THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CS No. 663 of 2013

1. **GENERAL INDUSTRIES (U) LTD**
2. **HAJJI HARUNA SEMAKULA::::::::::::::::::::PLAINTIFFS**

VERSUS

1. **NANAKASA TRADERS (U) LTD**
2. **AHMED SSEBULIBA**
3. **HAKIM SSENDI:::::::::::::::::::::::::::::::::DEFENDANTS**

BEFORE HON. JUSTICE RICHARD WEJULI WABWIRE

JUDGEMENT

This suit was commenced by the Plaintiffs against the Defendants for an eviction order, recovery of Shs. 118,000,000/= being accumulated rent arrears, cost of demolishing toilet structures on the Plaintiffs premises, an order that the Defendants restore the suit land to its state before the Agreement, a permanent injunction against the Defendants, damages, interest and costs of the suit following breach

of a tenancy Agreement executed on 29th June 2011 between the parties.

The only agreed fact according to the Joint Scheduling Memorandum is that the Defendants rented the Plaintiffs' land for which they paid Shs 72,000,000/= in rent and established a market thereon. The 1st Defendant then counterclaimed Shs. 6,000,000/= being rent unutilized.

At scheduling, the parties raised three issues for resolution, namely;

1. **Whether the Defendants breached the terms of the tenancy Agreement between them and the Plaintiff.**
2. **Whether the Defendants are entitled to Ugx. 6,000,000/ being unutilized rent.**
3. **Whether the parties are entitled to the remedies prayed for.**

The Plaintiffs were initially represented by Moses Kuguminkiriza of Kuguminkiriza & Co Advocates but he was taken ill, upon which the 2nd Plaintiff opted to represent himself while M/s Nakachwa & Partners Advocates represented the Defendants. The parties filed written submissions.

Issue 1: Whether the Defendants breached the terms of the tenancy Agreement between them and the Plaintiff.

It is common ground that the parties entered a tenancy Agreement by which the Defendants rented the Plaintiffs property and paid up the duly agreed rent. The Agreement was in writing and is on record.

Plaintiffs' submissions.

In his submissions, the 2nd Plaintiff stated that the Defendants used the land as a marketplace without first seeking consent of the landlord.

That when the two years of the tenancy elapsed, the Defendants simply walked away and did not bother to have the market stalls and toilet removed, which constituted a breach of the tenancy Agreement. That it is a common law position that even if it is not reduced into writing the tenant should always put the land rented from a landlord in the state it was in at the time of starting the tenancy.

That it was also a breach of the tenancy Agreement when the Defendants left a number of sub-tenants in the premises even when they purported to have vacated the premises. That there is no evidence that these sub tenants were told to vacate the Plaintiffs' land.

That the Defendants also breached the tenancy agreement when they did not demolish two toilets on the Plaintiffs land, when the tenancy agreement terminated. The Plaintiffs allege that one of the toilets was constructed outside the portion of land rented by the Defendants and the Defendants did not seek the consent of the landlord/Plaintiff to construct that toilet. That in cross examination of DWI, She stated that one toilet would have been removed but they did not do it for fear of trespass, which constituted an admission and breach of the tenancy Agreement.

Defendants' submissions

In reply the Defendants' Counsel submitted that by his own admission in cross examination, the 2nd Plaintiff- PW1, agreed to the operation of the market on the said land and was aware there was need for a toilet to be constructed for purposes of running the said business. That indeed the Defendants constructed a toilet on the land. That the Defendants did not know anything about the 2nd toilet as it had allegedly been constructed by KCCA and they had never procured the same.

That it is not true that at common law a tenant should always return the land rented to a landlord in the same state as it was at inception of the tenancy

They drew Courts attention to the case of **ATC Uganda Limited V Kampala Capital City Authority; CS No.323/2018 for the** legal proposition that that unless otherwise specifically provided, fixtures by a tenant become part of the land unless a tenant can remove them with ease, with no or minimal damage to the land**.** That this means there was no way the Defendants could remove the toilet they had constructed because it had become an integral part of the land.

