

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL SUIT NO. 138 OF 2004

1. IBRAHIM ULEGO
2. STEPHEN TABAN
3. ABDUL LOKUT } **PLAINTIFFS**

VERSUS

ATTORNEY GENERAL DEFENDANT

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

The plaintiffs to wit; Ibrahim Ulego, Stephen Taban and Abdul Lokut represented by M/s Fides Legal Advocates filed this suit on behalf of themselves and others against the Attorney General for:-

- (a) A declaration that the freezing of the plaintiffs accounts by the Banking (Freezing of Accounts) Order 1982 by the defendant and the removal of the money standing on the plaintiffs' Frozen Accounts and putting it to use by the defendant is an infringement of their rights under the Constitution.
- (b) A declaration that in passing in passing the Order then Minister of Finance Acted illegally and ultra vires.

- (c) A declaration that the plaintiffs are entitled to the money's worth as at the time of freezing the accounts in issue without regard to any adverse factors or otherwise fair and adequate compensation.
- (d) An order for payment of the profits made from the investment and use of the said money by the defendant since 1982.
- (e) Lost income that would have accrued from uninterrupted freedom to invest and/or use of the said funds.
- (f) Exemplary damages.
- (g) Costs of the suit.
- (h) Interest on (c) (d) (e) and (f) at the rate of 25% per annum from the date of the order up to payment on full.
- (i) Any other relief Court deems fit.

In its defence, the defendant denied liability and averred that the plaintiffs' alleged cause of action is without any legal validity or basis and is barred by law and limitation and that it is not liable for the alleged refusal to defreeze the plaintiffs' accounts. That this suit is brought against a wrong party and in the wrong fora and without prejudice, if the plaintiffs were to be entitled to the claim as set out in the plaint which is not admitted, the Currency Reform Statute of 1987 would be applicable.

At the commencement of the hearing of this suit, Mr. Elisha Bafirawala for the defendant raised several preliminary points in objection to the suit under O.7 r 11 CPR & O. 6 r 28 of the Civil Procedure Rules, hence this ruling.

The preliminary objections are that:-

- (i) The suit is time barred.

- (ii) The plaint does not disclose a cause of action.
- (iii) The 1st plaintiff has no locus- standi to bring this suit.
- (iv) The 2nd, 3rd and other unknown plaintiffs never served a Statutory Notice to the defendant prior to commencement of the suit.

In its written submissions, the defendant contends that under S. 3(1)(a) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, an action based on tort against government should be brought within two years. That the plaintiffs could not bring an action based on the Banking (Freezing of Accounts) Order of 1982, in 2004 after a period of 19 years on the basis of the same facts. That the suit is barred by limitation. That the plaintiffs cannot rely on the doctrine of continuing offence because the said doctrine has to be applied sparingly in view of the clear law on limitation. That even if the plaintiffs had a cause of action there can be no justification for a delay of 19 years. That this was unreasonable delay and the suit should be dismissed.

In the alternative and without prejudice, learned counsel for the defendant submitted that the cause of action under tracing cannot also be maintained either at common law or in equity. Under common law the claimed money can no longer be traced or identified because it became part of a mixed account and under equity the money cannot be traced because of the doctrine of laches. That the essence of the doctrine of laches is that an equitable relief will not be given if the applicant has unduly delayed in bringing the action. That both justice and equity abhor a claimant's indolence. That stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice.

Regarding the cause of action, learned counsel for the defendant submitted that the plaintiffs have no cause of action against the defendant in the instant suit as envisaged in the case of **Auto Garage Vs Motokov [1971] EA 514**. That accounts related to the plaintiffs were defrozen and the claimants ought to have approached their respective commercial banks to reactivate their accounts and failure to do so the plaintiffs should go ahead and sue the respective commercial banks that would not comply. Further that there is no fiduciary relationship between the plaintiffs and the defendant and the suit should be struck out.

Regarding the issue of locus standi of the 1st plaintiff, learned counsel for the defendant submitted that he does not have interest in the matter for he had no account that was frozen. That he could not sue on behalf of others.

