THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.0002 OF 2015

PAUL BAGUMA

T/A PANACHE ASSOCIATES::PLAINTIFF

VERSUS

ENG. KARUMA KAGYINA::DEFENDANT

BEFORE: JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiff brought this suit against the defendant for breach of contract, loss of income, special damages, general damages, recovery of valuable business items (tools of trade) confiscated by the defendant as well as costs of this suit.

The plaintiff entered into a tenancy agreement with the defendant whereupon the plaintiff rented the defendant's premises located on plots 9350 and 9351, Block 185, Kira - Wakiso commencing on 01st April 2014 for a period of five years. It was agreed that the monthly rent was UGX 5,000,000 per month inclusive of taxes, UGX 8,000,000 for the 1st 3 months for up-to 3 years and UGX 10,000,000 for the rest of the tenancy period.

The parties among others agreed that the plaintiff pay the property utility bills and maintain the property in good condition. The defendant among others agreed that the plaintiff shall for the period of the tenancy enjoy peaceful and quiet occupation without any interruptions from the Landlord or any person rightfully claiming from under it.

The parties also mutually agreed that the landlord can re-enter the premises if the rent is in arrears from the space of 3 months after the date whereon the same falls due or if the tenant breaches or fails to observe any of the covenants or conditions of the tenancy agreement.

The plaintiff alleges that the defendant contrary to the tenancy agreement hired out the facilities on the premises including the swimming pool to Green Hill Junior Academy and other third parties for the months of April, June, July and August. Further that the defendant remained in occupation which significantly affected the setting up and operation of the plaintiff's business.

The plaintiff prayed for orders of compensation for breach of contract, loss of income special damages and immediate release of the plaintiff's business items as well as interest thereto and costs of the suit.

The defendant in their defence denied the plaintiff's allegations and stated that the plaintiff breached the tenancy agreement by subletting parts of the premises contrary to the tenancy agreement hence the defendant exercised his right of re-entry. The defendant also stated that the plaintiff neglected to honor his undertaking to pay his rent for the 5 months that he was in occupation of the premises and that the plaintiff had no duty to repair or renovate the premises and the facilities there on.

The defendant further filed an amended defence wherein he filed a counterclaim against the plaintiff. The counterclaim was for payment of

UGX 23,000,000 as accrued rent arrears, UGX 932,612 in unpaid utility bills, general damages, interest thereto and costs.

At conferencing, two issues were agreed upon for determination;

1. Whether there was breach of terms of the agreement by the defendant
2. Remedies available

The parties filed written submissions.

The defendant further filed submissions on the counterclaim wherein he raised the following issues for determination by this court;

1. Whether there was breach of the terms of the agreement by the counter defendant.
2. Remedies available.

For purposes of determining this suit to its logical conclusion I will merge the issues;

1. Whether there was any breach of the agreement by the parties.
2. What remedies are available to the parties.

Before I proceed to determine the above issues I have to address the point of law raised by the plaintiff in their submissions. The plaintiff submitted that the defendant filed his amended defence and smuggled a counter claim long after he had already filed his defence contrary to the provisions of Order 8 Rule 7 and 8 of the Civil Procedures Rules.

Counsel cited the case of *Makula International Ltd vs His Eminence Cardinal Nsubuga & Anor [1982] HCB 11*, where court noted that an illegality can be brought to the attention of court at any stage of the proceeding and that once brought to the attention of court cannot be allowed to stand and

further that such illegality overrides all questions of pleadings including any admission made. Counsel prayed that the defence be struck off the record and subsequent pleadings of both parties not withstanding that a reply was made to it and subsequent inclusion in the joint memorandum of scheduling.

Counsel for the defendant in response submitted that the plaintiff ought to have raised this issue at the earliest opportunity that is when he was responding to the counterclaim. This is envisaged under order 6 rule 28 of the Civil Procedure Rules which allows raising points of law by pleading.

He even had an opportunity to do the same at the hearing but instead opted to keep quiet.

In ***Male Mabirizi & 7 others v. Attorney General, Constitutional Appeal No. 01 of 2018*** (SC), Mwangusya, JSC refused to strike out a memorandum of appeal on grounds that the Attorney General had raised his preliminary objection belatedly. He, in our view, rightly observed in that case that: "***the preliminary point should have been raised at the earliest opportunity which was at the Pre hearing Conference when apart from consolidating the appeals issues arising from all the memoranda of appeal were framed. After framing the issues court allowed parties to file written submissions which the parties including the appellant complied with. Having allowed the appellant to proceed with the appeal this court cannot strike it out at this stage of the hearing.***"Emphasis ours.

