

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

CIVIL APPEAL No. 0142 OF 2016
(Arising out of Civil Suit No. 0007 of 2013)

LUKODA YUSUF ::: APPELLANT

Versus

BITEEBA JULIUS ::: RESPONDENT

BEFORE: HON. JUSTICE STEPHEN MUSOTA

JUDGMENT

This is an Appeal against the judgment of His Worship Matyama Paul Magistrate Grade 1 at the Chief Magistrate’s Court of Makindye delivered on 8th July 2016.

The Appellant was represented by M/S Sewankambo & Co. Advocates and the Respondent was represented by M/S Kibirige & Kibirige Advocates.

The Appeal is against the whole Judgment and decision of the said Magistrate on the following grounds that;

1. The learned trial Magistrate erred in law and fact when he found that there was a valid Tenancy Agreement between Appellant/Defendant and Respondent/Plaintiff between the months of November and December 2012.

2. The learned trial Magistrate erred when he failed to evaluate the evidence and thus arriving at a wrong conclusion that the Appellant/Defendant unlawfully locked the Respondent’s premises on 1st November 2012.

3. The learned trial Magistrate erred when he dismissed the Appellant's/Defendant's counterclaim.
4. The learned trial Magistrate erred in law and fact when he awarded the Respondent/Plaintiff nominal and general damages.

Briefly the background of this Appeal is that the respondent entered into a Tenancy Agreement with the appellant on 30th October 2009, for purposes of renting his premises at Kanaba Ndejje Makindye for a monthly rent of UGX.140,000/= payable in two months advance. After the Tenancy Agreement the respondent started doing business in the said premises running among others Mobile Money Business, Phone Accessories Shop and Phone Charging Services. On 1st November 2012, the defendant entered onto the suit premises, confiscated the keys for the shops and locked up the premises. The respondent claimed that he had already paid rent in advance for the month of November and December 2012. The respondent was aggrieved and felt that the appellant had no justifiable reason to lock up the premises because the respondent had already paid the rent for November and December. The respondent then filed Civil Suit No. 0007 of 2013 against the appellant for a declaration that the defendant unlawfully locked up the premises, an order directing the defendant to unlock the premises, special damages of UGX.19,337,000/=, general damages, interest and costs of the suit.

The Defendant/Appellant filed a written statement of defence claiming that the respondent did not have a cause of action and his case lacked merit since he failed several times to comply with the terms of the Tenancy Agreement and was therefore given one month notice to vacate the premises but he failed. The Magistrate decided the matter in favour of the respondent and awarded the respondent all the remedies sought including general damages of UGX.280,000/=, nominal damages of UGX.4,000,000/=, costs and interest at 8% per annum. The Defendant/Appellant was dissatisfied by the judgment and filed this Appeal.

When the Appeal came up for hearing the parties were directed to file written submissions which they did.

As a first Appellate Court, it is the duty of this court to re-evaluate the evidence of the Lower Court and decide whether the Lower Court decision can be sustained or not. The Appellate Court has to come to its own conclusion while bearing in mind that the Appellate Court did not have the opportunity to see the witnesses (demeanor) as they testified in the Lower Court. That was settled in the case of *Fredrick Zaabwe Vs Orient Bank & 5 Ors, Supreme Court Civil Appeal No. 04 of 2006.*

I shall therefore proceed to consider the grounds of Appeal, one by one.

Ground 1: That the learned trial Magistrate erred in law and fact when he found that there was a valid Tenancy Agreement between Appellant/Defendant and Respondent/Plaintiff between the months of November and December 2012.

The issue here is whether or not there was a valid Tenancy Agreement between the appellant and the respondent between the months of November and December 2012.

The appellant submits that there wasn't a valid Tenancy Agreement since the appellant had already issued and served a notice to vacate on the respondent.

On the other hand the respondent submits that there was a valid Tenancy Agreement. The learned trial Magistrate found at pages 41-44 of the Record of Appeal (pages 2-5 of the Judgment) that there was a valid Tenancy Agreement. This was on the strength of Exhibit 'PEX2' which was a receipt issued by the Landlord showing that the appellant had been paid rent for the months of November and December 2012.

As I have already stated it is the duty of the first Appellate Court to re-evaluate the evidence as a whole as was also held in *D.R. Pandya Vs Republi [1957] EA 336.*

In executing the above duty, this Court has to examine and scrutinize the evidence of all witnesses at the trial.

After re-evaluating the evidence on record, I am inclined to agree with the position taken by the Trial Magistrate. Counsel for the appellant submits that Exhibit 'PEX2' on which the Trial Magistrate relied was a mistake. Learned counsel argued that the proof that it was a mistake is in a letter as per the testimony of the appellant which he wrote to the defendant reminding him and notifying him that he was supposed to vacate the premises and these were admitted as exhibits 'DEX1', 'DEX2' and 'DEX3' on page 28 of the Record of Proceedings.

The issue here therefore is whether the appellant received rent payment for the months of November and December 2012 or not? If yes, what then was the effect of the letters and notices purporting to terminate the tenancy?

