

UGANDA / JUDGMENT

Nabiito Nakato v Lukanga (Civil Appeal 618 of 2018) [2024]

UGHCLD 225 (24 September 2024)

[2024] UGHCLD 225

COURT

HC: Land Division (Uganda)

BEFORE

Busingye, J

CASE / FILE NUMBER

Civil Appeal 618 of 2018

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5 THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (LAND DIVISION)

CIVIL SUIT NO. 618 OF 2018**HARRIET NABABIITO NAKATO : PLAINIFF 10 VERSUS
DAVID LUKANGA : DEFENDANT****BEFORE: HON. LADY JUSTICE IMMACULATE BUSINGYE BYARUHANGA**

15 JUDGMENT

The plaintiff brought this suit against the defendant for forfeiture of the lease executed on 13th June 2016 between the plaintiff and the defendant, vacant possession of the plaintiff's property comprised in Kyadondo Block 207 Plot 1020 at Kanyanya, permanent injunction, damages and costs of the suit.

20 Background

In the facts constituting the cause of action, the plaintiff contended that she is the owner and the registered proprietor of the land and buildings comprised in Kyadondo Block 207 Plot 1020 at Kanyanya in Kampala District entered into a lease agreement with the defendant for the said property.

The plaintiff further contended that the lease agreement was executed on 13th 25 June 2016 where the defendant was obliged to pay Ug. Shs. 15,000,000 (Uganda shillings fifteen million only) as premium and Ugx 6,000,000 (Uganda shillings six million) annually as ground rent.

The plaintiff went ahead to contend that upon execution of the lease agreement, the 30 defendant took possession of the property and started utilizing it. The plaintiff also

5 averred that the defendant has failed or refused to pay the premium and ground rent as agreed.

In reply, the defendant filed a written statement of defence on 19th September 2018, wherein he denied the contents of the plaint and in particular, it was contended that the defendant has been remitting payments to the accounts agreed upon with the 10 plaintiff in the lease agreement from 2016 to date.

The defendant further contended that the plaintiff lodged a caveat on the land to halt the processing the defendant's lease title upon a dispute having risen out of the remittance of funds onto the plaintiff's account as agreed, however on 5th March 2018, the plaintiff and defendant agreed that the defendant remit Ug. Shs. 5,000,000 15 (Uganda Shillings five million) and an extra sum of Ug. Shs. 300,000 (Uganda

shillings three hundred thousand shillings only) on to the plaintiff's Centenary Bank account to offset the dispute that had risen.

The parties filed their joint scheduling memorandum, their respective trial bundles and witness statements. During scheduling, the parties agreed to the following issues 20 to aid court in the resolution of the suit at hand. These include;

- *1. Whether the defendant is in breach of the lease covenant?*
- *2. What remedies are available to the parties?*

The plaintiff adduced evidence by herself ; Harriet Nababiito Nakato (**Pw1**) while the defendant equally adduced evidence from himself namely; Lukanga David 25 (**Dw1**).

The parties also relied on documentary evidence which was marked and exhibited. The plaintiff intends to rely on the following documents;

- 5 *1. Exhibit PE1 – Lease agreement dated 13/6/16*
- *2. Exhibit PE2- Bank Statement from Finance Trust Bank*
- *3. Exhibit PE3- Bank Statement from Centenary Bank*
- *4. Exhibit PE4- Bank Statement from Centenary Bank 2520078151*
- *5. Exhibit PE5- Land Title Block 207 plot 1020.*
- 10 *6. Exhibit PE6- Notice of caveat dated 27/6/17*

- *7. Exhibits PE7- Invitation letter from Police dated 30/5/23*
- *8. Exhibits PE8- letter from Mwebesa Richard Advocates & Solicitors dated 2/6/23*

On the other hand, the defendants/ counterclaimants intend to rely on the following

- 15 documents;
- *1. Exhibit DE1- Letter from Kimbugwe Herbet LCII Chairman*
- *2. Exhibit DE2-KCCA Ruling between Nababiito Nakato Harriet and Rukanga David*
- *3. Exhibit DE3 (a-n)- Centenary account for Sum of Ug. Shs. 2,000,000 a deposit*
- 20 *of Ug. Shs. 1,000,000 on the Centenary Account dated 13/12/21*
- *4. Exhibit DE4- A deed of acknowledgement of payment by Harriet Nababiito Nakato from Rukanga David dated 5/3/18*
- *5. Exhibit DE5- receipts from pages 41-42 of the defendants Trial Bundle issued by Finance Trust Bank dated 10/8/2016, 16/8/16, 12/7/16 and 13/6/16*
- 25 *6. Exhibit DE6- deposit slip dated 20/6/23*
- *7. Exhibit DE7- deposit slip dated 19/9/23*
- *8. Exhibit DE8- deposit slip dated 13/2/22*
- *9. Exhibit DE9- deposit slip dated 7/12/18*
- *10. Exhibit DE10-Receipt No. 2602 dated 23/11/19*
- 30 *11. Exhibit DE11-Receipt dated 3/11/18*

5 *12. Exhibit DE112-Receipt dated 13/8/19 13. Exhibit DE13-Receipt dated 11/8/18 14. Exhibit DE14-Receipt dated 3/6/19 15. Exhibit DE15-Receipt dated 5/8/18 16. Exhibit DE16-Receipt dated 6/3/19*

10 Representation

At the trial, the plaintiff was represented by **Mr. Mwebesa Richard** of **M/s Mwebesa Richard Advocates and Solicitors** while the defendant was represented by **Mr. Katongole Joseph** of **M/s Katongole, Yiga & Masane Advocates & Solicitors**.

