THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 278 OF 2017

EVAREST BANYENZAKI T/A AFRICAN POT RESTAURANT ::::: PLAINTIFF

VERSUS

NAOME KIBAAJU :: DEFENDANT

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGMENT

Introduction

[1] The Plaintiff brought this suit against the Defendant seeking recovery of special damages, general damages, exemplary damages, interest and costs of the suit arising out of wrongful termination of a tenancy agreement by the Defendant.

[2] The brief facts according to the Plaintiff are that on 15th February 2015, he entered into a tenancy agreement with the Defendant for rent of premises at Plot 9 Entebbe Road at a monthly rent of UGX 2,000,000/= payable every three months in advance, for a period of two years and a store at UGX 100,000/=for the first three months and thereafter at UGX 200,000/= per month for the rest of the period of the tenancy. The Plaintiff stated that he was paying rent for all the time he was in occupation of the premises and the rent account had more money than was owed. He was, however, shocked when on 22nd May 2017 he found extra padlocks on the suit premises without any prior notice from the Defendant. The Plaintiff tried to approach the Defendant with a view of understanding the reasons for closure of his business but was ignored and his hotel equipment and documents were detained in the premises. The Plaintiff stated that he suffered business loss as a result of the Defendant's conduct for which he seeks special and general damages, among others.

[3] The Defendant filed a Written Statement of Defence (WSD) in which she denied the Plaintiff's claims and stated that the consideration for letting the restaurant and extra space to the Plaintiff was at a sum of UGX 3,500,000/= plus a store at UGX 100,000/= for the first three months and thereafter UGX 200,000/= per month, payable every three months in advance. She stated that the Plaintiff deposited rent into the Defendant's account fully for 2015 and failed to do so in 2016. The Defendant stated that at the time the demand was made, the Plaintiff was in rent arrears of UGX 36,000,000/= and the term of the tenancy had expired without notice of renewal. She averred that the Plaintiff opted to keep away from the Defendant and totally neglected to pay up the arrears. The Defendant further made a counter claim for an order that the outstanding unpaid rent of UGX 36,000,000/= be offset from the proceeds of distress for rent and for payment of the costs of guarding and storage of the counter defendant's property since 22/5/2017 at a monthly rate of UGX 500,000/= until disposal of the property under storage.

[4] The Plaintiff filed a reply to the WSD and a defence to the counterclaim whose contents I have also taken into consideration.

Representation and Hearing

[5] At the hearing, the Plaintiff was represented by **Mr. Kangaho Edward** and **Mr. Yovino Okwi** of M/s Kangaho & Co. Advocates while the Defendant was represented by **Ms. Faridah Ikimana** of M/s Nangumya & Co. Advocates. Evidence was adduced by way of witness statements and the Plaintiff led evidence of one witnesses. Counsel for the Defendant, however, neither filed any witness statements as directed by the Court nor appeared to lead any defence evidence at the time they were to do so. The Court thus closed the hearing in accordance with Order 17 rule 4 of the CPR and allowed Counsel for the Plaintiff to make and file written submissions. The Plaintiff's submissions

were duly filed and I have taken them into consideration during the determination of the matter before Court.

Issues for Determination by the Court

[6] Two issues are up for determination by the Court, namely;

a) **Who of the parties breached the terms of the tenancy agreement?**
b) **What remedies are available to the parties?**

Burden and Standard of Proof

[7] In civil proceedings, the burden of proof lies upon he who alleges. Section 101 of the Evidence Act, Cap 6 provides that;

(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[8] Section 103 of the Evidence Act provides that the *''burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person''.* Accordingly, the burden of proof in civil proceedings normally lies upon the plaintiff or claimant. The standard of proof is on a balance of probabilities. The law however goes further to classify between a legal burden and an evidential burden. When a plaintiff has led evidence establishing his/her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

Resolution of the Issues;

Issue 1: Who of the parties breached the terms of the tenancy agreement?

