THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON.JUSTICE A.E.N.MPAGI BAHIGEINE, JA
5 **HON.JUSTICE C.K.BYAMUGISHA, JA**
HON.JUSTICE S.B.KAVUMA, JA

CIVIL APPEAL NO.92 OF 2003.

F.K. MOTORS (U) LTD :::::::::::::::::: APPELLANT.

10 **VERSUS**

1. **KABU AUCTIONEERS & COURT BAILIFFS**
2. **MULJIBHAI MADHVANI::::::::: RESPONDENTS.**

15 **JUDGEMENT OF A.E.N.MPAGI BAHIGEINE, JA**

This is an appeal against the dismissal of the appellant's case by the High Court on 26-6-2003. The appellant had sued in damages for breach of contract/tenancy agreement.

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Mr. Andrew Baggayi appearing with Mr. Mathias Sekatawa represented the appellant company while Mr. Ezekiel Tuma was for both respondents.

25 The undisputed facts were as follows. The appellant, who was a motor agent with a franchise for Hyundai in Uganda, was a tenant of the 2nd respondent, at plot No.11, Old Port Bell Road, Kampala. The rental was US $ 2,500 per month.

At some point, the tenant defaulted and by the end of February 2001,
30 the rental arrears had accumulated to US $32,154.

On 28-3-2001, the 1st respondent which is a firm of Auctioneers and Court Bailiffs, acting at the instance of the 2nd respondent's counsel, evicted the staff of the appellant company, closed up the premises

with the entire appellant's property inside. Subsequent negotiations between the parties came to naught, resulting into the High Court suit aforementioned in which the learned Judge made the following orders:

"(a) The plaintiff shall pay US $ 32,154 being the arrears of rent up to 28-3-2001.

(b) The plaintiff shall pay US $ 2,500 plus vat per month from April 2001 to November 2001.

(c) The plaintiff shall pay US $ 1,500 per month from December 2001 to 30th June 2003.

(d) The plaintiff shall pay costs of the suit and since the counter claim was not fully successful the plaintiff shall pay ½ of the costs on the counter claim.

(e) All the above shall attract interest at court rate from the date of judgement till payment in full."

During the conferencing before the Registrar of the Court of Appeal, the memorandum of appeal was crystallised into three issues for determination by the Court as follows:

"1. Whether or not the 1st respondent acted lawfully when it levied for distress without a warrant/certificate to do so. What are the consequences of levying without a certificate?

2. Whether or not the appellant is entitled to restitution on account of the unjust enrichment of the 2nd respondent for having levied distress on property with a value far in excess of the amount owed in rent arrears and related costs.

3. Whether or not the appellant is liable in rent for the period after its eviction from the premises/re-entry by the respondents."

5 Submitting on issue No.1, Mr. Baggayi pointed out that the 1st respondent acted unlawfully in carrying out the eviction, levying distress and detaining the appellant's property on 28-3-01 without a warrant or certificate from Court. This contravened section 3 of the **Distress for Rent (Court Bailiffs) Act, cap 68.** He disagreed with 10 the learned Judge's reasoning and contended that the appellant did not refuse to pay for some reason or another but only defaulted. He further contended that the appellant was not a trespasser and submitted that the 1st respondent acted unlawfully in carrying out the eviction without a licence.

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In reply, Mr. Tuma learned counsel asserted that at the time of re-entry by the 2nd respondent on 28-3-01, the rental arrears amounted to US $ 32,154. This amount had been outstanding for a long time and demands for it by the 2nd respondent had gone unheeded. The 20 appellant, therefore, had become a trespasser. In his view refusing to pay and defaulting struck no difference. Both terms meant the same thing.

Citing the case of **Joy Tumushabe and Another vs Anglo-African Ltd and Another SCCA No.7 of 1999**, which the Learned Judge had 25 relied on, learned counsel submitted that the 2nd respondent was entitled to evict the appellant and detain the goods. He pointed out that at the time of eviction, one of the Directors had fled the country and another had followed suit soon thereafter. There were, therefore, no directors in the country at the time of eviction. There was no option 30 but just to close the premises.

