

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-LD-CS-0062-2022
MUHAME GONLAND BROWN :::::::::::::::::::: PLAINTIFF
VERSUS

- 1. ATTORNEY GENERAL**
- 2. NATIONAL WATER & SEWERAGE CORPORATION**
- 3. IBANDA MUNICIPAL COUNCIL**
- 4. BLOCK TECHNICAL SERVICES LTD :::::::::::::::::::: DEFENDANT**

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

RULING ON PRELIMINARY POINT OF LAW

Introduction.

[1] When this matter came up for hearing before me on **18th April 2023** counsel for the 1st and 3rd Defendant pointed it out to this court that she intended to raise preliminary objections which were likely to dispose of this matter.

Directions were given to counsel to address this court by way of written submissions which they complied with and I have taken cognizance of the submissions.

The following were the objections raised;

- 1. The Plaint does not disclose a cause of action against the 3rd Defendant, is brought against a wrong party.**
- 2. The suit against the 1st Defendant is time barred and ought to be struck out.**

The Plaintiff does not disclose a cause of action against the 3rd Defendant, is brought against a wrong party.

[2] On this objection, it was submitted by counsel for the 1st and 3rd Defendants that according to **paragraph 7(c)** of the plaintiff, the Plaintiff stated that the 1st Defendant through the Ministry of water and Environment contracted the 4th Defendant to install water pipes in Ibanda District. That a contract dated 11th September 2007 was attached which indicates that it was made between Government of Uganda represented by the Ministry of Water and Block Technical Services Ltd. That the 3rd Defendant does not appear anywhere in the contract. That it was erroneous for the Plaintiff to state that the said parties were agents of the 3rd Defendant. That the plaintiff did not show any connection between the actions of the parties in the contract and the 3rd Defendant. That the plaintiff does not indicate how the 3rd Defendant is liable for the actions complained of.

[3] In reply, counsel for the Plaintiff submitted that the 3rd Defendant was sued as a successor to Ibanda Town Council which was responsible of implementation of the project. That the 3rd Defendant's employees and agents trespassed on the suit land by digging up and laying water pipes thereon. That because of this, the plaintiff disclosed a cause of action against the 3rd Defendant.

[4] In rejoinder, it was submitted that Ibanda Town Council does or its lawful representative does not appear anywhere in the agreement for installation of the water pipes. That it was the 4th Defendant that was contracted to install the water pipes in Ibanda District and the

contract did not involve the 3rd Defendant nor its predecessor, Ibanda Town Council.

Resolution.

[5] A plaintiff must give enough particulars in their plaint as will enable the defendant and the court to ascertain from the plaint whether in fact and in law the cause of action did arise as alleged. **Order 7 Rule 1** of the Civil Procedure Rules lays down what must be contained in a plaint. In as far as the provision is relevant to the instant suit, it provides that;

"1. Particulars to be contained in plaint.

The plaint shall contain the following particulars-

(a)...

(b)...

(c)...

(d)...

(e) the facts constituting the cause of action and when it arose."

A cause of action has been defined as meaning simply the facts the existence of which entitles one person to obtain from the court a remedy against another person. (**See Cooke vs Gull LR 8 E.P 116, Read vs Brown 22 QBD 31 and Letang vs Cooper [1965] 1 QB 232 at page 242 per Diplock LJ**). The phrase includes every fact which is necessary to be proved to entitle the plaintiff to succeed and every fact which the defendant would have a right to dispute. (**See Cooke vs Gill (1873) LR 8 CP 107 at 116**).

[6] Whether a plaint does or does not disclose a cause of action is a matter of law which can be raised by the defendant as a preliminary point at the commencement of the hearing of the action even if the point had not been pleaded in the written statement of defence.

It has been held by the Supreme Court that it is good practice to aver in a party's pleadings that they intend at trial to raise such an objection. This puts the opposite party on notice so that; that party is minded to put its pleadings in order before court hearing. In that way Court's time may be saved if parties can sort out preliminary matters in advance. (See Tororo Cement Co. Ltd vs Frokina International Ltd (Civil Appeal No 2 of 2001) 2002 UGSC 24).

[7] Where the court makes a finding that the suit does not disclose a cause of action against the defendant, **Order 7 rule 11 (a)** of the Civil Procedure Rules provides that such a plaint shall be rejected.

