THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE

CIVIL APPEAL NO. 126 OF 2019

(Arising from Civil Suit No.061 of 2016, Busia Chief Magistrate's Court)

BATULI JOHN BARASA :: APPELLANT

VERSUS

GEORGE HENRY BWIRE :: RESPONDENT

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

JUDGMENT

[1] This is an appeal from the judgment and orders of the Busia Chief Magistrate, **H/W Angwero Catherine** at Busia, in **C.S No. 061 of 2016** dated 11th/9/2017.

[2] The facts of the appeal are that in the specially endorsed plaint, the plaintiff/Respondent claimed against the defendant/Appellant for payment of a sum of **Shs. 18,240,000/=** being monies had and received by the defendant/Appellant from the plaintiff/Respondent as one year's rent for the period of 10th/3/2016 to 10th/3/2018 in respect of the defendant's commercial premises situated in Namayingo Town.

[3] The plaintiff contended that he entered into a tenancy agreement with the defendant to rent the defendant's premises situated at **Namayingo Town Council** at the rate of **Shs. 18,240,000/=** for the period of **March 2016** to **March 2018.** The defendant received the said sum of money but failed, refused/or neglected to give/deliver vacant possession of the premises which he had planned to use as a medical clinic and at the same time failed to refund the money.

[4] The defendant successfully sought for leave to file a defence and in his written statement of defence, the

defendant/Appellant averred that in March 2016, he entered into a 2 year tenancy agreement with the plaintiff in which he rented to the plaintiff/Respondent his houses (19 rooms) situated at Nambugu Zone, Namayingo Town Council at a money sum of **Ugx. 40,000/=** per room thus received a total of **Shs. 18,240,000/=.** That upon entering the agreement, the defendant/Appellant handed over vacant possession of the subject house to the plaintiff who immediately took possession and also proceeded to sublet the same houses to 3rd parties. That however, when the plaintiff's sub tenants vacated the premises, he turned against the defendant and began making demands that the defendant refunds him money paid in rent, something the defendant refused.

[5] The defendant contended that having entered a tenancy agreement in which the plaintiff paid and defendant delivered vacant possession of the houses thereof, the contract was complete and could not be retracted and therefore he is not indebted to the plaintiff.

[6] The defendant further contended that the contract was entered and concluded at **Nambugu Zone, Namayingo Town Council** where the subject houses are located and where the payment of consideration was done and the contract was to be performed and that as such, this lower court had no jurisdiction to handle the matter.

[7] The trial Magistrate found that the plaintiff/Respondent advanced to the defendant/Appellant the sum of **Ugx. 18,240,000/=** at **Jinja Road Lumino Guest House in Busia District,** receipt of which the defendant/Appellant acknowledged and when the defendant/Appellant failed to pay the said sum, let out his premises in **Namayingo Town Council**

to the plaintiff/Respondent for recovery of the sum. That following the execution of the tenancy agreement with the defendant, the plaintiff took possession of the houses (19 rooms) and sublet them to the 3rd parties but the defendant interfered with the 3rd parties' occupation of the premises by letting them to other tenants and as a result, the 3rd parties vacated the premises and the suit sum of **Ugx. 18,240,000/=** therefore remained unsatisfied.

[8] The judgment was therefore entered in favour of the plaintiff against the defendant for recovery of the sum of **Ugx. 18,240,000/=** from the defendant as money had and received with interest and costs of the suit.

[9] The defendant/Appellant was not satisfied and being aggrieved with the judgment and the above orders filed this appeal on the following grounds as contained in his amended memorandum of appeal dated 6th of October, 2020;

1. *That the learned trial magistrate erred both in law and fact when she failed to properly evaluate the evidence on record thereby arriving at a wrong decision.*
2. ***That the learned trial Magistrate erred both in law and fact when she failed to conduct scheduling of the case as a legal requirement before hearing evidence of the parties.***
3. *That the learned trial magistrate erred both in law and fact when she held that the Appellant/Defendant is indebted to the Respondent.*
4. ***That the learned trial magistrate erred both in law and fact when she totally misappreciated the Respondent's case as stated in his pleadings/plaint on court record and considered completely different facts not pleaded thus arriving at a wrong decision.***

5. ***That the learned trial Magistrate erred both in law and fact when she struck out the witness statements of DW1 and DW2 from the court record without taking into consideration the fact that the statements had been read and translated to the witnesses and they had understood the contents therein thus occasioning a miscarriage of justice.***
6. *That the learned trial magistrate erred both in law and fact when she held that the Appellant/Defendant is indebted to the Respondent/Plaintiff.*
7. *That the learned trial Magistrate erred in both law and fact when she entertained, heard and determined the suit without jurisdiction.*

Counsel legal representation

[10] The Appellant /defendant was both in the lower court and on appeal represented by **Counsel Were David Mukocha** of **M/s Were Associated Advocates & Legal Consultants, Jinja** while the Respondent was represented by **Counsel Lebu** of **M/s Lebu and Associates, Advocates, Busia.** Both counsel filed their respective written submissions on appeal as permitted by court.

