THE REPUBLIC OF UGANDA

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

CIVIL SUIT NO. 120 OF 2013

ANUPAMA RAO SINGH ……………………………… PLAINTIFF

VERSUS

1) **GIUSEPPE GIAMONA**
2) **CLAUDIO NOCOTRA ……………………………… DEFENDANTS**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

JUDGMENT

Background: On 16.08.12, the Plaintiff and the First Defendant entered into a sale agreement in respect of the Plaintiff's land and other property comprised in LRV 2794 Folio 12, Land at Lukuli Hill, Makindye Division. The purchase price was USD $390,000, payable upon the signing of the agreement – Exhibit P2.

After the execution of the agreement, the First Defendant experienced difficulty in transfer of the money from his bank account abroad to Uganda, and requested for more time within which to pay the purchase price.

On 11.10.12, the parties including the Second Defendant executed a memorandum of understanding (MOU) by the terms of which the period of payment of the purchase price was mutually extended to 31.12.12.

By the terms of the memorandum of understanding, a limited Tenancy was also created to cover the period of extension. The Plaintiff handed over possession of the property to the First Defendant on condition that among other things, that the First Defendant would pay rent for the property at a monthly rent of USD $ 5000 for the period October – 31st December 2012, which totaled up to USD $15,000 payable in advance.

However, of the agreed total of USD $15,000, the First Defendant only paid USD $1000 and the balance of USD $14,000 remains due and owing to date.
After 31.12.12, the First Defendant continued in possession of the property until 29.01.13, thereby incurring an addition month of rent of USD $5000.

Upon repossession of the property on 29.01.13, the Plaintiff established that the First Defendant had not paid for electricity, water, security, workers' wages and other bills and had caused damage to the property. The Plaintiff claims to have incurred a total of USD $5000 to pay the bills and to carry out repairs on the property.

It was a term of the memorandum of understanding that the purchaser (First Defendant) was to bear costs of the consumer and maintenance bills, and also indemnify the Plaintiff for all and any damage caused to the property, together with the outstanding consumer bills accruing during the period of occupation.

The Second Defendant guaranteed the First Defendant under the memorandum of understanding and undertook to pay all the monthly rent and other liabilities arising from the First defendant's possession and occupation of the property.

Notice of intention to sue was served on the First Defendant for the USD $14,000 but he did not pay, hence the suit against both Defendants as tenant and guarantor respectively.

The First Defendant did not file a defence. The interlocutory judgment was entered against him on 07.05.14. The Plaintiff at the hearing relied upon the evidence of PW1 Patrick G. Barugahare as evidence of formal proof against the First Defendant.

The Second Defendant filed a defence denying the claim and contended that he was discharged from all liabilities upon repossession of the property by the Plaintiff.

At the scheduling, two issues were agreed upon by the parties:-

1) Whether the Second Defendant is liable as guarantor under the memorandum of understanding.

2) What remedies are available to the parties.

In the witness statement of PW1 which was admitted on record as his evidence __ PW1 recited the facts of the case as already set out. He tendered in Exhibit P1, the power of attorney allowing him to prosecute the case, Exhibit P2, the sale agreement, Exhibit P3, the memorandum of understanding, correspondence with the Defendants' Advocates as Exhibit P4, Accountability to the Plaintiff and receipts as Exhibit P5 and P5A –S.

The witness emphasized that the Plaintiff suffered general inconvenience and loss as set out in paragraph 14 (a) – (d) of the evidence in chief.

Also that rent was payable in advance but only $1000 was received out of $15,000 and vacant possession was given since Plaintiff had already made arrangements to move to Bangkok. The memorandum of understanding is silent as to whether $1000 was part of the rent. Under the memorandum of understanding measures to recover rent included immediate repossession.

The Second Defendant guaranteed performance. And under the Sale agreement Plaintiff was entitled to repossession and compensation for damages upon renovation.

The Plaintiff tried to enforce the two clauses by writing to the lawyers of the Defendants and demanding for payment. The Defendants requested for extension of time within which to pay and it was granted on condition that all outstanding rent be paid. It did not happen and hence the repossession.

Under clause seven (7) of the memorandum of understanding, **"the guarantor is liable for all obligations and liabilities of the purchaser and may be sued instead of the purchaser for all liabilities incurred during the tenancy".**

In his defence, DW1 statement was admitted as his evidence in chief. While he admitted Exhibit P2 and the memorandum of

understanding, he contended that clauses five (5) and six (6) thereof indicate that if Plaintiff took over possession, he would be absolved from responsibility. He added that the Plaintiff took over possession of the property at the end of January, 2012, when the First Defendant failed to pay. The memorandum of understanding was also tendered in as Exhibit D1.

