

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
HC CV CS NO.0038 OF 2001

MAINUKA PAUL:.....PLAINTIFF

VERSUS

**THE REGISTERED TRUSTEES
OF THE CHURCH OF UGANDA:.....DEFENDANT
RWENZORI DIOCESE**

BEFORE HON. MR. JUSTICE MIKE J. CHIBITA

JUDGMENT

This Civil suit has had a long history. The brief and simple facts of the case are that the parties entered into a Tenancy Agreement whereby the plaintiff would manage the defendant's hospital for a twelve year period commencing May 1997 (Exhibit PE 1 refers).

In August 2001 the defendant re entered the hospital and took over from the plaintiff citing several instances of breach of contract. The plaintiff, being dissatisfied with the actions of the defendant sued the defendant hence the present suit.

He asked court to award him general and exemplary damages and to pay back lost cash, income and earnings.

The defendant filed a counter claim in which they claimed for rent arrears and other monies agreed to be invested by the plaintiff in the Tenancy Agreement.

At the scheduling conference two issues were framed and agreed upon by the two Counsel, Joseph Muhumuza Kaahwa for the plaintiff and Timothy Atuhairi for the defendants.

The two agreed issues are:-

1. Whether there was a breach of the terms of the Tenancy Agreement by either party.

2. What are the remedies available to the parties?

The plaintiff called seven witnesses to prove his case while the defendant called eight witnesses.

PW 1: OCHWO OCHIENG OJAMOKO, SENIOR GOVT HOUSING ECONOMIST/VALUER OF GENERAL PRACTISE

Inspected and valued plaintiff's properties at Kabarole Hospital in March 2005. Valuation Report tendered in and marked PE 14.

PW 2; RICHARD KAGANDA, PRIVATE VALUER

Was instructed by the High Court to inspect the properties and improvements left behind by the plaintiff at Kabarole Hospital as at 31st August, 2001. He carried out inspection from 12th to 15th March, 2005. His Report is exhibit PE 7

PW 3: EMMANUEL KAGORO, 46 YEARS, SELF EMPLOYED

Started working as Hospital Administrator soon after the plaintiff took it over in 1997. The Hospital was in a sorry state when we took it over and so we were given a four month grace period.

Some work was done starting with roofing and replacing leaking areas. On 30th August, 2001 the Hospital was taken over by the defendants.

PW 4: ISAAC KAIHURA, 60 YEARS, BUSINESSMAN

Worked on the road between Kyebambe and the Hospital for the plaintiff and also worked on the parking yard starting April, 2000.

PW 5: CHRISTINE JOY MAINUKA, 50 YEARS, RETIRED

Witness is sister to the plaintiff and was in charge of Finances at Kabarole Hospital during the plaintiff's management of the Hospital. At the time of take over the safe had Shs 2,500,000/= and cheque leaves.

PW 6: CHRISTOPHER KAFUMU, 80 YEARS, PLUMBER/MASON.

Witness did plumbing on the Hospital when it was under the management of plaintiff. He took two years to do the work.

PW 7: PAUL MAINUKA, 48 YEARS, MEDICAL DOCTOR

Witness is the plaintiff and entered into a tenancy agreement with the defendant to manage Kabarole Hospital for 12 years starting in 1997. The monthly rental amount was Shs 2,500,000/=, i.e. Shs 30,000,000/= per year after a four month grace period.

He admitted being arrears of rent by Shs 14,500,000/= by May, 2000. He left for studies and informed the Bishop accordingly but returned in August, 2001 and found that defendant had re entered the Hospital.

By time of re entry the rent due was Shs 23,000,000/=, he stated.

DW 1: PAUL ISINGOMA KABASEKE, TAKES OATH, 43 YEARS, LC I CHAIRPERSON, RESIDENT OF KABAROLE,

He stated that he was aware of the dispute and came to know about it on 30th August, 2001. Rev Clovis Kyalimpa, Secretary to the Diocese came to my office at about 3.30 p.m. and asked me to be around while taking over their Kabarole Hospital.

He was told that the agreement with Dr. Mainuka had been breached. He was not paying as agreed, was not maintaining the Hospital. That is why the Diocese wanted to take over.

He advised that the Diocesan Secretary could lawfully take over the Hospital since it served people. We agreed that since it was dark the following day, 31st August we would meet at the Hospital to effect the eviction.

On 31st indeed , the Vice Chairperson, Secretary for Youth, Amanyana Simon, Treasurer and Dean Kyaligonza, Rev. Clovis Kyalimpa. We inspected the Hospital, Nursing school and then the Staff quarters and saw the state of disrepair.

They entered and sent for Dodovico who eventually opened the safe and found money inside amounting to 32,000/=. They recorded the money and everything found in the office and signed.

