THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA
AT MENGO

(CORAM: ODOKI, CJ., ODER, TSEKOOKO, KAROKORA,

KANYEIHAMBA, JJ.S.C.)

CIVIL APPEAL NO. 3 OF 2003

BETWEEN

VIMILA THAKKAR :: APPELLANT

AND

1. **LALITA MINILAL RAJA]**
2. **PRADIP NANDLAL KARIA]**
3. **NANDLAL HARJIVAN KARIA] ::: RESPONDENTS**
4. **TRIBHOVANDA MADHAVJI DATTANI]**
5. **PABCO PROPERTIES LTD.]**

[An appeal from the judgment and decision of the Court of Appeal, (Mukasa-Kikonyogo, D.C.J., Kato, Kitumba, JJ.A.), dated 20.11.2001 in Civil Appeal No. 52 Of 2000].

JUDGMENT OF COURT

A suit in which the appellant and respondents were parties involved the payment of rent and the power of reentry in relation to a sublease registered as Volume 1 Folio 24 and known as Plot No. 6 and 6A, Market Street, Kampala. The suit was eventually disposed of by consent of parties in the High Court. The facts and resolutions in the agreement are not relevant to this appeal. Be that as it may, in the High Court before Ntabgoba, P.J., the parties to the suit reached an understanding which was tantamount to a settlement of all the disputes between them and the learned Principal Judge reflected this understanding in his

judgment. When it came to costs of the High Court suit, the court awarded the costs to the present respondents on the ground that it was the appellant who was solely responsible for the suit because of her intransigence in refusing to pay her due contributions and unreasonably seeking to pay the 1933 fixed rent which defeated reason. The appellant appealed to the Court of Appeal challenging the decision and reasoning of the learned Principal Judge on costs. The appellant lost her appeal principally because the learned Justices of the Court of Appeal agreed with the trial judge and confirmed his award of costs to the respondent.

The appellant has now appealed to this court. The grounds of appeal as framed in her Memorandum of Appeal are as follows:

1. *The learned Judges of the Court of Appeal erred In law and fact in arriving at the wrong conclusion that the appellant was not justified in filing the suit against the respondents in the High Court.*

2. *The learned Judges of the Court of Appeal erred in law and fact when they ordered the appellant to bear the costs due to her conduct prior to the filing of the suit on 6th February, 1955.*

3. *The learned Judges of the Court of Appeal erred in law and fact when they confirmed the decision of the learned Principal Judge that the suit was brought by intransigence of*

the appellant in refusing to pay the due contribution and as such was to pay the costs.

4. *The learned Judges of the Court of Appeal erred in law and fact when they confirmed the decision of the learned Principal Judge that it*

was reasonable for the respondents to demand a contribution of 25% of the new statutory ground rent and it was unreasonable for the appellant to insist on paying the sum set out in the sublease agreement.

5. *The learned Judges of the Court of Appeal erred in law and fact when they failed to evaluate the evidence on record as a first appellant (sic.) court and arrived at a wrong decision when they upheld the learned Principal Judge's decision.*

6. *The learned Judges of the Court of Appeal erred in law and fact in holding that because the appellant compromised with the respondent, therefore she was not the successful party.*

Considering that the parties reached a settlement which was recorded in the trial court, we find that only grounds 2 and 3 of the appeal are pertinently relevant. The other grounds, namely, 1, 4, 5 and 6 should be subsumed in the settlement arrangement accepted and recorded by the learned Principal Judge in his reasoned judgment and as confirmed by the learned Justices of Appeal.

On ground 2, the appellant who represented herself submitted that in awarding costs to the respondent, both courts below erred in that their findings and decisions were not founded on the facts and circumstances of the case. Appellant contended that it was not until she went to court that the fact of the rent revision was raised. The appellant further contended that until she acquired that knowledge there was no way she could have known the value of the 25% payable for the sublease of which she was tenant. She contended that until she discovered the figures herself from Kampala City Council, the only rent payable she

knew of was what was reflected in the original sublease agreement of 1933 which she duly and diligently offered to pay.

For the respondent, Mr. Godfrey Lule, S.C, submitted that the respondents had been in constant touch with the appellant to remind her of her obligations with regard to the sublease. He submitted that when she eventually responded, she insisted on paying the original rent of Shs. 53/75 fixed as long ago as 1933 when the sublease was first granted to her predecessors. Counsel further contended that there is evidence that the appellant was fully aware that the rent payable was 25% of the annual rent for the head lease assessed by the Kampala City Council at Shs.348,355/=.