15 Burden and standard of proof in Civil Cases

In civil matters like the instant case, the burden of proof rests on the plaintiff. The standard of proof is on a balance of probabilities.

According to **Section 101(1) (2) of the Evidence Act Cap.6 Laws of Uganda**,

"*Whoever desires any court to give judgment as to any legal right or liability* 20 *dependent on the existence of facts, which he or she asserts must prove that those facts exist.*

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Section 102 of the Evidence Act goes on to provide that *"The burden of proof in a* 25 *suit or proceeding lies on that person who would fail if no evidence at all were given on either side and Section 103 provides that "the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence*

5 *unless it is provided by any law that proof of that fact shall lie on any particular person"*

With this background, I shall proceed to evaluate the evidence on record and resolve the issues raised by the parties.

Preliminary points of law

- 10 Counsel for the plaintiff raised a preliminary point of law to the effect that the plaintiff being an illiterate entered into a lease agreement drafted in the English language with the defendant and yet the same was not translated and explained to the plaintiff. Counsel referred to **Sections 2, 3 and 4 of the Illiterates Protection Act, Cap 288 (Revised Edition Laws of Uganda, 2023)** which make it mandatory
- 15 for the writer of the document to translate the same for the illiterate, failure of which would nullify the document.

In reply, it was counsel for the defendant's submitted that the defendant's advocate explained the contents of the lease agreement to the plaintiff during its preparation in the language she understood best and she willingly appended her signature and 20 thumb print on the said document in the presence of her witnesses.

Counsel for the defense relied on the case of **Teodozio Bariyo & anor versus Baingana Patrick HCCA No. 26 of 2014**, and concluded that it was not the intention of the legislature for a certificate to be drawn on the document itself in order to show that the writer had read through and explained the contents to the 25 illiterate. In conclusion, counsel for the defendant submitted that the advocate read over and interpreted the agreement for both parties and thereafter proceeded to write his full name and address on all the 5 pages of the lease agreement. counsel prayed that the preliminary objection be overruled by this Honorable court.

5 In rejoinder, counsel for the plaintiff submitted that the *Teodozio case (supra)* is bad in law and the same is non-binding on this Honorable Court. Furthermore, Counsel for the plaintiff cited the case of **Paul Rujura versus Nyebare Fred Kyamuzigita C. A. C. A No. 85 of 2014** where

the Court of Appeal affirmed the fact that the act of stating in the certificate the full name and full address of the person who writes the 10 document on behalf of the illiterate implies that he or she received instructions from the illiterate person to do so and that the contents of the document were properly

read over and explained to the illiterate.

Counsel for the plaintiff went ahead to submit that during cross examination, the plaintiff confirmed that she stopped in primary two thus counsel for the defendant

15 ought to have interpreted the lease agreement in the Luganda language which the plaintiff understood before she signed the document. In conclusion, counsel submitted that failure to have a certificate of translation on the sale agreement violated Section 2 and 3 of the Illiterates Protection Act.

Resolution

- **20 Section 1 of the Illiterate Person Protection Act, Cap 288 (Revised Laws of Uganda, 2023)** defines an illiterate person to mean, "in relation to a document, *a person who is unable to read and understand the script or language in which the document is written or printed.*" In the case of **Abdalla Faraj versus A. R. Odimbe & Co Advocates HCCS No. 962 of 1986**, *Justice Ntagoba held that "an illiterate* 25 *person is a person susceptible to being misled into subscribing to contracts and*
- *other documents the contents of which they do not know or understand".*

In paragraph 6 of her witness statement, the plaintiff testified that she signed a lease agreement with the defendant while in the defendant's lawyer's office without explaining the contents of document to her. During cross examination, the plaintiff

5 testified that she is not able to read and write since she stopped her education in primary two. The plaintiff further testified that she does not have people who usually assist her to read and write which is why she uses her thumb print.

The law and the Courts of law have clearly come out to protect the interest of the illiterate so that they are not coerced into appending their marks to documents and

10 transactions whose contents they do not understand. **Section 2 of the Illiterates Protection Act**, states that;

"No person shall write the name of an illiterate by way of signature to any document unless such illiterate shall have first appended his or her mark to it; and any person who so writes the name of the illiterate shall 15 *also write on the document his or her own true and full name and address as witness, and his or her so doing shall imply a statement that he or she wrote the name of the illiterate by way of signature after the illiterate had appended his or her mark, and that he

or she was instructed so to write by the illiterate and that prior to the illiterate* 20 *appending his or her mark, the document was read over and explained to the illiterate".*

Furthermore, **Section 3 of the Illiterates Protection Act** provides that;

"Any person who shall write any document for or at the request, on behalf or in the name of any illiterate shall also write on the document* 25 *his or her own true and full name as the writer of the document and his or her true and full address, and his or her so doing shall imply a statement that he or she was instructed to write the document by the person for whom it purports to have been written and that it fully and correctly represents his or her instructions and was read over and* 30 *explained to him or her". (emphasis on the highlighted part).*

In the case of **Kasaala Growers Co-operative Society v. Kakooza and another, S. C. C. A No. 19 of 2010***, the supreme court held that *Section 3 of the Illiterate Protection Act (supra), enjoins any person who writes a document for or at the request or on behalf of an illiterate person to write in the jurat of the said document* 5 *his/her true and full address. That this shall imply that he/she was instructed to write the document by the person for whom it purports to have been written and it fully and correctly represents his/her instructions and to state therein that it was read over and explained to him or her who appeared to have understood it."*

