THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 381 OF 2005

OKOT AYERE OLWEDO JUSTIN::::::::::::::::::::::PLAINTIFF

VERSUS

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

BEFORE: THE HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff brought this action against the defendant in a representative capacity for general and special damages arising out of the negligent acts of the army men. The Attorney General is being sued under the principle of vicarious liability. The defendant denied the claim. The facts giving rise to this suit may be summarized as below:

The plaintiff is the registered owner/proprietor of property known as LRV/3115 Folio 16 Plot 11 Obiya road in Gulu Municipal Council. The above property was fully developed by the plaintiff with the main house and boys' quarters on it. In or around February 1974, the plaintiff rented out the said property to Ministry of Defence. It was being used as officers' mess for the army. The last rental payment was made in March 1983 by a cheque in the names of the plaintiff. The plaintiff alleges that on 10th February 1986, just before the lapse of the tenancy, the said property was burnt down and thereafter rental payments were stopped by the defendant's agents. The plaintiff holds that the said soldiers who were in

occupation were negligent for the fire. Alternatively, plaintiff pleads *res ipsa loquitur*.

The defendant in his defence states that he was not liable for the unfounded claim of negligence since there was no proof of how the house got burnt. Further, that, the tenancy agreement was frustrated by the burning of the house, thereby releasing each party from further performance of the contract. The defendant alleged further that the suit was time barred and incompetent.

At the scheduling conference, the agreed facts were;

1. The plaintiff is the registered proprietor of property comprised in LHRV 3115 Folio 16 plot No.11 Obiya road Gulu.
2. There was a tenancy agreement between plaintiff and Ministry of defense w.e.f 1/3/1983 for 3 years in respect to the property.
3. The main house was burnt down on or around 10/2/1986.
4. The Chief Government Valuer wrote to the Ministry of Defence on 18/8/1986 stopping all rental payments.

The agreed issues were;

1. Whether the plaintiff had a cause of action against the defendant.
2. Whether the burning of the house was caused by negligence of the defendant's agents.
3. Whether the principle of res ipsa loquitor is applicable under the circumstances.
4. Whether the contract between the parties was frustrated by the burning of the house.
5. Remedies available to the parties.

Determination of issues.

Issue 1. Whether there is a cause of action against the defendant.

Relying on ***Auto Garage Vs Motokov [1971] E.A 514*** Counsel for the plaintiff stated that there were three essential elements to support a cause of action, to wit;

1. The plaintiff enjoyed a right.
2. The right had been violated.
3. The defendant is liable.

He added that in regard to the first leg, the ownership of the suit property is not in issue as the title deed; Exhibit P1 shows that the proprietor of the property is Justin Ayere Okot, the plaintiff. This was further confirmed by DW1, Chairman of the Compensation Committee of the Ministry of Defence from 2000-2009, who stated that according to the investigation of the Compensation Committee, it was found out that the suit property belonged to the plaintiff.

In regard to violation of the right, Counsel submitted that the suit property was rented out to the Government of Uganda for use by Ministry of Defence as an army officers' mess. The property got burnt while the said army was in occupation of the said property, thus the right to enjoy the use of the property was violated.

On the last leg, Counsel contended that the said property was not handed over to the plaintiff in a good condition as it was at the time of commencement of the tenancy. It was gutted down by fire while the tenant was still in occupation, thus the tenant, the Government of Uganda, was liable. Counsel in conclusion submitted that there was a cause of action against the defendant.

Counsel for the defendant raised two preliminary objections. He stated that the plaintiff's suit disclosed no cause of action against the defendant since the action

complained of was allegedly done by Uganda Army forces in February 1986 for which the defendant was not responsible. He added that the evidence on record shows that Kampala fell to the National Resistance Army on the 26th January 1986 and the Government in Gulu at that time became a rebel force. Further, all the attempts to settle the matter out of court were done on an exgratia basis.