Counsel submissions and resolution of the grounds of appeal

[11] Counsel for the Appellant submitted and argued grounds **1, 3, 4 & 6** together and grounds **2, 5 and 7** separately. This court shall follow suit in the determination of this appeal.

Grounds 1, 3, 4 & 6

[12] Counsel for the Appellant submitted that the defendant/Appellant admitted receiving the subject money, being rent payment by the plaintiff for his (defendant's) premises for a period of 2 years from 10th/3/2016 to 10th/3/2018. The Appellant contended that he handed over vacant possession of the premises to the plaintiff who also sublet the same to subtenants thus **Dr. Odongo Robert** who established and operated a medical clinic for 6 months and vacated the same, and therefore, was not under any duty to refund him any money. That the reasons as to why **Dr. Odongo** vacated the premises are not of concern to the defendant.

[13] Counsel contended therefore, that the trial Magistrate wrongly evaluated the evidence on record thereby arriving at a wrong decision. That despite the clear case of the plaintiff as per his plaint, counsel for the plaintiff clearly departed from the pleadings and created a new case, changing the facts from a tenancy agreement to a friendly loan agreement which was not the plaintiff's case; a violation of **O.6 r.7 CPR**.

[14] Counsel for the Appellant concluded that the tenancy agreement between the plaintiff and the defendant did not provide that in case he fails to get subtenants in the rented premises, the defendant would refund the tenancy money paid to him by the plaintiff. That for the plaintiff having rented the premises, was free to use them and or leave them empty for his entire tenancy period. That the defendant having therefore not breached the tenancy agreement in any way, cannot be blamed and therefore, is not indebted to the Respondent/plaintiff at all.

[15] Counsel for the Respondent on the other hand submitted that the Respondent's claim against the Appellant was for a liquidated sum of **Shs.18,240,000/=** being monies had and received by the Appellant from the Respondent on diverse dates between 2015 and 2016.

[16] Counsel submitted that the Appellants admitted receipt and/or acknowledgment of the sum of **Ugx. 18,240,000/=** from the Plaintiff **(P.Exh.1**) and that the sum was to help the defendant complete construction of his houses situated in Namayingo Town Council. That upon completion, the Appellant handed them over to the Respondent (i.e the 19 rooms) to enable him sublet to tenants so as to recover his money.

[17] Counsel concluded that the learned trial Magistrate comprehended the facts of the dispute and rightly correctly ruled that the Appellant/defendant did receive monies **shs.18,240,000/=** from the Respondent for purposes of utilizing the same to complete construction of his houses at Namayingo.

[18] The duty of this court as a 1st appellate court is to re-evaluate the evidence on court record of the trial court and come up with its own findings thereon; **PANDYA Vs R [1957].**

[19] The Respondent/plaintiff in the lower court initially proceeded by way of summary suit under **O.36 r.3 CPR** for recovery of the sum of **shs. 18,240,000/=** being monies had and received by the defendant from the plaintiff. The Appellant/defendant however successfully sought for leave to file a defence and the matter proceeded as an ordinary suit. The major issues for determination as canvassed by both counsel during submissions in the lower court were as follows;

1. *Whether the defendant is indebted to the plaintiff in the sum of shs.18, 240,000/=.*

2. Whether court has jurisdiction to try the suit.

[20] The trial court found the above issues in favour of the plaintiff. The plaintiff had testified as follows;

a) During the period of September, 2015 – April 2016 on diverse dates, he advanced a total of **Ugx. 18,240,000/=** to the defendant to enable him complete construction of the rental houses he had in Namayingo Town Council. Acknowledgment receipts were admitted in evidence and collectively marked as **P.Exh.3.**

b) When the plaintiff approached the defendant for refund of the money, the defendant offered his rental houses to the plaintiff so as for the plaintiff to recover his money out of rent. A 2year tenancy agreement was entered into between the plaintiff and the defendant, whereby the defendant rented his houses to the plaintiff to enable him sublet them and recover the sum due. The tenancy agreement was admitted in evidence and court marked it **P.Exh.1.**

c) Though the tenancy agreement was to enable him recover his money, the tenants vacated the premises after 3 months of occupation due to interferences by the defendant in their tenancy.

