

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
CIVIL SUIT NO. 077 OF 2014

1. MAWOKOTA CHEMICALS INDUSTRIES LTD }
2. SARAH CONSTANCE NAMBOZE MUGWANYA } ::::::::::::::::::::::: PLAINTIFFS
3. MICHAEL KUTANWA MUGWANYA }

- *VERSUS* -

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING

The plaintiff to wit; Mawokota Chemical Industries Ltd, Sarah Constance Namboze Mugwanya and Michael Kutanwa Mugwanya represented by M/S Semuyaba Iga & Co. Advocates and M/S Alliance Advocates filed this suit against the Attorney General for:

- (1) A declaration that the plaintiffs are entitled to own property either individually or in association with others and that they cannot be deprived of the same without prompt payment of fair and adequate compensation prior to the taking of possession or acquisition of the property.
- (2) A declaration that the plaintiffs have a right of access to Courts of Law and are entitled to a fair and speedy public hearing since they have an interest or right over property.
- (3) A declaration that the plaintiffs be compensated for the loss of property comprised in a soap factory located at Naziri and comprised in Mawokota Block 46 Plot No. 20 and 21 which comprised of several properties include a soap factory residential houses, commercial houses, farm house and farms with livestock and crops.

- (4) A declaration that the defendant admitted that the plaintiffs be paid shs.10,600,000.000= as compensation for the loss of the above mentioned property.
- (5) A declaration that the plaintiffs be paid shs.10,600,000.000= as compensation for the loss of the above mentioned property by way of special damages.
- (6) A declaration that the plaintiffs be paid interest of 30% per annum on shs.10,600,000.000= from 1983 the date when the incident happened till payment.

The defendant in the written statement of defence denied liability and raised preliminary point of law to the effect that:

1. The plaintiffs' suit disclosed no cause of action against the defendant since the actions complained of were by Uganda National Liberation Army (UNLA) Forces that occurred in the period 1982-83 for which the defendant is not responsible.
2. That the suit against the defendant is a statute barred having been brought 31 years after the acts complained of occurred.

On the first issue on whether there is no cause of action, learned counsel for the defendant submitted that under Order 7 Rule 11 (a) of the Civil Procedure Rules the plaint shall be rejected where it discloses no cause of action. That the plaint must allege all facts necessary to disclose a cause of action. The Court peruses the plaint and any documents attached to it and assumes that all the facts alleged are true to establish whether the plaint discloses no cause of action. Learned counsel referred to **Attorney General Vs Oluoch [1972] EA 392 per Spry VP at page 394** where it was held by the Court of Appeal that:

“In deciding whether or not a suit discloses no cause of action, one looks, ordinarily, only at the plaint (Jeraj Shariff & Co. Vs Chotai Family Stores [1960] EA 374) and assumes that the facts alleged in it are true.”

He argued that the provision that a plaint be rejected for disclosing no cause of action under Order 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. (See *Auto Garage Versus Motokov [1971] EA 514*).

He further submitted that the acts forming the basis of the instant suit arose during the period 1981-83 and according to the plaint, these acts were committed by the Uganda National Liberation Army Forces and that there is no way the plaintiff can seek to enforce rights under the 1995 Constitution which had not yet come into force at the time. Therefore the Constitution could not guarantee rights before it came into existence.

He further contended that the instant suit discloses no cause of action because the acts that occurred between 1981-83 cannot be sustained through a legal action against the current government by virtue of Legal Notice No. 1 of 1986.

That section 12 (2) of Legal Notice No. 1 of 1986 (as amended) provided as follows:

- (i) No Civil Suit, action or other proceedings whatsoever shall be instituted in any court for recovery of damages or compensation against the Government or Local Administration on account or in respect of any tortuous act or omission or any breach of a statutory duty by a member of Government Security Forces, Police Forces, Prisons Services or Intelligence Agencies by whatever name called or by Chiefs, Local Administration Police or other Official of any Local Administration, resulting in,
 - a. Assault of, injury to, or loss of life of any person;
 - b. Arrest, imprisonment, confinement or detention of any person in any manner whatsoever;
 - c. Seizure, use, destruction of, or damage to any property of whatsoever description.

Learned defence counsel further argued that the effect of Section 12 (2) of Legal Notice No. 1 of 1986 was to extinguish all claims that occurred during the period beginning on the 1st day of November 1978 and ending on 26th day of January 1986. That this implies that the plaintiffs' claim which arose during the period 1981-83 were extinguished by the proclamation. Therefore the plaintiff cannot claim to resurrect claims that were already "dead" and "buried" by relying on the 1995 Constitution because the said Constitution was not law at that time the said events occurred.

It is the defendant's contention that claims of this period must be dealt with under the Supreme Law that was obtaining at that time.