Regarding the 2nd and 3rd and other unknown plaintiffs, learned counsel for the defendant submitted that they never served a statutory notice to the defendant prior to commencement of the suit. That the notice was served by Ibrahim Ulego who has no locus standi. Further that the notice of Ulego refers to himself and 'others' who are not shown or disclosed in the notice or annexed thereof. That this renders the suit incurably bad because of non-compliance with S. 2(1)(a) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72.

Learned counsel prayed that this suit be dismissed with costs.

In answer to the objections by the defence, Mr. Faisal Mukasa the defendant's defence counsel submitted that the plaintiffs' claims cannot be categorised as a tort but are for enforcement of one's constitutional rights with torts. That S. 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act neither applies to human rights actions nor

equitable claims. That that law is subject to Article 273 of the constitution and must be put in conformity with the constitution. That it does not matter how a party comes to court or what form his complaint takes. That statutory notice does not apply to human rights based actions. That Article 2 of the constitution is supreme and any law which is inconsistent shall to that extent be void.

Learned counsel for the plaintiff further submitted that the Civil Procedure and Limitation (Miscellaneous Provisions) Act does not in any way limit actions in equity. It limits actions in tort and contract, which are not the subject of this trial. That the defendant has not pleaded that any alleged delay has caused any prejudice to the Government of Uganda or that it was caused by the plaintiffs. Therefore the defence of laches is not available to the defendant because the plaintiffs have kept demanding for their money to be returned by the defendant. That even if the actions of the defendant were to be treated as tort, then there is a continuous Tort.

Regarding whether the plaint discloses a cause of action, learned counsel for the plaintiffs submitted that the plaint disclosed several causes of action especially the issue of the money that was frozen/stolen by the defendant. That the defreezing of 1993 did not mention paying back the money with attendant damages, profits and interest that had accrued. He however emphasises that the defreezing referred to was a hoax.

Regarding the existence of a fudiciary relationship, Mr. Mukasa submits that it exists because government holds office in trust for the people and it is answerable to the people. That even if there was no fudiciary relationship between the plaintiffs and defendant, the doctrine of tracing exists and it is enough that the person the defendant got the money from was in a fudiciary relationship with the plaintiffs.

Regarding locus standi of the 1st plaintiff, Mr Mukasa submitted that even without proving that the 1st plaintiff has a right of his own over the money in question, he has a locus standi to maintain the action before court because under Article 50 (2) of the constitution of Uganda, any person or group of persons may bring an action for the violation of another person or group of persons' rights. That the rule of locus standi is outdated. Further that the 1st plaintiff is a holder of letters of administration of the estate of Elias Abdul Ulego who held an account that was frozen.

Regarding the 2nd, 3rd and 4th plaintiffs not serving a Notice of intention to sue, learned counsel for the plaintiffs submitted that there is no requirement to give such notice in suits based on violation of one's human rights.

That entertaining the defendant's objection would serve to defeat the intention of the constitution therefore the preliminary objection should be dismissed with costs.

Finally, learned counsel for the plaintiffs applied for judgment since the defendant's objection are brought under O. 15 r 2 CPR covering the entire defence which is on points of law.

That there is no need for evidence because the freezing and conversion of the money by the defendant is not contested in the WSD meaning the claim is admitted.

Alternatively that judgment may be entered on admission since His Excellency the President admits liability as per O. 13 r 5 CPR. Further that the Currency Reform Statute does not apply in this circumstances because it did not cover compensation that would come after so many years. That this court should administer substantive justice and curtail delayed litigation by entering judgment on the basis of the record.

In rejoinder Mr. Bafirawala for the Attorney General reiterated his earlier submissions and urged that judgment cannot be entered at this moment because if the objections are resolved in the negative, the case has to be decided on merits.

I have considered the objections raised by the defence, I have internalised the submissions by respective counsel in respect thereof and considered the law applicable. I will go ahead and decide on the issues as raised by learned counsel for the defendant.