This line of submission notwithstanding, it is common ground that the Defendants would have liked to remove the 1st toilet but only feared to be cited for trespass on the Plaintiff's property.

That with respect to the stalls, it was the evidence of DWI, that they indeed informed the Plaintiffs by way of letter (PE2) that they were vacating the land upon expiry of the tenancy and that they had

equally, through a public address system, informed their tenants to leave the market, which they did and took away their stalls.

That the tenants who are on the land after the Defendants left the premises are staying on the authority of the Plaintiffs. That to prove that the Plaintiffs knew that the Defendants had left the premises, the Plaintiffs through their lawyers wrote **PEX3** to a one Hajati Minsa Kabanda and in paragraph 3 of the said letter stated that the 1st Defendant's tenancy had expired on 31.08.2013 and even acknowledged the Defendants letter **PEX2** of 20th July 2013.

Resolution of Issue.

Section 33 of the Contracts Act, 2010 provides that the parties to a contract shall perform or offer to perform their respective promises, unless the performance is dispensed with or excused under the Act or any other law.

Black's Law Dictionary 5th Edition at page 171 defines breach of contract to mean where one party to a contract fails to carry out a term.

Further, in the case of **United Building Services Ltd V Yafesi Muzira, CS No.154 of 2005** breach of contract was held to occur when one or both parties fail to fulfill the obligations imposed by the terms of the contract.

The definition was more succinctly stated by Justice Bamwine in the case of **Mamba Point Limited v Domus Aurea Limited High Court Civil Suit No. 0638 of 2004** that *breach of contract* is the violation of

a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance.

The tenancy Agreement entered between the Plaintiff and Defendants on 29th June 2011, in which the respective obligations of the parties are enshrined, was not disputed by any of the parties.

It was agreed that the tenancy was for purposes of doing business on the premises at an agreed fee of Shs. 72,000,000/= (Seventy Two Million Shillings) which was fully paid by the 1st Defendants. See acknowledgement receipts marked **DEX1-4** of the trial bundle.

I will deal with each head of alleged breach individually.

Use of the premises.

It was the Plaintiffs' case that the Defendants breached the said Agreement when they used the land as a marketplace without the Plaintiffs' consent.

A perusal of page 2, clause 4 of PEX1 states that the tenant let out the land for the purpose of establishing or operating a market thereon.

According to the Agreement, establishment of a market on the suit land was agreed to by the parties and therefore no additional consent was required. It cannot be said that there was a breach of Agreement in that regard.

Removal of market stalls.

The Plaintiff further submitted that the failure to remove the stalls and toilets erected by the Defendants was a breach by the Defendants, of the tenancy Agreement.

The burden of proving that the stalls were not removed, as in all civil cases had to be discharged by the person who asserts or alleges and the other party can only be called to dispute or rebut what the party alleging has proved, -See S.101, 103 Evidence Act Cap.6, **Sebuliba V Cooperative Bank 119821 NCB 129**

DW3 testified that the stalls having been temporary structures made out of wood, were removed when the Defendants were leaving. The Plaintiff therefore had the burden to prove on a balance of probabilities that the Defendants did not remove their stalls upon departure**.**

No evidence was adduced to prove that the stalls were still on the property.

Instead, in his cross-examination PW1 clarified that there was no provision in the Agreement, for demolition of structures put on the land.

There was therefore no obligation in the tenancy Agreement that required removal of the stalls upon expiry of the rent period. In the absence of such an obligation in the Agreement, then there cannot have been breach in that regard.

Removal of toilets.

From the evidence of PW1 it was clear and undisputed that the Plaintiffs were aware that when the 1st Defendant rented the Plaintiffs' land it was for purposes of establishing and operating a market on the 1.5 acres he had let out. This was clearly stipulated in paragraph 4 of PEX1 as the purpose for which the land was let out.

Under Paragraphs 6, 7 and 8 of PEX1, it was the responsibility of the tenant (1st Defendant) to ensure they comply with all laws and regulations necessary to run its trade (market) as well as ensure the general cleanliness of the area under which the market was being operated, a toilet was a necessity. Even when cross examined, PW1 acknowledged that that a toilet was prerequisite for setting up the business of a market.

