THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 338 OF 2015

1.ASHA ALI SULEMAN AL-BAHARY

2.AFSANA AZAD MOHAMAD :::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

1.NASSANGA AYSHA SALMA

2.MICHEAL ANIEKAN LEWIS :::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

JUDGMENT

Introduction

[1] The Plaintiffs brought this suit against the Defendants jointly and severally seeking a declaration that the Defendants' actions are in breach of the sales agreement; a declaration that the Plaintiff is entitled to an order of restitution; an order for recovery of all the salon items as listed in the sales agreement; special and general damages; interest and costs of the suit.

[2] The brief facts according to the Plaintiffs' amended plaint filed on 28th January 2016 are that on the 12th day of March 2015, the 1st Plaintiff and the 1st Defendant entered into a sales agreement for the purchase of Afsana Beauty Salon located at Kingsgate Mall, Kabalagala at a consideration of UGX 100,000,000/=. Under the agreement the Defendants agreed to pay an initial sum of USD $ 10,000 [United States Dollars Ten Thousand Only] as the first instalment and the balance of UGX 70,000,000/= [Uganda Shillings Seventy Million only] was to be paid by 3rd April 2015. It was agreed

that the purchaser would be granted vacant possession upon payment of the 1st instalment. It was further agreed that any unpaid sums by the due date would attract an interest of 10%.

[3] The Plaintiffs gave the Defendants vacant possession of the premises and introduced them to the landlord. The Defendants issued the Plaintiffs a cheque of USD 10,000 dated 12th March 2015 under the name of Michael Aniekan Lewis (the 2nd Defendant) on an account number from GT Bank. The cheque was however dishonoured when banked. The Defendants also issued another cheque from the same bank dated 23rd April 2015 in the amount of USD 24,600 which too was dishonoured for being beyond the maximum cheque amount according to Bank of Uganda Regulations.

[4] By 14th July 2015, the Defendants were in arrears of rent to the tune of USD 4,100 which the Landlord (Kingsgate Mall) sought to recover by attachment of the salon items for auction. The Plaintiffs paid USD 1,000 to the Landlord on behalf of the Defendants in order to halt the auction since the items were more valuable than the rental arrears. The Plaintiffs further incurred expenses for storage of the salon items since July 2015. The Plaintiffs allege that the Defendants' actions were dishonest and fraudulent, they amounted to breach of contract and occasioned loss and damage to the Plaintiffs.

[5] The Defendants filed an amended written statement of defence (WSD) and a counter claim on 17th February 2016 in which they denied the Plaintiffs' claims and particularly stated that they entered into the transaction under a misrepresentation that the 1st Plaintiff was the owner of Afsana Beauty Salon and was a holder of a power of attorney which was before the Uganda Registration Services Bureau

(URSB) for registration. Upon search at URSB, the Defendants discovered that the said power of attorney did not exist whereupon they communicated to the Plaintiffs that the agreement was unenforceable in absence of the power of attorney. Thereafter, the Defendants terminated the contract and demanded for return of the cheques which the Plaintiff refused and instead presented them for payment. The Defendants stated that the cheques were issued as security and were both above the maximum cheque amount in accordance with the Bank of Uganda Regulations.

[6] The Defendants/ Counter Claimants raised a counter claim in which they stated that the 1st Plaintiff was neither a Director with Afsana Beauty Salon nor an equitable owner of the same and, as such, had no right or interest to execute an agreement of sale of the salon. The Counter Claimants further stated that they have never contracted with the 2nd Plaintiff on any matter and she had no locus to sue them. The Counter Claimants also averred that there was no valid agreement of sale since the agreement was procured illegally and under mistaken identity that the salon and its items belonged to the 1st Plaintiff whereas not. It was stated that as a result of the misrepresentation, the Counter Claimants were seeking for a refund of UGX 19,500,000/= as loss incurred in paying the salon workers, new cosmetics, and other salon equipment which were subsequently taken over by the 1st Plaintiff. The Defendants/ Counter Claimants therefore prayed for dismissal of the suit and for the counterclaim to be allowed with costs.