The issues will be dealt with in the order that they were set out.

- **Whether the Second Defendant is liable as guarantor under the memorandum of understanding.**

Under S.68 of the Contracts Act, a contract of guarantee is defined as ***"a contract to perform a promise or discharge the liability of a third party in case of default of that third party, which may be oral or written".***

That the Second Defendant was a guarantor in the present case is evidenced by paragraph 7 of the memorandum of understanding where it is clearly stated that **" in consideration of the vendor allowing the purchaser to take over possession and paying therefore a monthly rent as herein agreed, the Guarantor shall guarantee the payment of the monthly rent and all liabilities arising from the possession and occupation of the property up to the time of payment of the purchase price shall be made or the taking of repossession, whichever is earlier. For this purpose, the guarantor shall become liable for any or all the obligations and liabilities of the purchaser and may be sued instead of the purchaser for all liabilities incurred during the tenancy herein created.**"

The Second Defendant in the present case signed the memorandum of understanding as guarantor. Decided cases have established that ***"where a person signs a memorandum or agreement agreeing to guarantee the***

liability of a third party, then there is a binding oral agreement of the guarantee. The signature constitutes on the document an acknowledgment and is sufficient to render him liable to provide a memorandum in any event and his intention to apply in those capacities” - Refer to **V.H.S Ltd and BKS Air Transport Ltd vs. Stephen [1964] 1 LLOYDS Rep. 460**.

By signing the memorandum of understanding in the present case, the Second Defendant made a binding agreement of guarantee to pay the monthly rent and all liabilities arising from possession and occupation of the property up to the time of payment of the purchase price or the taking of possession.

The liability of the Second Defendant as guarantor took effect upon default by the First Defendant as principal debtor – See S.71 (2) of the Contracts Act.

The Second Defendant there upon became liable for any or all obligations and liabilities of the First Defendant incurred during the tenancy that was created. The Plaintiff had the option to sue the Second Defendant for all those liabilities – Paragraphs 7 memorandum of understanding.

The liability of the guarantor, Second Defendant took effect upon default by the First Defendant as principal debtor. The evidence of PW1 paragraphs 7 and 8 of the witness statement clearly indicates that by 31.12.12, the First Defendant had only paid USD $1000 of all the rental charges that were due. This evidence is not denied by Second Defendant.

The Second Defendant hereby became **liable for any or all obligations and liabilities of the First Defendant**. The repossession of the premises by the Plaintiff did not absolve DW2 from the liability, as his Counsel would like court to believe. As already pointed out earlier in this judgment, the Plaintiff had the option to sue the Second Defendant instead of the First Defendant.

While the Plaintiff possessed the property under Clause five (5) of the memorandum of understanding, any rent due and unpaid remained recoverable – clause five (ii) from the purchaser. And this is what the Second Defendant had guaranteed to pay, together with the damages caused to the property, and any outstanding consumer bills accruing from the time of the First Defendant's possession to the time of repossession. The Second Defendant was only discharged from payment of any expenses incurred after repossession.

While the First Defendant did not file a written statement of defence, and an interlocutory judgment was entered in favor of the Plaintiff, that did not absolve the Second Defendant from his liability under the memorandum of understanding. At that point liability ceased to be an issue and what remained to be determined was only what was due to the Plaintiff. – See the case of **Haji Asuman Mutekanga vs. Equator Growers (U) Ltd SCCA 07/95**.

The Plaintiff could not execute the decree as argued by Counsel for the Second Defendant, without formal proof of her claim. The First Defendant was never released from his liabilities either expressly or as a result of legal consequences, and therefore the guarantor – Second Defendant cannot be said to have been discharged from his liability. The case of **Midland Motor Showroom vs. Newman [1929] K.B 256 al 263** relied upon by Counsel for the Second Defendant is not applicable to the circumstances of the present case.

In any case, under S.78 of the Contracts Act as rightly pointed out by Counsel for the Plaintiff, ***"mere forbearance on the part of the creditor to sue a principal debtor or to enforce any other remedy against the principal debtor, does not, in the absence of any provision in the guarantee to the contrary, discharge the guarantor."***

There is no provision in the memorandum of understanding that discharged the Second Defendant from his liabilities.

This brings us to the question as to **whether there was a variation of the terms of the memorandum of understanding as regards the period within which to pay the rental charges**, and if so **whether this discharged the Second Defendant from his liability**.