To fully enjoy the benefits of the tenancy therefore, the premises had to have a toilet as an integral part, so that it does not matter who put up the toilet on the premises, even if it was the Defendants.

Were the defendants under any obligation to remove the toilet?

In **ATC Uganda Limited V Kampala Capital City Authority, CS No. 23 of 2018**, Court held that;

> "*…unless otherwise specifically provided, fixtures by a tenant become part of the land and unless a tenant can remove them with ease, with minimal or no damage to the land, the same becomes a part of the land"*

The toilet cannot be considered a fixture whose removal may irreparably damage the land. The Defendants could easily restore the land to its original state.

However, they were under no contractual obligation to remove the toilet at the end of the tenancy. Whereas therefore their omission to remove the toilet may be a source of annoyance and inconvenience to the Plaintiffs, it was not a breach of any obligation under the tenancy agreement.

I therefore find that there was no breach of contract by the Defendants in respect to the 1st toilet.

Be that as it may, DW1 stated that the Defendants were willing to remove the 1st toilet but did not do so for fear of being cited for trespass if they went back onto the premises.

Regarding the 2nd toilet, the Defendants submitted that they had never given authority for its construction. However, PW1 stated that the said toilet was constructed by KCCA at the Defendants' behest. The toilet is said to be located about two (2) acres away from the land that had been rented out to the 1st Defendant.

The Plaintiffs did not adduce evidence of the Defendants' solicitation of KCCA to construct the toilet.

I do not understand why then, the Plaintiffs would want the Defendants to demolish a toilet that they never authorized to be constructed.

In the absence of evidence to prove that the 1st Defendant had procured construction of the 2nd toilet, the Defendants cannot be held liable for actions of KCCA.

From the foregoing, there was therefore no breach of the Agreement in respect to the 2nd toilet, as it was not constructed by or under the Defendants' authority.

Sub-tenants on the premises.

The Plaintiffs further submitted that it was a breach of the tenancy Agreement when the Defendants left a number of sub -tenants in the premises even when they purported to have vacated the premises.

In **PEX2,** the 1st Defendant wrote to the 1st Plaintiff on 20th July 2013 terminating the tenancy through their expression of no intention to renew the same.

The said termination of the tenancy Agreement is corroborated by **paragraph 2 of PEX3** dated 11th June 2014 wherein the Plaintiffs' lawyer wrote to the Chairperson Finance Committee of the Nakivubo War Memorial Stadium stating that the land in question is no longer rented by the 1st Defendant.

During cross-examination of **PW1,** he also admitted that the Defendants terminated their tenancy before its expiry on 31st August 2013, as evidenced in **PEX2**.

Read together, the evidence in **Pex2 and Pex3** leads to the conclusion that the tenancy Agreement between the Plaintiffs and the Defendant was accordingly terminated.

However, during his cross-examination, PW1 stated that there were some tenants who were left behind by the Defendants and who refused to vacate and these included Ssenyimba Mukiibi, Michael Mukiibi, Kitezaala and Rosemary Nakityo.

During her re-examination, DW1 testified that Mr. Ssenyimba and Kitezaala stayed on the land because they entered a tenancy Agreement with the 2nd Plaintiff.

In **DEX5** dated 2nd January 2016 the Plaintiffs through their lawyer wrote to Mr. Kitezaala Abubaker, Mr. Semujju Suleiman and Mr. Senabulya Baker a letter terminating the tenancy between him and the people he alleges were left behind by the Defendants. The letter was titled '*Termination of tenancy with our client'.*

Under paragraph 2 of that letter, reference was made to an earlier **letter dated 4th September 2015** in which the Plaintiffs had terminated the tenancy with the said people. It was stated that the purpose of this letter was to inform these people that their tenancy had terminated as of 31st December 2015.

In that letter the Plaintiffs asked these people to vacate their land and remove their properties and hand it over to the new tenant, Mr. Senoga John. This letter is also further indication of acknowledgement that the contractual relationship between the parties had ceased and the Plaintiffs had entered a new tenancy with new clients.

