

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO. 517 OF 2004

SIHRA SINGH

SANTOKH PLAINTIFF

VERSUS

FAULU UGANDA LTD

..... DEFENDANT

BEFORE: Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The parties executed a tenancy agreement dated 31st March 2000 in respect of a portion of the plaintiff's property at plot 31 Acacia Avenue, Kampala; hereinafter referred to as the suit premises. The tenancy agreement was for a term of 7 years commencing on 1st May 2000. In 2003 the plaintiff commenced construction works on a piece of land adjacent to the suit premises. Despite a verbal complaint from the defendant company about noise and dust emanating from the construction site, the construction works continued unabated. On 30th December 2003, the defendant company gave 2 months notice to the plaintiff that it intended to terminate the tenancy agreement and did subsequently leave the suit premises. It was the plaintiff's contention that in so doing the defendant breached key terms of the tenancy agreement to wit 6 months notice period; payment of rental arrears due till the end of the said notice period, and returning the suit premises in appropriate state of repair. Conversely, the defendant maintained that by the time it left the suit premises the tenancy agreement stood breached in so far as the plaintiff had reneged on his obligation to avail the suit premises to the defendant's quiet use and peaceful possession.

At a scheduling conference held on 19th March 2008 the parties framed the following issues:

1. Whether the tenancy agreement was breached, and by who.

2. Remedies available to the parties.

Issue 1:

The tenancy agreement at the heart of this case was admitted in evidence as Exhibit P1. The pertinent clauses of the tenancy agreement are reproduced below for ease of reference.

2. *In consideration of the rent hereby reserved and of the covenants and conditions hereinafter contained on the part of the tenant to be paid, performed and observed the landlord hereby demises unto the tenant the property above-described for a total annual rent of USD \$ 30,000 at a rate of USD \$ 2,500 per month (VAT inclusive) SUBJECT to the covenants and conditions hereinafter to be observed and performed.*

3. *THE TENANT HEREBY COVENANTS WITH THE LANDLORD AS FOLLOWS:*

(a) To pay the rent hereby reserved and such rent plus value added tax to be paid to the landlord as he may from time to time instruct the tenant to pay.

(g) TO YIELD up the demised premises at the expiration or sooner determination of the term hereby created in such a good and substantial repair and shall be in accordance with the landlord's covenants hereinafter contained with all doors, windows, panes, landlord's fixtures, keys and fastenings complete. That return the premises to the state of good decoration which prevailed at the commencement of the tenancy, reasonable wear and tear excepted.

4. *THE LANDLORD HEREBY COVENANTS WITH THE TENANT AS FOLLOWS:*

(c) As long as the rent hereby reserved is paid and the covenants and conditions herein contained on the part of the tenant are duly observed to allow the tenant to enjoy quiet and peaceful possession of the demised premises without any interruption by the landlord or any person lawfully claiming to act as his agent/ employee.

5. *PROVIDED ALWAYS AND IT IS HEREBY MUTUALLY AGREED as follows:*

(b) Either party may terminate this agreement upon giving 6 months written notice.

At trial the plaintiff filed a witness statement deponed on 15th February 2010 in which he conceded to the alleged construction work. He, however, maintained that he notified the defendant company of the intended construction works; received no objection from it, and denied any noise or dust emanating from the said site as had been pleaded by the defendant. *See paragraphs 12 and 13 of the plaintiff's witness statement.* The plaintiff asserted that the defendant company left the suit premises without adequate notice of termination because it had secured alternative premises and not because of any breach on his part. *See paragraph 14 of the witness statement.* He further testified that the defendant had left the premises in a state of disrepair thus costing him business in terms of timely replacement thereof with alternative tenants; as well as the expenses incurred in effecting repairs to the suit premises that allegedly should have been undertaken by the defendant. *See paragraphs 18 and 19.* Under cross examination the plaintiff clarified that he had notified the defendant of the impending construction verbally and the defendant had, similarly, verbally informed him of the noise and dust emanating from the construction site. It was his evidence that the construction activities were undertaken at night and the construction workers accessed the site using a different entrance from that utilised by the defendant company, therefore the construction could not have affected the defendant's operations. The plaintiff further testified that the defendant effected some repairs but reneged on others. He clarified that his claim in that regard was only in respect of incomplete repairs.

