

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 177 OF 2003

ERUKANA KUWE.....PLAINTIFF

VERSUS

- 1. ISAAC PATRICK MATOVU**
- 2. NYAIKA LEE KASUNGA.....DEFENDANTS**

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

JUDGMENT

The Plaintiff brought this suit against the Defendants for an order of forfeiture and or re entry of the lease on the Plaintiff's land against the 2nd Defendant, an order for cancellation of the 2nd Defendant's lease, damages and costs. The Plaintiff's case is that he is the registered proprietor of mailo land comprised in Block 29 Plot 124 land at Mulago registered under instrument number KLA 123511 vide a vesting order dated 3rd February 1987. At the time of purchasing and registering the land in the Plaintiff's names, the land was subject of a lease interest comprised in LRV 716 Folio 23 Plot 124 registered in the names of the 1st Defendant. The 1st Defendant, in breach of the lease terms, failed and or refused to pay reserved ground rent to the Plaintiff. Further, on or about the 14th day of December 2000, the 1st Defendant illegally and unlawfully sold his lease interest to the 2nd Defendant without seeking the Plaintiff's consent. Subsequently, on 8th August 2003, the 2nd Defendant was registered as the proprietor of the lease. The Plaintiff contends that all the actions of selling and transferring the lease interest were fundamental breaches of the lease covenants and the law.

The 1st Defendant's case is that he acquired the lease from Semyoni Gava who he always paid rent. He then sold the lease to the 2nd Defendant on 14th December 2000 and informed the Plaintiff and the late Semyoni Gava.

The 2nd Defendant did not file a defence in this matter though he was served by substituted service through the New Vision and Daily Monitor newspapers of 1st May 2006 and 6th May 2006 respectively. There is an affidavit of service of Reuben Tumusiime to that effect filed on the court record. The Registrar of this court accordingly entered a default judgment against the 2nd Defendant under Order 9 rule 1 of the Civil Procedure Rules. It is the Plaintiff's prayer that the orders for forfeiture and deregistration be made against him by this court.

The 1st Defendant filed scheduling notes in addition to his defence. He did not attend the scheduling conference conducted by this court but his Counsel represented him at the conference. He also failed to attend court twice, on 15th June 2011 and 21st November 2011 when this matter was called for hearing. This was despite being served by substituted service in the New Vision newspaper of Thursday 17th November 2011 as ordered by this court. The hearing therefore proceeded ex parte against him on the application of the Plaintiff. His Counsel was also, on application, given leave to withdraw from the case after he reported to court twice that he had failed to trace the 1st Defendant. The Plaintiff filed a sworn witness statement and his Counsel filed written submissions in accordance with time schedules given by this court.

Agreed Facts

At the scheduling conference between the Plaintiff and the 1st Defendant, the following facts were agreed on:-

- a) The Plaintiff is the registered proprietor/mailo owner of land comprised Block 29 Plot 124 at Mulago having been registered on 3rd February 1987 by virtue of a vesting order Instrument No. KLA 123511.***
- b) There is a subsisting lease comprised in LRV 716 Folio 23 Plot 124 with effect from 2nd May 1969 in the names of the 2nd Defendant and it will expire on 2nd May 2018.***
- c) The 1st Defendant sold his lease interest to the 2nd Defendant on 14th December 2000.***

- d) *HCCS No. 1062 of 1987 Annette Namirimu V Erukana Kuwe in respect of the suit property was dismissed by this court under Order 17 rule 6 of the Civil Procedure Rules (CPR) on 19th September 2007.*
- e) *The court has jurisdiction in this matter.*

Issues for Determination

The following issues were agreed:-

- i) *Whether the plaint discloses a cause of action against the 1st Defendant.*
- ii) *Whether the Plaintiff is the rightful registered proprietor of the suit property comprised in Block 29 Plot 124 land at Mulago and is therefore the lessor of the lease interest vide LRV 716 Folio 23 Plot 124.*
- iii) *Whether the 1st Defendant lawfully transferred the lease interest to the 2nd Defendant.*
- iv) *Whether the 1st Defendant breached the lease agreement for the lease vide LRV 716 Plot 124.*
- v) *Remedies available to the parties.*

Resolution of Issues

Issue i: Whether the plaint discloses a cause of action against the 1st Defendant.

A cause of action means every fact which is material to be proved to enable the Plaintiff to succeed. It has been established through case decisions that in order to prove that there is a cause of action, it is necessary for the Plaintiff to establish three essential elements namely that:-

- a) *The Plaintiff enjoyed a right;*
- b) *The right has been violated;*
- c) *The Defendant is liable.*

If all the three elements are present then a cause of action is disclosed and any defect or omission can be put right by amendment (**Auto Garage & Ors V Motokov (No.3) [1971] EA 514**).

In disclosing whether or not a suit discloses a cause of action, one looks ordinarily, only at the plaint and assumes that the facts alleged in it are true (**AG V Oluoch [1972] EA 392, Spry J**).

