THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO.117 OF 2016

SOPHIE NAKITENDE::PLAINTIFF

VERSUS

MABU COMMODITIES LIMITED::DEFENDANT

BEFORE: HON.JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiff brought this suit against the defendant for breach of tenancy agreement, special damages, general damages, recovery of valuable business items (tools of trade) confiscated by the defendant as well as costs of this suit.

The plaintiff entered into a tenancy agreement in 2008 with the defendant whereupon the plaintiff allocated shop No. 420 on Mabirizi Plaza located along Kampala road within Kampala city centre. The plaintiff prior to taking the shop, she paid a goodwill of 8,000,000/= to the previous tenant.

In 2016, the plaintiff slightly delayed to meet her rental obligations for the first quarter of the year and while she was away, the defendant without according her a hearing broke into her shop on 15th March 2016, seized the merchandise and locked it up.

The defendant contended that the plaintiff defaulted on her rent for the month ending 15th January 2016 and closed her shop and disappeared without notifying the defendant's officers.

The plaintiff declined to enter into a formal tenancy agreement for the year starting 2016. Owing to her failure to settle rental arrears, the defendant on the 21st day of January 2016 closed the plaintiff's shop demanding that she clears her rental obligation.

That on the 15th day of March 2016, the plaintiff's merchandise was in the presence of the LC I chairperson transferred to the store room for storage. The plaintiff continuously ignores the defendant's demands to collect her merchandise which keeps accumulating storage costs.

The defendant filed a counter-claim for recovery of accumulated storage costs of 9,500,000/=at the rate of 500,000/= per week, general damages and costs of the suit.

Representation

The plaintiff was represented by *Mr. Walikagga Isaac* of MMAKS Advocates and the defendant was represented by *Mr. Kuteesa Paul* of Arcadia Advocates

Scheduling

The parties filed a joint scheduling memorandum where they failed or refused to agree to any facts between themselves and yet there are some facts from the pleadings which are indeed the same and common like the plaintiff being in occupation of the shop and the seizure of her property by the defendant for non-payment of rent.

The parties in their joint scheduling agreed on the following issues for determination;

1. Whether there was any valid tenancy between the plaintiff and defendant?
2. If so, whether the tenancy agreement between the plaintiff and defendant was lawfully terminated?
3. Whether the tenancy agreement between the plaintiff and the defendant was breached and if so by whom?
4. Whether the defendant was lawfully entitled to take possession of the rented premises?
5. Whether the plaintiff is entitled to the return and /or value of the property seized by the defendant and if so how much should be paid to her?
6. Whether the counter-defendant/plaintiff is indebted to the counterclaimant in the sum of 9,500,000/=
7. What remedies are the parties entitled to?

The parties lead evidence of one witness to prove their respective claims and thereafter filed written submissions. I have read and considered them in my analysis of the case.

Whether there was any valid tenancy between the plaintiff and defendant?

The plaintiff testified that she has been occupying the shop No. L1-20 since 2008 and was paying rent of 1,000,000/= per month to the defendant although the defendant was acknowledging only 500,000/=. That she was supposed to pay rent every 15th day of the month.

The defendant witness also testified that the plaintiff was a tenant who was occupying a shop on Mabirizi complex and was supposed to rent on every 15th of the month.

The defendant in his written statement of defence paragraph 6.4 contended *"that the plaintiff declined to enter into a formal tenancy agreement for the year starting January 2016"*

Resolution.

Whether there was any breach of the agreement by the parties.

The plaintiff counsel led evidence that she was a tenant and the defendant also confirmed that she was a tenant and occupying a shop on Mabirizi complex for a period of about 8 years.

Therefore there was no basis of raising the issue. No evidence has been led to the contrary. The defendant in paragraph 6.4 attempted to deny the existence of a tenancy agreement in the pleadings.

Based on the evidence on record, there was a tenancy agreement between the plaintiff and the defendant. This was an actual tenancy by possession and payment of rent; unwritten tenancy.

If so, whether the tenancy agreement between the plaintiff and defendant was lawfully terminated?

The plaintiff's counsel submitted that the plaintiff adduced evidence that she was occupying the shop on Mabirizi complex L1-20 since 2008 paying a sum of 1,000,000/= to the defendant although the defendant only acknowledged 500,000/= in their receipts every month.

It was the testimony of the plaintiff that on 16th December 2016, the defendant without closed her shop and seized her trading stock for alleged default of rent.

The defendant's counsel contended that the plaintiff breached the tenancy by refusing to pay rent for the months 15th December 2015-15th January

2016, and 15th January 2016 to-15th February 2016 which was payable in advance.

That since the plaintiff had not paid rent by 16th December 2016, according to counsel she was in breach of the tenancy. Failure to pay on that date amounted to breach of the periodic tenancy.

