THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(LAND DIVISION)

CIVIL SUIT No. 175 OF 2013

JOSEPH AKOL..... PLAINTIFF

VERSUS

1. INNOVATIVE MASTERS HOLDING GROUP LTD.:: DEFENDANTS
2. PAUL MUTAWE

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

The Plaintiff has sued the Defendants jointly and severally for the recovery of rent owing from his property comprised in LRV 2458 Folio 7 Plot No. 92 Kira Road Kampala (herein after the suit property. He seeks a declaration that he is entitled to re–entry thereon, and orders for vacant possession, general damages, costs, and interest. In the joint scheduling memorandum, the parties hereto agreed that the Plaintiff is the registered proprietor of the suit property. They also agreed that by an agreement dated 8th day of December 2011, he let out the suit property to the 1st Defendant at the monthly rent of US$ 3,500 (United States Dollars Three Thousand Five Hundred Only), payable 6 (six) months in advance. They further agreed that the rent from August 2012, up to the scheduling date, remained unpaid.

However, when the suit came up for hearing, the 1st Defendant paid a sum equivalent to US$ 5,555 (United States Dollars Five Thousand, Five Hundred and Fifty Five Only). There being no denial of the rent owing, judgment was entered for the Plaintiff in the sum of US$ 43,445 (United States Dollars Forty Three Thousand Four Hundred and Forty Five only); with interest thereon at 8% per annum from the date of that judgment to full payment. The matter then proceeded for formal proof under the provisions of 0.8 rr. 3 and 4 of the civil Procedure Rules. The issues agreed upon in the joint scheduling memorandum, which this Court has adopted, are: –

1. Whether the Defendants have breached the tenancy agreement.

2. Whether the Plaintiff has a cause of action against the 2nd Defendant.

3. Whether the Plaintiff is entitled to the remedies sought, or any.

4. Quantum of damage, if any.

I think the proper course of action is to first consider and resolve the issue regarding the contested cause of action against the 2nd Defendant (issue No. 2), since it is from this that the other issues would then flow. In the event that the Court finds that the suit as against the 2nd Defendant cannot be maintained, then it shall be dismissed as against him; leaving only the 1st Defendant, which shall thereafter be referred to simply as the Defendant.

Issue No 2. Whether the Plaintiff has a cause of action against the 2nd Defendant.

It is submitted for the Plaintiff that the 2nd Defendant should be held accountable in his personal capacity because he signed the tenancy agreement, and issued personal cheques (exhibited in evidence as ***'P'3*** and ***'P'4***) for payment of rent then owing from the 1st Defendant to the Plaintiff; which he however he later countermanded, to the detriment of the Plaintiff. I find this contention untenable. The tenancy agreement was clearly strictly between the Plaintiff and the 1st Defendant; with no reference to any third party as a beneficiary, which would have entitled the Plaintiff to take action against such third party in the event of breach. At no stage in the execution of the suit contract did the 2nd Defendant guarantee observance by the 1st Defendant of the terms and covenants in the tenancy agreement.

Apart from describing the 2nd Defendant as the Managing Director of the 1st Defendant, the Plaintiff never specified in his plaint the capacity in which he sues him. This amounts to nothing; and confers no liability on the 2nd Defendant under the suit contract. The Plaintiff needed to first lift the corporate veil and expose the 2nd Defendant as the real person with whom he had contracted despite his having executed the contract with the 1st Defendant. Alternatively, he could have proved that the 1st Defendant's Articles of Association provides that the Managing Director may be sued together with or as an alternate party to the 1st Defendant. The mere fact that the 2nd Defendant signed the tenancy agreement does not in any way confer liability on him upon the 1st Defendant's breach of the contract.

Similarly, the fact that the 2nd Defendant issued a personal cheque to meet the liability of the 1st Defendant, without more, would not in any way make him liable to the Plaintiff under the contract. The Plaintiff should have adduced evidence that the 2nd Defendant had, in issuing the cheques, taken over the responsibility which the 1st Defendant had to him under the contract. This was not the case. Accordingly then, there was no justification in suing the 2nd Defendant either severally or jointly for the failure of the 1st Defendant to honour its obligations to the Plaintiff under the contract. Had this point been raised as a preliminary point, I would have struck out the suit as against the 2nd Defendant. As it is, I dismiss the suit against him with costs.

Issue No. 1. Whether the Defendants have breached the tenancy agreement.

It is not in dispute that, from August 2012 to September 2013, when the scheduling memorandum was executed, rent was in arrears to the tune of US$ 49,000 (United States Dollars Forty Nine Thousand Only). This was a clear breach of the term of the agreement on payment of rent. In the light of the resolution of issue No. 2 as I have done, this breach was by the 1st Defendant. The Plaintiff (as PW1) adduced evidence showing that attempts by the Defendant to pay the rent already in arrears was futile as the cheque payment was countermanded leading to its being dishonoured by the bank (see exhibits ***PE*** *2(a)*, ***PE*** *2(b)*, ***PE*** *3(a)*, ***PE*** *3(b)*, and ***PE*** *4*).

