

UGANDA / JUDGMENT

Mash Investments Limited v Kampala District Land Board and Others (Civil Suit 899 of 2017) [2023] UGHCLD 237 (9 August 2023)

[2023] UGHCLD 237

COURT

HC: Land Division (Uganda)

BEFORE

Bernard Namanya, J

CASE / FILE NUMBER

Civil Suit 899 of 2017

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA [LAND DIVISION] CIVIL SUIT NO. HCT-00-LD-CS-0899-2017

MASH INVESTMENTS LTD
. PLAINTIFF

VERSUS

1. KAMPALA DISTRICT LAND BOARD

2. OMAR TUMUSIIME

3 . NAGURU SKYZ HOTEL LTD DEFENDANTS

BEFORE: HON. JUSTICE BERNARD NAMANYA

JUDGMENT

Introduction:

1. The disputed land is comprised in Leasehold Register Volume 4145 Folio 9 Plot 7 Summit View Close, Naguru, Kampala measuring approximately 0.103 hectares (hereinafter "the suit land"). The 1st defendant, Kampala District Land Board, initially granted a lease to the plaintiff, Mash Investments Ltd, for an initial lease term of 5 years subject to construction of a building of a value of not less than 500 million Uganda shillings. The 1st defendant contends that the plaintiff failed to comply with the building covenant whereupon extension

of the lease was refused, and the suit land was instead leased to the 2nd defendant, Mr. Omar Tumusiime. The 2nd defendant entered into an informal agreement with the 3rd defendant, Naguru Skyz Hotel Limited to use the suit land as a motor vehicle parking space for hotel visitors.

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Background:

- The plaintiff brought this suit by ordinary plaint against the defendants seeking \$2.5 for cancellation of the lease offered to the 2nd defendant by the 1st defendant, and for other reliefs including a permanent injunction restraining the 1st defendant from offering, leasing, alienating and/or in any way allocating the suit land; a declaration that the plaintiff is the registered proprietor/sitting tenant/occupant; an eviction order against the 3rd defendant; a further permanent injunctive remedy restraining the 2nd and 3rd defendants or anyone claiming under them from interfering with the plaintiff's quiet occupation and enjoyment of the suit land; general damages for fraud, breach of legitimate expectation and inconvenience; and costs of the suit.
- The 1st defendant filed its written statement of defence stating inter alia that the \$3.5 lease granted to the plaintiff on the 1st January 2009 was subject to various express terms and covenants contained in the lease agreement; breach of which warranted the 1st defendant to re-enter and take possession of the suit property. That the lease agreement required the plaintiff to erect and complete a building of a value of not less than 500 million Uganda Shillings by the 31st December 2013 which the plaintiff failed to do. That the extension of the lease was subject to fulfilment of the above covenants by the plaintiff, and the plaintiff's failure to fulfil the lease covenants entitled the 1st defendant to re-enter the suit land, take possession and otherwise deal with the suit land as provided by the law.
- The 2nd and 3rd defendants also filed their written statement of defence stating \$4.5 inter alia that sometime in 2017, the 2nd defendant applied to the 1st defendant for a lease on the suit land, and on the 23rd November 2017, the 1st defendant wrote to him offering him the lease. That following satisfaction of the

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conditions set out in the offer letter, the 2nd defendant was issued a leasehold certificate of title in his names registered under Instrument No. KCCA0004504 on the 4th December 2017. That upon conclusion of the allocation and registration process, the 2nd defendant took possession of the suit land without knowledge or notice of any interest from any third party including the

plaintiff. That presently, the 2nd defendant remains in possession of the suit land, and is in advanced stages of developing the suit land in conformity with the terms and conditions of the lease. That in the meantime, the 2nd defendant has allowed the 1st defendant, Naguru Skyz Hotel Limited who operates a hotel on the adjoining land to temporarily use part of the land as a motor vehicle parking space for hotel visitors. That the 2nd defendant lawfully obtained a lease interest on the suit land.