The Supreme Court went on to hold that the illiterate person cannot own the 10 *contents of the documents when it is not shown that they were explained to him or her and that he understood them. Further, that the Act was intended to protect illiterate persons and the provision is couched in mandatory terms, and failure to comply with the requirement renders the document inadmissible.*

I have critically examined exhibit P.1 which is a lease agreement between the plaintiff and the defendant dated 13th 15 June 2016. I observed that as required by Section 2 and 3 of the Illiterates Protection Act, since Counsel Katongole was the author of the said lease agreement, in the jurat of the same, counsel appended the name of the law firm and also included the full address of the law firm. Secondly, I also observed the fact that the plaintiff appended both her signature and thumb print 20 on all the pages of the lease agreement.

Section 3 of the Illiterates Protection Act states that by the author of the document writing his full name and full address in the jurat, this shall imply that the document was written on the instruction of the illiterate person and that the same was read over to the latter and that the same represents the instructions given by the illiterate 25 person.

In the Court of Appeal case of **Stanbic Bank Uganda Ltd versus Ssenyonjo Moses & Anor Civil Appeal No. 147 of 2015**, *Justice Madrama held that the word "illiterate" clearly does not connote or mean "unable to understand the English language in which the document is written or printed. It has everything to do with*

5 *understanding the written language. ... the above provision clearly was meant to protect the illiterate from endorsing a document which he or she did not understand and to be bound by a document he or she has not instructed the writing of. It preserves the freedom of an individual to choose what to be bound by. It was meant to overcome the misrepresentation of facts to someone who does not understand the* 10 *language in which it is written.*

I do not agree with Counsel for the defendant that the above cited provisions of the Illiterates Protection Act do not explicitly require a certificate of translation to be written on the document. The requirement in Section 3 is that the author of the document must write his or her full name and address in the jurat of the document 15 and there must be proof that the illiterate understood the contents of the document as stated by the appellate courts above. I believe that the draftsman intended for illiterate persons to understand the contents of documents written in languages that they do not understand.

It is trite that when interpreting statutes, the courts shall always apply the literal rule 20 such that words are given their ordinary meaning. Whereas, the law does not expressly create an obligation to include a certificate of translation, I believe the legislators intended that in cases where a document is authored for an illiterate person, in a language foreign to him or her, a certificate of translation ought to be included to prove that the illiterate person understands what was written before he 25 or she appends their signature.

In the instant case, the plaintiff stated in paragraph 9 of her witness statement that she agreed to lease her land to the defendant for a period of four years and later extend the same after he performed his obligations. This is proof that the plaintiff was fully aware that she was entering into a lease agreement. However, exhibit PE1

30 section 1.1 shows that the plaintiff signed a lease agreement for forty-nine years. In

5 addition, there is no proof that the contents of the lease agreement (exhibit PE1) were explained to her. In paragraph 10 of her statement, the plaintiff also testified that after her sons interpreted the loan for her, she found the terms to be unfavorable, however, she told her sons to keep quiet because she had a pending loan with Finance Trust Bank which the defendant was financing until after he started defaulting on 10 the loan payments.

Dw1 testified in paragraph 3 of his witness statement that as one of the conditions for entering into the lease agreement, the parties agreed that the defendant would clear her outstanding loan held in Finance Trust Bank. I have perused the contents of exhibit P.1 and I observed under Article 2 of the lease agreement, the defendant

15 (lessee) was supposed to pay monthly premium installments and under clause 2.3, it was agreed that these installment payments were meant to cover the monthly installments demanded by the bank as loan repayments.

In paragraph 8 of his statement, the defendant testified that upon completing the loan payments, the bank released the certificate of title and the same was confirmed by

20 the plaintiff during cross examination that the defendant deposited money on her account, a sum which she did not remember. Pw1 also further testified that the bank released her title which she deposited with the defendant's lawyer.

In light of the above findings, I am not convinced that the plaintiff was fully aware that she was entering into a lease agreement with the defendant and also understood

25 the terms of the said agreement. The lease agreement provisions were not understood by the plaintiff from the beginning. Therefore, this preliminary is upheld.

Issue No.1: Whether the defendant is in breach of the lease covenant?

It is Counsel for the plaintiff's submission that the plaintiff is the registered proprietor of land comprised in Block 207 plot 1020 land at Kanyanya in Kampala.

- 5 Counsel went ahead to submit that the plaintiff was supposed to pay a premium of Ug. Shs. 15,000,000 (Uganda shillings fifteen million) and an annual ground rent of Ug. Shs. 6,000,000 (Uganda shillings six million), however to date, the defendant has only paid a premium of Ug. Shs. 10,360,000 (Uganda shillings ten million six hundred thirty thousand only).
- 10 Counsel for the plaintiff also submitted that the defendant has been paying the ground rent in piece mills and is currently in arrears of Ug. Shs. 22,640,000 (Uganda shillings twenty-two million six hundred and forty thousand shillings). In conclusion, counsel submitted that the defendant breached the lease agreement covenants.
- 15 In reply, counsel for the defendant summarized all the payments made to the defendant and concluded that the defendant paid the premium in totality which explains why the suit land which had been mortgaged by the plaintiff was released. Counsel also went head to submit that apart from the premium installment payment, the defendant also made other payments alongside the premium. Counsel prayed that
- 20 this court finds that the defendant did not breach any lease covenant since the defendant paid off the premium and the ground rent.

