THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 170 OF 1999

SUNSHINE TOURS AND TRAVEL LTD :::::::::::::::::: PLAINTIFF

VERSUS

ALAM GROUP OF COMPANIES LIMITED:::::::::::::::::: DEFENDANT

BEFORE: HON. JUSTICE REMMY K. KASULE

JUDGMENT

The plaintiff company sued the defendant, also a company, for various reliefs arising out of an eviction and distress for rent in respect of premises known as "Impala House", Plot 13 Kimathi Avenue, Kampala City. The plaintiff was tenant of the defendant in respect of the premises.

The suit was originally brought against the defendant and Messrs Kika Associates & Bailiffs as co-defendant. The case against the latter was however withdrawn by plaintiff on the ground that the sole proprietor of the said co-defendant firm had died.

At scheduling the parties agreed on the following facts:-

(i) Plaintiff was a tenant of the defendant at the suit premises.

(ii) Plaintiff was, at the material time of the cause of action, in arrears of rent.

(iii) Defendant locked up the suit premises rented by the plaintiff because of nonpayment of rent.

The issues framed at scheduling for determination by court were:-

1. Whether the plaintiff owed Shs.5, 000,000/= to the defendant as arrears of rent.
2. Whether the defendant sold all the property locked up in the office.
3. Whether the plaintiff is entitled to the remedies claimed in the plaint.

In his written submissions, filed in court, after court had completed taking evidence from both parties, the plaintiff raised another issue, and invited court to resolve it, namely:-

Whether the locking of the plaintiff's office and the subsequent disposal of its property were unlawful. Court will revert to this matter later on.

On behalf of the plaintiff, Mr. Godfrey Zobo, the Managing Director of Plaintiff Company testified, as PW1, Mr. Godfrey Musoke Nagenda, a practising accountant in private practice as PW2, and Mr. Godfrey Sabiiti, then an employee of the plaintiff at the time of the cause of action, as PW3.

The defendant adduced evidence of one witness, Mr. Abid Alam, their Managing Director.

As to whether or not an additional issue should be added, it is submitted for the plaintiff that the issue is based upon the pleadings of both parties is thus crucial to the whole case.

The defendant, on the other hand opposes the addition of the issue on the grounds that the same was not agreed upon inter-parties and that defendant had adduced evidence only in respect of the issues agreed upon.

This court notes that plaintiff pleaded in paragraph 13 of the plaint that:-

> **"13. The plaintiff avers that its eviction from office and subsequent sale of some of its property was wrongful."**

By way of reply to the above averment the defendant averred in paragraph 6 of his written statement of defence to the effect that the eviction and sale of the plaintiff's properties was lawful by reason of the same having been carried out in pursuance of a lawful order of court. The sum total effect of the evidence of PW1, PW2 and PW3, was that, because the eviction and distress, or part of it, was unlawful, the plaintiff had

suffered loss and damage and was, by reason thereof, claiming the reliefs stated in the plaint.

On the other hand, by way of refuting the evidence of the plaintiff's witnesses, DW1, for the defendant, testified, justifying that the eviction and distress was lawful because the plaintiff, as tenants had failed to pay the rent due for the suit premises, for a period from January 1997 to August, 1997. This witness completed his evidence in chief by stating:-

> "**That the distress and sale was wrongful and not based in law, there was nothing unlawful. The Chief Magistrate's Court Mengo, appointed and authorized the bailiff to distress:-''**

Therefore, on the basis of the pleadings, and the evidence given to by the witnesses of both parties to the suit, this court is satisfied that, the additional issue is relevant for determination by court, and no prejudice will be caused to any party by such determination. Instead justice will be done, as all issues raised by the pleadings and testified to by the witnesses of both sides, including this additional issue, will have been conclusively resolved upon. Court therefore allows the issue:-

"Whether the locking of the plaintiff's office and the subsequent disposal of its property were unlawful" to be added on the framed issues.

Both the plaintiff and defendant submitted on this issue first. Court will also deal with it first.

It is not denied that the plaintiff was in arrears of rent. The dispute, according to the evidence, is only as to the amount of rent which was in arrears. According to PW1, the rent in arrears was shs.5,400,000/=. However, no documentary evidence, say by way of bank statements, which the plaintiff was in a position to access from his bankers, was availed to court to support the assertion that the arrears of rent was only Shs.5,400,000/=/

The defendant, on the other hand, showed in his evidence that the arrears of rent was Shs.10,798,900/= and gave particulars of cheques, exhibit D2, that the plaintiff had issued to defendant at different times, and had been dishonoured by defendant's bankers. The cheques totalled to Shs.10, 798,900/=. There was no credible evidence from plaintiff to deny this evidence.

