

UGANDA / JUDGMENT

Kamulegeya v Zaribwende (Civil Suit No. 417 of 2006) [2014]

UGHCLD 52 (15 December 2014)

[2014] UGHCLD 52

COURT

HC: Land Division (Uganda)

CASE / FILE NUMBER

Civil Suit No. 417 of 2006

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 417 OF 2006

HANNE KAMULEGEYA suing through her agent,

IRENE NABIATAKA KISINGIRI PLAINTIFF

VERSUS

HAJI SIRAGI ZARIBWENDE DEFENDANT

Hon. Lady Justice Monica K. Mugenyi

JUDGMENT

The plaintiff was the registered proprietor of land comprised in Block 29 plot 50 situated at Kalagala Road, whose interest therein had been registered in 2006. The defendant has been in possession of the property comprised in LRV 210 folio 23 and known as plot 50 Block B, Namaliga since 2003. Whereas the plaintiff considers the defendant a lessee on her land who has since defaulted on rent in respect thereof, the defendant contends that he is the rightful owner to the premises, having bided for and purchased the same from the Departed Asians Property Custodian Board (DAPCB) on 28th September 1995. The plaintiff now seeks vacant possession of her property by the defendant, a claim that the defendant contests and counters with a counter-claim for relief against forfeiture of his lease.

In a joint scheduling memorandum dated 20th May 2014, the parties framed the following issues for determination:

1. Whether the defendant's refusal to vacate the suit premises amounts to trespass to land.
2. Remedies available.
3. Whether the defendant defaulted in payment of rent he owed to the plaintiff.
4. Whether the noting of re-entry is lawful.
5. Whether the defendant is entitled to relief against forfeiture and any other legal remedy.

This Court proposes to address the first, third and fourth issues together, and conclude with the joint determination of the second and fifth issues. At trial the plaintiff was represented by Mr. Joseph Kasozi, while Mr. Deus Nsenguyunva appeared for the defendant.

Issues 1, 3 & 4: *Whether the defendant's refusal to vacate the suit premises amounts to trespass to land; whether the defendant defaulted in payment of rent he owed to the plaintiff & whether the noting of re-entry is lawful*

The plaintiff was the registered proprietor of land described as Block 29 plot 50 situated at Kalagala Road, having acquired the same following the distribution of her deceased father, Stanley Kisingiri's land between his children. The original certificate of record in respect of that land was never produced in court, but a copy thereof was appended to the Plaint as Annexure B. In 2006 the plaintiff was formally registered as proprietor of the mailo interest in that land. On the other hand, the defendant is the proprietor of a leasehold interest in property comprised in LRV 210 folio 23 known as plot 50 Block B, Namalinga, Bulemeezi, having purchased the same from the DAPCB under the then section 8 of the Expropriated Properties Act. A certificate of title in respect thereof was admitted on the record as Exhibit P1.

PW1 produced written correspondence between the parties' advocates in respect of the property in issue between them. In a letter Ref. PSA/1/2004/2003 dated 23rd September 2005 that was admitted on record as part of Exhibit P4, the defendant's advocates intimated that the property in issue between the parties was comprised in Plot 50 Bombo Road registered as LRV 210 Folio 23. The gist of that letter was that the defendant was the registered proprietor of that property, having acquired it from DPACB, which in turn had been the custodian thereof following the expulsion of Vallabhdiu Kalidas & Co. that previously was a beneficiary of a 49-year lease allegedly created on 19th March 1947. On the other hand, in a letter Ref KO/P/11/397 dated 16th March 2011 and admitted on the record as Exhibit P5, the plaintiff's attorneys clarified that their client was the registered proprietor of the Mailo land comprised in Block 29 plot 50 from which the leasehold interest in respect of LRV 210 folio 23 had been derived, and advised the defendant to vacate the said property. Although this Court finds no evidence that sufficiently demonstrates that the plaintiff's mailo interest in Block 29 plot 50 in Sabawali County, Bulemeezi District in East Buganda was, in fact, delineated from MRV 26 folio 19 at Namaliga, Bulemeezi County, from which the defendant's leasehold interest in LRV 210 folio 23 was derived; in a joint scheduling memorandum dated 20th May 2014 the parties acknowledged the plaintiff's proprietary interest in the suit property as an agreed fact. The defendant's leasehold interest was similarly acknowledged as having been in respect of the suit property. I do recognise that the need to

adduce specific evidence in proof of the plaintiff's reversionary interest in the disputed land could have been obviated by her interest having been acknowledged as an agreed fact. Consequently, I find that the parties did concede that the plaintiff enjoys a mailo interest in respect of property for which the defendant enjoys a leasehold interest. This suit shall, therefore, be determined on that basis.