The same premises could not have had two concurrent tenancy Agreements – one with the Defendants and the other with Senoga

John, to whom to whom the people said to have been occupying the premises were directed, by the plaintiffs, to handover the premises.

Strangely, these are the same people whom the Plaintiff claims not to know in his cross-examination. For example, one of the people the Plaintiff referred to as the Defendants' tenants was Nakityo Rosemary and yet during his cross examination PW1 confirmed that his lawyer signed on page 2 of DI2 of an Agreement made in January 2017 between the 1st Plaintiff and the said Nakityo Rosemary.

Under clause 2 of that Agreement the Plaintiffs stated that their tenancy Agreement with the 1st Defendant expired on 31st August 2013 and that the said Nakityo was willing to rent it and the terms were accordingly agreed to. Clearly, the people who occupied the premises after August 2013 were authorised by the Plaintiff. Whereas PW1 insisted that it is the Defendants who brought those tenants, he did not adduce any evidence to prove that allegation.

I am not convinced that the 1st Plaintiff did not know the people who stayed behind yet evidence shows that he had entered an Agreement with them.

The Defendants' submitted that through a public address system they informed the tenants to leave the premises and to take whatever belongings they had on that land. That the notice of leaving given to the tenants was not written because even when inviting them, it was not done in writing.

It is a notorious practice in Uganda, of which Court takes Judicial notice, that in crowded places like markets information is often

delivered through public address systems commonly known as hailers, in circumstances such as the ones in this case, where the people to whom the Notice was directed do not contest its effectiveness, the notice amounts to sufficient notice.

The Defendants were consequently not responsible for any of the remnants on the property and in the event, there was no breach occasioned by the Defendants in this regard.

Non-payment of rent

On breach of the Agreement by non-payment of rent by the Defendants, my assessment of the evidence presented in this case is that a tenancy Agreement (PEX1) was entered into between the 1st Plaintiff and the 2nd Defendant on 29th June 2011. Paragraph 3 thereof provides that the said tenancy is renewable at the option of the landlord on the same terms or on other terms as parties mutually agree.

The Agreement provided that the land had been let out for a consideration of Shs. 3,000,000/= per month for a period of two (2) years bringing the total amount to Shs. 72,000,000/=, whose payment and receipt is not contested by the parties.

DEX1, DEX2, DEX3 and DEX4 is evidence of payment and receipt of the said Shs 72,000,000/=. There was therefore no default in payment in respect of this Agreement.

However, in cross examination, PW1 stated that his claim for outstanding rent was premised on P1D1, which is an unsigned

Agreement which was allegedly being negotiated with the 2nd and 3rd Defendants as individuals and not on behalf of the 1st Defendant.

The 2nd and 3rd Defendants cannot be held liable for rent arrears on an Agreement that was never executed by them or at all by anybody.

In the circumstances, the Plaintiffs have failed to prove the Defendants' breach by non-payment of rent arrears on the basis of an uncompleted non–binding Agreement.

In the event, Issue No. 1 is answered in the negative. The Defendants did not breach the Tenancy Agreement between them and the Plaintiffs.

ISSUE 2: Whether the Defendants are entitled to Ugx. 6,000,000/ being unutilized rent.

It was the Plaintiffs' submission that the Defendants failed to prove this counterclaim against the Plaintiff. That as admitted by DW1, the tenancy Agreement of 2 years started running on the 29th June 2011 and expired on the 29th day of June 2013. That the Defendants kept the premise even when their tenancy expired and the letter informing the landlord/ Plaintiff of termination of the tenancy was written 2 months thereafter on the 31st August 2013. That as such, the counterclaim of Shs. 6,000,000/= (Six Million Shillings Only) being alleged unused rent of 2 months had been used up and prayed that the same be dismissed with costs to the Plaintiff.