Determination

This issue hinges on whether there was a breach by the plaintiff on the 16th December 2015, when the shop was closed by the defendant.

This was an oral contract and the court has drawn inferences from how the oral contract was being performed. In such circumstances it may be hard to impute any fundamental terms but rather the conduct of the parties would guide the court in establishing when a breach would arise. In absence of any formal document the parties' intention must be inferred from the circumstances and parties conduct. See ***Kenya Shell Ltd v Vic Preston Ltd HCCC No. 3948 of 1999***

The defence witness testified that *"the shop was closed on 16th December 2016. She was given 10 days to clear the rent on 21st January it was permanently closed. There were communications promises between the client and management. We tried to communicate to her from 16th December until 15th March. It was always from us and no response from her."*

The defendant who wanted to apply the strict rules of enforcing the contract had a duty to ensure that the contract terms are in writing and this would have avoided any such issues of trying to enforce oral terms which are specifically not agreed upon but rather are used by the landlord as when he deems fit.

It is clear that by the time the plaintiff's shop was closed on 16th December she was not in rent arrears. The argument of counsel for the defendant that she was in arrears is devoid of merit.

Black's Law Dictionary 11th Edition 2019 defines "arrears" as follows;

The quality, state, or condition of being behind in the payment of a debt or the discharge of an obligation.

In the case of ***Chukwuma F. Obidegwu v Daniel B. Ssemakadde HCCS No.59 of 1992 [1992] II KALR 64*** the court noted that; *Rent is due in the morning of the day appointed for payment but it is not in arrears until after midnight*. See also ***Aspinall v Aspinall [1961] Ch 526***

Secondly, the manner in which the tenancy was being executed allowed the plaintiff some flexibility and it would not be true to say that every 15th day of the month the tenancy would be terminated.

According to some of the receipts of payment tendered in court as exhibit PE-2 the payment for the period 15/7/2015 to 15/8/2015 was effected on 24/07/2015 after about 9 days. The period 15/8/2015 to 15/9/2015 was paid for on 27/08/2018 after 12 days.

It can be deduced from these receipts that indeed the 15th day of the month was not strictly enforced within the conduct of the parties as to entitle the defendant to close the plaintiff's shop on the 16th day of December 2016. In fact the plaintiff (PWI) during cross examination testified that sometimes we could pay in advance and sometimes in arrears.

In addition the oral agreement did not provide for consequences for non-payment of rent on the due the 15th day of the month. The absence of any written tenancy would imply that no stringent terms could be evoked to the extent of closing the shop without notice or some due process.

The defendant disadvantaged herself by failing to reduce the terms of the tenancy in writing and could not be allowed to come up with unreasonable terms not agreed upon with the tenant (plaintiff). The law allows a landlord to recover rent through distress for rent under the Distress for Rent (Bailiffs) Act instead of using irregular and illegal means of recovery. It would be a challenge to court to allow the defendant who claims unpaid rent in circumstances where there is no written tenancy.

The landlord should not be allowed to use all means available to recover rent or obtain vacant possession for non-payment rent by a tenant. A landlord should not exercise his rights of re-entry or recovery of rent extra-judicially and acts of hooliganism should not be encouraged or allowed by a court of justice. Parties ought to manage their businesses (rental) in an organized or orderly manner in order to avoid self-help measures in landlord-tenant relationship which may turn out be very unreasonable and unfair. See ***Peter Mburu Echaria and another v Priscilla Njeri Echaria Civil Application No. 149 of 1997***

In addition, the act of the defendant seizing the property of the plaintiff was also illegal since there was no agreement that if she defaults on the rent payments, the defendant would be allowed to close the shop and attach/seize the property. Such measure as noted earlier would be illegal and contrary to the unwritten agreement between the parties.

Similarly removal of the property for purposes of obtaining vacant possession was equally illegal and unlawful. All the above scenarios would have been better dealt with in a written tenancy agreement, which would have set out known terms to the plaintiff as a tenant.

In the case of ***Wildlife Lodges t/a Landmark Hotel v Jacaranda Hotel Ltd HCCC No. 521 of 1999***; the court noted that unless a tenant agrees to give

up possession, the landlord has to obtain an order of a competent court to obtain an order of possession.

