THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

HCT- OO - CIVIL SUIT No. 301-2009

1. **HENRY OKUMU OKORI**
2. **LEATITIA NAKIGUDDE OKUMU :::::::::::::::::::::::::::::::::::: PLAINTIFF**

VERSUS

1. ALFRED J. TUMWESIGYE

2. VERINA TUMWESIGYE ::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON MR. JUSTICE B.KAINAMURA

JUDGEMENT

The plaintiff brought this case against the defendants seeking orders; (a) a declaration that the defendant breached the agreement of 27th April 2009 (b), special damages of UGX 117,865,000/=, (c) general damages (d) interest on (a) and (b) and costs of the suit.

The amended plaint sets out the facts constituting the cause of action as:-

The plaintiffs executed an agreement with the defendants on the 27th of April 2008. By the terms of the agreement, the defendants let out their proprietary interest in a school called Bright Star Nursery Day and Boarding Primary School at a monthly fee of UGX 1,500,000/= for an initial period of 5 years. The agreement was to be reviewed after 3 years.

The plaintiffs paid UGX 9,000,000/= and took possession of the school and commenced renovations of all the old buildings, constructed the administration block and made an extension to the office premises and walk ways upto the gate. The plaintiffs however found out that the school had never been incorporated as alleged. They were also served with a letter

dated 24th April 2008 from the Town Clerk of Entebbe Municipal Council directing the immediate closure of the school yet the defendants had received the plaintiffs' money on the 27th of April 2008. Furthermore the plaintiffs received a notice of closure dated 27th May 2008 from the Directorate of Education Standards directing the closure of the same school for operating without a valid license. The plaintiffs then pursued and obtained all the necessary authorizations and licenses from the Ministry of Education and concerned local authorities.

Further on the 7th of July 2008 the plaintiffs received yet another communication from the Lawyers of Wings of Hope Ministries, who was alleged to be the registered proprietor of the land on which the school was built, ordering the plaintiffs to stop carrying out any activities on the land. Faced with eminent eviction, the plaintiffs through their Lawyers Kwizera Mukisa & Co. Advocates wrote to the defendants demanding that the defendants guarantee quiet possession or have the agreement terminated. The agreement was indeed terminated by a letter dated April 14th 2009. The plaintiffs filed this suit seeking special damages which include monies incurred in renovations amounting to UGX 65,365,000/=, new school buildings built worth UGX 35,300,000/=, good will of UGX 17,200,000/= all totaling UGX 117,865,000/= and a non-refundable commitment fee paid to the land lord of UGX 5,000,000/=.

The defendants filed an amended written statement of defence in which the defendants state that they would raise a preliminary objection that the suit is bad and misconceived in law for contravention of the Arbitration and Conciliation Act. Further, the defendants disputed the claim of fraudulent misrepresentation pleaded by the plaintiffs. They added that the plaintiffs and defendants sat in several meeting in which it was made clear that they were customary tenants relying on bibanja sale agreements. They further stated that they also made it known that the school was a sole proprietorship and not a limited liability Company as claimed. They further stated that they had agreed that the renovations would be done upon prior permission from the defendants which the plaintiffs never sought. They further stated that the defendants at all material times never misrepresented any facts to the plaintiffs as alleged. In a counter claim the defendants stated that the plaintiffs instead acted fraudulently with intent to dispossess them of their school. They added that as a result, the defendants suffered loss and damage of furniture worth UGX 6,000,000/= and rent arrears of UGX 36, 000,000/=. They

therefore prayed for dismissal of the suit with costs and judgment to be entered for the defendants on the counter claim for;

a) A declaration that the plaintiffs' conduct was fraudulent
b) Special damages
c) General damages
d) Interest
e) Costs of the suit.

In reply to the amended statement of defence the plaintiffs stated that; the defendants misrepresented as to the nature of ownership of the school, they also by the agreement and the minutes attached continued to undertake to produce Memorandum and Articles of Association of the Company as well as a land title and that, there is no provision in the agreement that the plaintiffs were to consult the defendants on any intended renovations.