Resolution

Section 9 (1) of the Contract Act Cap 284 (Revised edition 2023) provides that;

A contract is an agreement made with the free consent of the parties with the 25 capacity to contract for lawful consideration and with a lawful object with the intention to be legally bound.

In the case of **Olanya Hannington versus Acullu Hellen HCCA 0038 of 2016, Justice Stephen Mubiru** held that, *"a valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material* 5 *terms of the agreement. One of the cardinal principles of construing non-statutory documents is deciphering the intention as expressed in the document or as can be gathered from the four corners of the document".**

As earlier observed, the plaintiff and defendant entered into a lease agreement on 13th June 2016 and the same was marked PE1. It is the plaintiff's claim that the 10 defendant failed to or refused to pay the agreed premium and ground rent hence

Section 101 of the Registration of Titles Act, Cap 240 stipulates that;

In every lease made under this Act there shall be implied the following covenants with the lessor and his or her transferees by the lessee binding the latter and his or

15 *executors, administrators and transferees;*

breaching the covenants of the lease agreement.

a. That he or she or they will pay the rent reserved by the lease at the times mentioned in the in the lease.

In the instant case, the payment of ground rent was not only implied but was expressly provided for under covenant 2.4 of the lease agreement.

- 20 In the case of **Meridiana Africa Airlines (U) Ltd versus Avmax Spares (EA) Ltd HCCS No. 111 of 2017**, a **breach of contract** was defined as a violation of any of the agreed-upon terms and conditions of a binding contract, and this includes circumstances where an obligation that is stated in the contract is not completed on time. It is a failure, without legal excuse, to perform any promise that forms all or 25 part of the contract.
- I have critically perused exhibit P.1 where it was covenanted as follows;

Covenant 2.1 states: *The premium of Ug. Shs. 15,000,000 (fifteen million shillings) which shall be paid in by the lessee to the lessor*

| 5 | | as desired by the lessee. The Lessor desires to have the
premium paid through her bank account in Finance Trust
Bank Limited in monthly installments. |

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| 10 | Covenant 2.2 states: |

The
premium
payments
shall
be
paid
in
A/
c
No.
200200015108 in the names of Harriet Nababiito Nakato,
with Finance Trust
Bank Limited. |

| | Covenant 2.3 states: | The premium monthly installments should be able to cover
the monthly installments demanded by the bank as loan
repayments for a loan acquired by the lessor. |

| 15 | Covenant 2.4 states: | At the completion of the loan repayments the lessee shall continue depositing the monthly installments onto the said account until the accumulation of the premium amounts of Ug. Shs. 15,000,000 (Uganda Shillings fifteen million only). |

| 20 | Covenant 2.5 states: | The lessor has set her ground rent as being Ug. Shs. 6,000,000 (Uganda shillings six million only) per annum payable annually. The lessor has allowed the lease to pay the said amount in installments on a monthly basis on A/c No. 200200015108 in Finance Trust Bank Limited. |

| 25 | Covenant 2.6 |
The lessor shall always issue an acknowledgment whenever payment shall be made in terms of ground rent. The rent may after (30) thirty years be revised as the parties may mutually agree provided that the increase or decrease for the same shall not exceed 10% of the running rent. |

- 5 According to covenant 2.2 above, the defendant was supposed to pay a premium payment of Ug. Shs. 15,000,000 (Uganda shillings fifteen million) to be paid in A/c No. 200200015108 in the names of Harriet Nababiito Nakato, held with Finance Trust Bank Limited. As at the end of December 2023, the defendant ought to have paid the plaintiffs a sum of Ug. Shs. 15,000,000 as premium for the lease and a sum
- 10 of Ug. Shs. 48,000,000 (Uganda Shillings forty-eight million) as ground rent. The sum of Ug. Shs. 48,000,000 is deduced from Ug. Shs. 6,000,000 multiplied by 8 years running between 2016 and 2023. Ug. Shs. 48,000,000 plus premium of Ug. Shs. 15,000,000 is equal to Ug. Shs. 63,000,000 (Uganda Shillings sixty three million). According to **Exhibit PE2** which is a certified bank statement of Finance
- Trust Bank dated 27 15 th May 2021 for account number 200200015108 in the names of Nakato Harriet, the following is the summary of payments by the defendant on the plaintiff's account in Finance Trust.

On 13th June 2016, the defendant (David Lukanga) deposited Ug. Shs. 680,000 (Uganda shilling six hundred- eighty thousand), on 12th July 2016, the defendant 20 deposited Ug. Shs. 2,800,000 (Uganda shillings two million eight hundred thousand shillings), on 8th August 2016, the defendant deposited Ug. Shs. 2,520,000 (Uganda shillings two million five hundred twenty thousand), on 10th August 2016, the defendant deposited Ug. Shs. 1,000,000 (Uganda shillings one million), on 16th August 2016, the defendant deposited Ug. Shs. 250,000 (Uganda shillings two hundred fifty thousand), and on 19 25 th August 2016, the defendant deposited Ug. Shs. 2,500,000 (Uganda shillings two million five hundred thousand). The total sum is Ug. Shs. 9,750,000 (Uganda Shillings Nine Million Seven Hundred Fifty Thousand).

