THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA- 62 OF 2016

MARGRET WAMULUGWA :: APPELLANT

VERSUS

BUGISU COOPERATIVE UNION:::::::::::::::::::::::::::::::::::: RESPONDENT

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

JUDGMENT

The brief facts are that appellant brought an action against the respondent in Civil Suit 001/ 2009 resulting from a landlord-tenant relationship. Defendant/respondent counterclaimed for payment of rent arrears, vacant possession and costs. Judgment was delivered in favour of the respondent, hence this appeal.

The appellant raised 7 grounds of appeal in his memorandum of appeal which he argued by combining 1 & 2 together, 3 and 4, separately abandoning 5, and 6 and 7 together.

I will adopt the same style for want of consistency.

The duty of a first appellate court is to re-evaluate the evidence , reach own conclusions bearing in mind the fact that it had no chance to observe and listen to the witnesses. (**PANDYA V. R [1957] EA 336**)

Ground 1 and 2

Whether there was a subsisting tenant landlord relationship at time of termination, and if so, whether there was breach of contract by the plaintiff.

From the submissions, it is argued by the appellant that learned trial Magistrate was wrong to hold that there was no subsisting tenancy and to infer breach of contract by the plaintiff.

The respondents agree with the learned trial Magistrate's findings.

I have looked at the entire record and analyzed the pleadings, evidence and submissions. I now hold as follows;

a) Tenant – landlord relationship

The evidence shows that the plaintiff **Margret Wamulugwa** was a tenant of Bugisu Cooperative Union Ltd vide Tenancy Agreement dated 17th August 2007 (annexed to the plaint as 'A') and to the Written Statement of Defence also as "A". The agreement was also exhibited.

The defendant/respondent then wrote to the appellant/plaintiff vide letters of termination of tenancy (Exh P7) of 22nd December 2008, and (EX P5), "Termination of Tenancy" in which the defendant/respondents informed appellant that the tenancy had been terminated on grounds and for reasons stated in the letters(Exh 5 and Exh 7).

A reading of those documents referred to above raises the fact that the defendant/ respondents recognized the plaintiff/appellant as a tenant.

He acknowledges payment of rent and informs her that "your payment of rent for the month of January 2009 amounting to Ushs 472,000/= shall be refunded promptly by cheque".

The only legal question which arises is that these parties had an existing tenancy agreement which they signed for 1 year running from 17th August 2007 to 31st July 2008. After that period of expiry no new agreement was entered into, but the plaintiff remained on the premises as a tenant. (See plaint paragraph 4 (a), (b), and (c).

It was during that period on 10th December 2008 that defendant/respondent wrote Exh.5, terminating the tenancy, and wrote Exh.7 explaining the reasons.

By Written Statement of Defence paragraph 4 and plaint paragraph (4) all parties acknowledge that plaintiff continued paying "Rent" under the "no written agreement" period which was acknowledged.

In the case of ***Pardhan Jwraj V Whelpadale (1920 -29) 3 ULR 193,*** It was held that payment and acceptance of rent provided requisite evidence that the defendant and the plaintiff regarded each other as landlord and tenant.

This case contrasts the case of ***Nabagala Anitah V. Drake Lubega CS 383/ 2007*** in which the issue was a mere demand for rent, where the other party had not been in a contractual obligation so to pay. It is therefore distinguishable.

The facts further bring into question the legal relationship which existed between these parties after the expiry of the written agreement . Could this tenancy pass for a "periodic tenancy? which means a tenancy with exclusive possession but whose duration is not fixed but is determined with reference time rates at which rent is paid. In effect, in this type of tenancy, on receipt of rent the tenancy is renewed for a corresponding period. I think this tenancy would not pass that test because the earlier agreement for 17th August 2007, was very specific under the terms. This agreement provided under clause 1(b) that it would be for one year's tenancy terminable in writing each party giving not less than two months notice.

(c) Rent shall be 472,000/= per month payable six months in advance …."

(g) Tenant shall have the option to review this tenancy for a further period at a rent and conditions to be agreed by the parties herein.

From the above, the moment this tenancy agreement lapsed, and the tenant did not exercise the option under (g) above, she became "a tenant by estopell."

This at common law means a tenancy where the landlord recognizes the "tenant" as a tenant though they never expressly agreed to this relationship.

See: ***Bamsters Reference Books Series (2nd edition) Land Transactions in Uganda at page 130***.

I therefore find that there was a tenant/landlord relationship which was governed by their agreement signed on 17th August 2007. However at expiry of that agreement the tenant assumed the right of a tenant by estopell.

(B) Breach of Contract by the plaintiff

I have found from evidence that the relationship between the landlord (Defendant) and tenant (plaintiff) after the expiry of the agreement of 17th August 2007 to 31st July 2008, was that of a tenancy at will. This type of tenancy does not attract a period of notice before termination.

In effect, for the period the appellant remains on the premises without a formal agreement, she does so at the will of the landlord. Her presence could easily translate into trespass to the property.

In the case of ***Stanley and Sons V. Akberali Saleh [1963] EA 594***.

