

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 0192 - 2013

NABAGGALA REGINA ::
PLAINTIFF

VERSUS

MTN (U) LTD & ANOTHER ::
DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

The Plaintiff Nabaggala Regina sued the Defendants MTN Uganda Ltd and Kawanga John claiming US\$67,000- being rent in arrears, interest, exemplary damages, general damages and costs.

The facts of the suit as they emerged from the pleadings are quite straight forward and easy to follow. Briefly the Plaintiff is the owner of a piece of land situated at Nantabulirwa, Seeta in Mukono District. This land is well situate in that the 1st Defendant who was looking for a mast site spotted it and approached the Plaintiff who agreed to lease it to it at an annual rent of US\$ 7,000- per annum for 10 years.

A lease agreement was signed on 9th September 2002 where upon the Plaintiff was paid Ug.Shs.8,000,000= with the rest to be collected

later. She did not see the 1st Defendants' employees again until 2012 when they approached her for renewal of the lease.

The Defendants employees exhibited shock when she demanded for the rent balance.

The foregoing facts are not disputed by any of the Defendants.

It is also clear from the pleadings and evidence both of which are not disputed by the Defendants that after the 1st payment to Nabaggala, one Peter Kawoya who was the Property Negotiator of the 1st Defendant introduced a woman to the 2nd Defendant as Regina Nabaggala the Lessor. The 2nd Defendant trades under the Name and Style of M/S Kawanga Kasule Advocates. It is to this firm of advocates that the 1st Defendant was to pay the yearly rent of Nabaggala. The Plaintiff having waited in vain for the rent filed this suit.

The issues for resolution were eventually three;

First, whether the 1st Defendant is liable to the Plaintiff.

Secondly, whether the 2nd Defendant was liable to the Plaintiff.

Thirdly, what remedies.

On the issue of liability, it is important to first determine the relationship that existed between the Plaintiff and the 1st Defendant.

In her evidence the Plaintiff told Court that she was approached by the 1st Defendant who requested and obtained a lease of the Plaintiffs piece of land in Nantabulirwa. The transaction was reduced into a

lease agreement Exh. P.1. By those presents, a lessor lessee relationship was created. By that agreement payments were to be made by the 1st Defendant to the Plaintiff. Indeed that is how the 1st payment was made.

The Plaintiff told Court that the Defendant did not remit any payments until its employees returned to her seeking renewal of the lease.

DW1, who testified on behalf of the 1st Defendant denied that the Defendant owed the Plaintiff any rent.

He stated that from the very beginning the 1st Defendant believed that the Plaintiff was represented by the 2nd Defendant, Kawanga, Kasule and Co. Advocates and so it remitted all the payments it made to the 2nd Defendant.

The 2nd Defendant denied ever representing the Plaintiff. In his evidence he stated that the woman who was introduced to him as Nabaggala was different. He was emphatic that he had never before this case met the Plaintiff. He further stated that the woman he paid money to was introduced to him by Peter Kawoya who was the 1st Defendants Negotiator. He said at times Peter Kawoya would collect the money on behalf of the "Nabaggala" he had introduced to M/S Kawanga, Kasule Advocates.

The Plaintiff and her son PW2 told Court that they never instructed the 2nd Defendant at all.

Exh. P.1 that the 1st Defendant relied upon to prove that the 2nd Defendant was an advocate for the Plaintiff at the top mentions the Plaintiffs name Nabaggala Regina and immediately follows it with:

“Herein Represented by: Kawanga, Kasule & Co. Advocates in Their Capacity As: Her Advocate respectively (“the Lessor”).

Because of the foregoing DW1 stated that the Plaintiff was represented by the 2nd Defendant.

This assertion however meets with a lot of obstacles. Firstly the agreement was neither signed at the 1st Defendant’s office nor at the 2nd Defendant’s office.

The Plaintiff told Court that the agreement was signed from her home. This evidence received support from PW3 Nabukenya Sauda who told Court that the agreement was signed at Nantabulirwa. None of the witnesses said that the 2nd Defendant attended the signing proceedings at Nantabulirwa. PW2 said she was present and that after the execution Peter Kawoya retained all the copies and immediately paid the Plaintiff Ug.Shs.8,000,000/=. It was the evidence of PW2 and the Plaintiff that the agreement was not read back to her.

The Defendants did not adduce any evidence to the contrary. In the absence of contrary evidence this Court finds that the agreement was not read back to the Plaintiff. This was a failure on the part of the 1st Defendant because it was apparent that since the Plaintiff could not write, she could not read and so was not able to confirm whether the 2nd Defendant was her representative or not.

Further more the 2nd Defendant's denial that he ever met the Plaintiff corroborates her evidence. It is my view that Peter Kawoya took advantage of the Plaintiff's illiteracy and the ignorance of the witnesses who also did not read the document they signed. For an advocate to represent a person like the Plaintiff, she had to instruct him or empower someone by way of Power of Attorney to do so. She did none of these.

In all its my finding that the Plaintiff did not instruct the 2nd Defendant. It is also my finding that Peter Kawoya misrepresented to the 1st Defendant that the Plaintiff was represented by the 2nd Defendant. The question now to consider is whether the Plaintiff received the money.

It is clear from the evidence of DW1 that the money was sent to the 2nd Defendant to pass over to the Plaintiff. The Plaintiff denied receiving the money. The 2nd Defendant who did not deny receiving the money, testified that he gave the money to a different woman who had been introduced to him as Nabaggala and who was not the Plaintiff.

In conclusion, the money never reached the Plaintiff.

