THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CA-0087-2012

(ORIGINATING FROM MBALE CIVIL SUIT NO. 83 OF 2010)

JAMES MAGODE IKUYA……………………………..…...……APPELLANT

VERSUS

LONDA MBARAK ABDULLAH...…………………….………RESPONDENT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Appellant raised 7 grounds.

This is a first appellate court with duties as listed in *Pandya v. R (1957) E.A 336*.

To re-evaluate the evidence.

To come to own conclusions.

The facts before the lower court were well articulated in the submissions by appellant and Respondent and will not be repeated.

I have considered the same, the submissions and the law and have made the following findings.

In the order as argued by Appellants.

Grounds 1 and 2:

1. Learned trial Magistrate failed to find that the term on the alleged contract of sale had long expired at time of filing the counter claim.
2. The learned trial Magistrate erred in failing to hold that the contract of sale related to the old lease and not the new lease.

From the background information on file, and the grounds above, the governing law applicable is the law of contract, and how it applies to leaseholds.

The governing principle in leases is that a lease must have a fixed determinable term, with a clear commencement and expiry date. Leases are also governed by "Terms and Conditions" between the Lesee and Lessor, subject to the controlling authority.

There is a wealth of authorities on this position including:

- *Marshall v. Berridge; CA, 1881*.
- *Dr. Adeodanta Kekitiinwa and 3 Ors v. Edward Haudo Wakida Civil Appeal 3 of 2007*.

It is therefore rightly put by appellants following *Broach vs. Ahmed (1965) 2 GB 02 and Papatla Hirji*, that, there cannot be a sale of lease interests beyond the lease period. Once a lease terminates by afflixion of time, the lessee or tenant has no longer any legal right on the property. It is not correct to argue as the Respondent did that when the appellant applied for the new lease or extension he was doing it for the Respondent, basing on the case of *Gabriel Rugambwa & Anor. Vs. Ezironi Bwambale and Another HCCS No. 395 of 1992(1997) 1 KAL 72*, that a vendor who has sold the interest to a purchaser becomes a trustee for the purchaser in respect of the sold property and whatever he does he does for the purchaser.

There is need to distinguish the above authority from the scenario in this appeal. This is because in this case, the above authority can only be relied upon if the facts show that indeed a Trust was created between the parties.

The next step for us therefore is to examine whether a legal Trust was in existence between the parties. The law of Trusts requires specific conditionalities before a Trust, is deemed to exist. While discussing this law, the appellant in submissions in rejoinder referred this court to "Wikipedia the free encyclopedia on the internet" where the following conditions are discussed as necessary for the creation of a Trust.

a) Capacity

b) Certainty

c) (c) Constitution.

The question therefore to be answered is "did these conditions exist as per the common law on Trust?"

I agree with appellant's argument that these conditions did not exist for the following reasons:

The appellant did not have capacity to sale or transfer his lease interests in either the old or extended or new lessee (whichever) without the " express consent in writing of the lessor (controlling authority)". This was an express term of the lease he purported (if at all) to sale to the Respondent. It is an express term of all leases that for the period of the leasehold the lessee cannot tamper with or transfer his interest without such consent. This is clearly proved by information on "PE.2"

marked ‘B’ of 22.08.2011 on lower court record which is the lease offer dated 5th March 2009, in respect of FRV 224 Folio 7, Plot 55 Naboa Road for 5 years from 1.3.2009.

Under paragraph 2 (f) (i) and (ii) it states that:

> “ *the lessee shall not without the consent of the lessor in writing deal in any way with his/her interest in the land before the lease is extended to the full term of 49 years*.”

Paragraph 3, further provides need for “consent to transfer”

The above covenant is a lease covenant common to all leases in Uganda and is always implied or expressed on the lease offer form. It was therefore a condition expressly known by both parties that they could not transfer or deal with this lease without the consent of the lessor.

The above requirement renders any purported sale or transfer without consent in writing of the lessor, illegal. I have not come across such consent on the court record neither did any of the parties refer to it in their pleadings or in evidence. The exercise of sale was hence an exercise in futility. It was a <u>breach</u> of contract between the lessee and lessor for which the lease offer to the lessee could have been terminated if the lessor came to know about the illegal transaction. There is

therefore no Title or “Trust” that could have been created. The entire transaction was illegal and once an illegality is brought to the attention of court, it cannot be allowed to stand. This is the legal position stated in *Makula International v. Cardinal Wamala 1982 HCB*.

On the above finding alone the rest of the arguments raised in support of learned trial Magistrate’s findings cannot stand. There was no sale legally, and there was no trust, created. I therefore find that ground 1 and ground 2 have been proved.

Ground 7: Failure of the learned trial Magistrate to evaluate the evidence.

Appellant pointed out in submissions that learned trial Magistrate failed to find illegalities in the evidence adduced which included lack of jurisdiction, tendering of a forged agreement, allowing hearsay evidence from defence witnesses to prove a document (agreement) he never witnessed, and finally wrongly holding that after the first lease, appellant got a new lease and not an extension.

The Respondents argued that the learned trial Magistrate properly evaluated the evidence and reached the right conclusions.

I have already faulted the learned trial Magistrate’s failure to notice the illegality of the entire sale transaction. No legal claims could have arisen from a non-existing

contract because court cannot enforce an illegality. This failure was fatal to the case. The case of *Cardinal Emmanuel Nsubuga* (supra) clearly states that once an illegality is discovered it overrides all other questions.

I am therefore in agreement with arguments raised by appellant in ground 7, that the learned trial Magistrate failed to properly evaluate the evidence and hence reached a wrong conclusion. The ground succeeds.

Grounds 4 and 5:

These were remedies granted by the learned trial Magistrate, having found for Respondents on their counter claim.

Having found that there was an illegality, it follows that there was no way the appellant could give vacant possession of property to which he was holder of a lease with valid covenants with the controlling authority (lessor) who was not party to the said transaction. "No sublease" was being created. There was no way court could order enforcement of illegalities. As argued by appellant in *Livingstone Kyofa Mpiima vs. Elizabeth Nanteza HCCS No.856/1989*, court should not order specific performance where it appears to the court that it may be unable to enforce the order.

These grounds are duly proved for reasons already stated and those as presented by appellants.

In the result, the appeal is proved on all grounds as raised.

Ground 3 and 6 were abandoned. This appeal is allowed with costs to the appellant. I so order.

Henry I. Kawesa

JUDGE

31.03.2015