[7] The Plaintiffs filed a reply to the WSD and the Counterclaim on 22nd July 2016. I have taken the contents of the reply into consideration.

Representation and Hearing

[8] At the hearing, the Plaintiffs were represented by Mr. Najib Mujjuzi while the Defendants were represented by Mr. Rogers Wadada. Counsel made and filed a joint scheduling memorandum. Evidence was led by witness statements. The Plaintiff led evidence of three witnesses whose statements were filed and adopted by the Court and the witnesses were cross examined by the Defendants' Counsel. Counsel for the Defendant filed one witness statement but when the case came up for defence hearing, neither the witness nor Counsel for the Defendants appeared despite sufficient evidence of service of hearing notices. The matter then proceeded in the absence of the Defendants and hearing was closed by the Court in accordance with Order 17 rule 4 of the CPR. Counsel for the Plaintiffs filed written submissions which I have considered in the course of determination of the issues before the Court.

Issues for Determination

[9] Three issues were agreed upon for determination by the Court, namely;

(a) Whether the Defendants are in breach of the sales agreement?

(b) Whether the parties are indebted to each other?

(c) Whether the parties are entitled to the remedies sought?

Burden and Standard of Proof

[10] In civil proceedings, the burden of proof lies upon he who alleges. *Section 101 of the Evidence Act, Cap 6* provides that;

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

[11] *Section 103 of the Evidence Act* provides that;

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[12] Accordingly, the burden of proof in civil proceedings normally lies upon the Plaintiff or claimant. The standard of proof is on a balance of probabilities. The law however goes further to classify between a legal burden and an evidential burden. When a Plaintiff has led evidence establishing his/her claim, he/she is said to have executed the legal burden. The evidential burden thus shifts to the defendant to rebut the plaintiff's claims.

The Evidence

[13] The Plaintiffs led evidence of three witnesses. **PW1** was **Asha Ali Suleman Al-Bahary**, the 1st Plaintiff, who stated that she was the biological mother of the 2nd Plaintiff who resides in South Africa. The 2nd Plaintiff was the owner of Afsana Beauty Salon which she had donated to PW1. By agreement dated 12th March 2015, PW1 sold the assets in the Salon to the Defendants. The Defendants were to operate from within the same premises but under the name of "Duchess Beauty Salon". PW1 introduced the Defendants to the Landlord and were responsible for paying rent for the premises starting 15th March

2015. The agreed purchase price was UGX 100,000,000/= in respect of which the Defendants issued two cheques which, however, were dishonoured upon being presented to the bank. The Defendants did not pay the agreed purchase price and after three months, they abandoned the saloon. In a bid to recover the rent arrears, the Landlord's agents sought to auction the assets whereupon PW1 intervened and made part payment of the rent to save the salon items. PW1 also had to meet costs of keeping the items under safe custody.

[14] **PW2** was **Yahaya Mihigo**, a former worker in the salon and a relative to the Plaintiffs, who stated that he was present when the agreement for sale of the Salon was executed although he did not sign as a witness. He stated that the 1st Plaintiff only sold the Salon assets to the Defendants who operated the Salon for about three months after which they abandoned and closed the same. He stated that the Defendants never made any payment of the purchase price. The Landlord wanted to auction the items for non-payment of rent until the 1st Plaintiff made payment of USD 1000. Thereafter, the items were kept by the 1st Plaintiff who had to meet the storage expenses.

[15] **PW3** was **Afsana Azad Mohamad**, the 2nd Plaintiff, who stated that she is a biological daughter to the 1st Plaintiff. She was resident in South Africa. She was owner of Afsana Beauty Salon whose assets she donated to her mother (PW1). She however retained the legal rights to the name of Afsana Beauty Salon. She stated that PW1 had good and transferrable title to the Salon items and it was only mistakenly stated by the lawyers who drafted the agreement that the items were being sold on PW2's behalf. PW2 stated that she learnt that the Defendants took possession of the Salon and changed its name to Duchess Beauty Salon and Spa and carried on business up to July 2015 when the

premises were locked for non-payment of rent. The Defendants never paid the purchase price under the sale agreement.

[16] As already stated above, the Defendants did not lead any evidence and the hearing of the case closed pursuant to the provision under Order 17 rule 4 of the CPR.

