THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

CIVIL SUIT NO. 853 OF 1989

LIVINGSTONE KYOFA

MPIIMA::

:::::::::: PLAINTIFF

VERSUS

ELIZABETH

NANTEZA::;;::

::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)

JUDGMENT.

The claim.

The defendant is the administrator of the estate of the late James Hannington Bukulu Kiwanuka Mukasa. She was sued in that capacity.

The plaintiff seeks the following remedies from this honourable court:

a) an order for specific performance, directing the defendant to execute a lease, in favour of the plaintiff, over part of the property formerly comprising Kyagwe, Block 193, plot 365, at Nabuti, Mukono;

b) special damages, in the form of compensation of Shs. 71, 500,000/= being the value of the land that was alienated,

c) general damages for breach of contract,

d) interest on (a) and (c) above, and

e) costs of this suit.

History.

This case has had a very long but not so pleasant a history since it was filed in this court. It could well have been one of the longest pending cases to date. The plaintiff filed it .St November, 1989. The suit was allocated to the late Honourable Justice Louis Ongom. Upon his demise, it was re-allocated to the late Honourable Justice Wilson Kityo. After over a dozen appearances before him, but without the substantive hearing commencing, the late justice Kityo also left the suit pending, upon his retirement and subsequent death. It was allocated to the Honourable Justice C.K.Byamugisha. The Honourable Justice Byamugisha was transferred to the Commercial Division of the High Court before she could commence the actual hearing of the suit. The next allocation was to the late Honourable Ignatius Mukanza. When the late Justice Mukanza retired and subsequently died, the file was re-allocated to my brother, the Honourable Justice Augustus Kania, from whom I inherited it.

The parties made pledges to the various judges that they would settle the case out of court if they were given time to do so. Much of the time given to them was never utilized for the purpose. It did appear to me that there was less willingness on the part of the defendant to have the case settled out of court.

Ex-parte Order.

On l5th October 2002, two days were set aside for hearing this case. They were 28th February and 3rd March, 2003. The fixture was done in court in the presence and with the full agreement of both counsel. 0 n the first day of hearing, 28th February, 2003, the plaintiff and his counsel were in court. The defendant and her counsel were absent. The court made an order under Order 9 rule 17 (1) (a) for the hearing to proceed ex-parte. It did.

Pleadings.

In his plaint, the plaintiff alleged that on 9th July, 1985, he entered into an agreement with James H.B.K. Mukasa, who was proprietor of the land then held under customary tenure by the plaintiff and comprising Kyaggwe Block 193, plot 365, situate at Ggulu, Mukono. The defendant was to grant a sub-lease to the plaintiff. The plaintiff was to pay a premium of Shs. 400,000/= and an annual ground rent of shs 600/=. The plaintiff paid the premium of shs 400,000/= as stipulated in the agreement (exh.P1). He also paid ground rent for a period of five years. But the defendant refused to execute the sub-lease in accordance with the sub-lease agreement. Instead, the defendant leased or sold to other persons a large portion of the suit property leaving the plaintiff with only part of his original customary holding.

The defendant, in her pleadings, did not dispute the existence of the sub-lease agreement. Nor did she dispute the fact that she refused to grant the sub-lease after the plaintiff had fulfilled his part of the bargain. The defendant's only defence was to the effect that all the area which the plaintiff claimed to be his customary holding was actually not his. One of the two customary plots (bibanja) belonged to the plaintiff's son and not to the plaintiff. The defendant also pleaded that she would be willing to grant a lease to the plaintiff if the plaintiff would first survey the land into plots so that the plaintiff leases each plot separately.

Issues.

The issues are:

a) whether the plaintiff and the late J.H.B.K. Mukasa entered into a sub-lease agreement over the suit property in favour of the plaintiff;

b) if so, whether the defendant breached the terms of the that agreement

c) whether the plaintiff has suffered any damage or loss, and

d) what remedies are available to the parties?

First Issue.

The plaintiff gave evidence as PW1. His evidence was to the effect that he and the late J.H.B.K. Mukasa, 9th July 1985, executed an agreement whereby they agree upon a sub-lease in respect of the plaintiffs two customary holdings
(bibanja) situate upon Mukasa's lease comprising Kyaggwe Block 193, plot 365. He tendered the agreement as exh. P1.

In addition to the plaintiff, there is the evidence of PW2, Joseph Zzinda, who was a witness to the agreement made on 9th July, 1985, by the late Mukasa and the plaintiff. He identified his signature on exh. P1.

The impression this court formed was that both PWI and PW2 were truthful witnesses. The agreement, exh. P1 appeared to this court to be totally authentic and genuine.

In those circumstances, this court must return an affirmative answer to the first issue. Indeed, a contract was concluded between the late J.H.B.k.Mukasa and the plaintiff whereby the late Mukasa was to grant a sub-lease to the plaintiff in respect of the plaintiff's two customary

holdings at Ggulu, Mukono.

Second Issue.

The next question to resolve is whether the defendant breached the contract made by the late Mukasa and the plaintiff.