There was an attempt, in the course of the hearing, to justify the non–payment of the rent. The Defendant's contention was that the non–payment was partly attributable to the Plaintiff who had levied a surcharge of 10% on top of the rent arrears owing. However, there was no evidence placed before this Court that the Plaintiff had demanded the prior payment of this penalty levy as a pre–condition for the settlement of the arrears of rent owing. Thus, there was nothing to inhibit the Defendant from paying what was uncontested as owing; and thereafter to contest the penalty levied. Having given judgment to the Plaintiff for the sum owing, there was no point arguing the point at all. If there were any mitigating factor, it would only be relevant while determining the quantum of damages to be awarded.

Issue No. 3. Whether the Plaintiff is entitled to the remedies sought; or any.

Clause 4(a) of the tenancy agreement in issue (exhibit ***PE*** *1*) provides as follows: –

> *"If the tenant shall at any time fail or neglect to perform and observe any of the covenants and conditions herein contained and on its part to be performed and observed then the*

landlord may at any time hereinafter re–enter upon the demised premises or any part thereof in the name of the whole and thereupon this tenancy shall absolutely determine but without prejudice to any right of action or remedy of the landlord for any antecedent breach of covenant by the tenant."

This clause is quite clear that upon breach by the tenant, of any of the covenants and conditions in the tenancy agreement, the property owner may exercise the discretion to re–enter upon the demised property. In law, re–entry may be effected by the proprietor taking physical possession of the whole, or part, of the property demised. In the alternative, it may be effected by obtaining a Court order to that effect. The Plaintiff has chosen the latter; and has declared his desire to discontinue having the Defendant as his tenant, and that therefore the Defendant should give vacant possession of the suit premises to him immediately. I think the Plaintiff is justified in taking this decision.

It was quite evident from the several unjustified excuses that the Defendant has no wish to have this matter resolved by Court. It tried to hide behind the excuse that its Managing director is sick. Given that there are admittedly other principal officers of the Defendant who could and should have stepped in, the Court found the excuse untenable; and so regarded it as a mischief perpetrated to abuse the due process. This mischief, the Court of law cannot be complicit in. The Defendant's Counsel went on record as having withdrawn from representing it. However the final written submissions, allegedly filed by the Defendant, was evidently the work of some learned Counsel; and this betrayed and left the mischief naked.

This has therefore fully vindicated Court which, when it ran out of patience, decided to proceed under the provisions of 0.17, r.4 of the Civil Procedure Rules; which is that: –

"Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding that default, proceed to decide the suit immediately."

Having satisfied myself that the Defendant has defaulted in its rental obligation to the Plaintiff, and has shown utter inability to make good its default, I so order for the re–entry the Plaintiff has prayed for.

Issue No. 4. <u>Quantum of damage; if any</u>.

Failure to pay the rent agreed upon is not one of the breaches, which is irredeemable in law. Had the Defendant come forward and paid the rent owing and pleaded for relief from forfeiture, I would have granted such relief and only penalised it in damages. This not being so, I find that the Plaintiff is entitled to vacant possession of the suit property and for an award of damages. He led evidence to show how he has suffered owing to the Defendant's chronic default. Apart from the stress he has naturally gone through, due to the non–payment of rent, he has not been able to meet his obligation to pay for his daughter's education. He is entitled to an award of U shs 10,000,000/= (Ten Million only) as damages for the inconvenience and torment he has gone through owing to the breach by the Defendant.

I am aware that from the date of this judgment, the tenancy agreement between the Plaintiff and the Defendant stands terminated. Accordingly, the Defendant shall pay rent to the Plaintiff up to the date of this judgment only. It follows that any further occupation of the suit property by the Defendant, beyond the date of this judgment, cannot be due to the tenancy agreement; hence for such further occupation, without payment, the Defendant shall pay mesne profits to the Plaintiff in a sum equivalent to the rent levied under the tenancy agreement now terminated. Accordingly then, I allow this suit; and make the following orders: –

(i) The Plaintiff is entitled to re–entry onto the suit property.

(ii) The Defendant shall give vacant possession of the suit property to the Plaintiff forthwith.

(iii) The Defendant shall pay the Plaintiff the arrears of rent owing, up to the date of this judgment.

(iv) The Defendant shall pay the Plaintiff mesne profits, equivalent to the rent provided for in the tenancy agreement now determined, for any occupation of the suit property beyond the date of this judgment.

(v) The Defendant shall pay the sum of U shs 10,000,000/= (Ten million only) as general damages for breach of contract.

(vi) The Defendant shall pay the costs of the suit.

(vii) The awards in (iii), (iv), (v), and (vi) shall each attract interest at the rate of 8% per annum from the date of this judgment till payment in full.

Alfonse Chigamoy Owiny – Dollo
JUDGE

15 – 04 – 2014