The defendant further contends that there is absolutely no way the cause of action could have survived and that the same can be transplanted into the current legal regime. This being the case, any efforts by the Government Officials to verify and/or settle the matter beginning in the year 2000 onwards had no legal basis and could only have been done on an Ex-gratia basis.

In reply counsel for the plaintiffs submitted that the plaintiffs' claim arose out of the contract/agreement with the Government to compensate the plaintiffs in the sum of shs.10,600,000/= (ten billion and six hundred million only) being compensation for the plaintiffs' properties destroyed. The sum of shs.10,600,000/= arose after a verification by the relevant Government Departments and the valuation report to the effect that the sum was adequate and fair compensation in the circumstances. This agreement arose in 2003 long after the 1995 Constitution came into force.

He agreed with the submissions of counsel for the defendant as to what amounts to a cause of action as stated in the cases **Attorney General Vs Oluoch [1972] EA 392 per Spry VP at page 394** and **Auto Garage Versus Motokov [1971] EA 514.**

Counsel further submitted that in deciding whether or not a suit discloses a cause of action one looks at the plaint alone and all the attachments which form any part of it and upon the assumption that any express or implied allegations of fact is true. See *Jeraj Shariff & Co. Vs Chotai Family Stores [1960] EA 374.*

It was further submitted that an agreement to compromise a suit by compensation creates a contract upon which the plaintiffs could sue.

In a lengthy rejoinder, learned counsel for the defendant reiterated his earlier submissions that the matter filed by the plaintiffs is bad in law and discloses no cause of action against the defendant.

I have considered the preliminary objections raised by learned counsel for the defence and justifications therefore and the response by learned counsel for the plaintiff. The arguments on the preliminary points were so extensive that it was as though the parties were arguing the main suit before me. I will not consider matters raised prematurely but concentrate on resolving the two preliminary points raised by the defendant of:

1. Whether there is a cause of action against the defendant since the actions complained of were by the Uganda National Liberation Army (UNLA) forces that occurred in the period 1982-1983.
2. Whether the suit against the defendant is statute barred having been brought 31 years after the acts complained of occurred.

First point of objection:

Order 7 rule 11(a) of the Civil Procedure Rules provides as follows:

“11. The plaint shall be rejected in the following case -

a) Where it doesn't disclose a cause of action

and under Order 7 rule 11(d) of the Civil Procedure Rules, the plaint shall be rejected where it appears from the statement in the plaint to be barred by any law. For a cause of action to exist, the plaint must allege all facts necessary to disclose it.

In my view, it is settled law that the question as to whether or not the plaint discloses a cause of action must be determined upon perusal of the plaint alone together with anything attached as to form part of it and upon the assumption that any express or implied allegations of fact in it is true.

See: **Attorney General Vs Oluoch [1972] EA 392** and **Jeraj Shariff & Co. Vs Chotal Fancy Stores [1960] EA 374, 375.**

A look at the plant, shows that the plaintiff seeks to be compensated for the loss of property comprised in a soap factory located at Naziri and comprised in Mawokota Block 46 plots No. 20 and 21 which included several other properties to wit; residential houses, commercial houses, a farm house, livestock and crops. The plaintiff claims that the said properties were lost during the 1981-1983 war when the government of Uganda attacked the said property.

According to learned counsel for the plaintiff the claim now before court arose out of the contract/agreement with the government to compensate the plaintiff in the sum of UGX 10,600,000,000= for the properties lost and destroyed. That the said agreement runs through various correspondences attached to the plaint.

Learned counsel for the defendant refutes this claim denying existence of any agreement to compensate the plaintiffs. I agree with the defendant's submissions that nowhere in the plaint is it

mentioned that the plaintiff's claim is based on a contract. The plaintiff's claim is for enforcement of fundamental rights under the 1995 Constitution. Paragraph 4 of the plaint is very clear on this. Nowhere is it stated that the suit is for breach of contract or enforcement of a contract. Any finding to the contrary would be a departure from the plaintiff's pleadings.

It is trite law that a party is expected and bound to prove his or her case as alleged and as covered in the issues framed. The case cannot be changed during trial or allowed to go contrary to the pleadings. The facts forming the basis of the instant suit arose during the period 1981-1983 and the acts were committed by the Uganda National Liberation Army (UNLA). There is therefore no way the plaintiff can seek to enforce rights under the 1995 Constitution for acts that occurred before the said Constitution came into force at the time.

As rightly submitted by learned defence counsel, there has to be a limit for actions that can be brought under the 1995 Constitution. These actions must not predate the 1995 Constitution. The right to be enforced must have been subsisting at the time the Constitution came into force.

