THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO.207/2015

(Arising from Civil Suit No.205/2014

GODFREY YIGA :: APPLICANT

VERSUS

1. **ENTEBBE MUNICIPAL COUNCIL**
2. **CHIEF ADMINISTRATIVE OFFICER,**
   WAKISO DISTRICT LOCAL GOVERNMENT
3. **NATIONAL FORESTRY AUTHORITY ::::::::::::RESPONDENTS**

BEFORE: HON.LADY JUSTICE ELIZABETH MUSOKE

RULING

This application was brought by Notice of Motion under the provisions of **Section 98** of the **Civil Procedure Act, Cap 71, Order 1 rule 10(2) and (4**), and **Order 52 rules 1, 2, 3** of the **Civil Procedure Rules SI 71-1**, seeking for orders that the Chief Administrative Officer Wakiso District Local Government be struck out and Wakiso District Local Government be substituted as the 2nd defendant in **Civil Suit No.205 of 2014**.

In the affidavit in support of the application, sworn by **Samuel Kyozira**; an Advocate with the Firm representing the Applicant, it was stated that at the time of instituting **Civil Suit No.205 of 2014**, the applicant's Advocates inadvertently, bonafidely and improperly joined the Chief Administrative Officer Wakiso District Local Government instead of Wakiso District Local Government as a second defendant. He stated that substituting the Chief Administrative Officer Wakiso District Local Government with Wakiso District Local Government was necessary in enabling court to effectually and completely adjudicate upon and settle all the questions involved in the suit, and this would not prejudice the 1st and 3rd respondents.

In an affidavit in reply sworn by **James Katono**; an Advocate with the 2nd respondent's Lawyers, it was contended that the 2nd respondent is a nullity because it is not a body corporate, and therefore it could not be substituted. Further, that the proposed amendment had the effect of defeating the defence of limitation and suing a non-existent party.

In his submissions, Counsel for the applicant relied on the provisions of **Order 1 rule 10(2)** of the **Civil Procedure Rules**, and the authority of ***Departed Asians Property Custodian Board Versus Jaffer Brothers Ltd, SCCA No.9 0f 1998***, to state that court had the power to substitute the parties as prayed for by the applicant. With regard to the issue of limitation, Counsel submitted that as long as costs can be paid, limitation could not be a bar to amend, join or substitute parties in a suit.

In reply, Counsel for the 2nd respondent submitted that under **Section 6 of the Local Governments Act**, it is the District Council which is a body corporate and can therefore sue or be sued. While the applicant chose to sue the Chief Administrative Officer which is not party at law, in order to substitute or amend under **Order 1 rule 10** of the **Civil Procedure Rules,** there must be a party who is sought to be substituted or replaced. Counsel submitted that the 2nd respondent is a nullity and cannot be substituted. He relied on ***Mulangira Ssimbwa Versus The Board of Trustees, Miracle Centre & Anor, Misc Application No.576 of 2006***, to support the above submission.

Counsel for the 2nd respondent further submitted that substituting the District would amount to bringing an action which is barred by limitation. While the deceased is alleged to have died on **4th March, 2013**, this application to substitute the District Local Government was lodged **1st June, 2015**, which is more than 2 years limitation period provided under the **Law Reform (Misc Provisions) Act, Cap 79,** and even under the **Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap72**. Counsel contended that the inherent Jurisdiction of court and **Section 98 of the Civil Procedure Act** could not be invoked where there were specific provisions of the law, and a suit against a party who is a nullity is a substantive matter which goes to the root of the case.

In rejoinder, counsel for the applicant submitted that the authority of ***Mulangira Ssimbwa Versus The Board of Trustees, Miracle Centre & Anor, Misc Application No.576 of 2006***, was distinguishable from the facts herein; in that in ***Mulangira Ssimbwa's case***, the Board of Trustees Miracle Centre was nonexistent, while in the present application, Wakiso District Local Government exists. Counsel relied on the provisions of **Section 6(1)** of the Local **Governments Act, Cap 243,** which he stated that, it provides that every local Government shall be a body corporate, and may sue or be sued in its corporate name.

