THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 124 OF 2002

GALLERIA IN AFRICA LTD::PLAINTIFF

VERSUS

ATTORNEY GENERAL ::DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT

The plaintiff's claim against the defendant is for special and general damages arising out of a breach of contract and loss of business as well as interest and costs. Its case is that it entered into a contract with the defendant for provision of canteen and recreation facilities which the defendant breached occasioning them loss of business. The defendant is being sued in a representative capacity.

At the conferencing, the existence of an agreement between the plaintiff and the defendant was admitted. The issues for determination are:

1. Whether there was a breach of contract by the defendant.
2. Whether the plaintiff suffered any loss, injury or damage.
3. Whether the plaintiff is entitled to the remedies which it seeks in the plaint.

Before I delve into the above issues for determination, I should note that conferencing was before my brother Musoke-Kibuuka J. way back on November 21, 2003. The case was then adjourned to 23/02/2004 for filing of a consent judgment or trial. Come that date, counsel for the defendant sought an adjournment to explore a possibility of a settlement. From then, the case was adjourned from time to time until hearing commenced before another Judge on 24/01/2005 (sic) with the evidence of PW1 Azim Kassim, the director of the plaintiff. It was then adjourned to 26/04/06 for further

hearing. No further hearing took place until the file was allocated to me in 2009 and both parties appeared before me on 24/09/2009 when PW1 adduced more evidence with the consent of the defence. After the evidence of PW1 Kassim Azim, learned Counsel for the defendant applied yet for another adjournment to seek more instructions from his client. The case was put on 16/12/09 for further cross-examination of PW1 but learned counsel for the defendant did not appear. Hearing proceeded in his absence and the plaintiff led the evidence of PW2 Moses Luyimbazi. From that time learned counsel for the defendant absented himself from further conduct of the case until the case was closed for submissions and judgment under Order 17 Rule 4 of the Civil Procedure Rules. The defendant opted to file no written submissions.

Issue No. 1*: *Whether there was breach of contract by the defendant.

It is an admitted fact that the parties entered into an agreement, Exh. P1. According to PW1 Azim Kassim, the defendant breached the said contract. There is a series of correspondence showing that the plaintiff on numerous occasions complained to the Police about their failure to fulfill the terms of the agreement. The complaints were to no avail.

PW1 testified that the plaintiff was supposed to get possession of the suit premises by the end of August 1997. The landlord had to demarcate the whole area, relocate uniports from the demarcated area and vacate staff in the hall. From the records, this was in accordance with clause 3 of the agreement and the needful was not done. They were delayed by 12 months. PW1 wrote Exh. P6 complaining about failure by the Police to transfer uniports, vacate staff, repair the sewage and urinal facilities, clear the dumping site and hand over vacant possession of the premises by end of August 1997. From the evidence, the landlord did not respond. The building was dilapidated and the place not habitable. The commandant and other officials kept promising to work on the areas complained about but did nothing.

In Exh. P5, a letter from the Inspector of Police to the Managing Director of the plaintiff company dated 18/07/2000, the Police accused the plaintiff of breach of the terms of the agreement. However, as learned counsel has correctly pointed out in the written submissions, no evidence was adduced by the defendant at the trial to substantiate those allegations. It is trite that a fact is said to be proved when the court is satisfied as to its truth. The evidence by which that result is produced is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. The standard of proof is on the balance of probabilities.

In the instant case, the plaintiff has adduced evidence that shows that the following obligations in the impugned agreement were breached:

a) giving vacant possession of the premises.
b) clearing the existing garbage dumping site by 1/08/1997;
c) repair of the sewage and drainage system and renovation and provision of toilet and urinal facilities by the end of August 1997; and
d) closing down existing kiosks and household operators.

