

THE REPUBLIC OF UGANDA.

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL APPEAL NO.3 OF 1996

DR. BWOGI RICHARD KANYEREZI :::::::::::::::::::: APPELLANT

VERSUS

**THE MANAGEMENT COMMITTEE
RUBAGA GIRLS SCHOOL :::::::::::::::::::: RESPONDENT**

BEFORE: THE HON. JUSTICE E.S. LUGAYIZI

JUDGMENT

This is an appeal. The appellant (Dr. Bwogi Richard Kanyerezi) having been dissatisfied with the judgment and decree of His Worship Aweri Opio dated 7th December, 1995, appealed to this Honorable Court and prayed for the following remedies,

1. That this appeal be allowed and the Decree of the Chief Magistrate's Court be set aside with costs.
2. That a permanent injunction be granted against the respondent preventing it from using the 12 VIP latrines situate on the lower end of its school premises.

The background to this appeal is briefly as follows. The appellant a medical doctor who has been residing at plot No. 170 Mugwanya Road Rubaga since 1972, filed Mengo Civil Suit No. 218 of 1994, against the respondent which is running Rubaga Girls School. His main complaint was that the respondent was constructing 12 VIP latrines at the lower boundary of its school which directly adjoins the plaintiff's home. And this would by reason of the attendant bad smell constitute a nuisance by unreasonably interfering with and diminishing the appellant's ordinary use and enjoyment of his home. The respondent denied the above, claim. When the case came up for hearing, the appellant called four witnesses. Those witnesses told court three important facts. First of all, that the appellant's home was very close to the 12 VIP toilets in issue. Secondly, those VIP toilets by nature emit smelly gases through their vent. Thirdly, that the toilets in issue which were being used by over 600 students constantly emitted smelly gases; and those gases went directly into the appellant's house, thus making life very uncomfortable for its inhabitants. According to the appellant those gases constituted a nuisance in law. In the circumstances he needed a permanent injunction to restrain the respondent from using the said toilets.

On the other hand, the respondent's side called two witnesses who basically told court two things. First of all that the appellant's home was quite far away from the respondent's VIP, toilets. Secondly, that VIP toilet did not emit smelly gases. Such gases would immediately be diluted by air or get oxidized the moment they came out of the VIP toilets' vent. As a result the respondent's side submitted that no injunction should issue against it.

The respondent also argued that even where the trial court found against it on the merits of the case, since the VIP toilets' programme was a Government programme again court would be prevented by *S.15* of the Government Proceedings Act (Cap 69) from issuing an injunction against it. The respondent's side therefore called upon the trial Magistrate to dismiss the appellant's action.

After the trial Magistrate had apparently visited the locus he agreed with the respondent's side on all the above facts. As a result he dismissed the appellant's action with costs.

It is against that background that the appellant appealed to this Honourable Court. While the appellant was represented by Mr. Kanyerezi Sewanyana. Mr. Bwengye represented the respondent in this appeal. The Memorandum of appeal consisted of three grounds. The first two were consolidated and argued as one ground at the time of hearing this appeal.

However, because I sincerely believe that the substance of this appeal revolves around the issues below. I will simply concentrate on those issues which are as follows:

1. Whether the VIP toilets in issue emitted smelly gases which reached the appellant's home?
2. In case they did, whether such gases constituted a private nuisance, which is actionable in law?
3. The proper remedies in this appeal?

I will deal with the above issues in relation to the evidence on record in the order in which they occur.

As far as the first issue is concerned, PW4 a former K.C.C. health Inspector told the lower court that VIP toilets by nature emitted smelly gases; and that is why they were always located on the leeward side of other premises. He further pointed out that in the instant case the respondent's VIP toilets were built on the wind ward side of the appellant's house and their vent was below that house. He then argued that the above being the case, the smelly gases from those toilets were likely to flow straight into the appellant's double storeyed house on the opposite side.

That aside, PW1, PW2 and PW3 also told the lower court that the VIP toilets in issue constantly emitted smelly gases, which reached the appellant's house.

That evidence was neither shaken nor contradicted by anyone, let alone DWI (the

Headmistress of the defendant's school) who could not confirm or deny it. To me therefore, after considering all the above, I am satisfied that the appellant had on a balance of probabilities proved in the lower court that the respondent's VIP toilets emitted smelly gases which reached his home. One wonders why the trial Magistrate decided to overlook all the above evidence and consequently come to the wrong conclusion. Be that as it may, the first issue is answered in the affirmative.