In the case under consideration, the acts complained of occurred in 1981 - 1983 which were outlawed by Legal Notice No.1 of 1986. As rightly submitted by learned defence counsel, it is well known that on 26th January 1986, a successful revolution took place. The power of the government which was based on the old Constitution was taken over by the NRA and vested in the National Resistance Council. The old order came to an end and the new order was set up by the proclamation in Legal Notice No.1 of 1986. In the said Legal Notice, the old Constitution was suspended and Legal Notice No.1 of 1986 became the Supreme law of the land Under Section 12(2) of the said Legal Notice it is provided that:

“2(1) No civil action or other proceedings whatsoever shall be instituted in any court for recovery of damages or compensation against the government or local administration on account or in respect of any tortuous act or mission or any breach of statutory duty by a member of Government, Security Forces, Police Forces, Prison

Services or intelligence agencies by whatever name called or by Chiefs, Local Administration Police or other official of any local administration resulting in

- (a) Assault of, injury to, or loss of life of any persons*
- (b) Arrest, imprisonment, confinement or detention of any person in any manner whatsoever;*
- (c) Seizure, use or destruction or damage to any property of whatever description where such act or omission occurred within the period beginning on the 1st day of November 1978 and ending on 26th day of January 1986.*

Legal Notice 1/86 contained proclamation made by NRA when it overthrew the old order of government and replaced it with a new one.

By that proclamation, the old constitution was overthrown and the proclamation suspended it and became the Supreme law as expounded by Prof. Kelsen in the book titled as **General Theory of Law and State** discussed at length in **Uganda Vs Commissioner of Prisons Ex-parte Matovu [1966] 514,535.**

I agree that the effect of the above provision of Legal Notice No.1 of 1986 was to extinguish all claims that occurred during the said period implying that the plaintiff's claims which arose during the period 1981 and 83 were extinguished by the proclamation. The plaintiff cannot attempt to resurrect such claims since the 1995 Constitution was not the law at the time. With the above legal regime, there is no way the plaintiff's cause of action could have survived to be considered under the current legal regime.

Whereas it is true and clear that there were correspondences from various government Ministries regarding compensation, it is not true to conclusively say they amounted to a contract or agreement to compensate the plaintiffs between the plaintiffs and the defendants. The

correspondences are clear and rotated around the investigations falling short of approval to compensate and bind the defendant.

I agree with learned defence counsel that any efforts by government officials to verify and/or settle the matter beginning in the year 2000 on words had no legal basis and could only be done on an Ex-gratia basis. Ex-gratia according to **Black's Law Dictionary 6th edition** means out of grace, favor, kindness or indulgence. Ex-gratia offers cannot be claimed as of right because it creates no legal right. It is given on compassionate grounds and one cannot sue for payments Ex-gratia. The relationship between the plaintiffs and the defendants disclose no essential elements of a valid contract.

The first objection will accordingly succeed.

Second point of objection:

According to the submission by learned defence counsel, he contends that the plaintiff's suit is statutorily time barred and therefore unenforceable. However, learned counsel for the plaintiff contends that there was an admission by the defendant to pay because of the new arrangement entered into in 2013 and thereafter. He relied on annexures B2, B5, B6, B7, B8 and B15 which did not mention that the intension to pay the plaintiffs was on the basis of Ex-gratia. That the correspondences made the plaintiffs to believe that they were going to be paid and none states that the plaintiffs' claim is barred by law.

From the pleadings, it is clear that the events complained about by the plaintiffs occurred during the period 1981-83. This suit was filed on 18th March 2014 which is more than 31 years down the road. The plaintiffs have sought to distance themselves from the acts of 1981 to 1983 by stating that their cause of action arose in 2003 and their claim is independent of the occurrences of 1981 – 83.

I however agree with the submissions by learned defence counsel that there is no way the plaintiffs' claim can be divorced from the activities of the UNLA forces since it is the said activities that form the basis of the claim. If the said acts had not occurred then there would be no claim to talk of in the first place.

It was held in **Buffalo Tungsten Inc. Vs SGS Uganda Limited HCMA No. 6 of 2012** a case relied upon by both plaintiffs and defendants that for there to be a cause of action the plaintiff must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue.

Therefore when considering the time limit for filing the suit the operative year is 1981 to 83 when the act constituting the cause of action took place.

Section 3 (1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72 Laws of Uganda provides that no action founded on tort shall be brought against the government or against a local authority after the expiration of two years from the date on which the cause of action arose. The claim herein is for destruction of personal property which is a tort since it constituted a civil wrong resulting from an intentional or wrongful act by a tortfeasor, the UNLA. Its limitation therefore falls squarely under section 3 (1) of Cap 72 Laws of Uganda since the suit was brought 31 years after the event.

It is trite law that statutes of limitation are strict in nature and not concerned with the merits of the case. Once the axe falls the defendant who benefits from it has to insist on his strict rights. See: **Hilton Vs Sulton Steam Laundry [1946] 1 KB 81.** If a suit is to be instituted outside the period of limitation then the plaintiff must show grounds upon which exemption from such law is claimed; See: Order 7 rule 6 of the Civil Procedure Rules. This was not the case here. Therefore where a suit appears from the statement in the plaintiff to be barred by any law, it will be rejected.

