

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0426-2004

HERMEZDAS MULINDWA
MARION BABIRYE MATOVU PLAINTIFFS

VERSUS

STANBIC BANK UGANDA LTD DEFENDANT

BEFORE HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

The plaintiffs, Hermezdas Mulindwa and Marion Babirye Matovu first brought this suit by a plaint filed on 12th January 2004 against the Attorney General and John Kiruthu, Simon Karenzi and Sheik Zahir (liquidators of Uganda Commercial Bank Ltd.). An Amended Plaint was filed on 14th October 2004 wherein the defendants were named as Stanbic Bank (U) Ltd and John Kiruthu (for Uganda Commercial Bank Ltd in liquidation). A further Amended Plaint was filed on 28th September 2007 wherein Stanbic Bank (U) Ltd was retained as the only defendant.

Paragraph 3 of that amended plaint states:-

“3. The plaintiffs are suing the defendant in a representative capacity on their behalf and on behalf of 162 other former employees of Uganda Commercial Bank who were retired/retrenched/terminated in 1994 and who are claiming their unpaid long service awards.”

At the scheduling Conference the following issues were agreed upon for courts determination.

1. Whether the plaintiffs' suit is time barred
2. Whether the plaintiffs have a cause of action.
3. If so, whether the plaintiff have a valid claim against the defendant.
4. Whether the plaintiffs or any of them are/is entitled to the long service award as claimed in the plaint.
5. Whether there exists a valid representative order in this suit in relation to the claim against the Defendant.
6. Remedies.

Representation was Mr. Augustine Semakula co-appearing with Mr. David Matovu for the Plaintiffs. The defendant was represented by Mr. Masembe-Kanyerezi. By consent of counsel for both parties it was agreed to resolve the following issues first:

Issue No 1. Whether the plaintiffs' suit was time barred.

Issue No 2. Whether there exists a valid representative order in this suit against the Defendant

Issue No. 1 **Whether the plaintiffs' suit was time barred.**

The defendant Stanbic Bank (U) Ltd was first introduced as a party to the suit by the first amended plaint filed on 14th October 2004. That was the date when this suit was filed against Stanbic Bank (U) Ltd, the only now remaining defendant as per the second amended plaint filed on 28th September 2007.

Mr. Masembe-Kanyerezi argued that the plaintiffs' suit was time barred. That the plaintiffs' cause of action occurred on 13th June 1994 and the suit filed on 28th September 2007 long after the expiry of the six years statutory limitation period. In their Amended Plaint the plaintiff plead as follows:-

“5. The Plaintiffs and all the numerous individuals who were retrenched/retired/terminated in 1994 were not paid their long service awards in 1994 at the time of paying their terminal benefits through a mistake by the management of UCB when it omitted to include long service awards in the circular detailing their terminal benefits which circular is attached and marked annexure “B” and which long service awards had been sanctioned by the UCB Board of Directors and had been paid to employees who were retired/retrenched/ terminated in 1993 (A photocopy of the minutes of the Board authorising payment of long service awards is hereto attached and marked a annexure “C” and the circular spelling out the benefits of the employees retrenched in 1993 is hereto attached and marked “D”)

6. It shall be contended for the plaintiffs that they and all the individuals retired/retrenched/terminated in 1994 by Uganda Commercial Bank Ltd are exempted from the period of limitation on grounds that they were only able to discover the mistake on or about the 26th day of May 2003 when they got hold of the minute by the Board and after learning of H.C.C.S. No. 0366 of 2001 Nyanzi and Anor Vs Uganda Commercial Bank Ltd which judgement is hereto attached and marked "E".

7. The plaintiffs shall further contend that the period of limitations began to run on 26th day of May 2003 when they discovered the mistake.

8. Alternatively the plaintiffs shall aver that UCB Board of Directors meeting was concealed from the plaintiffs and the numerous individuals whose service were terminated/retired/ retrenched in 1994 by fraud until they discovered it on 26th May 2003.

