THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

CIVIL APPEAL NO. 57 OF 2009

1. **MUKASA TOM**
2. **NSUBUGA STUART::APPELLANTS**

VERSUS

1. **NDAULA CHRISESTOM }**
2. **MAYANJA ROBERT }**
3. **MULIMBANGA MOSES }**
4. **MAWWEJJE LABISON }::::::::::::::::::::::::::::::::::RESPONDENTS**
5. **EGESA LAWRENCE }**
6. **MAGULU LEO }**
7. **NDAULA RONALD }**

[Appeal from the Ruling of Her Worship Karemani Jamson Karemera (GI.) in Mukono Civil Suit No. 034 of 2008, originally Jinja H.C.C.S. No. 125 of 2007, dated 20th March 2009]

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

JUDGMENT

This appeal arose from the ruling and order of His Worship Karemani Jamson Karemera, sitting as the Grade I Magistrate at Mukono, in which he rejected the appellant's plaint and struck out their suit with costs to the respondents. The facts which led to the suit and consequently the appeal can be summarised as follows.

The appellants sued the respondents in Jinja High Court Civil Suit No. 125 of 2007. They claimed special, general and exemplary damages in respect of property that was destroyed when the respondents set the appellants homes on fire in the night of 13-14th July 2000. The respondents had prior to the suit been prosecuted and convicted of arson and malicious damage

to property in Criminal Case No. M48 of 2000 at Mukono Chief Magistrates' Court. The respondents who were found guilty on both counts charged were each sentenced to a fine of shs 200,000/= on the first count, and shs. 200,000/= each on the second count. In default thereof they were to be imprisoned for 48 months to run concurrently on both counts. The respondents failed to pay the fines and served their prison sentences as ordered.

On the 11/09/2007, the appellants filed H.C.C.S. 125 in this court. The file was subsequently transferred to Mukono court when the Magistrates Courts Act was amended to enhance the pecuniary jurisdiction of Magistrates Courts. The respondents then filed a written statement of defence in the suit on the 22/01/08 in which they indicated that they would raise a preliminary objection that the suit had no basis in law.

When the parties appeared before the trial magistrate on the 25/02/2009, Mr. Kamya for the respondents raised a preliminary objection that the suit was time barred because the acts complained of took place in the night of 13/07/2000. That the suit was filed in Jinja Court on the 11/09/2007 yet the Limitation Act provides that actions in tort shall be brought within the space of 6 years from the date the cause of action arises. Relying on the decision in the case of **Iga v. Makerere University [1972] E.A. 65**, he prayed that the plaint be rejected with costs.

Mr. Nyakana who then represented the appellants argued that the cause of action in the matter arose at the time when the respondents were convicted. He advanced the argument that the time between charging and convicting the respondents let to delay which constituted a disability. He prayed that the court disregards technicalities and disposes of the matter substantively.

Mr. Kamya's rejoinder was that criminal and civil matters based on the same facts could proceed concurrently. That as a result, the appellants did not have to wait for the respondents to be convicted before filing their suit in tort. He further argued that the fact that the respondents had been convicted did not necessarily mean that they were liable in tort. That in addition, the appellants did not in their plaint plead that the time when they were waiting for the respondents to be convicted was a hindrance to filing their suit. He thus reiterated his prayer that the suit be struck out.

The trial magistrate found that the cause of action arose on the 14th July 2000 and the suit based on that tort had been filed on the 11th September 2007. Further, that six years had elapsed since the cause of action arose and no disability was pleaded by the appellants as to why they could not file their action in time. He thus rejected the plaint and stuck it out with costs.

The appellants appealed on the following grounds:

1. The learned trial magistrate erred in law and fact when he ruled that the suit was not based on the earlier judgment and orders against the Respondents in Mukono Criminal Case No. 48 of 2000.

2. The learned trial magistrate erred in law and fact when he failed to take into consideration the respondent's disobedience of the said earlier court orders to compensate the appellants, culminating into the institution of the civil suit to recover the same.

3. The learned trial magistrate erred in law when he held that the suit was time barred and consequently rejecting (sic) the plaint with costs.

The appellants proposed that this court allows the appeal with costs in this court and the court below.
When the parties and their advocates appeared before me on the 24/06/2009 I ordered that their advocates file written submissions. The appellants' advocates filed their submissions on 29/06/2006 after which the respondents' advocates filed a reply on 6/07/2009. The appellants' counsel filed a rejoinder on 16/07/2009.

