

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

HIGH COURT CIVIL SUIT NO.236 OF 2008

SPEAR HOUSE LIMITED :::PLAINTIFF

VERSUS

BARCLAYS BANK OF UGANDA LIMITED:::::::::::::::::::::::::::::DEFENDANT

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO

JUDGMENT

1.0. Background:

The Plaintiff Spear House Ltd rented its 3rd Floor premises at Spear House situated on lot 12 Jinja Road, Kampala, Uganda to Nile Bank Ltd on the 21st December, 2000. This activity was executed through a tenancy agreement (Exhibit P.1) which was later renewed on the 30th day of July 2002. Nile Bank Ltd was later bought by Barclays Bank (U) Ltd, the instant Defendant. The tenancy agreement in the

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meantime continued till the 26th day of June 2007 whereupon and based on terms of the said tenancy agreement, the Plaintiff gave the Defendant a six (6) month notice of its intention to terminate the said tenancy agreement which would come into effect from the 31st day December, 2007. In the meantime, during the following month of July, 2007, Mr. Gordon Wavamuno, the Plaintiff's Chairman together with Mr. Byarugaba, the Defendant's Chief Operations Officer carried out an inspection of the suit premises to ascertain its state of repair, to identify the fixtures and fittings which will eventually be removed as tenants (defendant's) fixtures and those to that will be kept or left with the landlord as its fixtures and to generally agree on whatever repairs were to be carried out before the Defendant yielded vacant possession of the premises to the Plaintiff. The tenancy thus did eventually come to an end by the 19th February 2008. However, a dispute did arise between the parties as to whether certain fixtures which at the expiry of the tenancy were taken over by the succeeding tenant United Bank of Africa (U) Ltd did belong to Spear House Ltd, the Landlord or to Barclays bank (U) Ltd, the tenant. This was because according to the Plaintiff, a joint inspection report tendered in court as Exhibit P.2 and which had been forwarded by the Plaintiff in its letter dated the 10th day of July 2007 to the Defendant Exhibit P2 and responded to by the Defendant in its letter dated the 23rd day of August 2007 with reference of Ref: BBU/LEGAL/ A.12/07 (Exhibit Y) , the parties had agreed to the identified **2: Judgment on issues relating to tenant's chattels claimed to have reverted to a landlord by virtue of certain terms of a tenancy agreement .Per Hon. Justice Henry Peter Adonyo: April, 2015.**

fixtures mentioned in the report including movables to be left to the landlord its fixtures. That these items were confirmed as seen in Exhibit B1 and also by Richard Byarugaba who testified in court as DW1. Therefore , according to the plaintiff confirmations amended in *pari materia* Clause 4.4 of the tenancy agreement thus transferred the indicate the Defendants chattels to it but the Defendant in total breach of those amendments to the terms of the tenancy agreement decided to sell those transferred tenant's chattels to United Bank of Africa in addition to it neglecting settle utility bills incurred but was forced to do so only after being reminded of its obligations to do so by the Plaintiff's lawyers resulting in of the Plaintiff incurring as legal fees the sum of Uganda Shillings Three Million Seventy Two Thousand only (Ug. Shs. 3,072, 000/=) for the instruction it gave to M/s Kalenge, Bwanika, Kimuli & Co. Advocates in pursuit of the utility costs payments. The Defendant refused to settle the plaintiff's claim on contention that no legal variation in the tenancy agreement terms had been made to have its chattels transferred to the Plaintiff at the end of the tenancy period to the Plaintiff and that it had even settled its utility bills eventually and so could not be responsible to meet the legal fees the Plaintiff incurred in instructing its own lawyers for even those fees were incurred by the plaintiff during its normal engagement with its lawyers. The disagreement between the parties thus led to this instant suit.

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2. Issues:

The issues framed for resolution of this matter were as follows.

- a) Whether the items listed in the plaintiff's Memo dated the 13th March 2008 were property of the Landlord or of the tenant.
- b) Remedies.

3. Evidence:

To prove its case against the Defendant, the Plaintiff called one (1) witness Mr. Gordon Babala Kasibante Wavamuno, its Managing Director (PW1) whose testimony was received in main via a sworn witness statement and was examined accordingly. The witness also tendered in evidence documents. The Defendant on its part called two (2) witnesses; Mr. Richard Patrick Byarugaba (DW1), its former Chief Operations Officer and Mr. Eric Lokolong (DW2); its legal counsel. Their testimonies were orally received in court and they were cross examined and re examined accordingly, who also tendered in court documents to support the defence case.

