THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 349 OF 2017

MAKUBUYA ENOCK WILLY::PLAINTIFF
T/A POLLAPLAST

-VERSUS-

1. SONGDOH FILMS (U) LTD
2. KIM SUK YOUNG::DEFENDANTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff Makubuya Enock Willy filed this suit against the defendant Songdoh films (U) Ltd and Kim Suk Young . The plaintiff's claim against the defendants jointly and severally lies in recovery of special and general damages for breach of tenancy agreement and unlawful detention of the plaintiff's products as well as costs to the suit.

On 22nd October, 2016 the plaintiff entered into a tenancy agreement with the 1st defendant for a period of four years in respect of 4 plastic manufacturing machines and the premises occupied by the said machines at a monthly payment of **UGX 1,750,000** per machine giving rise to a total of **UGX 7,000,000** per month.

He further avers that under the tenant agreement the defendant had to handover to the plaintiff fully installed and functioning machines within a period of three weeks from the date of the agreement and thereafter allow the plaintiff two months nonpayment grace period for testing the said machines.

The defendant verbally discussed with the plaintiff and requested him that if he could buy the spare parts and oil and get his own engineers to repair the machines and that the expenses were to be set off in rent. The plaintiff did and engaged various engineers to wit electrical engineers, mechanical engineers, electrical engineers fabrication engineers and chiller engineers who spent four months working on the said machines but only three out of the four machines were ready by the end of February 2017.

The plaintiff spent over UGX 32,978,000 in buying spare parts, oil and other related expenses involved in the servicing and running of the machines as evidenced in a detailed report served on the defendant. However even though the 3 machines were fully repaired by the end of February 2017 and only remained with the 4th machine the 2nd defendant was not in the country to officially hand them over to the plaintiff as per the terms of the agreement.

The plaintiff further avers that the 2nd defendant immediately locked the premises and denied the plaintiff's employees access to the premises. And when the he tried to see the 2nd defendant over the issues of the closure of the factory where he had invested a lot of money all his efforts were in vain.

The plaintiff has suffered and continues to suffer mental anguish as a result of the deprivation of the use of the rented machines and premises in which he invested a lot of money to which he holds the defendants jointly and severally liable in general and special damages.

Consequently the plaintiff prays for judgment to be entered in his favor against the defendants for;

a) A declaration that the 1st defendant breached the tenancy agreement dated 22nd October 2016.
b) Recovery of special damages amounting to UGX 110,784,797.
c) Recovery of mesne profits amounting to to UGX 30,400,000.
d) Recovery of UGX 84,000,000 for unlawful termination of the tenancy agreement.
e) General damages of UGX 125,000,000
f) Punitive and exemplary damages.

g) Interest on (b), (c), (e) and (f) above at a rate of 24% per annum from the date of breach till payment in full.
h) Costs of the suit.
i) Any other relief as this honorable court may deem fit in the circumstances.

In their written statement of defence the defendants contend that On the 22nd day of October 2016 the 1st defendant executed a tenancy agreement with the plaintiff wherein the plaintiff agreed to pay UGX 7, 000,000 (Seven million shillings) per month for the premises and 4 machines. And the plaintiff paid UGX 6,000,000 for rent of 2 months and issued cheque No. 801 which bounced and thus failed to pay the balance of UGX 2,000,000 to complete the first two months' rent. And as a result of failure to pay the tenancy agreement was terminated on the 29th December, 2016.

That the plaintiff pleaded with the defendants for leniency to allow him continue with the running of the factory and on 24th March, 2017 the parties agreed to execute a fresh agreement on condition that the plaintiff pays by 25th March, 2017 UGX 8,000,000 being unpaid rent for 2 months and the outstanding bills of UGX. 5,500,000 which the plaintiff failed to do and hence the termination of the tenancy agreement for failure to pay rent but never the less allowed him to remove all his goods.

The defendants further averred that the plaintiff was given the premises with fully functioning machinery and at no time did he spend his own money on repairing machines that did not belong to him.

The defendants also raised a counterclaim basing on the fact that the plaintiff also breached the tenancy agreement which was made on the 22nd October, 2016. The plaintiff failed to pay the agreed rent for which the first defendant claims both general and special damages for breach of contract including unpaid rent and utility bills totaling 17,077,425.

The parties filed a joint scheduling memorandum dated 2nd October 2019.

