

UGANDA / JUDGMENT

Nalubega v DL Properties Ltd and Lubega (Civil Suit 294 of 2021) [2023] UGHCCD 426 (15 December 2023) [2023] UGHCCD 426

COURT

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

Civil Suit 294 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 294 OF 2021

NALUBEGA RUTH: PLAINIFF Trading as
Nyonyi Traders

VERSUS

- 1. DL PROPERTIES LTD : DEFENDANTS
- 2. FRANCIS DRAKE LUBEGA

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff filed this suit against the defendant jointly and severally (seeking) for:

- a) An order that the defendants are liable for actions and omissions of that employees and their agents.
- b) An order for compensation for the plaintiffs converted goods amounting to Ug. Shs 271,400,000.

- c) Special damages, general damages, inconvenience suffered by the plaintiff exemplary damage, interests and costs of the suit.

The plaintiff alleges that was renting at the defendant building situate at Farmers Centre in Container Village store number No FCE 06 in Kampala. After the 1 st covid-19 lockdown in September 2020, the plaintiff alleges to have paid the defendant rent for the store from the month of April, May, June, July, August, September thus totaling to 2,280,000/=.

The plaintiff contended that before the month of September, 2020 was over, when the plaintiff was not in arrears, to the dismay of the plaintiff, the defendants through their employees/agents broke the padlocks off the plaintiffs store and stole/converted all the plaintiffs merchandise and reallocated the plaintiff's store to another person.

The defendants in their defence contended that since March 2020 when the 1 st lockdown was announced the plaintiff's store FC06 remained locked and the defendants failed to establish contact with the plaintiff. The defendants directed that the store be issued to another tenant as the plaintiff could not be found.

That the defendants' employees opened the plaintiff's store in the presence of the Area Local Council Officials and all that was found was recorded and taken for storage. The plaintiff's son appeared and complained about the opening of the store and was advised to take it up with the management.

The plaintiff after the store was opened hurriedly paid her outstanding rental arrears and started alleging that her store was erroneously opened and goods removed. Following the complaint at police the goods were removed from storage and the plaintiff was advised to pick the goods removed which she neglected or refused to do and started complaining that the goods were stolen. The goods remained at police and the plaintiff todate refused to collect the same.

The defendants contended that the plaintiff only paid rent arrears after the premises had been opened and her property taken for storage after the plaintiff's failure to pay her rent from March 2020 to September 2020 and her failure to notify the defendants of her interest in the store for a long period.

The parties filed a joint scheduling memorandum.

Agreed facts

That it is true that Nalubega Ruth (The plaintiff) was a tenant to the defendant (Drake Francis Lubega)

Agreed Issues

- *1. Whether the defendants are liable for conversion of the plaintiff's goods?*
- *2. What are the remedies available?*

The plaintiff was represented by *Counsel Patrick Kasumba* while the defendants were represented by *Counsel Adam Kirumira*

Determination of the Issues

Whether the defendants are liable for conversion of the plaintiff's goods?

The plaintiff counsel submitted that the plaintiff led evidence to prove that her property was taken from her store at Farmers Centre Container Village and converted by the defendants and the items were taken to the defendants stores. The plaintiff at the time of the removal of the property from the stores was not in rental arrears since she had paid up to September.

The plaintiff in her evidence stated that after the easing of the lockdown she had items to be exported to Burundi and had purchased and stocked them for that purpose. The plaintiff further stated that the records of the store book was inside the store and it was taken in the process.

The plaintiff in her testimony stated that the following items were taken; 30m/s Vegimax and 100pms of Eureka from Agriscope (Africa) Ltd, Chemicals from Basiima Agro Chemicals, goods from General and Allied Ltd. The plaintiff listed other goods in stock which was allegedly taken.

Basing on the statement on the plaintiff and his witness, the defendant broke and took the item of the plaintiff without her consent and alleged to have done the process in the presence of the area LC chairperson of which he denied not to have taken part in the process and other witnesses said that the defendant took the items of the plaintiff in his stock of which the few exhibit were brought at the police.

