THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 28 OF 2011

KABANDIZE AND 20 OTHERS……..APPELLANTS

VERSUS

KAMPALA CAPITAL CITY AUTHORITY……... RESPONDENT

CORAM: HON. JUSTICE A. S NSHIMYE, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON.LADY JUSTICE PROF LILLIAN E.TIBATEMWA, JA

(Appeal against the Judgment of Hon. Justice V.F Musoke Kibuuka in High Court Civil Suit No. 1128 of 1998 delivered on 13th January 2011.)

JUDGMENT OF THE COURT

This appeal is against the Judgment of Hon. Mr. Justice V.F Musoke Kibuuka J of the High Court of Uganda delivered on 13th January 2011.

The suit at the High Court and this appeal had both been brought against the Kampala City Council (KCC). At the time this appeal came up for hearing Kampala City Council was no longer in existence. The respondent applied and was granted leave by this Court to substitute the respondent (KCC) with Kampala Capital City Authority (KCCA).

The respondent in this appeal therefore is Kampala Capital City Authority (KCCA).

The brief facts that appear to be undisputed giving raise to this appeal are as follows;-

All the appellants were employed by the respondent for periods ranging from 6 to 36 years on permanent terms. On 1st April 1997, the respondent terminated the employment of all the appellants and paid them a specific package amount specified in their termination letters.

The appellants were not satisfied with the payments received and claimed the amounts paid were less than that they were entitled to under their terms and conditions of service. They brought a suit at the High Court to recover their claim. At the High Court the suit proceeded well and both parties called evidence and closed their respective cases.

However, subsequent to the closure of the hearing and while the delivery of the Judgment was pending, upon an application by the appellants Court re-opened the hearing of the suit and allowed the appellants to adduce evidence in order prove service of a statutory notice of intention to sue upon the respondent as required by Section 2(1) (b) of the Civil Procedure and Limitations(Miscellaneous Provisions Act Cap 72).

Subsequently the learned Judge delivered his Judgment on 13th January, 2011 and dismissed the suit. He held that the suit was incompetent, as the appellants had failed to prove that they had served the respondent with a statutory notice of intention to sue as required by the above law. The learned Judge however, having dismissed the suit did not make any findings as to the remedies sought by the appellants even though evidence had been adduced by both parties.

The appellants being dissatisfied with the decision of learned Judge appealed to this Court.

At the hearing of this appeal Mr. Joash Sendege appeared for the respondent while Mr. Luswata appeared for the appellants.

We noted at the commencement of this appeal that on 24th of September 2012 when this appeal came up for hearing the following order had been made;-

> ***"In view of what has transpired based on the submissions of both counsel it is necessary for the Attorney General to appear in the proceedings as a friend of the Court. The presence of the Attorney General is necessary to assist this Court determine whether failure to serve the statutory notice of intention to sue renders a suit incompetent. The Attorney General should be served with all the necessary documents and proceedings to enable him prepare for the case."***

Mr. Luswata informed Court that he had complied with the above order and had duly served the Attorney General with both the proceedings and the hearing notice. The Attorney General had accepted service. An affidavit of service is on record and was seen by the Court. That being the case, Court allowed the appeal to proceed in the absence of the Honourable The Attorney General.

The Memorandum of Appeal sets out only one ground of appeal and two alternative grounds as follows;-

1. ***The learned trial Judge erred in law and fact when he held that the appellants had not proved that statutory notice was served upon the Respondent.***

<u>Alternative to Ground 1:</u>

1. ***The learned trial Judge erred in law when he held that a suit filed without serving statutory notice was incompetent.***

2. ***The learned trial Judge erred in law when he failed to grant to the appellants remedies prayed for in the plaint and submissions.***

Mr. Luswata submitted that a statutory notice of intention to sue which was exhibited had been duly served upon the City Advocate. He submitted that service on the City Advocate was effective service upon the Town Clerk as the City Advocate was an agent of the Town Clerk. He relied on the authority of this Court in ***Crested Crane Tours and Travel Ltd versus Kampala City Council, Court of Appeal Civil Appeal No. 16 of 2004 (Unreported).***

This fact was conceded by Mr. Joash Sendege, so we shall not dwell on it. We agree with Mr. Luswata that the learned trial Judge erred when he held that service upon the City Advocate was not effective service upon the Town Clerk.