On the other hand, the gist of the defence evidence was that the plaintiff having breached the obligation to allow it enjoy quiet and peaceful possession of the suit premises, the defendant company was under no obligation to comply with the 6 month notice period. DW1, the Chief Executive Officer (CEO) of the defendant company at the material time, testified that the defendant company gave 2 months notice of termination and duly paid rental arrears as up to the end of that notice period. DW2, who had served as Human Resource Manager at the time, in turn testified that the defendant company terminated the tenancy agreement following complaints from staff that the dust from the ongoing construction was

affecting their health. She testified that despite being brought to the plaintiff's attention, their complaint was not addressed.

From the foregoing evidence, it seems to me that the allegations of breach of contract under scrutiny were sparked off by the construction works undertaken by the plaintiff. The fact that the said construction works were undertaken within close proximity to the suit premises is not disputed; neither is the verbal complaint made to the plaintiff by the defendant company in respect thereof. The plaintiff conceded as much under cross examination. The plaintiff asserted that he did notify the defendant company of his intention to undertake construction works on property adjacent to the suit premises, but this piece of evidence was denied by both defence witnesses. Be that as it may, by virtue of clause 4(c) of the tenancy agreement both parties did contract to have the plaintiff deliver to the defendant company the quiet and peaceful possession of the suit premises. Therefore, the purported verbal disclosure of impending construction works notwithstanding, the plaintiff did covenant to allow the defendant quiet and peaceful possession of the premises. This created a contractual obligation on his part and he was enjoined to comply with it.

It would appear that he reneged on this obligation. Although he sought to have this court believe that the construction was undertaken at night, the defendant's well corroborated evidence points to the contrary. If indeed, as testified by the plaintiff, the construction activities were undertaken at night and the construction workers accessed the site using a different entrance from that utilised by the defendant company, there would have been no sort of disturbance from the construction activities, certainly no issue as to noise; and it would have been illogical for the defendant company to have made the verbal complaint about noise and dust that was acknowledged by the plaintiff in cross examination. To my mind, had the defendant company's complaint been as totally devoid of merit as the plaintiff would have this court believe, he (plaintiff) could have responded to it formally putting the record straight about the time of construction and unimpeded access to the suit premises. He omitted to do so at the time but later purported to volunteer the said explanation under cross examination. It is quite telling that such a critical explanation was neither offered promptly when the verbal complaint was raised, nor was it volunteered in the plaintiff's witness statement; but suddenly emerged under cross examination. In my considered view, the plaintiff's intermittent presentation of this important piece of information raises the inference of its having been an afterthought that did not represent a factual position but,

rather, was conjured up by the plaintiff under the pressure of cross examination. On a balance of probabilities, therefore, this court rejects the plaintiff's explanation that the construction works did not cause any disturbance to the defendant company, and agrees with the defence evidence that the said construction works violated clause 4(c) of the tenancy agreement. I do, therefore, find that the plaintiff breached his contractual obligation to yield the suit premises to the defendant for its quiet and peaceful possession.

It was contended for the defendant that faced with the plaintiff's breach of clause 4(c) of the agreement the defendant company was no longer bound by clause 5(b) of the said agreement. This position was advanced by both defence witnesses. It raises the question as to whether or not the defendant had, by virtue of the plaintiff's breach, been discharged of its own obligations under the tenancy agreement. The obligations under scrutiny presently are the defendant's obligation to pay all rent due to the plaintiff, its obligation to give 6 months notice of termination and, upon termination, to yield the suit premises in such a good and substantial state of repair as would 'return the premises to the state of good decoration which prevailed at the commencement of the tenancy, reasonable wear and tear excepted.' *See clauses 3(a), 3(g) and 5(b) of the agreement.* It is the evidence herein that the defendant unilaterally opted to reduce the notice period to 2 months and, accordingly, limited the rental arrears due to the plaintiff to the said 2 month notice period. This fact was well conceded by the defence and the reasons therefor advanced in oral evidence. Suffice to note at this stage that the reason advanced by the defendant for its purported breach of clauses 3(a) and (g) was that the plaintiff's proven breach of clause 4(c) of the agreement.