Agreed Facts

The plaintiff and the 1st defendant represented by the 2nd defendant executed a tenancy agreement dated 22nd October 2016.

Issues

1. **Whether any of the parties is in breach of a tenancy agreement dated 22nd October, 2016.**
2. **What remedies are available to the parties?**

The plaintiff was represented by Mr. Edward Mukwaya and the defendants by Mr.(Hon) Wilfred Niwagaba.

The parties led evidence in support of their respective cases, which this court has evaluated in arriving at this decision. In addition, they filed final written submissions that were duly considered by this court.

Determination

Whether any of the parties is in breach of a tenancy agreement?

The plaintiff's counsel submitted that the parties agreed that they entered into a tenancy agreement dated 22nd October 2016 and the tenancy was to run for a period of four years.

The 1st defendants was to handover fully installed and functioning machines to the plaintiff within a period of three weeks from the date of the agreement. The defendants did no handover fully functioning machines to the plaintiff within the three weeks as stated in the agreement. However, the 1st defendant requested the plaintiff to have the machines repaired at his own cost and the expenses will be set off in rent.

That the plaintiff who was desirous of starting his business obtained a loan, proceeded and repaired the machines and thereafter requested the 2nd defendant to officially handover the machines to him which he failed to do.

However the defendants completely denied the allegations and stated that the machines were fully functioning at the time the agreement was made and that the plaintiff did not at all spend money to repair any of the machines.

The plaintiff's testimony was corroborated with that of PW2 Fahad Said who testified that he was a former employee of the defendants and that the 2nd defendant called him to inquire if the 4 machines subject to the tenancy could work again within a period of 3 weeks since he had a tenant who needed those machines within a period of 3 weeks.

When PW2 had started to work on the machines he discovered that the problem was not mechanical as he had anticipated and that the machines needed new spare parts, and hydraulic oil but still the machines could not take only three weeks to be repaired as it was not easy to also find the spare parts. And that the plaintiff later called him and informed him that he had agreed with the 2nd defendant to allow him bring his own engineers in addition to his services and the plaintiff engaged various engineers such as electronic engineers, mechanical, fabrication and chiller engineers who worked on the machines for a period of 5 months and made sure that they were in better working condition.

Counsel for the plaintiff further submitted that that the plaintiff in paragraph 2.11 of his witness statement also referred to various email correspondences the 2nd defendant had with his manager a one Nakafu Grace who also witnessed the tenancy agreement and in the said emails the 2nd defendant acknowledged the fact that the plaintiff was servicing and repairing the machines which evidence the 2nd defendant did not dispute.

The defendants in their submissions distanced themselves from ever entering into the verbal agreement with the plaintiff to repair the machines, but the plaintiff contend that the parties agreed to vary the mode of performance of the contract following the defendants failure handover functioning machines as stipulated in the tenancy agreement

Counsel for the plaintiff cited **Sec. 33 (1) of the Contracts Act 2010** which states that

" ***the parties to the contract shall perform or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act or any other law"*** which provision gives the parties room to dispense from the mode of performance of a contract as long as it is allowed under the Act. Further still cited **Section 67 of the Contracts Act 2010 which states** that

"***Where any right, duty or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of the dealing between the parties or by usage or custom would bind both parties to the contract".***

And they also relied on one of the recent decided case of **Lokhandwala v Hippo Industries & 2 ORS HCCS No. 183 of 2017** where it was stated that "in the absence of statutory or common law restrictions the parties have freedom to agree whatever terms they choose to undertake and can do so in a document, by word of mouth or by conduct". And the same applies to the case at hand since the evidence on record prove that that there was an oral variation of the written agreement following the defendants failure to handover fully functioning materials to the plaintiff which was confirmed by DW1 (the 2nd defendant) during cross examination.

Counsel for the defendants vehemently submitted that at the time the agreement was entered into the machines were functioning and that the same machines were used to produce products for the plaintiff whereby he even used the 2nd defendants pickup to ferry some of the products to the market. And that PW2 (Fahad) testified that he was only engaged by the plaintiff between June-September 2016 long before the tenancy agreement was executed.

In their submissions in rejoinder also stated that PW2 confirmed that the plaintiff was using the machines to produce products by December 2016 thus denying the defendants evidence that that PW2 testified to have serviced the machines satisfactorily between June to September 2016.