We also hold that the appellants did not depart from their pleadings when they pleaded that they had effected service upon the Town Clerk but adduced evidence to show that they had in fact served the City Advocate. We hold so because in the case of ***Crested Crane Tours vs Kampala City Council (Supra)*** this Court held that the City Advocate is an agent of the Town Clerk, therefore service upon the City Advocate is in fact service upon the Town Clerk. The learned Judge therefore erred when he held that the appellants had departed from their pleadings when they adduced evidence to show that service of the statutory notice of intention to sue had been effected upon the City Advocate and not the Town Clerk as pleaded.

However, we agree with the learned trial Judge and Mr. Sendege that the appellants failed to prove on a balance of probabilities that they effected service upon the City Advocates, as claimed.

The evidence adduced by the appellants was contradictory. For example it was first claimed that services had been effected upon a man in the City Advocate's office but the appellants went ahead to adduce evidence to prove that in fact service was effected upon a woman. They blamed this on lapse of time. They failed to retain proof of service. They failed to ascertain the name of the person served and or his or her designation. They then sought to prove service by oral evidence. The Judge who saw the witnesses and heard them testify did not believe them. We have no reason to fault his findings on this issue. We accordingly uphold it. We agree with learned Judge that the appellants failed to prove service of the statutory notice of intention to sue upon the respondents.

The first ground of appeal therefore fails.

The other two grounds of appeal are in the alternative to ground one.

The 1st alternative ground is that;-

> ***The learned trial Judge erred in law when he held that a suit filed without serving a statutory notice was incompetent.***

In this regard Mr. Luswata submitted that ***Section 2*** of the **Civil Procedure and Limitations (Miscellaneous Provisions) Act** is no longer good law in view of the decisions of this Court in ***Dr. James Rwanyarare versus Attorney General (2003) 2 EA 664 and Attorney General versus Osotraco Ltd, Court of Appeal Civil Appeal No. 32 of 2002,*** in which it was held that unjustified

discrimination between the State and the person is no longer justifiable under the 1995 Constitution of Uganda.

Mr. Luswata submitted further that the **Civil Procedure and Limitations (Miscellaneous Provisions) Act Cap 72** must be read in conformity with Article 274 of the Constitution to give equality to all persons before the law.

This issue was not pleaded by the appellant, but since it is a question of law we shall resolve it even if it was first raised on appeal.

However, we note that it was raised in the appellant's written submissions, but the respondent did not reply to it at all neither did the Judge consider it in his Judgment. We think it was an important issue which ought to have been given due attention.

Mr. Luswata cited the decision of the Constitutional Court in ***Rwanyarare and others versus Attorney General (2003) 2 EA 664,*** in support of his argument that failure to serve a statutory notice of intention to sue is no longer a mandatory requirement as it gives undue advantage to the state whereas the Constitution provides that all persons are equal before the law.

In ***Rwanyarare case (Supra***) the issue before the Court was whether **Section 15 (2)** of the **Government Proceedings Act (Cap 69)** was still good law in so far as it prohibited Court from granting any injunctive relief against Government or officers of Government.

In that petition, the Constitutional Court observed and held as follows;-

> ***"In our view, the 1995 Constitution has ushered in the administration of justice a fundamental change. Article 126(1)***

provides: "Judicial power is derived from the people and shall be exercised by the courts established under this Constitution in the name of the people and in conformity with law and with the values, norms and aspirations of the people". This, in our view, is an important innovation in our administration of justice because the emphasis now is on the people. Judicial power is now derived from the sovereign people of Uganda and is to be administered in their names. This provision had never been contained in any previous Constitutions of this country. This must have been for a purpose. The purpose is to break away from the past colonial practice. Like that of many other former British dependencies, the previous Uganda Constitutions were drafted against the background of English historical practice. Judicial authority was created in those Constitutions as institutions performing functions similar to those performed by the courts in England and local colonial courts. Courts in England were and still exercise their judicial powers in the name of the Crown. That explains the rationale behind section 15 (2) of the Government Proceedings Act. The Crown cannot issue an injunction against itself. See Jaundoo v Attorney-General of Guyana (1971) AC 972.