d) During the period, the defendant was receiving rent directly from the tenants and upon the defendant frustrating the tenancy agreement by interferences with tenants which included taking over the premises and renting them out to other tenants (who included the R.D.C Namayingo, **Mr. Opira Slyvester**/DW3), the plaintiff decided to file the present suit for recovery of his **shs.18, 240,000/=.**

[21] The defendant (DW1) on the other hand admit receipt of the total sum of **18,240,000/=** but contend that it was not an

advance to him from the plaintiff but payment of rent for his incomplete premises at Namayingo Trading Centre.

[22] In brief, the defendant admitted the acknowledgment/receipts **(P.Exh.3)** of the sum dues which cumulatively led to the total sum of **18,240,000/=** and the tenancy agreement **(marked P.Exh.1)** where he rented his premises to the plaintiff.

[23] Though the tenancy agreement did not reflect the date of its execution, the description and location of the property subject of rent, both parties appear to agree that it was executed in respect of the defendant's rental houses located in **Namayingo Town Council** and in respect of **shs. 18,240,000/=.**

[24] The defendant on his part explained that the received sum of **18,240,000/=** was rent for the said premises in **Namayingo Town Council** whereas the plaintiff contended that the sum had been advanced to the defendant to enable him construct the said rental houses and that the funds were to be refunded. As to **whether therefore the said sum of 18,240,000/= was money advanced to the defendant and therefore refundable, or whether the said sum was rent for the defendant's premises,** the answer can be deduced from the following;

1. Acknowledgments/receipts of the total sum of 18,240,000/= dated from 20/9/2015 to 20/4/2016 (P.Exh.1).

[25] These acknowledgments/receipts formed the plaintiff's evidence that the defendant received a total sum of **shs.18, 240,000/=.** The defendant did not deny or challenge these acknowledgments. A perusal of each of these acknowledgments reveal that the received sum of money were to be paid back on the respective dates the debt was to fall due. These admitted

acknowledgments of the sum of **Ugx. 18,240,000/=** do not reflect anything to the effect that that the sums were rent or for rent. They instead support the plaintiff's view that this was money advanced to the defendant and had to be paid back on the reflected due dates.

[26] The defendant's statement therefore, on page 24 of the typed proceedings that;

> *"The plaintiff started paying the money in 2015 because the house was under construction and wanted to put them in the form the plaintiff wanted,"*

is definitely false and this amounted to a lie that was intended to mislead court.

2. The parole evidence rule

The parole evidence rule is to the effect that evidence cannot be admitted (or even if admitted, it cannot be used) to add to, vary or contradict a written instrument in relation to contracts, it means that where a contract has been reduced in writing, neither party can rely on evidence of terms alleged to have been agreed which is extrinsic; **SHINE PAY (U) LTD Vs SARAH KAGORO & ANOR H.C.C.S. No.054/2004 (Commercial Division).**

[27] In the instant case, it follows therefore that the evidence of the defendant and **Opira Sylvester** (DW3) cannot be used to add to, vary or contradict the written acknowledgment/receipts of the sum of **18,240,000/= (P.Exh.1)** which was to the effect that the funds were to be paid back as the debts fell due.

[28] In this respect, I do not have any reason to fault the trial magistrate's finding that the plaintiff advanced to the

defendant the sum of shs.18,240,000/= and therefore, the defendant is or was indebted to the plaintiff in the said sum. The money was not for rent of the defendant's premises. The defendant failed to refund the sum and as a result, he let the 19 rooms to the plaintiff at his premises in **Namayingo** to enable the plaintiff to sublet to tenants so as to recover the debt.

[29] It is the evidence of the plaintiff that upon the defendant letting his 19 rooms to the plaintiff for recovery of the debt, he frustrated the arrangement by interfering with the tenants to the extent of receiving rent directly from them (PW2), to placing in the premises other tenants who included **Mr. Opira** (DW3) and other officials like the DISO, D.P.C, UMEME and UNRA, a fact that was not denied by the defendant. DW3 admitted being one of the tenants at the defendant's premises. As a result, the received sum of **18,240,000/=** remained unpaid and therefore owing from the defendant to the plaintiff.

[30] It therefore follows from the foregoing that the tenancy agreement **(also P.Exh.1)** which the defendant admits and relies on, despite its controversy regarding the scripts versus the typed parts, whether it was for a rental sum of **18,240,000/=** or for the benefit of the plaintiff to recover the advanced sum to the defendant, is immaterial. The sum of **18,240,000/=** advanced to the defendant had remained unsatisfied.