He argued that no property was taken away or advertised for sale, in which case the Distress for Rent Act was inapplicable. It was rather a

question of the landlord dealing with trespassers as the Judge had observed. He prayed Court to dismiss the appeal.

The learned Judge held:

5 **"In the instant case I find that the 2nd Defendant as the owner of the property had a right to evict a trespasser (which the plaintiff had become) who had refused to vacate the property. Their eviction did not have to comply with the provisions of the Distress for**
10 **Rent (Court Bailiffs) Act. The 2nd defendant was entitled to remove the property so as to leave the premises empty. However, in this case the 2nd defendant instead detained the property in the premises.**
15 **In my view they were entitled to this course of action in view of the nature of the property in issue."**

The crux of issue No.1 is that the 1st respondent acted without a licence/warrant from Court.
20 Section 2 of the Distress for Rent (Bailiffs) Act (cap 76) (Laws of Uganda 2000) provides:

"No person, other than a <u>landlord in person, his or her attorney or the legal owner of a reversion,</u> shall act as bailiff to levy any distress for rent unless he or she
25 ***shall be authorised to act as bailiff by a certificate in writing under the hand of a certifying officer, and such certificate may be general or apply to a particular distress or distresses."***

30 Section 4 of the Act makes it an offence, and prescribes a penalty for contravention of section 3 as follows:

"Any person, required by this Act to hold a certificate as a bailiff, who levies distress for rent without being

> ***the holder of a certificate, is, without prejudice to any civil liability, liable to a fine not exceeding two hundred shillings.”***

5 It is thus clear that the 2nd respondent as landlord had a personal right to levy distress and so did his lawyers, M/S Shonubi, Musoke and Company Advocates whom he had instructed to carry it out. However, the latter instead instructed the 1st respondent to carry out the distress, which it proceeded to do without a licence/certificate. This 10 was a flagrant contravention of section 2 of the **Distress for Rent (Court Bailiffs) Act**, which rendered the 1st respondent liable to civil or criminal proceedings under section 3.

It would have been otherwise had the distress been carried out 15 personally by the 2nd respondent as landlord or his attorneys. Since the appellant had become trespassers the landlord or his attorney or legal owner of reversion could have resorted to any lawful means to evict the appellants and remove their property so as to leave the premises vacant which is the desired objective of the aggrieved 20 landlord. However, instructing a bailiff brought the process under the ambit of the Act and rules thereunder which then had to be complied with in every respect.

In **Joy Tumushabe & Another vs Anglo – Africa Ltd and Another** 25 **(supra)**, Kanyeihamba JSC held inter alia:

> **“… he who chooses to distress for rent under the Act must do so strictly in accordance with the provisions and the rules of that Act. The bailiffs who are authorised to distress for rent must be 30 qualified and do so in accordance with the terms and conditions prescribed under the Act or rules made thereunder.”**

Also see this Court's recent decision in ***Civil Appeal No.17 of 2003 Sam Samaali Moit vs Michael Osekeny,*** dated 25-08-05, where the facts were on all fours with the instant case. The landlord gave instructions to his advocate to levy distress but the latter instead instructed a bailiff who had no certificate. Relying on Joy Tumushabe (supra) we agreed with the learned trial Judge that both the bailiff and the advocate were liable in trespass, the advocate having ratified the uncertified bailiff's actions (see lead judgement by Byamugisha, JA, page 21, lines 4-12). The decision has not been appealed.

The instant case is a clear breach of the tenancy agreement by defaulting on the rental payments. The breach can be termed refusal to pay or defaulting on payment. However, whatever the terminology, the law for its recovery is very clear and had to be followed otherwise non-compliance rendered the action unlawful. Issue No.1 therefore would succeed, in my view.

Regarding issue No.2, Mr. Baggayi contended that the respondents attached properties worth much more than their rent arrears and related costs. They retained and appropriated these goods at the expense of the appellants. He argued that the appellant was entitled to restitution because the attachment was unlawful. The Judge should have ordered release of the goods.