That argument cannot hold under the present Constitution when judicial power is derived from the people and is exercised by courts in the name of people. There is no sound reason under the Constitution why government should be given preferential treatment at the expense of an ordinary citizen. That provision of the Government Proceedings Act is an existing law, which under article

273(1) should be construed with such modifications, adaptations as may be necessary to bring it into conformity with Constitution.

In the Canadian case of <u>Levesque v Attorney General of Canada et al (1985) 25DLR 184,</u> a serving prisoner claimed and sought to enforce a right to vote. It was held that he had such a right, and the question arose whether an order of <u>mandamus</u> would issue enforce it. Rouleau J held (at 191-192):

"If the Canadian Charter of Rights and Freedoms, which is part of the Constitution of Canada, is the supreme law of the country, it applies to everyone, including the Crown or a Minister acting in his capacity as a representative of the Crown. Accordingly, a fortiori the Crown or one of its representative cannot take refuge in any kind of declinatory exception or rule of immunity derived from the common law so as to avoid giving effect to the Chatter"

The Crown was held to be subject to the provisions of the Charter in the same way as any other individual.

In the Indian case of <u>Rao and Company v State of AP (1994) AIR SC 2663 RM Sahai</u> J (in paragraph 24 of his Judgment) said:

> ***"No legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent act of officers of the State without any remedy. The modern social thinking of progressive societies and the judicial approach is to do away***

with archaic State protection and place the State of the Government at par with any other juristic legal entity"

We are in agreement with the above decision.

Mr. Luswata also cited to the case of ***Osotraco Ltd vs Attorney General (2003) 2 E A 254.*** The case he cited is a High Court decision however, the matter came to this Court on appeal and the Judgment of the High Court was upheld by this Court in ***Civil Appeal No. 32 of 2002.*** He asked this Court to follow the reasoning and the conclusions in the case.

The ***Section 2*** of **Civil Procedure and Limitations (Miscellaneous Provisions) Act Cap 72** stipulates as follows;-

2) Notice prior to suing.

(1) ***After the coming into force of this Act, notwithstanding the provisions of any other written law, no suit shall lie or be instituted against-***

a) the Government
b) a local authority or;
c) a scheduled corporation,

until the expiration of forty-five days after written notice has been delivered to or left at the office of the person specified in the Fist Schedule to this Act, stating the name, description and place of residence of the intending plaintiff, the name of the Court in which it is intended the suit be instituted, the facts constituting the cause of action and when it arose, the relief that will be claimed and, so far as the circumstances admit, the value of the subject matter of the intended suit.

2) The written notice required by this section shall be in the form set out in the Second Schedule to this Act, and every plaint subsequently filed shall contain a statement that such notice has been delivered or left in accordance with the provisions of this section"

This law was enacted in 1969. It therefore falls under the category of all laws that must be construed in conformity with the 1995 Constitution under Article 274.

That Article states as follows;-

"Existing law.

274 (1) Subject to the provisions of this article, the operation of the existing law after the coming into force of this Constitution shall not be effected by the coming into force of this Constitution but the existing law shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring into conformity with this Constitution.

(2) For the purposes of this article, the expression "existing law" means the written and un written law of Uganda or any part of it as existed immediately before the coming into force of this Constitution, including any Act of Parliament or Statute or statutory instrument enacted or made before that date which is to come into force on or after the date"

While construing ***Section 2*** of **The Civil Procedure and Limitations (Miscellaneous Provisions Act)** already set out above, Courts of law must therefore take into account the provisions of Articles 274 and Article 20 of the Constitution of Uganda.

Article 20(1) of the Constitution provides as follows;-

"All persons are equal before and under the law in all spheres of political, economic, social and culture life and in every other respect and shall enjoy equal protection of the law."

This article in our view requires that parties appearing before Courts of law must be treated equally and must enjoy equal protection of the law.

