**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**LAND DIVISION**

**CIVIL SUIT NO. 243 OF 2011**

**HENRY M.B MAKMOT.....PLAINTIFF**

**VERSUS**

**1. NATIONAL WATER AND SEWERAGE CORPORATION**

**2. LIRA DISTRICT LAND BOARD.....DEFENDANTS**

***Before: Lady Justice Alexandra Nkonge Rugadya***

**JUDGMENT**

***Introduction:***

The plaintiff brought a suit against the defendants jointly and severally for; recovery of land comprised in ***plot 12, Maruzi Road, Lira Municipality;*** a declaration that he was the rightful lessee of the suit land; an order that the lease from the 2nd defendant in favor of the 1st defendant is null and void and be cancelled; an order that the entry of proprietorship on the certificate of title to the suit land in favor of the 1st defendant be cancelled; an order that the 2nd

defendant do execute a lease in accordance with the lease offer in favor of the plaintiff; an order that the 1st defendant do forthwith vacate the suit property and hand over the same to the plaintiff; general damages; interest thereon at such rate and from such date as court may deem fit; and costs of the suit.

It is the plaintiff's claim that he was offered a lease offer over the suit property for the purposes of developing the same, on 18th April, 1975.

That he had duly accepted the offer by fulfilling the conditions for acceptance required in the said offer and that after a lot of administrative delays a lease was finally issued to him on 27th January 1977, taking effect from 1st May, 1975, for an initial period of 2 years, extendable to a full term of 49 years, upon compliance with the terms thereof.

Upon execution of the lease, a certificate of title to the property had been duly issued under ***Folio 4, volume 955*** and registered in the plaintiff's names on the 27th January 1977.

In June, 2005 however, the 2nd defendant in complete and utter disregard of the plaintiff's legal and equitable interests in the same, wrongfully and fraudulently offered the suit property on lease to the 1st defendant. The 1st defendant wrongfully and fraudulently took up the lease and obtained a certificate of title to the suit property.

The plaintiff therefore prayed for, among other reliefs, cancellation of the title which he claims was fraudulently issued to the 1st defendant, allegations which the 1st defendant denied in its statement of defence.

***Issues:***

1) ***Whether the plaintiff is the rightful lessee of the suit land;***

2) ***Whether the lease for the 2nd defendant in favour of the 1st defendant was obtained fraudulently;***

***3) What remedies are available to the parties.***

***Analysis of the law and evidence:***

I will deal with ***Issues No.1 and 2*** jointly.

The plaintiff who was represented by ***M/S Omara Atubo & Co. Advocates*** relied on the evidence of two witnesses, himself as ***PW1*** and ***PW2***, Addy Sebuggwawo Gabiraari, a chartered surveyor and Valuer.

The 1st defendant did not turn up in court and the matter therefore proceeded *exparte.*

In *paragraph 8* of the WSD, the claim by the 1st defendant was that the suit property was one of those handed over to the Corporation; that it had structures constructed by *M/S Joseph Riepl Bau-AG,* a company which had been contracted by the Ministry of Water to carry out the project in Lira town; that it occupied the premises in respect of which no title had been acquired or issued by 1995 when the lease was allocated to it.

In the course of the hearing, this matter was on 16th August, 2018 partially settled between the plaintiff and the 2nd defendant, Lira District Land Board.

The settlement consent was made in the terms below:

1. *The 2nd defendant shall offer and lease to the plaintiff on its standard lease terms of 49 years, less the requirements to pay premium, the following parcels of land in Lira municipality:*
    - ***a) plot No. 14 on Bishop Odur Kami Road; and***
    - ***b) plots No.14A, 14B, 16, 16A, and 16B along Okello Degree Road.***

2. *The 2nd defendant shall upon signing this consent judgment forthwith proceed to prepare and execute the relevant leases and issue certificates of title in respect of the aforesaid parcels of land to the plaintiff and in his*

*names in full and final settlement of the matter as between the plaintiff and the 2nd defendant.(emphasis added)*

3. *Each party shall bear its costs of this suit.*

Following the above settlement, all matters raised as against the 2nd defendant board were fully settled; and all the reliefs sought against it were therefore overtaken by events.

