

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
(CIVIL DIVISION)

HCT-00-CV-CS-0194-2009

INNOCENT ORISHABA & 25 OTHERS :::::::::::::::::::::::::::::::PLAINTIFFS

VERSUS

GLOBAL TRUST BANK (U) LTD :::::::::::::::::::::::::::::::DEFENDANTS

BEFORE: THE HONOURABLE JUSTICE STEPHEN MUSOTA

RULING

The Plaintiff Innocent Orishaba and 25 others represented by M/s Lex Uganda Advocates Solicitors instituted this suit against the Defendant Global Trust Bank (U) Ltd represented by Mugenyi & Co. Advocates. Later in time the Plaintiffs changed

instructions to M/s Tiishekwa A. Rukundo & Co. Advocates.

In the plaint, the Plaintiffs sued for recovery of special, general and exemplary damages for breach of contract, misrepresentation and unfair dismissal as well as seeking interest and costs on vie claim. According to the Plaintiffs, the termination of their services was unlawful, unfair and unjust because of the Defendant's failure to:

- a) Consult or communicate with the Plaintiffs the contemplation of their termination.
- b) Notify the labour office.

- c) Give statutory and contractual notice.
- d) Comply with the Human Resource Policy Manual.

The Plaintiffs also claimed special damages for:

- i) Medical Insurance cover promised in the contract.
- ii) Transportation / Repatriation pay.
- iii) Guarantor of loan for employees promised during employment.

In its written statement of defence, the Defendant denied the claim by the Plaintiff and threatened to challenge the suit for being bad in law for not disclosing a cause of action and being frivolous and vexatious.

In the joint scheduling memorandum the Defendant reiterated its threat to object to the suit.

I decided to start with this point before venturing into hearing of the suit on its merits.

In his submission Mr. Owakukiroru for the Defendant raised his preliminary objections that:

- 1) The Plaintiff who was in court, Mr. Innocent Orishaba did not obtain a representative order before filing the suit. That before a Plaintiff can institute a suit on behalf of numerous others he/she ought to obtain permission or leave of court in accordance with the provisions of Order 1 rule 8 of the Civil Procedure Rules (CPR). That obtaining such judicial permission is essential for binding persons other than those actually in court.

That if this condition is not fulfilled, the suit cannot be a representative one. That the purpose of getting this order is to avoid encumbering Plaintiffs or Defendants to serve many people to attend the trial. Further that the order guards against dragging people to court without their knowledge or consent or interest.

In reply both Mr. Emiru and Mr. Tishekwa for the Plaintiff submitted a joint written reply to the above objections contending that from the wording of Order 1 rule 8 (1) Civil Procedure rule the draftsman never intended it to be very mandatory that any suit filed by a person in his/her capacity and on behalf of others strictly required first to obtain a representative action.

That the current suit can still proceed with or without a representative order on condition that each of the other 25 Plaintiffs must each personally appear in court and testify on his or her behalf.

Alternatively that the 25 can apply to this court to be made parties to the suit so that, the suit is determined on merit.

- 2) The second objection raised by Mr. Owakukiroru is that the suit does not disclose a cause of action against the Defendant. That a cause of action is bundle of facts which is necessary for the Plaintiff to prove if taken in law, applicable to them thus giving him/her a right of relief against the Defendant.

Referring to paragraph 3 of the plaint and annexures C and D thereto learned Counsel contended that the Plaintiff was paid Shs.1,456,730/= as terminal benefit and salary in lieu of notice. Therefore he and the 25 others

have nothing to complain about. That no rights of the Plaintiffs were violated and therefore the plaint be rejected on this ground without prejudice to the first objection.

In reply to the second objection learned Counsel for the Plaintiffs submitted that there is a cause of action triable by this court for unlawful and unfair dismissal. That both preliminary objections should be overruled and dismissed with costs.

I have considered the submissions by respective Counsel.

The first objection by learned Counsel for the Defendant is governed by Order 1 rule 8 (1) of the Civil Procedure Rule. This was ably quoted in the submissions by both learned Counsel for the Plaintiffs. It provides thus:

“Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of court, sue or be sued in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement as the court may direct.”

And in sub-rule (2) thereof:

“Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) of this rule may apply to the court to be made a party to the suit.”

From my reading of this provision, I do not agree with the submission by learned Counsel for the Plaintiffs that obtaining permission of court to file a representative action is optional. Where somebody sues on behalf of others, it is mandatory that permission to do so is sought from court to guard against the shortcomings pointed out by learned Counsel for the Defendant.

This was held by this court before to be the correct position of the law by Ntabgoba PJ (as he was) in TARLOGAN SINGH V JASPAL PHAGUDA & ORS 1997 – 2001 UCLR 408, 410 and I agree that:

“In my opinion, the taking of the steps necessary to enable the Plaintiff institute a suit in a representative capacity is taking the procedure under Order 1 rule 8 of the Civil Procedure rules and Order 7 rule 4 of the Civil Procedure Rule which is rendered in mandatory terms. With respect, therefore, the non-compliance with Order 1 rule 8 of the Civil Procedure Rules and Order 7 rule 4 of the Civil Procedure Rules cannot be said to be a mere matter of mis-joinder or non-joinder. It is a matter that must be complied with and failure to so comply renders the suit incurably defective.....”