The termination of the plaintiff's tenancy agreement did not fulfill the termination conditions provided for in the tenancy agreement which included first failure by the tenant to pay rent for three consecutive months and also that where the tenant fails a three months' notice of termination should be served to him which was not given to the plaintiff. The same is confirmed by the 2nd defendant's evidence during cross examination where he stated that he does not remember giving a termination notice to the defendant. And that any termination on the ground of non-payment of rent as claimed by the 2nd defendant had to comply with clause 19 of the tenancy agreement which only envisaged a breach of nonpayment of rent for three consecutive months by besides the tenancy had not yet even commenced as the tenant had not yet been handed over functional machines.

In regards to water bills the plaintiffs' counsel also submitted that under clause 6 of the tenancy agreement, the tenant was supposed to pay utility bills (water and electricity) during the grace period two months and will continue to pay the same on his own meters after owning one in in his own names and that the grace period could only arise after the tenant has acknowledged receipt of functional machines within three weeks from the date of the agreement. But the plaintiff has never obtained one since the agreement was frustrated.

In their submission the defendants in regard to electricity bills amounting to UGX 10,377,425 invited court not only to look at the pleading but also consider the following evidence. And that in his testimony PW1 during cross examination conceded that under clause (iv) of the Tenancy agreement only the plaintiff was responsible for securing a meter in his named which he failed to do, and that he used electricity to operate four machines which electricity he never paid for at all. In addition that during cross examination DW1 testified that he remembered that the plaintiff owed over UGX 10,000,000 (Shillings Ten Million) in Electricity charges.

Counsel for the plaintiff in rejoinder averred that they still emphasize that there's no way Electricity bills of UGX 5,500,000 by 25th March, 2015 could have

accumulated to UGX 10,337,425 by 29th December, 2016 when the 2nd defendant purportedly terminated the agreement. In addition that the electricity consumed was during the time of repairing, servicing and testing of the machines which in any case was supposed to be the work of the Defendants.

Further still in their submission in rejoinder the plaintiff conceded to be responsible to obtain a meter in his own name under clause 5(iv) of the tenancy contended that the incidental question is "when" that this was to come into play during the grace period and after the plaintiff acknowledges receipt of functional machines which was not done since the commencement of the tenancy was frustrated by the 2nd defendant who illegally denied the plaintiff access to the premises.

Analysis

It is well established principle in **D.S.S Motors Limited v Afri Tours And Travels Limited AND Amin Tejani HCT-00-CC-0012-2003** that evidence cannot be admitted to add, vary or contradict a written instrument (Parole evidence rule).
The parole evidence rule has been applied in various cases some of which are ***L'Strange v Gracoub Ltd [1934]2 KB 394*** where **Scrutton LJ** in his lead judgment underscored the principle that once an agreement is reduced into writing and executed by booth parties, the parties are bound and it is wholly immaterial whether the parties read the contents or not. He also noted the exceptions to the rule which would include fraud, duress, illegality, misrepresentation, lack of consideration, and lack of capacity to execute the contract or mistake.

From the main evidence on record which is the Tenancy agreement clause 4 the plaintiff was to pay the balance of UGX 2,000,000 after 30 days from the date the Tenant acknowledges receipt of operational/functioning machines.
And the Landlord under clause 5 was to handover to the Tenant fully installed and functioning machine within three weeks and the tenant would acknowledge receipt of functioning machines after receipt of the sad machines and the tenant

was to be given a grace period of two months to the Tenant without payment of rent so as to enable the tenant test the machines, secure employees e.tc.

The gist of the plaintiff's case is that the tenancy agreement was varied verbally between himself and the 2nd defendant. The nature of the alleged variation is major change in the character of the tenancy agreement. The defendants have denied ever making any such variation to the tenancy. Therefore, it remains to be determined between the plaintiff's word against defendants' denial.

The parties have a right to vary the contract under **Section 67 of the Contracts Act** which provides that ***"where any right, duty, or liability would rise under agreement or contract, it may be varied by express agreement or by course of dealing between the parties or by usage or custom of the usage or custom would bind both parties to the contract".***

The said variation must be agreed upon between the parties and once it is denied by one of the parties, then such variation cannot stand in the eyes of court unless proved against the party in denial. The law takes an objective rather than a subjective view of the existence of agreement and so its starting point is the manifestation of mutual assent by the parties to one another. Agreement is not a mental state but an act, and as an act, it is a matter of inference from conduct. The parties are to be judged, not by what they is in their minds, but by what they have said or written or done.