In ***Kivumbi Bashir v. Ali Muyangu & anor, Civil Appeal No. 11 of 2016*** where a point of law regarding the pecuniary jurisdiction of a trial Magistrate had been raised belatedly during submissions, Masalu Musene, J. observed as follows:

"So without going into the detailed submissions of both sides, the preliminary point of law concerning jurisdiction of the Court should have been raised and disposed of at the beginning of the trial, <u>and not during submissions.</u>" Emphasis provided by the learned Judge.

In the present case, issues had already been framed and the hearing had already commenced. It also suffices to note that the plaintiff/counter defendant filed a response to the counterclaim refuting the defendant's contentions therein. He however omitted to raise any objection on the competency of the counterclaim.

Thus he cannot be allowed to raise it at this stage. We accordingly pray that the Plaintiff's point of law be struck out.

I concur with the submissions of counsel for the defendant. The plaintiff raising this point of law at this stage is evidently an afterthought. Counsel had ample time to object to the counterclaim during the earlier stages of the trial. He filed a defence to the counterclaim and evidence to that effect. He therefore never suffered any injustice. The nature of the counterclaim made arises directly from the same transaction and ineffect the same facts.

The point of law is therefore dismissed and the counterclaim will be determined to ensure this matter is resolved to its conclusion.

<u>Issue 1:</u> Whether there was any breach of the agreement by the parties.

The parties executed a tenancy agreement dated 24th March 2014 that commenced on the 1st April 2014.

Counsel for the plaintiff submitted that the defendant breached the tenancy agreement in the following ways;

1. The defendant never left the premises even when he agreed to let the whole premises to the plaintiff, thereby frustrating the tenancy

agreement, the plaintiff's business and quiet enjoyment of the premises.

2. The defendant used water and power and wanted the plaintiff to pay all the bills singly.
3. The defendant further sublet part of the premises to Green Hill Academy and continued to receive money from the said academy and at the same time wanted the plaintiff to pay him rent as agreed in the tenancy agreement. The defendant's claim in paragraph 10 of his witness statement that he reassigned the contract with Greenhill Academy to the plaintiff is not backed by any evidence.
4. The defendant had the option of filing a suit against the plaintiff for the damage to properties mentioned in paragraph 17 and 20 of his witness statement and reporting to the authorities the alleged illegal connection of water by the plaintiff but he never did so. The defendant instead resorted to confiscating the plaintiff's trade items (whose lists were attached to the defendant's annexture "A" of the Written Statement of Defence and witness statement) and evicting the plaintiff and his business and sat back and relaxed.
5. The defendant's annexture "B" on the witness statement, the water bill dated to 21st February 2014 long before the plaintiff occupied the premises and therefore the defendant cannot claim that the plaintiff was solely liable to pay the said water bill.
6. The defendant in his paragraph 15 of his witness statement claims that the construction of the conference hall was his responsibility but does not explain why he failed to construct the same. This is further proof of breach of contract.

The plaintiff invited the court to disregard the evidence of the 2nd defendant's witness as it was just concoction to help the defendant escape liability for his tortious acts against the plaintiff.

In response counsel for the defendant submitted that that the defendant's actions did not amount to a breach of the tenancy agreement. Rather it was the actions of the plaintiff who in failing to take the first essential step of paying the rent as agreed under the tenancy agreement before the defendant could vacate the building that amounted breach.

Clause 3 of the tenancy agreement was clear on how much the tenant/plaintiff was to pay as rent and for what periods.

Clause (a) of the Tenant's Obligation was categorical that the tenant made a covenant *'to pay rent hereby reserved in advance at the rate as directed by the landlord.'*

It was the submission of the defence counsel that in the present case, the payment of rent was a condition precedent to the defendant's obligations under the tenancy agreement.

The plaintiff himself testified that he has never paid a single coin as rent to the defendant in respect of the premises he had been occupying for more than 4 months. He attempted to justify his actions on grounds that the defendant had not vacated the premises.

Thus the plaintiff had a duty to pay rent before the duty of the defendant to vacate the premises could arise. Since the plaintiff did not pay the rent, consideration had not passed to the defendant to enable him vacate the premises, therefore one of the elements of a valid contract was lacking.

It is also the defendant's submission that the omission by the plaintiff to pay rent entitled the defendant to come to the conclusion that the tenancy agreement entered into between him and the plaintiff had been discharged by breach and thus relieved him of the obligations under the tenancy agreement.

Hodgin in his book **Law of Contract in East Africa** on the issue of discharge of a contract by breach observes thus:

"When one party fails to perform his obligations or performs them in a way that does not correspond with the agreement, the innocent party is entitled to a remedy. What form the remedy will take depends on what type of breach the guilty party has committed. In all cases the innocent party is entitled to claim damages, but only in two situations can he regard the contract as discharged and thus freeing him from performing his own obligations." Emphasis ours.

