IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL APPEAL No. 154 OF 2016

(ARISING FROM CIVIL SUIT NO.002 OF 2011)

NSUBUGA HUSSEIN MOSES ======== APPELLANT

VERSUS

1. **HAJAT SALAMA NAKIGANDA**
2. **MUSOKE LEONARD**
3. **MUKASA YUSUF } RESPONDENTS**

BEFORE HON. MR. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

This is an appeal from the decision of the Chief Magistrate Court of Mengo seeking for a declaration that they acted unlawfully when they conspired to evict him from the premises he was renting for his Bright Infant primary school, compensation and costs.

The trial magistrate ruled in favour of the Respondents when she stated that by applying the common law doctrine of novation, the first Respondent was discharged from her obligations of providing the building to the appellant and was now transferred to the 2nd Respondent.

She further found that since the rest of the terms of the original agreement were not varied save for rent, the original contract which was to last for fours ought to have ended on or around the 1st may 2005. Hence at the time on 13th December 2005 when the appellant was evicted there was no existing contract between the parties.

The appellant was dissatisfied with the decision hence this appeal.

GROUNDS OF APPEAL

1. **The learned trial Magistrate erred in law and fact when she held that the appellant does not have a contract with the 1st respondent.**

2. **The learned trial Magistrate erred in law and fact when she held that the appellant could not have a contract with the respondent.**

3. **The learned trial Magistrate erred in law and fact when she held that the appellant had not been evicted by the 3rd respondent.**

4. **The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence as a whole thus occasioning a miscarriage of justice to the appellant to the appellant.**

CONSIDERATION OF APPEAL

This being a first appeal, I will first of all remind myself of our duty as a first appellate court to re-evaluate evidence. Following the cases of **Pandya vs R [1957] EA 336; Kifamunte Henry vs Uganda Criminal Appeal No.10.1997, Bogere Moses and Another v Uganda Criminal Appeal No.1/1997,** the Supreme Court stated the duty of a first appellate court in **Father Nanensio Begumisa and 3 Others vs Eric Tiberaga SCCA 17/20 (22.6.04 at Mengo from CACA 47/2000 [2004] KALR 236.**

The court observed that the legal obligation on a 1st appellate court to re-appraise evidence is founded in Common Law, rather than the Rules of Procedure. The court went ahead and stated the legal position as follows:-

"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has

neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

I will therefore bear that principle in mind as I resolve the grounds of appeal in this case.

Ground 1 & 2

1. **The learned trial Magistrate erred in law and fact when she held that the appellant does not have a contract with the 1st respondent.**
2. **The learned trial Magistrate erred in law and fact when she held that the appellant could not have a contract with the respondent.**

Appellant counsel decided to argue Grounds 1 & 2 concurrently as far as they relate the existence of a contract between the appellant and the 1st respondent, notably (1) that the learned trial magistrate erred in law and fact when she held that the first respondent did not have a contract with the appellant, (2) that the learned magistrate erred in law and fact when she held that the appellant could not have a contract with the first respondent.

In reference to the above, ***Section 2 & 10 of the Contracts Act 2010*** demands that, a contract is;-

"An agreement enforceable by law made with free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound"

In the case of ***Greenboat Entertainment Ltd vs. City Council of Kampala HCCS No. 0580 of 2003,*** court emphasized the essential elements of a valid contract as follows;-

In law, when we talk of a contract, we mean an agreement enforceable at law. For a contract, intention to contract, consensus ad idem, Valuable consideration, legality of purpose, and sufficient certainty of terms, if in a given transaction any of them is missing, it could as well be called something other than a contract

Counsel for the Appellant submitted that in the instant case, due regard must be given to the fact that it is a common ground between the appellant and the 1st Respondent that on the 1st day of May 2003 they entered into a tenancy agreement running for (2) two years at a consideration of 3,300,000/= per year

and the same was to be broken down into (3) three quarterly instalments of UGX 1,100,000/=.

Later on during the subsistence of the above contract, the 1st respondent sold of the premises to the 2nd respondent who entered into. Since all the essential elements of a valid contract are not in contention and non of the parties to the tenancy agreement disputes the existence of all the same, this honourable court should be inclined to find that there existed a valid contract between the appellant and the 1st respondent with the intention to be legally bound by the same contract.

Counsel further submitted that, having established the existence of a valid contract, the most important question to be determined here is whether the first contract between the Appellant and the Respondent was discharged. According to the trial Magistrate under paragraph 4 on page 3 of her judgement, she states that, much as the 1st defendant sold the premises to the 2nd defendant before the lapse of the agreed two years, the 1st respondent was discharged from the contract by the fact that the plaintiff waived or varied the terms of their original agreement there by entering into a fresh one with 2nd defendant. She further stated under paragraph 1 on page 4, that the applicable principle is that of discharge by novation which recognizes the possibility that one party to a contract can release the other and substitute a third person who then under takes to perform the released persons obligations.

As a general rule liabilities under a contract cannot be assigned. However they can be assigned with the consent of the other party to the contract. This is what is known in law as novation. Thus novation is the only method by which the original can be effectively replaced by another. In C***hesire, fifoot & furmstons law of contract, 14th edition at P.577,*** the learned editors define it thus;- novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made.

The new contract may be between the original parties, e.g. where a written agreement is later incorporated in a deed/or between different parties e.g. where a new person is substituted for the original debtor or creditor. In other words it is a situation where the acts to be performed under a old contract remain the same,

but are to be performed by different parties. In ***Halsbury's Laws of England/Contract (Volume 9 (1) (Reissue)/8, Discharge of Contractual Promises (5) Discharge of Contractual Promises (5) Discharge by subsequent Agreement (Vi) Novation at Para 1042,*** it was stated that since novation involves a new contract, it is essential that the consent of all parties to be obtained. And in this necessity for consent lies the essential difference between novation and assignment.

