

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT NO. 321 OF 2018

LAWRENCE TUMUSIIME :::PLAINTIFF

VERSUS

PATRICK IDRINGI SALVADO:::DEFENDANT

BEFORE: HON JUSTICE DUNCAN GASWAGA

JUDGMENT

- [1] This is a judgement on a suit brought for; a *declaration that the defendant is in breach of contract in respect of the tenancy agreement dated 28th June, 2016 between the plaintiff and the defendant for land comprised in Kyadondo Block 222 Plot 2448 at Namugongo (hereinafter referred to as “the suit land”) dated 28th June, 2016; an order of rescission of the tenancy agreement dated 28th June 2016 between the plaintiff and defendant in respect of the suit land on account of the defendant’s false misrepresentations; an order permitting the plaintiff to repossess the suit land and developments thereon; special damages for breach of contract; interest; general damages; interest and costs.*
- [2] The brief background to this suit is that at all material times the plaintiff and his wife were the registered proprietors of the suit land

where the plaintiff operated a bar and grill lounge as well as a car washing business. In March 2016 the defendant approached the plaintiff with a representation that he was carrying on business with a one David Greenhalgh in a company known as **“House of Laughter Bar and Grill Limited”** and wished to take up the said land for re development and use by the said entity on rental terms for a period of 5 years. On 08/04/2016 the plaintiff’s wife granted him a power of attorney mandating him to enter into any agreements for the rent and management of the property. That on 09/04/2016 the defendant signed a tenancy agreement in respect of the said property as a director of **“House of Laughter Bar and Grill Limited”**, a purported company which was subsequently established not to exist on the company register. It was agreed in the said tenancy agreement that;

- (i) the defendant was to pay rent in the sum of Ugx 4,500,000/= per month with effect from 01/06/2016,
- (ii) the defendant was mandated to demolish the structures on the said land and construct new structures thereon at his own cost and at the expiry of the tenancy the tenant’s structures would revert to the plaintiff. That pursuant to this agreement the defendant took possession of the said land but breached the same by failing to pay rent as it fell due. The defendant further failed to complete the structure he attempted to erect on the land at the time of the said agreement. As a result of the breach the plaintiff terminated the said agreement by way of re-entry as mandated under Section 103(2) Registration of Titles Act and sued the defendant in his personal capacity on account of having executed the said agreement as a director of the above non-existent company.

[3] This suit raises seven issues to wit;

1. Whether the defendant made any false representation to the plaintiff as to the existence of House of Laughter Bar and Grill

2. Whether the defendant signed a tenancy agreement dated 09/04/2016 in respect of the plaintiff's property comprised in Kyadondo Block 222, Block 2448 at Namugongo as a director of "House of Laughter Bar and Grill Limited"

3. Whether the "House of Laughter Bar and Grill Limited" was in existence at the time of signing the said tenancy agreement

4. Whether the defendant is personally liable on the said agreement

5. Whether the defendant breached the terms of the said tenancy

6. Whether the plaintiff suffered any loss and damage

7. Whether the plaintiff is entitled to the reliefs sought

[4] At the hearing of the suit on 25/02/2020 counsel for the plaintiff informed court that she had filed a joint scheduling memorandum which, together with the respective hearing notices had been served on the defendant on 18/02/2020. This is confirmed by the affidavit of service filed on the court record. The defendant however did not turn up in court for the hearing without any excuse. In the circumstances, Counsel sought and obtained leave to proceed ex parte and also filed written submissions. Of importance to note however is that whether a case proceeds ex-parte or not the burden of the plaintiff to prove his case on a balance of probabilities remains. See **Kityo Vs Eria Kadu [1982] HCB 58** and **Kiwalabye Stephen Kifamba John Musoke, HCCS No. 458 of 2012.**

[5] I find it apposite to resolve issues 1, 2, and 3 concurrently. It is the plaintiff's case that the defendant approached the plaintiff with a business proposition on behalf of a purported company called **M/s House of Laughter Bar and Grill Limited**. In his unchallenged evidence the plaintiff (PW1) stated that the defendant had convinced him that he was carrying out business under the said company together with a one David Greenhalgh, a well-known businessman with financial capacity to undertake the business under the terms proposed above. On the basis of the said representation the plaintiff executed a tenancy agreement (EX P2) on 9/04/2016 showing **M/s House of Laughter Bar and Grill Limited** as the tenant and the defendant signed it as a director of the said company. As it turned out later, a search at the Companies Register dated 15/05/2018 (EX P5) revealed that the purported company "**House of Laughter Bar and Grill Limited**" on behalf of which the defendant had signed as its director was non-existent at the material time and, in fact, no such company had ever been incorporated under the laws of Uganda.

