THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 60 OF 2012

DENIS NAMARA::: PLAINTIFF

VERSUS

1. RUHINDA MAGURU DAUDI II (RTD CAPT)

2. ADOLF MWESIGE ::::::::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

JUDGMENT

The plaintiff's claim against the defendants is for a declaration that the consent judgment which was purportedly entered into by the defendants vide HCCS No 214 of 2010 is null and void ab initio and/or is illegal and is of no legal consequence; an order setting aside the consent judgment; a permanent injunction restraining the defendants by themselves or through their authorised servants from executing the said consent judgment; general damages; costs and interest there on from the date of filing till payment in full.

The background to the case is that 1st defendant had filed HCCS No. 214 of 2010 seeking an order of the court to set aside the election of the Chairperson of the National Resistance Movement who was also its presidential flag bearer. It was alleged therein that the Chairperson of NRM and its flag bearer could not have been elected unopposed yet the 1st defendant had also been duly nominated to contest for that post at Namboole. The plaintiff further averred that on 25.10.2010 without the consent, authority or approval of any authority the 2nd defendant unlawfully and irregularly entered into the consent judgment with the 1st defendant under the false pretext that he was a Chairman of the Legal Committee, a non-existent organ of the National Resistance Movement. It was his contention that the purported consent judgment is null, void and incapable of passing rights/ benefits to the signatories as the parties to this judgment are in **pari delicto**. He went ahead and averred that by virtue of the defendants' action,

he has suffered substantial loss and damage, psychological and mental torture, humiliation and inconvenience in his capacity as a member of the NRM and a Chairman of the National Youth League.

The 1st defendant in his defence denied the plaintiff's contentions and averred that the consent judgment was validly executed by the persons authorised by law. He also denied the alleged fraudulent misrepresentation and any loss suffered by the plaintiff in the circumstance. The 2nd defendant also denied the existence of the alleged irregularity, fraudulent misrepresentation and contended that the consent judgment was entered into by NRM, a registered political party and body corporate and that he was merely an officer of the party assigned by the party to attend court proceedings. He also raised a preliminary objection that the plaintiff has no cause of action against him (2nd defendant) and that the suit if frivolous, vexatious, bad in law and should be struck out with costs.

At the conferencing, parties agreed that;

1. The three parties are all members of the National Resistance Movement
2. Both the 1st and 2nd defendants entered into a consent agreement in HCCS No. 214 of 2010, the terms of which have not been implemented by the parties.
3. The plaintiff was neither a party to the suit nor to the consent judgment
4. The 1st defendant has filed an application vide MA No.053 of 2012 seeking the orders of the court that both the National Resistance Movement party and its principal officials should show cause why it should not be wound up and liquidated in execution of the consent judgment arising from HCCS No. 214 of 2010
5. The plaintiff has challenged this move and seeks the intervention of the court for the other orders other than implementing the terms of the consent judgment

Issues

1. whether there is a cause of action maintainable against the defendants
2. Whether the plaintiff has locus standi to institute the suit.
3. Whether the consent judgment which was entered into by the two defendants vide, HCCS No. 214 of 2010 is not null and void ab initio and/ or is not illegal and of no legal consequence
4. Whether the parties are entitled to the remedies sought

No oral evidence was adduced. The parties were thus allowed to file written submissions in respect of the 1st and the 2nd issues only; the 1st defendant was expected to file and serve by 24.08.2012; the 2nd defendant by 31.08.2012 and the plaintiff to file by 07.09.2012.

Counsel/ representation

Mr. JM Mugisha and Mr. Chris Bakiza for the plaintiff

Mr. Rwakafuzi for the 1st defendant

Mr. Ntambirweki Kandeebe for the 2nd defendant

Issue one:

Whether there is a cause of action maintainable against the defendants.