The reading of Article 20(1) above and Article 274 of the Constitution together would require ***Section 2*** in ***CAP 72*** to be construed with such modifications, adaptations, qualifications and exceptions as is necessary to bring it into conformity with the Constitution.

Section 2 above is a law that gives preferential treatment to one party to a suit by requiring the other party to first serve it with a 45 days mandatory notice of intention to sue. The section is also discriminatory in that it requires one party to issue statutory notice to the other without a reciprocal requirement on the other. None compliance renders a suit subsequently filed by one party incompetent.

Government and all scheduled corporations are under no obligation to serve statutory notice of intention to sue to intended defendants. On the other hand ordinary litigants are required to first issue and serve a 45 days mandatory notice upon Government and scheduled corporations.

We find that in view of Article 20(1) of the Constitution a law cannot impose a condition on one party to the suit and exempt the other from the same condition and still be in conformity with Article 20(1) of the Constitution.

It was submitted by Mr. Sendege that Government requires more time to inquire into the facts set out in the notice of intention to sue than is required by ordinary citizens.

We do not agree that Government and scheduled corporations require more time to ascertain facts arising from a notice to sue than ordinary citizens. It is Government that has all the machinery, the personnel and the financial means required to prepare and file a defence in time, ordinary citizens do not all have such means.

Be that as it may, the Constitution must be complied with by according parties to an intended suit equal treatment and protection of the law.

We find that ***Section 2*** referred to above is not a law that treats all persons equally before the law neither does it accord them equal protection.

We accordingly find and hold that the requirement to serve a statutory notice of intention to sue against the Government, a local authority or a scheduled corporation is no longer a mandatory requirement in view of Articles 274 and 20(1) of the Constitution.

We also find and hold therefore that non compliance with that impugned ***Section 2*** does not render a suit subsequently filed incompetent.

Having relied on Judgments in the cases of ***Osotraco (Supra)*** both at the High Court, this Court and the Constitutional Court, decision in the ***Rwanyarare case (Supra),*** we have not found it necessary to give our own detailed reasoning and jurisprudence on this particular issue since that is already set out in the authorities cited with which we entirely agree.

This alternative ground of appeal therefore succeeds.

The second alternative ground of appeal is that:-

The learned trial Judge erred in law when he failed to grant to the appellants the remedies prayed for in the plaint and submissions.

A full trial had been conducted at the High Court and to prove their claim, the appellants called 22 witnesses who testified in Court and were cross examined.

The respondent called only one witness and closed its defence. The learned trial Judge then allowed both counsel to file written submissions and adjourned the matter for Judgment. Before Judgment could be delivered, the suit was re-opened at the instance of the appellants in order to adduce evidence in respect of the issue of service of statutory notice.

Subsequently the learned Judge delivered his Judgment, in which the suit was dismissed on account of failure to issue and serve a statutory notice of intention to sue.

The learned Judge did not determine the issues raised in the suit in respect of which 23 witnesses had testified. He felt justified in doing so because the suit had been determined on a point of law. The above ground of appeal faults the Judgment in that aspect.

We think that it is good practice for a Judge who has heard the evidence to determine all issues relating to the claim, especially, to claims relating to special and general damages even where the suit is determined on another issue. The reason for this is not hard to find. There is always a possibility that the decision may be wrong and over turned on appeal. In which case appellant Court would have to rely on the decision of the trial Court in respect of damages and other issues of fact.

In this particular case the Judge having heard 23 witnesses, with all due respect should have set out his findings and conclusions on those other issues in his Judgment, just in case, his decision on statutory notice was over turned on appeal, as it has actually happened in this appeal.

Nevertheless this Court has jurisdiction as a first appellant Court under ***Rule 30*** of the Rules of this Court to re-appraise the evidence and come up with its own conclusions.