[31] As to whether the trial Magistrate was swayed by counsel for the plaintiff who allegedly departed from the plaintiff's pleadings and changed facts from a tenancy agreement to a friendly loan agreement, which was not the plaintiff's case, I find that both the issue of the advancement of the total sum of

18,240,000/= and the tenancy agreement were both well canvassed by both parties to the extent that both the acknowledgments and the tenancy agreement (**P.Exh.3** and **P.Exh.1**) were not denied by the defendant, therefore, I am unable to see any injustice and or miscarriage of justice having been occasioned to the defendant.

[32] There was no departure from the pleadings because the tenancy agreement between the plaintiff and the defendant **(P.Exh.1)** formed part of the plaintiff's case, together with the acknowledgments/receipts of the **18,240,000/=** that were not expressly but impliedly pleaded as **"payment of the sum of shs.18, 240,000/= to the plaintiff being monies had and received by the defendant"** thus became part and parcel of the pleadings. In the **DHANJI RAMJI Vs RAMBHAI & CO (U) LTD [1970] E.A 515 (C.A),** it was held that judgment on unpleaded issue may stand of no prejudice is caused and if the issue is argued.

[33] In the premises, I find ground 1, 3, 4 and 6 lacking merit and all of them therefore, accordingly fail.

Ground 2: That the learned trial Magistrate erred both in law and fact when she failed to conduct scheduling of the case as a legal requirement before hearing evidence of the parties.

[34] Counsel for the Appellant/defendant relied on **O.12 r.1 (1) CPR** which is to the effect that;

> ***"the court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, Arbitration and any***

other form"

[35] A scheduling hearing is a preliminary step prior to the holding of the trial of the case. In **OLANYA JAMES Vs OCITI TOM & 2 ORS H.C.C.S NO. 64/2017(GULU),** Counsel for the Appellant submitted and argued that the trial Magistrate occasioned a miscarriage of justice when he failed to hold a scheduling conference before commencement of the trial, on this issue court held as follows;

"An appellate court will set aside a judgment of a trial court, or order a new trial, on the ground of misdirection, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading or for any error as to any matter of procedure, only if the court is of the opinion that the error complained of has resulted in a miscarriage of justice. A miscarriage of justice occurs when it is reasonably probable that a result more favourable to the party appealing would have been reached in the absence of the error...

The general principle that the rules of procedure are "intended to serve as hand maidens of justice not to deter it." ***(See IRON AND STEEL WARES LIMITED Vs C.W MARTYR AND COMPANY (1956) 23 E.A 173 AT 177;*** *"In a deserving case, the court may rightfully exercise its discretion to overlook the failure to comply with the rules of procedure upon conditions as it may deem fit intended to guard against the abuse of its process."*

[36] In the instant case, on the **23rd/5/2018,** court directed that both counsel file scheduling notes and the matter be set for mediation. On **28/6/2018**, it was reported to court that mediation took place but was not successful and a fresh date for scheduling was set by court to enable hearing take place the subsequent set date of **23/8/2018.** On **23/8/2018,** there were

no schedule notes on record and all along, neither the defendant nor his counsel were attending court. After several adjournments caused by the absence of the defendant and his counsel, the matter proceeded on **25/4/2019** when counsel for the defendant appeared and was allowed to cross examine the plaintiff and his witnesses. Counsel for the Appellant has not explained to this court why he failed and or refused to comply with the court's directive for filing schedule notes and what injustice his client suffered as a result.

[37] Scheduling conference was designed to reduce on technicalities and to allow more expedient justice for those with legitimate claims, by making the process of adjudication swift, fair, just, certain and even handed; **OLANYA V OCITI** (supra).

[38] In the instant case, I find this as a proper case where court rightfully exercised its discretion to overlook the failure to comply with the rules of procedure since the defendant and his counsel were using the rules to delay trial and therefore, the learned trial Magistrate proceeded to hear witnesses thus guarded against the abuse of court process. No miscarriage of justice surely occasioned the defendant as it has not been shown that there has been any unfairness in the conduct of the trial resulting in an error being made; **CHEPTEKA SAMUEL Vs MANGUSHO SHADRICK H.C.C.A. No.6 OF 2016.**

[39] As regards issues that were framed without scheduling conference, counsel for the plaintiff framed the issues in his submissions. The same issues including the issue of jurisdiction of court were adopted by counsel for the defendant and were all canvassed and determined by the trial court.

