

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 71 OF 2008

RAJINDER SINGH OBHRAIPLAINTIFF

VERSUS

WILSON MUWONGEDEFENDANT

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

1. One Yosiga Kironde leased a piece of land being part of the land comprised in Kibuga Block 2 plots 113 and 114 in Bukesa, Kyadondo to Fatima Sultan Ally for a period of 49 years commencing on 30th April 1958, when a lease agreement in respect thereof was executed. The plaintiff subsequently acquired Ms. Sultanally's lease interest and his interest in the suit property was registered on 12th August 1970. The property was taken over by the Departed Asian Property Custodian Board (DPACB) in the 1970s but was later repossessed by the plaintiff on 27th August 1993 vide Instrument No. 264046, and the said

repossession duly registered on the certificate of title on 11th July 1994. On 27th October 2003, the plaintiff's interest in the suit property was deleted from the certificate of title and substituted for the defendant pursuant to a re-entry order issued in **Civil Suit No. 159 of 2003 – Wilson Muwonge vs. Rajinder Singh Obhrai**. On 11th October 2005, pursuant to an order of reinstatement arising from **Misc. Application No. 89 of 2004 – Rajinder Singh Obhrai vs Wilson Muwonge**, the plaintiff's interest in the suit land was re-entered on the certificate of title. However, when the plaintiff sought to evict the defendant from the property, he was served with an interim order that had been issued in **Misc. Application No. 37 of 2006** that arose from **Civil Suit No. 24 of 2006 – Wilson Muwonge vs. Rajinder Singh Obhrai**, which suit has since been withdrawn. The defendant is now deceased, but it would appear that to date his family continues to be in occupation of the suit property.

2. On 18th November 2009, vide a scheduling conference before Opio Aweri J. (as he then was), the parties adopted the following issues for determination:
 - i. Whether the defendant breached the lease agreement by failing to give vacant possession of the suit premises.
 - ii. Whether the defendant exercised his right of re-entry onto the suit premises.

iii. Whether the defendant committed fraud.

iv. Remedies, if any.

3. At trial, the plaintiff was represented by Mr. Peters Musoke, while Mr. Michael Bakidde appeared for the defendant. Both parties argued issues 1 and 2 together, and addressed the outstanding issues separately. I propose to adopt the same approach.

Issues 1 & 2: *Whether the defendant breached the lease agreement by failing to give vacant possession of the suit premises & Whether the defendant exercised his right of re-entry onto the suit premises.*

4. The present issues hinge on the obligations of either party under a tenancy agreement between their purported predecessors in title, Yosiga Kironde and Fatima Sultan Ally, and whether (arising there from) the defendant rightfully exercised his right of re-entry. It was the defence contention that the plaintiff breached clauses 1 and 2(c), (d) and (f) of a lease agreement dated 4th January 1956 that was admitted on the record as Exhibit D1; and the said breach entitled the defendant to exercise his right of re-entry on the suit land. Learned counsel for the defendant cited the cases of **Erukana Kuwe vs. Vasrambhai Damji** **Vader Civil Appeal No. 2 of 2002** and **The Executrix of the Estate of Late**

Christine Namatovu Tebajjukira & Another vs. N. G. Shalita Stananzi Civil Appeal No. 2 of 1998 (both Supreme Court) in support of his submission that the defendant terminated the plaintiff's lease when he exercised his right of re-entry, and the plaintiff, as lessee, could not bring an action for recovery of land against the defendant, the lessor.

5. Conversely, the plaintiff denied any breach of tenancy agreement on his part and contended that the defendant's re-entry of the suit property was tantamount to fraudulent abuse of court process with no legal justification whatsoever therefore. However, the plaintiff premised the foregoing position on a lease agreement between the afore-cited predecessors in title dated 30th April 1958 that was admitted on the record as Exhibit P1. I must state here that Exhibit P1 was an incomplete document that excluded parts of clauses 2 and 3 thereof, and materially differed from Exhibit D1. Be that as it may, to buttress his case learned counsel for the plaintiff cited the cases of **Andes (EAS) Ltd vs. Akoong Wat Mulik Systems Ltd & Another Civil Suit No. 184 of 2008** that defined breach of contract as '**the breaking of the obligation which a contract imposes which confers a right of action for damages**', as well as **Onegi Obel vs. Attorney General Civil Suit No. 66 of 2002** that defined trespass to land as '**the act of (a) entering upon land in the possession of the plaintiff or (b)**

remaining upon such land or (c) placing any material object upon it, in each case without lawful justification.’