The two instances referred to by the learned author are where there is: (i) a fundamental breach; and (ii) Repudiation.

As far as the defendant is concerned, the plaintiff's actions amounted to a fundamental breach. On this, Hodgin (supra) observes thus:

"In deciding whether there has been a fundamental breach of the contract it is necessary to ask whether it is a condition or a warranty that has been broken…We can say that a condition is a major term of the contract and breach of such a term allows discharge of the contract…If the breach goes to the root of the contract and affects its commercial viability, it is said to discharge the contract."

It was the submission of the defendant's counsel that in a contract of this nature (tenancy contract) whereby the defendant agreed to let his premises to the plaintiff, payment of rent in respect of the let premises is a fundamental factor. Without payment of rent/or its equivalent, there is a total failure of consideration.

Thus the failure to pay rent in line with the above proposition in ***Hodgin*** and Black's Law Dictionary amounted to a breach of a condition which entitled the defendant to treat the contract as discharged.

It therefore follows that the defendant was not under an obligation to comply with what he had bound himself to do in the tenancy agreement.

The failure to pay rent was not the only breach committed by the plaintiff. The record bears evidence that having moved on the premises, he went ahead to sublet some facilities to 3rd parties without the consent of the defendant as set out in the tenancy agreement.

In light of our submissions above, counsel prayed that Court finds the defendant was not in breach of the tenancy agreement.

With regard to the plaintiff's claim that defendant used water and power and wanted the plaintiff to pay all the bills singly counsel for the defendant submitted that the only way the defendant could offset his losses was to avoid paying utilities until the plaintiff paid him rent.

The defendant did not report the illegal water connection but confiscated the plaintiff's property.

The defendant did not report to the authorities but resorted to exercise his right of re-entry under the tenancy agreement.

He confiscated the goods of the plaintiff in order to force him to pay for the rent he had defaulted to pay. However, instead of the plaintiff paying rent and redeeming his property, he resorted to taking the defendant to court.

The defendant's annexture "B" on the witness statement, is a water bill back dated to 21st February 2014 long before the plaintiff occupied the premises.

We invite this court to look at the Counterclaim annexture B which is the same disconnection order annexed to the Witness Statement of the defendant. The National water and Sewerage Corporation (NWSC) disconnection order is dated 22nd August 2014 and the balance reflected on

the same is 920,812/= , the statement attached to the Disconnection order shows that by the 22nd August 2014, the outstanding water bills were at 920, 812/=.

It was the defence counsel's submission that the disconnection order of 22nd August 2014, bears the sums claimed by NWSC from the plaintiff who was in occupation of the premises and carrying out business therein. Having not paid rent from April to August he did not expect the defendant to pay for the water bills.

Therefore there was no breach of the tenancy agreement by the defendant.

The defendant sublet part of the premises to Greenhill Academy and continued to receive money.

The defendant in his witness statement and in his testimony stated that he reassigned the contract of Greenhill Academy using the swimming pool to the plaintiff and there was a letter of introduction to that effect.

The defendant further testified that he never received any money from Greenhill academy for the use of the swimming pool, because the plaintiff entered the premises in April 2014 when the pupils were on holidays.

He further testified that Greenhill Academy used to pay for the use of the swimming pool at the end of the term, the plaintiff was not paid for the use of the swimming pool because he had already been evicted from the premises.

The above actions show that the defendant indeed reassigned the contract to the plaintiff but none of the parties was paid for the use of the swimming pool by Greenhill Academy during the pendency of the Plaintiff's tenancy.

The defendant in his paragraph 15 of his witness statement claims construction of the conference hall was his responsibility but did not explain why he failed to construct the same. Thus further proof of breach of contract.

It was the defence counsel's submission that the failure to construct the conference hall by the defendant, does not amount to breach of contract

It was not a condition in the tenancy agreement but a warranty to construct a conference hall, that failure to construct the same would tantamount to the contract not being performed or breached.

Court's findings

The parties are accusing the other of breaching the contract. I have reviewed both the oral and documentary evidence on the 1st issue as well as considered the submissions of counsel on the same and the authorities relied upon.

The Oxford Law dictionary 5thedition defines breach of contract as breaking of the obligation which a contract imposes which confers a right for action for damages on the injured party.