It is a well recognised principle at common law that where a condition of the contract has been breached by one party the other party is entitled to rescind the contract or to treat it as discharged, and the contract would terminate as from that moment. See **Buckland vs. Farmer & Moody (1978) 3 All ER 929 at 938** (CA). This principle is aptly articulated in **Halsbury's Laws of England, Vol.9(1), Re-issue, paragraph 989** as follows:

"Where one party (A) to a contract has committed a serious breach of contract by defective performance or by repudiating his obligations under the contract, the innocent party (B) will have the right to rescind the contract *de futuro*, that is, to treat

himself as discharged from the obligation to tender further performance, and to sue for damages for any loss he may have suffered as a result of the breach. Such a breach by A does not automatically terminate the contract. B has the right to elect to treat the contract as continuing or to terminate it by rescission. In a case where it is alleged that B has a right to rescind for breach, it must be determined (1) whether there has been a breach by A of a term of the contract or a mere representation; (2) whether the breach is sufficiently serious to justify rescission *de futuro* of the contract by B, as well as claim for damages, and (3) whether B has instead elected to affirm the contract." (*emphasis mine*)

In the matter before this court the defendant company did claim to have been discharged from the tenancy agreement owing to the plaintiff's breach thereof; the defendant thus purports to have rescinded the said agreement. It has been established that the plaintiff breached clause 4(c) of the tenancy agreement. This clause is stipulated under the covenants attributable to the plaintiff. The covenants constitute primary obligations of either party thereunder. I, therefore, find that clause 4(c) was a term of the agreement and not a mere representation.

The question then is whether the breach complained of was sufficiently serious to justify rescission of the tenancy agreement or, stated differently, whether it constituted breach of a condition not mere warranty. Breach of a condition would entitle the wronged party to rescind the contract, as well as claim damages for any loss s/he may have suffered; whereas a breach of warranty would only entitle him or her to damages. The determination as to whether a contractual term is a condition or warranty depends on the intention of the parties as deduced from the construction of the contract. Where the contract contains no indication on its face of the status of the terms, the trial court must review the contract within the context of its extrinsic circumstances in order to determine the intention of the parties. Important factors to be taken into consideration include the extent to which the performance of the term under scrutiny would be likely to affect the substance and purpose that the contract is intended to carry out. See **Bentsen vs. Taylor, Sons & Co. (No.2) (1893) 2 QB 274 at 281** (CA).

In the present case, the defendant was a microfinance institution operating as such on the suit premises. It was testified by both defence witnesses that the noise and dust from the construction works undertaken by the plaintiff

negatively impacted on the defendant company's business operations. DW1 testified that the company's equipment was affected by the dust; security had been compromised, and it suffered loss of clientele given that they were operating at a noisy construction site. In the same vein, DW2 attested to receiving complaints from staff about the impact the dust on the premises was having on their health. She did also attest to having personally experienced the noise and dust at the defendant company after commencement of the construction works by the plaintiff. The defendant's complaints in that context were initially brought to the plaintiff's attention verbally. The plaintiff therefore knew at that point the purposes for which the suit premises were being utilised, and the effect of the construction on that purpose. Subsequently, a notice of termination dated 30th December 2003 admitted on the record as Exhibit D1 made reference to the dust from the construction being harmful to its computer and other electronic equipment, particularly in its data processing centre.

Therefore, the extrinsic circumstances of this case were that the suit premises were being utilised for microfinance business; the nature of that business was primarily client-based and significantly relied on its staff and data processing equipment for efficacy, and all those critical parameters of the defendant's operations were negatively affected by the construction works undertaken by the plaintiff. The defence evidence on this issue was not discredited in cross examination; I find no plausible reason to disbelieve it. I am, therefore, satisfied that clause 4(c) of the tenancy agreement was so essential to the extrinsic circumstances of the present tenancy agreement that its non-observance by the plaintiff would amount to a substantial failure to perform the said agreement. It therefore constituted a condition not warranty, the breach of which entitled the defendant to rescind the tenancy agreement. I so hold.

