

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 462 OF 2020

PETUA KATEEBA **PLAINTIFF**

VERSUS

1. MR. HAKAN TURKMEN

2. GREEN AFRICA RECYCLING LIMITED **DEFENDANT**

(Before: HON. JUSTICE PATRICIA MUTESI)

JUDGEMENT

The Plaintiff instituted this suit against the Defendants seeking special damages of UGX 97,176,522 and USD 90,610 being the unpaid rent arrears and the cost of repairs to the rented property, an order of eviction, plus general damages, costs, interest.

The brief facts leading to the above cause of action are that by a tenancy agreement dated 20th day of December, 2017, the Plaintiff rented to the Defendants a property situate at Plot 59 Kyambogo Road for a term of 2 years with effect from 2018 under terms and conditions stipulated in the said agreement. The agreement required the Defendants to pay rent of USD 3 per square meter exclusive of VAT per month and which rent as to be payable six months in advance. Under Clause 3 (a) and 3 (b) of

the agreement, the Defendants covenanted with the Plaintiff to pay the rent in the manner aforesaid and to pay interest of 5% per month on any unpaid arrears.

The Plaintiff averred that the Defendants failed to pay all the rent outstanding and that as at the month of July, 2020, a sum of USD 49,045 and six months later in December 2020, a sum of USD 90,610 was outstanding and unpaid. That whereas the Plaintiff has since demanded from the Defendants payment of the outstanding rent, to date they have not paid the monies and yet they still remain in occupation of the Plaintiff's property.

The Plaintiff further stated that as the owner of the property in the tenancy agreement, she was entitled to possession of the premises immediately upon expiry of the said agreement in February 2020 but that to the contrary, the Defendants have refused to yield vacant possession which has occasioned her loss of rent computed at a market rate of USD 8,313. Furthermore that under the tenancy agreement, the premises were to be kept in good and tenantable proper working order and conditions, except for reasonable fair wear and tear. That however the Defendants breached the said covenants when they failed to deliver the premises in good repair and instead caused great structural damage to the property which the plaintiff intends to renovate.

The Plaintiff contends that as a result of the defendants' actions she suffered special and general damages, mental anguish, disappointment, embarrassment and inconvenience, hen filing of this suit.

The Defendants filed a joint Written Statement of Defence denying the claims. It is their contention that the 2nd Defendant entered into a tenancy agreement for the

said premises for a period of two years and that the tenant satisfactorily complied with the terms of the tenancy which was renewed for one extra year on similar terms and conditions from 1st March, 2020. The Defendants contend that the Plaintiff breached the covenants when she frivolously and unlawfully filed an application for distress for rent at the Chief Magistrates Court of Nakawa. The 2nd Defendant admitted being in occupation of the said rental premises as per the tenancy agreement but averred that the Plaintiff has never issued them with a notice of vacant possession of the property as per the tenancy agreement. They contended that the property is in good and tenantable manner except for normal wear and tear of a building. They further contended that the Plaintiff is in breach of the tenancy agreement and caused them mental anguish, disappointment, embarrassment and inconvenience and that the Plaintiff is not entitled to any of the reliefs sought.

The 2nd Defendant lodged a Counter Claimant against the Plaintiff for breach of contract and unjust enrichment wherein it seeks general and aggravated damages, interest thereon and costs.

Representation

The Plaintiff was represented by Mr. Yese Mugenyi of M/s Mugenyi & Co. Advocates while the Defendants were represented by Mr. Eric Eloket of M/s Mark Mwesigye & Advocates. Both Counsel duly filed written submissions which I have considered.

Issues

1. Whether the Defendants breached the tenancy agreement?

2. What remedies are available to the parties?

The Plaintiff (PW1) adduced evidence in support of her claim through a witness statement. She also produced another witness namely Mugisha Allan Turyahikayo (PW2), a registered valuer. Both of these witnesses testified on oath and were cross examined. However the Defendants did not lead any evidence to disapprove the Plaintiff's claims against them and neither did the 2nd Defendant lead evidence in support of the Counter Claim against the Plaintiff. Accordingly the 2nd Defendant's counter claim is hereby dismissed for want of prosecution. I will proceed to determine the Plaintiff's case against the Defendants.

Determination

Issue No. 1: Whether the defendants breached the Tenancy Agreement?

The Tenancy Agreement dated 20th December, 2017 marked EXP1 which forms the basis of the Plaintiff's suit against the Defendants, is not disputed between the parties as both agree to its execution in their respective pleadings.

A breach of contract is a legal cause of action in which a binding agreement is not honored by a party to the contract by non-performance or interference with the other party's performance. (See **Black's Law Dictionary 8th Edition page 200**. See also **Cargo World Logistics Limited V Royale Group Africa Limited HCCS 157 of 2013; Michael Katungye V Fred Byamukama & Another HCCS No. 706 of 2020; and Nsibambi Mudashiru v Kasule Joseph HCCS No. 244 of 2014.**)

PW1 testified that notwithstanding the tenancy agreement between the parties, the Defendants failed to pay all the outstanding rent and as at the month of December 2020, the sum of USD 59,080 was outstanding and unpaid. (See par. 3,

5 and 6 of PW1's witness statement) The plaintiff also adduced a Statement of Account (Exp4) which showed the outstanding rent of USD 59,080. This evidence was not challenged by the defendants who failed to adduce any evidence to disprove the same.

