

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCT-OO-CC-CS-33 OF 2007

NANTUME SHAMIRA:.....PLAINTIFF

VS

KAMPALA CITY COUNCIL & 2 OTHERS:.....DEFENDANT

BEFORE: HONOURABLE MR. JUSTICE ANUP SINGH CHOUDRY

J U D G M E N T

(Contractual obligations with infants and toddlers are unenforceable in law, and amount to infringement of toddlers and infants human rights, punitive damages against public body for breach of agreement and tortuous acts, liability of children's guardians as trustees)

This action is brought by the Plaintiff initially as a minor against the 1st Defendant for breach of tenancy agreement dated 24.07.03 and also against the 2nd and 3rd Defendant also minors for fraudulent acquisition of the tenancy of 2 shops in Nakivubo Kampala. The action is brought against all the 3 Defendants jointly and severally.

The 2nd and 3rd Defendant's legal representatives did not make any application for the 2nd and 3rd Defendant as minors to be sued through their Guardian ad litem and hence the minor have been sued individually i.e. the toddler and the infant.

The Plaintiff seeks the following orders:

1. The purported sale of Lock up shops D035 and D036 Nakivubo Road, Kisekka Market, Kampala on 12.04.04 between the Plaintiff and 2nd and 3rd Defendant is void and/or invalid for fraud.

2. An order that subsequent tenancy agreement between 1st Defendant and 2nd & 3rd Defendants is null and void as it was based on false representation and for the cancellation of the said agreement.
3. Compensation in the sum of 80,000,000 Shillings, general damages, punitive damages, costs and Interest.

PLAINTIFF'S CASE:

1. That on the 29th day of May 2003 the Plaintiff and the 1st Defendant executed a written agreement under which the lockup shops No. D035 and D036 were sold to the Plaintiff, for a period of 12 years.
2. The Plaintiff thereafter let the lock up shop No. D035 and D036 to one Mr. Katende.
3. That whilst the said tenancy was subsisting, sometime in September 2004, the Plaintiff lost all her documents, log books and other essential items necessary to prove her proprietorship of the lock up shops/premises. The Plaintiff then reported the said loss to the 1st Defendant seeking its indulgence that no dealings should be carried out in respect of the said lock up shop.
4. That to the Plaintiff's surprise, on demand for rent payment from the said Katende to whom she had let the lock up shop, she learnt that the 1st Defendant had entered into another tenancy agreement relating to the same lock up shops with the 2nd and 3rd Defendant having transferred ownership from the Plaintiff to the 2nd and 3rd Defendant without any justification.
5. That the Plaintiff being unaware of the aforesaid developments went on to obtain an order for distress to distrain for the unpaid rent only to learn that the 1st Defendant had let the premises/lock up shops to the 2nd and 3rd Defendants.
6. That on further inquiry and confrontation with the 1st Defendant pertaining to the matter, the Plaintiff discovered that the 1st Defendant had negligently relied on forged sale agreements that were presented by the father of the 2nd and 3rd Defendant, without any

proof of its authenticity or due diligence that the Plaintiff had indeed been genuinely been involved in the alleged sale despite prior warning and notice to it by the Plaintiff.

FIRST DEFENDANT’S CASE: (hereafter to be called Kampala City Council KCC)

1. The Plaintiff has no cause of action against the 1st Defendant.
2. The 1st Defendant was not a party to the alleged sale of the Plaintiff’s stalls. The sale was merely referred to it later in the ordinary course of business to note the names of the new tenants in its records. Therefore, this action against the 1st defendant is misconceived and has been brought against a wrong party.
3. The 1st Defendant denies ever having let the suit premises to anybody as claimed in the plaint or at all.
4. The alleged negligence and fraud leveled against the 1st Defendant by the Plaintiff is denied.

2nd and 3rd DEFENDANTS’ CASE:

1. The Plaintiff’s suit does not disclose a reasonable cause of action against the 2nd and 3rd Defendant.
2. The Plaintiff’s suit is for unjust enrichment and as such it ought to be rejected.
3. The 2nd and 3rd Defendants aver and contend that the 1st Defendant lawfully rented the suit premises to the 2nd and 3rd Defendants acquired the suit premises as bonafide tenants of the 1st Defendant without notice of the Plaintiff’s purported prior interest having lawfully acquired the same from the Plaintiff by virtue of sale agreements both dated 19th April 2004 at a valuable consideration of an aggregate sum of UGX 30,000,000 (thirty million shillings only) all of which was paid to the Plaintiff receipt whereof the Plaintiff duly acknowledged. (Copies of the Sale Agreements are annexed hereto and marked Annexures “C” and “D” and copies of the Tenancy Agreements between the 1st Defendant and the 2nd and 3rd Defendants are annexed hereto and marked Annexures “E” and “F” respectively.