In his rejoinder, counsel for the appellants prayed that the respondents' submissions be struck out under Order 51 rule 6 CPR because the submissions were served on them on the date when appellants' counsel was supposed to file a reply. He argued that this did not only constitute an abuse of court process but it was also an infringement of the appellants' rights under Article 28 of the Constitution to make a suitable rejoinder. I will therefore first deal with that complaint.

When the parties and counsel hereto appeared before me on the 24/06/2009 I issued an order that counsel for the appellants file the appellants' submissions on 01/07/2009. The respondents'

counsel was to file a reply by the 15/07/2009. If the appellants' counsel wished to file a rejoinder, such was to be filed by the 22/07/2009. The guideline given by the court omitted to specify the time within which service was to be effected on the opposite party but it was implied that it should be before the timeline given for filing the next submission.

If the appellants' counsel's complaint is that respondent's counsel served him with a reply on the 22/07/2009, this was not proved on evidence because there was no return of service ordered; none was filed either. I am unable to penalise the respondents' counsel as prayed by appellants' counsel for that reason. And although he protested against the respondent's alleged late service of submissions on him, counsel for the appellants made a rejoinder to the submissions. By this he waived his right to relief because that implies that he agreed to the late service of the submissions on him. Suffice it to add that this court has a wide discretion under the provisions of Order 51 rule 6 to extend time within which an act is to be done. This is especially so where it is not prejudicial to the opposite party. No prejudice has been alluded to by counsel for the appellant and I have found none.

Finally, it is trite law that the rules of procedure are the handmaidens of justice; they are a guide to the orderly disposal of suits and a means of achieving justice between the parties. They should never be used to deny justice to a party entitled to a remedy (**Allen Nassanga v. M. Nanyonga, [1977] HCB 352**). I am of the view that orders of court for taking certain actions in a suit are in the same category. Since no injustice has been proved in this case, the respondents' submissions shall be retained.

In their written submissions, counsel for the appellants abandoned ground 2 and argued grounds 1 and 2 together. They reiterated the contents of the pleadings and stated that Civil Suit 125 of 2007 was filed on the basis of an arson that occurred in the night of 13-14th July 2000. Further, that the respondents herein were tried and convicted and in the judgment of the court in Criminal Case No. M.48 of 2000 the trial magistrate ordered that the appellants were entitled to commence civil proceedings against the respondents for recovery of damages for the property destroyed. That in compliance with this, the appellants filed the suit (now Mukono Civil Suit No. 34/08) which was struck out with costs. Counsel thus concluded that the trial magistrate erred when he rejected the plaint and struck it out.

With regard to ground 1, relying on the decision in **Badiru Mbazira v. Abisagi Nansubuga [1992-93] HCB 241,** counsel for the appellant argued that the Limitation Act applies to all matters unless the Act itself makes an exception. It was thus argued for the appellants that s.3 of the Limitation Act foresaw the possibility of actions though rooted either in tort or contract, penalty or forfeiture and they were given wide latitude of enforceability to be brought not within the period of 6 years but within the period of 12 years. Counsel premised this argument on the fact that s.3 of the Limitation Act provides that an action shall not be brought upon any judgment after the expiration of 12 years from the date on which the judgment became enforceable.

Counsel for the appellant emphasised the fact that the suit before court was based on the judgment in Criminal Case M.48 of 2000 and that it was so pleaded in the plaint. He argued that the lower court should have confined itself to that plaint to establish whether there was a cause of action or not. That the judgment following which the respondents were convicted was delivered on the 1st August 2001; the same judgment contained an order that the appellants had a right to file a suit to claim damages for the loss sustained. That the respondents had never appealed against their conviction and sentence and as a result the appellants were entitled to file their civil action on the basis of the said judgment.

Counsel for the appellants further relied on 39 (2) (b) of the Evidence Act which in his view applied to this case. S. 39 (2) (b) provides that a judgment, order or decree of a competent court is conclusive proof that the legal character which it declares a person to be entitled to, accrues to that person when the judgment, decree or order declares it to accrue to that person. That as a result, the right to bring a civil action could not be dissected from the judgment of the criminal court. Further, that had the legislature intended to make a distinction between mere statements made by judicial officers from actual orders to be protected by the Limitation Act, it would have specifically provided so. He thus submitted that the lower court was wrong when it struck out the suit for being time barred.

