

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 89 OF 2011

JAMES MUNDELE SUNDAY}.....PLAINTIFF

VS

PEARL OF AFRICA TRAVELS AND TOURS}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a preliminary objection by the Defendant's Counsel to the Plaintiff's suit on the ground that it is time barred under the Limitation Act. The Defendant is represented by Counsel David Kaggwa while Counsel Richard Omongole represents the Plaintiff.

The Defendant's objection is that the Plaintiff's suit is barred by the statute of limitation. He submitted that as a matter of law, causes of action have a limitation period within which they are brought. According to **section 3 (d) of the Limitation Act Cap 80**, all actions for damages founded on a cause of action in negligence must be brought within three years from the date on which the cause of action arose. The Limitation statute is strict in nature and inflexible and is not concerned with the merits of the case. Non-compliance with the limitation period renders that suit a nullity. Counsel relied on the holding of Lord Greene MR in **Hilton versus Sulton Steam Laundry [1956] 1 KB 73** and which case was cited with approval in the **Madhvani International S A versus Attorney General Civil Appeal No. 23 of 2010**.

Secondly the Defendant's Counsel maintains that a Plaintiff who commences an action after the expiration of the period of limitation must show sufficient cause through the pleading of exemption from the law of limitation under **Order 7 rule**

6 of the Civil Procedure Rules. Order 7 rule 6 of the Civil Procedure Rules provides that where a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the grounds upon which exemption from the law is claimed. The court emphasised the need to rely on the plaintiff only in determining whether or not a suit is time barred in the case of **Okeng Washington versus Attorney General HCCS 16 of 2004**. In that case reference was made to the case of **Iga versus Makerere University [1972] EA 65** where it was held that in considering whether or not a plaintiff is time barred or discloses no cause of action, the court is required to peruse the pleadings only and nothing else and a plaintiff which is deficient in that it shows that the action is time barred or discloses no cause of action and must be rejected. In the case of **Uganda Railways Corporation versus Ekwere D.O [2008] HCB 61** it was held that if a suit is brought after the expiration of the period of limitation and no ground of exemption from the law of limitation is pleaded in the plaintiff, the plaintiff must be rejected.

The Defendant's Counsel relies on paragraph 3 of the plaintiff, which avers that the cause of action arises from the Defendant's negligence. In paragraph 4 the negligence is said to have occurred in 2006 when the Defendant was allegedly using the Plaintiff's motor vehicle registration number UAE 330N. The Plaintiff's action was filed more than three years after the cause of action arose and no grounds of exemption have been pleaded. The Defendant's Counsel submitted that in the case of **Madhvani International S.A versus Attorney General Civil Appeal Number 23 of 2012** where the suit was filed after the limitation period expired, C.N.B Kitumba JSC established that the statements in the plaintiff were clear that the cause of action arose more than three years back. She dismissed the appellant's appeal.

On the above premises and authorities Counsel prays that the court finds that the case before it is deficient in as far as it shows that the action is time barred owing to a lapse of five years between the time when the cause of action arose and when this suit was filed. It does not disclose any grounds of exemption as to why it was filed out of time and as such the plaintiff ought to be rejected

In reply the Defendant's Counsel submitted that the Plaintiff's action is not time barred. The action is not affected by the law of limitation because the Defendant is still holding onto the subject matter of the suit namely the Plaintiff's motor vehicle. There was a continuing wrong been committed against the Plaintiff in a negligent manner. The Plaintiff's case is that there is a continuing tort against the Plaintiff and therefore there is a continuing cause of action. In the case of **Eridad Otabong Waimo versus Attorney General [1992] V KALR** the Supreme Court in the lead Judgment of Oder JSC held that:

"It is that such a wrong is necessarily a continuing tort so that the cause of action accrues continuously throughout its duration."

The Plaintiff's Counsel further relies on **Clerk and Lind Sell on Torts 13th edition paragraph 612** where it is written:

"Where there is a continuing nuisance or a continuing trespass, every fresh continuance is a fresh cause of action and therefore an injured party who sues after the cessation of the wrong may recover for such portions of it as lie within the limited period."

It is clear from the plaint that the Defendant has refused to hand over the motor vehicle to the Plaintiff up to date and has been keeping it since 2006. Due to the Defendant's unlawful actions, the Plaintiff's vehicle has been exposed to open harsh weather conditions for such a long period of time and the vehicle can no longer be used on the road unless overhauled. The continued holding onto the Plaintiff's motor vehicle under such conditions would be regarded as negligence on the part of the Defendant for which it is liable in damages for each day the vehicle continues to be in its possession. The Plaintiff's Counsel further contends that the particulars of whether the act of negligence is continuous requires the court to hear evidence and cannot be determined on the basis of the law only. In the premises the Plaintiff's Counsel maintains that the plaint is not barred by the law of limitation.