Under S.74 of the Contracts Act, ***"a guarantor is discharged from his obligations by variance in the terms of the contract between the principal debtor /third party and creditor made without consent of the guarantor. The guarantor is thereby discharged from any transaction which is subsequent to the variance"***. This provision is fortified by the case of **Bank of Uganda vs. Bank Arabe Espanol SCCA No. 08/1998** – where the Supreme Court held that ***"where there is material variation to the guaranteed contract without the guarantor's consent may lead to a discharge of the guarantor".***

In the present case, Counsel for the Second Defendant submitted that the memorandum of understanding was varied when the Plaintiff and First Defendant extended the tenancy period without the consent of the Second Defendant, which extension varied the terms of the guarantee. He relied upon paragraphs 8 and 9 of the witness statement of PW1, which indicates that the Plaintiff and First Defendant entered into negotiations to extend the time within which to pay the purchase price and rent. The letter Exhibit P4 to First Defendant, in which the Plaintiff agreed to extend time and draft addendum to the memorandum of understanding, it was argued, were sent to First Defendant without the consent of the Second Defendant. Counsel argued that the variance automatically discharged the Second Defendant as guarantor.

The case of **Holme vs. Brun Skill (1887) 3 QBD 495 at 505** and **Midland Motor Showroom vs. Newman (supra) at P263** were cited in support of the argument.

Looking carefully at the document, Exhibit P4, court finds that it was an offer to the First Defendant. The offer to extend was

made upon the request of the First Defendant and was conditional upon the payment of the total rent due and payable for the entire period of October 2012 to February 201_ on failure of which the First Defendant had to pay the rent for October 2012 – January 2013. – The letter is dated 08.01.13.

It is apparent that the terms for payment of rent remained the same; therefore there was no variation in this respect. And secondly, there is nothing to indicate that the proposals or offer by the Plaintiff were acted upon by the First Defendant or accepted.

In the circumstances, it can be rightly said that there was no variation of the terms and conditions of the original memorandum of understanding between the Plaintiff and the Defendants.

As per Exhibit P5, the Plaintiff declined to grant the extension of time for payment of the purchase price and notified the Advocates of the Second Defendant that the property would be repossessed with effect from Tuesday, 29.01.13, in accordance with the terms of the sale agreement and the memorandum of understanding.

The letter dated 25.01.13, clearly indicates that the rent arrears due were for the period up to 31.12.12 that is USD $14,000.

Court finds therefore that there was no variation in the terms of the original memorandum of understanding to discharge the Second Defendant from his liabilities.

Counsel for the Defendants also argued that the Plaintiff allowed the First Defendant to occupy the premises without consideration, relying on PW1’s evidence that rent of USD $15,000 was payable in advance and yet First Defendant was allowed to occupy the premises upon payment of USD $1000, and that therefore First Defendant’s obligation to pay rent upfront was waived. And that therefore the Second Defendant

is entitled to be relieved from liability and hence the guarantee canceled.

- The case of **Watt vs. Shuttle Worth (1861) 7H and N353 EXCH and Halburys Laws of England 4th Edition Page 136** were relied upon to support the contention that ***"when conditions to the surety's liability have not been fulfilled or have become incapable of fulfillment, the surety is entitled to be relieved altogether from liability and to have the guarantee cancelled".***

However, court finds that those arguments cannot be sustained in the circumstances of the present case and the authorities relied upon are not applicable.

The Second Defendant guaranteed **"the payment of the monthly rent and all liabilities arising from possession and occupation of the property up to the time of payment of the purchase price shall be made or the taking of repossession, whichever is earlier"**
As already stated in this judgment, the **forbearance** of the Plaintiff in allowing the First Defendant to occupy the premises upon payment of $1000 did not discharge the Second Defendant from liability. The rent was payable monthly.

The last issue for this court to **determine is what remedies are available to the parties.**

Under paragraph 9 of the plaint, the Plaintiff sought to recover $24,000 – special damages, and general damages, and interest on the special damages at the rate of 24% from the date of filing the suit till payment in full, and interest on the general damages at the same rate from date of judgment until payment in full.

Costs of the suit were also applied for.

Counsel for the Second Defendant argued that the Plaintiff is not entitled to any of the remedies sought against Second Defendant.

I will deal with the remedies in the order that there were sought.

Special Damages
Counsel for the Plaintiff submitted in this respect that according to the memorandum of understanding and the evidence of PW1, rent was at the rate of USD $5000 per month payable for the period of 1st October – 31st December 2012. The First Defendant paid $1000 and the balance of $14,000 remains due and owing.

