THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE

CIVIL APPEAL NO. 139 of 2013
(ARISING FROM TORORO CIVIL SUIT NO. 61 OF 2010)

OBWANA PETER.....APPELLANT

VERSUS

1. **MALABA TOWN COUNCIL**
2. **GEORGE ALFRED OBORE**
3. **OKALLANY SAMUEL BAKER.....RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

The Appellant was dissatisfied with the judgment of **his Worship Emuria Charles** of 4th October 2013 at Tororo under Civil Suit 61 of 2010.

Under the memorandum of appeal six (6) grounds of appeal were listed. Appellant argued ground 1, 2 and 3 together, grounds 4 and 5 were argued separately. Respondents jointly argued grounds 1 separately and the rest of grounds 2, 3, 4 and 5 together.

I will therefore address the grounds in the order of presentation by the appellant.

The duty of this court as a first appellate court was well articulated in ***Kifamunte Henry v. Uganda Cr. Appeal No. 10/1997***. This duty involves re-evaluating the evidence with a view to make new conclusions thereon but bearing in mind that the court had no chance to listen to or observe the witnesses.
With that in mind; I now consider the grounds of appeal as follows:

Grounds 1, 2 and 3:
The background to the appeal is that plaintiff was owner of the residential house. He entered into a tenancy arrangement with 1st defendants vide its agents D.2 and D.3. The terms were reduced in a document and the parties each undertook to commence the said terms on 1st August 2005.

On 28. August 2005 the defendant wrote to plaintiff rescinding the contract on the basis of plaintiff's "Failure" to provide a "finished produce" as agreed before finally signing and executing the contract (see plaint).

Plaintiff sued for breach contract.
The defendants denied the liability raised by plaintiff setting up a counter claim in defence that it was the plaintiff to blame for the breach.

The learned trial magistrate after conducting the trial found for the defendants, hence this appeal.

Two issues were framed for determination by the lower court. These were:

1. Whether or not the tenancy agreement was breached and if so by who.
2. Remedies available.

The evidence before court was briefly as follows:
PW.1 Obwana Peter who was the plaintiff. he tendered the agreement as EP.I and other documents in evidence contained in EP.2.
PW.2 Kasirye Siraj, who renovated the house and drew a bill of quantities.
PW.3 Luutu Daniel officer from IGG who tendered Exp.3, PE.4, EP.5.
DW.1 Obore George Alfred who said the signing of the document was done pending drawing of a final agreement and paying of rent (P.47 of typed proceedings). He also stated that by 01.08.2005 the premises were not ready! Hence they were (Council) forced to write to plaintiff canceling the agreement.
DW.2 Malinde Charles.
DW.3 Samuel Baker Okallany.
DW.4 Owori Wilberforce- these witnesses identified a number of documents as indicated on record.

From that evidence the learned trial magistrate concluded that the tenancy agreement as presented was varied by oral evidence that there was an implied term of the contract that the plaintiff was to pass on a "finished product".

The learned trial Magistrate, basing on exception to S.92 Evidence Act under the parole evidence rule, allowed the defendant to lead evidence of the implied warranty habitability. Basing on that and other findings, he terminated both issues for the defendants.

This is the appellant's complaint that the learned trial Magistrate erred in law and fact and the judgment occasioned a miscarriage of justice, when the learned trial Magistrate admitted the Respondent's parole evidence to explain the terms of tenancy agreement. He referred to the case of ***DSS Motors Ltd vs. Afri Tours and Travel Ltd HCCS No. 12 of 2013, and Jacobs v. Batvia & General Plantations Trust Ltd (1924) 1 Ch.287***.

In their joint submissions the Respondents argued that according to Exp.1 – Tenancy agreement this agreement was to commence on 1st August 2005 and so learned trial Magistrate was right to state at page 4 paragraph 4 that the tenancy had never commenced by time of the suit because premises were not habitable; and were not occupied.

All arguments under these grounds are premised on the fact that the learned trial Magistrate allowed oral evidence to explain why the plaintiffs tenancy with defendants never came to be inspite of the terms of their agreement contained in the Tenancy agreement EP.I.

This situation is governed by Section 91 and 92 of the Evidence Act. The strict provisions of this Act are that parties to a contract are bound by their contract. This is the exposition discussed in the case of ***DSS Motors v. Afri Tours*** (supra) where Hon. J. Bamwine reiterated that:

> "*Since the agreement between the parties was in writing the parol evidence rule isn't applicable to it. This rule is to the effect that evidence cannot be admitted or that even if admitted it cannot be used) to add to vary or contradict a written instrument. In relation to a contract of this nature, the rule means that where a contract has been reduced to writing neither party can rely on evidence on terms alleged to have been agreed which is extrinsic that is, not contained in it*."

That position has been restated in many decided cases. However this rule is not cast in iron. It gives room to exceptions where the party to a contract can be allowed to adduce extrinsic evidence to court to clarify 'the intention of the parties' where the terms of the contract though written down are as provided under Section 92 of the Evidence Act if the statement is ambiguous, illegal (for lack of consideration, incapacity to contract); Collateral- contract partly oral and partly in writing, or to prove nature of the transaction.