Learned counsels representing the parties thereafter presented written final submissions which are on record. Of note, however, was learned counsel for the Plaintiff's submission that this honourable court while assessing the evidence of witnesses should ignore that of DW2 as it was hearsay for he was not personally

involved in the transactions relevant to this suit. The learned counsel for the
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defence countered otherwise. Upon considerations of the arguments tendered for and against this particular issue, it is the opinion of this honourable court that the defendant being legal personality exists in perpetuity perpetual existence as a going concern unless it is wound up which is not the case here. Thus accordingly under the Evidence Act the evidence of DW2 can be considered as receivable evidence by this court since he testified to the fact that he was familiar with the facts surrounding the instant matter as he was in custody the relevant files which contained information relevant to this case which relates to the tenancy arrangements and all communications in that regard. His testimony is thus admissible in accordance with the information he has in his custody.

To resolve this matter, the following issues are framed and discussed and conclusions made thereon on each as below.

4. Whether the items listed in the plaintiff's memo dated 13th March, 2008, were the property of the landlord or of the tenant:

From the pleadings and the testimony before this court, it is clear to me that the real dispute between the parties herein relates to whether or not the tenant's chattels which had been attached to the Plaintiff's premises ceased to be its chattels following communications between officials of the Plaintiff and the Defendant following the expiry of the tenancy agreement, contract upon which that the parties

herein did enter into in 2000 (Exhibit P.1). The tenancy agreement had several
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clauses among which included the restoration of the demised premises to its original condition upon its expiry. Clause 4.4 contains these conditions and it particularly provides that at the determination of the tenancy agreement the Defendant would yield to the Plaintiff the demised premises duly painted, repaired after removing all its extensions, additions and improvements inclusive of any fixtures and fittings other than those which belonged to the landlord and was to ensure that the demised premises was returned fit for use by the landlord after the tenant had made good any or all damages occasioned on the demised premises. This provision was a restatement of the rights of parties under a tenancy agreement under the common law which guarantees the tenant its rights to remove its lawful fixtures generally. This right by itself does not in any way negate the sanctity to be had by parties to such a contract to freely vary the common law position and thus enter into an arrangement which is legally binding to both sides so long as they agree for **WoodFall's Law of Landlord and Tenant 24th Ed (Revised and Remodeled) by Leonel A. Blundell, Sweet and Maxwell 1939** at page 764 would seem to suggest that:

“It is a principle of law applicable to fixtures as well as other things that individuals on entering into a contract may agree to vary the strict position in which they would otherwise legally stand towards each other, where no absurdity or general inconvenience would result from the transaction...and if
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the Landlord wishes to restrict his tenants' ordinary right to remove trade machinery or fixtures he must do so in plain language..."

Thus the Canadian Court of Appeal for Ontario in its decision in the case of **Clemmer Steel Craft technologies Inc. v Bangor Metals Corp.**2009 ONCA 534 (CanLII) would appear to have noted this position for it stated that in order for a fixture to be considered a trade fixture which belonged to a tenant then such fixture should be that which was introduced to the land and affixed thereto by the tenant and was particular to the tenant's business or trade and thus the tenant would have the right to them at common law. with Newbold J distinguishing between chattels and fixtures when he concluded that a spray booth as was the chattel in issue was a trade or tenant's fixture that could be removed but under the terms which the parties had agreed upon. The learned justice, however went on to stress that the language used between landlord and tenant in the lease and their further dealings would govern the result of the suit for in the lease agreement in this particular case the parties had under Section 21 agreed as follows;-

"...leasehold improvements and fixtures upon the demised premises and which in any manner are or shall be attached to the floors, walls, ceiling or roof of the demised premises shall, upon commencement date, become the sole property of the landlord..."

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This provision of Section 21 was a standard form clause which originally contained exceptions for trade or tenant's fixtures that were to be listed in a schedule to the lease but in this respect the exception had been struck out by the parties and the schedule thus intentionally left blank. By acting in this manner, the learned justice concluded that the parties had made the spray booth and the racking to become property of the land lord which could only be removed by the tenant with the landlord's permission but which in this case was refused by the landlord. This arrangement which was freely agreed to by the parties was considered by the court to have reversed the common law position and the court thus accordingly dismissed Clemmer's case.