Counsel contended that under Order 7 rule 11 of the Civil Procedure Rules, a plaint which disclosed no cause of action was a nullity and could not be amended. As per Legal Notice No.1 0f 1986, actions that took place before 26/01/1986 could not be sustained by the current Government. And that any efforts to settle the matter were not by law, and could only have been considered on an ex gratia basis since the plaintiff's claim was already barred by time and law. Exhibit P11, the letter from the Compensation Committee to the plaintiff was just a recommendation to compensate the plaintiff and was not an admission of liability.

Counsel then made lengthy submissions on ex gratia payments; stating that Black's Law Dictionary defined "Ex gratia" to mean "out of grace, as matter of grace, favor or indulgence". He added that although the defendant had admitted to pay the plaintiff Ug. Shs. 239,000,000/=, this did not amount to acknowledgment of the claim. Counsel relied on ***Madhvani International Vs Attorney General Civil Appeal No. 48/04*** a decision which was upheld by the Supreme Court in Civil Appeal No. 32 of 2010 for the proposition that An acknowledgment is an admission which must be clear, distinct unequivocal and intentional. There must be no doubt that the debt is being admitted although the amount does not have to be stated.

He concluded that the plaint in the instant case disclosed no cause of action and ought to be dismissed or struck out with costs.

A cause of action means every fact which is material to be proved to enable the plaintiff to succeed or every fact which, if denied, the plaintiff must prove in order to obtain judgment. See - ***Cooke -Vs- Gull LR.8E.P. page 116 and Read -Vs- Brown, 22 QBD p.31***. It is trite that in considering whether or not the plaint discloses a cause of action, the court only considers the pleadings and anything attached thereto. A summary of what constitutes a cause of action and the guidelines courts follow in determining whether a plaint discloses a cause of action in cases of negligence, was made in the case of ***Tororo Cement Co. Ltd Vs Frokina International Ltd CA No. 2 of 2001*** where it was held that particulars of negligence are an important aspect of any party's case and therefore, it is important that particulars of negligence should be pleaded early so as to assist in the framing issues as well as in avoiding surprises which are bound to happen if particulars are not disclosed. A party must know the species of negligence which the opposite party seeks to rely on.

It is now well established in our jurisdiction that a plaint has disclosed a cause of action even though it omits some fact which the rules require it to contain and which must be pleaded before the plaintiff can succeed in the suit. What is important in considering whether a cause of action is revealed by the pleadings are the questions whether a right exists and whether it has been violated. ***Cotter -Vs- Attorney General (1938) 5 EACA 18.***

In the instant case, the plaintiff has stated in the plaint that the damaged premises were his property and his right in that property was violated when the property was burnt down. He further states that the property was in the hands of the defendant’s agents who were therefore liable for the loss to the defendant. Further, that there was no contributory negligence on his part. The three elements set out in **Motokov** (supra), are present in the plaint in the instant case.

I thus find that the plaintiff had a right to enjoy his house which was gutted down by fire, while under the management and control of the defendant's agents. I find that a cause of action has been made against the defendant, and it is only after hearing and evaluating all evidence that will be adduced, that I can come to a conclusion on whether the plaintiff's claims are sustainable. Further, I find no evidence to show that Government/Ministry of Defence denied liability on the ground that Gulu was at the relevant time in the hands of rebels. The fact of the Government in rebels' hands has not been proved. Neither is there any assertion by Government/Ministry of Defence throughout the negotiations for compensation, that this was being done as an ex gratia payment. No evidence to the effect was produced. It was only evidence from the bar. Without deciding the question of the liability of the Attorney General, the objection is overruled.

In regard to the 2nd point of objection, Counsel submitted that the plaintiff's suit was time barred, the event having occurred on the 10th February 1986 and the instant suit having been filed in 2005. Relying on Section 3 of the Civil Procedure Act, Cap. 71, Counsel submitted that no action in tort shall be brought against Government or a local authority, after the expiration of two years from the date on which the cause of action arose. Counsel added that the acts of destruction of property were tortuous in nature, given the fact that they constitute a civil wrong resulting from an intentional or wrongful act by a tortfessor in this case the Ugandan army.