As stated earlier herein, the defendant's leasehold interest was acquired by virtue of a sale thereof under the Expropriated Properties Act. As quite rightly conceded by both Counsel, Regulation 13 of the Expropriated Properties (Repossession and Disposal) (No. 1) Regulations, SI 87-8 provides that after property has been dealt with under the Expropriated Properties Act, a lease agreement shall be deemed to continue for a further period of two years or a period equivalent to the unexpired period of the lease whichever is the greater period. In the instant case the suit property was subject to a 49-year lease that started to run on 1st June 1946. By the time the property was expropriated in 1972, the lease had an unexpired 23-year term left, which period started to run after the sale of the property to the defendant on 23rd May, 1997. It is due to expire on 23rd May 2020. I therefore find that the defendant is a legally recognised lessee on the suit premises and cannot be deemed to be a trespasser thereon. I would answer the first issue in the negative.

Be that as it may, it was the plaintiff's contention that, having acquired Stanley Kisingiri's reversionary interest in respect of the property comprised in LRV 210 folio 23, she was entitled to rental payments from the defendant but he defaulted on payment. She thereupon secured the noting of re-entry in respect of the suit property and had since requested the defendant to vacate the suit property but he had declined to do so. The defendant, on the other hand, contended that he did not refuse to pay his rental dues but, rather, he did not know who the lessor was or how much he owed in rental dues. He contested the purported re-entry and, by counter-claim, sought relief against forfeiture.

The execution of leases by proprietors of mailo land is permitted under section 101 of the Registration of Titles Act (RTA). Section 102(a) of the same Act imposes a covenant on the lessee in a lease made under the RTA to 'pay the rent reserved by the lease at the times mentioned in the lease.' On the other hand, section 103(b) of the RTA empowers a lessor and his or her transferees to 're-enter upon and take possession of the leased property' in the event that rental payments or rental arrears remain outstanding for 30 days with or without a formal demand for rent. In the instant case, clause 1 of the Lease Agreement provided as follows on rental payments:

*****YIELDING AND PAYING therefor ... secondly for the first fifteen years of the said term the yearly rent of Shs. 180 (shillings one hundred and eighty) and thereafter during the residue of the said term such rent as may be assessed by the Land Officer at the expiration of the 15th and the 30th year of the said term but not exceeding one twentieth part of the unimproved value of the land hereby demised at the time of each of such re-assessments, such rent to be paid up to the 31st day of December 1946 on the execution of these presents and thereafter by equal monthly payments each payable in advance on the first day of every calendar month ... subject to the covenants and powers implied under the abovementioned Ordinance (except as hereby**

negatived or modified) and also to the covenants and conditions hereinafter contained**.”*

On the other hand, clause 3 explicitly empowered the lessor to re-enter the leased premises upon the failure by the lessee to pay rental dues, whether demanded or not.

The lease in issue presently was executed under the Registration of Titles Ordinance, which subsequently translated into the Registration of Titles Act. Therefore, the provisions of the above provisions of the RTA are applicable to the instant case. Section 103(b) does provide for re-entry by a lessor in the event of a lessee's default on rent beyond 30 days. This was the scenario in the present case where the plaintiff initiated dialogue with the defendant, informing him that though not yet formally registered as the proprietor of the mailo interest in respect of the suit property, she was the mailo owner thereof. Depicted in Exhibit P3 dated 27th June 2005, this communication did inform the defendant of the lessor to whom he was to pay rent way back in 2005 and invited him to negotiations with the plaintiff as to the rental arrears due to her. It is not true, therefore, that the defendant did not know who to pay rent to from that date forward. Indeed, in written correspondence that subsequently ensued between the parties, the defendant repeatedly sought to know how much he owed in rent but when the sum due was communicated to him, he opted to pursue the matter in court. *See Exhibit P5*.

With respect, therefore, I find rather misleading, the argument by learned Defence Counsel that the plaintiff was not entitled to any rental arrears when she instituted the present proceedings because her proprietary interest in the suit property had just been formally registered. The correspondence between the parties that preceded the filing of the present suit demonstrates that the defendant acknowledged the plaintiff's mailo interest, as well as the fact that he owed her rental arrears. In any event, the moment she secured a certificate of title in respect of her mailo interest she legally acquired a reversionary interest in the suit property. There is no evidence on record to suggest that the defendant bothered to effect rental payments thereafter, neither has any evidence been adduced before this Court that establishes that the defendant diligently endeavoured to resolve the issue of the rent payable.

I am satisfied, therefore, that the defendant did default on rental payments due to the plaintiff and the plaintiff lawfully exercised her right of re-entry.

Issues 2 & 5: *Remedies available*; *whether the defendant is entitled to relief against forfeiture or any other legal remedy*

The plaintiff herein inter alia sought vacant possession as against the defendant. The defendant instituted a counter-claim against the plaintiff in which he inter alia averred that he was willing to pay the rent due to the plaintiff; he was in possession of the suit property; challenged the legality of the noted re-entry, intimating that the lease still subsisted, and sought relief against forfeiture. Conversely, the plaintiff contended that the lease had been cancelled and a re-entry duly noted; the defendant was in possession of the suit property illegally hence her prayer for vacant possession, and the defendant was not entitled to relief against forfeiture given that he had breached the lease agreement.