1. Whether the suit is time barred

To determine this issue, court has to determine whether the cause of action in the civil suit is based on tort or violation of constitutional right as argued by Mr. Mukasa for the plaintiffs. On this point I am in total agreement with the submission by Mr. Bafirawala for the defendant that a careful perusal of the plaintiffs' pleadings indicates that their action is based on tort. It is clearly an action in conversion and not a violation of constitutional rights as enshrined in the 1995 constitution. It relates to money had and received. The general rule is that a cause of action on money had and received accrues when the defendant received money to which he is not entitled and thus becomes unjustly enriched. **Ghelani Vs Radia [1968] EA 311.**

The cause of action for the plaintiffs as can be deduced from the pleadings arose in 1982 after the enactment of the Banking (Freezing of Accounts) Order 1982 which had the respective monies of the plaintiffs/claimants frozen. Civil Suit 138 of 2004 was filed in 2004. The claims by the plaintiffs cannot be causes of action that arose under the 1995 constitution which was promulgated after 13 years after the plaintiffs' cause of action arose. To hold otherwise would be to give it a retrospective application to the 1995 Constitution. Since I have agreed with the contention that the cause of action herein is under tort then the Civil Procedure and Limitation (Miscellaneous Provisions) Act would be the law applicable. It appears the plaintiffs want to circumvent that law in order to avoid being caught up by the law of limitation.

The plaintiffs' cause of action is hinged on money had and received and converted as pleaded in paragraph 4 of their plaint. It is not hinged on a violation of Human Rights under the 1995 Constitution. Therefore the law of Limitation under S. 3 (1)(a) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act which is still in force comes into play. To further support my conclusion is the pleading in paragraphs 8 and 9 of the amended plaint which states that:-

“Sometime in 1982, the defendant without the consent of or any benefit to the plaintiffs and in further perpetuation of the illegality in paragraph 7 above wrongfully through the Bank of Uganda accessed the plaintiff's money standing on the credit of their frozen accounts and applied it to its own use.....”

Paragraph 9 reads in part that:-

“ As a result of freezing the accounts, the plaintiff lost control over their funds and could not invest or otherwise benefit from the same on any way whatsoever.....”

These complaints are clearly founded on tort. By the plaintiffs trying to hide under Article 50 of the Constitution in their submissions is diversionary and an attempt to avoid the law of limitation which would deny the defendant that defence.

It is trite law that courts have always refused to allow a party or cause of action to be added where if it were allowed the defence of the statute of limitations would be defeated. See: **Mohammed B Kasasa V Jasphar Buyonga Sirasi Bwogi Civil Appeal No. 42 of 2008.**

The court of appeal in that case went ahead to hold that:-

“Statutes of Limitations are in their nature strict and inflexible enactments. Their overriding purpose is interest reipublical ut sit finis litum meaning that litigation shall be automatically stifled after a fixed length of time, irrespective of the merits of a particular case the statute of limitation is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitations is entitled, of course, to insist on his strict rights.”

I take cognisance of the plaintiffs’ argument in their answer to the objection that the instant case is for declarations that their rights under that constitution are being infringed. In my view however and I agree with learned counsel for the defendant that this does not necessarily place it beyond tort or contract law. All rights enforced by this country are enshrined in the constitution. The cause of action in the instant case is clearly under the tort of conversion placing it, as rightly submitted by Mr. Bafirawala under the auspices of the Civil Procedure and Limitations (Miscellaneous Provisions) Act.

The above notwithstanding and assuming that indeed the plaintiffs are enforcing their constitutional rights, this court takes judicial notice that the constitution of Uganda came into force in 1995 when the rights of the plaintiffs had been allegedly infringed upon for 13 years since 1982.

I agree with learned counsel for the defendant that a person whose constitutional rights have been infringed should have some zeal and motivation to enforce his or her rights. In litigation of any kind, time is essential as evidence may be lost or destroyed and this is the more reason the law of limitations should be allowed to take its course. A party who wishes to enforce his rights in court must do so within a reasonable time and must be prompt. See: **Attorney General of the Republic of Uganda and Attorney General of the Republic of Kenya Vs Omar Awadh & 6 others Appeal No. 2 of 2012 (EACJ Appellate Division)**.

Therefore for the plaintiffs to come after 8 years after the promulgation of the 1995 Constitution to enforce a right was not prompt. The plaintiffs by their conduct and negligence failed to institute a suit against the defendant for 22 years when their cause of action arose. This was to the prejudice of the defendant because it cannot properly defend the suit due to probable loss of witnesses, memory and lack of sufficient public records to rely on.