The evidence of the plaintiff shows that he paid the consideration of shs. 400,000/= agreed upon as the premium for the sub-lease. It also shows that he paid ground rent of shs.600/= for five consecutive years (exh.p2). This court has carefully examined the receipts comprising exh. P2. There is no doubt that they are genuine and were issued to the plaintiff either by the late Mukasa himself or his legal representatives.

Exhibit P4 shows that the suit I and was surveyed and a sub-lease agreement was drafted (exh. P5) but the defendant refused to execute it. But that was not all. The evidence of PWI and PW3 Dr. Stephen Kituuka, as well as exh. P6, the valuation report made by Dr. Kituuka, show that the defendant went ahead to lease part of the suit property to other tenants.

In view of the above cogent evidence, I answer the second issue also in the affirmative.

Third Issue.

The third issue relates to whether the plaintiff suffered any loss or damage by reason of the defendant's breach of the contract between t he plaintiff and the defendant.

The plaintiff's evidence is that he was the holder of two customary holdings covering about 21 acres. Exhibit P4, tend to render a lot of credence to that claim. There is no doubt that the plaintiff lost, since 1985, the benefit of holding a sub-lease over that large area of land. The evidence of PWI and PW4 show that the plaintiff, after losing the benefit of obtaining the sub-lease, he further lost part of the customary interest which had accrued to him for years in relation

to the suit property. According to the evidence of PW3, Dr. Kituuka, the land economist, an area of over 4.6 hectares, had, by 8th October, 2002 been leased in the form of over 30 demarcated plots to third parties by the defendant. Thus the plaintiff had lost his customary tenancy over that part of the suit property.

In view of that evidence, the finding of this court on the third issue is also in the affirmative. As a result the defendant's breach of the agreement, the plaintiff lost the opportunity of obtaining a sub-lease over his two bibanja. In addition, he also lost his customary tenancy over 4.6 hectares of the suit property.

Fourth Issue.

The next and last issue concerns the remedies to which the plaintiff is entitled.

The first remedy which the plaintiff seeks is an order for specific performance. The plaintiff prays that the defendant be ordered to carry out her obligation over the remaining portion of the plaintiff's customary holding.

Before issuing an order for specific performance, the court must consider the following three principles:

a) a court will, normally, order specific performance only where it is satisfied that the exact performance of the contract, in the specific form in which it was made, and, according to the precise terms agreed upon, is possible in the circumstances. A court cannot alter the original terms of a contract made by the parties and order specific performance of that contract. By so doing the court would be writing a contract for the parties and forcing it upon them.

b) specific performance will, normally, not be ordered where, in the opinion of the court, monetary damages would accord the innocent party adequate protection. The remedy of specific performance is an equitable one. It would be only in circumstances where the court is satisfied that money damages would be inadequate compensation, for the breach of an agreement that the contractor or vendor would be compelled to perform specifically what he or she had agreed to do. Suleiman Mukasa Vs. Arch Motors ltd, Civil Suit No. 169 of 1969 (unreported);

c) a court will normally not order specific performance where it appears to the court that it may be unable to effectively enforce the order for specific performance. Fiat Kenya ltd. Vs. Ali Jamil Roblab [19731 E.A.11.

When each of the three principles set out above are tested against the circumstances of the instant case, it becomes apparent to me that an order for specific performance would not be appropriate in the circumstances of this case.

As exhibit P1 clearly shows, for example, the defendant was required to grant a sub-lease to the plaintiff. It is general knowledge that in 1985, the defendant, who is a mailo holder today, was then a leasehold proprietor as a consequence of the existence, at the time, of the Land Reform Decree, 1975. The Land Reform Decree, 1975 has since been repeated by the Land Act, 1998, following the restoration of the mailo land tenure by the Constitution of the Republic of Uganda, 1995.

The defendant's lease on conversion has since reconverted back to mailo tenure. The defendant who was, 1985, in position to directly grant a sub-lease to the plaintiff is no longer able to do so as a consequence of the changes that have taken place in the law since 1985. A sub-lease can not now directly flow from mailo tenure. That was probably why the plaintiff's claim now relates to a lease while his bargain in the agreement with the late J.H.B.K. Mukasa was for a sublease.

I, therefore, find that specific performance is not an appropriate remedy considering all the circumstances of this case. I decline to grant it.

The second relief which the plaintiff seeks is compensation in respect of the part of the suit property which the defendant has leased out to third parties. To support his claim, the plaintiff has produced the evidence of PW3, Dr. E.Kituuka, whose evidence is contained in exhibit P6, a valuation report which PW3 made after valuing the 32 plots demarketed out of the 4.6 hectares of the suit property and which the plaintiff has lost as customary holding. The plaintiff seeks an order granting to him Shs. 71,000,000/=, which Dr. Kituuka states in exhibit P6, to be "the current open market value" of all the 32 plots listed by him in his valuation report, exh. P6.