In addition, the defendant paid a total of Ug. Shs. 25, 500,000 through the Centenary bank account (Per exhibit PE4) as follows; on 27th November 2021 Ug. Shs. 2,000,000 (Ug. Shs. 2,000,000) on 13 30 th December 2021 Ug. Shs. 1,000,000 (Uganda

- Shillings one million), on 18 5 th November 2021 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 13th March 2021 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 19th February 2020 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 23rd November 2020 Ug. Shs. 5,000,000 (Uganda Shillings five million), on 3rd September 2018 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 31 10 st August 2018 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 28th August 2018 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 24 th August 2018 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 10th August 2018 Ug. Shs. 1,000,000 (Uganda Shillings one million), on 1st August 2018 Ug. Shs. 2,000,000 (Uganda Shillings two million), on 10th 15 July 2018 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on
- 10th July 2023 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 19th September 2022 Ug. Shs. 4,000,000 (Uganda shillings four million), on 20th June 2023 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 13th February 2022 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 7th December
- 2018 Ug. Shs. 1,000,000 (Uganda Shillings one million), on 5 20 th April 2023 Ug. Shs. 1,000,000 (Uganda Shillings one million). According to exhibit DE4, the plaintiff received Ug. Shs. 3,000,000 (Uganda Shillings three million) from the defendant. The above payments are also corroborated by exhibit DE3.
- According to exhibit PE3 the defendant equally deposited sums on the plaintiff's Centenary Bank account as follows; on 11th 25 July 2018 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 11th December 2018, Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 14th January 2019 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 24th June 2019 Ug. Shs. 1,000,000 (Uganda Shillings one million), on 16th June 2019 Ug. Shs. 5000,000 (Uganda Shillings five hundred thousand), on 13th 30 September 2019 Ug. Shs. 500,000 9Uganda Shillings

- 15 | P a g e

- five hundred thousand), on 30th 5 September 2019 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 27th January 2020 Ug. Shs. 500,000 (Ugand Shillings five hundred thousand), on 10th February 2020 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 19th February 2021 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand), on 13th March 2021 Ug. Shs. 500,000 (Uganda Shillings five hundred thousand) and on 19 10 th April 2021 Ug. Shs. 1,500,000 (Uganda Shillings one million five hundred thousand). This is a total of Ug. Shs. 7,500,000 (Uganda Shillings seven million five hundred thousand). This brings the

total payments to Ug. Shs. 42,750,000 (Uganda Shillings forty-two million seven hundred fifty thousand) against the required as at the end of 2023 which is Ug. Shs. 63,000,000 for premium and rent. The balance owed by the defendant to the plaintiff as at 31st 15

- December 2023 is Ug. Shs. 20,250,000 (Uganda Shillings twenty million two hundred fifty thousand).

According to paragraph 8 of the defendant's witness statement, he testified that after making the above mentioned payments, the bank released the plaintiff's certificate 20 of title and as agreed in covenant 6.1 of the lease agreements. During cross examination, the plaintiff confirmed that Finance Trust Bank Ltd had released her certificate of title and she deposited the same with Counsel for the defendant. After realizing that the title had been released by the Bank and handed over to the defendant's counsel, the lessee stopped depositing money in respect of the premium

25 agreed upon.

In paragraph 19 of her statement, the plaintiff testified that she placed a caveat on the land title following several defaults and non-payment of the premium and ground rent. According to paragraphs 9 and 11 of the defendant's witness statement, the defendant stated that despite releasing the title, the plaintiff placed a caveat on the

30 suit land. Dw1 further testified that following the above stated disagreements, the

- 5 plaintiff and the defendant entered into an understanding whereby the defendant paid Ug. Shs. 3,000,000 (Uganda shillings three million) in cash as ground rent and the plaintiff requested for an extra Ug. Shs. 5,000,000 (Uganda Shillings five million) as the balance for the premium.
- According to exhibit DE4, the plaintiff acknowledged receipt of Ug. Shs. 3,000,000 10 (Uganda shillings three million). It was also agreed that a balance of Ug. Shs. 5,000,000 (Uganda Shillings five million) on the premium was to be paid onto Account number 2520078151 in Centenary Bank in the names of Nababito Harriet Nakato. I have critically perused exhibit P.4 which is a Centenary Bank Demand Deposit Statement for account number 2520078151 registered in the names of
- Harriet Nakato Nababito (the plaintiff) for the period of 1st July 2021 to 29 15 th April 2023.

According to DE4, the defendant was supposed to pay the balance of the premium being Ugx 5,000,000 (Uganda shillings five million). According to DE4, deed of acknowledgement of payment dated 5th March 2018, it was agreed that the defendant

20 had to pay the premium balance on Harriet Nababiito Nakato Harriet's Centenary Bank Ltd account number 2520078151.

However, there is no stipulated time within which to pay the premium balance as per exhibit DE4 (deed of acknowledgement of payment dated 5th March 2018), I am not convinced on a balance of probabilities that the defendant fully paid off the premium

25 balance Ug. Shs. 5,000,000 (Uganda shillings five million). The plaintiff testified during cross examination that the defendant never paid full premium for the lead as had been agreed in exhibit DE4. This explains why the parties in exhibit DE4 agreed that upon payment of Ug. Shs. 5,000,000 (Uganda Shillings five million) the plaintiff would remove the caveat.