The Plaintiff pleads in paragraph 4 of his amended plaint that he is the owner and registered proprietor of Block 29 Plot 124 land at Mulago out of which a lease had been granted by his predecessor in title to the 1st Defendant who eventually transferred it to the 2nd Defendant; and that the Defendants have breached several covenants of the lease entitling him to re enter the suit property. The same paragraph goes on to set out particulars of the breach committed by each of the Defendants. In paragraph 5 of the Plaint the Plaintiff alleges that he has suffered loss and damage for which the Defendants are liable.

In my opinion, the three elements set out in **Motokov, supra**, are present in the plaint. The plaint discloses a cause of action. Issue i is therefore resolved in the affirmative.

Issue ii: Whether the Plaintiff is the rightful registered proprietor of the suit property comprised in Block 29 Plot 124 land at Mulago and is therefore the lessor of the lease interest vide LRV 716 Folio 23 Plot 124.

Section 56 of the Registration of Titles Act (RTA) provides that:-

“...every certificate of title issued under this Act shall be received in courts as evidence of particulars set forth in the certificate and of the entry of the certificate in the register book and shall be conclusive evidence that the persons named in the certificate as the proprietor or having any estate or interest in or power to appoint or dispose of the land described in the certificate is seized or possessed of that estate or interest or has that power.”

In **Kampala Bottlers V Damaniko (U) Ltd SCCA No. 22 of 1992** the Supreme Court held that under section 56 of the RTA the production of a certificate of title in the names of a party is sufficient proof of ownership of the land in question.

In his sworn witness statement, the Plaintiff states that he is the registered proprietor of land comprised in Block 29 Plot 124 land at Mulago measuring approximately 0.25 acres. A copy of the title to the said land was tendered in court as exhibit **P2**. It was also agreed issue number (a) during the scheduling conference between the Plaintiff and the 1st Defendant. This evidence has not been challenged or rebutted by the Defendants. The Plaintiff's proprietorship of the said land

was at one time disputed by a one Namirumu Annette in HCCS No. 1062 of 1987 but this suit was dismissed by court as per copy of a ruling tendered in this court as exhibit **P3**.

It is not in dispute therefore that the Plaintiff is the rightful registered proprietor of the property comprised in Block 29 Plot 124 land at Mulago which is a mailo interest. It was the evidence of the Plaintiff that at the time he acquired the mailo interest, it was the subject of a lease comprised in LRV 716 Folio 23 plot 124 in the names of the 1st Defendant. A copy of the said leasehold title was tendered in evidence as exhibit **P1**.

Section 66 of the RTA provides that:-

“The person named in any certificate of title as the proprietor of an estate of freehold in possession in the land described in the certificate of title shall be held in every court to be seized of the reversion and inheritance in the land immediately upon the term of any lease that is mentioned as an encumbrance in the certificate, and to have all powers, rights and remedies to which such a reversioner is by law entitled and shall be subject to all the covenants and conditions in such lease to be performed and observed by or on the part of the Lessor.”

On basis of the foregoing adduced evidence and authorities, it is my finding that, being the proprietor of the mailo interest in Block 29 Plot 124 land at Mulago, the Plaintiff is the lessor of the lease interest in LRV 716 Folio 23 encumbered on the said mailo interest. Issue ii is therefore answered in the affirmative.

Issue iii: Whether the 1st Defendant lawfully transferred the lease interest to the 2nd Defendant.

The Plaintiff stated in his sworn statement that prior to the 1st Defendant owning the leasehold interest the then owner of the mailo interest the late Semyoni Gava issued and or granted the then registered lessee, Amin Mohamed Jamal Shiusi the requisite consent to transfer his interest to Isaac Matovu. He tendered a copy of the consent issued to the 1st Defendant as exhibit **P6**. He stated however that the 1st Defendant irregularly, illegally and fraudulently transferred his leasehold interest to the 2nd Defendant without his (the Plaintiff's) consent or permission as the lessor of LRV 716 Plot 124. A copy of the sale agreement between the 1st Defendant and the 2nd

Defendant was tendered in court as exhibit **P7**. The Plaintiff further stated that consequently, the 2nd Defendant was fraudulently and or illegally registered as owner of the same lease. The lease agreement embedded in a copy of the certificate of title exhibit **P1** in its clause 4 provided, among other things, that the lessee was not to assign, sub let, or part with the possession of the lease or any part of it without the consent in writing of the lessor.

The 1st Defendant pleaded in paragraph 8 of his Written Statement of Defence (WSD) that the selling of the lease property to the 2nd Plaintiff occurred when there was a dispute between the Plaintiff and Annette Namirumu as to who was the true owner of the lease. The Plaintiff has adduced evidence that the said dispute embodied in HCCS No. 1062 of 1987 was dismissed by court as per copy of a ruling tendered in this court as exhibit **P3**. It is evident that indeed the 1st Defendant did transfer the lease interest on the Plaintiff's land to the 2nd Defendant and that no consent was obtained by the 1st Defendant from the rightful lessor when he transferred the said interest. This was contrary to clause 4 of the lease agreement. This therefore renders the said transfer unlawful. In that regard, issue iii is answered in the negative.

Issue iv: Whether the 1st Defendant breached the lease agreement for the lease vide LRV 716 Plot 124.