The plaintiff's counsel vehemently relied on the case of Drake Lubega vs Lubega Roberts and five others 49/2/2019 a similar arose and court of appeal judgement was given on 15th /02/2023. Upheld the High Court findings that the closure of the business premises and taking away of the respondents' goods were unlawful and amounted conversion.

The defendants' counsel submitted that the plaintiff was in rental arrears for 6 months and that her goods were removed from the store by way of eviction and not theft on 8/09/2020 and yet her receipt is dated 9/09/2020 to show that she was in rental arrears.

The defendant contended that they were justified to remove her goods on 8/09/2020 and allocating it to another tenant at the time the landlord tenancy relationship had ceased owing to the plaintiff's default and lack of justification for the said default. The defendant was evicting a trespasser on the defendants' premises and they acted reasonably by clearly marking, packaging and storing whatever was found on the premises so that the said items could easily be identified.

The defendants' counsel further submitted that their agents did not convert or detain any of the plaintiff's goods as at all material times all witnesses testified that the defendant was willing to return the plaintiff's goods but she refused to take them back.

Analysis

The plaintiff's claim against the defendants' is jointly and severally for conversion, trover and detinue of goods worth 271,400,000/= and inconveniences suffered by the plaintiff.

Detinue consists in wrongful withholding of the plaintiff's goods. It does not matter whether the person or the wrong doer, that is detainee of the goods obtained possession of the detained goods lawfully or illegally or by seizure. What is relevant is the wrongful retention of the chattel after demand. It is therefore material that, to sustain an action in detinue, there must be demand by the plaintiff and on receipt of this notice the persistence in keeping the chattel by the defendant would give rise in detinue.

The essence of detinue is that the defendant holds on to the property belonging to the plaintiff and fails to deliver the property to the plaintiff when a demand is made. The goods must be in the custody of the defendant at the time the demand for them is made before an action in detinue can succeed. The cause of action in detinue is the refusal of the defendant to return the goods to the plaintiff after the plaintiff have made a demand for them. A claim for detinue would fail if at the time the plaintiff made a demand the goods were not in the defendant's actual possession. In such a case, the plaintiff might have a cause of action in conversion but definitely not detinue. The plaintiff can still sue in detinue and succeed if he is able to show by credible evidence that the defendant wrongfully or improperly parted with possession of the goods before the plaintiff made a demand for them. *See *Enterprise Bank Ltd v Aroso* (2004) 3 NWLR (pt 1394) 257 (SC)*

The plaintiff demanded for the goods taken to the store of the defendant after he reported a case of theft at police and the same was brought to police and it transpired that the same was not stolen but rather taken out of the premises/store of the plaintiff. The plaintiff claimed that he has duly paid his rent until September and thus there was no rent due from him for the said six-month period.

The evidence on court record clearly shows the plaintiff was in rent arrears for a period of six months as per PExh 4. The plaintiff paid for the months of April to September 2020 and it was after the goods had been removed from the store on 8th September 2020. The argument of the plaintiff's counsel that the plaintiff was not in rent arrears is false and baseless. Default in payment of rent converts a periodic tenancy into a tenancy at will. Similarly, a tenancy at will may be converted by the payment and acceptance of rent on a regular basis.

A tenancy at will generally conveys a mutual wish or intention on the part of the tenant and the landlord in the occupation of the estate. A tenancy at will is built into the mutual understanding that both the tenant and the landlord can terminate the tenancy when any of them likes or at the time convenient to any of them. In a tenancy at will, the tenant is a tenant at will because the landlord can send him packing at any time the landlord pleases. From the moment the plaintiff's rent became due and payable by the tenant but remained unpaid, the original tenancy created by the conduct of the parties thereto came to an end by effluxion of time and the tenant thereupon became a tenant at will to the landlord by continuing or remaining in possession of the property. In other words, the tenant at that stage is said to be holding over the property and in that

capacity, became a tenant at will. *See *Odutola v Papersack (Nig) Ltd* [2006] 18 NWLR (pt 1012) 470*; **Tumushabe and anor v Anglo-African Ltd & Anor* SCCA NO. 7 of 1999*

The plaintiff's conduct of failing to pay rent for a period of six months in equity entitled the 2nd defendant to take possession and or cause the removal of the plaintiff's goods or belongings from the premises. It is bad practice for the defaulting tenants to lock premises and expect the landlord to continue looking for them to unlock or remove the property which sometimes is valueless and only intended to inconvenience the landlord.