It should be noted however that the power to reject a plaint should not be exercised except in a clear case. If there is any serious question to be decided between the parties, the proper course of action is to let the suit proceed and then determine the matter on preliminary issues. (See Mulla; The code of Civil Procedure 16th Edition Volume 2 at pages 1923 and 1924.)

[8] As to what are the elements of a cause of action, the law is now settled. In Auto Garage & Another vs Motokov (No.3) (1971) EA. 514 the elements were stated by Spry V.P in his lead judgment as;

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

It therefore follows that, as to whether the Plaintiff's plaint in the instant matter disclosed a cause of action, the plaint must on its face show that the Plaintiff enjoyed a right, that the right had been violated and that the Defendants were liable. (See Serugo vs Kampala City Council & Anor (Supreme Court Constitutional Appeal no. 2 of 1998)). What is important to be revealed in the above consideration is the question as to what right has been violated.

[9] For a determination of whether a plaint should be rejected under **Order 7 rule 11(a)** for failure to disclose a cause of action, the averments in the plaint and the accompanying documents relied upon in it must be looked at. (See Kebirungi vs Road Trainers Ltd and two others [2008] HCB 72, Kapeka Coffee Works Ltd vs NPART (Court of Appeal Civil Appeal no. 3 of 2000) and Mukisa Biscuit Manufacturing Co. vs West End [1969] EA 696). The question therefore is whether the real cause of action has been set out in the plaint or something purely illusory has been stated with a view of getting out of the ambit of **Order 7 rule 11(a)**.

While examining the plaint, the court must give it a meaningful reading and if it is seen to be manifestly vexatious and merit less in the sense of

not disclosing a clear right to sue, the court may exercise its power under **Order 7 rule 11.**

[10] I have critically examined the plaint in the instant matter, under **paragraph 4** thereof, the Plaintiff states that the 3rd Defendant was sued as the successor of Ibanda Town Council.

In **paragraph 6(a)** the Plaintiff's claim against the Defendants was in trespass onto his land at Rukundo in Ibanda Town Council. In **paragraph (b)** the Plaintiff seeks an order directing the Defendants to remove the water pipes that they placed on his land.

Under **paragraph 7(c)** of the plaint, the Plaintiff contends that the 4th Defendant was contracted to install pipelines by the Government of Uganda in Ibanda area.

In **paragraph 7 (d)** thereof, the Plaintiff alleged that the Defendant's agents, employees and or people acting on their behalf or instructions illegally entered into his land or plots and dug up trenches and laid water pipes in the land rendering the land useless to him.

[11] It is a settled position of law that a cause of action arises when a right of the Plaintiff is affected by the Defendant's acts or omissions. (**See Elly B. Mugabi vs Nyanza Textiles Industries Ltd [1992-1993] HCB 227, Tororo Cement Co Ltd vs Frokina International Ltd Civil Appeal No. 2/2001**).

From the above averments of the Plaintiff in his plaint, the Plaintiff has sufficiently shown that he enjoyed a right as the proprietor of land located at Rukundo in Ibanda Town Council which land according to

him was trespassed upon by agents and or employees of the Defendants who dug trenches thereon and lay water pipes therein thus rendering it useless to him for which he sought a remedy from this court directing them to remove the said pipes from the land.

The averments in the plaint in my opinion were sufficient to setup a cause of action against all the Defendants. I am of the considered view that what now remained was for the Plaintiff, in order to succeed, to prove the allegations in the plaint and for the Defendants to dispute them on a balance of probabilities.

[12] The issues of who signed the contract relied upon by the Plaintiff or who was contracted to lay the pipes in the Plaintiff's land are matters of evidence that going into the merits of the case which cannot be considered at this preliminary level of the suit.

It is now a settled position of the law that in considering whether a plaint discloses a cause of action or not, the court ought to restrict its ruling on the defect of the plaint and not to decide on the merits of the case. (See Baku Raphael Obudra and Ors vs The Attorney General (1) (Constitutional Appeal 1 of 2003) [2003] per Mulenga JSC as he was then).

It has been further held by this court that a preliminary point of law cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion, therefore, in any preliminary objection, there is no room for ascertainment of facts through affidavit oral evidence. (See Yaya vs Obur and Ors (Civil Appeal 81 of 2018) and Mukisa Biscuits vs Western Distributors [1969] EA 696).

This objection is therefore overruled.

The instant suit against the 1st Defendant was barred by time.

