

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

CIVIL SUIT NO. 237 OF 2010

1. SEMAKULA PETER
2. KARENGUJA OLIVIA } **PLAINTIFFS**
3. APEYA RICHARD }

VERSUS

ATTORNEY GENERAL **DEFENDANT**

BEFORE: HON JUSTICE STEPHEN MUSOTA

RULING

The plaintiffs represented by M/s Matovu & Matovu advocates filed this suit against the Attorney General for recovery of their terminal benefits and/or declaration that they are entitled to their terminal benefits in accordance with the Produce Marketing Board retirement benefits scheme and for general damages and special damages for breach of contract and costs of the suit.

The plaintiffs' case is that they were employees of the Produce Marketing Board (PMB) Liquidated. While in employment of the said PMB they were beneficiaries of the retirement benefits scheme to which both the board and plaintiffs contributed. According to that scheme the benefits from the scheme were to be paid at the age of 55 years on retirement. Between 1990 -93 the board issued the plaintiffs with termination letters as per annex 'B'. On termination of the plaintiffs' contract of service, the board did not pay the plaintiffs their benefits accruing to them from the retirement benefits scheme and neither did they pay them their terminal benefits. That PMB has since been completely liquidated and a report made to the Privatization Unit managed

and operated by the Ministry of Finance who the plaintiffs hold liable upon liquidation of the Produce Marketing Board. That upon liquidation of the Produce Marketing Board and the transfer of its assets and liabilities to the Privatization Unit in the Ministry of Finance the plaintiffs hold the defendant liable for their terminal benefits and claim damages for breach of contract.

In its written statement of defence, the defendant contends that the plaintiffs' suit discloses no cause of action and is time barred frivolous and vexatious. That the plaintiff is not entitled to any of the prayers sought. Indeed at the commencement of the hearing of this suit Mr. Mwambusya learned counsel for the defence raised preliminary points of law as promised in their amended written statement of defence. Court allowed respective counsel to file written submissions to support their respective cases.

In his submission Mr. Mwambusya raised two points for determination. They are:-

1. Whether the plaint discloses a cause of action against the defendant and
2. Whether the matter is time barred.

Learned counsel decided to submit on the first issue alone. He contended that the facts contained in the plaint do not disclose a cause of action because according to the plaint, Produce Marketing Board was in liquidation. That the second paragraph of the plaint states so. In paragraph 3, the plaintiffs' claim for terminal benefits and the dispute arises from the Public Enterprise Divestiture (PERD) Statute of 1993 where state enterprises were divested. Therefore the PERD Statute is paramount and the same must be followed to the letter with no short cuts. He relied on the case of UNIDRON & 25 others Vs Attorney General HCCS No. 04 of 2007 where Kiryabwire J (as he then was) referred to S. 41 of the PERD Statute that :-

“Where any provision of any enactment conflicts with any provision of the Act, the latter shall prevail over the former.”

Mr. Mwambusya further submitted that S. 23 of the PERD Act deals with the sale and transfer of a public enterprise and in this case government divested itself through winding up and liquidation of the assets of Produce Marketing Board. Further that S. 23(4) provides that.

“(4) All proceeds of divestiture of a public enterprise, including, for avoidance of doubt any proceeds to which but for this section, the enterprise concerned would be entitled, shall be deposited in the divestiture account to be maintained in Commercial Banks and development banks designated by the Minister responsible for finance in consultation with the committee and used solely in accordance with this Act.”

That this enactment was relied upon in the case of **Specioza Kalungi & 61 others Vs Attorney General and the Divestiture Reform and Implementations Committee HCCS 63 of 2008.**

Learned counsel for the defendant further submitted that the above provision of the Act provides that the proceeds of the sale or liquidation shall be paid to the divestiture account. That by failing to plead that there was money paid onto the divestiture account from the liquidation of Produce Marketing Board then the plaintiff does not disclose a cause of action. That nowhere in the plaintiff is it pleaded that Produce Marketing Board is a public enterprise that has been sold and the proceeds of sale are on the divestiture account. That if no such averment is made in the plaintiff then the plaintiff discloses no cause of action because the plaintiffs’ case can only be founded on a question of fact that money from the divestiture of a particular public enterprise has been paid to the divestiture account. Learned counsel prayed that the plaintiff in this case should be rejected for being a nullity under O. 7 r 11 CPR and the suit dismissed with costs.