[6] Black's Law Dictionary, 2nd edition defines a misrepresentation as "*a false statement or misrepresentation made intended that the listener will rely upon it and act upon it to their detriment*". In the case of Fredrick J.K Zaabwe Vs. Orient Bank Limited Civil Appeal No.4 of 2006, the Supreme Court defined the term misrepresentation as; "*a false representation of a matter of fact whether by word or by conduct, by false misleading allegations, or by concealments of that which deceives and is intended to deceive another so that he may act upon to his legal injury.....anything calculated to deceive, whether by a single act or culmination, or by suppression of the truth, or*

*suggestion of what is false, whether it is by direct falsehood or the innuendo by speech or silence, word of mouth, or look or gesture.. a generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestions or by suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheatedⁿ. See also **AZK Services Limited Vs. Crane Bank Limited, HCCS No. 334 of 2016***

- [7] From the foregoing discussion, there is ample evidence to prove that at the time of signing the said agreement, and indeed up till now, **M/s House of Laughter Bar and Grill Limited** was, and still is, a non-existent company. It therefore follows that the defendant misrepresented facts to the plaintiff when he held out as a director of a non-existent company and went ahead to purport to sign the said agreement on behalf of that company. See EX P2. The defendant also misrepresented to the plaintiff that he was a partner with one David Greenhalgh and that they had the necessary resources to finance the construction of the redesigned structures on the suit land. I have no reason whatsoever to doubt that this was a well-orchestrated move by the defendant calculated and intended to deceive the plaintiff and induce him into signing a bogus agreement to his peril. The representation by the defendant was misleading, full of falsehoods, and a suppression and or concealment of the truth, all intended to cheat the plaintiff and instead give the defendant unfair advantage. Right from the time of signing the agreement the defendant was aware of this misrepresentation. He cannot say it was

a mistake because the company he claimed to be acting for was never in existence. Even the closest name in resemblance i.e “**House of Laughter Limited**” was, according to the certificate of incorporation (EX P6), incorporated much later on the 16/06/2016, carefully leaving out the words ‘**Bar and Grill**’ and thereby making it a different company from the earlier name used in the agreement. I should perhaps observe that it is indeed very disturbing for the defendant to boldly indicate in his written statement of defense *para 6 (i) and (ii)* that the plaintiff had let out his land to “**House of Laughter Ltd**” and then went ahead to refer to the attached tenancy agreement (annexture **A**) which clearly shows the tenant as “**M/s House of Laughter Bar and Grill Limited**” and not “**House of Laughter Ltd**” which was registered on 16th June, 2016 much later after the signing of the tenancy agreement herein. This was a blatant lie!

[8] Accordingly, the first two issues are answered in the affirmative while the third issue is answered in the negative.

[9] **Issues 4,5 and 6 shall also be resolved together.** Although according to section 52 of the Companies Act a director can execute any documentation on behalf of the company, it should be noted that the defendant herein could not do so because he falls outside this category. He purported to be a director of **M/s House of Laughter Bar and Grill Limited**, a non-existent company. Yet, a non-existent entity cannot sue or be sued and therefore, to be precise, is incapable of maintaining a suit in court. **See Wasswa Primo Vs Moulders (U) Ltd, MA No. 685 of 2017.** However, section 54(1) of the Companies Act is instructive on the matter. It states: “*A contract which purports to be made on behalf of a company before the*

company is formed has effect as one made with a person purporting to act for the company” It was held in **Kelner Vs Baxter (1866) LR 2CP 174** by Erie, CJ that:

“if the company had been an existing company, the persons who signed the agreement would have signed as agents of the company. But as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that where a contract is signed by one who professes to be signed as an agent, but who has no principle existing at the time and the contract would be all together inoperative against the company.”