The Defendants' Counsel submitted that the Defendant's failure to pay the sums under the contract were not their own doing. That the Defendant's business was affected by the COVID pandemic and over taken by events beyond its control, and thus the Defendant's non-performance was thus a result of force majeure. Counsel cited the case of **Partizanski and Another v Sobetra (U) Ltd (HCT-00-CC-CS 1740 of 2000) [2007]** where Court of Appeal for East Africa dealt with the issue of force majeure or an act of God that may release a person from liability. Counsel further submitted that had it not been for the unforeseen events that disabled the Defendants from running business, the rent under the tenancy agreement would have been paid on time. However in as far as the Defendants did not adduce any evidence on record in support of the alleged force majeure / frustration, the said defence cannot be sustained.

Under clause 1 and 3 (a) of the Tenancy Agreement, the Defendants' had the obligation to pay rent for use of the said premises subject to the agreement. In the case of **Makubuya Enock Willy T/A Pollaplast v Songdoh Films (U) Ltd & Anor Civil Suit No. 349 of 2017**, Justice Musa Ssekaana stated that the parties to any contract and the Court are bound by the terms or conditions in a contract, whether parole or written, between contracting parties. The Courts lack the power to add or subtract from the terms of the contract of parties and parties thereto are not allowed to unilaterally alter them. This has acquired the sobriquet and mantra of

sanctity of contract which is expressed in the maxim *pacta sunt servanda*, which means the non-fraudulent agreement of parties must be observed.

I fully agree with this holding and find that the Defendant's failure to pay the outstanding rent due amounted to breach of the tenancy agreement between the parties.

Furthermore, both PW1 and PW2 testified that the Defendants breached the covenants in the tenancy agreement specifically clauses 3 (d), (n), (t) thereof, for having failed to deliver the premises in good repair and causing great structural damage to the property. (See paragraphs 10 and 11 of PW1's witness statement and paragraph 4 of PW2's witness statement.) The plaintiff also adduced a copy of a Dilapidation and Structural Integrity Report (EXP5) that shows the extent of the damage to the property.)

The defendants did not adduce any evidence to disprove the alleged state of disrepair of the property as reflected in the valuation report. Where evidence on a material or essential point is not challenged, then such evidence is deemed admitted as inherently credible and probably true. (**See Uganda Revenue Authority v Steven Mabosi; SCCA No. 26 of 1995**). Furthermore the defendants attempt to dispute the valuation report in cross examination was also not helpful in the absence of them adducing any evidence as to the actual state of repair in which they left the property. Therefore the plaintiffs evidence remains unchallenged and I find that on a balance of probabilities, the defendants caused the structural damage to the property as reflected in the report, which damage is beyond the expected wear and tear.

Accordingly, in consideration of the evidence on record I find that the Defendants' actions of failing to pay rent and causing structural damage to the property beyond the expected reasonable wear and tear, amounted to breach of the tenancy agreement. Issue No. 1 is answered in affirmative.

Issue No. 2: What are the available remedies?

Where there is 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. (See **Section 61 (1)** of the **Contracts Act 2010**). The plaintiff prayed for the following remedies;

Eviction Order

PW1 testified in paragraph 18 of her statement about the continued occupation of the premises by the Defendants who despite having failed to pay rent since July 2020, still have their property on the rented premises. This has caused her to suffer loss of rental income, which loss continues to date.

The Defendants having breached the tenancy agreement, cannot remain in occupation of the rented premises as this continues to cause loss to the Plaintiff and unfairly limits her right to use her property. In the circumstances, I find this to be a proper case for grant of an eviction order against the Defendants and I order so. In order to avoid unnecessary litigation, the eviction of the Defendants should be done in the presence of local authorities and police.

Special Damages.

In the case of **Ewadra Emmanuel v Spencon Services Limited Civil Suit No 0022 of 2015** Justice Mubiru stated that the rule of the common law is that where a party sustains a loss by reason of a breach of a contract, he is so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed (*See Robinson v Harman (1848) 1 Exch 850 at 855, [1853-60] ALL ER Rep 383 at 385 and Kibimba Rice Ltd v Umar Slaim, S.C. Civil Appeal No. 17 of 1992*). Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party. There is no doubt therefore that wherever it is reasonable, for the innocent party to insist upon reinstatement as the measure of damage.

In **Gameca & Anor Vs Steel Rolling Ltd HCCS No. 2228 of 2006**, court observed that a party who sues for breach of contract is entitled to recover the amount of loss sustained for such breach and that the defendant is liable to make good such loss. Special damages have been defined to relate to past pecuniary loss calculable at the date of trial or past expenses and loss of earnings (*See Uganda Commercial Bank v. Deo Kigozi [2002] 1 EA 293*). It is now trite that anyone who wishes to be granted special damages must plead and specifically prove the same.