In reply the Defendants' Counsel submitted that upon entering into the tenancy Agreement (PE1), they had already been in occupation

of part of the land and had paid Uganda Shillings 5,250,000/= as evidenced in clause 3 of the preamble to PEXI, as rent on the initial Agreement. That according to clause 2 of PEX1, an Agreement had to be worked out for the mode of payment of the balance on rent less the earlier payments/ deposits. That instead the 1st Defendant through a series of installments paid the entire amount of Shs. 72,000,000/= payable on the tenancy and the amounts in clause 3 remained unutilized. That PWI, in cross-examination acknowledged that indeed the said amounts were never utilized and the same ought to be paid to the 1st Defendant.

As rightly submitted by the Defendants, clause 3 of PEX1 evidently states that the Defendants had paid Uganda Shillings 5,250,000/= before entering the tenancy Agreement in question. During his cross-examination PW1 admitted that the Defendants did not utilize their Ugx. 6,000,000/. He stated that he applied it to their over staying the alleged extension. During cross examination of DW1, it was agreed that the Defendants were paying Ugx. 3,000,000/ per month. DW1 testified that the tenancy Agreement between the parties was for a period of 2 years and was to expire on 29th June 2013. That by the time the termination letter was written on 20th July 2013, the tenancy had already expired contrary to their allegation in the said letter that it would expire on 31st August 2013. She confirmed that the Ugx. 6,000,000/ was included in the termination letter, to the extra two months expiring on 31st August 2013 instead of 29th June 2013.

I am in Agreement with the Plaintiffs that the Ugx. 6,000,000/ that was counterclaimed by the Defendants was properly applied to the Defendants' over stay by two months.

The Plaintiffs do not therefore owe the Defendants any money as alleged in the counterclaim.

In closure of my analysis of the evidence, my mind is once again drawn to the definition of "breach of contract".

In the case of **Jarvis v Moy, Davies, Smith, Vandervell & Co ([1936] 1 KB 405)** breach of contract as stated by Greer LJ, is said to occur where that which is complained of *is a breach of duty arising out of the obligations undertaken by the contract*." (emphasis by court)

Breach of contract can only be based on the contractual terms signed up by the parties.

Parties to a contract are bound by the terms of the Agreement which they have negotiated and it is only upon default to meet obligations created by these terms that a breach of contract arises. Extraneous factors that may prejudice or undermine or defeat the performance of obligations or commission of actions that undermine the contractual obligations do not give rise to a claim for breach, unless they are the handicraft of the errant party.

The Plaintiff's grounds for breach entail; ostensible failure by the Defendants to remove people (sub-tenants) who settled on the premises after the tenancy had lapsed, removal of toilets on the

rented land and the adjacent property and failure to pay rent under an unsigned contract.

There was no evidence adduced that the Defendants were responsible for settlement on the property by the people said to have occupied after departure of the Defendants nor was any evidence adduced that the Defendants constructed the toilet on the adjacent property.

The Plaintiffs seem to want to derive their claim outside the precincts of the terms of the signed contract that was entered with the Defendants and also on the basis of another uncompleted Agreement.

This would be independent of any of the contractual obligations undertaken by the Defendants in the tenancy contract – which I have had the benefit of carefully perusing and found nothing that could give ground to the possibility of liability for any of the alleged breaches.

The Defendants were under no contractual obligation of the kind that the Plaintiff seems to want to place on them.

ISSUE 3: REMEDIES

The Plaintiffs prayed for an eviction order against the Defendants, their agents, representatives or any person claiming rights under their names, refund of the cost of removing the stalls and toilets constructed in the market at Ugx. 50,000,000/, permanent injunction, damages, interest and costs.

Section 61(1) of the Contracts Act 2010 provides that:

"Where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract compensation for any loss or damage caused to him or her."

This was further expounded in the case of **Hadley V Baxendale (1843-60) ALLER 461**, where ALDERSON B held that:

"*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered as arising naturally from such breach of contract itself."*

Having found that the Defendants did not breach the tenancy Agreement entered between the Plaintiff and the 1st Defendant and that in respect to the 2nd and 3rd Defendants, no Agreement was executed between them and the Plaintiffs, it follows that the Defendants cannot therefore be held liable in damages or any form of atonement to the Plaintiffs.