In this case we are fortified by the decision of the Supreme Court in the case of ***Kifamunte versus Uganda, Supreme Court Criminal Appeal No. 10 of 1997 (unreported)*** in which it has been established;-

"The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial Judge. <u>The appellate Court must then make up its own mind</u> not disregarding the judgment appealed from by carefully weighing and considering it. When the question arises as to which witness should be believed rather than another and that question turns on manner and demeanour, the appellate Court must be guided by the impressions made on the Judge who saw the witnesses. However there may be other circumstances quite apart from manner and demeanour, which may show whether a statement is credible or not which may warrant a court in differing from the Judge even on a question of fact turning on credibility of witness which the appellate Court has not seen . <u>See Pandya vs. R. (1957) E.A 336</u> and <u>Okeno vs Republic (1972) E.A. 32 Charles B. Bitwire vs Uganda Supreme Court Criminal Appeal No. 23 of 1985</u> at page 5.

We shall accordingly proceed to re-appraise the evidence and come to our own conclusion since the parties to this appeal expect to get from this Court its own Judgment.

The appellants' suit was based on the claim that the respondents failed to comply with the provisions of ***Section 62*** of the Local Government Act of 1997 which is now ***Section 61 of Chapter 243*** of the Revised Laws of Uganda 2000 Edition.

Section 62(2) stipulated as follows;-

(2) ***"Notwithstanding subsection (1), an employee whose services are terminated by the council contrary to the terms and conditions of service, or contrary to the ruling of the Public Service Commission as provided for in Section 59(3), shall be entitled to the following benefits-***

a) one year's gross pay in lieu of notice;

b) pensions in accordance with the Pensions Act;

c) basic salary in lieu of all earned and officially carried forward leave;

d) severance package equivalent to six months' basic pay for every completed year of service;

e) transport expenses at the rate equivalent to one currency point for every five kilometers from duty station to employee's home district headquarters;

f) transport expenses at the rate equivalent to fifteen currency points from the home district headquarters to the employee's home village."

The appellants assert that the terms and conditions of service of public servants are not only contained in staff regulations of a particular Government department or in Government standing orders but are also found in other legislation that apply to civil servants.

The respondent on the other hand submitted that ***Section 62 (2)*** of the **Local Government Act** does not apply in all cases of termination. That it applies only in cases where an employee's services are terminated contrary to the terms and

conditions of service or contrary to the ruling of the Public Service Commission as provided in ***Section 60 (3)*** of that Act.

It seems that the appellants' case is that their contracts were terminated contrary to the terms and conditions of services in that they had been employed on permanent and pensionable terms by the respondent and contrary to that provision they were retrenched. On the other hand the respondent seems to argue that upon retrenchment they were paid in accordance with the terms and conditions of service set out in respondents' staff regulation and as such they could not get a relief under ***Section 62*** of the Local Government Act.

We note that the KCCA Staff Regulations were made under ***Section 27*** in PART IV of the **Urban Authorities Ordinance** of **1958**.

We find that the KCCA terms and conditions of service having been established by a subsidiary legislation that predates the current Local Government Act cannot override the provisions of that substantive legislation.

Therefore where there is a disparity between the KCCA Regulations and the Local Government Act, the Act takes precedence over the Regulations. Accordingly we agree with the submissions of counsel for the appellants that the appellants ought to have been paid in accordance with ***Section 62 (2)*** of the Local Government Act and not in accordance with the provisions of KCCA Staff Regulations.

We also up hold the argument of Mr. Luswata that the respondent terminated the services of the appellants contrary to the terms and conditions of the service.

Whereas their terms and conditions of service were permanent and pensionable the respondent retrenched them before they had attained the retirement age. The appellants were therefore entitled to be paid in accordance with ***Section 62 (2)*** of the Local Government and we so hold.

Accordingly this appeal is allowed.

We make the following orders.

1) **The Judgment of the High Court is hereby set aside. We order that the trial file be sent back to the High Court with a direction that the trial Judge or his successor proceeds to conclude the hearing and disposal of the suit on merit as if the preliminary objection that gave rise to this appeal had been dismissed.**

2) **Since the appeal succeeded on the alternative grounds, we award the appellant half of the costs in this Court.**

We make no order as to costs in the Court below.

Dated at **Kampala** this …**04th** … day of …**March**… **2014**.

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HON. JUSTICE A. S NSHIMYE

JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. LADY JUSTICE PROF LILLIAN E.TIBATEMWA
JUSTICE OF APPEAL