The plaintiff prayed for payment of the outstanding rental arrears due from the defendants. The Plaintiff adduced unchallenged evidence that a sum of USD 59,080 was outstanding as unpaid rent arrears, as reflected in Exp4. In these circumstance, I find that the Plaintiff is entitled to a sum of **USD 59,080 (USD Fifty nine thousand and Eighty)** which she had lost as unpaid rent at the time she instituted this suit.

The Plaintiff also prayed for special damages of UGX 97,176,522/= being the cost of repair and renovation as presented in the Structural and Dilapidation Survey

report. She also prayed for UGX the sum of 3,540,000/= being the cost of undertaking the Survey report.

However I note that the said repairs have not yet been undertaken but will be required to be made on the rented property in the future, since the defendants are currently still in occupation of the same. Since special damages relate to past pecuniary loss which has already been incurred, yet the claimed repair costs relate to a future or anticipated loss, they were wrongly claimed as special damages.

General Damages.

The plaintiff prayed for general damages for the loss and inconvenience occasioned to her arising out of the breach of contract and specifically for failure to use or rent the premises since the date of default.

General damages have been defined to relate to anticipated future loss as well as damages for pain and suffering and loss of amenity (**See Uganda Commercial Bank v. Deo Kigozi [2002] 1 EA 293**). As to whether the plaintiff is entitled to general damages, in **Kampala District Land Board & George Mitala Vs Venansio Babweyana, Civil Appeal No. 0002 of 2007** the Court of Appeal stated the well settled principle that damages are the direct probable consequences of the act complained of with such consequences being enumerated to include loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering.

General damages consist of items of normal loss which are presumed by law to arise naturally from the normal course of things. In **Gulaballi Ushillani v Kampala Pharmaceuticals Ltd SCCA No. 6 of 1999**, the Supreme Court held that according to the principle of *restitutio integrum*, damages are intended to restore the wronged party into the position he would have been if there had been no breach

of contract. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the Defendant's actions. **(See Luzinda Marion Babirye Vs Ssekamatte & 3 Others Civil Suit No. 366 of 2017).**

In respect to the quantum of damages, the Supreme Court held in the case of **Haji Asuman Mutekanga Vs Growers (U) Ltd SCCA No. 0007 of 1995** that *'damages are determined according to the assessment of a reasonable man and do not represent a person's financial or material asset'*.

The Plaintiff proved that she suffered injury and financial loss after the defendants refused to perform their obligations. The Defendants after breaching the Tenancy Agreement by failing to pay rent, have remained in the Plaintiff's rentable premises to date. This has caused the plaintiff to suffer loss and inconvenience as she has been unable to rent out the said commercial property to date. The plaintiff prayed to be awarded general damages in the sum of USD 61,920 which is equivalent to the amount of rent that she would have earned had the defendants not remained in the property. The plaintiff also adduced evidence showing that the defendants caused structural damage to the property and she adduced a Survey Report which shows that she will have to incur repair and renovation costs which a valuer (PW2) assessed will cost the sum of UGX 97,176,522 to repair. The plaintiff is therefore entitled to an award of damages as compensation for the said loss and inconvenience.

Basing on the loss and inconvenience that the Plaintiff has been and will be subjected to by the Defendants actions, I award her general damages of **UGX 100,000,000/= (Uganda Shillings One hundred million)**, which sum I deem to be reasonable in the circumstances.

Interest

Section 26 (2) of the **Civil Procedure Act Cap 71**, gives Court discretionary powers in so far as the decree is for the payment of money to order interest at such rate as the Court deems reasonable to be paid on the principal sum. This may be from the date of the suit to the date of the decree, in addition to any prior date to the institution of the suit as well as further interest from the date of the decree to the date of payment or such earlier date as the Court deems fit.

I award the Plaintiff interest at the rate of 15% per annum on the unpaid rent of USD 59,080 being rental arrears from the date of filing the suit till payment in full. I also award interest of 10% per annum on the awarded general damages, payable from the date of judgment until payment in full.

Costs

In accordance with Section 27 of the Civil Procedure Act Cap 71, Costs follow event unless Court for good cause orders otherwise and accordingly the Plaintiff being the successful party is therefore awarded Costs of the suit.

In the final result, judgement is entered for the Plaintiff as against the Defendant for breach of contract in the following terms;

- a. An eviction order hereby issues against the Defendants in respect of the suit property.
- b. The defendants shall pay to the Plaintiff the sum of **USD 59,080 (USD Fifty nine thousand and Eighty)** being the outstanding unpaid rental arrears.
- c. The defendants shall pay interest on (b) above at the rate of 15% per annum from the date of filing the suit until payment in full.

- d. The plaintiff is awarded general damages of **UGX 100,000,000/= (Uganda Shillings One hundred Million)**
- e. Interest shall be payable on general damages at the rate of 10% per annum from the date of judgment until payment in full.
- f. The plaintiff is awarded the costs of the suit.



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Patricia Mutesi

JUDGE

(8/12/2023)