Mr. Rwakafuuzi defined a cause of action as every point which is material to be proved to enable the plaintiff to succeed. The plaintiff must however prove that he enjoyed a right which has been violated by the defendant; see **Auto Garage v Motokov (1971) EA 514.**

In the instant case, counsel contended that the plaintiff's pleadings do not show any right that has been violated by the 1st defendant nor did the plaintiff attach the NRM Constitution showing the rights of the National Chairperson of the NRM Youth League and a member of the Central Executive Committee that had been violated by the defendant. He contended further that much as O.6 r.2 of the CPR requires that a party must attach to his pleadings documents to be relied upon, the plaintiff did not attach the NRM Constitution on his pleadings but he merely pleaded that this Constitution gave certain rights to him. The said rights are neither pleaded in the plaint nor is the Constitution creating the said rights attached. Counsel thus maintained that the plaint does not disclose any rights as violated by the defendant.

Counsel further contended that even if an assumption was made that the plaintiff had rights; these could not have been violated by the 1st defendant for the sole reason that, it is his right to contest in the elections that had been violated in the suit that culminated into the consent judgment vide HCCS No. 214 of 2010. Further, the parties in HCCS No.214 of 2010 amicably resolved their issues in the consent judgment, so the plaintiff cannot claim to have his rights infringed by the 1st defendant and if he has any grievance, he should seek the remedy from the defendants in HCCS No. 214 of 2010 or the party as a whole. The party took full benefit of the consent judgment; an individual in absence of representative capacity cannot seek to set the same aside; the plaintiff filed the suit as an individual without reference to any section of the members of the party.

Counsel referred to the case of Cranmer **Ssajabi Imaka & Anor v Kawune Wakhooli & 2 Others Constitutional petition No 11 of 2008** where their Lordships dismissed a petition that sought to impeach the Busoga Constitution on the ground that it left out some clans from the contest for the Kyabazingaship on the reasoning that the petitioners could not claim to be speaking for any sizeable section of Busoga when they filed the petition in their individual capacities and not showing that the petition was representative.

In the instant case, counsel contended that the rights of the plaintiff were never violated by the 1st defendant and that none of the ingredients of a cause of action have been proved by the plaintiff against the 1st defendant. It is settled law that a plaint that does not disclose any cause of action should be rejected under Order 7 rule 11 of the CPR. However where the plaint discloses a cause of action that is not maintainable, O 6 r 30 (1) of the CPR requires that such a suit should be dismissed. See **Baku Raphael Obudra & Anor v AG SCCA No.1 of 2003.**

He further contended that a third party who wishes to set aside a consent judgment must show that he suffered a legal grievance by the judgment he wishes to set aside; a consent judgment is binding interparties unless proof is made that it was procured by fraud, mistake, misapprehension of facts or that it is against the policy of court. A third party is not bound by a consent judgment if he cannot show that he has suffered a legal grievance.

It was counsel’s contention that the plaintiff in the instant case must show that the defendants, NRM and the Chairman of NRM did not have any capacity to enter into the consent judgment.

Counsel went ahead to submit that it was after the NRM had taken full benefit of the consent judgment that the plaintiff sought to enforce his rights accruing under the consent; the plaintiff cannot be allowed to approbate and at the same time reprobate. Counsel thus maintained that the plaintiff does not have a sustainable cause of action in law and the suit should henceforth be dismissed.

In reply, Counsel for the plaintiff agreed to the ingredients of a cause of action as articulated in the case of **Auto Garage vs Motokov (1971) EA 514** and the ratio decided in **AG vs Oluoch (1972) EA 392**. He also relied on **AG v Tinyefuza Const. Appeal No.1 of 1997** which gives the definition of a cause of action as a fact or a bundle of facts plainly appearing on the face of the plaint that the plaintiff must prove, if, traversed, to be entitled to judgment against the defendant.

Counsel thus submitted that the plaint duly complies with and satisfies the ingredients as envisaged in the above authorities. They alluded to paragraphs 1, 5 and 8 of the plaint where the plaintiff alleged that he is a member of the NRM and that his party was duped into entering an illegal and fraudulent consent judgment; he pleaded particulars of illegality, irregularity, fraud and misrepresentation of the defendants pleading as to how his interest and those of the entire membership would suffer if the consent judgment is enforced.