In reply, Mr. Matovu learned counsel for the plaintiffs submitted that the plaintiff he filed discloses a cause of action and the plaintiff should be stopped from departing from its pleadings since he pleaded to the extent of his liability from paragraph 4 to 7 of his amended WSD. Mr. Matovu

further submitted that the plaintiff has pleaded sufficient material facts to bring into consideration S. 23(4) of the PERD Act. He also referred to the case of **Specioza Kalungi** (supra).

Learned counsel further contended that S. 23(4) of the PERD Act does not have to be pleaded verbatim.

In the alternative Mr. Matovu argues that paragraphs 4(a) to 4(g) are pleadings relating to privatization and fall within the case of **Specioza Kalungi** (supra).

Although learned defence counsel relied on **Specioza Kalungi** (supra) he goes on to submit that facts in that case and the case of **Priamit Enterprises Limited Vs Attorney General** are distinguishable from the present facts. That in Specioza Kalungi's case the company was in liquidation so S. 23(4) of the PERD Act did not arise. In the case of Priamit Enterprises Ltd (supra) the plaintiff did not plead facts to necessitate application of S. 23(4) of the PERD Act, so there was no cause of action.

Mr. Matovu further submitted that the purpose of S.23(4) and 26 of the PERD Act were not intended to exonerate government from liability upon completion of the divestiture process.

I have considered the respective submissions by respective counsel, I have related the same to the law applicable and the pleadings before me. I agree with the submissions by Mr. Mwambusya that a plaintiff must allege all facts necessary to disclose a cause of action. **Attorney General Vs Olouch [1972] EA 392**. And when deciding whether a plaintiff discloses a cause of action court only peruses the plaintiff and any accompanying documents.

In order for me to determine if the plaintiffs' pleadings disclose a cause of action in a claim emanating from a divested entity like the Produce Marketing Board from which the plaintiffs claim terminal benefits, provisions of the PERD Act have to be considered especially S. 23(4) thereof (supra).

It is explicit that this provision provides that the proceeds of the sale or liquidation shall be paid into the divestiture account. S. 26 provides for the use of the proceeds of divestiture and the responsible minister's discretionary power on how to utilize that money. It follows therefore that for a plaintiff to disclose a cause of action on the basis of S. 23 of the PERD Statute it must aver that the debtor public enterprise has been sold and proceeds of the sale are on the divestiture account. see **Priamit Enterprises Ltd** (supra). If no such averment is made in the plaintiff then the plaintiff does not disclose a cause of action. On this point I agree with the decision by my learned brother in *Specioza Kalungi & 61 others* (supra) that given the construction of S. 23 of the statute it is inevitable to conclude that even under S. 23 of the statute the plaintiff disclosed no cause of action because no facts were pleaded to necessitate the application of that section to the appellant's allegation in the plaintiff.

In the case under consideration creditors have to be paid from the divestiture account. The money that is claimed has to be from the proceeds of the sale of the public enterprise in question in this case Produce Marketing Board. The discretion to pay is with government. Therefore I agree with Mr. Mwambusya that the plaintiffs' case can only be founded on a question of fact that money from the divestiture of a particular public enterprise, has been paid to the Divestiture Account. These facts have to be pleaded to found a cause of action. It was necessary to plead facts to necessitate the application of S. 23 of the statute to the plaintiffs' allegations in the plaintiff.

Whereas it is correct as submitted by learned counsel for the plaintiff that S. 23 and 26 of the PERD Act was not intended to exonerate the government from liability it is important that in

order for government to be held responsible, relevant facts have to be pleaded to found a cause of action.

Whether or not a plaint discloses a cause of action is a question of law and can be raised at any time of trial even if it is not pleaded.

It is provided under O. 7 r 11(a) that a plaint shall be rejected where it appears from the statement in the plaint to be barred by any law. In deciding whether or not a suit discloses a cause of action, one looks, ordinarily, only at the plaint and assumes that the facts alleged are true. Rejection of a plaint for not disclosing a cause of action under O. 7 rule 11 of the Civil Procedure Rules is mandatory. A plaint which discloses no cause of action is a nullity and cannot be amended **Auto Garage Vs Motokov [1971] EA 514.**

By not pleading that Produce Marketing Board is a public enterprise that has been sold and proceeds of sale are on the divestiture account, it rendered the plaint in this suit defective for not disclosing any cause of action.

Consequently I will uphold the objection by Mr. Mwambusya and reject the plaint in this suit for being a nullity under O. 7 r11 of the Civil Procedure Rules. The suit is struck out with costs.

Stephen Musota

J U D G E

08.01.2014