Counsel added that Order 7 of rule 6 of Civil Procedure Rules provides that when a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show grounds upon which exemption from such law is claimed. There was nothing in the pleadings to show that the plaintiff was under a disability which prevented him from seeking timely legal redress. He added that

although the plaintiff claimed that his action was being verified by the defendant, this was not a bar to him seeking legal redress. Counsel relied on ***Allen Nsibirwa Vs National Water and Sewage Corporation GCCS No. 811 of 1992*** where court held that;

> ***"…also I do not agree with Mr. Mukasa that this disability could be dispensed with simply because the case was going on with a view to settle this matter probably out of court. That was not a disability and that alone could not stop the plaintiff from filing the suit within the prescribed period. But this by itself could not have stopped the plaintiff from filing the suit in time".***

Regarding the issue of limitation, the position of the law as was stated in ***F.X Miramago Vs Attorney General [1979] HCB 24*** is that the period of limitation begins to run as against a plaintiff from the time the cause of action accrued until when the suit is actually filed.

For avoidance of doubt, a suit is not regarded as duly instituted or filed against the Attorney General, and indeed against any other party, until it is received by court in the Court Registry, which acknowledges this by stamping it with the court stamp (usually a "received" stamp); and endorses as well as inserts a date on which the documents were received. Thereafter, a file is opened, is assigned a case number, and is entered in the Court Register. Even though this exercise appears purely administrative in nature, it is invariably important as the formal initiation of the court process that signifies the actual time on which an action is considered filed, and proceedings commenced for purposes of limitation of actions.

The suit in the instant case was filed on 10th May 2005. However, Exhibit D1, the letter from the plaintiff to the Secretary Ministry of Defence was requesting for

compensation and replacement of his property. The letter is dated July 20th 1995.In this letter the plaint states and I quote under paragraph 5 that;

> ***"…subsequently, I likewise addressed to your office two letters both Ref. No. JA00/PERS/11 OB RD GLU dated the 1st October 1986 and 30th October 1992 on this burning issue…"***

Exhibit D2, the letter from the plaintiff to the secretary of defence dated 1st October 1986 provided therein a request to the Government to compensate the plaintiff and to repair and renovate the servants quarters.

Further, Exhibit D6, the letter from the Infantry Division of the Ministry of Defence to the Compensation Committee dated 19th February 1996 reads in part as follows;

> ***"…on 1st March 1986, the owner of the property Mr. Justine A. Okot reported it's burning to the police. It has however become impossible to trace both the officer at the counter then as well as the exact particulars of the fire as reported…I hope this letter will meet the needs of the compensation committee and assist it in its deliberations".***

In addition to the above, Exhibit P11, a letter from the Permanent Secretary to the Solicitor General, Ministry of Justice and Constitutional Affairs dated August 2004 reads in part as follows;

> ***"..you are kindly requested to compensate the claimant in the above minute extracts of which is hereto attached together with our ministry file for your ease of reference…"***.

The plaintiff further wrote a letter to his Excellency the president of Uganda on the 15th May 2011 seeking for compensation of his burnt premises.

The above exhibits indicate that the plaintiff reported the matter to those concerned. Negotiations and compensation investigations were being carried out from 1986 way into 2004 and the cause of action arose only when the plaintiff realized that he was not about to be compensated. The cause of action did not arise immediately after the arson because the plaintiff believed that he would be compensated amicably. The limitation time thus begun to run from the time the plaintiff realized that the amicable way of compensating him was not yielding results and from the record, that was around 2004.The objection is thus overruled.

Issue 2. Whether the burning of the house was caused by the negligence of the defendant's agents;

Counsel for the plaintiff submitted that a house cannot ordinarily catch fire on its own. He added that someone must have been responsible for the setting of the fire which he or she failed to supervise or control so as to avoid the damage. He added that failure to act in itself is evidence of negligence. He concluded that the agents of the Government be held liable in negligence hence liability of the Attorney General.