Order 7 rule 4 of the Civil Procedure Rule provides that:

“Where the Plaintiff sues in a representative character, the plaintiff shall show not only that he or she has an actual existing interest in the subject matter but that he or she has

taken the steps, if any, necessary to enable him or her to institute a suit concerning it.”

Therefore it is far fetched for both Plaintiffs’ Counsel to suggest that complying with Order 1 rule 8 of the Civil Procedure Rule is optional let alone Order 7 rule 4 of the Civil Procedure Rule. Most probably this argument stems from appearance of the word “**may**” in the wording of the sub rule. But the law should be read as a whole and in a complementary manner.

It is my contention that “**May**” in the sub rule is not intended to allow the Plaintiff in a representative suit to choose whether to apply or not apply for permission to sue on behalf of other absent Plaintiffs or Defendants.

It is intended to remind the Plaintiff to choose either to sue, alone or on behalf of others. If he chooses the latter option then compliance with Order 1 rule 8 of the Civil Procedure Rule is mandatory.

Order 1 rule 8 of the Civil Procedure Rule has two parts. The first is to get permission from court to bring a representative suit/action and second is giving notice of institution of the suit to all such persons on whose behalf the suit is brought either by personal service or public advertisement if people to be represented are very many. Court must give direction as to how to proceed before filing the suit. This is essential in order to bind all persons other than those actually presenting the suit.

In the plaint under consideration it is headed **INNOCENT ORISHABA & 25 ORS.** This meant that “**others**” implied numerous absentee Plaintiffs. Throughout the pleadings reference is made to many Plaintiffs who were not in court. Schedule I attached to the plaint further bares me out on this point. All the other annexures ‘A’, ‘B’ as well as the letter from Commercial Microfinance Limited and Global

Trust Bank are all in reference to one Plaintiff Innocent Orishaba. This means that no order was obtained by Orishaba Innocent before filing this suit which is a condition precedent for filing a valid representative action. It follows that the assertion by learned Counsel for the Plaintiffs that the suit can be saved in one way or the other cannot arise. The Plaint is incurably defective and on this account alone, it will be struck out.

Without prejudice to my above holding and as submitted by Mr. Owakukiroru the suit under consideration does not disclose a cause of action.

A cause of action is a basis for a suit filed and contains information that justifies a Plaintiff's right to demand relief from the Defendant. It has to refer to a legal violation committed. The violations are the facts or a set of facts that give a person the right to seek judicial redress or relief against another. These facts must be contained in the pleadings in a law suit.

It is not enough to state that a set of events occurred that entitle the Plaintiff to relief.

All elements of each cause of action must be detailed in the complaint supported by the relevant facts. In other words, as was held in the often quoted authority on causes of action of **AUTO GARAGE & ANOR VS MOTOKOV (NO.3) [1971] E A 314**, 519 BY Spry V. P. he said that:

“I would summarize the position as I see it by saying that if a plaint shows that the Plaintiff enjoyed a right, that the right has been violated and the Defendant is liable, in my opinion a cause of action has been disclosed and any omission or defect may be put right by amendment.”

This however presupposes that the pleadings are not incurably defective. And in case there is need for amendment the amendment cannot be initiated by court but by the culpable party instead.

As rightly stated by TESEKOOKO, JSC in TORORO CEMENT CO. LTD VS FROKINA INTERNATIONAL CIVIL APPEAL NO.2 OF 2001 (SC) that:

“The Plaintiff relies on Article 126 of the Constitution for the view that the plaint is not defective.

I do not think Article 126 was meant to encourage sloppy drafting of pleadings. Properly drafted pleadings define issues in contest. That is why we have rules. What can be argued legitimately is that because of that article and by authority in decided cases, a plaint ought not to be rejected for failure to disclose a cause of action unless even when it is amended, within the limits of the law, a cause of action is not disclosed. But the party whose pleadings are objected to must be graceful enough” to recognize the defect in its pleadings and seek court’s leave, if it is possible, to rectify the relevant defect, instead of being adamant as the plaintiff has been in these proceedings.”

The Plaintiffs’ pleading has annexure “C” attached thereto. It is headed “***Termination of Service***” and dated 27th February. In paragraph 4 thereof it is stated that:

“In accordance with your employment contract you shall be paid 1 month’s salary in lieu of notice “and any outstanding leave days amounting to Ug.Shs. x 1,456,730/= to you on

completion of the exit clearance procedure as per the attached form.”

This annexure has been introduced by the Plaintiff in his pleadings and in the employment agreement the mode of termination is provided and ironically it is pleaded by the Plaintiff. From the pleadings the letter of termination is dated 27th February 2009 and the Plaintiff was paid Shs.1,456,730/= on termination.

I agree with Mr. Owakukiroru that whereas the Plaintiff enjoyed a right as an employee the said right according to his own pleadings was taken away in accordance with the law. Therefore no right was violated. This leaves no valid complaint to be investigated by this court.

Consequently this plaint is rejected for failure to comply with Order 1 rule 8 of the Civil Procedure Rule, Order 7 rule 4 of the Civil Procedure Rule and disclosing no cause of action under Order 7 rule 11 (a) of the Civil Procedure Rule. The Defendant shall get the costs of this litigation.

I so order.

STEPHEN MUSOTA

JUDGE

17.12.2012