ***URA V Mabosi, SCCA***

***No. 26 of 1995 and the case of Alliance Media (U) Limited V Vivian Metal Projects Limited (supra)*** in support of this proposition.

[44] Counsel further submitted that in the instant case, the interest rate of 18% pa was too high and excessive especially since the sums claimed in the plaint were not ascertained at the time of filing the suit. Counsel further argued that the fact that the defence initially succeeded in the High Court and in the Court of Appeal, subjecting the Appellant to 18% per annum for all the time between the filing of the case and judgement is harsh.

[45] Finally, counsel submitted that if any interest is to be awarded, it should be at the court rate from the date of judgement just like it was for the other monetary awards of the court.

**RESPONDENTS' SUBMISSIONS**

[46] The Respondents' counsel submitted that it was trite law that the award of interest and the period when it is awarded are matters of discretion. The Court of Appeal will not interfere with discretionary powers of the High Court unless a manifest error has been demonstrated. That there was no manifest error in the exercise of the discretionary powers of the High Court by the trial judge.

**ANALYSIS AND DECISION**

[47] In light of this court's findings on ground one of the appeal, this ground is rendered moot. Nevertheless, since both counsel addressed us on the issue, we will proceed to give our opinion on the same.

[48] The Appellant has raised three points in this ground of appeal: the propriety of the award of special damages; the propriety of awarding interest from date of filing the suit to the date of judgement; and the propriety of awarding 18% pa rate of interest. Regarding special damages, counsel admitted that this was not raised as aground of appeal. This is contrary to Rule 102(a) of the Rules of this court. We do not agree with the Appellant's counsel that this argument is implicit in or linked in the second ground of appeal which specifically challenges the award of interest.

[49] Regarding the award of interest from the date of filing the suit to the date of judgement, the issue is whether the learned trial judge was right to award interest from the date filing the suit till the date of judgement. In Kanoblic Group of Companies (U) Limited v. Sugar Corporation of Uganda Limited, SCCA No. 15 of 1994, the Supreme Court held that interest is awarded from the date of filing till judgement "where a debt is due at the time of filing the suit" and that interest on general damages such as damages arising from personal injury, interest is awarded from date of judgement till payment in full.

[50] It appears from the authorities that for interest to be awarded from the date of filing the suit, the sums claimed must be ascertained or known before filing the suit. This is particularly the case in suits for debt recovery or actual expenses incurred. In this case, the Appellant submitted that the amount claimed was not ascertained because the original plaintiff's prayer in the plaint was that the court should ascertain the profits derived from the suit land.

[51] The relevant prayers in the original plaint were as follows:

> *"(c) an order for ascertainment of the value of the profits the Defendant has up to 27 – 10 – 94 taken out of the land using current market price as the measure;*
>
> *(d) an order for the ascertainment of the value of the profits taken out of the land and due to the Plaintiff since 27 – 10 – 94 to the date of judgement at the rate of Shs. 6000= per metric ton;*
>
> *(e) an order of the compensation payable for the damage done to the land on account of the interference by the Defendant."*

[52] These prayers were maintained in the Amended Plaint and slightly modified in the Further Amended Plaint. Under the Further Amended Plaint, the Respondents prayed for:

> *"(b) the value of the blasted, uncrushed stone at shs. 8,535 (Eight Thousand Five Hundred Thirty-Five Shillings) per metric ton being the reasonable market price of the metric ton after providing for extraction costs."*

[53] It is clear from the prayers in the Plaint that the sums claimed in this case were not ascertained or known at the time of filing the suit. This was a claim of damages or injury for trespass to be assessed and ascertained by the court. For instance, the rate per tone was not known and had not been agreed. It had to be determined based on the evidence of market value. The quantity of extracted stone was also unknown and had not been agreed by the parties. This court believes that this was the very reason why the Supreme Court sent the file back to the High Court to determine

appropriate remedies for the Plaintiff. The claim was subjected to expert evidence and some of the Plaintiff's evidence adduced was rejected.

[54] We therefore, find that the learned trial judge erred in applying to this case the principles for award of interest which apply in claims of ascertained debts or amounts prior to the filing of the case.

[55] Regarding the 18% rate of interest per annum, such high rates usually apply in cases of ascertained amounts e.g in commercial contracts. Since the amount claimed was not ascertained in this case, this rate was not warranted.

Ground two of the Appeal also succeeds.

[56] Having found that the Appeal has succeeded on all the grounds, this court hereby allows it and makes the following orders:

1. The appeal succeeds on all grounds and the judgment and decree of the High Court are set aside and substituted with the judgement and decree of this Court.
2. Costs of this appeal and in the High Court are awarded to the Appellant.

**We so order.**

Dated, signed and delivered this 19th day of September 2025

Cheborion Barishaki

**JUSTICE OF APPEAL**

Nambayo Esta

**JUSTICE OF APPEAL**

Musa Sekana

**JUSTICE OF APPEAL**