Regarding the reference to O.6 r 2 of the CPR, counsel submitted that the import of the provision is that a party ought to attach at least a list of documents to be relied upon among other things; it not mandatory that a party attaches actual documents. In the instance, the plaintiff stated that he would rely on the NRM Constitution. They maintained thus had the defendants wished to have the said Constitution in advance, they ought to have issued a notice to produce the document in issue under O.10 r 15 of the CPR. I concur with counsel and I hasten to add that the defendant could as well seek for further and better particulars as provided in O.6 r 4 of the CPR.

Counsel further contended that the plaint discloses breach of the plaintiff's rights by the 1st defendant in as far as he has a right to belong to any political party of his choice and that right was violated when he irregularly/ illegally entered into the consent judgment. They further contended that the plaintiff has the prerogative to choose whom to sue; they maintained that no prejudice would be suffered by the mentioned Secretary General, NRM or the Chairperson in the given circumstances. He referred to **Joel Odong Amen & Anor v Dr. Ocero Andrew & Anor HCCS No. 602 of 2004.**

It was counsels' contention that the plaintiff's party being a registered entity, his suit is deemed to be a derivative action and that he indeed pleaded that the acts of the defendants adversely affected his interests and those of the party and its membership as a whole.

Counsel sought to distinguish the case of **Cranmer Ssajabi Imaka & Anor v Kawune Wakhooli & 2 ors Const. Petition No.11 of 2008** from the instant case. They contended that whereas the suit listed some clans and left out others; in the instant case the plaintiff is challenging the legality of the consent judgment which was purported entered into for and on behalf of a distinct body, the NRM party. They further contended that much as a point of law can be disposed of at preliminary level where such a point needs ascertainment, that is, the adduction of evidence, then the point of law is postponed until evidence is adduced and such a matter is framed as the 1st issue at the substantive hearing. They maintained that some of the matters raised by the 1st defendant need to be ascertained at the main hearing and cannot just be washed away by a preliminary objection. (see **AG v Intdron & 25 others CACA No. 4 of 2009** and **Lt. Kabareebe v Major Nalweyiso CACA No. 34 of 2003 also(2004) KALR 357**.

Counsel further contended that there is no need of invoking the provisions of Orders 6 r 29 and 30 (2) and Order 7 r 11 of the CPR as the plaint discloses a cause of action; as such the authorities of **Re Abdulhakim & Aor const. Ref No 7 of 1998** citing **AG v Tinyefuza SCCA no 1 of 1997** and **Raphael Baku & Anor v AG SCCA No 1 of 2003** as quoted by the defendants are out of context. Additionally, counsel submitted that **HMB Kayondo v AG (1989) KALR 33** is clearly distinguishable in so far as Kayondo's cause of action was unknown to the law unlike in the instant case where the plaintiff is an aggrieved party in regard to the consent judgment. See **Libyan Arab Uganda bank V Adam Vassildas SCCA No.10 of 1990** and also reported in (1993) VI KALR 112. Counsel further contended that the plaintiff rightly pleaded that he had suffered a legal grievance within the meaning of **Ladak Muhamed Hussein v Griffith Isingoma & 2 Ors**

As regards the time factor, counsel submitted that the law does not stipulate the time limit within which a party can apply for review and as such, each case is to be treated on its own facts and circumstances; see **Kanyabwera v Tumwebaze (2005) EA 86.** They further contended that the passage of time cannot be taken as proof of approbation and reprobation by the plaintiff. Counsel went ahead and stated that the gist of the plaintiff's claim is to challenge the illegality perpetrated by some of the officers of the party; they submitted thus that once an illegality is drawn to the court's attention, it defeats questions of propriety of pleadings; see **Makula International Ltd v His Eminence Cardinal Nsubuga & Anor 1982 HCB 11.**

In their reply, counsel submitted that the authority of **Combined Services Ltd v AG (2009) KALR** is distinguishable from the instant case.

"A preliminary objection" or a "preliminary point of law" as I understand it raises a pure and precise point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion**.** See **Mukisa Biscuit Manufacturing Ltd Vs. West End Distributors (1969) EA 697.**

When preliminary points are raised they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleading alone. See **Quick Enterprises Vs. Kenya Railways Corporation Kisumu High Court Civil Case No. 22 OF 1999.**

I now turn to resolve the preliminary points of law raised by the 1st defendant. The 1st one touches on the cause of action.