This court therefore holds that as of the 26.08.97, when the suit premises were closed, the plaintiff was in arrears of rent in the sum of shs.10,798,900/=.

According to exhibit P3, dated 15.07.97, PW1 for plaintiff, wrote to DW1 of defendant, apologizing for plaintiff not meeting the rent payment obligations and undertaking to settle the same in weekly installments. Exhibit D3 is thus proof that the defendant made demand of the rent payment from the plaintiff.

Though the period of the written Tenancy agreement between plaintiff and defendant, executed at the commencement of the Tenancy, in respect of the suit premises, Exhibit D1, had expired, the tenancy, by consent, continued between both plaintiff and defendant, on the terms of the expired Tenancy agreement. Article 5(a) of that agreement authorized the defendant, as landlord, to enter the suit premises and determine the tenancy and carry out distress, in case the plaintiff, as tenant was in arrears of rent payment for a period of three calendar months.

Plaintiff adduced no evidence to show he was not in breach of this part of the provision of the Tenancy Agreement.

The distress for rent (Bailiffs) Act, Cap.76, provides in its Section 2 that, no one, other than, a landlord in person or, an attorney of a landlord or the legal owner of a reversion, shall act as a bailiff, to levy any distress for rent, unless that other person shall be authorized to act as bailiff by a certificate in writing under the hand of a certifying officer. The certificate may be general or for a particular distress.

According to Rule 3 (2) of the Distress for Rent (Bailiffs) Rules, a special certificate has to specify the particular distress to which it applies. Rule 20, prevents the one levying distress from charging fees, charges or expenses, other than those, specified in and authorized by Rule 21 and the scales set out in the second schedule of the Rules. In case of any dispute, as to the amount of fees payable, then the fees are to be taxed by a certifying officer in the area, where the distress is levied. Rule 24 of these Rules, requires every bailiff, levying a distress , once requested by the tenant, to produce to that tenant, the certificate authorizing distress, and a copy of the table of fees, charges and expenses, authorized by the Rules.

The existence of a landlord and Tenant relationship is a pre-requisite to the exercise of the powers of distress under the Act: See: **SOUZA FIGUERIDO & Co. Ltd Vs. GEORGE & OTHERS [1959] EA 756.**

Once a landlord, or the landlord's attorney, opts to distress for rent under the Act, then, such a one, must do so strictly in accordance with the provisions of the Act and the Rules made there-under: See: **Supreme Court of Uganda Civil Appeal No.7 of 1999: Joy Tumushabe & Another Vs. M/s ANGLO – AFRICAN LTD AND ANOTHER**.

Applying the law to the facts of this case, this court holds that the defendant was entitled under the law to distress for rent against the plaintiff.

It is necessary now, to examine, whether the distress was executed in accordance with the law.

It is not disputed that on 26.08.97, one Naseem, an employee of the defendant locked the suit premises and, as a result of this action, the plaintiff could not enter and carry on their business of a tour operator. On 02.10.97, more than a month after the closure of the premises, the defendant instructed, in writing, Messrs Kika Associates & Bailiffs, to evict the plaintiffs from the suit premises, as the plaintiffs had failed to settle the outstanding rent since January, 1997.

On the 03.10.97, the Chief Magistrate's Court issued to one **SAMUEL DETRAS KAGGWE KIBERU**, of M/S Kika Associates & Bailiffs, a special certificate to levy distress pursuant to the Distress For Rent (Bailiffs Act) and the Rules there-under. The certificate directed the levying of distress against the plaintiff, in respect of office premises, on 3rd Floor, Impala House. Messrs Kika Associates & Bailiffs, thereafter proceeded to place an advertisement, in the New Vision newspaper of 07.10.97 to the effect that they were to sell by public auction on 14.10.97, the properties of the plaintiff, whose particulars they stated in the advertisement, unless the "rent defaulters" paid to them all the rent arrears due, plus all incidental eviction costs, and fees before the date of sale.