It is my finding in issue iii above that the 1st Defendant breached the lease agreement when he transferred his lease interest to the 2nd Defendant without the consent of the lessor.

However, the Plaintiff also alleges a second breach of the lease agreement in that the Defendants failed to pay ground rent to the Plaintiff as the lessor contrary to clause 4(b) of the said agreement. Section 103 of the RTA makes it an implied covenant/obligation for the lessee to pay the reserved rent within 30 days whether or not there is formal demand for the same. Section 105 of the same Act makes it an implied covenant for any transferee of any lease to pay forth the rent and observe and perform all the covenants in the lease. In this case it was a term in the lease for the lessee to pay the ground rent. Exhibits **P8 (i) – (viii)** show that there were numerous attempts by the Plaintiff to the Defendants demanding for payment of ground rent in vain. In this respect, I find that the lease agreement was breached by the Defendants. Issue iv is therefore answered in the affirmative.

Issue v: Remedies available to the parties.

The Plaintiff has proved his case against the Defendants that he is the registered proprietor of the suit land comprised in Block 29 Plot 124 land at Mulago and therefore also the lessor of the lease interest vide LRV 716 Folio 23 Plot 124. He has also proved that the Defendants breached the lease agreement for the lease, first, by the 1st Defendant unlawfully transferring the lease interest to the 2nd Defendant, and, secondly by the 2nd Defendant failing to pay the ground rent. The Plaintiff in his sworn witness statement averred that he would have earned ground rent of a total sum of U. Shs.22,000,000/= for the 11 years the Defendants possessed the lease at U. Shs.2,000,000/= per year. He attached a valuation report annexure **AA** to his statement to support the figures. This was not disputed by the Defendants. He also prayed for general damages of U. Shs.198,000,000/= for being denied the opportunity to utilize his premises on the land being transferred to the 2nd Defendant.

It is trite law that damages are the direct probable consequence of the act complained of. Such consequences may be loss of use, loss of profit, physical inconvenience, mental distress, pain and suffering (**Assist (U) Ltd V Italian Asphalt & Haulage & Anor HCCS No. 1291 of 1999**, unreported, Kiryabwire J). Special damages arising from loss of income must be strictly proved and properly assessed by court. A claim for loss of business is a special damage which must be strictly proved to show how much business was lost and for how long to enable court come to a reasonable decision on the issue (**Uganda Breweries V Uganda Railways [2001 – 2005] HCB 24**). Loss of rental income is assessed on the basis of the value of the premises at the time. The landlord should aver in his pleading what he alleges is the annual value and must be prepared to prove it (**George Kasedde Mukasa V Emmanuel Wambede & Ors Civil Suit No. 459 of 1998** unreported). Regarding general damages, the law is that they must be pleaded and proved (**Moses Kizige V Muzakawo Batolewo [1981] HCB 66**). In **Assist (U) Ltd V Italian Asphalt & Haulage & Anor, supra**, inconvenience was held to be a form of damage.

In the instant case the Plaintiff's has proved the special damages of U. Shs.22,000,000/= regarding the ground rent in his undisputed sworn statement. In the same statement he stated that as a result of the illegal action of the Defendants he suffered damage and loss of income at a rate of U. Shs.2,000,000/= per month for 99 months, totalling to U. Shs.198,000,000/=. The Plaintiff also stated that the property comprises of two storied residential blocks and an out building, and is located in the prime area of Mulago. Annexure **AA** to the witness statement supports this

statement. In my opinion, the Plaintiff has also proved the general damages and I would award the same.

The Plaintiff further prayed for forfeiture and or re entry of the lease, and the eviction of the Defendants or their agents. Default judgment having been entered against the 2nd Defendant, and the Plaintiff having formally proved his case against him, and the case having proceeded *ex parte* against the 1st Defendant, I find that the Plaintiff is entitled to the orders. The eviction order however will allow compassionate time of two months from the date of judgment for the Defendants and or their agents to organize their vacation from the suit land. This is in consideration of the fact that the 2nd Defendant purchased the now challenged interest on the land a long time back on 14th December 2000 eventually becoming the registered proprietor of the same on 8th August 2003.

I therefore enter judgment for the Plaintiff against the Defendants jointly and severally as follows:-

- a) ***An order for forfeiture and or re entry of the lease comprised in LRV 716 Folio 23 Plot 124 for non observance of the covenants of the lease agreement.***
- b) ***An order directing the Chief Registrar of Titles/Commissioner Land Registration to cancel the 2nd Defendant's lease and registration as proprietor thereof.***
- c) ***An order of eviction against the Defendants and or their agents, representative, tenants or whoever is in occupation of the suit property with effect from 23rd May 2012.***
- d) ***Special damages of U. Shs. 22,000,000/=.***
- e) ***General damages in the sum of U. Shs. 198,000,000/=***
- f) ***Costs of the suit.***
- g) ***Interest at 6% on (d) above from 2003 and on (e) from the date of judgment.***

I so order.

Dated at Kampala this 23rd day of March 2012.

Percy Night Tuhaise

JUDGE.