6. I deem it necessary to resolve the apparent disparity in the description of the property in issue herein prior to a determination of the merits of this joint issue. I have carefully considered the oral and documentary evidence on record. The sum effect of paragraph 4(a) and (b) of the Complaint is that the leasehold interest reflected in Annexure B should derive from the mailo interest described in Annexure A thereof. The paragraph reads:

Para. 4(a)

“By a lease agreement dated 30th April 1958, Yosiga Kironde leased a piece of land being part of the land comprised in Kibuga Block 2 plots 113 and 114 Bukesa in the County of Kyadondo, Mengo District to Fatima Sultanally for a period of 49 years A copy of the lease agreement is attached hereto and marked Annexure ‘A’.”

Para. 4(b)

“Subsequently, the plaintiff acquired the leasehold interest from Fatima Sultanally and his proprietary interest was registered on the 12th August

1970. A copy of the leasehold certificate of title is attached hereto and marked Annexure 'B'.

7. The top right hand corner of the certificate of title marked as Annexure B reflects the description of mailo landholding from which the lease interest reflected therein arises. The description of mailo holding therein appears to be different from that reflected in Annexure A; whereas the former is described as Mailo Register Volume 1028 folio 2, the latter is described as Kibuga Block 2 plots 113 and 114 Bukesa, Kyadondo, Mengo District.

8. However, this disparity is explained by the oral evidence of PW1, the plaintiff, who attested to the property in question as Plot 99 Sir Apollo Kagawa Road that had since been sub-divided into plots 113 and 114. This evidence synchronises the reference in the lease (Exhibit P1) to land situated in Bukesa, Kyadondo known as 'plot No. 99 (Kibuga Block 2), and that referred to in the Complaint as Kibuga Block 2 plots 113 and 114 Bukesa, Kyadondo, Mengo District. Indeed, the description of the mailo interest herein is similarly recorded in the right hand corner of the lease as Mailo Register Volume 1028 folio 2.

9. Therefore, it is the land reflected in Exhibit P2 herein, which is comprised in LRV 463 folio 11 and is also described as Kibuga Block 2 plot 99 that is in issue presently. Hereinafter referred to as 'the suit property', the said property was subject to a 49 year lease effective 10th February 1958, the terms of which are stipulated in Exhibit P1 albeit with retrospective application. Having so held, the question is whether the plaintiff was in breach of the lease terms therein so as to warrant the exercise of the defendant's right of re-entry.

10. I have carefully considered the defence evidence on this matter. It would seem from paragraph 4(b) and (c) of the Written Statement of Defence that the gist of the defence case on this issue was that he exercised his right of re-entry following the neglect and abandonment by the plaintiff of what he deemed to be the suit premises. In his oral evidence, the defendant (DW1) presented Exhibit D1 as the lease agreement between himself and the plaintiff that the latter was in breach of, as well as photographs of the sorry state the purportedly abandoned property was in (Exhibit D2). On his part, in submissions, learned counsel for the plaintiff took issue with the said photographs, contending that they had not sufficiently established that they were pictures of the suit property.

11. Aside from the fact that a plaintiff would be best placed to assert the suit property s/he considers to be in issue between parties, this court finds that the description and size of the land in reference in Exhibit D1 is materially different from that in issue in the Plaintiff. Further, as quite persuasively argued by Mr. Musoke, the nexus between the photographs comprising Exhibit D2 and the suit property was not established; in fact, in the absence of more affirmative evidence, it was not clear what property the photographs pertained to.