The defendant has not challenged the plaintiff's evidence on all the four areas above. In the circumstances, therefore, the plaintiff has discharged its burden of proof on the questions in dispute. The defendant has not adduced evidence to rebut the presumption raised by the plaintiff's evidence that its assertions are true. Court is satisfied on the balance of probabilities that there was breach of contract by the defendant as alleged.

I would therefore answer the first issue in the affirmative and I have done so.

Issue No. 2: Whether the plaintiff suffered any loss, injury or damage.

From the evidence of PW1 Azim Kassim, the plaintiff had to repair the sewage and urinals at its own cost although under the agreement this was the responsibility of the Police. In Exh. P10, a letter from the Inspector General of Police to the Chief Technical Officer, Police Construction Unit, dated 3rd July, 1998, the Police did admit in paragraph 4 thereof that the obligation complained of by the plaintiff had not been fulfilled by July, 1998. In his evidence, PW1 testified that he was not allowed to stage entertainment and yet this was the core purpose of the transaction with the defendant. The defendant did not adduce any evidence to counter the plaintiff's assertions as to the loss and damage. Once again court is satisfied on the balance of probabilities that the acts of the defendants occasioned loss, injury and damage to the plaintiff.

I so find.

Issue No. 3: Whether the plaintiff is entitled to the remedies which it seeks in the plaint.

The loss which was allegedly occasioned to the plaintiff is particularized in paragraph 9 of the amended plaint as follows:

a) Repairs to sewerage and drainage systems,
toilet and urinal facilities: …… Shs.8,047,500=

b) Investment amount …… Shs.29,000,000=

c) Loss of projected income for 12 years from
August 1998 up to October 2009……. Shs.1,068,053,333=

The total claim under this head is Shs.1,105,100,833/=. As regards the repairs and renovations, I have already indicated that according to the plaintiff, these were the responsibility of the landlord under the agreement. The plaintiff did the repairs. The recreation hall itself was dilapidated and the plaintiff carried out the renovations. Its claim is for a sum of Shs.8,047,500/=. The claim is well documented and supported by receipts. I am inclined to allow it and I have done so.

As regards the investment amount of Shs.29,000,000/= and the loss of projected income for 12 years amounting to Shs.1,068,053,333/=, I would note that in this claim the plaintiff is among other things claiming money spent in starting off the business. I am of the view that business by its very nature entails risk. The court can in my opinion consider loss of business profits and opportunities due to the wrongful acts of the defendant, not the cost of setting up the business, unless of course the parties had so agreed. There appears not to have been any such agreement. The lease agreement was to renovate and run the recreation hall at Nsambya Police barracks. When the plaintiff was stopped from providing entertainment, the management felt that the plaintiff was being stopped from doing business. He gave the example of Nile Breweries who did a promotion but the Police authorities stopped the live entertainment. The defendant did not adduce any evidence to rebut the plaintiff's assertions. I would agree with the submission of learned counsel for the plaintiff that it was clearly a breach to lease a recreation hall to a tenant and then stop him from providing entertainment. This negated the purpose of the tenancy since entertainment was a way of attracting customers to the canteen, supply shop and recreation facility.

It is contended by learned counsel for the plaintiff that projections were not controverted by cross-examination or other evidence in rebuttal. He appears to suggest that in the absence of evidence adduced by the defence in support of their denials contained in the Written Statement of Defence, the plaintiff has a lighter burden to prove its case against the defendant than would otherwise have been the case.

In one of the leading cases on pleading and proof of damages, namely, ***Ratcliffe vs Evans [1892] 2 Q.B 524, Bowden LJ*** said this at pages 532 – 533:

> ***"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done must regulate the degree of certainty and particularity with which the damage ought to be proved. As such, certainly must be insisted on in proof of damage as is reasonable, having regard to the circumstances and the***

nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

I agree.