In reply to the counterclaim, the plaintiffs denied the contents of the counterclaim including the alleged fraud as well as damages and loss claimed to which the defendants will be put to strict proof.

At commencement of the trial the following issues were framed;

1. **Whether the plaintiffs were entitled to the value of the improvements claimed and if so how much?**
2. **Whether the defendants were entitled to the arrears of rent, if so how much?**
3. **Whether the plaintiffs owe the defendants any balance for the properties taken, if so how much?**
4. **What are the remedies?**

At the trial, Mr. Gilbert Nuwagaba together with Sunday Mpagi appeared for plaintiffs; and Mr. Vincent Kamugisha together with Scovia Mudondo appeared for the defendants.

The parties filed witness statements. The parties also agreed to rely on a joint valuation report prepared jointly by M/S Bagaine & Co. Ltd and M/S East African Consulting and Surveyors & Valuers dated 4th February 2015.

Issue one- Whether the plaintiffs were entitled to the value of the improvements claimed and if so how much?

The plaintiffs called one witness; the second plaintiff Leatitia Nakigudde Okumu as PW1. In her testimony she stated that as part of their obligation to renovate and carry out fresh construction for the purposes of uplifting the standards of the school, they renovated the school buildings and infrastructure and constructed a new classroom block. She also stated that according to the terms of the agreement, they were entitled to payment of the value of the renovations and the value of the new construction upon termination of the agreement.

She stated further that they contacted East African Consulting Surveyors who upon valuation made a report indicating that the renovations carried out amounted to UGX 65,965,000/=, the new school building was valued at UGX 35,300,000/= while the goodwill potential was at UGX 17,200,000/= thus making a total of UGX 117,865, 000/=.

In cross examination, she stated that they did renovations of classes and dormitories and improved the standards of the school.

In re-examination PW1 stated that they are claiming the costs of renovations and goodwill totaling to UGX 117,800,000/=.

The defence called two witnesses; Alfred J. Tumwesigye as DW1 and Joswa Katongole as DW2.

DW 1 testified that the plaintiffs put up buildings in the green belt which he had restrained them from doing.

In cross examination, he stated that it is true that he agreed to compensate the plaintiffs for the renovations but he had not yet compensated them.

DW2 testified that the plaintiffs and defendants got misunderstandings after the school took over and the 1st defendant sought assistance of the LCs to stop the construction by the plaintiffs in a wrong place.

In his submissions, Counsel for the plaintiffs stated that during the hearing, the parties adopted a joint valuation report which would be relied on by court.

He submitted that under paragraph 5.5, 5.6 and 5.7 of the Deed of Change of Proprietorship and Management Contract, Exhibit P.1, it was clear that the plaintiffs were authorized to make improvements on the property and under para 5.7, it was agreed that the plaintiffs would be compensated in the event of termination.

Counsel for the plaintiffs additionally stated that in as far as regards the value of the new buildings valued in the joint report at UGX 40,000,000/= and the value of the renovations as made by the plaintiff at UGX 19,500,000/=, the figure of UGX 19,500,000/= does not represent the costs of renovations. Counsel argued that the joint valuation report does indicate that the renovation works did cost a sum of UGX 28,991,000/= and to award a sum of UGX 19,500,000/= would be contrary to the agreed position that the plaintiffs would not receive anything less than the actual cost incurred. (per para 5.7 of the deed)

In reply, Counsel for the defendants submitted as follows;

The parties agreed that the renovations / improvements carried out by the plaintiffs shall at the time of termination be valued and compensated. However, counsel for the plaintiffs seeks to rely on clause 5.7 which requires receipt for the costs incurred which the plaintiffs did not even tender in evidence. Counsel also stated that the values for the renovations as found by the joint valuation report is UGX 19,506,000/= and the figure of UGX 28,991,000/= in the report is what would be required to put up new structures.

Counsel further submitted that the plaintiffs put up new structures in the green belt without approval and the move was protested by the defendants who even involved the Local Council Chairpersons and the Town Clerk who had also not been consulted for approval. He stated that the defendants could not sanction such an illegality by payment which risks making them accomplices. He cited the case of ***Makula International Ltd vs. Cardinal Nsubuga & Another (1982) HCB II*** where court held that court cannot sanction illegalities.