The plaintiffs have tried to bring themselves into the limitation period by arguing that the claim was admitted and acknowledged by the defendant, however as rightly contended by the defendant, the issue of acknowledgment cannot arise in a situation where there is no legal liability and where a legal action cannot be maintained against the defendant in the first place. One cannot acknowledge or admit liability for an action that cannot be sustained in law.

It was held in *Madhvain International SA Vs Attorney General, CA 48/2004* per Byamugisha J.A (RIP) that

“An acknowledgement is an admission which must be clear, distinct and unequivocal and intentional. There must be no doubt that the debt is being admitted although the amount does not have to be stated.”

None of the letters attached to the plaint amount to an acknowledgement of any legal obligation to compensate the plaintiff’s property destroyed by the UNLA forces. But even if they were to be acknowledgements which they are not by the time they were made, there was no legally tenable claim by the plaintiffs because the matter is already barred in law and barred by law. Therefore any consideration of the matter should have been on an ex-gratia basis as I have held above.

The authorities relied upon by the plaintiffs on acknowledgments are distinguishable because in those cases courts were dealing with acknowledgments made on the basis of legally valid claims unlike in the instant case where the defendant never admitted that he was liable or otherwise for the destruction of the plaintiff’s properties.

According to the plaintiffs, they did not file the suit in time because there were efforts being made to compensate them. But as I have already held, the process talked about was for assessment of the plaintiffs claim for ex-gratia compensation although no conclusive decision had been reached that the plaintiff are entitled to UGX 10.600.000.000=. The defendant is right

to contend that the process of verification of a claim cannot amount to a disability which could stop the claimant to file a suit in time.

The plaintiffs also pleaded the consent judgment entered into with the Non-Performing Assets Recovery Trust as one of the basis for their claim. But that was strictly a consent judgment between NPART, Mawokota Chemical Industries Limited, Mr. P. J Zimula Mugwanya, Sarah Mugwanya and Michael Kutanwa in respect of debts which the late J.P Zimula Mugwanya had with various banks that had been declared non-performing. The consent judgment had nothing to do with the defendant herein.

Regarding the plaintiff's argument that their case is based on contract and is therefore not time barred, either way, the provisions of Section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act would catch that cause of action for being out of time.

I do not agree with the plaintiffs that the provisions of Cap 72 are discriminatory against individuals. There is need to bring proceedings to court as early as possible in order that reliable evidence can be brought for proper adjudication of disputes. That is why timelines are necessary and are introduced by parliament in its wisdom. The rationale is the principle of legal certainty. It is inexcusable for one to file a suit after 31 years since the cause of action arose. As years go by, essential evidence is destroyed or lost and cannot be traced.

I agree with learned counsel for the defendant that this claim was wrongly brought under the 1995 Constitution because the claim by the plaintiff is not a matter of enforcement of fundamental rights and freedoms. Even if this was to be the case, a person whose Constitutional rights have been infringed should have the zeal and motivation to enforce his or her rights in litigation of any kind in time. There can be no justification for somebody to delay for 31 years to enforce his or her violated fundamental rights. It was held by the East African Court of Justice in

the case of *Attorney General of Uganda and Attorney General of Kenya Vs Omar Awadh & 6 ors EACJ Appeal No. 2 of 2012* that;

“there can be no justification whatsoever for a petitioner to delay for 24 years to enforce his or her violated fundamental rights. Such grave violations of rights as alleged ought to be instituted early so as to test the regime, the courts and the pretence or commitment of the then regime to adherence to the democratic principles.....”

This is a matter which has transcended nearly five parliaments and two political regimes and administrations to be tenable. It is manifestly clear that this suit is time barred and no amount of legal maneuvering can resurrect it.

As conceded by the defendant, the state may exercise its discretion through the Attorney General and make a payment or extend a favor to the claimant against the state who is for legal technical reasons, unable to enforce his claim through the courts of law. Usually under common law, four conditions must exist before the Attorney General on behalf of the state may exercise such discretion in favor of the claimant against the state and these are:-

- a) The claimant must have a good case against the state.
- b) There must be a technical legal impediment which bars him or her from enforcing the case through the courts of law.
- c) The circumstances which bar him from legal redress such that the claimant cannot be blamed for it; and
- d) The attorney general exercising the discretion properly feels it would otherwise be grossly unfair or morally unjust to deny the claimant the relief sought only because the state would in any case for technical reasons be victorious before the courts of law.

Consequently I will uphold the second objection as well.

Since both objections by the defendant have been upheld, I will find that the plaintiff's suit discloses no cause of action whatsoever and it is time barred. It will be dismissed with costs.

Stephen Musota

J U D G E

27.04.2015