Court noted that the plaintiff on 31st October, 2018 went ahead to file ***MA No. 1709 of 2018*** by which application he sought leave to amend the plaint to add an additional prayer for *mesne* profits.

The said application was however never followed up. On 12th December, 2018, he obtained an order of this court for the valuation of the suit property, for purposes of compensation.

The plaintiff filed a witness statement and testified as ***Pw1,*** as against National Water and Sewerage Corporation, the 1st defendant and as per the valuation report submitted by ***Pw2***, he sought from the 1st defendant a sum of ***Ugx 134, 238, 310/***= as the accumulated rental loss for the period from 1993 to 2018; and ***Ugx 110,000,000/***= as the current open market replacement value.

The said claims however as duly noted by this court, were never specifically pleaded under the main suit which was not amended. The amendments to the plaint would also have been relevant and consequential to the changed circumstances which followed the settlement between the plaintiff and the 2nd defendant.

In ***Inter freight forwarding (U) Ltd Vs. East African Development Bank, Civil Appeal No. 33 of 1993,*** court had this to say:

> ***"A party is expected and is bound to prove the case as alleged by the pleadings and as covered in the issues framed. He will not be allowed to succeed on a case set up by him and be allowed at the***

***trial to change his case as set-up ...inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings."*** *(Refer also to:* ***Kato & Anor Vs. Nalwoga SCCA No. 3 of 2013).***

The rules of natural justice would require that an amendment to the plaint be made in those circumstances and hence prior leave of court ought to be obtained to amend the plaint to include in this case a prayer for compensation.

This becomes even more pertinent bearing in mind the fact that the WSD had been filed seven years earlier, responding to a different reliefs sought then by the plaintiff.

***The law:***

Generally, where there is failure by a party to turn up and defend a suit partial responsibility may be imputed for any of the actions which may have been taken contrary to the law. That principle is borrowed from the case of: ***FJ K Zaabwe vs. Orient Bank & 5 O'rs SCCA No. 4 of 2006).***

Furthermore, by virtue of ***section 101 (1) of Evidence Act, Cap. 6,*** where a party desires court to give judgment to any legal right or liability depending on the existence of any facts it asserts, it must prove that those facts exist.***(George William Kakoma v Attorney General [2010] HCB 1 at page 78).*** The principle equally applies in this case where the 1st defendant filed a defence but failed to make it to court.

The plaintiff's claim in this case was that fraud had been committed by the defendants in relation to the transfer of the suit land to the 1st defendant.

*Fraud* has been defined to imply an act of dishonesty. ***(Kampala Bottlers Ltd. vs. Damaniaco (U) Ltd SCCA No. 2 of 1992.);*** an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right.

In ***F.I. K Zaabwe vs Orient Bank and 5 others SCCA No. 4 of 2002)*** it was defined as a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations or by conccalment of that which deceives and is intended to deceive another so that he/she shall act upon it to his legal injury.

The burden of proof therefore lies with the plaintiff who has the duty to furnish evidence, whose level of probity is such that a reasonable man, might hold more probable the conclusion which the plaintiff contend, on a balance of probabilities. ***(Sebuliba vs Cooperative Bank Ltd. [1982] HCB 130; Oketha vs Attorney General Civil Suit No. 0069 of 2004.***

*Fraud* when proved, is such grotesque monster that courts should hound it wherever it rears its head and wherever it seeks to take cover behind any legislation.

It unravels everything and vitiates all transactions. (***Fam International Ltd and Ahmad Farah vs Mohamed El Fith [1994] KARL 307).*** It goes without saying therefore that fraud must not only be specifically pleaded but also specifically proved, to a level higher than in any ordinary suit.

