

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO. 146 OF 2011

NAGURU/NAKAWA ESTATES RESIDENTS ASSOCIATION LTD.....PLAINTIFFS

VERSUS

1. THE ATTORNEY GENERAL OF UGANDA
2. UGANDA LAND COMMISSION.....DEFENDANTS

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This is a ruling on two points of law raised by learned Counsel Wanyama for the Attorney General immediately after the conclusion of the scheduling conference.

The two points of law were that the instant suit is incompetent as no statutory notice was ever served on the Defendants as legally required; and that that the Plaintiff has no capacity to sue as it is a nonexistent person. Both Counsel were requested to file written submissions within given time schedules. The Defendants' Counsel however did not file written submissions as final reply to the Plaintiff's Counsel's written submissions in reply.

I have carefully addressed the points of law raised, together with the submissions of Counsel and the authorities cited.

I will start with the second point of law that the Plaintiff has no capacity to sue as it is a non-existent person. Learned Counsel Wanyama for the Defendants submitted that it is trite law a nonexistent person cannot sue or be sued. He cited the case of **Sajjabi V Timber Manufacturer Ltd, Civil Suit No. 1016 of 1977** to support his position. He prayed that the suit be dismissed with costs. Counsel Rwakafuuzi did not respond to this issue in his written submissions.

On the question of whether or not the Plaintiff is a legal person for purposes of establishing its capacity to sue or be sued, there is nothing to assist court ascertain this allegation raised as a point of law. In my opinion, it can only be ascertained as a fact by

adducing evidence to that effect. This court would only be able to ascertain the fact by going into or calling for extrinsic evidence. In **Mukisa Biscuit Manufacturing Co V West End [1969] EA 696, at 701**, Sir Charles Newbold stated that:-

“A preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is extrinsic evidence of judicial discretion.”

This objection raises issues of evidence which would require proof of a Registrar of Companies or other appropriate body to prove that Naguru/Nakawa Estates Residents Association was duly registered as a body corporate with capacity to sue or be sued. See **Lusweswe V Kasule & Anor [1987] HCB 62**.

The procedure of determining a point of law is, in my opinion, intended to stop proceedings which should not have been brought to court in the first instance, and to protect the parties from continuance of futile and useless proceedings. In the premises, where the point of law can only be ascertained by extrinsic evidence, the matter becomes a triable issue to be determined on adducing the relevant evidence during the trial rather than being determined as a point of law.

On the first point of law, Learned Counsel Wanyama contended that the instant suit is incompetent as no statutory notice was ever served on the Defendants as demanded under section 2(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act cap 72. He submitted that the Plaintiff, having opted to bring the instant suit by ordinary plaint, was legally obliged to have first served the Defendants with the mandatory statutory notices of 45 days before filing the suit. He cited the case of **L. Rwakasoro & 5 Ors V Attorney General [1982] HCB 40** to support his position. He prayed court to strike off the suit with costs.

Learned Counsel Ladislaus Rwakafuuzi for the Plaintiffs conceded that no statutory notice was served before the suit was filed. He contended however that this does not make the suit incompetent because the Civil Procedure and Limitation (Miscellaneous Provisions) Act, only provides for tort and contract and no more. He argued that the instant case is for enforcement of the Plaintiffs' right to shelter under articles 8A, 45, and 50(1) of the Constitution, plus Chapter 14 of the National Objectives and Directive Principles of State Policy. He maintained that they were not obliged to serve a statutory notice on the Defendant on the authority of **John Oketcho V The AG HCMC 124/09**. He also relied on the Supreme Court decision in **The Commissioner General of Uganda**

Revenue Authority V Meera Investments, Civil Appeal No. 22 of 2007 to contend that in the given scenario where the Plaintiffs were notified to be evicted within 7 days, the Plaintiffs were prompted to sue promptly to enforce their rights.

Section 2(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act provides as follows:-

*“After the coming into force of this Act, notwithstanding the provisions of any other written law, **no suit** shall lie or be instituted against;*

- a) The Government*
- b)*
- c) A scheduled Corporation*

Until the expiration of forty five days after written notice has been delivered to or left at the office of the person specified in the first schedule to this Act stating the name, description and place of residence of the intending Plaintiff, the name of the court in which it is intended the suit to be instituted, the facts constituting the cause of action and when it arose, the reliefs that will be claimed, so far as the circumstances admit, the value of the subject matter of the intended suit.”
(emphasis mine).

In the instant case, one of the parties sued is the Government of Uganda, represented by the Attorney General. The other party sued is the Uganda Land Commission which is listed as a scheduled Corporation (no. 46) under the third schedule of the Civil Procedure and Limitation (Miscellaneous Provisions) Act. The law clearly requires whoever is suing the said two parties to serve statutory notices of 45 days before filing the suit against each of them. It is Counsel Rwakafuuzi’s contention however that the provisions of the Civil Procedure and Limitation (Miscellaneous Provisions) Act do not apply to the instant proceedings where the Plaintiff seeks to enforce rights created under the Constitution.

