THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

CIVIL SUIT NO. 328 OF 2002.

QUICK CARGO HANDLING SERVICES LTD:::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. IRON STEEL WARES LTD
   2. N.K. RADIA]
   3. PROPERTY MANAGEMENT SERVICES LTD:::::::::::::: DEFENDANTS

BEFORE: V.F.MUSOKE-KIBUUKA (JUDGE)

RULING.

Civil Suit No. 328 of 2002 came before this court on 19th May**,** 2003**.** Upon application by learned counsel, Mr. Nester Byamugisha, representing the second and third defendants, the court made an order, under order 6 rule 27, of the Civil Procedure Rules, permitting counsel for the defendants to raise points of law to be heard and determined before the main suit.

Mr. Byamugisha raised three points of law:

a) that the plaint disclosed no cause of action against both the second and third defendants.
b) that the suit was frivolous and vexatious against the second defendant.
c) that the suit was time-barred by the law of limitation.

Mr. John Kiwuwa, representing the first defendant associated himself fully with the submissions made on the three points of law by Mr. Byamugisha. Mr. Kiwuwa, in addition, submitted that the plaint did not disclose any cause of action against the first defendant as well.

Whether the plaint discloses A cause Of Action or not and Whether Or Not it is Frivolous and Vexatious.

The relevant law on this point is found in Order 7 rule 11(a) and (e). According to that rule of procedure, it is mandatory for the court to reject the plaint in any case where the court finds that the plaint discloses no cause of action.

The leading authority on this law of procedure is the celebrated case of Auto Garage Vs. Motokov [1971] E.A. 514. In that case, the court of Appeal for East Africa specified three tests which the court must apply in order to decide whether or not the impugned plaint discloses a cause of action. Those tests laid down by
Spry, V.P., are that the plaint must show:
a) that the plaintiff enjoyed a right,
b) that the right has been violated, and
c) that the defendant is liable.
It is also the position of the law that the question of whether the plaint discloses a cause of action or not must be determined upon the perusal by the court of the plaint in question alone, together with anything attached to it so as to form part of that plaint, and upon the overall presumption that any express or implied allegation of fact in the plaint are true. Jeraj Shariff vs. Chotai Fancy Store [1960] E.A 374.

Both learned counsel argued that the plaint did not disclose any cause of action against their clients, the defendants. I will decide that claim first.

Upon perusing the plaint and Annexture E, which is part of the plaint, I find that in paragraph 4, the plaint clearly shows that the plaintiff enjoyed a right of being a tenant at plot 29 A and 29 B, Nasser Road, in Kampala. The plaint also discloses that the plaintiff enjoyed a right of carrying on business at those premises. The plaint also shows that the plaintiff was enjoying the right of owning movable properties at the premises of its business.

The plaint, again in paragraph 4, shows that during the month of June 1994, those rights were interfered with through eviction and distress for rent both of which the plaintiff claims to have been unlawful.

The plaint also shows that the eviction or distress was carried out on behalf of the first defendant by the second and third defendants. All these pleadings appear to me to be supported by Annexture E to the plaint.

In the circumstances, therefore, the submission that the plaint does not disclose any cause of action against the first defendant does not appear to me to be well founded.

The same finding goes to the alleged non-disclosure of any cause of action against the second defendant by the plaint in this suit. It appears to me that the fact as to whether the second defendant acted in his individual capacity or as an advocate or as a director of the third defendant, clearly is a matter of evidence. It cannot be determined by a mere perusal of the plaint at this stage. I duly agree with Mr. Alenyo in that regard.

The mere imprecision, on the part of the plaintiff, where it fails to state in it’s pleadings the actual capacity in which the second defendant is alleged to have acted is not sufficient ground, in my humble view, to render the suit frivolous and vexatious against the second

defendant. In paragraph 2 of the plaint, it is stated that “the second defendant is sued in his personal capacity.” In paragraph 4 of the plaint the allegation is that the second defendant, in June, 1994, “whether acting personally, as an advocate or as a director of the third defendant” went with one Esuma and Edward Magala together with two police men, to evict the plaintiff.

While I agree that this kind of pleading is, to the very least, not plausible, I nevertheless, do not find that fact alone renders the suit to be frivolous and vexatious against the second defendant.

In respect of the third defendant, the argument raised by Mr. Byamugisha is that the third defendant is a non-existing person. This argument was largely based upon the tact that the plaint shows that the third defendant is named in it as “Property Management Services Ltd.” But Annexture E which is attached to the plaint and is therefore, part of it and upon which the plaintiff relies to show the nexus between the second and third defendants names the third defendant as “Properties Management Limited”. Annexture E is signed by the second defendant as director of Properties Management Limited.

Both in paragraphs 2 and 4 of the plaint the plaintiff claims that the second defendant is a director of the third defendant. Since annexture E was written by the second defendant himself and upon what appears to be an official headed paper of the company and he signed annexture E as director, I am inclined to believe that the second defendant would be in the best position to know the name of the company of which he is a director.