The defendant's Counsel in reply submitted that Exhibit P2 that showed the terms of the tenancy provided in paragraph 4 that;

> ***"The tenant shall be responsible to maintain the interior of the house in good tenantable condition, wear and tear expected. The owner is to be responsible for all other repairs except for any willful or unreasonable damage to the property by the tenant".***

Counsel contended that the plaintiff must establish that there was willful or unreasonable destruction/damage by the tenant which he has not done. He further added that the onus to prove negligence in this case squarely lies on the plaintiff.

He has not proved any of the particulars of negligence as set out in the plaint. Neither had he discharged that burden. Counsel prayed that court finds that no negligence was proved against the defendant.

According to the witness statement of PW1 which was not challenged by the defendant, at the time the said house got burnt, there was no electricity in Gulu and the property was under management of the defendant or his servants. The arson was such as in the ordinary course of things does not happen if those who had the management of the property exercised proper care. It affords reasonable evidence, in the absence of explanation by the defendant, that the arson arose from want of care and the only plausible explanation is that it was burnt due to the negligence of the army men who were in its occupation at the time. I find that unless the defendant is able to offer a reasonable explanation as to how the arson could have happened, am left with no choice but to draw an inference that the defendant's agents had been negligent.

Issue 3. Whether the principle of res ipsa loquitor is applicable in the circumstances.

It is the plaintiff's case that issue 3 is an alternative pleading to negligence and is specifically indicated so in the plaint in paragraph 9. If court does not find the defendant liable under negligence, it should find him liable under this principle. Counsel relied on ***Juma Asile Vs Nyanza Textile Limited (1975) HCB 292*** to state that Res Ipsa Loquitor is a maxim applicable to situation where all facts leading to the accident are unknown and helps the plaintiff thereby to discharge the onus upon him to prove negligence. The conditions for this maxim were aptly put by Sir William C.J in the leading case of ***Scott Vs London & St Katherine Dock (1865) 3 H&C 596 at page 601*** as follows:

> ***"there must be reasonable evidence of negligence but where the thing is shown to be under the management of the defendant or his servant and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".***

Counsel further relied on ***Royi Nanziri & Another Vs Joseph Kambaza (1978) HCB 304*** where it was held that;

> ***"The rule of Res Ipsa Loquitor is merely a rule of evidence and not a rule of law enabling the plaintiff to plead facts of the accident and thereby establish a breach of the duty of care on the part of the defendant without proving the particulars of negligence"***.

Counsel contended that the ***Royi Nanziri case*** (supra) went on to get down to the conditions upon which res ipsa loquitor can apply such as;

1. The thing inflicting the damage must have been under the sole control and management of the defendant or someone for whom he is responsible or he has a right of control.
2. The occurrence is such that it could not have happened without negligence.
3. There is no evidence or explanation as to how the occurrence took place, otherwise the defendant's negligence would have to be determined on that evidence. The rule shifts the burden of proof onto the defendant to displace the prima facie case established against him.

He concluded that all the above conditions for the application of the principle have been met since the buildings of the plaintiff were entirely under the control and

management of the defendant's agents who had the means and option of fighting the fire had they taken reasonable care.

In reply, counsel for the defendant submitted that Res Ipsa Loquitor is not a principle of liability but a rule of evidence and it possesses no major qualities nor has it any added virtue other than the mere fact of it being expressed in latin. When used on behalf of a plaintiff it is generally a short way of saying I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant. Counsel contended that it was clear from ***Asile Vs Nyanza Textile*** **(supra**) that the plaintiff had to prove negligence on part of the defendant, which he has not done. He must also show that the thing complained thereof was under the management and control of the defendant which has also not been proved.

The doctrine of Res Ipsa Loquitor cannot be applied when there is direct evidence of the cause of the injury and facts and circumstances surrounding it. To apply res Ipsa Loquitur, the following elements must be present:

1. The accident must be of a type that normally would not occur in the absence of negligence.
2. There was no contribution to the plaintiff's injuries by the plaintiff or any third party.