12. Section 103 of the Evidence Act places the burden of proof of any fact upon such party as wishes the court to believe in its existence. In the instant case, to the extent that the defendant wished the court to believe in the fact of breach of lease terms as a basis for the re-entry, it bore the burden of proof of the alleged breach. By making reference to a different lease agreement as the basis for his re-entry, the defendant fell short on proof that the plaintiff was in breach of the lease in issue presently. To compound matters, even if Exhibit D1 had been the lease in issue presently (which it is not), the defendant fell short on proof that the lease terms there under had been breached.

13. I am, therefore, satisfied that the defendant has not established any breach by the plaintiff that warranted the exercise of his right of re-entry. Whereas the

lease adduced as Exhibit P1 is incomplete, the said document was tendered in evidence with no objection from the plaintiff; neither was it impugned in submissions or the breach thereof raised as a basis for the defendant's right of re-entry. Consequently, with respect, I am unable to agree that the defendant rightly exercised his right of re-entry over the suit property. I find that no breach of lease terms by the plaintiff has been established before this court as would have given the defendant the option to revert to his right of re-entry.

14. As a second limb to this issue, this court was addressed on breach by the defendant of his obligation to give the plaintiff quiet possession of the suit property. This obligation was spelt out as a covenant under clause 4 of Exhibit P1. The clause reads:

“The Lessor hereby covenants with the Lessee that the Lessee performing his obligations hereunder shall peaceably hold and enjoy the demised premises during the said term without any interruption by the Lessor or any person rightfully claiming under or in trust for him.”

15. PW1 produced the plaint in the Summary Suit - **Civil Suit No. 159 of 2003** (Exhibit P4); a copy of his passport to prove that he was not in Uganda on the date it proceeded (Exhibit P6); the consent order setting aside the resultant *ex*

parte decree (Exhibit P9), and his re-registration as proprietor of the suit premises (Exhibit P2) in proof of his interest in the said premises. He did also furnish a Notice of Withdrawal in respect of **Civil Suit No. 24 of 2006** as Exhibit P13, as well as the plaint in **Civil Suit No. 127 of 2006** (Exhibit P12), that is materially similar to the plaint in the withdrawn suit. It was argued by learned counsel for the plaintiff that, following the setting aside of the *ex parte* decree in **Civil Suit No. 159 of 2003** and the withdrawal of a subsequent suit, **Civil Suit No. 24 of 2006**; the interim order in **Misc. Application No. 37 Of 2006** (arising from **Civil Suit No. 24 of 2006**) notwithstanding, the defendant was entitled to possession of the suit property but to date the defendant had deprived him of the same. _

16. The plaintiff reiterated his argument hereunder with regard to the issue of fraud below. I propose to address the question of fraud separately. For present purposes however, as the registered proprietor of the leasehold interest in the suit property as depicted in Exhibits P1 and P2, the plaintiff is entitled to possession of the suit property. I would, therefore, hold the defendant in breach of clause term of the lease agreement depicted in Exhibit P1.

Issue No. 3: *Whether the defendant committed fraud.*

17. The particulars of fraud as pleaded in paragraph 7 of the Plaintiff are as hereunder:

- i. The defendant took advantage of the plaintiff's absence and lack of residence in Uganda to file **Civil Suit No. 159 of 2003** against the plaintiff out of which the decree annexed as 'C' was extracted in the defendant's favour.*
- ii. The defendant filed the above said suit, **Civil Suit No. 159 of 2003** and deliberately failed to effect service of court process on the defendant contrary to the Civil Procedure Rules SI 71-1.*
- iii. The defendant refused to vacate the leased premises contrary to the court order reinstating the plaintiff on the leased premises.*
- iv. The defendant registered himself as proprietor of the land in the Land Office vide Instrument No. 336367 on the 27th day of August 2003 using an irregularly obtained court decree thus cancelling the plaintiff's lease.*

18. Citing the definition of fraud in **Black's Law Dictionary, 8th Ed., p. 685**, as well as the definition thereof in **David Sejjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985**; Mr. Musoke argued that the defendant knowingly and dishonestly made a false affidavit of service purporting to have served the

plaintiff with court process whereas not, as a result of which a note of re-entry was made in respect of the suit property.