According to the submission by learned counsel for the plaintiffs, his clients are seeking for equitable and restitutionary remedies for money had and received as well as under the doctrines of tracing. That doctrine of laches is not open to the defendants. On this, I agree

with the submission by learned defence counsel that the equitable defence of laches comes into play when the limitation Act cannot be relied on.

Consequently I will uphold the submission by learned counsel for the defendant that by virtue of S. 3 (1)(a) of the Civil Procedure and Limitation (Miscellaneous Provisions Act) this suit is time barred.

2. Whether the plaint does not disclose a cause of action.

According to learned counsel for the plaintiffs the plaint discloses several causes of action because of the money frozen and stolen by the defendant. That the alleged defreezing was a hoax.

On the other hand, learned counsel for the defendant insists that the plaintiffs do not have a cause of action. It is trite law that for a cause of action to exist, the following tenets must be shown to exist i.e that the plaintiff had a right, that right was breached by the defendant and the defendant is responsible. If any of these elements is missing then the plaint would be bad in law and cannot be amended. **Auto Garage Vs Motokov [1971] EA 514.**

As rightly submitted by Mr. Bafirawala learned counsel for the defendant, it is undisputed that the Banking (Freezing of accounts) Order 1982, the validity of which has never been challenged, froze some individual's bank accounts. However the Banking Act 1969 was repealed by the The Financial Institutions Act 1993 which had effect of

defreezing the frozen accounts with effect from 14th May, 1993. Communication in form of a formal request was made by the Minister of Finance and Economic Planning to all commercial Bank Managers to have such accounts defrozen. It was therefore incumbent upon the respective claimants to approach their respective Commercial Banks to reactivate their accounts. If the commercial banks failed to act then those banks ought to have been the ones to be sued. A fiduciary/contractual relationship existed only between the plaintiffs and their respective commercial Banks which are legal entities. No such relationship existed between the plaintiff and the defendant herein. Any outstanding claim by the plaintiffs should be brought against the commercial Banks. For the reasons I have given in resolving issues 1 and 2 it is my considered view that the plaintiffs have no cause of action against the defendant.

3. Whether the 1st plaintiff has no locus standi to bring this suit.

Whereas learned counsel for the defendant contended that the 1st plaintiff has no locus standi to bring this action, learned counsel for the plaintiff submits to the contrary. He relies on Article 50(2) of the constitution which gives authority to any person or group of persons to bring an action for the violation of another person or group of person's rights.

Learned counsel for the plaintiffs attacked the rule of locus standi as outdated. Further that the 1st plaintiff is the administrator of the estate of Elias Abdul Ulego who held an account that was frozen and is therefore mandated by law to bring this suit in that behalf.

According to **Black's Law Dictionary 9th Edition**, the term Locus standi is defined as referring to the right to bring an action or to be given the forum to bring an action. It is

not denied by the plaintiffs that Ibrahim Ulego does not appear as one of the persons whose Account was frozen as a result of The Banking (Freezing of Accounts) Order 1982. It cannot, therefore be said that the 1st plaintiff is a person having the same interest as those persons whose accounts were frozen as a result of the order. His name does not appear under the schedule to the Legal Notice that lists the names of persons whose accounts were frozen. The 1st plaintiff (Ibrahim Ulego) cannot purport to import letters of Administration into his pleadings at this stage to show that he is the administrator of the Estate of Elias Abdul Ulego, because it is not shown anywhere in the plaint that he was bringing the suit as an Administrator of the Estate of the Late Elias Abdul Ulego.

It is my considered view that relying on the provisions of Article 50(2) of the Constitution does not salvage the plaintiff's claim either, nor does reliance on authorities/cases that govern public interest litigation help.

Reliance on Article 50(2) of the Constitution should only arise in public interest litigation matters. However, a close look at the plaintiff's Statutory Notice and the pleadings indicate that the suit is a representative suit under O.1 r 8 of the Civil Procedure Rules and not a Public Interest litigation. The statutory notice issued by the 1st plaintiff indicates that he was bringing a representative action on his own behalf and on behalf of several others. The 1st plaintiff received an order to institute a representative action on his behalf and on behalf of others on 22nd December 2003. In the plaint as amended, the plaintiffs plead that:-

“The plaintiffs have filed the suit on their behalf and on behalf of several other persons whose accounts were frozen.”