The parties entered into a tenancy agreement whereupon the plaintiff rented the defendant's premises located on plots 9350 and 9351, Block 185, Kira - Wakiso commencing on 01st April 2014 for a period of five years. It was agreed that the monthly rent was UGX 5,000,000 per month inclusive of taxes, UGX 8,000,000 for the 1st 3 months for up-to 3 years and UGX 10,000,000 for the rest of the tenancy period.

The plaintiff entered the premises and commenced to operate a business in the premises up until the 23rd of August 2014 when he was evicted by the defendant.

The plaintiff conceded to not having paid rent for the period that he was in occupation of the defendant's premises and on the other hand the defendant also conceded to not having vacated the premises for the period the plaintiff was in occupation.

As per Clause 3 of the tenancy agreement was clear on how much the tenant/plaintiff was to pay as rent and for what periods.

Clause (a) of the Tenant's Obligation was categorical that the tenant made a covenant *'to pay rent hereby reserved in advance at the rate as directed by the landlord.'*

Counsel for the defendant submitted that the payment of rent was a condition precedent. A condition precedent would entail any act or event (not being a lapse of time) that must exist or occur before a duty to perform something promised arises. If the condition does not occur and is not excused, the promised performance need not be rendered. See **Black's Law Dictionary, 2004, 8th Edition, p.312**. A condition precedent is incidental to the fundamental terms of a contract, which go to the very essence of a contract's validity at the stage of formation.

The plaintiff ought to have paid the rent required as per the agreement whereupon the defendant in return would hand over vacant possession of the premises to the defendant. The plaintiff cannot now claim the defendant's failure to vacate the premises as a justification not to pay rent yet he remained in occupation of the premises for the 3 months. The plaintiff's conduct implied a waiver on his side on holding the premises without any interruption from the landlord.

All other breaches claimed by the plaintiff as outlined in their submissions are incidental to the defendant's continued occupation of part of the premises; a situation that the plaintiff impliedly accepted. The plaintiff

cannot therefore use these breaches as justification for failure to pay rent for the five months that he was in possession of the premises and operating a business in the said premises. This court is satisfied that the plaintiff's conduct showed that he had waived his rights under this agreement when he continued to occupy the premises and operate business as usual despite those circumstances.

Black's Law Dictionary 8th Ed at page 1611 defines waiver as*; "the voluntary relinquishment or abandonment express or implied of a legal; right or advantage"*.

It states further that ; *"an implied waiver may arise where a person has pursued a course of conduct as to evidence an intention to waive a right or where his conduct was inconsistent with any other intention than to waive it"*.

In **Agri-Industrial Management Agency Ltd v. Kayonza Growers Tea Factory Ltd & Anor HCCS NO. 819 of 2004**; Kiryabwire, J while considering the issue of waiver stated that;

> ***""'waiver' in contract is most commonly used to describe the process whereby one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived."***

The effect of waiver is that a party cannot later seek a remedy for breach that was waived. **Kiryabwire, J** stated in **Three Way Shipping Services (Group) Ltd v China Chongaing International Construction Corporation HCCS 538 of 2005** that;

> ***"What is waived therefore is the right to rely on the term waived for purposes of enforcing his remedy for the breach made."***

The defendant having failed to insist that he quietly and peaceably hold and enjoy the premises during the lease without any interruption from the Landlord or any person rightfully claiming from the landlord cannot turn around and rely on the breach thereof. This court cannot overlook the

plaintiff's laxity in ensuring the defendant vacate the premises and terminate the agreement with Greenhill Academy to access the swimming pool at the premises without the plaintiff's authorization.

On that note, this court finds that the plaintiff breached the tenancy agreement when he failed to pay rent as agreed between the parties but continued to occupy the premises.

Issue 2: What remedies are available to the parties.

The plaintiff's claim failed and dismissed with costs.
According to section 61(1) of the Contracts Act, 2010 where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her.

In view of the above the defendant/counterclaimant is entitled to compensation for the breach by the plaintiff/counter defendant.

In these circumstances therefore the plaintiff is ordered to pay the defendant the outstanding rent arrears of **UGX 23,000,000**.

The plaintiff is also ordered to pay **80% of the UGX 932,612** in unpaid utility bills.

With regard to general damages; the character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

The defendant sought UGX 80,000,000 in general damages. I have not seen basis for such an amount. The defendant remained in part possession of

the property and re-entered the premises five months after non payment of the rent thus I find the award of **UGX 10,000,000** sufficient in the circumstances as general damages.

The defendant is also awarded interest at a rate of 20% from the date of filing this suit until payment in full.

The defendant is awarded costs for the counter claim.

The defendant shall return to the plaintiff the confiscated items (tools of trade) upon satisfaction in full of this judgment.

It is so ordered.

SSEKAANA MUSA
JUDGE
20th/12/2019