The particulars of fraud as pleaded against the 1st defendant in this case were:

1. *Failing to inquire and establish as to how its predecessor M/S Joseph Riepl Bau-Ag came to be in possession of the suit property;*

2. *Failing to inquire and establish who had caused the land to be surveyed;*

3. *Failing and neglecting to make reasonable inquiries as to the antecedents of the suit property;*

4. *Actively procuring registration of proprietorship of the suit property with intent to defeat the plaintiff's equitable interests in the same;*

5. *Taking or agreeing to take a lease over the suit property without going through the due process;*

6. *Purporting to carry out a survey on the land that had already been surveyed at the instance of the plaintiff;*

7. *Acting dishonestly in the circumstances.*

***Analysis of the evidence:***

The plaintiff as ***Pw1,*** relied also on a number of documents to support his claim.

***PExh1,*** a lease offer was made to him on 18th April, 1975. ***PExh9*** was his acceptance of the offer. The undisputed evidence also proved that a lease was issued to him on 27th January, 1977, to start running from 1st May, 1975 for an initial period of two years, extendable to a full term of 49 years, to be issued only upon compliance with the terms set out in the lease.

A certificate of title to the property was issued in his names for the land registered under ***Folio 4 Volume 955*** on 27th January, 1977 ***(PExh 2***). The certificate t was never renewed.

The plaintiff claimed that he had duly presented his building plans but nevertheless failed to obtain approval from the relevant authorities, despite all his efforts.

The same party also blamed the delay in developing the suit land on the insecurity prevailing in those days. Neither assertion was supported by any documentary evidence.

Whatever the case, the plaintiff's statements in court could only imply that he had failed to comply with the terms and conditions necessary for the extension of the lease to 49 years.

His further claim was that he had remained in possession and continued to pay the requisite ground rent to the relevant authorities, ***(PExh4)***; and later advised

by the Lira Town Clerk's office to re-apply for the suit property. By letter dated 31st October 1990, the land officer Lira/Apac confirmed that he would be issued with a fresh lease upon settling the outstanding fees.

The plaintiff also presented a receipt dated 24th June, 1991 to prove that he paid ground rent for the period from 31st December, 1979 to 31st December, 1990, plus the penalty for late payment.

The plaintiff claimed to have written a fresh application which he forwarded to the Town Clerk on 9th January, 1989. The Town Clerk had responded on 1st March, 1989 referring him to the Planning Development Committee meeting which had resolved that since the lease had long expired and the land undeveloped, the plaintiff would be required to re-apply.

Going by the contents of his letter dated 25th October, 1990, he had ignored that request on account of having already appended his application onto the letter to the Town Clerk on 9th January, 1989.

With all due respect however, a fresh lease offer could not have been valid based on an earlier application of 9th January, 1989, even before the *minute No. 6/89 (2)* had been passed by the committee.

It would be reasonable to conclude in those circumstances that the plaintiff had as far back as 1989 failed to take up the offer made to him by the committee to have his lease extended.

A subsequent letter to him dated 31st October, 1990 was a reminder to him from the Land Officer of what was required of him, including the payment of the arrears in ground rent, before the lease could be issued. It indicated that almost two years later, there was still no such application as the committee had recommended.

After settling the fees, instead of making sure that he complied with the committee decision, the plaintiff on 8th January, 1991 wrote back to the Land

officer, still referring to his letter and the application of 9th January, 1989 he had annexed to that letter. This could by no means be termed as a fresh application.

***PExh 4, 5A to 5D, PExh 6*** were receipts and various correspondences which were relevant only to the extent that indeed between 1975 and 1992 the plaintiff had been paid up, in compliance with the demand note of 20th May, 1991. ***(refer to: PExh 9).***

I found no other documentary evidence to prove that after 1993 the plaintiff had paid any further dues to the 2nd defendant. Thus on 4th October, 1990 the Land Officer referring to an earlier letter dated 18th April, 1975 had this to say to the plaintiff:

> *...as the terms and conditions contained in that same quoted correspondence having not been accepted within the stipulated time, the offer is hereby withdrawn thus declaring the plot vacant for leasing to another potential developer.*

On 8th January, 1991 again the plaintiff wrote to the Land Officer referring him to the letter of 31st October, 1990, reminding him of the application which he (the plaintiff) had sent to him attached to his letter of 9th January, 1989, still ignoring the committee's request to present a fresh application.