Applying the same principle to the instant case, the plaintiff renovated the premises in the hope that it would make a profit out of the venture. There is no evidence that the parties had agreed that in the event of the defendant failing to effect the repairs the plaintiff was at liberty to do so and claim re-imbursement from the defendant. In these circumstances, court is inclined to disallow the claim for investment in the sum of Shs.29,000,000/= as in any case the plaintiff has not indicated to court how much it had realized from the venture so that it is off–set from the expenses incurred in setting up the business.

As regards the claim for loss of projected income for 12 years (August 1998 – October 2009), the plaintiff has not produced evidence relating to the operation of the recreation hall, that is, evidence that would show how it was performing to raise inference that it was indeed earning Shs.94,240,000/= per year. The restaurant sales are all assumptions, based on estimates of how many beers would be consumed by each Police Officer, estimates as to milk sales, soda sales, food sales, etc (Exh. P.16, P.4).

Books of account, if any were being kept by the time the plaintiff called it quits, would have come in handy in this regard. What we have a pre-investment estimates. It is not enough to say that the plaintiff projected net income of Shs.94,240,000/= per year and leave it at that. The rule is has long been established that special damages must be pleaded and strictly proved by a party claiming them. From the evidence of PW1 and PW2, I'm unable to say that the plaintiff has rendered strict proof of these claims on the balance of probabilities or at all. In these circumstances, the plaintiff ought to be contented with an award of general damages, not special damages as claimed in the plaint.

As regards general damages, these are what may be presumed by law to be the necessary result of the defendant's wrongful acts. The plaintiff may not prove that he suffered general damages. It is enough if he shows that the defendant owed him a duty of care which he breached.

In the instant case, the plaintiff has demonstrated to the satisfaction of court that it did not earn any profit from the investment because the defendant's servants and/or agents made performance of the contract impossible. Damages are compensatory in nature. They are not made to punish the defendant.

In ***John Byaruhanga vs Lubega Paul HCT-00-CC-CS-0573-2007*** (unreported) I made a point (and I don't hesitate to re-echo the same herein) that in a case such as this where the tenant has made a substantial investment of time and resources to set up a business, commercial justice dictates that courts impose restrictions on the landlord's right to terminate the relationship, even if the landlord is terminating in accordance with the agreement or even if the tenant has breached the contract. The restrictions are in recognition of the mutual benefits derived from the relationship by both parties. In short the landlord must take action that makes commercial sense to himself and the tenant, even where the tenant may have been in breach of the tenancy. Having found that the defendant breached his duty of care towards the plaintiff, I make a finding that the defendant is liable to them in general damages.

The plaintiff was of the view that the alleged loss of projected income for 12 years was recoverable by way of special damages. I have already disallowed that claim.

I have taken into account the fact that the plaintiff made extensive renovations/restructuring of the premises. The plaintiff was expecting to use the premises for a long time to recoup its expenses. While I agree that the plaintiff must be treated as having lost something of value as a result of the defendant's conduct, which in my view it did, for which it ought to be compensated, I consider Shs.1,105,100,833/= to be on the unrealistic side of the scale of justice. It is hugely speculative in nature and in my view

out of proportion with the damage sustained. Doing the best I can, and taking into account the plaintiff's disallowed claims of special damages, I would award them a sum of Shs.100,000,000/= (One hundred million only) as general damages/compensation for all the lost opportunities in the premises it had so much invested in.

The awards would attract interest at the commercial rate of 25% per annum from the date of judgment till payment in full.

The plaintiff shall also have the costs of the suit.

In the final result judgment is entered for the plaintiff against the defendant in the following terms:

i) Special damages: Shs.8,047,500/=
ii) General damages: Shs.100m only.
iii) Interest on (i) and (ii) above at the rate of 25% per annum from the date of judgment till payment in full.
iv) Costs of the suit.

Dated at Kampala this 12th day of August, 2010.

Yorokamu Bamwine
JUDGE

17/08/2010:
Linda Ikanza for plaintiff
Azim Kassim present
Oluka Henry for defendant

Court:

Judgment delivered.

Yorokamu Bamwine

JUDGE

12/08/2010