Another case which similarly followed this position was that of **Vopak Terminal Darwin Pty Ltd v Natural Fuels Darwin Pty Ltd (subject to Deed of Company Arrangement)[2009] FCA 742**) a where Natural Fuels Darwin Pty Ltd had built a large industrial bio diesel plant on land it had sub-leased from Vopak Terminal Darwin Pty Ltd and the plant included buildings, cooling towers, pipe work, distillation columns and underground tanks which cost more than United States Dollars Eighty Million US\$80,000,000.00). Under the lease provision dealing with fixtures provided in clause 13.1, it was agreed to by the parties that on or before the lease termination date, Natural Fuels Darwin Pty Ltd would at its own cost remove those fixtures and all facilities associated with the plant's installation from

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the premises from the property. Further Clause 13.2 of the same provided that if Natural Fuels were not to remove its property within three months of the termination date then Vopak could remove Natural Fuel's property and dispose it at the cost and the risk of Natural Fuels or deal with those properties as if it were theirs. The lease eventually got terminated after Natural Fuels went into administration. Vopak on its part reminded Natural Fuels' administrator on the terms of the lease agreement which required the removal of the fixtures within three months of the termination of the lease. Furthermore Vopak even gave Natural Fuel's administrator an extra extension of time to sell the fixtures but no action was taken with even the extended time running out. Vopak was thus forced to apply to court for a declaration that it had the right to deal with Natural Fuel's Property as if they were its property and indeed the court held that it could deal with Natural Fuel's property as if it were its own property on the basis of the lease agreement holding that anything fixed to the land became part of the land and would remain so until it was detached from the land and that since Natural Fuels did not exercise its right to detach its fixtures and property from the land within the time provided then those fixtures became those of the landlord as the tenant right to detach a fixture from a leased land was an exception to its obligation to deliver up to the landlord everything that has become part of the land and thus since Natural Fuels did not remove its fixtures within the time provided in the sub-lease

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(and as extended by agreement it ceased to be entitled to remove them and was therefore not entitled to interfere with their sale by Vopak.

The Plaintiff in this instant matter urged this court to similarly find for it could keep fixtures of the Defendant since similar situations existed here as the parties had entered into an agreement after the termination of the lease agreement for the demised premises that certain items listed in the inspection report (Exhibit P2) were to be handed over to the Plaintiff at the end of the tenancy which intention varied Clause 4.4 of the tenancy agreement (Exhibit P1) by altering the right of the tenant to the benefit of the Plaintiff since by that report the Defendant had agreed with the Plaintiff that certain alterations, installations, additions or improvements upon the demised premises made by the Defendant were to be left intact due to the fact that the cost of removal would result into substantial damages to the Plaintiff's premises with the consideration to be had by the Defendant for leaving those fixtures being the cost of the removal of the fixtures and subsequent costs of damage occasioned by repairs which would result during the bid to restore the premises to its agreed original condition. This argument was raised on the basis that the parties' chief officers had so agreed and thus the Defendant lost its right to remove those fixtures since the Plaintiff had accordingly by the agreement of the parties acquired the right to deal with those items as if they were its property in line the holding in the case of Vopak (above) .

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Professor Peter Butt in his work **Land Law (5th Edition) published by Thomson Law Book Co. 2006 at P.413 para.15254** gives his insight to such situations for he states that “...**the tenant has to remove his fixtures within a reasonable time after the term ends or the notice to terminate the lease expires**” while citing the case of **Smith v City Petroleum Co. Ltd [1940] ALL ER 260 at 262** thus from this exposition it would appear that removal after the lease term expires is precluded.

The Defendant in the instant matter is said to have breached the parties subsequent agreement for at the end of the tenancy term it that it sold to a third party the fixtures which had reverted to the Plaintiff on the basis that its Chief Operations Officer had no authority to enter such exclusion agreement yet the law in Uganda well settled that a private company could not bring up the technicalities arising from its internal management to defeat a third party who dealt with the company for Wambuzi CJ in the case of **United Assurance Co. Ltd v Attorney General SCCA No.1 of 1986 arising from HCCS No. 221 of 1984** held that a single officer, manager or director of company who appeared to have ostensible authority to act for the company or enter into contract on behalf of a company and who held out to represent the company, carried with him the power of the board of the company effectively changing the old legal position which was laid down in the case of **Bugerere Coffee Growers Ltd v Sebaduka & Another [1970] EA 147 11: Judgment on issues relating to tenant’s chattels claimed to have reverted to a landlord by virtue of certain terms of a tenancy agreement .Per Hon. Justice Henry Peter Adonyo: April, 2015.**

which held that an explicit resolution board was required for any action of a company's officer to bind a company with this position being confirmed by the Supreme court in the case of **Tatu Naiga & Co. Emporium v Verjee Brothers Ltd Civil Appeal No. 8 of 2000** where Kanyeihamba JSC held that any director or manager or officer who is authorized to act for the company or who holds out to act for the company had the powers of the board of directors to act on that behalf meaning that the Defendant's Chief Operations Officer Byarugaba (DW1) was in the instant case properly authorised and thus did enter into a new agreement altering the clause which was contained in the earlier lease provisions with full powers of the board to execute the agreement Exhibits B1, B2 and Y and that this court should therefore reject his belated assertion that he was not mandated and had no authority to give away the properties as he took a conscious decision to leave the listed items intact, in lieu of removing them and the Plaintiff company relied on that promise to forego its pursuit of its rights to enforce the tenant's obligations at termination of the lease thus was deprived of those items whose value was at Ug. Shs 102,678,766/= in 2007 when they were sold to another party for which the Plaintiff sought orders of this court to find that the Defendant was in breach.