Also that the First Defendant remained in the premises up to 29.01.13 thus incurring another amount of $5000 which brings the amount due to a total of $19,000.

It was also contended that upon the Plaintiffs repossession of the property, electricity, water, security and workers wages and other bills and expenses incurred as a result of repairing the damage to the property were due and were incurred. In this respect a total of USD 5000 was claimed relying on the receipts tendered in evidence. This brought the total of the amount claimed to $24,000.

Rent: Under paragraph 3 of the memorandum of understanding the rental period guaranteed was from 11th October to 31st December 2012 at the rate of USD $5000 per month. The total that was due from the First Defendant to the Plaintiff was USD $15,000 for the three months. All parties agreed that out of this money $1000 was paid leaving a balance of $14,000.

Court finds that this is the amount that the Second Defendant to pay for the three months.

Special Damages: In addition to the above rent, the Plaintiff incurred special damages in the form of the extra month of rent from 01.01.13 – 29.01.13 when repossession of the premises was undertaken plus the electricity, water, security, workers' wages, and other bills and the expenses incurred to repair the damage occasion to the premises.

Special damages have been defined as **"that damage in fact caused by a wrong"** And it is trite law that this form of damages are recoverable unless specifically claimed and proved. – See **Uganda Telecom Ltd vs. Tanzanite Corporation Ltd SCCA 17/2004**.

The claim of the extra USD 5000 arises from the First Defendant's failure to meet his obligations up to 31.12.12 and then remaining in the premises up to the time of repossession on 29.01.13.

- It is clear that Second Defendant guaranteed **the payment of the monthly rent and all liabilities arising from the possession and occupation of the property up to the time of payment of the purchase price shall be made or the taking of repossession**, whichever is earlier.

The First Defendant incurred the extra rent due to continued possession and occupation of the property until 29.01.13 and the Second Defendant is liable to pay this money. That the rent was due is garanteed from the fact of First Defendant's continued occupation and possession of the premises.

Other Expenses incurred: These include the dues for electricity, water, security, wage bills, plus expenses incurred in repairing the damage to the property. Court has taken into consideration the receipts that were attached to the scheduling memo Exhibits P7 (a) – P7(s) compared them with some originals that were availed. Court wishes to observe that the receipts for water and electricity are not legible and court could therefore not ascertain amounts paid for those utilities, while

some receipts for water payments are in the names of a person not part of the suit.

Court finds that, that amount was specifically proved as having been spent by the Plaintiff after takeover of the house is Shs.5,480,000/=. It is in Uganda shillings and therefore the Plaintiff is not justified in claiming it in US dollars. The only other sum Plaintiff can claim in dollars is the extra $5000 incurred as a result of continued stay in the premises until repossession as already indicated.

A close scrutiny of the memorandum of understanding clause 7, clearly shows that the Second Defendant was **liable for all the liabilities arising from the possession and occupation of the property up to the time of taking repossession**. - The above expenses are as a result of the continued possession and occupation of the property, while some are liabilities incurred for February 2013 that is, some of the wages for workers are not covered by the memorandum of understanding. The amount due and payable to workers incurred after repossession is not recoverable from the Second Defendant and is accordingly subtracted to leave the amount of Shs. 5,480,000/- only as recoverable from the Second Defendant.

General Damages:

Counsel for the Plaintiff submitted that the Plaintiff is entitled to general damages for breach of contract. He relied upon the case of **Monhanlal Kakubhai Radia vs. Warid Telcom (U) Ltd HCCS 224/2011** and contended that court should take into account the value of the subject matter, the inconvenience suffered by the Plaintiff as a result of the First Defendant's breach of the sale agreement. The sum of USD 40,000 was estimated as a fair award of general damages.

General damages are damages the law presumes to follow from the type of wrong complained of. That is, the direct probable consequence of the act complained of. Such consequences may be loss of use, profit, physical inconvenience – Refer to

Kampala District Land Board and George Mitala vs. Venansio Babweyaka SC. CA 02/07 [2008] UGSC 3.

I wish to point out from the outset that, while it is apparent that the Plaintiff suffered general damages, these are also the responsibility of the Second Defendant. The memorandum of understanding clause 7 is clear as to the liabilities of the Second Defendant.

Although, the First Defendant who did not file a defence is liable for the general damages as liability in the respect is not an issue but only the quantum of damages – See **Asuman Mutekanga Case (Supra) SCCA**.