Particulars of Fraud

10. In 1994 UCB issued a circular concerning voluntary retrenchment which is annexed hereto as "B" and the plaintiffs and all the individuals whose service were retired/terminated/ retrenched in 1994 by Uganda Commercial Bank retired under the voluntary retirement scheme mentioned in the said circular. Photostat

copies of the plaintiffs' termination letters are hereto attached and marked "F" and "G" respectively.

11. The management of UCB by mistake/fraud omitted the item of long service award from among the benefits to which the plaintiffs and all the individuals whose services were retired/terminated/retrenched in 1994 by Uganda Commercial Bank were entitled despite the fact that the UCB Board of Directors had authorised the payment as per annexure "C".

Uganda Commercial Bank in its restructuring programme vide circular No 2/94 (Annexure B) invited staff who may wish to voluntarily terminate their services to the bank or who may wish to opt for Early Retirement to apply. All applications were to be submitted to the Executive General Manager to reach him not later than 31st May 1994. The plaintiffs and the other 162 responded to the invitation. An example of such responses is the letter annexure F2 dated 13th May 1994 by the 1st plaintiff, Hermezdas Mulindwa. By its letters dated 6th June 1994 UCB responded to each of the plaintiffs and the other 162 respectively accepting their applications for voluntary termination from the services of the bank. Each acceptance letter stated:-

"I wish to advise you that the Board has accepted your application. The effective date of your termination is 30th June 1994."

Counsel for the defendant argued that for all the plaintiffs and the other 162 the effective date of termination was 30th June 1994. His contention is that the circular Annexure B was an invitation to treat. Each of the plaintiffs and the other 162 made an offer which was accepted by UCB with an effective date of termination. He submitted that the relationship was contractual and with respect to any alleged breach the cause of action accrued on the 30th June 1994. That was the date on which each of the concerned employee's entitlement to payment accrued. That this entitlement expired six years later on the 29th June 2000. The suit against the defendant was filed on 14th October 2004. Section 3 (l) (a) of the Limitations Act provides that actions founded on contract shall not be brought after the expiration of six years from the date on which the cause of action arose. By the above provisions of the Limitation Act the sixth anniversary of the accrued cause of action was on 29th June 2000.

It is trite that parties are bound by their pleadings. By their pleadings the plaintiffs appear to concede that the period within which to file the suit had expired. In *Uganda Revenue Authority Vs Uganda Consolidated Properties Ltd (1997 – 2001) UCL 149* Justice Twinomujuni JA stated.:

“Time limits set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with”

The period of limitation where imposed begins to run from the date on which the cause of action accrues. See *Eridadi Otabong Waimo Vs Attorney General SCCA No 6 of 1990 (1992) V KALR 1*. Order 7 rule 11 (d) of the Civil Procedure Rules provides that a plaint shall be rejected

where the suit appears from the statement in the plaint to be barred by any law. The claim in the instant suit appears time barred by section 3 (l) (a) of the Limitation Act. In Francis Nansio Michael Vs Nuwa Walakira (1993) VI KALR 14 the Supreme Court held that clearly if the action is time barred then that was the end of it.

However, section 25 of the Limitation Act provides for postponement of the limitation period. It states:

“Where in the case of any action for which a period of limitation is prescribed by this Act, either ----

- (a) the action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent.
- (b) the right of action is concealed by the fraud of any such persons as mentioned in paragraph (a) of this section, or
- (c) the action is for relief from the consequences of a mistake;

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it, but nothing in this section shall enable any action to be brought to recover or enforce any charge against or set aside any transaction affecting, any property which ----

- (d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (e) in the case of a mistake has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have a reason to believe that the mistake had been made.”

Where a plaintiff wishes to rely on any exemption to the periods of limitation it must be specifically stated in the pleadings. If it is not the plaintiff should be rejected. See Iga Vs Makerere University (1972) EA 65. In the instant case the plaintiffs, in paragraph 6 of the plaint, plead an exemption by mistake which they contend were able to discover on or about the 26th day of May 2003. Alternatively, in paragraph 8 they plead concealment by fraud until their discovery of the UCB Board of Directors Resolution on 26th May 2003. They therefore contend that the date of accrual of the cause of action was by the provisions of sections 25 of the Limitation Act postponed to the date of discovery of the mistake or the fraudulent concealment on 26th May 2003.