Resolution of the Issues

Issue 1: Whether the Defendants are in breach of the sales agreement?

[17] It was agreed by the parties through the joint scheduling memorandum that Afsana Beauty Salon and its items were sold to the 1st Defendant at a consideration of UGX 100,000,000/=. It was further agreed that the document admitted as PE1 dated 12th March 2015 is the agreement that was signed by the parties. The terms of payment as per the said agreement and as agreed in the joint scheduling memorandum were that the 1st Defendant would make an initial payment of USD 10,000 which the 1st Defendant undertook to pay by cheque upon the signing of the agreement. The 1st Defendant would then pay the balance of UGX 70,000,000/= by the 3rd day of April 2015. It is shown by the Plaintiffs in evidence that the Defendants issued a post-dated cheque of USD 24,600 in respect of the balance of the purchase price. The cheque was issued under the name of the 2nd Defendant who was a boy-friend to the 1st Defendant.

[18] It is further shown in evidence that the Defendants took possession of the Salon and changed its name to Duchess Beauty Salon and Spa. The Defendants operated the Salon for about three months where after they abandoned and closed the Salon with outstanding rent arrears. Meanwhile, the cheques issued by the

Defendants had been dishonoured by the bank and the purchase price remained unpaid. It is further stated that the Landlord moved in and wanted to auction the salon items in order to recover outstanding rent arrears. That is when the 1st Plaintiff intervened to save the salon items which were higher in value than the amount outstanding in rent.

[19] It was claimed by the Defendants in the WSD that the contract was unenforceable because the 1st Plaintiff did not have good title to transfer the property in the Salon. It was however not shown by the Defendants that any conflict arose regarding ownership of the Salon after execution of the sale agreement. Secondly, if for any reason the Defendants had opted to rescind the contract of sale, it was incumbent upon them to communicate the rescission to the Plaintiffs in no unclear terms so that the Plaintiffs could take back the Salon and do not expect receipt of the purchase price. There is no evidence of any such communication. The letters dated 13th March 2015 and 24th March 2015, attached as Annexures A and B to the amended WSD cannot constitute such evidence since there is no evidence that they were served upon and received by the Plaintiffs. Similarly, abandoning and closing the Salon by the Defendants with outstanding arrears of rent is not and cannot be taken as communication of rescission of the contract. The evidence by the Plaintiffs of the manner in which the Defendants left the Salon has been found credible by the Court.

[20] There is also clear evidence by PW3 that she donated the Salon to the 1st Plaintiff. This evidence is uncontroverted. There was no claim by any other person over ownership of the said Salon. The document purportedly relied upon by the Defendants as indicating that the 1st

Plaintiff was selling the Salon on behalf of the 2nd Plaintiff does not in any way provide substantive evidence that is capable of contradicting the clear terms of the contract in PE1. To begin with, that document is not dated. Although it is attached to the agreement (PE1), it is not referred to expressly in the signed agreement. The Court cannot tell when and under what circumstances it was made. In view of the clear terms of the contract (PE1) and in absence of any credible evidence disputing ownership of the Salon, I am not persuaded that the Defendants' actions were occasioned by conflicting evidence of ownership of the subject matter.

[21] In the circumstances, I have found sufficient evidence by the Plaintiffs to prove existence of a valid contract of sale of the Salon and its items. The agreement (PE1) clearly states in Clause 1 that the agreement is "… *entered into on the unequivocal understanding by both parties that the Purchaser shall not acquire or take on the name of the Salon (Afsana Beauty Salon) and also the purchaser shall start to pay rent on entering the Salon premises"*. There is corroborated evidence that the Defendants took on the Salon, changed its name to Duchess Beauty Salon and Spa and operated it for about three months. The Defendants cannot then turn around and dispute enforceability of the contract.

[22] It is thus clear from the foregoing analysis that the Defendants were in breach of the contract by not paying the agreed purchase price and at the same time abandoning the Salon items without any communication to the unpaid vendor, thereby risking loss of the items by attachment and auction by the Landlord in order to recover unpaid rent. The 1st issue is therefore answered in the affirmative.