3. The source of the negligence falls within the scope of the duty owed by the defendant to the plaintiff. This usually (but not necessarily) arises where the instrument causing the injury was within the exclusive control of the defendant, or where there is an inability to identity the specific source of harm. Frequently it arises where the source of negligence lies within a group

of people who are unwilling or unable to divulge the actual source. (See, ***Byrne Vs Boadle, 2 H. & C. 722, 159 Eng. Rep. 299 (Exch. 1863).***

In the event the 3 conditions above are fulfilled, Res Ipsa Loquitor raises a *prima facie* presumption of negligence against the defendant. However, if the defendant can explain how the accident could have happened without negligence, the defendant has rebutted the *prima facie* presumption and the claimant must try to prove the defendant's negligence according to the normal rules of duty breach, causation and remoteness. However, whilst Res Ipsa Loquitor creates a *rebuttable presumption*, it does **NOT** reverse the legal burden of proof - the Privy Council held that this remains on the claimant throughout (***Ng Chun Pui Vs Lee Cheun Tat [1988] RTR 298 (PC)).***

Having answered issue 2 in the positive and basing on the above principles governing the rule of Re Ipsa Loquitor, I find that the doctrine applies to this case since the defendant has failed to discharge the burden imposed on him to explain how the arson happened without the negligence of his agents.

Issue 4.Whether the contract between the parties was frustrated by the burning of the house.

Counsel for the plaintiff submitted that one of the conditions of the tenancy agreement was that the tenant should surrender the demised premises in a good and tenable repair. He added that the defendant also offered to compensate the plaintiff for the loss of his property as Exhibited by P11 and P12 thus it cannot turn around and claim frustration. Counsel relied on ***Nile Bank Ltd Vs Akalu Enterprise KALR 15*** where the defendant alleged frustration and court held that since the

defendant had repaid some money and further negotiated a rescheduling, his acts were inconsistent with a frustrated contract.

Counsel for the defendant was of a different view. He submitted that the contract between the parties was frustrated by the burning of the house and thus the defendant was discharged from performance of the contract. Counsel relied on Halsbury laws of England 4th Edition to state that there is frustration if one of the possible ways of performing a contract becomes impossible. Counsel added that there was a lot of unrest and insecurity and implored court to take judicial notice of the war situation that was prevailing in the country at the time which was acknowledged by the plaintiff as well in several exhibits on record like Exhibit D11, a letter written by the plaintiff to the Secretary of Defence.

I have considered the above rival submissions.

Frustration occurs when an intervening act or circumstance, without the fault of any party, makes it impossible to perform the contract. In the words of Lord Radcliffe in ***Davis Contractors Ltd Vs Fareham Urban District Council [1956 1 All ER 145 at page 160;***

> ***"So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do".***

Frustration acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's

principal purpose for entering into the contract. Sir Daniel Crawshaw, J.A. stated in ***Howard & Co. (Africa) Ltd Vs Burton*** (supra);

> ***"The onus of proving frustration is on the party alleging it, and if that is proved, the onus is upon the other party to prove that it was self-induced".***

In the instant case it is without doubt that the contract was terminated by the arson to the suit property since the arson. I find that the arson was as a result of the negligence of the defendant's agents. The defendant has failed to prove the frustration by leading evidence to show that it was without fault on either party.

This issue is answered in the negative.

Issue 5. Remedies available to the parties

The plaintiff's Counsel submitted that a party who is wronged must be put back by way of compensation in a position in which he was before the wrong. The plaintiff had a fully completed house and boys' quarters. These were damaged beyond repair. Counsel added that the only compensation is either to build the property for the plaintiff or pay him a sum equivalent to what will make it possible for him to build back his home. The plaintiff contracted PW1 who assessed the damage and came with a figure which is found in Exhibit P10 and P13. PW2 stated that reconstruction of both the main house and servants' quarters came to a figure of Ug. Shs. 603,137,537/=. He also testified that loss of rent which the plaintiff has been deprived of since 1983 to 2004 to a tune of Ug.Shs. 293,700,000/= and interest thereof to a tune of Ug. Shs. 402,696,000/=. To the above, he added

consultation fee of Ug.Shs. 107,666,610/= and VAT of Ug. Shs. 213,044,025/=. All the total of the above figure came to a sum of Ug. Shs. 1, 466,244,172/=.