Furthermore, on 1st June, 1991 the plaintiff wrote to Town Clerk acknowledging the demand note of 20th May, 1991 and attaching the receipt as per the demand note ***(PExh6)***.

Thereafter he never took trouble to challenge the 2nd defendant's decision to make him pay the ground rent, and to do all other acts which gave him the impression that he was still recognized as the owner of the suit land. Not until 2011, some few decades later, did he consider it pertinent to file this suit.

By implication, on 4th October, 1990 any purported offer to the plaintiff had been legally withdrawn and the suit land duly reverted to the lessor. I find no proof that years thereafter that decision was ever reviewed/revised by the committee.

The dues he was requested to pay were intended in my view to cover the period prior to the time the 1st defendant took over possession of the suit land. The plaintiff did not retain any legal interest in the suit land since his had expired in 1977, and never extended.

Going by the contents of the WSD, which were not challenged in rejoinder, this was a period of 19 years from the time when the handover of the suit land and other properties to the 1st defendant took place. It was also therefore around the same time when the 1st defendant had taken possession over the land and remained unchallenged by the plaintiff.

I would also like to add on that score that the plaintiff failed to make a distinction between the weight to be attached to an offer of a lease made by the 2nd defendant to him, as against the weight of a mere promise to make an offer.

In June, 2005 therefore, the time he claimed to have been fraudulently deprived of the suit land by the defendants, the property had already been returned to its original owner and therefore already free for leasing to the 1st defendant. He could not therefore claim to have been the rightful lessee of the suit land.

The 2nd defendant also had no legal obligation in my view to make the offer of a lease to a party which, for whatever reason it may have had, had failed to make any development on the land, counting from the time it was granted the title in 1977 to 1995 almost two decades later, when the lease was granted to the 1st defendant.

On the point raised by the plaintiff that 1st defendant had generally failed to make reasonable inquiries as to the antecedents of the suit property, it is trite that such failure to make reasonable inquiries, ignorance, negligence was held to form particulars of the offence of fraud, In ***Uganda Posts and Telecommunications vs Abraham Kitumba SCCA No. 36 of 1995).***

It is on record and facts concerning this property are not in contention that the plaintiff's lease had long expired in 1977; no developments were made by him on the land and indeed no land title had been handed over to him thereafter.

The record is also clear that on 4th October, 1990 the offer to the plaintiff had been withdrawn thus declaring the plot vacant and available for leasing to another party.

Since after 1993 there is nothing to show that the plaintiff continued making payments on that land, he therefore acquired the status of a tenant at sufferance.

A *tenant at sufferance* arises by implication of law, not by contract. He acquires no interest in the land and therefore has no rights to enforce in that respect. At common law it arises where a tenant having entered upon the land under a valid title or tenancy holds over at the end of the tenancy, continues in possession without the landlord's assent or dissent.

Within that context therefore, until registration of the lease, a person receiving an offer of a lease from a controlling authority is in a position akin to that of a tenant holding over demised premises at the end of a lease.

A tenancy at sufferance may therefore be terminated at any time and recovery of possession effected. ***Etoma Francis vs Alex Agandru & 3 others, HCCS No. 0007 of 2011.***

In those circumstances, I therefore find it difficult to consider the issuance of a license by tenant at sufferance to *M/S Joseph Riepl Bau –Ag* and the undertaking between the two as material to this case.

In absence of anything to make this court believe otherwise, it would be reasonable to assume that it was on that basis that the 1st defendant had applied for and been duly granted the land in 1995 by the department of Lands in Lira District. In all this, no evidence of fraud has been proved against the 1st defendant.

I am also inclined to take into consideration the fact that the plaintiff had already received compensation from the 2nd defendant of alternative plots of land and by consent, the plaintiff could not hold onto any further claim in the suit land or against the 1st defendant for any financial compensation, given the above circumstances. Any award of compensation and/or replacement value would only amount to unjust enrichment, a decision which this court should not be made party to.

Since the 1st defendant did not turn up in court but only filed the defence, I would only award it 50% of the costs of this suit.

Nkonge

***Alexandra Nkonge Rugadya***

***Judge***

Delivered by email
Nkonge J
23/8/2021

***16th August, 2021.***