This court shall not allow landlords to use extra-judicial means in recovery of rent arrears or vacant possession especially where there is no written tenancy agreement to regulate the relationship between the landlord and the tenant. In the present case, the use of the area LC chairperson to oversee the whole process of taking the plaintiff's property could not validate an illegal exercise. In the case of ***Gusii Mwalimu Investment Co. Ltd & Other v Mwalimu Hotel Kisii Ltd Court of Appeal Civil Appeal No. 160 of 1995*** Justice Tunoi JA noted as hereunder;

"I have no hesitation whatsoever in holding that the landlord did all it could to obtain possession unlawfully and the Learned Judge was entirely right in making the orders he made. If what the landlord did in this case is allowed to happen we will reach a situation when the land lord will simply walk into the demised premises exercising his right of re-entry and obtaining possession extra-judicially. A court of law cannot allow such state of affairs whereby the law of the jungle takes over. It is trite law that unless the tenant consents or agrees to give up possession the landlord has to obtain an order of a competent court or a statutory tribunal to obtain an order for vacant possession."

This court equally agrees with the submission of counsel for the plaintiff when he notes as follows;

It is illegal and blatant abuse of process for a land to just take the law into their hands and lock-up premises that has been contractually handed over to a tenant just to intimidate the tenant into paying rennet even before there is default. Such conduct is common place in our society especially in shopping arcades.

This unfair habit must be put in check and interventions by a landlord should be in accordance with the law or due process and not capricious. No landlord without a written tenancy agreement should evict a tenant without due process or in an arbitrary manner.

The defendant breached the tenancy agreement when it locked the premises of the plaintiff's shop on 16th December 2016 and seized her trading stock. It unlawfully terminated the tenancy agreement.

Whether the plaintiff is entitled to the return and /or value of the property seized by the defendant and if so how much should be paid to her?

This issue is not contested. The defendant took the plaintiff's trading stock and they have confirmed that they indeed removed the trading stock. The exercise according to DW 1 was carried out in the presence of the area LC I chairperson of the area.

The contention is about the quantity of the things that were removed from the shop. This court would not insist on receipts as proof of special damages she listed the things in her shop at the time of illegal closure. She availed a list of items she left in the shop and came to court with the same claim. If the defendant wanted to dispute the same, he ought to have cross-checked the listed items against their own list to disprove the special damages. The only question in defence counsel's view was that she did not have receipts.

The stated position is that for as long as there is sufficient proof of the loss actually sustained which is either a direct consequence of the Defendant's action/omission or such a consequence as a reasonable man would have contemplated, this would suffice in place of physical and/or documentary evidence. See ***Byekwaso v. Mohammed [1973] HCB 20***.

Proving special damages is always not by documentation. The law only requires particularizing the special damages and not proof by documentary evidence. It is not intended to prove special damages beyond reasonable doubt. See ***Nankabirwa Irene v UMEME Ltd HCCS No. 310 of 2016***

The plaintiff's list was admitted in evidence and was not impeached in cross examination.

The plaintiff is awarded a sum of 74,608,800/= being the value of the property wrongfully seized by the defendant.

General Damages

With regard to general damages; the character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

The awards reflect society's discomfiture of the wrongdoer's deprival of the man's liberty and society's sympathy to the plight of the innocent victim. The awards therefore are based on impression.

The defendant sought UGX 100,000,000 in general damages. I have not seen basis for such an amount. I find the award of **UGX 50,000,000** sufficient in the circumstances as general damages.

Interest

Section 26 provides for an award of interest that is just and reasonable. In the case of ***Kakubhai Mohanlal vs Warid Telecom Uganda HCCS No. 224 of 2011***, Court held that;

> *" A just and reasonable interest rate, in my view, is one that would keep the awarded amount cushioned against the ever rising inflation and drastic depreciation of the currency. A plaintiff ought to be entitled to such a rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due"*

Special damages shall attract an interest of 15% from the date of filing the suit. General damages shall attract interest of 10% from the date of this Judgment.

Whether the counter-defendant/plaintiff is indebted to the counterclaimant in the sum of 9,500,000/=

The counter-claimant in its counter-claim contended that the storage costs continue to accumulate at the rate of 500,000/= every week. I find this outrageous since the monthly rent was 500,000/= per month. The counter-claimant should have left the plaintiff's goods in the shop since it is cheaper than the store which is 3 times higher than the rent.

This assertion would give credence to the plaintiff's testimony that indeed they were paying rent of 1,000,000/= but she was given receipts of 500,000/=. This is matter of interest and it may be the justification why the counter-claimant does not have any tenancy agreement with the tenants.

This may appear to be a scam for defrauding revenue by the landlords which even makes the tenancy unenforceable and against public policy.

No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of court is himself implicated in the illegality. See ***Heptulla v Noormohamed [1984] KLR 580***

The counter-claim fails since the seizure of plaintiff's property was illegal or wrongful.

The plaintiff is awarded costs of the suit and counter-claim.

It is so ordered.

Dated, signed and delivered by email & WhatsApp at Kampala this 15th day of May 2020

SSEKAANA MUSA
JUDGE