See also **MaatschappigVonck BVBP Vs Andreas Lybaert & Anor, HCCS No. 295 of 2008.**

- [10] From the evidence of PW1 it is not disputed that the defendant personally and or directly executed the tenancy agreement EXP 2 with the plaintiff purporting to be a director of a non-existent company. This was a pre-incorporation contract. So, legally, there was no corporate veil of a company known as **M/s House of Laughter Bar and Grill Limited** under which the defendant could take shelter to execute the said agreement as a director. Further, given that a pre-incorporation contract involves a situation in which a company has not yet been formed, a person who purports to act on behalf of the company cannot have any authority to bind that company. This is exactly what happened in this case and the defendant should therefore be held personally liable for executing the tenancy agreement herein with the plaintiff. I therefore find this

agreement valid and enforceable as between the plaintiff and the defendant. The evidence of PW1 and PW2 fortifies this position especially when they stated that the defendant had gone ahead to carry out some developments on the premises as he wished to suit his plans after signing the tenancy agreement. In the case of **William Kasozi Vs DFCU Bank Limited, HCCS No. 1326 of 2000**, Byamugisha, J (as she then was) held that: *“once a contract is valid; it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in absence of fraud or misrepresentation, the party signing it is bound by its terms”*.

[11] It has been submitted that after creating the said contract between the parties the defendant went ahead to breach its terms. According to the **Black’s Law Dictionary, 8th Edition at 200**, *“breach of contract means a violation of a contractual promise by failing to perform one’s own promise”*. **Davies on Contract 10th Edition at 287** stated that *“a breach of contract occurs where a party fails to perform or evinces an intention not to perform one or more obligations laid upon him or her by the contract”*. See also **Emmanuel Kyoyeta Vs Emmanuel Mutebi, Civil Suit No. 781 of 2014** (High Court).

[12] In addition, it was held by Kawesa Isabirye, J in **Kyarimpa Sarah Vs Harreit Nassozi Hewet, HCCS No. 0793 of 2016** that

“Where a party to a contract fails to perform his or her obligations or performs them in a way that does not correspond with the agreement, the guilty party is said to be in breach of the contract and the innocent party is entitled to a remedy”. In other words, or put differently, *“breach of contract is the*

breaking of obligation which a contract imposes which confers a right of action for damages to the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible or substantially fails to perform his promise".

See **Ronald Kasibante Vs Shell (U) Ltd, HCCS No. 542 of 2006 ULR 690.**

- [13] The uncontroverted evidence on record shows that the contract under which the parties freely defined their obligations was breached by the defendant and as a result the plaintiff suffered loss and damage. The plaintiff as PW1 had called in witnesses Lutakome Alex and Wanyakala Emmanuel Leonard, among others, to substantiate his case. For instance, the witnesses satisfactorily testified that the defendant had failed to construct the new structures on the land after breaking the old ones as covenanted and instead abandoned the site with incomplete buildings. He also destroyed the shallow well that provided the plaintiff with water for his car washing business yet he was to reconstruct it at the end of the tenancy. The plaintiff reconstructed it at a cost of 20,000,000/=. The defendant also failed to pay the agreed monthly rent of 4,500,000/= after some time which forced the plaintiff to terminate the tenancy, demand for the outstanding rent arrears (see EXP 12 and EXP 13) and also effect a re-entry pursuant to section 103(2) of the **Registration of Titles' Act**. Clearly, the defendant breached the terms of the tenancy Agreement thereby causing pain, inconvenience, loss and damage to the plaintiff for which he should be held liable. As such, issues four, five and six are answered in the affirmative.

[14] Issue seven is **whether the plaintiff is entitled to the reliefs sought**. The plaintiff has prayed for **special damages** in the sum of Ugx 482,164,750/=. It is the law that;

“Special damages must be specifically pleaded and proved, but that strictly proving does not mean that proof must always be documentary evidence. Special damages can also be proved by direct evidence; for example, by evidence of a person who received or paid or testimonies of experts conversant with the matters”.