Concerning the second issue, according to Winfield on Tort Eighth Edition pages 353 – 367, a nuisance is private where it exclusively affects a private person and not a sizeable number of the community where it occurs. The learned authors of the said book described a nuisance as an unlawful interference with a person's use or enjoyment of land. Such interference in essence being either of a continuous or recurrent nature and usually stench and smoke would qualify under that description. Despite that, however, the said writers continued to say that whether a nuisance is actionable or not will depend upon a variety of considerations especially the character of the defendant's conduct and a balancing of conflicting interests (i.e. the right of the defendant to enjoy his property as he wishes as against the right of his neighbours to enjoy theirs without interference etc, etc.). Where the defendant has acted reasonably, irrespective of the fact that his actions may lead to a nuisance, such a nuisance would not be actionable, otherwise it would be. Lastly, the mere fact that the action or process or business giving rise to the nuisance complained of is useful to the public generally, is not a good defence.

According to PWI's and DWI's evidence, it is only PWI who has been complaining of the nuisance, such a nuisance would not be actionable, otherwise, it would be. Lastly, the mere fact that the action or process or business giving rise to the nuisance complained of is useful to the public generally, is not a good defence.

According to PWI 's evidence, it is only PWI who has been complaining of the smelly gases in issue. Actually PWI appears to be the only close neighbour to the respondent on his side of the locality. As a result it is, in my view, reasonable to say that those gases almost exclusively affect the appellant in the locality under consideration. As far as PW3 was concerned, the said gases were most smelly in the evenings. And that caused the appellant's, family to close the windows of the sitting room and dining room at that time, but even then the bad smell would filter into the house.

The above evidence which was not shaken or contradicted clearly shows that by their interference with the appellant's enjoyment of his residence those smelly gases caused the plaintiff's family great inconvenience and discomfort. That in my view constituted a private nuisance to the plaintiff.

In addition to the above, PWI also told the lower court that when the respondent was constructing the said toilets, he tried to negotiate with it. That was done with a view to

having it change its mind in respect of the location of those toilets. However, the respondent did not agree. That was despite the fact that it had other alternative spots on its land where it could locate the said toilets. Further to the above, the said toilets were built on the wind ward side of the appellant's house; and according to PW4 that meant that the smelly gases from them would go straight into the appellant's house.

All the above evidence was also not shaken. To me, it, at least, shows unreasonableness on the part of the respondent. It would appear the respondent did not care whether the appellant was inconvenienced or not at his residence by .The smelly which was hound to come from those toilets that were to be very frequently used every singly day by such a big number of people (i.e. over 600 people).

For the above reason therefore the private nuisance in issue is, in my view, actionable in law. The fact that the respondent's school benefits society does not justify the existence of the said nuisance. In the circumstances, the second issue is answered in the affirmative.

Concerning the third issue, first of all it was argued by counsel for the respondent's side (Mr. Bwengye) that even where the appellant sued in respect of the first two issues, court was prevented by section 15 of the Government Proceedings Act (Cap. 69) from issuing an injunction against the respondent in this matter. According to Mr. Bwenge, to issue an injunction against the respondent was the same thing as issuing it against Government. That was so, since the VIP toilets' programme was a Government programme.

For the sake of clarity, I will reproduce below, the provisions of section 15 of the Government Proceedings Act (Cap. 69). They read as follows,

"15 (1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as the case may require. Provided that

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between private person be granted by way of injunction the court shall not grant an injunction but may in lieu thereof make an order declaratory of the rights of the parties and;

(b).....

(2) The court shall not in any civil proceedings grant any injunction against an officer of Government if the effect of granting the injunction would be to give any relief against the Government which could not have been obtained in proceedings against Government".

While in subsection (1) above the prohibition is in respect of any proceedings against Government, "that in subsection (2) above is in respect of an officer of Government" in any civil proceedings if the effect of granting the injunction, etc. would be to give any

relief against Government which could not have been obtained in proceedings against Government.

It is quite obvious that we do not have the above scenario in this matter. The suit in issue was neither against Government nor was any order against any officer of Government sought under it. In fact the said suit was against a private respondent which is the exclusive owner of the VIP toilets in issue. One therefore wonders why Mr. Bwengye held the above erroneous view!

Be that as it may, since the appellant succeeded in respect the two issues he must also succeed in respect of the third one. All in all therefore this appeal has succeeded. And as a result the following orders are made,

1. This appeal is allowed and the decree of the Chief Magistrate's court is hereby set aside.
2. A permanent injunction preventing the respondent from using the 12 VIP toilets situate on the lower end of the respondents school premise is here granted.
3. To allow the respondents time to relocate the above toilets or to make alternative arrangements in respect of the above permanent injunction shall not take effect immediately but after 90 days from the date of this judgment
4. Costs of this appeal and of the suit in the lower court shall be paid by the respondent.

E.S. LUGAYIZI
JUDGE.

17/2/98

Read before: At 9.45:

Mr. Sekatawa for Applicant

Mr. Tibesigwa for Respondent

Mr. Mulindwa court

E.S. LUGAYIZI
JUDGE.
17/2/98