In conclusion, Counsel submitted that in view of the buildings' illegal status it will undoubtedly be pulled down by the controlling authorities for contravening building regulations. He added that it would be double jeopardy to ask the defendants to pay for the plaintiffs' lawlessness.

Resolution of issue one

PW1 gave evidence that the plaintiff after the takeover of management of the school made a number of changes which included renovations, putting up structures, as well as purchase of items like desks, chairs, beds, benches among others to uplift the standard of the school. The defendants did not deny the renovations and new buildings put up by the plaintiffs.

A joint valuation report by Bageine & Co. / East African Consulting Surveyors & Valuers dated 4th February 2015 was filed and agreed to by the parties. The summary of the valuation at page 9 is as follows;

a. The value of the incomplete new building built by the plaintiffs is UGX 40,000,000/= as at today's date.
b. The value of the renovations made by the plaintiffs is UGX 19,500,000/=.
c. We are of the opinion that no good will is payable by the defendants who have repossessed the school because the school is not in operation.

I have taken note of the arguments of both Counsel regarding whether the amounts are refundable and the amounts being claimed. However I am cognisant of the fact that the defendants did not consent to the building of the new structures as they were allegedly built in a green belt. On the court record is a letter dated 08/08/2008 marked G in the defendant's trail bundle which was titled; *Notice of stoppage of civil construction works of a building* from the Town Clerk of Entebbe. PW1 in her evidence failed to confirm that the permission necessary was granted but stated that it was inferred. Counsel for the defendants submitted that Court cannot sanction illegalities. I agree.

It is therefore my considered opinion that in regard to the improvements made on the school premises, the plaintiff would only be entitled to the money spent on renovations which the joint valuation report assessed at UGX 19,500,000/=. I so hold.

Issue two- Whether the defendants were entitled to the arrears of rent, if so how much?

PW1 testified that the defendants breached the contract and frustrated their operations. The plaintiffs consequently stayed in the school after repudiation of the contract for purposes of receiving compensation which the defendants had failed to pay. She also testified that they attempted to handover the school to the defendants but each time they tried the defendants either never came or came and caused confusion and the handover aborted.

In cross examination, PW1 testified that they made an initial payment of UGX 9,000,000/= for a period of April to October. She added that after six months they made further payments for rent after expiry of 6 months. She however stated that she did not remember when they last paid the rent.

DW1 stated that he was approached by the plaintiffs with a view of taking over the school on a management basis and agreed on a five year period at a monthly rent of UGX 1,500,000/=. He stated that the plaintiffs refused to vacate the school premises and owed rent arrears of UGX 36,000,000/= for the period of 21/06/2009 to 18/05/2011.

Counsel for the plaintiffs submitted that the defendants were entitled to payment of a consideration of UGX 1,500,000/= per month which was paid when it fell due. He submitted further that the rent claimed is for the period after the termination of the agreement. Counsel stated that after termination of the agreement, the plaintiffs ceased all school operations and only stayed on the premises to receive compensation in accordance to the agreement. He urged that the agreement had been terminated, there was no school running on top of the various breaches by the defendants, therefore the management fees/monthly consideration could not be paid. In conclusion, Counsel prayed that the sum of UGX 36, 000,000/= inappropriately referred to as rent be disregarded and the claim dismissed.

Counsel for the defendants submitted that the 2nd plaintiff testified that the rent payable per month was UGX 1,500,000/= for which an advance payment of UGX 9,000,000/= was paid effective 27/04/2008 and thereafter continued being paid up to the time of termination. He urged that the defendants on termination did not vacate the school premises but continued operating till court's intervention at the end of March 2011 as indicated in the plaintiffs' trial bundle. He also stated that pages 24, 25, 26 and 27 of the defendants trial bundle all confirm

the plaintiffs' occupation of the defendants' premises yet they had long stopped paying rent to the defendants. Counsel further stated that consequently for the period running from June 2009 to 18/05/2011 at the monthly rate of UGX 1,500,000/= the accrued arrears amount to UGX 36,000,000/=. He urged that the defendants proved this by tendering in evidence of unpaid electricity and water bills amounting to UGX 3,016,549/= and UGX 796,539/= respectively which were consumed by the plaintiffs and were left unpaid.