Mr. Matovu, counsel for the plaintiff, argued that by a Board Resolution passed under Minute 1874 on 26th April 1993, Annexure “C” the bank decided to pay a long service award. The minute stated-

“That staff with over 15 years service would be paid a portion of their long service award on a prorata basis. --.”

Counsel submitted that this applied to all members of staff who opted to retire under the Restructuring Programme. That either by mistake or fraudulent design of the management the long service award was omitted from the compensation package communicated to the plaintiffs in circular “B”

The circular was the invitation to staff who may wish to voluntarily terminate their services to the bank to apply. Counsel submitted that the plaintiffs were not aware of their entitlement to the “long service award” until 26th March 2003 the date of judgment in Eng Silver Lwanga Nyanzi & Anor Vs Uganda Commercial Bank Ltd. H.C.C.S No. 366 of 2001.

The plaintiffs’ in that suit were claiming payment of long service awards due to them upon termination of their employment. The plaintiffs, just as in the instant, had based their claim on Minute 1874 in Annexure “C”. One of the issues determined in that case was whether Resolution No. 1874 applied only to employees who were retrenched in 1993 but not the plaintiffs who were retrenched in 1996. By concession of the defence Court found that:

- “1. Resolution 1984 did not apply only to staff who were retrenched or retired in 1993.
2. The plaintiffs were entitled to the said award at the time they were retrenched in 1996.”

In the case before me I am yet to decide on the applicability of the Resolution to the plaintiffs.

Mr. Masembe-Kanyerezi for the defendant, submitted that to benefit from the provisions of section 25 of the Limitations Act on the basis of a mistake, the relief sought must be a consequence of the mistake.

He argued that the plaintiffs' claim was not a relief from the consequences of mistake. Section 25 (c) states:-

“the action is for relief from the consequences of a mistake.”

The above provision extends the limitation period where the plaintiffs action is for relief from the consequences of a mistake.

Time begins to run from the time when the plaintiff discovered the mistake or could with reasonable diligence have discovered the mistake. The issue is whether the plaintiffs' action in the instant case was the consequence of the alleged mistake of omitting the long service award from the compensation package communicated to the Bank staff in the circular of invitation to apply for early termination of service –Annexure “B”

The “long service award” is a consequence of Minute No. 1974 of 26th April 1993 which would accrue at retirement under the programme. The plaintiffs' cause of action arose from the mistake of omitting to include it in the circular. A similar provision was considered in the English Case of Philips Highs Vs Harper (1954) QB 411 where Pearson J. held that the

section does not apply to the case of a right of action which is concealed from the plaintiff by mistake. Her Lordship stated at page 119:-

“What is the meaning of provision (c)? The right of action is for relief from the consequences of a mistake. It seems to me that this wording is carefully chosen to indicate a class of action where a mistake has been made and has had certain consequences and the plaintiff is seeking to be released from those consequences ---

--- probably provision (c) applies only where the mistake is an essential ingredient of the cause of action, where the statement of claim sets out the mistake and its consequences and prays for relief from the consequences---“

See also Andrew McGee's Limitation Periods 2nd Ed pages 337 – 338 where a number of cases in which mistakes were considered are considered. The plaintiff in the instant case are not seeking to be relieved from the consequences of the mistake but are seeking to recover monies they claim to be entitled to which they could not seek within the limitation period because by the mistakes of the management they were not made aware of the entitlement. The entitlement was not a consequence of the mistake. It does not arise from the mistake.

I therefore agree with counsel for the defendant that the plaintiffs' claim based on mistake is outside the scope of the exemption in section 25 (c) of the Limitation Act.