The Plaintiff's memo in this respect dated the 13th March 2008 does not seem though to give a conclusive view of this matter for it does not clearly raise the **12: Judgment on issues relating to tenant's chattels claimed to have reverted to a landlord by virtue of certain terms of a tenancy agreement .Per Hon. Justice Henry Peter Adonyo: April, 2015.**

issue of whether the Plaintiff was claiming those chattels as belonging to it or to the tenant with Wavamuno (PW1) categorically admitting during cross examination that as far as he was concerned the relation between the Plaintiff and the Defendant which was one of landlord and tenant was governed by the written tenancy agreement (Exhibit P1) between the parties of July 2000 whose Clause 4.4 provided that at the expiration or sooner determination of the term, the Defendant was to peacefully and quietly yield up to the landlord the demised premises duly painted, papered, upheld, amended, repaired, cleaned, maintained and kept and if necessary replaced in accordance with the covenants and the making good all damages occasioned by the removal of the said tenant's fixtures and fittings. When this clause is carefully considered vis a vis the contention that there was alteration to its provisions, I find that this contention that those chattels became those of the Plaintiff lacking for it is clear that for the Clause in the tenancy agreement to be altered, the parties must clearly intend to do so by making exclusions to such if Clemmers and Vopak's cases cited above are to be of any help to the plaintiff for the clearly provide that any exclusion to the common law position must be agreed to by the parties. I would thus find that to argue that a report or any subsequent memo to be considered as having altered the clear clause of a contract to be preposterous for as the decisions in those cases show, any

alteration to the common law position must be singularly agreed to by the parties
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during the process when they enter into such a tenancy agreement. In my view Clause 4.4 of the tenancy agreement clause made it clear that the Defendant as a tenant was at liberty upon the expiry of the tenancy to remove or deal with its fixtures and fittings provided it made good the damage occasioned with the items listed as 1 to 14 in Exhibit P2 showing that clearly they were the defendant's chattels as they fell into four categories such biometric locks, air conditioners, fire alarm systems and tables which by nature were movable tenant fixtures which could be removed provided any damage to the suit building was made good thereof. That being the case , I find that the Defendant (tenant) was entitled to sell these properties to United Bank of Africa who took over the premises subsequent to its the departure from the premises for the tenancy agreement could not be modified through exchange of letters between the Plaintiff and the Defendant for in the first place there was no consideration at all was given for the alleged changes in the original tenancy agreement to have the plaintiff keep the alleged tenant's chattels for if that were so then those exchanges would only fall in the category of a mere gratuitous promise which is not enforceable as a contract since neither did the Plaintiff pay the Defendant for those items nor and the Defendant precluding itself from taking its properties for it clearly acted within the terms of the tenancy agreement and never at any one time failed to comply with the tenancy agreement

terms with the holding in the case of **Kenya Breweries Ltd v Kiambu General**
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Transport Agency Ltd [2002] 2 EA 398 which deals with the question of new consideration being required in order to give an alleged variation of an agreement to have a contractual effect at law coming into mind for at page 403 of that case , Gicheru JA states that;

“A variation of an existing contract involves an alteration as a matter of contract of the contractual relations between the parties. Hence, the agreement for variation must itself possess the characteristics of a valid contract...indeed, the agreement for variation must further be supported by consideration...if the agreement is mere nudum pactum (a naked pact) it would give no cause of action for breach particularly if its effect was to give a voluntary indulgence to the other party to the agreement- see voluntary indulgence to the other party to the agreement- see the case of Van Bergen v St Edmunds Ltd 91933) 2 KB 223.

Thus in my view, the stated variation could not have arisen in the first place for it was merely communications between officers of the parties before this court but were never reduced into contractual obligations which fundamentally altered the clear provisions in the tenancy agreement as the tenancy agreement itself provided the mechanism upon which it could be altered which was never the case in the instant matter.