In conclusion Counsel submitted that the defendants have proved on a balance of probabilities that they are owed rent arrears of UGX 36,000,000/= and unpaid utility bills of UGX 3,813,088/=.

Resolution of issue 2

Counsel for the defendants urged that from June 2009 to 18/05/2011 at the monthly rate of UGX 1,500,000/= the accrued arrears amount to UGX 36,000,000/=. DW1 gave testimony that the school kept running till the time the plaintiffs got evicted. It is my considered opinion however that the rent should be computed to the date of repudiation.

In the case of ***Sihra Singh Santokh Vs Faulu Uganda Ltd Civil Suit No.517 of 2004,*** court addressed a similar issue of payment of rent arrears where there was already a termination of a tenancy agreement. Court in resolving the issue made reference to the case of ***Buckland Vs Farmer & Moody (1978) 3 All ER 929 at 938 (CA)*** *where the term rescind was considered:*

> *"The word rescind may be used to describe the effect of the sort of relief that is normally granted where the contract, has been obtained by fraud, misrepresentation or on some other ground which vitiates its character as a contract, where the court thinks it right to annul a contract in every respect so as to produce a state of affairs as if the contract has never been entered into…."*

Court went further to hold that rescission is effected by any clear indication of intention to no longer be bound by the contract; this intention must be either communicated to the other party or publicly evidenced. Additionally, the Court held that;

> *"Where a wronged party such as the present defendant, elects to rescind a contract de future following breach by the other party, all the primary obligations of the parties under the contract are terminated. Therefore, the defendant company having rescinded the tenancy agreement, all outstanding obligations under the said agreement terminated"*

Turning to the case under review, I note that the contract was rescinded by a letter dated April 14, 2009 marked P12. Counsel for the plaintiffs contended that the defendants had misrepresented a number of facts such as; registration of the school with Ministry of Education which was not the case, the school being a limited liability company which was not the case, to mention but a few. They therefore terminated the contract and stayed on the school premises because they wanted to be compensated first.

In the case of ***Sihra Singh Santokh Vs Faulu Uganda Ltd*** (supra) Court held that:-

> *" Thus the defendant was under no further obligation to effect rental payments for the period beyond ……the plaintiff would only have been entitled to claim damages against the defendant for obligations accrued to the latter prior to the rescission but were not performed.*

Accordingly based on the above decisions I am of the firm view that the defendant cannot claim such arrears from June 2009 to 18/05/2011 when the contract was already terminated effective from date of rescission of the tenancy agreement. It is my further view that the defendants would only be entitled to damages for the loss suffered by them which the defendants did not canvass at the trial. Accordingly the second issue is answered with negative.

Issue three- Whether the plaintiffs owe the defendants any balance for the properties taken, if so how much?

PW1 testified that they had certain standards that they wanted to set which were wanting when they took over management of the school. She stated that most of the property especially the furniture and buildings were in bad shape, so they procured text books, saucepans, beds, desks, blackboards and swings. She added that they handed over the property

they did not buy to Mr. Tumwesigye who picked the property from the school. She further stated that they had receipts for the property they bought.

DW1 in his witness statement stated that the plaintiffs took away everything ranging from desks, tables, benches.

In re-examination, DW1 stated that the property taken away included beds, chairs, benches tables, cupboards and books.

DW2 stated that the lawyers of the plaintiffs and defendants failed to agree on the terms of the handover document and thereafter the plaintiffs carried away everything leaving the defendants' school empty.