See: ***Cross and Tapper on Evidence Eighth Edition (1995) page 769-771***).

This position was exhaustively discussed by **Hon. J. Mulenga** in the Supreme Court decision of ***General Industries U. Ltd v. Non Performing Assets Recovery Trust CA.5/1988***, where he quoted with approval from the descenting judgment of ***Charles New Bold in Millis v. United Countries Bank Ltd*** thus:

> "*The time is long past since the courts have been precluded from giving effect to the intentions unless the words used cannot possibly bear that meaning…. Courts will interprete the words or construe them in a manner as to give effect to the intention of the parties…. and in applying those principles I hold that the intrinsic evidence was correctly relied on*."

The Judge in that case found that the trial court was right to relay on oral evidence to explain the terms of the mortgage, so as to remove certain unclear ambiguities which in its written form it was not clear to ascertain. The guiding principle however appears to be the need to protect the "intention of the parties."

I found that this same principle of the need to protect the intention of the parties was emphasized by **Hon. J. Bamwine** in ***Akugoba Transport Develop Services Ltd v. Sun Auto Co. Ltd & Anor. HCCS.050/2006***.

From the position above I do agree with the Respondents that the agreement in its form alluded to " a future happening" which is stated thus "In consideration of yearly rent of shs.12,000,000/= payable in August of every year in advance by the Tenant to the landlord, the first payment of 12 million for the first year being made on the date of execution hereof, receipt whereof the landlord

acknowledges, the landlord Lets and the Tenant takes from the landlord commencing on the 1st August 2005 for a period of 5 years."
For a contract to be valid there must be an offer and acceptance of the offer.

In this case the offer to rent out a house by the (Plaintiff was accepted by the defendants. The consideration (Price) was also agreed on to be shs. 12 million per month. This was the consideration. There is however ambiguity regarding how this consideration was to be dealt with before the conclusion of the agreement in the words of the clause of the Agreement as quoted. It is this ambiguity in my view which made it necessary to allow defendants to lead evidence to show that the due date was 1st August 2005, once the house is made July habitable…."

In common law, it is recognized as per ***Turner v. Forwood (1951) 1 ALLER 746***, that the parties may often be taken to have intended that their arrangements should be carried out partly by deed and partly parol, and it was reasonable to infer that so far as the intention of the parties was concerned, these cases were the same as those where no consideration was inserted in a deed."

The import here is that where the clause is ambiguous regarding the intention of the parties on the consideration, then it is assumed that their bargain was partly written and partly oral and hence this would qualify the party to move out of the parol evidence rule; by calling oral evidence to clarify the position.

I am of the considered opinion that this is exactly what transpired in this case. The defendants through evidence, placed before court explanations showing that the parties had agreed that the plaintiff's house was to be habitable by 1st August 2005 the date when plaintiff was to receive the first installment and also give vacant possession to defendants. Evidence was led to show that plaintiff frustrated this, by failing to give the defendants the house in a habitable form. Defendants therefore wrote to plaintiff drawing this anomaly to him and effectively rescinded the contract.

This scenario is a kin to the one considered in De ***Lassalle v. Guidford (1901) 2 KB 215***, where the plaintiff made it plaint to his landlord that he would not execute a lease unless the defendant gave a warranty concerning the healthy condition of the drains. Such warranty was given orally, and the lease was duly executed. The lease did not refer to the state of the drains but it was held that this fact did not prevent the adduction of oral evidence concerning the warranty." According to ***Cross and Tapper on Evidence*** (supra) page 772-

> "*A court may likewise come to the conclusion that the parties intended their contract to be partly oral and partly oral and partly in writing, in which case the oral parts may be proved by parol testimony*."

I do find that this discourse fits within the facts of this case. I do hold that:

1. There was no subsisting contract enforceable by Plaintiff as against defendant by the time of the suit, since plaintiff had failed to perform a major part of their agreement which was to give the defendants a habitable house by the 1st of August 2005.

By 1st August, 2005, no consideration was paid and hence the contract was not yet concluded. The learned trial Magistrate was therefore right to find that the defendants were not in breach of the said agreement. I do find that grounds 1, 2 and 3 all are not proved.

Ground 4 and 5:

These grounds are also repeating the complaint that the learned trial Magistrate was wrong to infer the doctrine of the warrant of habitability.

I have however in reference to former decided cases, especially form the Supreme Court as cited and those from common law found that there are valid exceptions to the parol evidence rule. I have also referred to the jurisprudence in ***Delessale v. Guidlford (1901) 2 KB 215*** to hold that where there is an implied warranty and a party successfully demonstrates that the written contract intended to depend on it yet its wording is ambiguous, court can allow adduction of oral evidence in proof of that fact.

See: ***Turner v. Forwood (195…) 1 ALLER 746 and General Industries U Ltd v. Non Performing Assetss and Recovery Trust*** (supra).

I therefore find that basing on the legal positions above, the learned trial Magistrate was right to allow the evidence on “liability” and to also infer from the intentions of the parties this fact as an implied warranty of their bargain.

Grounds 4 and 5 therefore are also not proved.

In all I do not find merit in this appeal. I do dismiss it with costs to Respondents. I so order.

Henry I. Kawesa

JUDGE

23.08.2017