4. The 2nd and 3rd Defendants do aver and contend that the Plaintiff having lawfully sold her interest in the suit premises to the 2nd and 3rd Defendant she is estopped from asserting ownership of the said suit premises.

R U L I N G

At the scheduling Conference the issue was whether agreements signed by the Plaintiff with 2nd and 3rd Defendants were fraudulently procured. The validity of the Plaintiff agreement with the 1st Defendant on 29th May 2003 was not an issue.

At the behest of the court a joint handwriting expert was engaged to provide a report to establish if the signatures on the sale agreements (annexture C & D) were signed by the Plaintiff. The report produced by Mr. Ntariirwa Principal Government Analyst of Government Analytical Laboratory dated 29th October 2008, concluded in the negative. These agreements dated 19th April 2004 (annexure C & D) were fake and the Plaintiff's signature was forged.

Likewise the tenancy agreement between Kampala City Council and 2nd and 3rd Defendant's Victor Kaisinga & Gensia Beateta respectively were forgeries because these agreements are dated 1st August 1999 five years before the purported sale of the shops by the Plaintiff (annexture C & D).

The tenancy agreement was signed by and on behalf Kampala City Council by its Town Clerk on 10th July 2006 over 2 years after the purported sale by the Plaintiff; and 7 years after the purported transfer to the 2nd and 3rd defendants by Kampala City council in 1999.

It is quite extra ordinary that the tenancy agreement with Kampala City Council was signed on 1st August 1999 with the 2nd and 3rd Defendants before they were born. Date of birth of the 1st Defendant is 30.06.2001 and of the 2nd Defendant is 12.04. 04. The Kampala City Council pleaded case is that they never let the suit premises to anyone and that all they did was to record the details of the tenancy.

The tenancy with the Plaintiff was signed by old Kampala Market Management Committee. I believe the committee was part of the Kampala City Council that was delegated for the purpose of signing leases with the tenants for the stalls which belonged to the council. A copy of this tenancy agreement with the Plaintiff was also procured from the Council records. I therefore do not accept that no tenancy was signed by the Kampala City Council when they signed the alleged tenancy agreement with the 2nd and 3rd Defendants dated 1st August 1999.

The Plaintiff on 6th September 2004 notified Kampala City Council of the loss of the original document of lockup shops D035 and D036. The Kampala City Council was put on Notice and they acted with reckless disregard of instruction from the bonafide tenant and granted fresh tenancy to 2nd and 3rd Defendants and or recorded it (See agreement dated 1st August 1999).

In the absence of any challenge to the signatories to the tenancy agreement dated 1st August 1999, the court must conclude that Kampala City Council was a signatory which signature was signed by the Town Clerk and duly witnessed on the document that was clearly a forgery.

Their feeble argument that they simply recorded and registered the new tenancy without checking the title or adhering to the instruction from an individual amounted to failure of their duty of care and arbitrary breach of the valid tenancy agreement entered into with the Plaintiff without any justification. The Council clearly facilitated the fraud by their negligence.

The 2nd and 3rd Defendants pleaded case that they were bonafide purchasers is not substantiated because the document is a forgery.

During the proceedings the court also raised a preliminary point of law as to whether the parties had the capacity to enter into a tenancy and sale agreements and whether such agreements between minors were enforceable or not.

At the time when the said purported sale agreement was signed on 19th April 2004 Victor Kasingha was one week old and the 2nd Defendant Gensia Baateta was 2 years 9 month old. The Plaintiff herself was 15 years old.

Both Defendants' counsels put forward skeleton arguments and submitted that the Plaintiff was 17 years and 9 months old when she filed the claim on 16th July 2007 as a minor.

Order 32 R 1(1) of the Civil Procedure Rules S1 71-1 provides that every suit by a minor should be instituted in her/his next of friend and the suit should be struck out in accordance with order 32 r2 of the CPR.

This is a bad point. The minor never disaffirmed the agreement before or after the age of 18 (Under Sec. 2 of Children's Act CAP 59 a child is a person under the age of 18) and in fact she ratified the agreement by going ahead with the suit. The Defendants ought to have challenged issues of propriety when the proceedings were issued and even then any procedural defect could have been cured under Article 126(2).

The legal representatives of the 2nd and 3rd Defendants equally chose for the minors not to be sued through their Guardian ad litem.

Different jurisdictions around the world have taken the view that minors can enter into agreements, can sue or be sued, and minors are children under the age of 18. The minor would include teenagers (13-18) infants below 12 years and toddlers below 12 months old. In Uganda the matter is dealt with in the contract Act and Section 3(2) states that the term infant and minor shall refer to those who do not attain the age of 18 years. This case concerns a one week toddler and an infant and in my view it is questionable whether a toddler can enter into contractual obligation or able to resolve any matter arising out of contractual disputes. Any right thinking person will accept that.