Clearly, this is a representative suit and not a public interest litigation case under Article 50 of the Constitution. For one to bring a representative action such person must have the same interest with the other persons that he elects to represent unlike in public interest litigation. The question of locus standi is called into play under a representative action only.

I therefore agree with the preliminary point raised by Mr. Bafirawala that the 1st plaintiff does not have a locus standi to institute this representative suit on his own behalf and on behalf of others as envisaged under O. 1 r 8 of the Civil Procedure Rules. I also reject the assertion by learned counsel for the plaintiffs that the rule of locus standi is outdated. It is still a useful rule and helpful in determining existence of causes of action.

4. Whether the 2nd, 3rd and other unknown plaintiffs never served a Statutory Notice out onto the Defendant prior to commencement of the suit.

In his objection, Mr. Bafirawala for the defendant contended that the 2nd, 3rd and other unknown plaintiffs did not issue a statutory notice as required by the law. That the “others’ are incognito. That Civil Suit 138 of 2004 is incurably bad because of failure to serve a statutory notice.

On the other hand Mr. Faisal Mukasa for the plaintiffs contended that the statutory notice given by the 1st plaintiff was enough and sufficient since it referred to other plaintiffs. Further that in the interest of justice, this court ignores the objection and administers substantive justice in the spirit of Article 126(2)(a) of the Constitution.

Section 2(1)(a) of the Civil Procedure and Limitations (Miscellaneous Provisions) Act makes it mandatory to serve statutory notice. Once the statutory notice is not given it renders the suit filed without notice a nullity. Failure to serve statutory notice is not a mere irregularity but a mandatory legal requirement. Such a suit filed without a Statutory Notice is not only bad but incurably bad. See: **Uganda Development Bank Ltd Vs Aba Trade International Limited and others Misc. Appl 567 of 2010.**

In the instant case, learned counsel for the plaintiff has conceded that he did not serve any Statutory Notice because the suit is based on the enforcement of the plaintiff's human rights and as such they did not need to issue a Statutory Notice.

In view of my earlier pronouncements in this ruling, this argument had no basis. The cause of action in this suit is not based on the enforcement of Human Rights but is rather based on a tort of conversion which enjoined the plaintiffs to serve a Statutory Notice to the defendant. The requirement for statutory notice is not a mere technicality. Failure to serve statutory notice rendered the suit incurably bad. This notice was intended to enable government investigate and if possible settle a case out of court. If this requirement was observed, it would avail a conducive atmosphere for government or scheduled corporations to settle matters out of court, which would expedite dispensation of justice and minimize litigation. See: **Naguru/Nakawa Estates Residents Association Ltd Vs 1. The Attorney General, 2. Uganda Land Commission Civil Suit 146 Of 2011** (per Tuhaise J).

Regarding Article 126(2)(e) of the Constitution, my view is that litigants should not be allowed to take refuge under this Article of the constitution to cover up their inadequacies. In any case, Article 126(2) clearly stipulates that in adjudicating cases, both

Civil and Criminal in nature, the court shall subject to the law apply the following principles:

- (e) ***Substantive Justice shall be administered without undue regard to technicalities.***

Subjecting litigation to law requires that litigants should institute their case within the law which requires interalia that it should be done in the stipulated time frame, serve statutory notice of 45 days before suing government, that one should have a locus standi and a cause of action against another in order to maintain a suit against another. Therefore the court must not have undue regard to technicalities. See: S.C Civil Appeal No. 4/2006 Fredrick J.K Zaabwe Vs Orient Bank & 5 others (per Katureebe JSC).

At the close of his submissions learned counsel for the plaintiff urged this court to invoke O. 13 r. 6 CPR and grant judgment to the plaintiffs in the event that the preliminary objections are overruled.

I agree with learned counsel for the defendant that overruling a preliminary objection does not entitle the plaintiff or defendant to instant victory. Disposal of a preliminary application in the negative enjoins the court to go ahead and decide the case on its merits.

For the reasons I have expounded in this ruling, I am inclined to uphold all the objections by Mr. Bafirawala for the defendant. I will order that this suit be and is hereby dismissed with costs.

Stephen Musota

J U D G E

31.10.2013