Counsel for the defendants submitted in support of the counterclaim that the plaintiffs on vacating the school premises took away all property ranging from desks, tables, beds, and benches. He stated that PW1;Leaticia Nakiganda falsely stated that they rejected some furniture and paid for some but presented no evidence of such payment in court. Counsel submitted that what is clear is that no furniture of any type was found in the school at the time the defendants regained possession. He stated that it should either be returned or paid in its monetary equivalent as expounded in the pleadings and the defendant's testimony. He submitted that the correct figure is therefore UGX16, 191,450/= as indicated on page 10 of the defendant' trial bundle.

Counsel for the plaintiffs in reply and relying on the case of ***Uganda Telecom Ltd vs. Tanzanite Corporation SCCA 17/2004*** submitted that it is a cardinal principal that special damages must be specifically pleaded and strictly proved. He submitted that the defendants pleaded a claim of UGX 6,000,000/= allegedly for the furniture taken. He urged that court had not been told how many desks, chairs, beds, benches were taken by the plaintiffs and their respective values. He stated that court cannot engage in a fishing expedition to get the amount owed in terms of the furniture taken.

Resolution of issue Three

It is an established rule of evidence that he that alleges a fact must prove as provided for in **Section 101** and **103 of the Evidence Act.** The defendants' witnesses alleged that all the

school properties were taken by the plaintiffs. However the plaintiffs' witness stated that they took what belonged to them and returned what belonged to the defendants.

I note that the deed of change of proprietorship – EX P1 – under which the plaintiffs took over the demised premises is silent on any furniture taken over. I further note that both DW1 and DW2 while they allude to furniture belonging to the defendant and take away by the plaintiff, do not in any particular detail point to any such furniture. It is my considered view that the defendants have not discharged the evidential burden placed on them to prove this issue.

In the result the issue is answered in the negative.

Issue four - What are the remedies?

Counsel for the plaintiffs submitted that the plaintiffs were entitled to compensation for the value of the new structure put at UGX 40,000,000/= by the joint valuers.

Counsel also submitted that the plaintiffs were further entitled to compensation for the actual costs of the renovations which is UGX 28,991,000/=. Counsel quoted paragraph 5.7 of the Deed of Change of Proprietorship and Management Contract which provides that;

> *"Such compensation shall not be less than the receipted cost of the renovations and additions"*

Counsel also prayed for an award of UGX 17,200,000/= as the projected good will as put in the valuation report by the East African Consulting Surveyors and valuers.

Counsel prayed for general damages of UGX 9,000,000/= paid upon signing the agreement which later got terminated.

Additionally, Counsel urged that the defendants bound themselves to avail documents of ownership, i.e. certificate of title, Memorandum and Articles of Association, proof of registration with Ministry of Education which they failed to avail to the plaintiffs. Counsel submitted that it is clear that the defendants misrepresented themselves to the plaintiffs. He therefore prayed that all theses breaches call for an award of general damages to compensate for the loss suffered and breach. Counsel stated that an award of UGX 100,000,000/= would be just and equitable compensation.

Regarding interest, Counsel submitted that as per S.25 of the Civil Procedure Act interest is in the discretion of court. He prayed that interest on the special damages at the rate of 20% per annum from the date of filing till payment in full be awarded. He also prayed for an award of interest at the rate of 20% per annum on the general damages from the date of judgment till payment in full.

Counsel for the plaintiffs also prayed for costs of the suit.

In conclusion, Counsel prayed that the counterclaim be dismissed with costs according to the submissions on issues 2 and 3.

Counsel for the defendants submitted that the plaintiffs had a plan to grab the land of the defendants by running ahead of the defendants to purchase a mailo interest from the registered proprietor. Counsel thus urged that the alleged breach of contract was self induced and therefore prayed for the dismissal of the suit with costs.

Resolution of issue four

Based on the findings above on issues 1, 2 and 3, the plaintiffs are only entitled to refund of the money spent on the renovations. The defendants fail on their counter claim.

Accordingly judgment is entered for the plaintiff's in the following terms:-

a) The plaintiff's are entitled to UGX 19,500,000/= (Uganda Shillings Nineteen Million Five Hundred Shillings Only) being refund of the money spent on renovations.
b) Interest on the above at 20% per annum from date of filling the suit till payment in full.
c) Costs of the suit.

B. Kainamura
Judge
30.09.2015