Alternatively the plaintiffs sought to rely on fraudulent concealment of the Resolution. In paragraph 8 of the plaint the following particulars of fraud are indicated:

- “(i) Concealing a decision of the Board of the Directors to pay long Service Awards from the plaintiffs and all the individuals who left UCB in 1994.
- (ii) Omitting the benefits of the Long Service Award from the circular that showed the plaintiffs and all those persons retired/terminated/retrenched in 1994 their Terminal Benefits”

Mr Masembe-Kanyerezi submitted that the particulars of fraud had not been pleaded. Order 6 rules 3 and 6 of the Civil Procedure Rules require that where a party relies on fraud it must be specifically pleaded.

Concealment or omission *per se* is not an element of fraud. There should be a fraudulent intent to conceal or omit. However the Laws of England 3rd Ed Vol. 24 para 631 page 318 on what constitutes fraudulent concealment states:

“Fraudulent concealment has been defined, in relation to an action to recover property , as designed fraud by which a person, knowing to whom the right belongs, conceals the circumstances giving the right and by means if such concealment enables himself or some other person to enter and hold property.”

In B EA Timber Co Vs Inder Sigh Gill (1979) EA 463, Forbes, VP at page 469 stated

“--- it is --- well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. Fraud, however, is a conclusion of law. If the facts alleged in the pleading are such as to create a fraud it is not necessary to allege the fraudulent intent. The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently, but from the acts fraudulent intent may be inferred.”

In Suleman Vs Azzan (1958) EA 553 court held that circumstantial evidence suffices to prove fraud.

In his submission Mr. Matovu argued that the fraudulent acts in the instant case regarded the release of information only known to the Board of UCB which was released to some staff who were retired/ terminated/retrenched in 1993 and concealed the same from the other members of staff retiring/ terminated/retrenched in 1994. The plaintiffs claim is that the management knowing that the staff retired/terminated/retrenched were entitled to long service awards withheld or concealed it from the retrenchment or omitted it from the retirement package thereby holding on the funds. I agreed and therefore, find that there was sufficient pleading to infer a fraudulent intent on the part of UCB Management.

That being the position Mr. Masembe argued that the exemption was taken away by the provisions of section 25 (d) of the Limitation Act. In paragraph 13 of their pleading, the plaintiffs state:

“The defendant took over the assets and liabilities of the former UCBL where upon the former Uganda Commercial Bank Ltd who had taken over the assets of UCB was deregistered from the company registry and the defendant is liable to pay the plaintiffs claim and is sued in that capacity—“

In paragraph 11 of the plaint it is claimed that the management of UCB by mistake/fraud omitted the item of long service award from among the benefits to which the UCB staff retired/terminated/retrenched in 1994 were entitled. Mr. Masembe-Kanyerezi argued that the defendant had bought for value the assets and liabilities of UCBL. He submitted that under Section 25 postponement of limitation cannot apply against a purchaser for value without notice of the defect in title or without notice of the fraud. Counsel argued that liability was property for the purposes of section 25 (d). On his part Mr. Matovu argued that liability is not property since it did not have value. That the holder of a liability cannot be said to be having property since liability is negative. Mr. Masembe-Kanyerezi argued that liability is a chose in action and as such property. Words and Phrases Legally defined Vol. 3 page 445 states:-

“Property is that which belongs to a person exclusively of others, and can be the subject of bargain and sale. It includes goodwill,

trade marks, licences to use patent, book debts, options to purchase, life policies and other rights under a contract.”

Blacks Law Dictionary 7th Ed page 234 defines “Chose” as “a thing, whether tangible or intangible, a personal article; a chattel”. While “chose in action” is defined as “a proprietary right in personam, such as debt owed by another person, a share in a joint stock company, or a claim for damage in tort. The right to bring an action to recover a debt, money, or thing. Personal property that one person owns but another person possesses the owner being able to regain possession through a law suit.”

The long service award is money which the plaintiff claim they are entitled to by virtue of the UCB Board of directors Resolution which they now claim from the defendant. It is thus property. This was a liability which the defendant had inherited through a purchase for a valuable consideration. The purchase was sometime in November 2001 long after the alleged fraudulent concealment or omission in 1996. It is not pleaded that the defendant was party to the alleged fraudulent concealment or omission. Further it is not pleaded that at the time of the purchase the defendant knew or had reason to know of the alleged fraudulent concealment or omission.