Issue 2: Whether the parties are indebted to each other?

[23] In view of my finding on issue 1 above, it is clear that the Defendants never paid the purchase price of UGX 100,000,000/=. There is however evidence that the 1st Plaintiff took back the items after saving them from being auctioned by the Landlord. There is another claim by the 1st Plaintiff that the items got damaged. The 1st Plaintiff further claimed for refund of expenses incurred in storage of the items after they were saved from auction. It is however not clear from the evidence where the items eventually ended and in what state. It is therefore difficult for the Court to make any assessment based on the value of those items.

[24] In the premises, since the 1st Plaintiff had attached a value of UGX 100,000,000/= to the Salon and had relinquished interest in the items therein, the 1st Plaintiff will be entitled to payment of the said purchase price. It is also clear that interest had been agreed upon by the parties upon default on payment in time at the rate of 10%. I take it that the agreement was at 10% per annum since the agreement is silent on the period. In any case, if it was meant to be 10% per month, it would be an illegal clause for charging exorbitant and unconscionable interest. I believe payment of interest at the rate of 10% per annum on the purchase price will meet the ends of justice in as far as the loss in time value of the said amount of money is concerned.

[25] The 1st Plaintiff also claimed for refund of USD 1,000 which she paid as part of rent arrears to the Landlord. This sum was specifically pleaded by the Plaintiffs and proved in evidence by way of a deposit slip marked as PE5 on record. This claim is proved by the Plaintiffs.

[26] The Plaintiffs further claimed for expenses incurred towards storage of the Salon items and fees paid to the Bailiff. As I have stated above, the Court has not been told of the final fate of these items. If they were available, the Plaintiffs could not be entitled to both the purchase price and the items. The items could perhaps be used to meet any damages and costs that may be awarded by the Court. If the items were sold in an attempt to mitigate loss that could have been occasioned by their depreciation, the sum realised ought to have been declared to Court in order to be used to offset any damages and costs that may be awarded by the Court. In the present case, there is no account as to how the items were finally disposed of or of their whereabouts. The Court cannot therefore award damages for expenses incurred in managing property whose status is not clear.

[27] In the circumstances, the best the Court can do is to let the loss lay where it is. I have proceeded on the assumption that the 1st Plaintiff used the items or the proceeds thereof to meet the expenses she incurred in managing them after they were abandoned by the Defendants. As such, I will not make any award to the Plaintiffs towards any expenses in that regard. In the same vein, the Defendants are not expected to lay any further claim on the said items. The value of the said items is deemed to have covered any expenses claimed by the 1st Plaintiff in that regard. I will therefore make no further award in that respect.

[28] In view of the above analysis, the Defendants' claims in the counterclaim are not made out. There was no dishonest dealing by the Plaintiffs. The sale agreement has been found valid and binding on the parties. No damages were lawfully suffered by the Counter Claimants

arising from any conduct by the Plaintiffs. The Defendants/ Counter Claimants therefore have no valid claim under the counterclaim.

[29] In answer to the 2nd issue, therefore, it is the Defendants that are indebted to the 1st Plaintiff in the terms stated herein above and as will be summarised under the next issue.

Issue 3: Whether the parties are entitled to the remedies sought?

[30] The 1st Plaintiff claimed for an order of restitution and recovery of the salon items which she put at a sum of UGX 945,000,000/= being the sum total of lost income for a period of 63 months from the 15th of March 2015 putting each month at UGX 15,000,000/=. I have already reached a finding that the 1st Plaintiff, having sold the Salon and its items, is entitled to recovery of the sale price. She cannot obtain the sale price and at the same time get back the items. Secondly, in absence of evidence regarding the final fate of the said items, I have found under issue 2 above that the 1st Plaintiff is not entitled to any payment over and above the value of those items whose fate is only known to her. This claim by the Plaintiffs is therefore disallowed. In lieu, the Court has awarded the sum of UGX 100,000,000/= being the purchase price under the contract.

[31] The Plaintiffs prayed for special damages for breach of contract. I have already indicated, while answering issue 2 above, that the 1st Plaintiff pleaded and proved special damages to the tune of USD 1,000 and the same is awarded to her. The claim for storage expenses and Bailiff fees are disallowed for reasons stated under issue 2 above.