Section 25 of the Judicature Act provides for an action for relief against forfeiture. Section 25(1) reads:

“Where a lessor is proceeding, by action or otherwise, to enforce a right of reentry or forfeiture for nonpayment of rent, the lessee, his or her executors, administrators or assigns may, in the lessor’s action or in an action brought by himself or herself, apply to the High Court for relief.”

I am constrained to observe from the onset that whereas the plaintiff’s pleadings alluded to the noting of a re-entry, no evidence was furnished in proof thereof. Section 114 of the RTA provides for a lawful re-entry to be entered in the Register Book and reflected in the requisite certificate of title by deletion of the lease from the incumbrance page. In the instant case, the plaintiff did not present this Court with the original certificate of title in respect of her mailo interest therefore the alleged note of re-entry cannot be confirmed. On the contrary, it is common ground herein that the defendant is still in occupation of the suit property hence the plaintiff’s prayer for vacant possession.

In the case of **Francis Butagira vs Deborah Namukasa (1992) KaLR 767** (Supreme Court), to which this Court was referred, Odoki JSC (as he then was) held:

“It is trite law that the proviso for re-entry on non-payment of rent is regarded in equity as merely a security for rent and therefore, provided the lessor can be put in the same position as before, the lessee is entitled to be relieved against forfeiture and any expenses to which the lessor has been put. See 23 Halsbury’s Laws of England, 3rd Edn, para 1409, page 681. The principle that the law leans against forfeiture was re-emphasized by Meggery and Wade in their book, The Law of Real Property, 2nd Edn, page 63 where they state:

“The law leans against forfeiture and a landlord suing for it is put on strict proof of his case.”

In **Francis Butagira vs Deborah Namukasa** (supra), the Court upheld the principle in **Gill vs. Lewis (1956) 1 All ER 844** that the fact that tenants had been bad payers in the past or elusive when attempts were made to serve them was irrelevant when exercising the discretion to grant relief against forfeiture for non-payment of rent. The Court did, however, recognise a long period of non-payment of rent as a ground for refusal to grant relief against forfeiture, as well as non-grant having no serious personal consequences for the lessee.

In the case of **Public Trustee vs. Westbrook & Another (1965) 3 All ER 398**, Lord Denning held:

“It does seem to me that this is a case which is most exceptional far outside the ordinary cases. When a period of time has passed such as here twenty two years without any rent being paid at all, without anyone treating a lease as in existence it seems to me that quite a strong case must be put forward in order to obtain relief.”

Similarly, in the instant case, there is no evidence that the defendant has ever paid any rent at all since he purchased the suit property in 1997. He, therefore, has been a beneficiary of a 17-year lease with no demonstrated rental payment. Even when the plaintiff brought her interest in the

suit property to his attention he did not bother to conclude negotiations with her with regard to this critical aspect of his leasehold interest and resorted to court action by way of counter-claim. Although he is in possession of the suit premises, he attested to being resident in Hima, Kasese. Therefore, this Court cannot deduce serious personal consequences to him in the event that the relief against forfeiture was refused. In the premises, I do not find that a strong case has been made for relief against forfeiture. I would, therefore, decline to grant the said relief.

In Vol. 12 Halsbury's Laws, 4th Edition, para. 1202 the rationale for general damages was expounded as follows:

"Damages are pecuniary recompense given by process of law to a person for the actionable wrong that another has done to him."

In the instant case, having found that the defendant is in default of rental payments to the plaintiff, it does follow that an actionable wrong has been established for which the plaintiff is entitled to recompense.

Finally, in **Francis Butagira vs Deborah Namukasa** (supra), it was held that the 'general rule is that costs should follow the event and a successful party should not be entitled to them except for good cause.' In that case, the following text from **Mulla on Code of Civil procedure 12th Edn. P.150** was cited with approval with regard to what amounts to 'good cause':

"The general rule is that costs shall follow the event unless the court for good reason otherwise orders. This means that the successful party is entitled to costs unless he is guilty of misconduct or there is some other good cause for not awarding costs to him. The conduct may not consider the conduct of the party in the actual litigation but matters which led up to the litigation."

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In the result, judgment is entered for the plaintiff with the following orders:

1. The defendant is ordered to vacate the property comprised in LRV 210 folio 23 known as plot 50 Block B, Namalinga, Bulemeezi with immediate effect.
2. A permanent injunction is issued as against the defendant.
3. General damages are awarded to the plaintiff in the sum of Ushs. 10,000,000/= payable at 8% interest from the date hereof until payment in full.
4. Each party shall bear its own costs.

I so order.

Monica K. Mugenyi

Judge

15th December 2014

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Prepared on 14 October 2026 · Esheria