The plaintiff/respondent produced a receipt of payment issued by the appellant himself indicating that he had received rent payment for the months of November and December 2012 which was issued on 17th September 2012. This document marked 'PEX2' was an agreed document at the trial. The appellant however, at page 27 of the Record of Proceedings paragraph 1 testified that he made a mistake in writing the receipt since the respondent had paid for the months of September and October but instead he wrote November and December. But this is not believable because there was no evidence to prove at all that this was a mistake. Even the alleged letters informing the respondent that the receipt was a mistake do not show anywhere that the respondent received them.

The law on proof of the contents of a document is that the document itself should be produced in court. Court cannot rely on oral evidence to prove or vary the meaning of the contents of a document which has been tendered in court. The document should speak for itself and in this

case the receipt document 'PEX2' clearly states that the rent payment was for the months of November and December 2012.

Payment of and acceptance of the rent by the Landlord is evidence of continuance of the tenancy. In Uganda the conduct of the parties involved can be used to infer a tenancy especially where the person enters the premises and gets into possession of the premises and pays rent, which is accepted by the Land owner see Mayanja Nkanji Vs National Housing Corporation [1972] 1 ULR 37. In this case the Landlord accepted the rent and so is estopped from denying the existence of a tenancy.

I therefore, find no merit in this ground and it therefore fails.

Ground 2: That the learned trial Magistrate erred when he failed to evaluate the evidence and thus arriving at a wrong conclusion that the Appellant/Defendant unlawfully locked the Respondent's premises on 1st November 2012:

The Magistrate's reasoning on this issue was that since it was an agreed fact that, the appellant/defendant was the one who locked up the premise, it was not necessary for the respondent/plaintiff to prove this fact. Further that since the plaintiff had proved that there was a valid tenancy between the parties then it follows that the appellant unlawfully locked up the premises. I agree with this reasoning and therefore find no merit in this ground. It must fail.

Ground 3: That the learned trial Magistrate erred when he dismissed the Appellant's/Defendant's counterclaim:

The trial Magistrate found that since there was a valid tenancy agreement with the counterclaimant by the time the counterclaimant/appellant locked the respondent's premises then the counterclaim must fail since the appellant had failed to prove the same on a balance of probabilities. The Magistrate then dismissed the counterclaim with costs.

I agree with the reasoning of the Trial Magistrate on this issue. The counterclaim was premised on the assumption that the appellant was entitled to lock up the premises which was not true. So the counterclaim could not succeed under the circumstances. The appellant is the one who locked up the premises without a court order. He caused the loss to himself. If he had allowed the respondent to continue in possession he would now be claiming rent arrears but since he decided to make the premises inaccessible to either party then he cannot claim for compensation through a counterclaim. The counterclaim had to fail and the Trial Magistrate rightly dismissed it with costs.

Ground 4: That the learned trial Magistrate erred in law and fact when he awarded the Respondent/Plaintiff nominal and general damages:

On this ground counsel for the appellant submitted that the respondent's case did not merit the award of general damages since the respondent/plaintiff did not produce any evidence in court to prove that he suffered any actual loss due to the appellant's action that would justify any award.

General damages, according to Lord McNaughton in the oft-cited case of ***Stroms Vs Hutchinson [1905] AC 515***, are such as the law will presume to be the direct, natural or probable consequence of the act complained of. What this means is that these are really at the discretion of court to decide what the probable loss could have been. In other words the court basing on the evidence available decides what the total loss could have been. It is an estimation done by court guided by the circumstances of a given case and the evidence.

In this case the Trial Magistrate had a Tenancy Agreement for UGX.140,000/- per month before him and a receipt of payment of rent worth UGX.280,000/=. Basing on this, the Trial Magistrate

awarded the respondent UGX.280,000/= as general damages. I cannot fault the discretion of the Trial Magistrate unless an error of law or fact is shown. In this regard there is none. The Magistrate properly awarded the general damages since the plaintiff had proved that he had lost two months worth of rental space possession.

On Nominal Damages, the Trial Magistrate awarded them on the basis that the respondent had failed to prove the actual damage he suffered. He relied on paragraph 813 of Halsbury's Laws of England Vol. 12 (1) in making this decision. I agree with the reasoning of the Trial Magistrate because as submitted by Lord Halsbury **12 Halsbury's Laws of England (4th Edition) paragraph 1114:**

“A plaintiff is entitled to ‘nominal damages’ where

- a) his rights have been infringed, but has not in fact sustained any actual damage from the infringement, or he fails to prove that he has; or***
- b) although he has sustained actual damage, the damage arises not from the defendant's wrongful act but from the conduct of the plaintiff himself; or***
- c) the plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right.”***

I however, think that since these are supposed to be nominal damages the quantum should reflect the value of the subject matter. In the circumstances of this case, a sum of UGX.4,000,000/= is on the higher side since the respondent did not prove any actual damage. I will accordingly scale it down to UGX.2,000,000/= (two million).

Save for the quantum on nominal damages, having found no merit in all the grounds of Appeal, this appeal is dismissed with costs to the respondent.

I so order.

Stephen Musota
J U D G E
15.02.2017.