IN THE SUPERIOR COURT OF JUDICATURE

IN THE HIGH COURT OF JUSTICE SITTING AT MANKESSIM ON THURSDAY, THE 13TH DAY OF OCTOBER, 2022 BEFORE HER LADYSHIP, MRS. JUSTICE CECILIA N.S. DAVIS.

SUIT NO. A2/06/2021

ESI YEBOAH @ JUSTINA MONNEY **PLAINTIFF**

V.

MFANTSEMAN MUNICIPAL ASSEMBLY **DEFENDANT**

JUDGMENT

Per her writ of summons, the Plaintiff claims against the Defendant, the following reliefs:

a. General damages for the loss of money, hardship, shock, psychological and emotional injury, caused to the Plaintiff by the Defendant
b. Special/specific damages of GHC41,850.00), together with interest at the commercial bank rate to be calculated from the date of the demolition to the date of final payment
c. Costs, including legal cost for prosecuting this suit

d. Any other remedies that the Court deems fit.

The Plaintiff claimed that she acquired a piece of land from one Razak Nyarkoh by way of an assignment from her assignors, who had earlier obtained the lease on the land from the Anona family of Mankessim and that the land is situate at Mankessim, within the Mfantseman Municipality. She stated that she started building on the land and somewhere in January 2020, she submitted her site plan and building plan to the Defendant for a permit. However, the documents were returned to her for her to make some amendments to them before the permit would be granted.

According to the Plaintiff, notwithstanding the arrangement she had with the Defendant, the Defendant went ahead and demolished her building, contrary to law. She contended that the Defendant was mandatorily required by law to serve a written notice on her to show cause why her building should not be demolished. However, the Defendant failed, refused and/or neglected to do so and therefore the demolition of her building by the defendant was contrary to statute and same is illegal, a complete nullity and void.

The Plaintiff claimed that the direct result of the Defendant's action has caused her serious damage, injury and loss of money. She particularised the special damages she had suffered and that as a result, she had suffered hardship, shock, psychological and emotional trauma.

The Defendant denied the claims of the Plaintiff. In its statement of defence, it admitted that it took steps to stop the unauthorized development allegedly started by the Plaintiff on a piece of land at Mankessim. It however denied that the Plaintiff submitted any proper documents officially for approval. It pointed out that the Plaintiff's claims affirmed that she was developing a building at Mankessim without any approval from

the Defendant, contrary to law. It added that it had no arrangement with the Plaintiff to build before approval of the building permits.

According to the Defendant, because the developer was not known at the time of the illegal development, the staff of the Defendant wrote "Stop Work, Produce Permit" with red paint on the structure to warn the developer.

It added that the Plaintiff's claim for special damages is without basis as the project was still at the foundation stage.

In his amended reply, the Plaintiff admitted that on 15th January, 2020, the Defendant wrote "Stop Work" on her structure. However, a day after, i.e. 16th January, 2020, the Defendant demolished her structure. She added that she had gone to the Town Planning Department and was told to leave about five feet but she left about ten feet and then amended her building documents and the structure she was building. However, the Defendant went ahead and demolished her building.

At the close of the pleadings, the following issues set out in the Plaintiff's application for direction were adopted by the Court for trial:

a. Whether or not the Plaintiff submitted her site plan and building plan to the Mfantseman Municipal Assembly for a permit and same was returned to her
b. Whether or not the Defendant demolished the Plaintiff's building without serving the Plaintiff with a written notice for the Plaintiff to show cause why her building should not be demolished
c. Whether or not the Defendant has caused the Plaintiff serious damage, injury and loss of money.

The Defendant did not file any additional issue.

The parties filed their respective witness statements as directed by the Court, in accordance with the High Court (Civil Procedure)(Amendment) Rules, 2008 (C.I. 87).

The Plaintiff testified through her witness statement, repeating all the averments as contained in her pleadings as recounted above and was cross examined by Counsel for the Defendant. In support of her claims, she tendered the following documents which were admitted in evidence – copy of her deed of assignment as exhibit A, copy of her proposed building plan as exhibit B and copies of cash sales and invoice/receipts as the exhibit C series. She called one witness, Ebusuapanyin Kwame Oppong Buako, who testified through his witness statement and was duly cross examined by Counsel for the Defendant.