Counsel added that the plaintiff had been deprived of his hard earned property for a period of 28 years now and he has extremely suffered and been mentally tortured. Counsel sought a figure of Ug. Shs. 500,000,000/= as adequate compensation in general damages. Counsel further prayed for interest at 25% per annum from 1986 on the decretal sum till settlement in full plus the costs of the suit.

It was the case for the defendant that no evidence was led to show how much income was lost due to the destruction of the house. Counsel added that the plaintiff converted the money allegedly owing in dollars but it is not shown how the dollar rate was arrived at yet the terms of the contract showed that the rent was to be payable in shillings. Further, the plaintiff presented a report from the quantitative surveyor which showed what the cost of reconstruction of the house would be but the report had several exaggerations. He added that PW1 did not produce any evidence to show how he arrived at the figures stated. Counsel contended that the plaintiff was partly to blame for the delay of the matter and thus if court finds it necessary, should award interest at the rate of 6% from the date of judgment.

In regard to general damages, the defendant contended that no evidence has been led on the quantum of general damages.

Counsel prayed that this court finds that the plaintiff is not entitled to the remedies prayed for and dismisses the suit with costs to the defendant.

A close analysis of the evidence on record, particularly the evidence of PW1 and Exhibit P9 and P10, indicates that PW1's computation of the figures was based on the fact that Government would have been occupying and paying the premises till 2004. He added that the work of a quantity surveyor was to establish what it would cost the plaintiff to have a house reconstructed.

I have considered the above submissions. According to PW1, in his testimony, he stated that reconstruction of both the main house and boys' quarters would cost Shs. 603,137,537=. This was on the (date of testimony). In 2004 he had stated a figure of reconstruction of main house as Shs. 389,137,537= (See Exhibit P.10) and boys' quarters as Shs. 48,000,000=. Total of Shs. 437,137,537=. The difference between the two figures given for reconstruction so far is mainly attributable to passage of time and inflation. However, there is no evidence of how old the house was at the time it was burnt down. I know that one can only build a new house, but the mount awarded would have to take into account this factor at some point.

I shall award the plaintiff the cost of putting up a new house at Shs. 603,137,537=. However, the amount stated for loss in rent will be the one affected by the lack of evidence of the age of the house. It is not known whether the house would still be habitable to the present day. Moreover part of the rent would have to go into the maintenance of the house over time, if the house was not burnt down. Moreover the plaintiff is going to get rent for a longer period as he is getting a new house. I will therefore grant Shs. 150,000,000= as loss of rent.

Since there is award for loss of rent, interest can only be awarded from the date of judgment until payment in full. The consultation fee, I will allow at Shs. 50,000,000= as the figure demanded appears exaggerated considering the

circumstances of the case, there being no house at the time of consultancy. The chargeable VAT shall be payable. General damages awarded shall be Shs. 100,000,000=. Interest on the above sums shall be at court rate from the time of judgment till payment in full. Costs of the suit shall go the plaintiff.

In conclusion, the plaintiff is awarded the following:

1. Cost of putting up a new house at Ug. Shs. 603,137,537=.
2. Ug. Shs. 150,000,000= as loss of rent.
3. Interest on (2) above from date of judgment till payment in full.
4. Consultation fee of Ug. Shs. 50,000,000=.
5. General damages of Ug. Shs. 100,000,000=.
6. Interest on the above at the court rate from the time of judgment till payment in full.
7. Plaintiff shall have costs of the suit.

Orders accordingly.

Elizabeth Musoke
JUDGE
9/03/2015