DW 2, BENJAMIN KABOYO, 60 YEARS, TAKES OATH, RESIDENT OF RWENGOMA, DISPENSER AT KABAROLE HOSPITAL,

Witness is a trained dispenser who studied at Mengo Hospital. He has done the job for 30 years at Kabarole Hospital all those years. I know Dr. Mainuka. I worked with him.

He was at the Hospital in August 2001 when the Diocese took it over. They came in and took it over and he started working under the Diocese on 1st September, 2001.

DW 3, REV CANON SHEM RUBAALE, 84 YEARS, TAKES OATH, RESIDENT OF RUBONA TOWN COUNCIL, PRIEST IN COU.

He was ordained in 1958 as Deacon and in 1963 as a Priest. He stated that he knew Dr. Mainuka as a friend of the family. He rented the COU Hospital and on 13th September, 2001 witness was called to be the Administrator of the Hospital. Plaintiff's Administrator was Mr. Kagoro so he took over from him.

The Hospital was in a very poor condition, the worst anyone has ever seen. Poor condition of the building, floor, roof, windows, ventilators all were in a poor state. The ventilators were not there. Mosquitoes could enter at will.

DW 3: LUDOVICO TINKASIMIRE, TAKES OATH, RESIDENT OF NSORRO, KABAROLE, GENERAL FITTER

Witness stated that he was picked on 31st August, 2001 at 10.00 a.m. and taken to Kabarole Hospital and he opened a safe in the presence of Clovis Kyalimpa, a Pharmacist Kaboyo, Canon Rubaale, Chairman Isingoma.

What was in the safe did not concern me but there was money counted amounting to Shs 32,000/= whereupon he signed and left. The next day he re assembled the safe, was paid and left. He signed for everything that was in the safe but I didn't know if there was any other money elsewhere.

DW 5: LUCY UNITA KABEGE, TAKES OATH, 53 YEARS, VALUATION SURVEYOR, (IDEAL VALUERS, SURVEYORS AND REAL ESTATE CONSULTANTS) MUNYONYO, KAMPALA

Witness possesses an Advanced Diploma Valuation Surveying, Dar es Salaam equivalent to a Bachelor's degree in Surveying. She is registered as a Surveyor having been registered as a Surveyor on 5th December, 1995 as a Valuation Surveyor.

She admitted knowing the Valuer Dr. Ochwo Ochieng Ojomoko in person. His qualifications are in Economics but didn't know what criteria the Registration Board base on to register but he is not a Registered Valuation Surveyor.

She testified that Dr. Ojomoko has never been on the list of Valuers.

DW 6: JULIUS MWIRUMUBI, 61 YEARS, MARRIED WITH 9 CHILDREN, CIVIL TECHNICIAN, KYENJOJO

He trained from Kilembe Mines School of Engineering. He stated that he knew Kabarole Hospital and had done some renovations for them in 2003-2004 after being awarded the tender.

DW 7: BISHOP BENEZERI KISEMBO, 68 YEARS, KITUMBA, EAST DIVISION/BUSORO, KYENJOJO, RTD BISHOP OF RWENZORI

He became Bishop in January 2000. He admitted knowing Dr. Mainuka who sued Rwenzori Diocese. When he became Bishop he found that he had entered into a Tenancy Agreement with the Diocese. He was to pay Shs 30,000,000/= p.a in advance.

One of the immediate problems he had to handle as Bishop was non payment of Shs 30,000,000/= for 2000. He did not pay that year. The following year he paid bits in small instalments.

They organized and took over the Hospital on account of non payment of rent and failure to maintain the Hospital. They were also foregoing Government designated funds because the Hospital was in private hands.

DW 8: REV. CLOVIS KYALIMPA, COU PRIEST, 60 YEARS, RWENGOMA COU, ARCHDEACON.

In 2001 he was appointed acting Diocesan Secretary, Rwenzori Diocese and confirmed later and served for five years. Late Kyaligonza was the substantive at the time of this incident.

On 15th June, 2001 he found the Diocese had written to Dr. Mainuka informing him of the re entry for failure to pay rent. Nyamutale and Co, his lawyers then wrote back.

Thereafter he was instructed to effect the re entry. On 30th he went to LC I Chairman Isingoma to be present. They went to Police where we were advised to go to the State Attorney, Richard Bwiruka, who gave a go ahead.

On 31st August, 2001, the Bishop, Rev Kyaligonza, the Chairman, Mr. Kagoro and another LC man plus Counsel from Kabiito and Co. led them to the Hospital.

He was directed to write an inventory of Dr. Mainuka's property, not allow it to leave hospital and leave security at the Hospital. Before 5.00 p.m. he wrote a declaration of re entry. Dr. Mainuka was not present.