In the premises I find that the plaintiffs have failed by their pleadings to show that their claim is entitled to postponement of the limitation period by the provision of section 25 of the Limitation Act. That ground suffices to strike out the plaintiffs’ suit.

Issue No. 5 **Whether there exists a valid representative order in this suit in relation to the claim against the defendant.**

This suit was first filed on 12th January 2004. An amendment plaint was filed on 14th October 2004 by which the defendant was first introduced as a party to the suit. A further amended plaint was filed on 28th September 2007 which retained the defendant as the sole defendant. On 1st February 2007 the plaintiffs were by order of this court permitted to institute an action on their behalf and on behalf of 162 others. This was long after the suit had been filed against the defendant on 14th October 2004.

Mr. Masembe argued that the permission under Order 1 rule 8 (I) of the Civil Procedure Rules must be sought and obtained before the filing of the representative suit. Counsel referred to the Kenyan case of Wariform Vs Standard Chartered Bank Kenya Ltd Others (2003) 2 EA 701 where Mwera J. stated:-

“It is this court’s view that a representative action should have leave of court or direction and the earlier is when it is being filed.”

Chitaley and Rao in A.I R Commentaries, The Code of Civil Procedure 7th Ed Vol. II pages 1896 and 1997 states that the obtaining of judicial permission is an essential condition for binding persons other than those actually parties to the suit and their privies, if this essential condition is not fulfilled, the suit is not a representative one. That as a matter of procedure, the court ought to insist on the permission prescribed by the Rules being obtained before a matter is allowed to be fought out in a representative

capacity. That the requirement as to permission under the rule cannot be waived.

The defendant was introduced as a defendant to the suit by the amended plaint filed on 14th October 2004. Paragraph 4 of that plaint stated.

“4 The plaintiffs are suing the defendant in a representative capacity on their behalf and on behalf of the former employees of Uganda Commercial Bank who were retired/retrenched/terminated in 1994 and who are claiming their unpaid long service awards.”

Annexure B to that plaint was the list of the said employees. There was no Representative Order in place as of that date. The plaint was clearly in contravention of Order 1 rule 8 (I) of CPR and liable to be struck out. The first plaint filed on 12th January 2004 also provided similarly.

However, the second amended plaint attached a Representative Order made on 1st February 2007 in Miscellaneous Application No. 125 of 2003. Though the application appears to have been filed in 2003 apparently there was no Representative Order until 1st February 2007. That explains why none was attached to the plaint filed on 12th January 2004 and the Amended Plaint filed on 14 October 2004. The amended plaint filed on 28th September 2007; and by which this court is now proceeding; had the Representative Order dated 1st February, 2007 attached. It thereby conformed with the provisions of Order 1 rule 8 (I) CPR.

By the date of filing the amended plaint on 28th September 2007 no application had been made to strike out the plaintiffs' suit for contravening the provisions of Order 1 rule 8 (I) of the Civil Procedure Rules. I have not been availed the courts ruling in Misc. Application No. 125 of 2003 from which the Representative Order – Annexure A – was extracted. At this stage for me to strike out the amend plaint filed on 28th September 2007 I will be sitting as an appellate court a jurisdiction I do not have. As was held by Mead J in Sonko and others Vs Halima and Anor (1971) EA 443 the provisions of Order 1 rule 8 are provisions of convenience to avoid the necessity for encumbering the plaintiffs or the defendants with names of many persons and to avoid the necessity for their personal service of proceedings and their personal appearances.

In the circumstances I am unable at this stage to strike out the plaintiffs suit on that ground.

However, in view of my findings on the first issue, the suit was time barred and outside the saving provisions of section 25 of the Limitations Act. Therefore the plaintiffs' suit is struck out and dismissed with costs.

Hon Mr. Justice Lameck N. Mukasa

JUDGE

22nd August 2008