It is a well known fact, in company law that every corporate body is incorporated, upon its registration, in its registered name which gives it its external corporate identity or personality. That name is unique to that company. It is often reserved well in time before incorporation. Once it is placed upon the register, no other corporate entity can be incorporated in the same name.

If, the company of which the second defendant is a director is called Property Management Ltd, as annexture E clearly indicates, there remains nothing in the pleadings of the plaintiff to associate the third defendant "Property Management Services Ltd." with the second defendant. There is nothing to show that Property Management Service Ltd was incorporated as a company or that if it does exist as a corporate entity. The cause of action, in this suit, is only disclosed against the company of which the second defendant is a director. Learned Counsel Mr. Alenyo, in his reply to the submissions made by Mr. Byamugisha did not offer any explanations to the serious discrepancy between what is in the main body of the plaint and what is in annexture E, in relation to the name and entire identity of the third defendant. In the circumstances, it is quite justifiable to say that the identity of the third defendant is doubtful and that a company called Property Management Services ltd probably does not exist. What is contained in the plaint and annexture E in relation to the third defendant can hardly be said to confront to the Provisions of Order 7 rule 1 (c) of the CPRs.
It appears to me, that where a suit is filed against a non existing person or a person who is dead the plaint is a nullity. It must be struck out. Patrick V. Mrekwe [19641 E.A. 24.

In the instant case, therefore, I find that the plaint in as far as it presents a suit against a non- existing entity, the third defendant, is a nullity. The name of the third defendant must be removed from the plaint by way of striking it off.

Whether the suit is barred By the Law of limitation.

Mr. Byamugisha's argument on this point of law was that the plaintiff's action was caught by the law of limitation under the provisions of Section 4 of the limitation Act, Cap. 70, which limits actions based on contract and tort to six years. Mr. Kiwuwa associated himself with this submission.

In answer, Mr. Alenyo submitted that, in paragraph 3 of the plaint, the plaintiff's action is based upon detinue which is stated both in paragraph 3 and 11 of the plaint, to be continuing. In reply, Ms. Byamugisha agreed that detinue can be a continuing tort.
It is, indeed, trite law that a plaint which is barred by limitation is barred by law. For that reason it must be rejected by the court before which the plaint has been presented. Iga vs. Makerere University [19721 E.A. 65.

In the instant case, I am unable to agree with both Mr. Byamugisha and Mr. Kiwuwa that the cause of action arose during the month of June, 1994, when the plaintiff was evicted and its properties were taken away from its business premises at plot 29 A and 29 B, Nasser Road. There are many reasons but the main are briefly the following:

First, by its very nature, the tort of detinue often arises from lawful acquisition or possession, of the chattel or goods by the defendant. Detinue is the wrongful keeping of a person's goods or chattel although the original taking may have been lawful. An action based upon detinue aims at the recovery of the chattels or goods from one who acquired possession of them lawfully but retains the goods or chattel without right or lawful claim. In the instant case, the defendants claim that the acquisition was lawful because it arose out of a lawful eviction and a process of distress for rent. The plaintiff disputes the lawfulness of the original acquisition of possession. This is a matter the court will decide upon evidence.

Second, the cause of action for detinue, it appears to me, arises when the defendant detains the chattels or goods after a demand has been made for their restoration to the plaintiff. In fact, in order for a claim upon the tort of detinue to succeed, the plaintiff must prove that the defendant detained the chattel after the plaintiff had demanded for its restoration. Failure to prove that important element of detinue will hinder the plaintiff's success. Sajan Singh vs. Sardar Ali [1960] 1 All. E.R. 269 and Charles Douglas Cullen

vs. Parson and Hensraj [19621 E.A 159.

Third, annexture C to the plaint shows that, in the instant case, the plaintiff made a written demand, for the restoration of his properties, on the first day of October 1999. That claim, was probably the one which prompted the writing of annexture E to the plaint by the second defendant. There was a further written demand by the plaintiff's counsel dated 31st January, 2000, as annexture D shows. The properties, the plaintiff claims, have continued to be detained in spite of those written claims for their restoration. Hence the cause of action in this suit.

For the reasons briefly set out above, it clearly appears to me that the cause of action in detinue, in this suit, did not arise during the month of June, 1994, when the eviction of the plaintiff from plots 29 A and 29 B, Nasser Road took place as counsel for the defendants would like this court to believe. On the contrary, it arose after the plaintiff had made a claim for the release to it of those properties but the defendants continued to detain them. That was on the 1st day of the month of October, 1999. That makes it a period of less than four years to date.

If the above represents the true position of the law, as it appears to me that it does, then clearly, the plaintiff suit based on detinue as he claims in paragraph 3 of the plaint is not barred by the law of limitation contained in section 4 of the limitation Act. This suit was filed in this court before the expiry of 6 years from the date on which the cause of action arose.

Thus, apart from an order striking off the name of the third defendant from the plaint, the rest of the objections raised on behalf of the first and second defendant, are rejected. Costs are to be in the cause.

V.F.MUSOKE-IBUUKA (JUDGE)

5.6.2003.