5. The plaintiff filed a reply to the written statement of defence wherein it stated inter alia that the plaintiff has physical possession of the suit land in spite of the initial lease period having expired, and as a tenant awaiting extension and/or renewal of a lease, the plaintiff has legal and equitable interest capable of being protected by courts of law. The plaintiff claimed that it failed to develop the land due to encroachment on the suit land by Uganda Broadcasting Corporation (UBC) and Mr. Rogers Ddunga, factors that are well known to the 1st defendant. The plaintiff further claimed that it was unfairly treated by the 1st defendant by refusing to extend its lease as a sitting tenant, that the 2nd defendant's application for the lease came in much later in November 2017, when the plaintiff was already in possession of the suit land, and that the allocation of the suit land to the 2nd defendant is tainted with fraud and illegality.

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Representation:

The plaintiff was represented by Mr. Mulema Mukasa of M/s KSMO 6. Advocates. The 1st defendant was represented by Ms. Joan Nakaliika of M/s Shonubi Musoke & Co. Advocates. The 2nd and 3rd defendants were represented by Mr. Andrew Oluka of M/s Muwema & Co. Advocates.

The plaintiff's evidence:

- The plaintiff produced three witnesses to prove its case: PW1 (Francis W. \$7.\$ Mashate), PW2 (Emmanuel Masiko) and PW3 (Badru Sasagi).
- The plaintiff adduced copies of the following documents that were exhibited: 8.
- i). Exh. P1 A letter dated 2nd November 2007 from the 1st defendant;
- ii). Exh. P2 Lease offer to the plaintiff dated 16th February 2010;
- iii). Exh. P3 Certificate of title for land comprised in LRV 4145, Folio 9 in the names of Mash Investments Ltd;
- iv). Exh. P4 Letter requesting for the renewal of the lease dated 20th May 2014;
- v). Exh. P5 Survey Report dated 12th November 2010;

- vi). Exh. P6 Letter to Uganda Broadcasting Corporation (UBC) dated 20th March 2012
- vii). Exh. P7 Notice of intention to sue to UBC dated 11th June 2012;
- viii). ExhP8 Letter from the plaintiff to the \$1st defendant dated \$10th October 2017 following up request to renew the lease;
- ix). ExhP9 Application for lease extension from the plaintiff to the \$1st defendant dated 25th October 2017;
- x). Exh. P10 Letter from the \$1st defendant about visiting the site dated \$23rd October 2017:

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- xi). Exh. P11 Survey report on opening boundaries dated 9th November \$2017;\$
- xii). Exh. P12 Certificate of title for land comprised in LRV 4145, Folio 9 in the names of the plaintiff:
- xiii). Exh. P13 Letter to the \$1st defendant requesting renewal of lease dated \$20th May 2014:
- xiv). Exh. P14 –Letter from the 1st defendant to the plaintiff on visiting the suit land dated \$23rd October 2017:
- xv). Exh. P15 Letter from the \$1st defendant on visiting the suit land dated \$26th October 2017;
- xvi). Exh. P16 Lease offer from the \$1st defendant dated \$23rd November 2017 to the \$2nd defendant:
- xvii). Exh. P17 Interim Order dated 19th December 2017 arising from Misc. App No.1817 of 2017;
- xviii). Exh. P18 Interim Order dated 1st March 2018;
- xix). Exh. P19 Certificate of title for land comprised in KCCA 340, Folio 19 in the names of the \$2nd defendant:
- xx). Exh. P20 KCC receipt dated \$28th November 2007;
- xxi). Exh. P21 KCC receipt dated 30th June 2009;
- xxii). Exh. P22 URA receipt dated 27th July 2010;
- xxiii). Exh. P23 URA receipt dated \$12th March 2010; and
- xxiv). Exh. P24 Architectural plans for proposed residential apartments.