The re entry was effected because there was an outcry from the public that the Hospital was not properly used and patients had run away. Secondly there was outstanding rent of Shs 23,000,000/=. So when they year ended the Bishop decided to re enter.

When all is said and done the most important piece of evidence in this case is the Tenancy Agreement. Thankfully both parties agree that there was a Tenancy Agreement. It was admitted in evidence as exhibit PE 1

Both parties agree that there was breach of the Agreement in as far as payment of rent was concerned. PW 7, the plaintiff himself accepted that there was outstanding rent arrears of Shs 23,000,000/=. The defendants also put the figure of rent arrears at Shs 23,000,000/= according to DW 8.

As per the terms of the Tenancy Agreement there is no evidence of breach by the defendants. The instances of breach cited by the plaintiff's side do not arise until after the defendants exercised their right to re-enter.

Court heard about factors that affected rent payment like closure of Cooperative Bank which was the plaintiff's bank, his leaving the country and going for further studies, his informing the then Bishop of these developments and the fact that meetings for revision of rent were ongoing.

All these were testified to and proved but do not alter the fact, admitted by the plaintiff himself, that he was in arrears of rent to the tune of Shs 23,000,000/= by 31st August, 2001.

The answer to issue one therefore is that indeed there was breach of the terms of the Tenancy Agreement by the Plaintiff.

The second issue relates to the remedies available to the parties. The two parties agreed that there was re-entry by the defendants on 31st August, 2001. The tenancy Agreement clause 4 provides as follows:-

“If the rent herein reserved or any part thereof shall be in arrears for the duration of thirty (30) days next after the day whereupon the same ought to have been paid as aforesaid (whether formally demanded or not) or if there shall be any breach, non-performance or non-observation by the Tenant or any of the Tenant's conditions, it shall be lawful for the Owner...to re-enter the demised properties or any part thereof in the name of the whole or to repossess and enjoy as the Owner's former estate without prejudice to his right of action or remedy in respect of any antecedent breach of condition on the part of the Tenant.”

The re-entry exercised by the owner therefore was provided for by the Tenancy Agreement. The plaintiff however seems to have major issues with the way the re-entry was carried out.

The defendants on the other hand defended their right to exercise re-entry.

What the parties refused, neglected or failed to address court on were the provisions of clause 4(d) of the Tenancy Agreement which provides as follows:-

“That any dispute arising out of or in connection with this Agreement shall be referred to the Director of Medical Services, Ministry of Health and shall be determined in accordance with the Arbitration Act of the Laws of Uganda.”

None of the parties made any reference to steps taken to engage the provisions of this clause. If any of the parties took steps in this direction, court was not told about it. Such information was not put in evidence.

The word 'shall' is used twice in that clause. "Shall" has been interpreted to mean a mandatory provision.

The parties, in signing the Tenancy Agreement agreed to be bound by its clauses. By ignoring the provisions of clause 4(d) and yet engaging the provisions of other clauses the two parties are guilty of selective application of the provisions of the Tenancy Agreement.

By not implementing the provisions of clause 4(d) the parties missed out on an opportunity to resolve their disagreements early and probably amicably. They missed out on an opportunity to subject themselves to arbitration.

As a result they engaged themselves and court in lengthy and unnecessary litigation which could have been avoided. Their advocates are equally culpable for not having properly advised their clients about the availability of arbitration as provided for by clause 4(d).

Both parties are therefore in breach of the provisions of the Tenancy Agreement. The plaintiff's claim and the defendant's counter claim are therefore dismissed.

They both have therefore come to court after failing to observe a key provision of the Agreement they signed and court cannot reward either of them with remedies. Neither would it be prudent to award costs to either of the lawyers. They failed in their duty to correctly advise the parties on the steps towards arbitration.

As a consequence, in a bid to foster the spirit of reconciliation between the parties and in the interest of justice, I find that neither party is entitled to any of the remedies prayed for.

Additionally, each party will bear its own costs.

Dated at Fort Portal this 5th day of December, 2012

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JUSTICE MIKE J. CHIBITA

JUDGMENT READ AND DELIVERED IN THE PRESENCE OF:-

1. COUNSEL FOR THE PLAINTIFF: MUHUMUZA KAAHWA
2. COUNSEL FOR THE DEFENDANT: TIMOTHY ATUHAIRE
3. PLAINTIFF'S: EMMANUEL KAGORO, CHRISTINE MAINKUA

4. DEFENDANT: ROBERT TUSIIME

5. COURT CLERK/INTERPRETER: HERBERT MWESIGWA

BY:

MIKE J. CHIBITA

JUDGE