Regarding the issue of removal of the toilets, PW1 clearly stated in his evidence that the toilet they sought to have demolished was the one built by KCCA. The said toilet had nothing to do with the Defendants, it was after all constructed by a third party, KCCA, in land separate from the land rented by the Defendants.

I do not agree with the proposition by the Defendants, which seems to have been the inference by the Plaintiff in his submissions as well, that a pit latrine toilet on the land is a permanent fixture which cannot be demolished without causing damage to the land. Pit latrines are

commonly filled up with earth when disused and the land upon which they were fixed is regenerated for other alternative uses. This is a notoriously known fact and common practice, especially in the rural and peri-urban communities in this Country.

Indeed in their testimony, PWE1 indicated that the Defendants were constrained from removing the toilets, by their fear of being found in trespass o the Plaintiff's land. DW1 indicated that they were willing to remove the 1st toilet if they are allowed onto the land.

That said, the omission to remove the toilet is not, in my view, a breach. After all it is a forgone conclusion that the Defendants were under no contractual obligation to remove the toilet.

In his submissions, the Plaintiff is aggrieved that the Defendants did not seek his consent nor did they demolish the toilet, at their own cost.

From the testimony of DW1 and as submitted by the Plaintiff, the only reason that the Defendants did not remove the 1st toilet was fear of the consequences of possible trespass. In this way the Defendants acknowledge that they ought to have removed the toilet. For the obvious reason therefore that the toilet was only introduced because it was necessary for the Defendants business and would now appear to have become an inconvenience and a source of annoyance to the Plaintiff, it is only proper that the Defendants remove the 1st toilet.

To give closure, with finality, to the matter and to avert the possibility of other suits, I do grant an order for removal of the 1st toilet by the Defendants.

I am however mindful of the fact that the relationship between the parties might have gone sour and so it would be impractical for the Defendants to enter the Plaintiffs' land solely for purposes of demolishing the 1st toilet.

The Plaintiff has prayed for Ugx. 50,000,000/ for demolition of the toilets. It was however not substantiated how he arrives at this amount. This amount was also based on the demolition of two toilets which includes the 2nd toilet for which the Defendants are not liable in any way.

In the event I allow Shs 10,000,000/= for costs of demolition of the 1st toilet and restoration of the land.

Special damages

The Plaintiff claimed special damages amounting to Shs. 118,000,000/= at the time of filing the suit. In his testimony PW1 stated that it arises from breach of PID1 but which, as has been established, was never executed.

Special damages mean quantifiable monetary losses specifically pleaded and proved. The Plaintiffs have not proved how Shs. 118,000,000/= was incurred. Be that as it may, an Agreement that was not executed is not a valid Agreement. As such Court cannot rely on it to ascertain and award any damages.

General damages.

General damages as defined in the case of **Kampala District Land Board and Anor V Venansio Babweyaka, SCCA NO.2 OF 2007**

arise from the direct, natural or probable consequence of the act complained of.

It has been established that none of the allegations of breach the Plaintiff claims to have suffered were occasioned by the Defendants as alleged. No inconvenience was therefore suffered by the Plaintiffs to warrant grant of general damages against the defendants.

Following the fact that there was no breach of any of the terms of the tenancy Agreement, Court finds that the Plaintiffs are not entitled to any damages as sought or any interest thereto.

Eviction Order.

The Defendants have already left the suit premises. An eviction order against them would therefore be in vain and nugatory and is accordingly denied.

Permanent Injunction.

Similarly, I find the prayer for a permanent injunction unfounded and it is accordingly denied.

Costs.

S. 27 of the CPA provides that costs follow the event. It has been established that there was no breach on the part of the Defendants and consequently that the Plaintiffs are not entitled to any of the remedies sought.

Save for the demolition of the 1st toilet, which remedy has been granted at the discretion of this Court based on the Defendants prior

willingness to remove the toilet, the Plaintiffs are not a successful party in this suit.

In the event, the suit is dismissed with costs awarded to the Defendants.

Delivered at Kampala this 30th day of September 2020.

Richard Wejuli Wabwire

JUDGE

Present in Court:

1. 2.

3. 4.