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The defendants' evidence:

- 9. The defendants produced three witnesses to prove their case: DW1 (Emmy Waligo) for the pt defendant; DW2 (Baguma Ababuza Laurel) for the 3rd defendant; and DW3 (Omar Tumusiime) for the 2 nd defendant.
- 10. The defendants adduced copies of the following documents that were exhibited:
- i). Exh. D 1 Letter from the pt defendant to the plaintiff dated 2nd November 2007;
- ii). Exh. D2 Certificate of title for land comprised in LRV 4145, Folio 9, Plot 7 Summit View Close, Naguru, Kampala in the names of the plaintiff;
- iii). Exh. D3 Letter from the plaintiff dated 20 th May 2014 requesting for renewal of lease;
- iv). Exh. D4 Letter from the l " defendant to the plaintiff dated 23 rd October 2017;
- v). Exh. D5 Letter from the l " defendant to the plaintiff dated 26th October 2017 inviting the plaintiff for the next board meeting;
- vi). Exh. D6 Lease offer letter from the l " defendant to the z= defendant dated 2Jfd November 2017; and
- vii). Exh. D7 Certificate of title for land comprised in KCCA 340 Folio 19 Plot 7 Summit View Close, Naguru, Kampala in the names of the 2nd defendant.

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Locus in quo visit:

- 11. On the 30th day of May 2023, I carried out a locus in quo visit to the suit land in the presence of counsel for the plaintiff and for the defendants, and the LC1 chairman, Mr. Kagowa Moses.
- 12. Also in attendance, were the plaintiff's Managing Director, Mr. Francis Mashate, Operations Manager, Mr. Emmanuel Matsiko, Mr. Sasagi Badru, the field officer for the plaintiff; and Mr. Omar Tumusiime, the 2nd defendant.
- 13. Mr. Francis Mashate gave evidence at the locus in quo, and counsel for the defendants opted not to cross examine him. Mr. Omar Tumusiime, the 2nd defendant gave evidence at the locus in quo and was cross examined by counsel Mulema Mukasa, and re-examined by counsel Andrew Oluka.
- 14. Court observed that, contrary to the claims of the plaintiff, it is the 2nd defendant who is in physical possession of the suit land.

<u>Issues to be determined by the court:</u>

- 15. The parties agreed on the following issues for determination by the court:
- i). Whether the plaintiff breached the lease offer contract with the 1st defendant in respect of the suit land?
- ii). Whether the plaintiff is entitled to an extension and/ or renewal of the initial lease offer of the suit land?
- iii). Whether the \$2^{nd}\$ and \$3^{rd}\$ defendants are liable for trespass on the suit land?

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- iv). Whether the \$1^{st}\$, \$2^{nd}\$, and \$3^{rd}\$ defendants committed fraud and illegalities in respect of the suit land being offered to, and registered in the 2nd defendant's name?
- v). What remedies are available to the parties?
- 16. I shall address Issues No.1 and 2 together, followed by Issues No.3 and 4 together, and finally address Issue No.5.

Issues No.1 & \$2\$:

- 17. Under these two issues the main question to be addressed is the extent of the plaintiff's compliance with the terms and conditions of the lease offered by the 1st defendant, and whether the 1st defendant was justified in its decision to offer the lease to the \$2^{nd}\$ defendant.
- 18. The lease commenced on the 1st January 2009 for a term of 5 years. If one is to go by the commencement date, then the lease ought to have expired on the 31st December 2013. However, clause 3(c) of the lease agreement required the plaintiff to complete construction of the buildings of a value of not less than 500 million Uganda shillings by the 31st December 2014. If one is to go by the deadline for the construction of the buildings, then the expiry of the lease would be 31st December 2014. The parties are accordingly disagreed on the exact date of expiry of the lease. The 1st defendant insists that the lease expiry date was 31st December 2013 while the plaintiff contends that the lease expiry was 31st December 2014.

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- 19. In view of the conflicting dates for the expiry of the lease in the lease agreement, I hold the view that the lease expiry date for the first 5 years was 31st December 2014 considering that the plaintiff had up to that date to complete construction of the buildings in accordance with clause 3(c) of the lease agreement.
- 20. Accordingly, with respect, I do not agree with counsel for the 1st defendant that the plaintiff's application for lease extension dated 20th May 2014 was out of time.
- 21. Clauses 2(b) and (c) of the lease agreement dated the 12th October 2010 provided for the following key legal obligations to be performed by the plaintiff within the initial lease term:

"b) to erect on the said land buildings \$[...]\$ of a value of not less than *shillings five hundred million [...].* c) to complete the said buildings for occupation and use to the satisfaction of the Lessor on or before the \$31st\$ day of December the *year 2014."*

- 22. The plaintiff contended that it was not able to comply with the building covenant in the initial lease term due to encroachment on the suit land by UBC; Mr. Henry Ddungu; and water installations by NWSC (see paragraphs 4(e), 5(b) & (c) & 6(c) of the amended plaint filed in court on the 10th October 2018; see also paragraphs \$8 - 11\$; and 30 of the witness statement of PW1 (Francis W. Mashate).