The principles for the assessment of quantum of damages have already been referred to in this judgment – See **Mohanlal Kakubhai Radia case (Supra)**. However, this court is mindful of the fact that decided cases have emphasized that in assessment of damages ***"it is necessary to bear in mind the rights of all persons seeking access to court to vindicate their rights. An award of exorbitant damages may have the adverse effect of turning litigation into profit making business and also discouraging or restricting court accessibility to the well to do only"*** - Refer to **Margaret Kato and Joel Kato vs. Nuulu Nalwoga SCCA 03/2013 (unreported).**

All the above principles are borne in mind in assessing the quantum of damages in the present case.

The Plaintiff prayed to be granted USD 40,000 as general damages. Court finds the amount requested too high and that the figure demanded being in dollars is contrary to S.17 of the Bank of Uganda Act.

The Section provides that ***"all monetary obligations or transactions shall be expressed, recorded and settled in shillings unless otherwise provided under any***

enactment or is lawfully agreed to between the parties to an agreement under any lawful obligations".

While the land sale agreement and the rental agreement were in dollars, there was no agreement between the parties that any damage arising out of breach of contract if any would be settled in US dollars.

Court accordingly uses its discretion and awards the general damages in Uganda shillings. The sum of Shs. 20,000,000/- is awarded for the inconvenience suffered by the Plaintiff. The value of the subject matter has not been taken into account as the property was repossessed and the expenses incurred to put it back in a habitable position have already been granted.

Interest: The Plaintiff applied for interest on rent arrears and expenses for repair at the rate of 24% per annum from the date of filing the suit until payment in full.

Interest was also prayed for on the general damages at same rate from date of judgment until payment in full.

Counsel for the Plaintiff relied upon S.26 C.P.A to submit that court has powers to award interest to the Plaintiff for having been kept out of her money, and it should be calculated from the date when money fell due.

The case of **Mustapha Ramathan and Osman Kassim Ramathan vs. Century Bottling Co. Ltd HCCS 431/2006 (Commercial Division)** by Kiryabwire J was relied upon.

In respect of interest on general damages, Counsel cited the case of **Phoenix Logistics (U) Ltd vs. Medical Products (U) Ltd and Another HCCS 177/2005 (Commercial Division).**

As pointed out by Counsel for the Plaintiff and rightly so, the award of interest is at the discretion of the court where there is no agreement to the contrary. The principles were elaborated in the case of **Charles Lwanga vs. Centenary Rural**

Development Bank LTD [1999] IEA 175 CACA 30/99 by G. Okello JA as he then was.

TO WIT:

1) Interest adjudged on the principal sum from any period up to the institution of the suit. Here court must first decide on the evidence, the question of award of the interest and then the rate at which if it is to be awarded, if any.

2) In addition to that, interest on the principal sum adjudged from the date of filing the suit to the date of a decree. Here court decides at its discretion, which must be made judiciously the rate of interest to be awarded, if any?

3) Further to the above, interest on the aggregate sum so adjudged from the date of the decree to the date of payment in full.

Applying all those principles to the circumstances of the present case, court awards interest on the rent arrears and the other expenses incurred as a result of the breach at the rate of 6% from the date of filing the suit until payment in full.

On general damages, interest is awarded at the rate of 6% from the date of judgment until payment in full.

Costs: Under S.27(1) of the Civil Procedure Act, costs are in the discretion of the court, which has full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions thereto:-

This position has been fortified by decided cases to the effect that ***"costs follow the event and a successful party is entitled to costs unless for good reason court decides otherwise"*** –. **Jennifer Behinge, Rwanyinda Aurelia, Paulo Bagenzi vs. School outfitters (U) Ltd CACA 53/1999**

Costs of the suit are therefore awarded to the Plaintiff against the Defendants.

Judgment is entered against the two Defendants jointly and severally as follows:-

1) a) Payment of the sum of USD 14,000 as arrears of rent.
   b) Payment of USD 5000 for the continued occupation and possession of the property from January 2013 until the Plaintiff took repossession on 29.01.13.
   c) Shs. 5,480,000/- for security, wage bills and repairs.

2) Interest on the items a, b, and c from the date of filing the suit until payment in full at the rate of 6% per annum.

3) General damages in the sum of Shs. 20,000,000/- are awarded to the Plaintiff.

4) Interest on general damages at the rate of 6% per annum from the date of judgment till payment in full.

5) Costs of the suit.

FLAVIA SENOGA ANGLIN
JUDGE
12.01.15