The other question is whether there was a contractual relationship between the Plaintiff and the 2nd Defendant. I think the answer to this is simple and straight forward.

Having found earlier that the Plaintiff never instructed the Defendant, no contractual relationship could have existed. It follows that the 2nd Defendant owed no duty to the Plaintiff as to require him to pay her.

The Plaintiff contracted with the 1st Defendant and so in the absence of any representative of the Plaintiff, its only to her that the 1st Defendant should have paid. That is exactly what the 1st Defendant did with the first payment.

In conclusion, I find that the Defendant was misled by its own employee to pay the wrong person. That notwithstanding, it does not absolve it of its obligation to the Plaintiff. I therefore find that the 1st Defendant is liable to pay the Plaintiff US\$ 67,000- as claimed.

The Plaintiff also claimed exemplary damages.

Exemplary damages are an exemption to the rule that damages are generally to compensate the injured person. These are awardable to punish, deter express outrage of Court at the Defendant's high handed, malicious, vindictive, oppressive and or malicious conduct. They focus on the Defendant's misconduct and not the injury or loss suffered by the Plaintiff. They are awardable with restraint and in exceptional cases because punishment ought, as much as possible, to be confined to criminal law and not the civil law of tort and contract. **Uganda Revenue Authority V Wanume David Katamirike CACA 43/2010**

Exemplary damages cannot be awarded for breach of contract. **ESSO Standard (U) Ltd V Semu Amanu Opio SCCA 3.93**

The instant case is one based on breach of contract of tenancy from which exemplary damages cannot be imposed on the Defendant. Moreover the 1st Defendant is going to pay a second time, the first one having been paid to a wrong party. Exemplary damages are therefore not awarded.

The other remedy that the Plaintiff sought was that of general damages. General damages are those envisaged in a situation where money falls to be paid by reason of some breach of duty or obligation as imposed by a contract. **Hall Brothers SS Company Ltd V Young (1939) 1 KB 748.**

These damages are compensatory and their primary function is intended to place the Plaintiff in as good a position as to the extent that money could do, if the breach complained of had not occurred. In this case Court looks at the material loss suffered by the Plaintiff. In doing so, the Court is expected to ensure that it does not unnecessarily enrich the Plaintiff but must also be careful not to deny her appropriate compensation. These damages are therefore expected to be the direct, natural or probable consequence of the breach that the Plaintiff complained of. **Storms V Hutchinson (1905) AC 515**

It is not in dispute that the Plaintiff and 1st Defendant entered into a contract that would have seen the Plaintiff receive US\$ 7,000- per year for 10 years. For 10 years, the Plaintiff was paid only one year's instalment and nothing else. It is agreed by all that the balance that she never received was US\$ 67,000-

In her evidence the Plaintiff said if she had gotten this money, she would have invested it into real estate. She was of the view that she would now be a billionaire. This investment in real estate was also alluded to by PW3 who said that her grandmother, the Plaintiff would have invested this money into a housing project. No evidence was led as to how many houses would be built out of US\$ 67,000- which would not be in lumpsum but trickle in the sum of US\$ 7,000 per year.

Furthermore the type of house and the likely rent from those houses was not stated. Considering that she would not have built the house in a single installment, the house would have taken several years to construct. And therefore taking into account all the circumstances surrounding the case, I find a sum of UShs. 25,000,000/= appropriate as general damages.

The Plaintiff sought compound interest on annual rent at commercial bank rate until payment in full. The award of compound interest depends on other different criteria besides the discretion of Court. Compound interest is not founded simply on the mere fact of indebtedness nor on the date the principle debt becomes due nor on the duration it has taken to pay since accruing. It is based on one or more of a multiplicity of reasons such as the law applicable to the transaction, the nature of the business transacted or agreed between the parties, the construction of the agreement or it made between the parties, the trade custom of the business out of which the indebtedness arose, the intentions of the parties or the consequences of the commercial transaction that was concluded between them.

Attorney General V Virchan Mithalal & Sons Ltd SCCA 20/2007.

In the instant case, there was no evidence produced by the Plaintiff to suggest that in her agreement with the 1st Defendant compound interest was intended, implied or anticipated by the parties. In my view, the circumstances of this case do not merit the grant of award of compound interest.

The Plaintiff claimed interest on US\$ 67,000- and on general damages at court rate.

The award of interest is a matter of discretion of the court. **Harbutt's Flastirine Ltd V Wayne Tank & Pump Co. Ltd [1970] 1 ChB 447.** Lord Denning found that

"An award of interest is discretionary. It seems to me that 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. So he ought to compensate the Plaintiff accordingly."

In the instant case the Plaintiff was deprived of her money which she could have used for the expansion of her rental houses. I do not find a claim of interest at Court rate excessive. In the premises the Plaintiff is awarded interest on general damages and special damages at Court rate.

Further, on the issue of costs, it has not been shown to Court that at the time the 2nd Defendant was paying the unknown recipient, he was aware that the Nabaggala he was paying was an impersonator. Since she was introduced to him by the employee of the 1st Defendant who

was acting in the course of his employment, I would find the 1st Defendant liable to pay costs to him as well.

In light of the foregoing, judgment is entered in favour of the Plaintiff against the Defendant as follows:-

- a) US\$ 67,000-
- b) General damages of US\$ 25,000,000/=
- c) Interest at Court rate on (a) from date of default till payment in full.
- d) Interest at Court rate on (b) from date of judgment till payment in full.
- e) Costs of the suit.

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David K. Wangutusi
JUDGE

Date: 13/11/2014