Submissions by Counsel for the Plaintiff

[9] Counsel for the Plaintiff cited the provisions of Section 10 of the Contracts Act 2010 to the effect that a contract is an agreement made with free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound. Counsel submitted that in the instant case, a tenancy agreement (EXP1) was executed between the Plaintiff and the Defendant at a monthly rent of UGX 2,000,000/= and for the store at UGX 100,000/= for the first three months and UGX 200,000/= for the rest of the months, payable three months in advance. Counsel cited the case of *United Building Services Limited v Yafesi Muzira T/A Quickest Builders and Co. HCCS No. 154 of 2005* for the submission that breach of a contract occurs when one or both parties fail to fulfill their obligations imposed by the terms of the contract. Counsel referred the Court to the testimony of PW1 to the effect that he had paid rent for close to 26 months and all fees for the store. The Plaintiff testified that the tenancy agreement was expiring in February 2017 but was renewed orally.

[10] Counsel submitted that under clause 7(a) of the tenancy agreement, in case the tenant was in breach of any covenant under the agreement, the land lord was required to give the tenant a notice of 30 days in writing indicating the details of the breach. Counsel further submitted that clause 7(c) of the agreement imposed a two months' termination notice on either party. Counsel argued that the Defendant's actions of closing the premises with extra padlocks and denying the Plaintiff access amounted to termination of the contract without notice as required which resulted into breach of the agreement. Counsel submitted that there was no evidence of service of notice of

termination which shows that the Defendant acted in breach of the tenancy agreement.

Determination by the Court

[11] There is evidence before the Court showing that the parties entered into a tenancy agreement. The Plaintiff adduced a copy of the agreement said to have been executed on 15th February 2015. In paragraph 4 of the WSD, the Defendant alleges that the said agreement attached as Annexure A to the plaint was a forgery and she would put the Plaintiff to strict proof over the same. The Defendant, however, does not indicate any particulars of the alleged forgery and neither does she adduce the authentic copy of the tenancy agreement. Paradoxically, the Defendant goes ahead to rely on the same agreement on parts that appear to favour her as can be seen in paragraphs 6 and 7 of her WSD. Be that as it may, it is not disputed that a tenancy agreement existed between the parties. Secondly, the attempt by the Defendant to raise a dispute over the written tenancy agreement, admitted in evidence as EXH. P1, is not made out. The said agreement was properly admitted in evidence and is reliable. A contract by way of a tenancy agreement therefore existed between the Plaintiff and the Defendant.

[12] Regarding the terms of the agreement, while the tenancy agreement (EXH. P1) indicated that the rental sum was UGX 2,000,000/= per month, the Defendant stated in the WSD that the agreed rent amount was UGX 3,500,000/=. This averment by the Defendant is, however, not supported by any material evidence and is, therefore, rejected. It is agreed that the rental period was two years. The agreement contains no express term on renewal and the mode thereof. It however appears that there was an implied covenant that the contract would be subject to renewal. In paragraph 4(g) of the agreement, it is stated thus;

"The tenant hereby covenants with the Landlord [that] … upon the expiration or sooner determination of the initial term and/or subsequently extended period, the tenant shall deliver vacant possession of the property to the landlord in good and tenantable condition …"

[13] The above covenant clearly implies that the parties envisaged extension of the term of the tenancy which was stated in paragraph 3a as being two years. What is lacking in the written agreement was the mode of seeking and granting a renewal. In absence of a clear term to that effect, the reasonable inference would be that a renewal would be sought and granted in any manner agreed upon by the parties. In the present case, it was stated by the Plaintiff that upon expiration of the tenancy period of two years, he sought for an extension orally which was granted by the Defendant. As evidence of such agreement, the Plaintiff pointed to the fact that he kept paying rent, which the Defendant kept accepting and the Defendant never issued any notice either terminating the contract or indicating that she had no intention to renew the tenancy. The Plaintiff testified that the contract was verbally renewed in January 2017 and that at the time of termination in April 2017, he had paid up to June 2017 and that he was not in arrears. The Plaintiff adduced evidence of various receipts to show that he was paying the monthly rent in various installments. This evidence was not rebutted by the Defendant.

[14] In absence of any evidence by the Defendant controverting the highlighted evidence by the Plaintiff, I find the Plaintiff's evidence credible and reliable. Having believed the Plaintiff's evidence to the effect that he kept paying rent after February 2017, there would have been no reason for the Defendant to keep receiving rent if she did not intend to extend the tenancy period beyond the agreed two years. In the circumstances, I have believed and found that the tenancy between the parties was on going at the time the alleged termination took place.