5 *Forgery*

In Paragraph 13 of her statement, the plaintiff testified that since the defendant started paying for the lease, she had never issued him with any receipts. Pw1/ plaintiff further stated that the defendant's exhibits DE10, DE11, DE12, DE13, DE14, DE15 and DE16 are forgeries. The plaintiff also testified that the signatures

- 10 indicated on the receipts are not her thumb print but merely the defendant's forgeries. In addition, the plaintiff testified that she has never authorized anyone to issue the said receipts and neither has the plaintiff received the said money. In paragraph 14 of her statement, the plaintiff further testified that the above mentioned receipts do not have any corresponding bank receipts to back them up.
- 15 During cross examination, the defendant testified that the receipts in DE10-DE16 do not bear the plaintiff's thumb print but that the same were signed by her. On the other hand, during re-examination, the defendant testified that he used to pay money to the plaintiff and she would issue receipts herself.

It was agreed by the parties in covenant 2.5 that, "the lessor has set her ground rent*

20 *as being Ug. Shs. 6,000,000 (Uganda shillings six million only) per annum payable annually. The lessor has allowed the lease to pay the said amount in installments on a monthly basis on A/c No. 200200015108 in Finance Trust Bank Limited.*

According to covenant 2.6 of PE1, the plaintiff and defendant agreed that, "The lessor shall always issue an acknowledgment whenever payment shall be made in terms*

25 *of ground rent. The rent may after (30) thirty years be revised as the parties may mutually agree provided that the increase or decrease for the same shall not exceed 10% of the running rent.*

This notwithstanding according to DE4, the mode of payment was varied by the course of dealing of the parties. **Section 66 of the Contracts Act**, stipulates that;

- 5 "Where any right, duty or liability would arise under agreement or contract, it may be varied by the express agreement or by course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract."*
- It should be noted that leases are both creatures of statute and contract, the 10 lessor and the lessee may agree to vary certain terms of the lease. This is done by way of Deed of Variation. The variation only affects the terms varied while the other terms of the lease are left intact. In this case exhibit DE4 cannot be termed at a Deed of variation. Much as the plaintiff never contested the receipt of Ug. Shs. 3,000,000 (Uganda shillings three million) as per DE4 which 15 according to the record of court does not seem to have been paid in the bank this does not amount to a Deed of Variation. A deed of Variation has to be express showing the terms that have been varied. Uganda Shillings 3,000,000 was for ground rent under exhibit DE4.
- According to exhibit DE4, the balance of the premium was to be paid on the 20 plaintiff's Centenary Bank Uganda Limited Account Number 2520078151 registered in the names of Nababiito Nakato Harriet and not A/c No. 200200015108 in Finance Trust Bank Limited as had originally agreed in covenant 2.2 of PE1. Secondly, as opposed to depositing the ground rent on the plaintiff's account in Finance Trust Bank as originally agreed in covenant 2.5 in PE1, the plaintiff agreed 25 to receive the same personally as per DE4. At that point, the course of dealing was altered by mode of course of dealing.

In the Court of Appeal decision of **Bisons Consult International Ltd versus Salini Construttori S. P. A** Court of Appeal Civil Appeal No. 77 of 2013, Hon Justice Stephen Musota (JA) stated as follows; "At common law, a contract can be 30 varied by oral agreement or by the parties' conduct, even where the contract itself

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5 contains a "no oral variation" clause. This position has been recently clarified and confirmed by Her Majesty's Court of Appeal in the case of **Globe Motors versus RW Lucas Varity Electric Steering Ltd** [2016] EWCA Civil 396, where Lord Justice Beatson held that;

"The general principle of the English law of contracts is that to which* 10 *I referred at (64) above. The parties have freedom to agree on whatever terms they choose to undertake and can do so in a document, by word of mouth, or by conduct. The consequence in this context is that in principle the fact that the parties' contract contains a clause such as Article 6.3 (No oral variation clause), does not prevent them from later* 15 *making a new contract varying the contract by an oral agreement or by conduct.*

Following the guidance of the Court of Appeal, it is clear that the channels of payment had changed and as such the plaintiff was justified to make the ground rent payments on the plaintiff's Centenary Bank Account.

- 20 Secondly, the plaintiff contended that the signatures of exhibits DE10- DE16 are forgeries. Forgery is criminal offence provided for under the Penal Code Act, Cap 128 (Revised Laws of Uganda, Cap 128). Despite being a criminal precedent, I am persuaded by the way the Hon. Justice Mubiru defined the term forgery in the case of **Uganda versus Obur Ronald & ors High Court Criminal Appeal No. 7 of**
- 25 **2019**. Forgery was defined as the creation of a false document or material alteration of a document.

According to **Section 2 of the Evidence Act, Cap 8**, "document" means any matter expressed or described upon any substance by means of letters, figures or marks, or

5 by more than one of those means, intended to be used, or which may be used for the purpose of recording the matter.

In the instant case, it is the plaintiff's contention that exhibits DE10- DE16 are forged documents since the same do not bear the plaintiff's thumb print and the same bear signatures unknown to the plaintiff. According to **Sections 60 and 61 of the**

- 10 **Evidence Act** the contents of a document may be proved by either primary evidence or by secondary evidence. Primary evidence is defined as the document itself produced for inspection by court while secondary evidence means certified copies from originals by mechanical processes which in themselves ensure accuracy, copies made from or compared with the original, counterparts of documents as against the
- 15 parties who did not execute them, and oral accounts of the contents of a document given by some person who has himself or herself seen it.

In forgery cases, the original document is the best evidence. In the instant case, the defendant produced the original receipts of exhibits D.10 to D.16 in court during scheduling which is why the same were exhibited and marked by this court.