19. It is well established law that the standard of proof in fraud is higher than the ordinary balance of probabilities. Against that standard, I find that the plaintiff fell short on proof to the required standard that the defendant took advantage of his absence to file **Civil Suit No. 159 of 2003** or register himself as the registered proprietor of the suit property under the resultant *ex parte* decree; deliberately omitted to effect the necessary court process, or refused to vacate the suit property. This is a question of evidence that must be established as such. Indeed, whereas the defendant's conduct might fall within the category of contempt of court or refusal to implement lawful orders; it must be proven to have deviated into the arena of fraud. Perhaps even more importantly, the defendant was not the deponent of the offensive affidavit of service, the deponent thereof being one Patrick Turyatunga. In the result, I would answer issue no. 3 in the negative.

Issue No. 4: Remedies, if any.

20. The following are the remedies sought herein:

- i. General damages for breach of the lease agreement.*

- ii. Special damages arising out of the loss of mesne profits as above stated (Ushs. 4,000,000/= per year for 7 years) amounting to Ushs. 336,000,000/=.*
- iii. Interest on the above sum at court rate until payment in full.*
- iv. Costs of the suit.*
- v. Any other relief that this Honourable Court deems fit.*

21. With regard to the claim for general damages, I do recognize the rationale for such a claim as was aptly stated in **Vol. 12 Halsbury's Laws, 4th Edition, para. 1202** as follows:

“Damages are pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him.”

22. In the instant case, whereas Mr. Musoke relied upon the decision in **Andes (EAS) Ltd vs. Akoong Wat Mulik Systems Ltd & Another** (supra) that breach of contract confers a right of action for damages, Mr. Bakidde cited **Erukana Kuwe vs. Vasrambhai Damji Vader** (supra) in support of his contention that no action for recovery of land can lie against a lessor by a lessee. Quite clearly the present suit is not one for recovery of land as can be deduced from the remedies sought. To that extent, therefore, the decision in

Erukana Kuwe (supra) is inapplicable to the present case. Having established an actionable wrong by the Defendant as against the Plaintiff, it does follow that the Plaintiff is entitled to recompense for the damage, loss or injury suffered by him.

23. On the other hand, section 26(2) of the CPA makes provision for interest on claims for monetary payment. Further, it is now well established law that costs generally follow the event. See **Francis Butagira vs. Deborah Mukasa Civil Appeal No. 6 of 1989 (SC) and Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35.** Indeed, in the case of **Sutherland vs. Canada (Attorney General) 2008 BCCA 27** it was held that courts should not depart from this rule except in special circumstances, as a successful litigant has a ‘reasonable expectation’ of obtaining an order for costs. In the instant case, the Defence was successful on the third issue, while the Plaintiff emerged successful on the outstanding issues. This would be borne in mind during consideration of an award of costs.

24. Finally, as rightly stated by learned counsel for the plaintiff, mesne profits are defined in section 2(m) of the Civil Procedure Act (CPA) as **‘those profits which the person in wrongful possession of the property actually received**

or might with ordinary diligence have received from it, together with interest on those profits, but shall not include profits due to improvements made by the person in wrongful possession.' I have carefully considered the Plaintiff's evidence. I find no evidence of the profits which the occupants of the suit premises actually received. DW1 attested to residing in the suit property. That piece of evidence was not undone in cross examination or otherwise rebutted by the plaintiff. In the premises, I find that the evidence on record does not sufficiently justify a claim for mesne profits. I therefore disallow the said claim. Similarly, I find that the prayer for special damages in the sum of Ushs. 336,000,000/=, premised as it is on the sought mesne profits, has not been proven.

25. In the result, judgment is entered against the Defendant with the following orders:

- i. The plaintiff is awarded general damages for breach of contract in the sum of Ushs. 30,000,000/= payable at 6% interest p.a from the date hereof until payment in full.
- ii. The plaintiff is awarded two-thirds of the costs hereof, and the Defendant is awarded one-third costs.

Monica K. Mugenyi

JUDGE

20th April, 2015