Order 7 rule 1 (e) of the Civil Procedure Rules states that a plaint shall contain facts constituting the cause of action and when it arose. Under rule 11 (a) of the same order a plaint shall be rejected where it does not disclose a cause of action. In Auto Garage Vs Motokov (above) Spy VP held that there are three essential elements to support a cause of action:

1. the plaintiff enjoyed a right,
2. the right has been violated,
3. the defendant is liable.

Paragraph 5 of the plaint in the instant case states;

a. **On or about the 25th day of October 2010 without the consent, authority or approval of any authority, the second defendant unlawfully, illegally and irregularly entered into the consent judgment with the 1st defendant under the false pretext that he was the Chairman of the legal Committee (sic) a non existing organ of the National resistance movement whereby it was purportedly agreed, inter alia;**

i. **The NRM, the Secretary general and the Chairman NRM held the view that the Chairman NRM was duly and constitutionally elected ad the NRM presidential flag bearer, the 1st defendant herein held the that the Constitution of the NRM was not followed and that the true parties had resolved to appoint 5 people each to settle the matter by consensus**
ii. **The NRM was to explore various options and put in place mechanisms that would ensure an electoral commission that was competent, independent and free from manipulation**
iii. **The NRM Party was to convene an extra ordinary National conference for purposes of generating consensus on key economic, social and political policy issues including electing the leadership of the party within a period of ten months after the national general elections**
iv. **The NRM Party was to cause a fresh election of those delegates where there would still be disputes unresolved by the time of the General Elections, by 1st August 2011**
v. **The NRM, the Secretary General and the Chairman pay costs of the suit**

b. **The plaintiff will aver that the said judgment is null and void ab initio, irregular and/or wrongful and is contrary to the public policy and the letter and the spirit of the laws of Uganda and should not be left to stand**

Paragraph 7 of the plaint states;

...**by virtue of the defendant's acts in his capacity as a member of the NRM and in his capacity as the Chairman National League, the plaintiff has suffered substantial loss, damage psychological, mental torture, humiliation and inconvenience for which he holds the defendants jointly and severally responsible**

Paragraph 8 states that;

The plaintiff will aver and contend that the defendants have already threatened to enforce the consent judgment, unless restrained the plaintiff will suffer irreparable damage, as the NRM to which he owes his political allegiance will be liquidated/ or wound up there by plunging the plaintiff's political and other interests and those of the entire membership and the public at large into a quagmire and/ or quandary from which all cannot extricate themselves

The above mentioned paragraphs are the ones that the plaintiff alleged to disclose a cause of action.

It was held, inter-alia, in Auto Garage (supra) that a plaint may disclose a cause of action without containing all the facts constituting a cause of action provided that the <u>violation by the defendant of a right of the plaintiff is shown.</u> If a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then a cause of action has been disclosed and any omission or defect may be put right by amendment.

It is the law that where a plaint discloses a cause of action but is deficient in particulars, the plaint can be amended so as to include particulars, say of negligence, illegality, fraud, misrepresentation etc.

Much as the plaint in the instant case shows the particulars of illegality, irregularity and misrepresentation, it does not in my opinion show any rights of the plaintiff that have been violated by the defendant. If any element is missing then no cause of action is established and no amendment will be allowed, the under lying principle being that where a plaint is a nullity, no amendment can redeem it, whereas a mere defect or an irregularity may be curable by

amendment where the ends of justice so demand, where a cause of action is otherwise disclosed. See **Tororo Cement Ltd v Frokina International Ltd SCCA NO 2 of 2001**

The crux of the issue before me is whether there is a maintainable cause of action. This is to be derived from the following circumstances:-

The plaint in the original suit was filed on 17.09.2012. it was allocated to Hon. Justice Bamwine as he then was on 20.09.2010 before a summons to file a defence was issued. On the same day the trial Judge declined jurisdiction to hear the case and it was forwarded to the Principal Judge for directions. The Principal Judge conducted hearings on the 01.10.2010, 08.10.2010 and 23.10.2010 during which the defendants namely, The National Resistance Movement, the Secretary General, National Resistance Movement and The Chairman, National Resistance Movement were represented by Mr. Kandeebe Ntambirweki. Hon. Adolf Mwesige the 2nd Defendant in this suit attended all the hearings. All the hearings took the form of discussions with a view to finding an amicable solution to the issues raised by the plaintiff and these discussions culminated into the Consent Judgment now a subject of this suit. The Consent Judgment was between RUHINDA MAGURU DAUDI II as the plaintiff and the defendants already named in this judgment. The consent judgment is in the following terms.