Court notes from exhibit D2, that the written instructions given to Messrs Kika Associates & Bailiffs by the defendant were:-

> **"This is to authorize you to evict Sunshine Tours Ltd, 3rd Floor, Impala House, as they have failed to settle the outstanding rent since January 1997."**

There is nothing in these instructions to distress by selling the plaintiff's properties by public auction. No evidence was adduced by defendant as to when and how they so instructed Messrs Kika Associates & Bailiffs to sell the plaintiff's properties through public auction. Court was also not availed with any evidence as to whether or not the plaintiff was informed of the decision to distress by way of sale of plaintiff's properties in a public auction. Likewise, no evidence was adduced to show whether the plaintiff was ever invited to attend and participate in the taking down the inventory of the properties and the determination of their respective values before sale in a public auction.

Distress, in law, is the right vested in the landlord as against the tenant in a lease or tenancy agreement, to seize and sell, such a quantity of the tenant's chattels on the land, so as to recover the unpaid rent due under the lease or tenancy.

In exercising the powers of distress, the landlord or the authorized bailiff, is in effect carrying out a task affecting the rights of an individual, the tenant. This being so, the landlord or bailiff is required to observe the principles of natural justice when carrying out the distress.

Accordingly, the defendant and Messrs Kika Associates & Bailiffs, the bailiffs, were under obligation to act fairly to the plaintiff, that is to say in accordance with the natural justice: "Natural Justice is but fairness writ large and Judicially" : See **Lord Morris in Furnell V. WHANGAREI High Schools Board [1973] A.C. 660.**

This court has considered the evidence that was adduced as relates to the distress. The only notification that distress by sale in a public auction was to take place, was the advertisement in the New Vision of 07.10.97. The advertisement does not mention the plaintiff as the rent defaulter, it does not state the premises in respect of which distress was being carried out. There is no amount of rent due disclosed. Therefore on the face of it, the plaintiff would only know that this advertisement referred to them, only by reading in detail the items listed as the subject of the sale. There is no evidence that, Defendant or Messrs Kika Associates & Bailiffs, brought notice of this advertisement to the notice of the plaintiff. No evidence was adduced by defendant that the plaintiff ought to have known by a particular date of the advertisement of their properties; that the sale was to be done in a period of seven (7) days from the date of advertisement.

This court therefore holds that the advertisement of 07.10.97 was not an effective and appropriate notification to the plaintiff of the sale by public auction of the plaintiff properties.

The claim that the inventory of the properties was prepared in the presence of a policeman does not in any way justify the compiling of the inventory in absence of the plaintiff's representative. At any rate, the policeman who is said to have been present when the inventory was being prepared did not testify in court.

So too, is the claim, that the properties were valued by a firm of valuers, before being sold. The valuers did not testify in court to explain how they carried out the exercise. No representative of the plaintiff attended the valuation of the properties.

Having considered all the relevant evidence on this issue, court finds that in failing to communicate to plaintiff that the properties were to be sold by public auction in a distress action, in failing to afford an opportunity to plaintiff to have a representative to be present when compiling the inventory of the properties; as well as during their valuation and sale, and in having an advertisement of sale of the properties in the New Vision of 07.10.97, which was not an effective and proper communication of such sale to the plaintiff, the defendant and/or their agents/representatives, Messrs Kika Associates & Bailiffs, acted contrary to the Rules of natural justice to the prejudice of the plaintiff. The distress was carried out unfairly and amounted to disposal of plaintiff's properties without affording plaintiff an opportunity to be heard.

What is done in contravention of the Rules of natural justice is a nullity: See **A.G. Vs Ryan [1980] AC 718**. The distress against the plaintiff was thus a nullity.

The defendant is liable for whatever Messrs Kika Associates & Bailiffs did in the distress because, according to DW1, the defendant instructed the said firm to evict and recover the rent, and whatever the bailiff did in the process of distress, including the sale in a public auction, the same was done on the instructions of the said DW1, the Managing Director of the Defendant. Further, in **S.FIGUEIREDO & CO. VS PANAGOPAULOS [1959] EA 756,** a case whose facts were not very different from the one under consideration, the then Court of Appeal for East Africa held that:-

> **"Applying these general principles to the present case, I am of that, although the fourth respondent was a court broker, and as such probably a *"public officer"*, not every distress levied by him must from that fact be necessarily held to have been levied in pursuance of a public duty**

or authority; and in particular the distress which he levied on the appellants' goods, not under any judicial process but upon the instructions of the first and second respondents, given through the third respondent, all of them private individuals, cannot in my view be held to have been so levied."