Alternatively and without prejudice the Plaintiff's Counsel contends that even if the cause of action in negligence is barred by the law of limitation, that action can

be severed from the rest of the cause of action since other parts of the action are not barred by the law of limitation. There could be different limitation periods attaching to different causes of action. He concluded that the action for negligence can be severed from those of unconditional return of the vehicle or current value, interest and special damages since different limitation periods apply. Counsel relied on **Order 2 rule 8 (2) of the Civil Procedure Rules** which provides that on the hearing of an application, if it appears to the court that the causes of action are such as cannot be conveniently disposed of together, the court may order any such causes of action to be excluded. Such was the case in **Eridad Otabong vs. Attorney General** (supra) where Oder JSC held that where there are distinct causes of action, the effect of limitation on the causes of action should be considered separately. He found that the Appellant's plaint was clearly bad in respect of the cause of action for unlawful arrest but that of unlawful imprisonment was a continuing tort and the claim in respect thereof was valid. The trial judge ought to have rejected the plaint only to the extent of the claim for unlawful arrest and tried the suit in respect to the claim for false imprisonment that was not affected by the law of limitation.

In the further alternative the Plaintiff's Counsel submitted that under section **25 (c) of the Limitation Act** there is provision for extension of time of the limitation period in cases of mistake. From the facts the parties are aware that the Plaintiff had earlier on filed suits and applications in law courts using different advocates and it is unfortunate that the suits were found wanting by reason of pecuniary jurisdiction and the Plaintiff withdrew the same and filed the instant case in this honourable court. The action of filing the previous suit was done for and on behalf of the Plaintiff who is not a legal expert and had no capacity to ascertain in which courts to file the action and had placed the matter in the hands of his former advocates. Under **section 25 (c) of the Limitation Act** the Plaintiff is excused and the cause of action starts running once such a mistake is identified. Secondly it is acceptable that the mistake of Counsel should not be visited on the client. There is no doubt that the different cases were filed on behalf of the Plaintiff in error and can therefore be categorised as 'mistake' under section 25 (c) of the Limitation Act. In the case of **John William Beyagala vs. Yunusu Kasumba**

High Court Miscellaneous Application number 622 of 2011 Honourable Lady Justice Night Percy Tuhaise held that the mistake or negligence of Counsel in the way he handled (or mishandled) the appeal should not be visited on the client. Consequently the court should be pleased to dismiss the preliminary objection of the Defendant with costs and set down the suit for hearing on the merits.

Ruling

I have carefully considered the Plaintiff's plaint as well as the written submissions of Counsel which have been summarised above. The only issue is whether the Plaintiff's action is time barred under the **Limitation Act cap 80** laws of Uganda having been brought more than five years from the date the alleged cause of action arose.

I agree with the submission that the question whether a suit is barred by limitation can be considered by a perusal of the plaint only. This is consistent with **Order 7 rule 11 (d) of the Civil Procedure Rules** which provide that the plaint shall be rejected in the following cases inter alia in (d):

"(d) where the suit *appears from the statement in the plaint* to be barred by any law;" (Emphasis added)

There are five grounds for rejection of a plaint under **Order 7 rule 11 of the Civil Procedure Rules** found under sub rules (a), (b), (c), (d) and (e) and it includes the ground in (a) that the plaint does not disclose a cause of action. The wording of sub rule (d) is even more specific than the wording of sub rule (a) which provides that the plaint shall be rejected: "where it does not disclose a cause of action". This is in the sense that under sub rule (d) it is clearly stipulated that the plaint shall be rejected "*where the suit appears from the statement in the plaint* to be barred by any law." In other words it must appear from the statement in the plaint to be barred by any law. The holding in **Iga versus Makerere University [1972] EA at page 65** is that of the East African Court of Appeal sitting at Kampala. Mustafa J.A. at page 66 of the Judgment considered **Order 7 rule 11 (d) of the Civil Procedure Rules** whose wording has been reproduced above and held that a plaint which is barred by limitation is a plaint, in the words of that sub rule that is

"barred by law". He further held that the judge in the circumstances should have rejected the plaint under Order 7 rule 11 of the Civil Procedure Code instead of dismissing it. Secondly the Court of Appeal held that a Plaintiff who seeks exemption from the law of limitation has to plead it under **Order 7 rule 6 of the Civil Procedure Rules**.