This, then, begs the question as to whether the defendant company did in fact rescind the tenancy agreement or it elected to affirm and continue with it. In the case of **Buckland vs. Farmer & Moody** (supra) the term 'rescind' was considered as follows:

"The word 'rescind' may be used to describe the effect of the sort of relief that is normally granted where a contract has been obtained by fraud, misrepresentation or on some other ground which vitiates its character as a contract, where the court thinks it right to annul a contract in every respect so as to produce a state of affairs as if the contract had never been

entered into. But it is often used to describe the consequence of acceptance by one party to a contract of a repudiation of the contract by another party by breach of some essential term of the contract. We were referred to 3 cases in which distinguished judges have used the word 'rescind' in the latter sense, or have indicated that it is capable of being used in the latter sense." (*emphasis mine*)

Rescission is 'effected by any clear indication of intention to be no longer bound by the contract; this intention must be either communicated to the other party or publicly evidenced.' See ***Oxford dictionary of law, 2009, 7th Ed., p.473.*** To 'affirm' a contract, on the other hand, is to treat a contract as continuing in existence, instead of exercising a right to rescind it for being voidable or to treat it as discharged by reason of breach of contract. See ***Oxford dictionary of law, 2009, 7th Ed., pp. 23, 24.***

In the matter before this court, the defendant's notice of termination (Exhibit D1) categorically notified the plaintiff of the defendant's decision to terminate the tenancy agreement with effect from 1st March 2004, and cited circumstances arising from the plaintiff's breach as the reasons for such termination. A chronology of the defendant's response to the plaintiff's breach is instructive. It was the sum effect of the evidence of both DW1 and the plaintiff that the defendant company initially raised a verbal complaint to the plaintiff about the noise and dust emanating from the construction works. Nonetheless, its complaint notwithstanding, the defendant continued to perform its obligations under the tenancy agreement. To that extent, therefore, the defendant did on that occasion elect to affirm rather than rescind the said agreement. However, on 30th December 2003 the defendant company communicated a termination notice to the plaintiff arising from the same breach. This notice explicitly spelt out the effective date of termination of any contractual relationship that had been created by the tenancy agreement. It thus constituted communication of 'clear intention to be no longer bound by the contract' within the definition of rescission ascribed to the ***Oxford dictionary of law*** (*supra*). In so far as it relayed the defendant's election to terminate the tenancy agreement owing to the breach of an essential contractual term by the plaintiff, the said letter did communicate the consequence of the said breach and thus constituted a rescission of the tenancy agreement within the meaning prescribed to that term in ***Buckland vs. Farmer & Moody*** (*supra*). I am, therefore, satisfied that the defendant company did duly rescind the said tenancy agreement.

Where a wronged party, such as the present defendant, elects to rescind a contract *de futuro* following a breach by the other party, all the primary obligations of the parties under the contract which have not yet been performed are terminated. See **Berger & Co. Inc vs Gill & Duffus SA (1984) AC 382 at 384.** Therefore, the defendant company having rescinded the tenancy agreement, all the outstanding contractual obligations under the said agreement terminated. Thus the defendant was under no further obligation to effect rental payments for the period beyond the last day of February 2004 as claimed by the plaintiff; effect payments in lieu of the outstanding 4 months notice, or institute repairs to the suit premises beyond the date of rescission. The plaintiff would only have been entitled to claim damages against the defendant for obligations that accrued to the latter prior to the rescission but were not performed. No such evidence was adduced before this court, neither was the defendant's pre-rescission contract performance in issue before this court.

In the result, I do find that the tenancy agreement was breached by the plaintiff, and absolve the defendant of liability therefor. I so hold.

Issue 2: Remedies

Learned plaintiff counsel did refer this court to the cases of **Mindira vs. Attorney General High Court Civil Suit No. 761 of 2001; Sietco vs. Noble Builders (U) Ltd Supreme Court Civil Appeal No. 31 of 1995,** and **Uganda Commercial Bank vs. Deo Kigozi (2002) EA 293** in support of his prayer for general damages, interest and costs. With respect, although the principles advanced in those cases are duly recognized, it is well settled law that damages must follow the event. This court has resolved the sole substantive issue hereof in favour of the defendant company. Accordingly, this suit is hereby dismissed with costs to the defendant.

I so order.

Monica K. Mugenyi
JUDGE

30th April, 2014