With regard to ground 1, Mr. Kamya for the respondents contended that the suit that was struck out was not based on the judgment in the criminal case but on the facts that occurred in the night of 14th July 2000. Further that in her judgment in the criminal case the trial magistrate only advised the appellants to bring a civil suit to recover damages and this advice did not purport to be a basis for bringing a civil action. Regarding what constitutes a cause of action Mr. Kamya

relied on Osborn's Concise Law Dictionary Ed. 7th for its definition, i.e. the fact or combination of facts which give rise to a right of action. He further submitted that it was clear from the plaint that the facts that led to the cause of action occurred in the night of 13th to 14th July 2000 and not from the judgment in the criminal case. He proposed that ground 1 should fail.

With regard to ground 3, Mr.Kamya argued that the provisions of the Limitation Act are mandatory; thus actions founded in contract or tort shall not be brought after the expiry of 6 years from the date on which they arose. Relying on **Iga v. Makerere University** (supra), he submitted that a plaint that is barred by limitation is barred by law and it should be rejected. He relied on the decision in the case of **Eridad Otabong v. Attorney General S.C.C.A No. 6/1990** where it was held that time begins to run from the date on which the cause of action accrues. That because the appellants had not pleaded any disability they were not entitled to any exemption from the provisions of the Limitation Act. He prayed that the appeal be dismissed with costs because the arguments made by counsel for the appellants were irrelevant and did not hold water.

Since counsel for the appellant abandoned ground 2 of their appeal I shall now address the two questions raised by grounds 1 and 3 of the appeal.

i) ***Whether the appellants' suit was based on the earlier judgment and orders against the respondents in Mukono Criminal Case No. 48 of 2000.***

While sentencing the respondents on 1/08/2000, the trial magistrate in the criminal case ruled as follows:

> *"The complainants whatever their actions have a right to enjoy their properties without undue interference. With all this in mind I make the following orders/sentence:*
>
> 1. *Each accused is sentenced to a fine of 400,000/= on both count 1 and count 2 (each count 200,000/=) in default forty-eight months imprisonment to run concurrently on both counts.*
> 2. *Each accused person is sentenced to a suspended sentence of Ten years in case anyone of them is convicted of another offence involving violence, he shall serve the default sentence.*

3. *The police community liaison officer is hereby ordered to sensitise the local community of Nakawugu about the dangers of violence and ensure that the complainants are allowed to settle down in their homes without threats of violence and should report back to court within a month from today.*
4. ***Since property worth a lot of money was destroyed, the complainants are also advised of their legal right to seek redress in the civil court.***
5. *The accused persons are warned that in case any harm befalls the complainants, the police will arrest them as the first suspects whether they are involved or not. Therefore they have a duty to ensure that nothing happens to the complainants.*

Any aggrieved party has a right to appeal within 14 days."

In their plaint the appellants pleaded as follows:

3. "The plaintiff's claim against the defendants is for recovery of special damages and exemplary damages in respect of property the defendants damaged belonging to the plaintiffs. The facts constituting the cause of action are set out hereinafterwards:-
4. On the night of 13th – 14th July, 2000 the defendants attacked the homesteads of the plaintiffs and set the same on fire thereby causing substantial damage thereto in addition to maliciously damaging their household property as listed below:
    a) Special damages
    b) Residential house belonging to the 1st plaintiff
    c) Residential house belonging to the 2nd plaintiff
    d) ……
    e) ……..
    f) ……
    g) ……

    TOTAL ::12,500,000/=
5. The defendants were prosecuted and convicted of the criminal offence of arson, malicious damage to property, among others, and in her judgment, the trial chief magistrate found that indeed the defendants had jointly

> damaged the plaintiffs' property for which they were entitled to compensation in a civil action. (a copy of the judgment is hereto attached as annexture "A")"

It is by paragraph 5 of the plaint that the appellants contended that their action in Civil Suit No. 34 of 2005 was based on the orders of the magistrate in Criminal Case No. M.48 of 2000.