I regret to say that it appears to me that exhibit P6, the valuation report and, indeed, the evidence of Dr. Kituuka as a whole, is of very minimal value to the plaintiff's case. That evidence is, certainly, not of much assistance to this court. The shs. 71,000,000/= assessed by Dr. Kituuka appears clearly to be the open market value for leasing those plots currently. The plaintiff, in my humble view, cannot lay a sustainable claim to that sum as compensation to him because he has never held any estate in the land in question.

While it is true that the plaintiff under the agreement with the late Mukasa, exh. P1, can be referred to as a buyer under a contract of sale, it is the position of the law that before transfer and registration, a buyer, under a contract of sale, acquires only an equitable interest (a right in personam). He or she does not acquire any right in rem. In other words it is only upon registration that an estate or proprietary interest vests in the buyer. An agreement of sale is not an instrument capable of transferring or vesting any interest within the meaning of the Registration of Titles Act. Thus a party to an agreement of sale cannot claim value in the land because no interest or estate is vested in him or her by the mere agreement of sale.

In the instant case, the plaintiff did not obtain, through exhibit P1, even after he paid the premium and ground rent for some years, any interest other than a n equitable one. In that position he had only the right to enforce the contract of sale against the defendant. He cannot therefore, claim any leasehold or sub- leasehold interest in the suit property as exh. P6 appears to show.

It appears to me that the effect of the failure or refusal, by the defendant, to execute the sub-lease instrument, was to leave the plaintiff in the position in which he had been before. That is the position of a customary tenant of the defendant on the then lease on conversion. That is the position in which he still is today though the lease on conversion has reverted back to mailo.

As a customary tenant the plaintiff cannot claim compensation for loss of the current market lease value of the plots in the land. The appropriate remedy for missing the sub-lease is damages and not compensation in the monetary value of the land.

What the plaintiff has lost is what pertains to his customary tenancy in the traditional sense as was elaborated by the Court of Appeal in Marko Matovu And 2 others Vs. Mohammed Sseviri And Another, [19791 HCB 174. The plaintiff's customary holding was not one registered under the Land Act, 1998. What the plaintiff appears to me to be entitled to, in that position, is the value of the developments (kibanja) and usufructury or possessory rights.

Compensation in the above sense would, certainly amount to special damages. It would not only be pleaded but, more importantly, proved strictly. John Nagenda Vs. Sabena Belgian World Airlines, (1992) IKLR 13.

In the evidence produced by the plaintiff in this case, I find no basis for the award of special damages for the loss by him of his kibanja interest on the part of the suit property which has been

alienated by the defendant. What he has presented and proved in evidence are not the value of his developments (kibanja) or possessory or usufructuary values the value of the leases on the land to which he is not entitled.

The third remedy sought by the plaintiff is general damages for breach of contract.

The evidence adduced by the plaintiff proves on the balance of probabilities that the defendant breached the agreement between the parties (exh. P1) not only by refusing to execute the sub-lease but also by going ahead to alienate part of the subject matter of the agreement (exh. P1). "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 of contract should be such as may fairly and reasonably be considered as either arising naturally i.e. accordingly to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. "So wrote Alderson B, of the court of exchequer in the celebrated case of Hadley V. Baxendale (1854) Exh. 341 thus laying a principle that is still guiding the courts today. In my humble view the damages which the plaintiff seeks in the instant case were reasonably foreseeable by the parties when they executed exhibit P1.

"The ordinary remedy for breach of contract is damages." So wrote Seaton, J.S.C, in J.K. Patel Vs. Spear Motors Ltd. SCCA. No. 4 of *1991* un reported (at P.16). However, the learned judge, went on to explain, the plaintiff, if there was a breach, would be entitled to receive such a sum as would put him in the same financial position as he would have been in had the defendant carried out his or her side of the bargain".

In the instant case, it is significant to note that the defendant deliberately breached the contract with the object of obtaining a profit from the wrongful act.

The plaintiff has sought a sum of Shs. 10,000,000/=. He considers it appropriate to put him in the same position in which he would have been had the defendant carried out her part of the bargain. The subject matter was a very large area of about 21 acres. It is situate within the town council area of Mukono town. The plaintiff owing to the defendant's breach lost the sub-lease over that prime area. The period for the sub-lease was to be over 90 years. I find the figure of shs. 10,000,000/= suggested by the plaintiff's counsel in his final submission's to be very moderate in the circumstances of this case. I, instead, award a sum of shs. 12,000,000/= which I consider to be more just and appropriate in the circumstances.

The sum of shs. 12,000,000/= shall carry interest at the rate of 8% per annum from the date of the filing of this suit till payment in full.
The plaintiff is awarded the costs of this suit.

Conclusion.

In summary, I enter judgment in favour of the plaintiff against the defendant. I make the following order:

a) an order awarding shs 12,000,000/= as general damages;

b) an order awarding interest upon (a) above, at the rate of 8% per annum, from the date of filing to the date of payment in full; and

c) an order awarding costs of this suit to the plaintiff.

V.F.MUSOKE-KIBUUKA (JUDGE)

1 26.2003.

Court: Order.

This judgment may be delivered by the Deputy Registrar/civil on a date and time fixed by her.

V.F.MUSOKE-KIBUUKA (JUDGE)