I have carefully read the cases of **John Oketcho V The AG HCMC 124/09** and **Rwanyarare & Ors Misc. Application No. 85 of 1993** where the above principle was applied. Both cases were filed as miscellaneous applications. They were thus handled expeditiously as special proceedings. The instant case was filed as an ordinary civil suit against the Government of Uganda and the Uganda Land Commission, a scheduled Corporation. In my opinion the hearing of this case, having been brought by ordinary suit, renders it to be tried in an ordinary manner and not as a special proceeding as to be exempted from serving the legally required statutory notices to the Defendants. Indeed, so far, all requirements of an ordinary civil suit have been duly

observed by this court, including the holding of a scheduling conference. Counsel Rwakafuuzi has not objected to this and has fully participated in the proceedings.

Counsel Rwakafuuzi also argued that the instant case seeks to enforce rights under the Constitution and is beyond contract and tort. He therefore contended that the Civil Procedure and Limitation (Miscellaneous Provisions) Act does not apply to it.

I have carefully perused the pleadings. Paragraph 6 of the plaint alleges the facts giving rise to the cause of action to be that:-

*“a) Between August 2007 and January 2008 the registered tenants of Nakawa/Naguru housing estates entered into a **memorandum of understanding** with the 1st Defendant by which the 1st Defendant **covenanted** that each registered tenant will be given the first priority to purchase one flat after the developer has built them...*

*b) the Government is about to hand over the land comprised in Nakawa/Naguru estate to the 3rd Defendant...the Developer who will take the same without encumbrance thus dispossessing the resident and registered tenants of their interest accrued in the land by virtue of the **memorandum of understanding** between the registered tenants and the Government....” (emphasis mine).*

In paragraph 8 of the same plaint, the Plaintiffs further allege that:-

*“By reason of the aforesaid, the 3rd Defendant is about **to breach** the MOU the tenants signed with Government and **the breach will cause hardship, homelessness and suffering.**” (emphasis mine).*

It is apparent on the face of the plaint that the Plaintiff is basing his cause of action on the memorandum of understanding signed between themselves and the Government, which they allege the Government has breached. Even the issues framed at the scheduling conference, where both Counsel participated, have everything to do with the MOU (contract). The agreed issues were as follows:-

- “1. Whether the Plaintiffs had interest in the suit land.*
- 2. Whether the eviction of the Plaintiffs from their respective houses was lawful.*
- 3. What remedies are available to the parties.”*

It was Counsel Rwakafuuzi’s contention that that the instant case is for enforcement of the Plaintiffs’ right to shelter under of the Constitution. This may be correct, since most if not all of the rights enforced by courts under various laws are enshrined in the

Constitution. Indeed this factor is repeatedly pleaded in the plaint. However, this does not necessarily place it beyond contract as Counsel Rwakafuuzi would like this court to believe. On the contrary, on the face of the pleadings, though the plaint alleges that the Plaintiffs' rights are guaranteed by the Constitution, the cause of action as spelt out in the plaint clearly places this suit under land and contract laws, allegedly breach of a memorandum of understanding signed between tenants and Government. With respect, therefore, I would not agree with Counsel Rwakafuuzi that this suit is beyond contract. If anything, the entire cause of action as spelt out in the plaint is on breach of contract, that is, a memorandum of understanding signed between the Government of Uganda and the tenants of Nakawa/Naguru Housing Estate.

Learned Counsel Rwakafuuzi also sought to rely on the Supreme Court decision in **The Commissioner General of Uganda Revenue Authority V Meera Investments, supra**, to justify the filing of this case without serving a statutory notice on the Defendants. In the said case, the Supreme Court, having reasoned that Commissioner General of the Uganda Revenue Authority (URA) could sue or be sued for recovery of taxes (as opposed to suing the URA, a statutory corporation), accordingly held that the Plaintiff was not obligated to serve a statutory notice on the Commissioner General of the Uganda Revenue Authority. My understanding of the holding is that it was based on the court's finding that since there are situations under the Uganda Revenue Authority Act where that Commissioner General of the URA is empowered to sue, he or she is also by necessary implication liable to be sued. It was in that regard that court held that the Commissioner General of URA had been rightly sued, and that, that being the case, since it was not URA the statutory body that had been sued, there was no legal requirement to first serve the Commissioner General with a statutory notice under the Civil Procedure and Limitation (Miscellaneous Provisions) Act. Thus, it is my opinion that the decision in this case is not applicable to the circumstances of the case before me.

In the premises, and for the reasons given above, it is my finding that this being an ordinary suit, the Plaintiff is legally obliged to observe the requirements of the Civil Procedure and Limitation (Miscellaneous Provisions) Act before filing a suit against the Defendants. One of the holdings in **Rwakasoro's case, supra**, is that the prescribed time in the statutory notice was for the purpose that the Government may investigate and if possible settle a case out of court. In my opinion, if this requirement was observed, it would avail a conducive atmosphere for Government or scheduled corporations to settle matters out of court, which would consequently expedite dispensation of justice and minimize litigation.

The Plaintiff's failure to serve the legally required statutory notice therefore renders this suit incompetent. On this point of law alone, I would sustain the preliminary point of law and dismiss this suit.

The suit is accordingly dismissed with costs to the Defendants.

Dated at Kampala this 19th day of January 2012.

Percy Night Tuhaise

JUDGE.