- 20 **Section 43 of the Evidence Act** provides that when the court has to form an opinion upon a point of foreign law, or of science or art, or as to identify handwriting or finger impressions, the opinions upon that point of persons especially skilled in that foreign law, science or art or in question as to identify if handwriting or finger impressions, are relevant facts. Such persons are called experts.
- 25 In cases where court has to form an opinion as to the person who wrote or signed a document, according to **Section 45 of the Evidence Act**, court may consider the opinion of a person who is acquainted with the handwriting of the person by whom the document is to be written.

- 5 As earlier cited, he who alleges must prove, in the instant case, save for claiming that the said exhibits are forgeries, the plaintiff testified that in addition to signing she would also affix her thumb on the documents signed and this is evidence by exhibit PE1 which is the lease agreement. This amounts to sufficient evidence to prove forgery. Further, I have observed from the record of court that whereas the 10 plaintiff uses her thumb print she equally signs her documents. For instance, the plaintiff's signature on the lease agreement (PE1) and her witness statement are
- similar, In addition, her signature on exhibit DE4 is coupled with her thumb print. I have critically studied these exhibits. Unlike, the lease agreement (PE1), the deed of acknowledgement (DE4) and even the plaintiff's witness statement which bear both
- 15 the plaintiff's signature and thumb print, exhibits DE10- DE16 do not bear the plaintiff's thumb print. This fact was acknowledged by the defendant during cross examination.

Secondly, the signature on exhibit DE10 is different from the Plaintiff's purported signature on DE11, DE12, DE15 and DE16. In addition, the signatures on DE13 and 20 DE14 are also distinctly different.

In paragraph 13 of her statement, the defendant testified that she has never authorized anyone to issue receipts on her behalf. On the other hand, DW1 testified during cross examination that the plaintiff used to issue the receipts by herself, however, this is not corroborated by evidence from the defendant. He just attached 25 receipts which were rebutted by the plaintiff. The distinct difference in the signatures

in exhibits DE10 to DE16 is quite peculiar. The differences cast doubt in the fact that the plaintiff is the one who signed these receipts. Whereas the plaintiff never produced any expert witness to prove the forgery, it is trite that an expert witness's opinion is merely persuasive. In light of the above, I am not convinced that the 5 plaintiff authored or even issued the receipts exhibited as DE10- DE16 and as such the same are set aside and the same not be considered and therefore, not relied upon.

In summary, after entering into the understanding which gave rise to the deed of acknowledgment (DE4), according to exhibits DE3 (h), DE3(i), DE3 (j), DE3(l), DE3 (m), DE3(n), DE9 and DE3(k), in 2018, the defendant deposited a total of Ug.

- 10 Shs. 6,500,000 (six million five hundred thousand shillings) on the plaintiff's Centenary Bank Account. In 2020, according to DE3 (g), the defendant deposited a total Ug. Shs. 5,000,000 (Uganda shillings five million). In 2021, according to DE3(c), DE3(a), DE3(b), DE3(e) and DE3(f), the defendant deposited a total of Ug. Shs. 4,500,000 (Uganda shillings four million five hundred thousand). In 2022,
- 15 according to PE4 and DE7, the defendant deposited a total of Ug. Shs. 5,000,000 (Uganda shillings five million). In 2023, according to PE4 and DE6, the defendant deposited a total of Ug. Shs. 1,500,000 (Uganda shillings one million five hundred thousand).

According to DE4, the defendant paid Ug. Shs. 3,000,000 (Uganda shillings three million) to the plaintiff for a period of six months between 13th 20 June 2016 to December 2016 which means that ground rent in 2016 was fully paid.

According to the record of court, the defendant did not pay ground rent for the period of 2017 and 2019. According to DE4, the defendant never paid off the premium balance of Ug. Shs. 5,000,000 using exhibit DE4. The bank deposit slips are the ones

- 25 to point to any payments. In 2020, the defendant paid Ug. Shs. 5,000,000 in ground rent, leaving a balance of Ug. Shs. 1,000,000. In 2021, the defendant paid Ug. Shs. 4,500,000 in ground rent leaving a balance of Ug. Shs. 1,500,000 million. In 2022, the defendant paid ground rent of Ug. Shs. 5,000,000 leaving a balance of Ug. Shs. 1,000,000. In 2023, the defendant only paid a total of Ug. Shs. 1,500,000 on ground
- 30 rent leaving a balance of Ug. Shs. 4,500,000.

5 Therefore, the defendant owes the plaintiff ground rent arrears for 2017, 2019, a balance of Ug. Shs. 1,000,000 in 2020, another amount of Ug. Shs. 1,000,000 in 2022, and a balance of Ug. Shs. 4,500,000 for 2023. By applying simple arithmetic, the defendant owes the plaintiff Ug. Shs. 20,250,000 (Uganda shillings twenty million two hundred fifty thousand) in premium and ground rent as arrears. In 10 conclusion, I am convinced that the defendant breached covenant 2.5 of the lease agreement. According to section 102 (b) of the RTA it is provided as follows: -

"In every lease made under this Act there shall be implied in the lessor and his or her transferees the following powers; that in case the rent or any part of it is in arrears for the space of thirty days, although no legal 15 *or formal demand has been made for payment of that rent, or in case of any other breach or non- observance of any of the covenants expressed in the lease or by way declared to be implied in the lease or his or her transferees, and the breach or non-observance continuing for the space of thirty days, the lessor or his or her transferees may re-enter upon* 20 *and take possession of the leases property".*

In this case it has been proved that the defendant has rent arears under the lease for the period of 2017, 2019, 2020, 2022 and 2023. That being the case the plaintiff is entitled to re- entry under the Registration of Titles Act (RTA).