From a consideration of **Order 7 rule 11 of the Civil Procedure Rules**, the issue of whether the Plaintiff's plaint is barred by law has to be considered upon perusal of the plaint only and anything attached to the plaint forming part of it. The Defendant's Counsel considered paragraphs 3 and 4 of the plaint for the assertion that the cause of action arose in 2006 more than three years to the time the action was filed in court contrary to **section 3 (d) of the Limitation Act Cap 80** laws of Uganda. As a matter of fact the Plaintiff's plaint was lodged on the court record on 18 March 2011. Summons to file a defence were issued on 18 March 2011. In paragraph 3 the Plaintiff's action is:

"... for unconditional return of the Plaintiff's motor vehicle registration number UAE 330N in sound mechanical condition, or its value then, special and general damages for negligence, interest thereon and costs of the suit."

Furthermore in paragraph 4 (g) of the plaint it is averred that in complete disregard to the agreement between the Defendant and the Plaintiff, the Defendant is keeping the said motor vehicle with its mechanics since 2006 and is unjustifiably demanding **Uganda shillings 2,560,000/=** as a precondition for the release of the motor vehicle to the Plaintiff. On the basis of the above paragraph the Defendant asserts that the cause of action arose in 2006.

The issue of whether the Plaintiff's action was time barred had been raised before but was not concluded because in the same objection the Defendant's Counsel prayed for stay of proceedings. Consequently in a ruling delivered on 15 January 2014 the court stayed proceedings pending resolution of **HCCS No. 227 of 2007** or production of any evidence showing that it had been determined in which case the issue of whether the current suit is *res judicata* can be considered. It was established from the **Civil Division of the High Court that HCCS 227 of 2007** had

not been determined on the merits but on 1 August 2007 had been dismissed under Order 5 rule 1 (3) of the Civil Procedure Rules for failure to serve summons. The dismissal was not on the merits and the current suit is not res judicata. Secondly the question of whether the plaint is barred by the law of limitation can be considered on the merits.

An action for the return of the Plaintiff's motor vehicle cannot be barred by limitation because the Defendant does not assert that the vehicle vested in it. The Plaintiff seeks unconditional return of the vehicle in a sound mechanical condition or its value then. Unless the vehicle vested in the Defendant, or the limitation period extinguished the plaintiff's right of action, the Plaintiff has a cause of action. An example is the defence of prescription in which land vests in a Defendant after occupation of over 12 years and it only applies to situations where the Defendant's occupation of the land was unchallenged by the landlord or the owner of the land for a period of 12 years. In such cases the Plaintiff's cause of action for eviction or vacant possession is extinguished having brought the action after 12 years from the date the cause of action arose and having not challenged the Defendant's possession during that period. As far as causes of action for wrongful detention of goods is concerned the applicable provision is section 4 of the Limitation Act. Section 4 provides as follows:

“4. Limitation in case of successive conversions and extinction of title of owner of converted goods.

(1) Where any cause of action in respect of the conversion or wrongful detention of a chattel has accrued to any person and, before he or she recovers possession of the chattel, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the cause of action in respect of the original conversion or detention.

(2) Where any such cause of action has accrued to any person and the period prescribed for bringing an action on it and for bringing any action in respect of such a further conversion or wrongful detention as aforesaid has

expired and he or she has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.”

The period of limitation for filing an action for wrongful detention of a chattel is six years from the date of accrual of a cause of action. In this case it is averred that the Defendant refused to return the vehicle for failure of the Plaintiff to pay to the Defendant **Uganda shillings 2,560,000/=** as a precondition for release of the motor vehicle. The issue is therefore triable as to whether the Defendant was justified in allegedly holding onto the vehicle for failure of the Plaintiff to pay **Uganda shillings 2,560,000/=**. Did this amount to wrongful detention? The cause of action for unconditional return of the Plaintiff’s vehicle is in those circumstances not time barred. Furthermore the basis of the holding onto the vehicle by the Defendant has been denied by the Defendant. It is a triable issue and it is not clear whether the initial relationship between the parties is governed by any agreement since the Defendant denies the existence of an agreement. The question of possession of the vehicle by the Defendant is denied. Moreover it is averred that in paragraph 4 (g) of the plaint that the defendant has been keeping the vehicle with its mechanics since 2006. Who for instance took the vehicle to the alleged garage?

Furthermore I have considered the case of **Eridad Otabong versus Attorney General Civil Appeal Number 6 of 1990** in the Supreme Court of Uganda. Oder JSC delivered the lead Judgment in which the facts were that the appellant had sued the Defendant for false arrest and unlawful detention. The suit was filed after 12 months of the date of arrest and at the hearing an objection that the suit was time barred was upheld. The court approved the passage from **Clark and Lind Sell on Tort 13th edition** paragraph 612 that:

"Where there is a continuing nuisance or a continuing trespass, every fresh continuance is a fresh cause of action and therefore an injured party who sues after the cessation of the wrong may recover for such portions of it as lie within the period limited."