According to the Plaintiff's witness, he is the head of the Anona Family which granted the land on which the Plaintiff built a structure and which was subsequently demolished by the Defendant. He stated that the family originally leased the land to one Razak Nyarkoh, who subsequently assigned his unexpired interest in the land to the Plaintiff. He corroborated the Plaintiff's claim about how she submitted her building plan to the Defendant and what transpired thereafter as stated in the Plaintiff's pleadings. He did not tender any exhibits but made references to that of the Plaintiff.

The Defendant testified through its representative and witness, Michael Tetteh, who repeated in his witness statement, all the averments as contained in the Defendant's statement of defence. In support of its claims, it tendered the following documents which were admitted in evidence – a copy of a photograph showing the "Stop Work" sign on a building structure as exhibit 1 and a copy of a photograph to show that the land of the Plaintiff is a community access road as exhibit 2. It did not call any witness.

Per the rules of evidence, the standard of proof of allegations or claims in any civil case is by the preponderance of probabilities and the Plaintiff bears the burden of proof to

provide sufficient evidence in proof of his claims or allegations, in accordance with sections 11(4) and 12 of the Evidence Act, 1975 (NRCD 323). In **Sarkodie v. FKA Company Ltd. (2009) SCGLR 65**, the Supreme Court held that:

"*……., the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.*"

Therefore, the burden of proving any particular averment is on the one who made the averment. It is when the claimant has established an assertion on the preponderance of probabilities that the burden shifts onto the other party to explain the matter, failing which an unfavourable ruling would be made against him.

In **Ababio v. Akwasi III (1995-96) GBR 774,** the Court noted that:

"a party whose pleadings raised an issue essential to the success of his case assumed the burden of proving such issue. The burden only shifted to the defendant when the plaintiff has adduced evidence to establish his claim."

From the totality of the evidence before me, there is no dispute about the fact that the Plaintiff was putting up a building on a land she had acquired, without a permit from the Defendant as required by law.

Section 91(1) of the Local Governance Act, 2016 (Act 936) provides that:

"*A person shall not carry out a physical development in a district except with the prior written approval in a form of a written permit issued by the District Planning Authority.*"

Section 234 of the same Act defines a District Assembly to include a Metropolitan and a Municipal Assembly.

Again, section 106(1) of the same Act also provides that a person shall obtain a building permit from the Assembly before undertaking the construction of a building.

This is what the Plaintiff said during cross examination:

"Q: I am putting it to you that at the time you commenced the construction of your building, you did not have any permit from the Assembly.

A: No. I did not have any permit from the assembly."

From the record before me, the Plaintiff did not provide any evidence to show that she submitted any building documents to the Defendant and same was returned to her.

I therefore find and hold that the Plaintiff built her structure without permit from the Defendant in contravention of sections 91(1) and 106(1) of the Local Governance Act, 2016 (Act 936).

From the evidence, there is also no dispute about the fact that the Defendant demolished the Plaintiff's building.

The Defendant's representative in the witness box admitted as follows:

"Q: Who demolished or caused to be demolished, the Plaintiff's structure?

A: The Special Planning Committee

Q: Where were you when the said structure was demolished?

A: I was at the site where the demolition took place."

It is the contention of the Plaintiff that the demolition of her property by the Defendant was contrary to law.

Section 94(1) of the Local Governance Act, cited above, provides as follows:

(a) where a physical development has been carried out without a permit or is being carried out without a permit, or

(b) conditions incorporated in a permit are not complied with,

a District Planning Authority shall give written notice in the form that shall be prescribed by Regulations, to the owner of the land to require that owner on or before a date specified in the notice to show cause in writing addressed to the District Planning Authority why the unauthorised
physical development should not be prohibited, altered, abated, recovered or demolished."

Similar provision has been made at section 106(3) of the same Act.