[15] It was agreed under the tenancy agreement that either party would give a written notice of two months before termination of the contract. The uncontroverted evidence by the Plaintiff is that one morning, the Plaintiff woke up to find that the Defendant had locked up the premises. The Defendant had neither issued any notice nor did she allow the Plaintiff to relocate his business or to take out his property and business equipment. It follows, therefore, that the actions of the Defendant in locking the premises without notice as required under the agreement amounted to breach of the express terms of the tenancy agreement. The Plaintiff has, therefore, led sufficient evidence proving that the Defendant acted in breach of the tenancy agreement.

[16] In the counter claim, it was claimed by the Defendant that the monthly rent was UGX 3,500,000/= and that the Plaintiff was in arrears of UGX 36,000,000/= for the period February to November 2016. The counter claimant also claimed a sum of UGX 500,000/= per month as costs for storage of the counter defendant's property. I have already found that there is no evidence to support the Defendant's contention over the rental amount. I have further found that the agreed monthly rent was UGX 2,000,000/= for the restaurant premises and UGX 200,000/= for the store (after the first 3 months). There is evidence on record indicating that this sum was deposited on the Defendant's bank account in the manner shown without any objection from the Defendant. According to the Plaintiff's evidence, which I have believed, he was not in arrears at the time of closure of the premises. The Plaintiff also claimed that some of his receipts were locked up in the premises. As already stated, the claim for rental arrears by the Defendant is not supported by any scintilla of evidence. The claim for costs of storage cannot be justified given that the Defendant closed the premises in breach of contract. The Defendant would be responsible for the consequences of her own wrong.

[17] In the circumstances, the Defendant/ Counterclaimant has not established any breach of contract on the part of the Plaintiff. As such, the counter claim bears no merit and shall be dismissed. Issue 1 is answered in favour of the Plaintiff.

Issue 2: What remedies are available to the parties?

[18] The Plaintiff claimed for special, general and exemplary damages; and for interest and costs of the suit. Regarding the claim for special damages, the Plaintiff sought for a sum of UGX 241,930,000/= being the value of the business equipment locked in the premises. The Plaintiff further claimed for a sum of UGX 9,700,000/= being loss of income on account outside catering services.

[19] The law regarding special damages is that they must be specifically pleaded and strictly proved in evidence. See: *Uganda Telecom Ltd v Tanzanite Corporation [2005] 2 EA 331 at p.341*. Before the Court, the Plaintiff adduced evidence by way of various receipts showing payment for equipment purchased by him for purpose of the restaurant business. The Plaintiff claimed that some of the receipts were locked up in the premises and he could not access them. However, I am unable to rely on this part of the Plaintiff's testimony as the existence of those documents is not verified by any other independent evidence. I will therefore place reliance on the receipts that were adduced in Court. Upon computation of the sums reflected on the various receipts, they total to the sum of UGX 33,566,500/=. I find this sum proved as special damages and I award the same to the Plaintiff.

[20] Regarding the claim for loss of income, the position of the law concerning damages for loss of income or earnings was aptly set out by **Oder JSC** in *Robert Cuossens v Attorney General, (SCCA No. 8 of 1999) 2000 UGSC 2 (2 March 2000)* thus;

"In cases of pecuniary loss … it is easy enough to apply [the rule that the court should award the injured party such a sum of money as will put him in the same position as he would have been if he had not sustained the injuries] in the case of earnings which have actually been lost, or expenses which have actually been incurred up to the date of the trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages. In this category falls income or earning lost between the time of injury and the time of trial. But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of the trial. It is therefore, awarded as part of the general damages. The plaintiff no doubt would be entitled in theory to the exact amount of his prospective loss if it could be proved to its present value at the date of the trial. But in practice since future loss cannot usually be proved, the Court has to make a broad estimate taking into account all the proved facts and the probabilities of the particular case". Also See: *British Transport Commission v Gourley (1956) AC 185 at p. 212*; *(1955) 3 A11 ER 796 at p. 808* to which the Court relied.