Any landlord whose premises have been permanently locked by an absconding tenant who has not paid rent for such unreasonable time is at liberty to break into the premises and mitigate on the continued loss being occasioned to them. Such defaulting/absconding tenant who acts unreasonably by locking premises without paying rent or keeping his/her side of the bargain should not be assisted by court in other claims of detinue, trover or conversion which may actually be frivolous and vexatious.

This challenge has been partly addressed through the *Landlord and Tenant Act of 2022* section 29 which provides for failure to pay rent by a tenant and rent arrears;

- *(1)Where a tenant defaults in paying rent and is in arrears, the landlord may apply to a court of competent jurisdiction to recover rent owed.*
- (2)*Where the default in subsection 1 continues for a period of more than 30 days, the landlord shall re-enter the premises and take possession in the presence of an area local council official and police.*

The above provisions do not envisage all possible situations which may include an absconding tenant who disappears and locks the premises permanently. *See section 39 of the Landlord and Tenant Act-Termination by Abandonment*.

The plaintiff in this case reported a case of breaking & theft at Nakivubo Police Post vide SD/ REF/18/07/10/2020. The 1st defendant's manager or staff brought the property that had allegedly been removed to police at per exhibit PExh 6. The defendants pleaded in their defence that the property found in FC06 was taken on a pickup as per the photographs attached to the defence. The plaintiff's in reply to the defence had pleaded that the photographs were a forgery which in her evidence failed to show or prove the alleged forgery.

An act of conversion is wrongful interference with the claimant's chattel in a manner that is inconsistent with the claimant's superior possessory title in the chattel. Conversion deals with unlawful disposal of the goods as opposed to detinue which deals with unlawful detention while trespass to goods is concerned with unlawful taking, all these are concerned with interference with goods. Liability of conversion is strict and the defendant's state of mind is critical in determining whether his act would amount to an act of conversion in law.

More specifically, an act of conversion must comprise a course of dealing which affects the claimant's possessory interests, and such conduct is accompanied by the intention to assert an interest that is inconsistent with those of the claimant's. Further, the defendant's conduct must be accompanied intention to assert an entitlement that is superior to that of the

claimant. *See Tat Seng Machine Movers Pte Ltd v Orix Leasing Singapore Ltd [2009] 4 SLR (R) 1101 AT [57]*

Therefore, the mere taking or removal of the chattel will, not on its own, constitute an act of conversion unless it is proved the taker had the intention to assert a possessory title that is superior to that of the claimant. In the present defendant removed the plaintiff's goods with no intention of permanently taking them over rather for the purpose of creating space for another potential tenant to take over the store. The plaintiff's alleged theft was baseless and the said goods were presented to police as exhibits and the plaintiff for her personal reasons refused to take the goods contending that it was not enough.

The plaintiff knew that the goods had been taken out of the store since her son Samula Ronald who was in charge of the store during cross examination stated he did not know what was in the store and yet he was exclusively in charge of the store. PW3 stated he saw the 1st defendant's agents breaking into the store and asked them why they were removing the goods and yet they had paid rent. It is clear the plaintiff's evidence was rehearsed and choreographed to fit in the intended case. The rent was paid on 9/09/2020 and the goods were removed on 8/09/2020 which means at the time of removal the rent was due for the period April to September.