"CONSENT JUDGMENT

By consent of the parties to this suit and in consideration of the plaintiff withdrawing the suit,

*It is **HEREBY AGREED**-*

a. *Whereas the defendants hold the view that the 3rd defendant was duly and constitutionally elected as NRM presidential flag bearer, the plaintiff holds the view that the Constitution was not followed. The two parties have resolved to appoint 5 people each to settle the matter by consensus.*
b. *The NRM party shall explore various options and put in place mechanisms that will ensure an electoral commission that is competent, independent and free from manipulation.*
c. *The NRM party shall convene an extra-ordinary National Conference, for purposes of generating consensus on key economic social and political policy issues including electing the leadership of the party, within a period of ten months after the national general elections.*
d. *The NRM party shall cause a fresh election of those delegates where there will still be disputes unresolved by the time of the General Elections, by 1st August 2011.*
e. *The defendants shall pay the costs of the suit."*

The consent judgment was filed and drawn jointly by M/s Rwakafuzi & Co Advocates for the plaintiff and M/s Ntambirweki Kandeebe & Co Advocates for the defendants. It was signed by Capt. Ruhinda Maguru Daudi II (Plaintiff), Mr. L.K Rwakafuzi counsel for the plaintiff, Hon. Adolf Mwesige, MP. Chairman Legal Committee and Mr. G. Ntambirweki Kandeebe counsel for the defendants. The judgment was entered by the Principal Judge on 25th day October, 2010. It should be observed that the Principal Judge facilitated the parties in negotiating the settlement of the suit because he presided over the hearing of the case on the dates already mentioned that culminated in the consent judgment. It was an open and not a fraudulent process. It should also be observed that throughout the trial Hon. Adolf Mwesige played a leading role in explaining the position of the NRM party as far as the suit was concerned and he did so in presence of Mr. Kandeebe Ntambirweki who was counsel for all the three defendants. The role of Hon. Adolf Mwesige who signed the consent judgment has not been disputed by the three defendants and their counsel and if the defendants in the original suit have not disowned him my view is that although there may have been no standing Legal Committee of the NRM party there might have been an adhoc Committee to handle the case together with the defendants' lawyer and I do not see how either the 1st defendant in this suit who negotiated the settlement on his own behalf and was described as a member of the family during the proceedings and Hon Adolf Mwesige (2nd defendant in this suit) who together with the defendants' lawyers negotiated the consent judgment on behalf of the three defendants to avert a crisis given the urgency with which it was handled would be held liable for violation of the plaintiff's right if at all. So the three elements in the case of Auto Garage already cited in this ruling were not satisfied because even if it was to be granted that the plaintiff enjoyed a right which was violated the violation was not by any of the two defendants and I would find that this suit does not raise any cause of action against the defendants and as a consequence it should be dismissed.

In the event that I am wrong about the existence of a cause of action; I would still hesitate to find that the same is maintainable in law. The reason is simple, the plaintiff's grievance stems from the consent judgment to which he was never privy; neither has he shown how his right under that consent judgment was violated by the defendants. A consent judgment is akin to a contract/ agreement in as far as it can be set aside on any ground that would invalidate a contract/ agreement between the parties. See **Hassanali v City Motor Accessories Ltd & Ors (1972) EA 423.** This disposes off the 2nd preliminary objection. In the circumstances and for the reasons stated, this preliminary objection is upheld. The suit is dismissed with costs to the 1st defendant.

Before I take leave of this suit; judicial precedence shows that an application to set aside a consent judgment should ordinarily be challenged in a suit itself by way of an application for review to set it aside. This would definitely be by motion under order 52 of the CPR and not a plaint under Order 4.

Eldad Mwangusya

J U D G E

07.06.2013

- High Court
- Add to Significant Recent Additions