[21] In this case, it was shown by the Plaintiff that he had running contracts to provide outside catering services to various organizations. The Plaintiff adduced in evidence copies of agreements executed with the named entities to which he was providing outside catering services. The Plaintiff claimed that he could have obtained the sums indicated if the business had not been abruptly closed on account of the Defendant's action. The Plaintiff specifically claimed for a sum of UGX 9,700,000/= as special damages in respect of lost income. The respective sums were specifically claimed in the plaint and proved in evidence by way of supporting documents indicating existence of the arrangement. These sums were ascertainable as at the time of instituting the suit and are capable of being considered as special damages. I am satisfied that the Plaintiff is entitled to the sum of UGX 9,700,000/= as special damages and the same is

awarded accordingly. In total, the sum awarded to the Plaintiff by way of special damages is **UGX 43,266,500/=**.

[22] Regarding the claim for general damages, the law is that the damages are awarded at the discretion of the Court and the purpose is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. See: *Hadley v Baxendale (1894) 9 Exch 341; Kibimba Rice Ltd v Umar Salim, SC Civil Appeal No. 17 of 1992* and *Robert Cuossens v Attorney General (SCCA No. 8 of 1999) 2000 UGSC 2 (2 March 2000).* In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. See: *Uganda Commercial Bank v Kigozi [2002] 1 EA 305*. Under the law, general damages are implied in every breach of contract and every infringement of a given right. The damages available for breach of contract are measured in a similar way as loss due to personal injury.

[23] In the present case, the Plaintiff has shown that the actions of the Defendant in wrongfully terminating the tenancy agreement and withholding the hotel equipment paralyzed his operations; he consequently closed the business, which caused him loss of business reputation, loss of good will, mental anguish and psychological harm. Counsel for the Plaintiff proposed a sum of UGX 500,000,000/= as general damages. I however find that suggestion way off the mark. Considering the facts and circumstances of this case, I am convinced that an award of UGX 30,000,000/= is sufficient to meet the ends of justice. I award the same as general damages for breach of contract.

[24] The Plaintiff also sought exemplary damages. According to **Lord Devlin** in the land mark case of *Rookes v Barnard [1946] ALLER 367 at 410, 411* there are only three categories of cases in which exemplary damages are awarded

namely; *where there has been oppressive, arbitrary, or unconstitutional action by the servants of the government; where the defendant's conduct has been calculated by him to make a profit which may well exceed the compensation payable to the plaintiff; or where some law for the time being in force authorizes the award of exemplary damages.* On the facts of the case before me, I do not find any circumstances that would justify an award of exemplary damages to the Plaintiff. This claim is therefore rejected.

[25] On interest, the discretion of the court regarding award of interest is provided for under Section 26(2) of the Civil Procedure Act. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and ought to compensate the plaintiff accordingly. See: *Premchandra Shenoi and Anor v Maximov Oleg Petrovich, SCCA No. 9 of 2003* and *Harbutt's 'placticine' Ltd v Wayne tank & pump Co. Ltd [1970] QB 447*. In determining a just and reasonable rate of interest, the court takes into account the ever rising inflation and drastic depreciation of the currency. A plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of currency in the event that the money awarded is not promptly paid when it falls due. See: *Kinyera v the Management Committee of Laroo Building Primary School, HCCS No. 099of 2013*.

[26] In this case, the Plaintiff prayed for interest on all the sums awarded at a rate of 30%. In the circumstances of the case, I will award interest on the sum awarded as special damages at the rate of 18% per annum from the date of filing the suit until full payment and on general damages at the rate of 10% per annum from the date of judgment until payment in full.

[27] Regarding the costs of the suit, under Section 27 of the Civil Procedure Act, costs follow the event unless the court upon good cause determines otherwise. Given the findings above, the Plaintiff is entitled to costs of the suit and the same are awarded to him.

[28] In all, therefore, the suit by the Plaintiff succeeds and the counter claim by the Defendant fails. Judgment is entered for the Plaintiff against the Defendant for payment of;

a) The sum of UGX 43,266,500/= as special damages.
b) The sum of UGX 30,000,000/= as general damages for breach of contract.
c) Interest on (a) above at the rate of 18% per annum from the date of filing the suit until full payment and on (b) above at a rate of 10% per annum from the date of judgment till payment in full.
d) The taxed costs of the suit.

It is so ordered.

Dated, signed and delivered by email this 14th day of February, 2024.

Boniface Wamala
JUDGE