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- 23. DW1 (Emmy Waligo) testified that by the time of the lease expiry, the plaintiff had failed to erect a residential house worth 500 million Uganda shillings as required by the terms and conditions of the lease.
- 24. I have carefully evaluated the evidence adduced by the parties, and it is my finding that the plaintiff failed to prove that it complied with the building covenants set out in clauses 2(b) and (c) above by the 31st December 2014 when the lease expired. The lease required the plaintiff to construct buildings of a value of not less than 500 million Uganda shillings which the plaintiff did not comply with.
- 25. Accordingly, it is my decision that the plaintiff breached the lease agreement, and upon expiry of the lease on the 31st December 2014, the suit land automatically reverted to the 1st defendant.
- 26. I am fortified in this conclusion by the case of *Dr. Adeodanta Kekitiinwa & 3 Others v. Edward Hauda Wakida, Court of Appeal Civil Appeal No.30(1997 (Coram: Justice M Kato, JA. Justice A. E. Mpagi-Bahigeine, JA. Justice* S. *G. Engwau. JA.)* The brief facts of the case were that the term of the lease was five years from 1st December 1987. The lessee covenanted to erect on the said land a residential house of a value not less than 12 million Uganda Shillings to be completed on or before 30th November 1992, the expiry date of the

lease. By the expiry date the respondent had not yet complied with the building covenant. On 16 th December 1993, a year after the expiry date, the respondent applied for an extension of the lease. On 17 th December 1993, the 1 st appellant, Dr. Adeodanta Kekitiinwa was allocated the said plot. This was on the ground that the respondent's five-year term had expired without any developments on the

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land, and that he had failed to apply for any extension before the expiry. The lessee (respondent) successfully challenged the re-allocation of the lease to another party in the High Court. On appeal to the Court of Appeal of Uganda, the court set aside the judgment of the High Court.

Justice A. E. Mpagi-Bahigeine, JA (with whom other members of the court agreed) held that in the view of the lessee's failure to comply with the building covenant, the controlling authority was justified in leasing the land to another party.

- 27. Turning to the facts of the instant case, upon expiry of the lease on the 31st December 2014, the 1 st defendant did not immediately re-allocate the lease but on the 23 rd November 2017, nearly 3 years later, the lease was re-allocated to Mr. Omar Tumusiime, the 2 nd defendant.
- 28. Consequently, I find no fault on the part of the 1 st defendant, Kampala District Land Board in re-allocating the lease to the 2 nd defendant, Mr. Omar Tumusiime considering that the decision was lawfully executed within its legal mandate.
- 29. To conclude on Issues No.1 and 2, the plaintiff was in breach of the lease agreement by not complying with the building covenant, and the plaintiff was not entitled to an extension of the lease.

Issues No.3 and 4:

- 30. The evidence before me proves that the 2 nd defendant, Mr. Omar Tumusiime is the registered proprietor of the suit land (Leasehold Register Volume KCCA340 Folio 19 Plot 7 Summit View Close, Kampala measuring 0.1030

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Hectares) having been entered as the registered owner on the 4 th December 2017 under Instrument Number KCCA-00045404 (Exh. D7). In his evidence before court, the 2 nd defendant testified that there is a running informal agreement with the 3 rd defendant, Naguru Skyz Hotel Ltd to use the suit land as parking space for the hotel. Accordingly, the 2 nd and 3 rd defendants are lawfully in possession of the land and cannot be held liable in trespass.

- 31. The plaintiff made several allegations of fraud and illegality against the defendants. It was held in the case of *Fam International Ltd & Anor v. Muhammed Hamid* (Civil Appeal No. 16 0(1993) [1994] UGSC 12 {per Justice Benjamin Odoki (J.S. C)}),* that in fraud cases, the standard of proof is heavier than a mere balance of probabilities.