See **Gapco (U) Ltd Vs A.S Transporters (U) Ltd CACA No. 18 of 2004, Uganda Telcom Vs Tanzanite Corporation [2005] EA 351 and Hajji Asuman Mutekanga Vs Equator Growers (U) Ltd, SCCA No. 7 of 1995.**

[15] As already indicated, evidence for the plaintiff's case was led through three witnesses; Lawrence Tumusiime PW1, Lutakoome Alex PW3 and Wanyakala Emmanuel PW2 who was first hired on the project by the defendant and later on by the plaintiff to complete the unfinished structures. The witnesses testified in details how the defendant took over possession of the suit land on 1st July, 2016 and demolished the plaintiff's structures hosting the bar grill lounge including the shallow well before embarking on the construction of structures designed for his intended business which he neglected and or abandoned in September, 2016 before completing them. The defendant also failed to honor a mutual agreement that the he would construct a shallow well estimated at Ugx 20,000,000/= to provide water for the car washing business of the plaintiff on the premises. PW1 testified that on average they have been paying monthly water bills of Ugx 1,200,000/= incurred on the car washing business from July 2016 to

March 2018 which amounts to Ugx 27, 300,000/=. Summary of costs and pictures (F1 and F2) for the newly constructed toilets and for completion of the wall fence were presented. The total cost was Ugx 50,710,000/=. A copy of the bill of quantities (D) for the completion of the unfinished structures on the suit land was adduced to provide an idea on the estimated cost of the works which stood at Ugx 265,161,000/=. It should be noted that the construction is still on going and a bill of quantities does not necessarily show the exact cost but reflects the cost of materials needed for a particular project or piece of work which could be more or less than that figure. Contrary to what was stated in the written statement of defence *para 6 (ix)* evidence was adduced to prove that the defendant had defaulted in paying the stipulated monthly rent for a period of 13 months (June 2017 to March 2018) amounting to Ugx 121,093,750/=. Accordingly, special damages of Ugx 482,164,750/= shall be awarded.

- [16] The plaintiff is seeking **general damages** and has proposed a figure of Ugx 200,000,000/=. In assessment of the quantum of damages, courts are mainly guided by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered. See **Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305**. It was held in the case of **Charles Acire Vs Myaana Engola, HCCS 143 of 1993** that *"a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong"*. See also **Kibimba Rice Ltd Vs Umar Salim, SCCA NO. 17 of 1992** and **Hardley Vs Baxendale (1894) 9 Exch 341**. But generally, *"measurement of the quantum of*

damages is a matter for the discretion of the individual judge which of course has to be exercised judicially with the general conditions prevailing in the country and prior decisions that are relevant to the case in question". See Moses Ssali a.k.a Bebe Cool & Others Vs Attorney General & Others, HCCS No. 86 of 2010 where the case of Southern Engineering Company Vs Mutia [1985] KLR 730 was followed. In addition, general damages in a breach of contract are "what a court may award when it cannot point out any measure by which they are to be assessed, except in the opinion and judgment of a reasonable man" See Haji Asuman Mutekanga Vs Equator Growers (U) Ltd SCCA No. 07 of 1995, per Oder, JSC.

- [17] The court has looked at the prevailing circumstances and the manner in which the agreement herein had been breached. Particularly, the plaintiff had first been duped and fooled to sign a bogus agreement, his buildings from which he derived an income were demolished and never reconstructed, the shallow water well from which he got water for the car washing business was also destroyed and never rebuilt, he lost rental income and clientele etc. All this caused a lot of pain, stress, suffering, loss and inconvenience to the plaintiff which would entitle him to an award of damages or compensation in a bid to try and put him back into the position he would have been if the defendant had not breached the tenancy agreement. See Art. 126(2)(c) of the Constitution of Uganda, 1995. In the case of Thunderbolt Technical Services Ltd Vs Apedu & Another, HCCS No. 340 of 2009, Kiryabwire, J (as he then was) stated that "*general damages were intended to make good to the sufferer as far as money can do so, the losses he or she has suffered as the natural result of*

the wrong done to him or her". See also **Okello James Vs A.G, HCCS No. 574 OF 2003**. Following the above principles and guidance in light of the facts at hand, it is my considered view that a sum of **Ugx 30,000,000/= would suffice as general damages**.