The plaintiff sued for rent arrears alleging a verbal agreement. The defendant had served a notice to quit but the plaintiff remained in occupation. SPRY J. held that:

> "*The plaintiff had failed to prove agreement but had proved existence of a tenancy until it was determined by notice to quit. After the notice to quit was served, the defendant was a tenant at will…*"

These facts when reverted to the case before me show that for the period between 31st July 2008 to 10th December 2008, the plaintiff was operating as a tenant by estopell, and the terms of the earlier agreement were 'assumed' to be in operation, and the landlord could enforce them as against her. However from the 10th of December 2008, when the defendant/respondent's officer served the plaintiff with a notice to vacate on 1st January 2009, she became " a tenant at will"

At common law, a tenant at will puts himself/herself at the will of the landlord and such tenancy can be terminated anytime without notice.

From the two positions above the rights of the plaintiff /appellant remained at the will of the landlord, she having put herself outside the formal written terms of the 2007 Agreement. The landlord wrote to her that she was in breach of terms of their 2007 agreement vide Exh. P7. This was supported in evidence by **DW2- William Wabulu**. The plaintiff conceded in cross-examination (page 7) that she kept coffee on the premises yet she was aware that dealing in coffee was prohibited by the landlord.

From the above position, I find that the plaintiff was in breach of the terms of the agreement, and hence the learned trial Magistrate was right to find so.

As a result:

Ground 1 succeeds; while ground 2 fails.

Grounds 3, 4, 6 and 7.

Special Damages

Special damages must be proved.

In this case the plaintiff did not lead any evidence to prove the special damages hence none were awarded.

However the respondent /counter claimant raised a demand for special damages which were awarded at shs. 20,667, 600/=

To be precise, the word "specifically or specifically proved" must be accorded its natural meaning.

In ***Provincial Insurance Co. of EA Ltd V. Mordekai Mwanga Nandwa (1995-1998) EA 289***. It was held that special damages are those which are ascertainable and quantifiable before the action and must be pleaded and proved. They should not be merely thrown at the defendant but have to be specifically pleaded.

In ***Mutekanga V. Equator Growers Utd (1995) (1998) 2 EA 219***

It was held that the plaintiff has to give warning in his pleadings of items constituting the claim for special damages with sufficient specificity and these must be proved.

I have noted from the pleadings by the counter claimant/respondent that he pleaded for Shs 20,667,600= under 7(a)- (k) of the written statement of defence. However in the prayer he prayed for shs 19,575,600 (unspecified). Then in the scheduling summary of evidence he mentions that he prays for rental arrears of 19,575,600/= (which is not specified in the counterclaim). The evidence in proof of this claim was by the oral testimony of DW1- **Birabi Moses**, who enumerated the figures of the arrears , and came to a figure of 178,461, 122/=. The law of evidence under section 101, 102, 103, requires whoever asserts a fact to prove it. The defendant had the burden to specifically prove the special damages. He failed. From the pleadings it is not clear what he was going to prove. Was it 20,667,600/=? Was it 19,575,600? Or was it the 178,461,122 claimed by DW1.

All that leads me to conclude that the evidence did not prove the special damages as pleaded. I agree with the appellant that the learned trial Magistrate erred to award the same.

General Damages:

An award of general damages according to ***Stroms V Hutchinson (1905) AC 515***, relates to the direct or natural or probable consequence of the act complained of. The aim of granting damages is to compensate the plaintiff for his loss.

The best practice is that in cases of breach of contract, courts now take into consideration inflation levels consequent variability of the cost of goods and services, changes in the value of currency. In such cases court will assess damages with reference to the market value of the goods as at time of Judgment. (per ***Uganda Civil Justice Bench Book Page 214***). With that guidance in mind and evidence that was before court, regarding the locality of the subject matter, I agree with the learned trial Magistrate that the award of Shs 15 million as general damages for the period of breach was reasonable.

Proof and Evaluation of Evidence

Where a case involves a counter claim, the right approach is to assess evidence of the main suit, determine the issue and make findings on it. The counter claim is also considered as a separate suit. See the case of ***Twiga Chemical Industries v Bamusedde (2005) EA 324 (SCU)***

In the case before court, the learned trial Magistrate referred to the evidence on record and determined the counterclaim within the main suit. That be as it as an appellate court I have re-evaluated the evidence and have come to the conclusion that the evidence by the defendant/counter claimant, proved that the plaintiff/ defendant counterclaimant breached the tenancy agreement.

She was liable for the orders sought of vacating the premises, damages and costs.

This finding is what the learned trial Magistrate also came up with in his final conclusion(though modified in regard to the award of special damages which were held as not proved.

I therefore find no failure or miscarriage of Justice and the ground fails.

In conclusion, this court therefore finds as follows on each of the grounds of the appeal.

Ground 1- succeeds, as there was a Landlord-Tenant Relationship.

Ground 2- fails as the plaintiff was in breach of the agreement.

Ground 3- fails, as there was no proof of the said 20.667.000/= arrears.

Ground 4- succeeds as the 15.000.000/= is reasonable.

Ground 5- Abandoned and is moot.

Ground 6- fails – learned trial Magistrate properly evaluated the evidence as a whole.

Ground 7- fails- Decision did not amount to miscarriage of justice.

In the result, the appeal succeeds only in part regarding ground 1, and 3. It fails on all other grounds and will be dismissed with orders that the learned trial Magistrate's judgment and order that the appellant pays Shs 20.667.000/= with interest of 20% be set aside and replaced with an order that there is no award of special damages.

The appellants will pay $^{2}/_{3}$ of the taxed costs of this appeal to the respondent.

I so order.

Henry I. Kawesa

JUDGE

28.02.2017