- 32. It was submitted for the plaintiff that the 1st defendant committed acts of dishonesty, by for example, not responding to the plaintiff's application for the extension of the lease dated 20th May 2014, acting with tremendous speed to approve the 2nd defendant's application for a lease, and ignoring the challenges faced by the plaintiff with regard to trespassers on the suit land. He further pointed out the non-compliance with the procedure in processing a lease for the 2nd defendant such as the failure by the Area Land Committee to invite the plaintiff to the meeting that considered the lease application. In the plaintiff's view, these actions, omissions or lapses amounted to fraud on the part of the 1st defendant.
- 33. It was held in the case of **Kekitiinwa v. Wakida (supra)** that when a lease has a definite term, and is terminated by effluxion of time, the lessor is not required to issue a notice of re-entry to the lessee. Accordingly, I am not satisfied that

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the alleged acts or omissions pointed out by the plaintiff on the part of the 1st defendant amount to fraud as envisaged by the law.

- 34. Counsel for the plaintiff then sought to rely on the case of **Kampala District Land Board & Chemical Distributors v. National Housing & Construction Corporation, SCCA No. 2 of 2004** in an attempt to argue that fraud was proved against the 1st defendant. Counsel argued that according to the above authority, the decision to lease the land to the 2nd defendant in disregard of the plaintiffs interest as a sitting tenant amounted to fraud.
- 35. With respect to counsel for the plaintiff, I do not agree that the case of **Kampala District Land Board & Anor v. NHCC (supra)** applies to the facts of the instant case. The facts of the case sought to be relied upon are totally different to the extent that in that other case, the Supreme Court dealt with the grant of a freehold certificate of title to Chemical Distributors in disregard of the unregistered interest of National Housing & Construction Corporation who was proved to be a bona fide occupant under the law. In the instant case, the legal question is about the non-compliance with the terms and conditions of the lease and the consequences for the lessee.
- 36. DW3 (Omar Tumusiime) testified that he applied for a lease on the suit land and his lease was approved by the 1st defendant. That a certificate of title for the suit land was issued in his names and he immediately took possession. That the lease requires the suit land to be used for hotel business, and it is currently utilised by the 3rd defendant, Naguru Skyz Hotel Limited as a parking space for hotel visitors.

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- 37. It should be emphasized that the 1st defendant is clothed with constitutional authority under articles 240 and 241 of the Constitution of Uganda (1995) and has power to lease land under section 60 (2)(c) of the Land Act (Cap 227) as set out below:

> "60. Powers of a board \$(1)\$...; (2) *A board shall have power to*— (a) ...; (b) ...; (c) sell, lease or otherwise deal with the land held by it; and \$(d)\$... "

- 38. Having regard to the evidence before me, it is my decision that the plaintiff has failed to prove beyond a mere balance of probabilities, that the defendants were involved in fraudulent conduct and illegality.
- 39. To conclude on Issues No.3 and 4, the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ defendants are not trespassers on the suit land, and the plaintiff has not proved fraud and illegality on the part of all the three defendants.

Issue No.5: What remedies are available to the parties?

40. The plaintiff claimed for declaratory orders, damages, and costs of the suit. In view of my decision above, the plaintiff is not entitled to any of these remedies. The suit is accordingly dismissed.

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41. I have considered the need for reconciliation amongst the parties involved in the dispute, and in this regard, I order that each party to the suit shall bear its own costs of the suit.

IT IS SO ORDERED.

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BERNARD NAMANYA JUDGE 9 August 2023

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Attendance

9 August 2023 at 09:17am

Joan Nakaliika Brian Mukisa (holding brief for Oluka Andrew) Jacob Kalaabi (holding brief for Mulema Mukasa) Francis Mashate & Emmanuel Matsiko (representatives of the plaintiff) are in court. Allena Kanyakire

Counsel for the \$1^{\text{st}}\$ defendant Counsel for the \$2^{\text{nd}}\$ and \$3^{\text{rd}}\$ defendants

Counsel for the plaintiff

Court Clerk

Court:

Judgment delivered in open chambers.

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BERNARD NAMANYA JUDGE 9 August 2023

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