The plaintiff's evidence is highly suspicious since the original statement made at police is missing on record as stated by PW2 who confirmed that the statement on police record was changed and the present police statement was recorded 10th January 2021. The credibility of the plaintiff's evidence in totality was questionable and was specifically crafted to suit the claim and in cross examination it became clear that the witnesses were untruthful to the extent of denying the obvious facts like whether the rent was due or not.

The plaintiff's evidence of PW2 was truthful and further stated that the plaintiff was requested to take her goods recovered brought to police and she refused to take the goods. The plaintiff's documentary evidence is suspicious to the extent that it appears to have been generated for the purposes of the suit. The plaintiff further claimed that the goods belonged to a person called Muzaire whose actual names are not known and the does not give any particulars. The evidence given at the police statement is contradictory in respect of the what she alleges to have been taken or converted from the store especially its value. The receipts adduced in court could be proof of purchase but not necessarily proof of availability of the stock or goods in the store given the timeframe between purchase in April until September 2020. The argument of the goods being in the store since April is untenable since the lockdown had been lifted by June 2020.

It is a basic principle of the law of evidence that a party who bears the burden of proof is to produce the required evidence of facts in issue that has the quality of credibility short of which his claim may fail. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more probable than its non-existence. The nature of the plaintiff's evidence in proof of her claim of conversion is highly questionable and in totality would not be believable against the other version of evidence.

It is true that witnesses are weighed but not counted and that a whole host of witnesses are not needed to prove a particular point. It is trite law that in establishing the standard of proof required in a civil or criminal trial, it is not the quantity of witnesses that a party upon whom the burden rests calls to testify that is important, but the quality of the witness called. The plaintiff's quality of evidence is so hollow and incredible to prove a case of conversion or detinue as presented in court.

The credibility of the plaintiff's evidence or witnesses was questionable as showed herein when the same it is tested as to its consistency with the probabilities that surround the currently existing conditions. In short, the plaintiff's story is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in those conditions. The plaintiff had another shop where she was doing her sales and it is not probable that the goods in the store always remained in the same store forever and the same could have been sold prior since the lockdown had since ended in June 2020 and nature of business was allowed to operate during lockdown. The absence of the records for the store was not satisfactorily explained and the mere allegation that it was taken from the store and thus no records makes the allegations suspicious. It is inconceivable that a records book is kept in the same store where the receipts for the purchase are kept or somewhere else outside the store. The dates on the receipts are so inconsistent with conditions prevailing at the time since it was a lockdown and the plaintiff's evidence was that she was never at her shop during this period.

The plaintiff's counsel tried to rely on the case of Drake Lubega vs Lubega and 5 Others CACA 49/2019 as being on all fours with this case. I respectfully disagree with this submission and the case is quite distinguishable on the facts since it related to closure of the shop by the landlord. The plaintiff in this case as found earlier was in rent arrears and was requested to collect her goods which she refused purposely to take from police. There was never any conversion in this case and the same is still held at police where it was deposited. The circumstances of the case occurred/happened at the time when it was not a requirement of the law to have a court order before a landlord could cause an eviction of a defaulting or absconding tenant.

The court should not allow a practice by any plaintiff to merely allege the bare bones of the elements of the tort of conversion or detinue against any landlord who takes away goods abandoned in premises without explaining why the premises were abandoned for such duration of time without paying rent. The landlord acted with reasonableness by removing the plaintiff's goods which had been abandoned in the store for such period of time. The defendant discharged his burden that the goods were never converted but rather removed and transferred to another

store and later taken to police upon a complaint or report of theft or breaking.

The plaintiff was entitled to right to immediate possession or recovery of the goods which is alleged to have been wrongfully dispossessed or taken from the store. The plaintiff refused and failed to exercise this legal interest and left the property at police with a view of claiming the same from court which was quite absurd. It was the plaintiff's complaint at police which resulted in the goods being taken to police, it is not clear why she opted to refuse to take the same from police.

The plaintiff has failed to prove her claims of conversion, trover and detinue and the same is dismissed with no order as to costs

I so order

SSEKAANA MUSA JUDGE 15 th December 2023

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