[40] This ground of appeal therefore has no merit and it also accordingly fails.

Ground 5: That the learned trial Magistrate erred both in law and fact when she struck out the witness statements of DW1 and DW2 from the court record.

[41] According to the trial magistrate, both **DW1** and **DW2** could not comprehend their witness statements which were prepared by their counsel in English because they were illiterate. While relying on the authorities of **KASAALA GROWERS CO-OP. SOCIETY Vs KAKOOZA & ANOR S.C.C.A. No. 19/2010 and TIKENS FRANCIS & ANOR Vs E.C & 2 ORS H.C.E.P No.1/2012** struck them out for lack of a certificate of translation as required by **Section 3 of the Illiterate's Protection Act.**

[42] The witnesses **DW1** and **DW2** however explained that the witness statements had been explained to them by their lawyer and therefore they understood them. The import of **Section 3 of the Illiterate's Protection Act** is to ensure that documents which are purportedly written for and on instructions of illiterate persons, are understood by such persons if they are to be bound by their content. It is meant to protect the illiterates but not to be used against them or be used to their disadvantage.

[43] In the instant case, **DW1** and **DW2** had owned their witness statements and had indeed told court that the same had been translated to them in a language they understood before signing. Besides, the mere fact that a witness fails to comprehend his/her statement is not sufficient proof that he is an illiterate. Even literates fail to comprehend their statements.

It was therefore erroneous for trial Magistrate to strike out their evidence in chief thus occasioning a miscarriage of justice. I have nevertheless considered their evidence and as I already found while resolving **grounds 1, 3, 4 and 6,** their evidence being struck out does not alter or change the outcome of this appeal.

[44] This ground of appeal therefore has merit though it does not change the outcome of this appeal, it accordingly succeeds.

Ground 7: That the learned trial Magistrate erred in both law and fact when she entertained, heard and determined the suit without jurisdiction.

[45] This ground is premised on the claim by the defendant that the plaintiff's suit was based on contract in which he sought to recover **shs. 18,240,000/=** arising out of alleged breach of contract for rent of houses situate at **Namayingo Town Council in Namayingo District** and that therefore the suit ought to have been filed at **Iganga Chief Magistrate's court** where Namayingo fall.

[46] According to the Summary plaint, this suit is founded on money had and received and not on rent for property. The applicable law for jurisdiction purposes is therefore **Section 215(4) M.C.A**. It provides thus;

> *"In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places-*
>
> *a) the place where the contract was made,*
>
> *b) the place where the contract was to be performed or the performance of the contract is completed;*

c) *the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable."*

[47] In the instant case, the plaintiff in his claim relied on acknowledgment/receipts of the sum of **18,240,000/=** he cumulatively advanced to the defendant **(P.Exh.1).** As already found, the defendant did not deny the acknowledgments. Whereas some of them did not indicate the place where the transaction of advancement of the monies took place, the acknowledgment dated **18/1/2016** in particular, indicated the location as **"New Lumino G.House".** It is the plaintiff's case and evidence which has not been denied by the defendant that the **New Lumino Guest House** is **found on Jinja road, Busia Town, Busia District.** However, according to **Jacob Malaba** (PW3) part of the sum of **18,240,000/=** owed by the defendant amounting to **9,000,000/=** was advanced in his presence, to the defendant on the **28/10/2015** at the plaintiff's home in **Namayingo Town Council**.

[48] From the foregoing, it therefore follows that some of the monies advanced to the defendant, the transactions took place in Busia within Busia jurisdiction and the sum of 9,000,000/= transaction took place in Namayingo within Iganga Jurisdiction. The plaintiff was therefore at liberty to file the suit in either Busia or Iganga Chief Magisterial area court that was vested with jurisdiction.

[49] The trial Magistrate while resolving this issue of jurisdiction found as follows:

"The suit before court is premised on recovery of money had and received in Busia District within

the jurisdiction of court, the sum of 18,240,000/= follows within the jurisdiction of this court."

[50] I have no reason to fault the learned trial Magistrate on this aspect. The plaintiff's Cause of Action was not for either enforcement or breach of tenancy agreement but for recovery of money had and received by the defendant. She was well vested with both geographical and pecuniary jurisdiction to hear and determine the suit.

[51] The objection on jurisdiction was rightfully over ruled by the trial Magistrate and I also therefore, find this ground of appeal lacking merit and it accordingly fails.

[52] In the result, the appeal generally lacks merit and it is accordingly dismissed with costs.

BYARUHANGA JESSE RUGYEMA
JUDGE
13th /10/2021.