Issue No.2: What remedies are available to the parties?

25 The plaintiff sought an order of forfeiture of the lease, vacant possession of the property, return of the plaintiff's certificate of title, general damages and costs.

Order of forfeiture

The plaintiff herein inter alia sought vacant possession as against the defendant following an order of forfeiture. On the other hand, it is the defendant's prayer for a 30 grant of relief against the prayer of forfeiture because the plaintiff instituted this suit

which put a financial toll on the defendant to incur legal and other incidental costs

5 in defending this case. Counsel also submitted that during cross examination, the plaintiff admitted the fact that she was collecting rent from two other tenants on the suit land which was already leased to the defendant.

Section 25 of the Judicature Act Cap 16 provides for an action for relief against forfeiture. It reads:

- 10 "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."
- 15 According to PE5, the suit land is registered in the names of the plaintiff vide instrument number KLA 145334. According to covenant 6.1 of the lease agreement (PE1), it was agreed that upon the completion of the payment of the loan outstanding with Finance Trust Bank Limited by the lessee, the lessor was to hand over the certificate of title and all the requisite documentation to enable the lessee to be 20 entered on the certificate of title. During cross examination, the plaintiff testified that
- she handed over the certificate of title to Counsel for the defendant

In the instant case, whereas the defendant has defaulted on some of the ground rent payments, the former has made some substantial payments towards the payment of ground rent as portrayed in the resolution of issue 1. Secondly, during cross 25 examination, the defendant testified that he is in occupation of the suit land and he further deposed during cross examination that he is willing to balance his books with the plaintiff and pay up the outstanding balance of the ground rent.

In the case of **Francis Butagira vs Deborah Namukasa (1992) KALR 767** (Supreme Court), Odoki JSC (as he then was) held that;

5 "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 Volume 23 Halsbury's Laws of England, 3rd Edn, para 1409, page 681. The* 10 *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.'

15 It is trite the grant of an order of re-entry is made at the discretion of court. The issues are often guided by the length of for nonpayment of rent.

In **Francis Butagira versus Deborah Namukasa** (supra), the Court upheld the principle in **Gill vs. Lewis (1956) 1 All ER 844** where it was held that the fact that tenants had been bad payers in the past or elusive when attempts were made to serve

20 them was irrelevant when exercising the discretion to grant relief against forfeiture for non-payment of rent. The Court did, however, recognize a long period of nonpayment 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

25 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 30 *case must be put forward in order to obtain relief against forfeiture."*

- In the instant case, the defendant has been in occupation of the suit land since 13th 5 June 2016. As earlier stated, during the past 8 years of the existence of this lease, the defendant had partially paid the premium but has also not made an effort to pay the ground rent of 2017 and 2019. He still has arrears of 2020 and 2022. Even for the year 2023 ground rent is still being owed to the plaintiff. During his oral testimony 10 in court, the defendant stated that he was committed towards the payment of the
- ground rent arrears however, he did not give court any indication in terms of timelines as to when he would pay the rent he owed to the plaintiff. The defendant has failed to prove a strong case to warrant the grant of relief against forfeiture.

Therefore, I do grant an order of forfeiture against the defendant.

15 *General damages*

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."

20 **Section 60 (1) of the Contract Act (revised Laws of Uganda, 2023)**, states that where there is 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.

As cited by counsel for the plaintiff, according to **Section 60 (4)**, in estimating loss or damage arising from breach of contract, the means of remedying the inconvenience caused by non-performance shall be taken into account.

In the case of **Luzinda v. Ssekamatte & 3 Ors (Civil suit -2017/366 [2020] UGHCCD 20 (13 March 2020)**, *this court held that as far as damages are*

- 5 *concerned, it is trite law that general damages be awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued because of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages, losses or injuries suffered as a result of the defendant's actions*.
- 10 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 compensation.

Costs

Section 27(2) of the Civil Procedure Act Cap 71 provides that the effect that costs shall be in the discretion of the court and shall follow the event unless for good reasons court directs otherwise. It is trite that cost "shall follow the event"; which means that the successful party, in absence of any order of court to the contrary, shall necessarily be entitled to costs.

In the case of **Francis Butagira vs Deborah Namukasa** (supra), it was held that the 20 '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 25 *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."*

5 In the instant case, since the court has found that the defendant partially breached its covenant of paying ground rent, and had the same not happened, the plaintiff would never have had a reason to litigate this matter, I find that with good cause the plaintiff is entitled to costs.

In the result, the plaintiff's suit succeeds with the following orders: -

- 10 1. An order forfeiture is issued against the defendant as a lessee on land comprised in Kyadondo Block 207 Plot 1020 at Kanyanya in Kampala District.
- 2. The defendant should give the plaintiff vacant possession of the suit land within a period of 90 days (Ninety) from the date of this judgment.
- 15 3. The defendant is hereby ordered to pay a sum of Ug. Shs. 20,250,000 (Uganda Shillings twenty million two hundred fifty thousand) within six months from the date of this judgment.
- 4. The defendant is hereby ordered to pay the sum in prayer (3) on the plaintiff's centenary account.
- 20 5. General damages are awarded to the plaintiff in the sum of Ug. Shs. 10,000,000 (Uganda Shillings ten million).
- 6. Costs are awarded to the plaintiff.

I so order.

Judgment delivered at High Court, Land Division via ECCMIS this 24th day 25 September, 2024.

IMMACULATE BUSINGYE BYARUHANGA JUDGE 24th September 2024

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Prepared on 14 October 2026 · Esheria