Oder JSC held regarding the effect of limitation on unlawful detention or false imprisonment that:

"Regarding the effect of limitation on unlawful detention or false imprisonment authoritative court decisions in this jurisdiction appear to be lacking, but the sum of text book statements and superior court decisions is quite clear. It is that such a wrong is necessarily a continuing tort so that the cause of action accrues continuously throughout its duration."

A Judgment of the Supreme Court is binding on the High Court. Considering the nature of detention of goods, the Plaintiff's action is clearly an action for wrongful detention of goods and the cause of action is therefore in conversion. The Plaintiff claims for unconditional return of the goods or its value. The Plaintiff further seeks the return of the vehicle in a sound mechanical condition. The Plaintiff has not alleged conversion. The Plaintiff further seeks special damages for detention of the goods contrary to the Plaintiff's request for return at the rate of **Uganda shillings 100,000/=** per day.

There may be some subtle issues arising as to the rights and duties of the parties if any with regard to the motor vehicle in question. It is apparent from paragraph 4 of the plaint that the Plaintiff alleges firstly that on 18 July 2006 he entered into a car hire agreement with the Defendant on a self drive arrangement at a cost of **Uganda shillings 100,000/=** per day. Secondly the Plaintiff alleges that he handed over the vehicle to the Defendant in a sound mechanical condition. Following from that the Plaintiff alleges that the vehicle broke down on its return from Murchison Falls National Park while in the possession and under the control of the Defendant, its servants or agents. Secondly that the Defendant has ignored, neglected or refused to hand over the vehicle to the Plaintiff despite repeated reminders or to settle daily rental fees of **Uganda shillings 100,000/=**. The question of whose responsibility it is to keep the vehicle or where the vehicle is kept is a matter that ought to be tried on merits and may have ramifications on the final resolution of the suit. This is in light of denial by the Defendant of being in possession of the vehicle. In other words as to whether there is a continuing tort is a matter that depends on the proof of facts in relation to possession and

considerations of law. As noted earlier the Defendant denies any agreement with the Plaintiff for the hire of a vehicle.

A question arises as to whether the Plaintiff can claim special damages beyond the period limited by the Limitation Act. The question of hire charges may be considered on the basis of an agreement or wrongful detention of goods and the principle of *restitutio in integrum*. In either case the question of limitation of causes of action would limit any claim for damages to the period falling within the limitation period next after when the last cause of action arose. Furthermore I need to point out that under **section 3 (1) (a) of the Limitation Act Cap 80** causes of action founded on contract or tort are not to be brought after the expiration of six years from the date on which the cause of action arose. However the Plaintiff's Counsel submitted on the basis of **section 3 (d) of the Limitation Act** that damages for negligence can only be claimed within a period of three years after accrual of the cause of action. I have not found any statutory provision (unless there has been an amendment that I have not seen) which provides for that. The Limitation Act cap 80 laws of Uganda provides for a limitation period of six years from the date the cause of action arose in respect of contract or tort within which to file an action for appropriate remedies. On the other hand section 3 (d) provides for actions to recover any sum of money by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

The Plaintiff filed this action on 18 March 2011. Six years from 18th of July 2006 would expire in June 2012. The Plaintiff filed this action on 18 March 2011 less than six years after the alleged cause of action on 18 March 2011. The Plaintiff's Counsel simply replied on the point of law and never considered the provisions of the Limitation Act neither did he address himself to questions of fact averred in the plaint. In the absence of any amendment to the Limitation Act which has escaped my notice, the Plaintiff filed the action within six years from 18th of March 2011 and therefore within the limitation period prescribed by section 3 (1) (a) of the Limitation Act Cap 80 laws of Uganda. The only applicable provision which is section 3 (1) (d) of the Limitation Act is the proviso thereto which provides as follows:

“except that in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under an enactment or independently of any such contract or any such provision) *where the damages claimed by the Plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person*, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.” (Emphasis added)

A claim for damages on a cause of action of negligence, nuisance or breach of duty in respect of personal injuries to any person are the only instances where the limitation period is three years from the date the cause of action arose. There is no action for damages for negligence, nuisance or breach of duty in respect of personal injuries to any person in this suit and the limitation period for the Plaintiff's cause of action is six years.

In the premises the Plaintiff's action is not time barred and the Defendant's objection to the action on the ground of time bar is overruled with costs.

Ruling delivered on the 20th day of August 2014 in open court.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Ogwang Sam holding brief for David Kaggwa for the Defendant

Defendant's Counsel Richard Omongole (absent)

Plaintiff is present

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

20/August/2014