The parties to any contract and the court are bound by the terms or conditions in a contract, whether parole or written, between contracting parties. The courts lack the power to add or subtract from the terms of contract of parties and parties thereto are not allowed to unilaterally alter them. This has acquired the sobriquet and mantra of sanctity of contract which is expressed in the maxim, *pacta sunt servanda*, which means the non-fraudulent agreement of parties must be observed. ***See Golden Const. Co Ltd v Stateco (Nig) Ltd (2014) 8 NWLR (pt 1408) p. 171.***

The plaintiff made a spirited attempt to import a verbal variation of the contract to the effect that the defendants allowed him to carry out repairs on the machinery and that the expense would be offset from the rent. This was major variation and in the circumstances of the case ought to have been put in writing in order to avoid such conflict in enforcement of the contract. The defendants denied the same and contended that they handed over the machines in a working condition. This court has a duty to construe the surrounding circumstances including the written or oral statement to discover the intention of the parties.

In addition to clause 4 and 5 of the tenancy agreement which provided that the Landlord would handover fully installed and functioning machines to the tenant, under clause 9 its well stipulated that the Landlord was to buy oil of the said machines in a bid to ensure that machines are in a good working condition before the tenancy commences. This court is not clear as to how the plaintiff received the non-working machines and he retained the same without the defendants had handed over to him.

The plaintiff ought not to have received the machines, if they were not compliant with tenancy agreement. The plaintiff doesnot explain how he took over the factory or the machines and at what stage he discovered that they were not working. I would agree with the defendant that the plaintiff was handed the machines and started work with them. The alleged variation which was verbal and has been denied by the defendant cannot be stand in the circumstances of this case.

The court must treat as sacrosanct the terms of an agreement freely entered into by the parties. This is because parties to a contract enjoy their freedom to contract on their own terms as long as is lawful. The terms of a contract between parties are clothed with some degree of sanctity and if any question should arise with regard to the contract, the terms in any document which constitute the contract are invariably the guide to its interpretation. When parties enter into a contract, they are bound by the terms of the contract as set out by them.

The defendants had to handover operational and installed machines to the plaintiff as a pre-condition for the agreement to commence. The plaintiff does not offer any satisfactory explanation why he took over the machines in a condition which was allegedly in violation of the terms of the tenancy. The plaintiff claims that the said machines were never handed over to him. Therefore, the question remains how did he get in contact with the same machines, if they had never been tested to be working as a condition precedent to the tenancy agreement. Clause 10 of the tenancy granted the plaintiff relief in case the machines failed to work. It provided;

The landlord undertakes to refund the tenant's money in case the machines fail to operate/function within a period of one month and in case one of the machines fails to operate, the tenant will only pay for the working/operating machines in accordance with clause 3 of this agreement.

It is my finding that there was never any oral variation of the tenancy agreement. The Evidence Act provides that extrinsic oral evidence is inadmissible to vary terms of a written contract of parties or to supplant or supplement the express terms of a written contract. The plaintiff ought to have refused to take over machines which were not working or alternatively he should have varied the contract in writing in order to facilitate what he wanted to do on the machines by way of repairs. An agreement of variation of an existing contract must itself possess the characteristics of a valid contract such as offer, acceptance and consideration. The plaintiff took over possession of the machines and he was duty bound to comply with the agreement and obligations.

The sum effect is that the plaintiff has failed to prove his case against the defendants.

The defendants made a counter claim for unpaid rent and utility bills for the period the plaintiff was in occupation of the premises. The plaintiff equally made a denial and contended that the termination of the tenancy was in breach of the termination clause which required 3 months arrears before termination.

A person seeking to enforce his right under a contractual agreement must show that he has fulfilled all the conditions precedent and that he has performed all those terms that ought to have been performed by him. Therefore, the defendants were in breach of the tenancy clauses and cannot be seen to counter-claim for the same in breach of the tenancy agreement. A tenancy agreement must be given its plain, natural, ordinary and simple interpretation. It is the business of the court to interpret terms of contract and give meaning to its ordinary and grammatical meaning and not to rewrite the agreement.

The counterclaim equally fails.

What remedies are available to the parties?

The plaintiffs claim fails and the counterclaim fails as well. They are dismissed with no order as to costs. (Each party bears its own costs)

I so order

SSEKAANA MUSA
JUDGE
20th February 2023