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In the instant matter the provisions of the tenancy agreement is provides that the Defendant as tenant was at liberty to deal with its properties as it fell for it never negated its rights under the tenancy agreement as the decided cases of Clemmer's and Vopak above seems to imply . The Plaintiff therefore cannot rely on the report as its ammunition to vary the clear terms tenancy agreement since it had its own very obligations and rights clearly spelt under the said tenancy agreement which it should have acted upon. Thus my finding on this issue would be that the items listed in the plaintiff's memo dated 13th March , 2008 belonged to the Defendant and not the Plaintiff thus the Plaintiff claims to them would accordingly fail for the Plaintiff has not shown to this court that it had the right's arising from the provisions of the tenancy agreement which the Defendant had agreed to and upon which both parties acted on as a result of the exclusion of the traditional common law rights which governs the relationship between a landlord and a tenant.

5. REMEDIES:

The Plaintiff sought to be awarded the damages for breach of contract on the basis that it should have been left with the Defendant's chattels for they had become its property and thus was legally in such position to dispose them any way it liked since the Defendant had ceased to claim any further rights to them and that by the

Defendant selling those chattels to another party then it incurred losses to the value ***16: Judgment on issues relating to tenant's chattels claimed to have reverted to a landlord by virtue of certain terms of a tenancy agreement .Per Hon. Justice Henry Peter Adonyo: April, 2015.***

of those chattels which if had been disposed off at that particular time would minimized the issue of depreciation and thus the plaintiff would have got real value for money for those chattels.. The Plaintiff claimed the recovery of legal fees of Ug. Shs. 3,072,000/= which were stated to have been incurred after the Defendant in breach of the tenancy agreement failed to settle utility bills for the demised premises which action forced the Plaintiff to instruct legal counsel to pursue settlement of the same. To prove its case the plaintiff relied on the case **Jivanji v Sanjo Electrical Co. Ltd [2003]E A 98** where the Court of Appeal of Kenya considered the issue of special damages. In that case it was held that where there is a claim for special damages such claim must be must be pleaded and strictly proved taking into account the circumstances and nature of the act complained of.

In the instant case, PW1 alludes to his experience as a businessman and thus the invited this court to accept his evidence and recognize his experience in business and his standing in society and as being of evidential value to prove the Plaintiff's case taking into account the principle of awarding damages as was held in the case of **Rookes V Barnard [1964] AC 1129** (House of Lords) which demands restoration an injured party to the position he should have been in had the injury complained of not been inflicted with PW1 stating only an award of U.shs 203,072,000/= would restore the plaintiff in the position it was in before he defendant breached its obligations together with an award of general damages for **17: Judgment on issues relating to tenant's chattels claimed to have reverted to a landlord by virtue of certain terms of a tenancy agreement .Per Hon. Justice Henry Peter Adonyo: April, 2015.**

breach of contract at the sum of sum of Ug. Shs 50,000,000/= would compensate the plaintiff for all the sufferings, inconveniences and mental anguish the Plaintiff had gone through over the years.

Apart from this general testimony there was no proof of the value of the suit properties adduced in court. It is trite that special damages must be both specifically pleaded and specifically proved for such a claim to succeed thus the Plaintiff's claim for special damages would fail for lack of proof.

As regards to the Plaintiff's claim for Ug Shs. 3,072,000/= stated to be legal costs which arose as a result of issuing a demand letter for payment of a utility bill to the Defendant, I would also find that this claim would fail for as well for the claim of securing the payment of the utility bill was not pleaded and thus not a subject for investigation by this court as to its veracity or not in this court. In any case, I would consider such a claim to be only arising as an outcome of a court bill of tax order on costs incurred in a suit which would be the point of reference but is lacking here.

As for the claim for Ug Shs, 50,000,000/= being general damages claimed this must also fail as it is without basis for I find that no contract having been breached by the Defendant to sustain such an award by this court as it was within the contractual right of the Defendant to transfer its rights in its assets to whomsoever

it wanted having exercised its obligations under the contract of the tenancy which
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in my view could only be varied by legal instrument properly acceded to by both parties and not what was produced in court as evidence of the variation of a contract by the parties for there could have been no variation to the contractual terms other than those terms which are mutually agreed to and assented to by the parties through the tenancy agreement notwithstanding the fact that there were letters purporting to wave such rights which I find to be of no effect since they do not operate to alter clear the terms of a contract unless and until the parties properly signified to in which case none exists and so could not operate to change terms of the tenancy.

6. Orders:

From the above, I find that there is no merit to the Plaintiff's case against the Defendant as the Plaintiff failed to prove its case against the Defendant to the required standards this suit is dismissed suit with costs to the Defendant in any event.

I do so order accordingly.

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