[32] Regarding the claim for general damages, the Plaintiffs claimed for general damages for the loss occasioned to the 1st Plaintiff by breach of

contract. In his submissions, Counsel for the Plaintiffs made no proposal of a particular amount. The law on general damages is that the damages are awarded at the discretion of the Court and the purpose is to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. *See:* ***Hadley v. Baxendale (1894) 9 Exch 341; Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993 and Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992.*** In the assessment of general damages, the court should be guided by the value of the subject matter, the economic inconvenience that the plaintiff may have been put through and the nature and extent of the injury suffered. ***See: Uganda Commercial bank v. Kigozi [2002] 1 EA 305).*** The damages available for breach of contract are measured in a similar way as loss due to personal injury. The court should look into the future so as to forecast what would have been likely to happen if the contract had not been entered into or breached. ***See: Bank of Uganda Vs Fred William Masaba & 5 Others SCCA No. 3/98 and Esso Petroleum Co. Ltd Vs Mardon (1976) EWCA Civ 4; [1976] QB 801***.

[33] In the present case, there is evidence of breach of contract by the Defendant by failure to pay the contractual sum of UGX 100,000,0000/=, occupation and use of the salon and its assets for about three months, and abandoning the salon and its items without notice. I agree that the 1st Plaintiff suffered some loss and inconvenience occasioned by breach of the contract by the Defendants. In the circumstances, I find a sum of UGX 15,000,000/= appropriate as general damages for breach of contract. I award the same to the 1st Plaintiff.

[34] On interest, the Plaintiff sought interest at the rate of 25% per annum on the sums claimed. The discretion of the court regarding award of interest is provided for under *Section 26(2) of the Civil Procedure Act*. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and the defendant has had the use of it himself and ought to compensate the plaintiff accordingly. See***: Premchandra Shenoi and Anor Vs Maximov Oleg Petrovich SCCA No. 9 of 2003 and Harbutt's 'placticine' Ltd V Wayne tank & pump Co. Ltd [1970] QB 447***. In determining a just and reasonable rate of interest, courts take into account the ever rising inflation and drastic depreciation of the currency. 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. See: ***Kinyera Vs the Management Committee of Laroo Building Primary School HCCS 099/2013***.

[35] As I have already found earlier, the Plaintiff is entitled to default interest on the contractual sum of UGX 100,000,000/= from the 3rd day of April 2015 to the date of full payment at the agreed rate of 10% per annum. The Plaintiffs also prayed for interest on other sums awarded at the rate of 25% per annum. I find that the 1st Plaintiff is entitled to interest on the sum of USD 1,000 being special damages. The rate of 25% per annum claimed by the 1st Plaintiff is, however, on the high side. I will award interest on the said sum at the rate of 20% per annum from the date of filing the suit until payment in full. On general damages, I award interest on the sum awarded at the rate of 8% per annum from the date of judgment till full payment.

[36] On costs, I have not found sufficient reason as to why the 2nd Plaintiff was made party to the suit. She was clearly a witness in the matter and her inclusion as a party was superfluous. The 2nd Plaintiff is therefore not entitled to any costs and I award none to her. Since the suit has succeeded and the counterclaim has wholly failed, I award the costs of the suit and the counterclaim to the 1st Plaintiff to be paid by the Defendants.

[37] In the result, judgment is entered for the 1st Plaintiff against the Defendants jointly and severally for payment of;

a) The sum of UGX 100,000,000/= being the contractual purchase price.

b) USD 1,000 being special damages.

c) UGX 15,000,000/= being general damages for breach of contract.

d) Interest on (a) above at the rate of 10% per annum from the 3rd day of April 2015 until payment in full.

e) Interest on (b) above at the rate of 20% per annum from the date of filing the suit until payment in full.

f) Interest on (c) above at the rate of 8% per annum from the date of judgment until payment in full.

g) The taxed costs of the suit and the counterclaim.

It is so ordered.

Dated, signed and delivered this 31st day of October 2022.

Boniface Wamala

JUDGE