According to the Defendant, they gave the required notice when they wrote on the structure, "Stop Work, Produce Permit" as shown in their exhibit 1, a copy of a photograph, showing the said inscription on a building structure because they could not locate the owner of the structure and that the structure was in the middle of a community access road.

There is no evidence before me to show that the regulations referred to in section 94(1) have been made however, the form in which the said written notice is to be made under section 106 of the Act has been provided in the sixth schedule of the same Act.

Now, a careful reading of section 94(1) and section 106(3) clearly shows that they are in conflict with each other. Section 94(1) provides that:

"*A District Planning Authority **shall** give written notice ……..",*

Whilst section 106(3) also provides that:

"*A District Planning Authority **may** give notice in writing……"*

Section 42 of the Interpretations Act, 2009 (Act 793) spells out how the two words shall be used in the construction of statutes as follows:

"In an enactment, the expression, "may" shall be construed as permissive and empowering, and the expression "shall" as imperative and mandatory."

This means that whilst section 94(1) makes it mandatory for the Defendant to give notice, section 106(3) makes it discretionary for them to do so.

We must not be confused about the two different wordings describing the subject matters of the two sections. Whilst section 94(1) uses the words "physical development", section 106(3) uses the words "construction of a building".

Section 234 of the same Act, which is the interpretation section, defines "physical development" as "*carrying out of a building, engineering …….. in, under or over land……"*

It is my considered view that in fact and in effect, physical development is the same or includes the construction of a building. So that where a person carries out a physical development or the construction of a building without permit, the Defendant shall/may give that person a written notice before deciding whether or not to demolish, etc.

It is also my considered view that in spite of the option to give or not to give written notice by virtue of the two conflicting or ambiguous sections, sections 94(1) and 106(3) of the Act, it is the intention of the framers of the Act that written notices must be given to offending persons and this the Defendant knows. That is why they wrote "Stop Work, Produce Permit" on the Plaintiff's building as shown in their exhibit 1.

I have taken judicial notice of the fact that the various Assemblies across the country usually paint the words, "Stop Work, Produce Permit" on structures they consider unauthorized. However, before this Court, the Defendant did not provide the authority

or power upon which they write such notices on structures as an alternative or substitute to the written notice required in sections 94(1) and 106(3) of the Act.

It is my considered view that writing on peoples structures does not conform to the intentions of the Act and by the wording of both sections of the Act, if the Assembly decided to give notice, it has to be in writing, on paper, specifying the date within which the offender must respond, etc.

In this instant case, the Defendant failed to give the Plaintiff the required written notice in accordance with sections 94(1) and 106(3) of the Act and as spelt out in the sixth schedule of the same Act.

Counsel for the Defendant, in his final address claimed that the Defendant took advantage of section 97 of the Act to carry out the demolition of the Plaintiff's structure. The said section 97 provides as follows:

" (1) A District Planning Authority may effect or carry out an instant prohibition, abatement, alteration, removal or demolition of any unauthorised development carried out or being carried out that encroaches or will encroach on a community right of space or that interferes or may interfere with the use of the space.

(2) The action to stop the encroachment on the community right of space shall be without prior notice."

From the wording of the section, it is my considered opinion that it is only where the unauthorized development encroaches or will encroach on a community right or use of the space that the Defendant may demolish the structure without notice to the owner.

In this instant case, even though the Defendant claimed in its pleadings and during cross examination that they demolished the Plaintiff's structure without notice because

the structure was in a community access road, it failed to provide the required evidence to that effect before this Court, especially when the Plaintiff had denied that claim.

In support of its claim, the Defendant tendered exhibit 2, a copy of a photograph. From where I stand, exhibit 2 only shows bare land with a vehicle, heap of stones and an old completed structure on it. There is nothing on the face of exhibit 2 to show, without any further explanation, that the Plaintiff's structure was standing on an access road. I expected that the Defendant would have tendered the land outlay or site plan of the area showing the access road and the Plaintiff's land and structure in it but they did not do so.