The above holding aptly applies to the facts of this case. The instructions of the Defendant to Messrs Kika Associates & bailiffs were on an individual basis, which made the defendant vicariously liable for the acts/omissions of Messrs Kika Associates and Bailiffs, in carrying out those instructions.

The defendant is thus liable to the plaintiff for the unlawful distress.

Court therefore answers the first issue to the effect that the locking of the plaintiff's office was lawful; but the subsequent disposal of the plaintiff's properties was unlawful.

The second issue is whether the office was locked by the defendant with all its property therein. The evidence of PW1, PW3 and DW1 is that on 26.08.97, the defendant locked the suit premises with all the office properties as at 26.08.97 therein. This evidence is uncontroverted.

The answer to the second issue is in the affirmative.

The third issue is whether the defendant owed Shs.5, 400,000/= or Shs.10,790,000/= to the defendant as arrears of rent.

The court has considered the evidence adduced on this issue and prefers to believe the evidence for defence that the rent owed was Shs.10,790,000/=.

The essence of the fourth issue is what quantity of the properties of the plaintiff found in the office was sold by way of distress.

According to PW1 the plaintiff's properties that were in the premises at the time of closure were as per exhibit P1. They had been acquired over a period of seventeen (17) years. They included the main tools of the business of a travel agency such as, Airline computed Reservations systems, Airline time tables, flight connections and data about fare and hotel companies, security safes, computers, steel filing cabinets, refrigerators, lazer printers and typewriters as well as furniture. After the closure of the premises, PW1, who had managed the acquisition over the 17 years period, listed down the properties, with the assistance of his staff, of the properties and also put down their respective monetary values, as per exhibit P1.

PW1, further testified, that cash of £2040, US$10,450 and Ug.Shs.550,000/= was also inside the premises at the time of the closure. The money belonged to several airlines. The same was misappropriated by the defendant as it was never returned to the plaintiff.

According to PW1, one of the items locked inside was a mobile X-ray machine, valued at Shs.35 million that belonged to a brother of PW1. This machine happened to be in the office at the time of the closure of the premises.

PW1, further testified, of his having scrutinized the list of items advertised for sale by public auction in the New Vision newspaper of 07.10.97. He found that the items contained in the advertisement were far much less than those that were locked in the premises on 26.08.97.

In August, 2002, plaintiff instructed PW2, an auditor and accountant, to compute the plaintiff's losses, including loss of these items. PW2 went around Kampala City, to the suppliers of the items lost, and this way he got the replacement values for the items in exhibit P1. The total replacement value of the items in Exhibit P1 worked out as being Shs.35,715,000/= while that of the x-ray machine was Ug.Shs.35,515,000/=.

The defendant, through DW1, agreed that on 26.08.97 when the suit premises were locked, there were properties of the plaintiff inside the premises. DW1 insisted however, that, these properties were the items advertised in the New Vision newspaper on 07.10.97. The list compiled by plaintiff, exhibit P1, is false. Equally false are the values given to these properties. The correct value was shs.1,742,000/= according to the valuation report of Ntende & Associates of 11.10.97.

Court has considered the evidence, as to the quantity and values of the plaintiff's properties that were in the premises at the time of closure; and which were subsequently disposed of by the defendant.

As to the cash money in various currencies that is alleged to have been in the premises at closure, PW1 simply stated that there was money in the premises. He did not explain who, of the plaintiff's officials received this money and where the same was being kept. If this money had been received on behalf of some airlines then some evidence, documentary or otherwise, would have been availed from these airlines as proof that the plaintiff was holding this money on their behalf. This evidence is totally lacking. There was also no evidence adduced as to who paid in this money to the plaintiffs. There was no evidence adduced of acknowledgements of this money, written or otherwise, that the plaintiff had issued to the payees. Yet the payees should have had such evidence.

There was also no credible explanation from PW1, as to why, if this money was in the premises at the time of closure, the plaintiff did not say anything about it to the defendant, with a view to retrieving it, if not to use the same to settle the rent arrears, now that the plaintiff's situation as regards tenancy, had become so bad to resulting into having plaintiff's work place being locked.

Further, plaintiff adduced no evidence to show that he had, subsequent to the distress, repaid this money to any airline; or that any airline had demanded the same from plaintiff.