Mr. Lule contended that since the appellant had finally accepted to pay the 25% of the true assessed figure, she ought not have filed a suit and as she had relied on a lower figure as the basis of her action, she was the loser and not the winner of the suit.

On ground 3, the appellant contended that the Principal Judge was wrong to hold and the Justices of Appeal were in error to confirm that it had been through the appellant's intransigence that court proceedings became necessary.

In the appellant's view, she did all she could to pay her rent. Firstly, when she first received a demand note, that note did not specify how much had been revised and assessed by the City Council. Consequently, there was no way she could ascertain what amount represented the 25% contribution from her. She further contended that in the absence of such an ascertained amount, she was justified in

tendering to the respondents the original fixed rent in the sum of Shs. 53/75 per month plus all the outstanding arrears. The appellant contended that the evidence available suggests that the respondents were no longer interested in keeping her as a subtenant. They appeared to be preoccupied with reentry and repossession. In support of this claim by the appellant she pointed out that even when she sent the sum of U.K. £300 which was adequate to cover the new revised rent and advised the respondents to inform her whether that amount was adequate and if not, for her to send more money, the respondents kept silent. She contended that even the lawyers of the respondents themselves did not know the amount payable.

For the respondent, on ground 3, Mr. Lule contended that the appellant was solely responsible for the protracted correspondence between the parties and for the necessity to go to court. He submitted that by the time the appellant chose to go to court she already knew the revised rent and the amount due to the respondents. He contended that therefore both the High Court and the Court of Appeal were correct in their findings and respective reasoning.

Having heard the appellant and counsel for the respondents and read the record of proceedings, we are not persuaded that either party can claim correctly that they won or their opponents lost the case. Neither side appears to have done all they could have done to finally settle their dispute. Neither the appellant nor the respondents' behaviour and acts conform to the old equitable *maxim* that he who comes to equity must come with clean hands. The impression one gets from the pleadings and submissions in this case is that each party wanted to eat their proverbial cake and have it at the same time. The appellant appeared to insist on

paying the original fixed rent of Shs. 53/75 per month even though she was fully aware that it was no longer economically viable and the 25% payable was not of any figure other than what the Kampala City Council had statutorily demanded, namely, Shs.348,355/=.

The respondents failed to demand the actual amount of what 25% of the revised rent represented. They did not volunteer any information about the revised rent. It was only the appellant or her lawyers who took initiative to find out. They refused to accept her payment as part payment and demand the balance. They did not acknowledge or respond to her suggestions regarding the £300 which she sent through her lawyers. Their total demand of some US $ 500 is not fully explained. However, the respondents were very clear on reentry. The letter written by Pradip N. Karia of Pabco Properties Ltd. on 14 December, 1993, is confusing and inexplicable just as his other subsequent letter dated 21 January, 1994. The letter is worded thus,

> *"Dear Madam,*
>
> *GROUND RENT DEMAND*
> *PLOT 6A MARKET STREET, KAMPALA*
>
> *We kindly bring to your notice that the above ground rent has not been paid by your Attorney Vinila Thakkar who was requested to pay the same as per sub-lease requirement. You note that you have also failed to do the same for this year.*
>
> *We also bring to your attention that there are some immediate repairs which are required on the buildings which should be effected also.*
>
> *Also note that if we do not receive any payments within 21 days date hereof then we shall move the Registrar to make a re-entry.*

Please treat this as final notice."

These letters threatened to activate re-entry within a short period notwithstanding that they were being sent to the appellant at her address in Leicester, U.K. There is no evidence that they were being sent by any quicker method of communication nor were the respondents minded to ensure that these letters were delivered and received by the appellant. Interestingly, long before these letters were written and dispatched, the respondents had been clearly informed by the appellant through her lawyers that she had agents in Kampala who could receive her letters and who were authorised to act on her behalf. The letter from Messrs Katende, Ssempebwa & Co. Advocates, dated 12th April, 1994, clearly reveals this knowledge.

Under these circumstances, it is our view that both the High Court and Court of Appeal erred in awarding costs to the respondents. We are satisfied that grounds 2 and 3 substantially succeed. Consequently, this appeal succeeds. We order that each party pays its costs in this court and in the courts below.

Dated at Mengo, this 22nd day of June 2004.

B.J. ODOKI
CHIEF JUSTICE

A.H.O. ODER
JUSTICE OF THE SUPREME COURT

J.W.N. TSEKOOKO

JUSTICE OF THE SUPREME COURT

A.N. KAROKORA

JUSTICE OF THE SUPREME COURT

G.W. KANYEIHAMBA

JUSTICE OF THE SUPREME COURT