In reply, Mr. Tuma submitted that there was no evidence that the 2nd respondent had appropriated the appellant's property. They were just detained and the place locked up. The sale was ordered after judgement. He pointed out that to sustain a claim for unjust enrichment and restitution, fresh evidence would be required. Furthermore, it was never an issue in the High Court and no finding was ever made in respect thereof.

The learned Judge held:

> **"The plaintiff is entitled to take away such of the detained property after satisfying the 2nd Defendant's awards as contained in this judgement. The 2nd Defendant is at liberty to sell such property in the plaintiff's presence or that of his representative, to meet its said awards and costs."**

The learned Judge correctly observed that the 2nd respondent was entitled to take away such of the detained property for satisfying his entitlement under the law. However, it is not disputed that no sale ever took place. The goods were just detained and locked up in the demised premises. The sale was ordered after judgement. It was however an agreed fact that the rental arrears amounted to Shs 59,000,000/=. There was no evidence on record that the respondent unjustly enriched himself. It was never an issue in the High Court.
Issue No.2 was thus not substantiated and would fail.

Regarding issue No.3 whether or not the appellant is liable in rent for the period after its eviction for the demised premises, Mr. Baggayi argued that the tenancy was for 2 years from 1st January 1999 till November 30th 2001. The appellant was evicted on 28-03-01 for defaulting. The learned Judge awarded damages at the rate of US $1,500 per month from December 2001 till 30-06-2003, which totalled US $27,000. Learned counsel submitted that there was no justification because it was never claimed by the respondent.
Similarly item (b) of US $2,500 plus Vat from April 2001 to November 2001 was unjustified. This period purportedly represented the unexpired term of the tenancy but eviction had taken place way back in March 2001. Mr. Baggayi prayed court to set aside these awards.

In reply Mr. Tuma pointed out that the learned Judge correctly applied the formula laid down in the case of **Hadley vs Baxandale (1854) 9**

Exh.341, regarding the award of damages and made the correct awards. He prayed court to confirm the awards.

In further reply by Mr. Sekatawa for the appellant argued that since there was no cross appeal by the respondent, the court cannot be asked to confirm awards (a) and (b). He submitted that the 2nd respondent was entitled to item (a) of the judgement being the arrears of rent up to 28-3-2001 when the appellant was evicted. The appellant was not liable to pay rent accruing after he had been evicted from the premises by the landlord as long as eviction continued. See **Halsbury's 3rd Edition volume 23 page 551 paragraph 1211**. He prayed court to set aside the two awards.

I entirely agree with both learned counsel for the appellant that the 2nd respondent would be entitled to US $ 32,154 being the arrears of rent up to 28-3-2001.

Though there was no physical expulsion of the appellant from the premises which were simply locked up, it is trite that any act of a permanent character done by the landlord or his agent with the intention of depriving the tenant of the enjoyment of the demised premises or any part thereof will operate as an eviction **(Halsbury's laws of England vol.23 page 551).**

The appellants staff was evicted, premises locked up and security guards were deployed to guard the premises. This was effective eviction though unlawful as from 28-3-2001. The appellant had no access to the premises and cannot therefore be held liable for rent accruing after eviction on 28-3-2001.

Thus the award of US $ 2,500 plus VAT per month from April 2001 to November 2001 representing the unexpired term of the tenancy is unsustainable and would be set aside. Likewise the award of US $1,500 per month from December 2001 to 30th June 2003 has no basis in law. It is atrociously oppressive. It is not clear what the learned

Judge could have intended. The whole objective of an eviction is to render the premises vacant so that the landlord could utilise them. Once the appellant had been evicted by denying him access to the premises, he could not be held responsible for what followed

5 thereafter, except perhaps for repair costs. If any. This Issue would thus partially succeed.

In the result, since Issue 1 and 3 item (a) succeed, the appeal partially succeeds. The appellant would pay 1/3 of the costs here and below.

10 Consequently the property unlawfully attached must be returned to the appellant.

Since my Lords, Byamugisha and Kavuma JJ.A both agree the appeal partially succeeds as herein stated.

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Dated at Kampala this ...22nd ...day of ...November... 2005.

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Hon. Justice A.E.N. Mpagi Bahigeine
JUSTICE OF APPEAL