It is the principle of the law of evidence and case law that a party, who in his pleadings, raises an issue essential to the success of his case, assumes the burden of proof. See **Abbey & Others v. Antwi V (2010) SCGLR 17** and **Bakers-Woode v. Nana Fitz (2007-2008) 2 SCGLR 879**, among many other such cases.

In this instant case, once the Defendant claimed that they demolished the Plaintiff's structure because it was on the community access road and the Plaintiff denied same, the burden of proof shifted onto the Defendant to prove that claim but it failed to do so.

A party does not satisfy the burden of producing evidence by merely going into the witness box and repeating on oath, the allegations contained in his pleadings or having it repeated on oath by his witness, as was done by the Defendant in this instant case. See **Klah v. Phoenix Insurance ltd. (2012) 2 SCGLR 1139.**

I therefore find and hold that the Defendant failed to give the Plaintiff the required written notice in accordance with sections 94(1) and 106(3) of the Act and as spelt out in the sixth schedule of the same Act before it demolished her structure.

I also find and hold that the Defendant failed to provide the required evidence to prove that the Plaintiff's structure was situate in a community access road in order to take advantage of section 97 of the Act to demolish the Plaintiff's structure without the required notice to her.

Now the Plaintiff is demanding general damages and special damages. She claimed that as a result of the demolition of her structure by the Defendant, she has suffered serious damage, psychological and emotional injury, hardship, shock and loss of money. She stated that she spent a lot of money on the demolished structure. In support of her claim, she particularised the special damages in her statement of claim and tendered the exhibit C series, which are various receipts/cash sales invoices for the purchase of various building materials.

It is my considered view that the Defendant's action of entering onto the Plaintiff's land and demolishing her structure without notice to her as required by law constitutes trespass to land in the law of torts.

Here, the Defendant cannot plead justification by the law because it did not follow the statutory requirements in accordance with the provisions of the Local Governance Act. The Defendant cannot also be heard to say that the Plaintiff also did not have the required permit. This is because the Local Governance Act envisaged persons building without permit from the Assemblies and that it why sections 94(1) and 106(3) of the Act specified what the Defendant must do in such an event. But the Defendant failed to comply with those statutory provisions.

Trespass to land, as a tort, is actionable per se. This means that once the act of trespass has been proven against the Defendant, the Plaintiff does not have to prove by evidence that she has suffered damages. The law presumes injury to the Plaintiff to be a natural consequence of the Defendant's act of trespass and therefore a claim for general

damages will arise as of right by inference of the law. See **Klah v. Phoenix Insurance Limited**, already cited above.

The assessment of the quantum of general damages to be awarded in such a case is determined at the discretion of the Court. See **Hayfron v. Egyir (1984-86) 1 GLR 682 CA.**

Even though the award of general damages, in an action for trespass to land, is at the discretion of the Court, the law requires the Court to consider all the circumstances of the case and in particular, the acreage of the land on which the trespass was committed, the period of wrongful occupation of the land by the Defendant and the damage caused, etc. See **Laryea v. Oforiwaa (1984-86) 2 GLR 410** and **Ayisi v. Asibey III & Others (1964) GLR 695.**

In this instant case, the Plaintiff's witness, who is the head of the family which sold the land originally to the Plaintiff's assignor, claimed, during cross examination by Counsel for the Defendant, that his family sold one plot of land to two brothers, including the Plaintiff's assignor who in turn assigned his interest in half of the plot to the Plaintiff.

A careful consideration of the Defendant's exhibit 1, a copy of a photograph, shows the small structure on which the Defendant wrote the "Stop Work" notice. It is my presumption that that is the structure belonging to the Plaintiff that the Defendant demolished. This is because from the evidence before me, the Plaintiff herself did not tender any evidence to the Court to show her structure that the Defendant demolished. She did not also deny that the structure in exhibit 1 with the "Stop Work" notice on it is her structure which was demolished by the Defendant.