- [18] The plaintiff is also praying for **interest of 8% p.a on the special damages and 6% p.a on general damages** from the date of judgment till payment in full. It is the position of the law that where interest was not agreed upon by the parties, as is the case in the facts herein, court should award interest that is just and reasonable. It was held in the case of **Mohanlal Kakhubhai Radia Vs Warid Telecom Ltd, HCCS 234 of 2011** That:

'In determining a just and reasonable' rate courts should take into account "the ever rising inflation and drastic depreciation of the currency. That a plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due."

This authority was cited with approval in the case of **Kinyera Vs The Management Committee of Laroo Boarding Primary School, HCCS No. 099 of 2013**.

- [19] Evidence shows that the breach of the contract occurred way back in 2016. No doubt, the plaintiff lost out on clientele, his original structures and business and as such could not make profits ever since because the defendant had not given him his money. However, it is worth noting that although the transaction out of which the breach of contract arose was commercial in nature and the parties had

indeed not agreed on payment of interest, to allow the rate of 8% on special damages as proposed by the plaintiff would be, in my view, to some extent a bit harsh and unconscionable. This position is strengthened by the authority of **Nipunnoratham Bhatia Vs Crane Bank Ltd, CACA No. 75 of 2006** where the Court of Appeal held that *“interest allowed by court for an amount to be refunded (paid) where there was no agreement for its payment (as is the case in the facts at hand) should be simple interest”* before going ahead to reduce the interest awarded by the trial court from 36% to 6% per annum from the date of judgment till payment in full. It should perhaps be emphasized at this point that the law prohibits award of interest that would amount to unjust enrichment or benefit to one of the parties. See also **Stanbic Bank Uganda Ltd Vs Hajji Yahaya Sekalega T/A Sekalega Enterprises, HCCS No. 185 of 2009** (Commercial Division). Resultantly, interest is hereby granted to the plaintiff on special damages at the rate of 6% per annum from the date of filing the suit until payment in full.

[20] As for the grant of **interest on general damages** the court follows the principle and guidance offered by the Court of Appeal (per Berko, JA) in the case of **Star Supermarket (U) Ltd Vs Attorney General, CACA No. 34 of 2000** that *“interest on general damages is compensatory in nature against the person in breach of the contract”*. Accordingly, the plaintiff is awarded interest on general damages at the rate of 6% per annum from the date of judgment until payment in full.

[21] As regards **costs of the suit**, the law (**section 27(2) CPA**) provides that costs are awarded at the discretion of court and usually follow

the event unless for some good reasons the court directs otherwise. See **National Pharmacy Ltd Vs Kampala City Council [1979] HCB 25** and **Jennifer Rwanyindo Aurelia & Anor Vs School Outfitters (U) Ltd, CACA No. 53 of 1999**. From the facts of this case where the plaintiff has succeeded on all the issues I see no compelling and or justifiable reason to deny him costs of the suit. Accordingly, the plaintiff is awarded costs of the suit.

[22] In conclusion, judgment is hereby entered in favor of the plaintiff as against the defendant in the following terms:

- (i) a declaration that the defendant made a misrepresentation to plaintiff when he purported to act and sign the tenancy agreement herein as a director of a non-existent company i.e M/s House of Laughter Bar and Grill Limited
- (ii) that the defendant breached the terms of the said tenancy agreement and is hereby held personally liable for the said breach and the resultant loss and or damage thereof
- (iii) that the plaintiff is awarded special damages of Ugx 484,264,750/=
- (iv) interest is awarded on special damages at the rate of 6% per annum from the date of filing the suit until payment in full
- (v) that a sum of Ugx 30,000,000/= is awarded to the plaintiff as general damages
- (vi) that interest on general damages is awarded at the rate of 6% per annum from the date of judgment until payment in full, and
- (vii) that costs of the suit are also awarded to the plaintiff.

^{19th}
Dated, signed and delivered at Kampala this ~~16th~~ day of August 2021


Duncan Gaswaga

JUDGE