Court therefore holds that plaintiff has not proved, on a balance of probabilities, that UK pounds 2,040, US Dollars 10,450 and UG.Shs.550,000/= were in their possession and in the premises at the time the defendant closed the premises. This part of the claim is disallowed as not proved.

As to existence of an x-ray machine, in the suit premises, at the time of the closure, PW1, apart from making a bare statement that the machine belonged to his brother, who is a medical doctor, PW1 did not give the names of this brother, let alone the circumstances under which the machine had to be kept in these premises. The brother, the alleged owner of the machine, did not give any evidence to court, to prove ownership and, under what circumstances the machine came to be in the suit premises; and why he did not object to the defendant against its being locked inside the premises since it was not property of the plaintiff. It was thus not subject to distress. PW1, on his part, gave no sound reason to Court, as to why, he did not inform the defendant, that the machine did not belong to the Defendant, and as such ought not to be the subject of impoundment and distress for rent.

Court finds this part of the claim as not proved to the requisite burden of proof of a balance of probabilities. The same is disallowed.

As to the rest of the properties, this court has already resolved that, defendant and Messrs Kika Associates & Bailiffs, acted wrongly in not involving the plaintiff when making the inventory of the properties, evaluating them and selling them.

Given the fact that these were properties acquired over a period of seventeen (17) years and, some constituted basic tools of the business of a travel agency, court finds the items and the values given by the plaintiff in exhibit P1 to be more realistic than the evidence of the defendant on this aspect of the case. Court therefore accepts Exhibit P1 items 1 to 61 as representing the number of items in the premises at the time of closure.

The total value of these items is stated to be Ug.Shs.35,715,000/=. PW1 and PW2's evidence does not show that depreciation was factored in the ascertainment of the values of these items, yet some were as old as seventeen (17) years. Further, given the fact that old records relating to acquisition of these items were missing, an element of over evaluating cannot be ruled out.

Bearing the above in mind Court reduces the value of the items to Shs.25,715,000/=.

Court has already held that, at the time of closure of the premises, the arrears of rent due from plaintiff to defendant were Shs.10,790,000/=. Of this amount, according to DW1, Defendant was paid Shs.1,000,000/= after the sale of the properties advertised in the New Vision on 07.10.97. The defendant remained claiming from the plaintiff Shs.9,790,000/= arrears of rent. Thus when total arrears of rent Ug.Shs.(1,000,000 + 9,790,000) are taken away from the sum of, the total value of items: Ug Shs.(25,715,000 – 10,790,000) = 14,925,000/= being balance of the value of the properties wrongly sold by defendant.

The plaintiff is thus awarded shs.14,925,000/= being the balance of the value of items less the arrears of rent due to the Defendant.

Plaintiff also claims general damages for loss of business, reputation and expected income. The particulars of the loss were testified to by PW1 and PW2 and are contained in a report: Exhibit P5.

This court has already held that the defendant was justified to close and evict plaintiff from the premises by reason of plaintiff's failure to pay rent in accordance with the terms of the tenancy.

Plaintiff having committed breach of the Tenancy agreement is not entitled to damages arising out of the closure and subsequent eviction from the premises. The said claim is accordingly disallowed.

Were the plaintiff to be successful in respect of the claim for general damages for loss of business, reputation and expected income, this court finds the evidence of PW1 and PW2 as to the damages suffered to be rather speculative and not credible on this aspect of the case. PW1, for example, tendered in Court what he referred to as a Report and Accounts of the Plaintiff for the year ended 31st December, 1995. What is referred to as a report is not signed by whoever is said to have prepared it, and not even by PW1, the Managing Director of the Plaintiff. Court attaches hardly any value to such type of evidence.

As to the evidence of PW2 and the report Exhibit P5, as well as that of PW3 the same is too speculative. There are no hard facts and records to provide the basis for the figures they rely on for their conclusions.

In the considered view of Court, had the plaintiff succeeded in the claim for general damages for loss of business, reputation and expected income, then a figure of Shs.10,000,000/= would have been awarded as general damages. None is awarded however, as the plaintiff has not been successful in this part of the claim.

In conclusion Judgment is entered for the Plaintiff against the defendant for:-

(a) Shs.14,925,000/= being value of the plaintiff properties.

(b) Interest on the sum in (a) above at the rate of 18% p.a from the date of closure of the premises i.e 26.08.97 till payment in full.

The plaintiff is awarded the costs of the suit against the defendant.

Remmy K. Kasule
Judge
28th August, 2009