It is my considered opinion that the Plaintiff's structure, as shown in exhibit 1, is a very small structure, just a small block work and not completed and that is what the

Defendant destroyed. From the record, the Plaintiff did not provide any evidence before this Court to prove that there were heaps of sand and stones and cement blocks on the land which were also destroyed by the Defendant when the Defendant denied same. There is also no evidence in my records to prove that the land itself on which the Plaintiff's structure was being developed was also destroyed and from exhibits 1 and 2, it is my view that the Plaintiff's land itself is intact and still accessible to and in the possession of the Plaintiff.

Accordingly, having taken the above factors into consideration, I grant to the Plaintiff the relief (a) as indorsed in her writ of summons.

I award general damages of GHC1,000.00 against the Defendant for trespass and the unauthorized demolition in favour of the Plaintiff.

The Plaintiff is also claiming an amount of GHC41,850.00 together with interest at the commercial bank rate, calculated from the date of the demolition to the date of final payment, as special damages from the Defendant.

It is the principle of the law of torts that a claim for special damages must be strictly proven. See **Delmas Agency Ghana Ltd. v. Food Distributors International Ltd. (2007-2008) SCGLR 748** and **Trapeq Ltd. v. Anglogold Ashanti Ghana Limited (2012) 46 GMJ 134 C.A.**

In **Ankomah v. City Investments Ltd. (2013) 53 GMJ 99**, the Supreme Court, per Dotse JSC, carefully made the distinction between general damages and special damages as follows:

"*For whereas general damages arise by inference of law and therefore does not need to be proved by evidence because the law implies general damage in every infringement of absolute right, special damages, a loss which the law will not presume to be the consequence of the defendant's*

act but which depends, in part, on the special circumstances, must therefore be claimed on the pleadings and particuarised to show the nature and extent of the damages claimed. The plaintiff must go further to prove by evidence that the loss alleged was incurred and that it was a direct result of the defendant's conduct."

I find a lot of issues with the exhibit C series tendered by the Plaintiff in proof of her loss.

First, even though the Plaintiff claimed that they are the receipts for the purchase of the various building materials indicated on them, there is nothing on the face of these receipts to show that those building materials were purchased and used for the construction of her structure that the Defendant demolished. Put differently, the Plaintiff did not provide any evidence to link the building materials purchased in the exhibit C series to the structure demolished by the Defendant.

Second, all the four exhibits show that they are either cash sales invoices/waybills or just invoices. Only exhibits C and C2 have got the word "paid" written and circled in ink on them. On the other hand, there is nothing on the face of exhibits C1 and C3 to show that the items written on them were paid for. They are mere cash sales invoices. Again, there is no name written on exhibits C1 and C2 to prove that even if they are receipts, they were issued to the Plaintiff for the purchases she made.

Third, assuming without admitting that the exhibit C series are indeed proof of purchases made by the Plaintiff and used for the construction of her structure which was demolished by the Defendant, the total amount of the exhibit C series is not up to the GHC41,850.00 being claimed by the Plaintiff as special or specific damages. Exhibit C has an amount of GHC3,510.00, exhibit C1 has GHC21,500.00, exhibit C2 has GHC4,500.00 and exhibit C3 has GHC900.00. By my elementary arithmetic calculations,

the total of these four figures amount to GHC30,410.00 and not GHC41,850.00 as claimed by the Plaintiff.

Fourth, even though the Plaintiff particularised the circumstances of the special damages she is claiming in her statement of claim, only the first five items in the particulars were supported by the exhibit C series. She did not lead any evidence to prove that she incurred the expenditures itemized from No. 6 to No. 18 at all.

I therefore find and hold that the Plaintiff was unable to prove the special damages she claimed against the Defendant.

Accordingly, the relief (b) as endorsed in the Plaintiff's writ of summons is hereby dismissed.

I however award costs of GHC2,000.00 in favour of the Plaintiff against the Defendant.

I advise the Defendant to take up the issue of the ambiguity in sections 94(1) and 106(3) of the Local Governance Act, 2016 (Act 936) with the framers of the Act for further consideration and possible amendment.

SGD.

CECILIA DAVIS J.
JUSTICE OF THE HIGH COURT

LAWYERS:

NANA KOFI SAFO KANTANKA FOR THE PLAINTIFF

S. ADU YEBOAH FOR THE DEFENDANT