[13] On this objection, it was submitted on behalf of the 1st and 3rd Defendants that since the allegations of trespass against the 1st Defendant ceased in 2008 when management and ownership of the water pipeline installations were taken over by the 2nd Defendant, the suit against the 1st Defendant was time barred. Counsel relied on authority of **Section 3(1) (c)** of the Civil Procedure and Limitation (Miscellaneous Provisions) Act for this submission.

[14] In response, it was submitted on behalf of the Plaintiff that the 1st Defendant through the Ministry of Water and Environment directly entered upon the Plaintiff's land without permission, placed water pipes onto the suit land which had never been removed from the time of placement to date. According to counsel, this was a continued act of the cause of action of trespass.

[15] It is the law that once a suit has become statute barred, no subsequent developments can revive it. (See Nicholson vs. England [1926] 2 KB 93; Arnold vs. Central Electricity Generating Board [1988] AC 288). Limitation of action is not concerned with the merits of the suit and it is strict and inflexible in nature. Statutes of limitation were enacted at the backdrop of the fact that *interest reipublicae ut sit finis litum*, meaning that litigation shall automatically be stifled after a fixed length of time irrespective of the merits of a particular case. (See Re Application by Mustapha Ramathan for Orders of certiorari, Prohibition

and Injunction Court of Appeal Civil Appeal No. 25 of 1996 and Hilton vs. Steam Laundry [1946] 1 KB 61 at page 8).

The law on limitation of actions for trespass to land has been settled by courts superior to this. The locus classicus case is Justine E.M.N Lutaya vs Sterling Civil Engineering Company (Supreme Court Civil Appeal no. 11 of 2002)).

In Lutaya (supra) it was held by the court that;

“Where trespass is continuous, the person with the right to sue may, subject to the law on limitation of actions, exercise the right immediately after the trespass commences, or any time during its continuance or after it has ended. Similarly, subject to the law on limitation of actions, a person who acquires a cause of action in respect of trespass to land, may prosecute that cause of action after parting with possession of the land.”

(See also Kiwanuka vs Kibirige (Court of Appeal Civil Appeal no. 272 of 2017)).

[16] From the foregoing, it therefore follows that the Plaintiff in the instant suit had a right to sue the Defendants, subject to the law on limitation of actions either immediately when the trespass occurred or at any time during its continuance or after it had ended.

The office of the 1st Defendant is set up by **Article 119** of the 1995 Constitution of Uganda as the principal legal advisor of the Government. According to **clause 4(c)** of that Article, the 1st Defendant

is tasked with the duty to represent the Government in courts or any other legal proceedings to which the Government is a party. Therefore, in any suit where the 1st Defendant is sued, there exists an irrebuttable presumption that such a suit is against Government.

[17] Limitation of actions against Government is governed by the **Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72.**

Section 3(1)(a) of the Civil Procedure Limitation (Miscellaneous Provisions) Act is relevant to the instant suit. It provides that;

“3(1). No action founded on tort shall be brought against the Government...after the expiration of two years from the date on which the cause of action arose.”

In **paragraph 7(d)** of the plaint, the Plaintiff averred that sometime in 2008, the employees and agents of the Defendants without a color of right illegally entered onto his land and dug up trenches and laid water pipes in his land rendering the land useless.

It is therefore clear, from the above, that for the purposes of the law of limitations, time would have started running in 2008 or thereabouts.

[18] From 2008, in accordance with the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 **Section 3(1)(a)**, the Plaintiff had two years to commence the instant action against the 1st Defendant premised on the tort of trespass.

This time was to efflux by **2010** or thereabouts. The time could only be extended if the Plaintiff was prevented from bring the suit due to a

disability. (See Section 5 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72, Nyeko Smith and anor vs Attorney General (Supreme Court Civil Appeal no. 01 of 2016 and Mangeni vs Departed Asians Property Custodian Board (Supreme Court Civil Appeal no. 13 of 1995).


[19] From the record of the instant suit, it was commenced on **16th June 2022** close to two years after the expiration of the time provided for under **Section 3(1)(a)** of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72.

It would therefore follow that the suit against 1st Defendant was time barred by the time that it was commenced. JK

This objection is therefore upheld and the suit against the 1st Defendant is struck out of this court with no order as to costs.

I so order.

Dated, delivered and signed at Mbarara on this **28th** day of **June 2024**.



Joyce Kavuma
Judge.