Regarding counsel's submission that s.3 (3) of the Limitation Act applies to this case, the provision reads as follows:

> "(3) An action shall not be brought upon any judgment after the expiration of twelve years from the date on which ***judgment became enforceable***, and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of 6 years from the date on which the interest became due." **{Emphasis added}**

Mr. Kamya submitted that this section did not apply to the case at hand and I agree with him. I think that this provision applies in instances where the judgment debtor's cause of action arises directly out of the judgment and orders of the court in a previous suit. In other words, it applies to cases where the judgment debtor had no right to bring a suit against the judgment creditor except after an order of the court declaring his rights. A case in point is one where the action before the court is one in which the plaintiff seeks the declaration of his interest in a piece of land so he can claim damages for trespass against an encroacher who is not a party to the suit. He/she would have no right to bring the action unless his/her interest in the land is first declared by court. Thereafter, he would have the right to bring his suit against the encroacher within 12 years. That right would abate after 12 years by virtue of the provisions of s. 3 (3) of the Limitation Act. The same would apply to any other declaratory judgment wherein a person's right or interest in a chose of action is established by a court of law.

It is my view that the case at hand is different from the circumstances envisaged by s.3 (3) of the Limitation Act; there was no judgment to enforce in Mukono Criminal Case M.48 of 2000 except the collection of fines ordered against the accused persons and in default thereof, their imprisonment. Both counsel in this matter agreed that a cause of action is a fact or the

combination of facts that give rise to a right of action. This court also held so in **Annebrit Aslund v. Attorney General [2001-2005] HCB 103.** It is also trite law that a cause of action arises as soon as the facts or combination of facts that bring it about occur. The right to sue for damage to property in tort therefore accrues as soon as the act or omission from which the right arises occurs. There is no need for a declaration by the court that the right exists. Indeed the trial magistrate in Mukono Criminal Case No M.48 of 2000 did not purport to confer such a right. Although the magistrate's statement came within the context of sentencing the accused persons, the magistrate's words were very clear; in addition to the sentences awarded to the accused persons, the appellants were ***also advised of their legal right to seek redress in the civil court.*** The manner in which this advice was coached leaves no doubt as to its meaning. I therefore do not agree with the submission that the trial magistrate ordered that the appellants bring a civil action to recover damages because such an order would have amounted to suplusage; the civil right to bring an action in tort for the loss occasioned by the arson existed right from the night of 13th – 14th July 2000 when the arson occurred.

Regarding the appellant's counsel's submission that s.39 (2) (b) of the Evidence Act applies to this case, I carefully considered the said provision. The relevant parts of the provision read as follows:

> **39. Relevancy of certain judgments in probate, etc. jurisdiction.**
>
> **(1)** A final judgment, order or decree of a competent court, ***in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction,*** which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character or the title of any such person to any such thing is relevant.
>
> **(2)** Such judgment, order or decree is conclusive proof—
>
> a) that any legal character which it confers accrued at the time when the judgment, order or decree came into operation;
>
> b) that ***any legal character to which it declares any such person to be entitled, accrued to that person at the time when the***

judgment, order or decree declares it to have accrued to that person;

c) ……

d) ……"

{Emphasis supplied}

The provision above is very specific. It refers to judgments of the courts in the matters categorised, i.e. ***in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction.*** Such jurisdiction is special jurisdiction where personal rights are declared. I am of the considered opinion that this provision should be strictly construed. Only judgments in probate, matrimonial proceedings, admiralty or insolvency jurisdiction would fall within the ambit of s. 39 (2) (b) of the Evidence Act. In the alternative, it could be construed *ejusdem generis*; only judgments that are of the same nature or genre as those named in the section, if any, would fall within its ambit. I have perused the judgment in Criminal Case No. M.48 of 2000. I did not find any declarations regarding the ***legal character*** of any of the appellants. I would therefore agree with Mr. Kamya that s. 39 (2) (b) was irrelevant to the facts in the instant suit and was cited out of context. In conclusion, Ground 1 of the appeal fails.

ii) ***Whether the trial magistrate erred in law when he held that the appellant's suit was time barred and consequently rejected the plaint with costs.***

In his ruling dismissing the action the trial magistrate ruled as follows:

> *"In the instant case the claim by the plaintiffs is of (sic) damages resulting from damaged property which is a tortuous claim and therefore ought to have been brought within six years. The cause of action arose on 14th July, 2000 when the alleged property was destroyed. The suit was filed in the High Court of Jinja on 11th September, 2007. This time was more than six years. This action is therefore time barred."*

The trial magistrate relied on the decision in the case of **Mugabi v. Nyanza Textile Industries Ltd. [1992-93] HCB 227,** where it was held that a cause of action arises when a right of the plaintiff is affected by the defendant's acts or omissions and such acts or omissions inflict

damage upon the plaintiff. The trial magistrate found that the plaintiffs did not plead any disability in order to be exempted from the provisions of the Limitation Act. That as a result the court had no jurisdiction to entertain the suit. He thus rejected the plaint with costs.

In their submissions before this court, the appellants' counsel engaged in legal gymnastics to prove that the appellants' right to bring the suit arose from the judgment in Mukono Criminal Case No. M.48 of 2000. They failed to address the facts from which the prosecution of the respondents arose. In the judgment which was attached to the plaint as annexure A the magistrate recounted the evidence adduced against the respondents as follows:

> *"That in the night of 13th January, 2000 in the village of Kawungu, a mob of people wearing banana leaves, carrying torches and making loud noise, raided the home of Festo (PW3) destroyed his house and pigs and shrines, moved to his son's house Nsubuga (PW2) destroyed his house and property and burnt his kitchen. They proceeded to the home of his other son Mukasa Tom and damaged his house and property as well as burnt his kitchen. They then proceeded to yet another son's place Mugamba and did the same thing."*

The respondents were found to have participated in these act and they were convicted of arson and malicious damage to property. The appellants pleaded the same facts in summary in their plaint in the lower court, including the date when the actions that caused the damage occurred. They did not advance any reason why they did not bring their action within the space of 6 years from the night of 13-14th July 2000 but contented themselves with pleading that the trial magistrate advised them to file an action for damages in her judgment which was delivered on 31/07/2001. On the other hand, Mr. Kamya for the respondents relied on the same facts and cogent authorities and submitted that the action was time barred.

The respondents were convicted on 31/07/2001 to serve a sentence of 48 months if they defaulted in paying the fine of shs 400,000/= each, on both counts. They failed to do so and were imprisoned. It was not stated in the plaint when the respondents completed serving their sentence. Paragraph 6 thereof which stated the facts relating to the sentence was silent on this. The WSD filed by the respondents was also silent on when they completed their sentence. In the absence of those facts, I will assume, as is normally the case when one fails to pay a fine that

imprisonment ensued immediately after sentence. A term of 48 months from the 31/07/2001 would ordinarily be completed on or around the 31/07/2005. Given the possibility of remission of 1/3 of the sentence which is credited to every prisoner on incarceration by virtue of the Prisons Act, about 16 months would have been credited to the respondents. Their sentences would have, under normal circumstances, been completed on or around 31/04/2004. If the appellants' wish was to plead that they could not sue the respondents while in prison they could still have brought the action at its earliest, i.e. by the 2/05/2004. The appellants' action would have still been within the period of 6 years provided for bringing actions in tort by the Limitation Act.

It is most unfortunate that the appellants' advocates did not do this but instead filed their suit on the 11/09/2007. As found by the trial magistrate this date was more than six years after the cause of action arose in the night of 13-14th July 2000. The suit was also filed more than 6 years after the 31/07/2001 when judgment was pronounced against the respondents, i.e. about 2 months after the 6 years elapsed. Suffice it to add that the appellants did not have to wait for the respondents to serve their sentence before filing their action in tort for damages against them. An action in tort is not precluded by a criminal sentence even where it arises from the same facts that led to the criminal sentence.

In conclusion, I agree with the decision of the trial magistrate that the action was barred by the Limitation Act and the plaint should be rejected. Order 7 Rule 11 of the Civil Procedure Rules obliges court to reject a plaint in a number of circumstances, which include, "(d) where the suit appears from the statement in the plaint to be barred by any law." The provisions of this rule are mandatory. In accordance with Order 7 Rule 11(d) of the Civil Procedure Rules, the plaint was properly rejected by the trial magistrate. Accordingly, this appeal is dismissed. The appellants shall pay the costs of the respondents in this court and in the court below.

Irene Mulyagonja Kakooza
JUDGE
1/09/2009