A toddler cannot walk

A toddler cannot talk

A toddler cannot write

A toddler cannot bite

A toddler cannot read

A toddler cannot by themselves feed

A toddler cannot sit

Toddlers cannot by themselves eat

A toddler has personal rights

A toddler cannot fight

*A toddler has a choice
A toddler under the human rights can make a noise.
Those who bind the toddler to an agreement.
May well have to repent.
For a toddler on reaching of age can bring to rest.
What is for him/her the best.*

I take the view that precedents on minors need to be reviewed in the light of human rights legislation and particularly in area of contractual disputes and most certainly relating to toddlers.

To think that a toddler can enter into an agreement is tantamount to entering into no agreement. Whether a contract with toddlers can be beneficial to them or for their permanent benefit is again a matter of opinion because the purported contract may well be to their detriment. And which the toddler may need to defend. In the instant case a tenancy for 12 years cannot be for the permanent benefit of the toddler, nor can it be said that it is beneficial to the toddler. A commercial transaction on behalf of the toddler may well be to his/her detriment as in this case.

In my view the minor's contractual obligations and their rights under the Human Rights Legislation can only be resolved if the test applied is that of choice or right to express his or her view as stated in Article 12 of the Convention on the Rights of the child (1989) which states that:

“Parties shall assure to the child who is capable of forming his or her own view the right to express that view freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.”

If the child lacked the capacity to choose or give a view, he or she cannot be a party to an agreement and suit agreement would be void. To impose an agreement on the minor would be an infringement of their human rights. In circumstances where an action is detrimental to the minor's interest the liability should be enforced against the legal Guardian as trustees of the child and not the minors; on whose name the contractual obligation arose.

The sale agreement dated 1st April 2004 between the 3 minors was fraudulently procured. The father of the 2nd and 3rd Defendants seems to have facilitated the fraud.

The sale agreement is accordingly cancelled and declared void as not being genuine. The remedies would be against the 2nd and 3rd Defendants as minors through their guardians as trustees of the minors and not the minors themselves.

The 1st Defendant remains liable for breaching the tenancy agreement dated 24.07.03 with the Plaintiff.

It is ordered that:

- (1) The purported sale agreement between the Plaintiff and 2nd and 3rd Defendants be set aside and declared void.
- (2) The 2nd and 3rd Defendants forthwith give possession of the lockup Shop D035 and D036, Nakivubo Road, Kisekka Market, Kampala to the Plaintiff forthwith.
- (3) The 2nd and 3rd Defendants pay the Plaintiff sum of 300,000 shillings being the wasted costs of the Auction.
- (4) The 2nd and 3rd Defendants do pay damages include a sum of 80,000,000/= for fraudulent misrepresentation procuring the sale agreement.

The costs and damages payable by the minor in paragraph (3) and (4) above should be paid by the legal Guardian of the minor as their trustees.

- (5) That the 1st Defendant Kampala City Council pay the Plaintiff punitive damages to the Plaintiff assessed at 50,000,000 Uganda Shillings at the rate of 10 million shillings every year for 5 years.

These damages are based on arbitrary breach of a valid agreement and tortuous acts against the Plaintiff. These damages are awarded on circumstances set out by Lord

Patrick Devlin in the leading case of *Rooker –v- Barnard [1964] AC 1129, [1964] 1 ALL ER 367* where an act of servants of government is oppressive or arbitrary.

In *Paper Reclaim Ltd. –v- Aotearoa International (2006 of 3 NZLR 185)* it was held that exemplary damages are not to be awarded in actions for breach of contract but the court left open the possibility that exemplary damages might be available where the breach of contract is in tort. This case clearly is a breach of contract based on tortious acts that is acting reckless and negligently.

- (6) The 1st Defendant Kampala City Council pay costs of this suit to the Plaintiff, as costs cannot be enforced against the minors who are now 5 and 9 years respectively.
- (7) The 1st Defendant Kampala City Council do pay the Plaintiff special damages for loss of profit during the period 2004 to 2009, such loss to be assessed if not agreed.
- (8) The 1st Defendant pay the Plaintiff general damages assessed at 5 million shillings for breach of the tenancy agreement.
- (9) The 1st Defendant Kampala City Council issue the Plaintiff with the documents of title to the shop No. D035 and D036 forthwith.

I trust this judgment will send signals to those people coming to court with false documents that they will do so at their own peril.

The City Council will also take note that when executing any document; it cannot act recklessly and negligently in disregard of specific instruction from individuals; and without any justification. The remedies against the Council and damages awarded are also meant to be deterrent to public bodies where legal transactions are tainted with fraud or corruption.

Anup Singh Choudry

J u d g e

30/03/09