It follows that to novate a debt, the creditor has to agree to release the original debtor and replace him with a new one. Thus no new agreement made between the new and retiring partner can of itself relive the old partner from liability, or prevent the creditor to bring a suit with the old part with whom he contracted.

From the evidence, it is this last form, the substituting of one debtor for another that concerns us in this case. In the case of ***Wega vs. The Chief Administrative Officer Maracha & Another HCCS No.0005 of 2016....****Hon Justice Stephen Mubiru* stated that a party asserting a novation has to prove there was;- (1) a previous valid obligation, (2) agreement of all parties to the new contract, (3) extinguishment of the old contact, and (4) validity of the new contract.

Appellant counsel further submitted that in application of the above, it implies that before the doctrine of novation is claimed to exist, it must be proven that the parties to make a contract replacing the old one must appear clearly from the circumstances, in case of doubt, the original contract remains in force.

In the instant case, it is important to note that in the month of December 2004 the chairman of the area introduced the 2nd respondent as the new land lord that had bought the 1st respondents premises, a fact the 1st respondent does not deny. Later on in the month of February 2005, the 1st respondent sent a demand notice to the appellant for rent arrears to which the appellant paid the 1st respondent UGX200,000/= and the balance was agreed to be converted in school fees due for the 1st respondents children.

By the above stated facts, it is evident that there is no any iota of evidence of a mutual agreement among all parties concerned for discharge of the valid existing contract between the appellant and the 1st respondent and hence the learned trial magistrate erred in law and misdirected herself when she failed to establish the

existence of consent to create a new contract among the parties concerned, therefore in short of establishing one of the essential element of novation, this doctrine was farfetched by the learned trial magistrate.

According to counsel for the appellant, the learned trial magistrate erred in law and misdirected herself when she delved into speculations and extraneous matters not supported by evidence on record, the trial magistrate therefore failed to correctly interpret the law vis-a-vis the pleadings on record and evidence adduced thus arriving at a wrong decision that the 1st respondents obligations were discharged by novation and thus the original contract between the appellant and respondent was substituted.

Counsel for the 1st Respondent avers that at the time the premises were sold there was no valid contract between her and the appellant. According to the tenancy agreement clause 5, the tenancy had lapsed because of default to pay rent.

The default is acknowledged by the Appellant in his evidence in the sum of UGX 791000/= reflected in Exh D(a) & (b) and further Ugx 900,000/= being the balance due to the 1st Respondent for the last term where the appellant paid only Ugx 200,000/= out of the agreed 1,100,0000/=. It should also be noted that the respondent's breach had been reported to the local LCs who intervened to no avail. The appellant was also given warning letter by the first respondent's lawyers dated 03/02/2005 but made no efforts to pay.

Therefore by the time the suit premises changed hands, the appellant was no longer a tenant but had become a trespasser. He had refused to settle his rent obligations as per the tenancy agreement and also refused to vacate. In the circumstances there was no existing contractual obligation which the 1st Respondent could hand over to the 2nd Respondent as the buyer. Therefore the argument of novation in this case is misplaced.

The respondent's counsel further submitted that there were no contractual relations between the Appellant and 1st Respondent at the time of eviction from the suit premises. There was no cause of action against the 1st Respondent and the Appeal should be dismissed with costs.

I have carefully reviewed the evidence that was presented at the Chief Magistrate Court of Mengo hearing, submissions by both counsel as well as the decision of the Court hence my findings below.

The Appellants claim that on 29th April 2001, they entered into a tenancy agreement to rent the premises of the 1st respondent for a period of 4 (four) years and the appellant used the premises to run a primary section school. It is alleged that 1st Respondent later on before the expiry of the tenancy agreement sold off the premises to 2nd Respondent who agreed to enter into a new arrangement with the appellant where the appellant was to pay shillings 800,000/= (eight hundred thousand shillings only) per term as rent.

Therefore by the time the suit premises changed hands, the appellant was no longer a tenant but had become a trespasser. He had refused to settle his rent obligations as per the tenancy agreement and also refused to vacate. In the circumstances there was no existing contractual obligation which the 1st Respondent could hand over to the 2nd Respondent as the buyer. Therefore the argument of novation in this case is misplaced.

The 1st Respondent continued to demand for the rent and issued a demand notice addressed to the appellant for the outstanding sum of money to which effect the appellant paid 200,000/= to the 1st Respondent and allegedly it was agreed that the balance should cover the outstanding school fees bill for her children however this fact is not supported by evidence. There was no formal specific act by the 1st respondent to the appellant to intimate novation as alleged and the appellant still had obligations under the original tenancy which he was in breach and could be evicted for failure to pay rent.

The 1st respondent together with the local area chairperson went to the school and evicted the appellant from the premises. The respondents in their respective defence denied liability; the 1st respondent in particular contends that the appellant breached the tenancy agreement by defaulting in rent payment. I associate myself with the same. The appellant has up until this point failed to prove that there was a new agreement that existed with the landlord.

On that basis therefore, I concur entirely with the findings and analysis of the trial magistrate. This ground accordingly fails.

Ground 3 & 4

3. **The learned trial Magistrate erred in law and fact when she held that the appellant had not been evicted by the 3rd respondent.**

4. **The learned trial Magistrate erred in law and fact when she failed to evaluate the evidence as a whole thus occasioning a miscarriage of justice to the appellant to the appellant.**

Having found as I have on ground 1 & 2, this ground also fails.

This appeal is therefore dismissed.

Costs are awarded to the Respondents.

It is so ordered.

SSEKAANA MUSA
JUDGE
26th March 2020