With regard to limitation, Counsel contended that the applicant's father died on 4th March, 2014, and the suit was instituted on 25th June, 2014, which was within the time of limitation. He relied

on the provisions of **Section 3 of the Limitation Act**, which states that in actions for damages for negligence, nuisance or breach of contract, the period of limitation shall be 3 years. Counsel also cited the authority of ***Mulowooza & Brothers Ltd Versus N.Shah & Co. Ltd, SCCA No.26 of 2010***, where court held that;

> ***"[A]mendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and …there is no injustice if the other can be compensated by costs… the court will not refuse to allow amendment simply because it introduces a new case… but there is no power to enable one distinct cause of action to be substituted for another…the court will refuse leave to amend where the amendment would change the action into one of a substantially different character… or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g by depriving him of a defence of limitation."***

I have considered the law and authorities relied upon by counsel for the applicant and the 2nd respondent and I have accordingly reached my decision.

It is trite law that court may allow parties to proceedings to alter or amend their pleadings for the purpose of determining the real questions in controversy between the parties. However, such amendments should be in accordance with the law, and should not prejudice the rights of the other party.

The applicant herein seeks for court to substitute the 2nd respondent with Wakiso District Local Government. However, I find that the 2nd respondent/defendant is a nonexistent party, with no legal capacity whatsoever. I agree with Counsel for the 2nd respondent that in order to substitute or amend under the provisions of **Order 1 rule 10 of the Civil Procedure Rules**, there must be an existing party at law which is sought to be substituted or replaced. In ***Mulangira Ssimbwa Versus The Board of Trustees, Miracle Centre & Anor, Misc Application No.576 of 2006,*** it was stated that;

> ***"The law is now settled. A suit in the names of a wrong Plaintiff or Defendant cannot be cured by amendment…while Order 1 Rule 10(2) empowers Court to add or strike out a party improperly joined; and Order 1 Rule 10(4) allows amendment of a plaint where the Defendant is added or substituted, such amendments of the plaint can only be made if they are minor matters of form, not affecting the substance of the identity of the parties to the suit:…where the amendment by way of substitution of a party***

purports to replace a party that has no legal existence, the plaint, must be rejected as it is no plaint at all…"

Accordingly, since the 2nd respondent does not exist, it cannot be substituted with Wakiso District Local Government as prayed for by the applicant. However, the suit shall still proceed as against the 1st and 3rd respondents, and therefore, the applicant can still be in position to amend and add any party in accordance with the law.

It was also the contention of Counsel for the 2nd respondent that under **Section 6** of the **Local Governments Act, Cap 243**; it is the District Council which is a body corporate. **Section 6 of the Local Governments Act, Cap 243**, reads as follows;

"Every local government council shall be a body corporate with perpetual succession and a common seal, and may sue or be sued in its corporate name."

In my opinion, the proper name/party is Wakiso Local Government Council and not Wakiso Local Government. The above provision is clear that it is the Local Government Council which has corporate personality and can therefore sue or be sued in its corporate name.

However, Counsel for the 2nd respondent submitted that substituting the District at this stage would amount to bringing an action which is barred by limitation. Counsel relied on the authority of ***Mohammad B. Kasasa Versus Jasphar Buyonga Sirasi Bwogi , CACA No.42 of 2008***, to submit that court cannot allow amendment where the defence of the statute of limitation would be defeated. From the record, the action by the applicant herein was brought under the provisions of the **Law Reform (Miscellaneous Provisions) Act, Cap 79**. Apparently, the deceased died on 4th March, 2013, and this suit was filed on 25th June, 2014. However, the proposed amendment would have the effect of instituting a suit against a Local Government, which according to Counsel of for the 2nd respondent is time barred. **Section 6(3) of the Law Reform (Miscellaneous Provisions) Act, Cap 79**, provides that actions there under shall be commenced within **twelve calendar months** after the death of the deceased person. However, in ***Velestom Onyom Versus Stephen Wekomba & Two Others, Civil Suit No.34 of 1997, Yorokamu Bamwine***, ***J***, as he then was, Stated as follows, and I agree;

"The Law Reform (Misc.Provisions) Act dates back to December 1953. It started as ord.23 of 1953. Ord. No. 46 of 1958 amended it. Whereas Ord. 23/1953 provided for twelve months, under Ord.46/58, the period was increased to three years. However,

when the Laws of Uganda were being revised in 1964, the revised edition erroneously reverted back to the pre-1958 position such that it provided for twelve months. This was a law revision error which to date has not been corrected. In Kampala City Council Versus Nuliati Nakyanzi (1974) HCB 190, the respondent, a minor had sued for general damages under the Law Reform (Misc. Provisions) Act. It was found that the case was filed after a period of three years. The issue was whether the suit was time barred. The former EACA held that such a suit must be commenced within three years. In view of what I have stated about S.36 of ordinance 46 of 1958, I am unable to agree with Mr. Majanga that this case filed before expiration of 3 years is time barred. I am also satisfied that reference to 12 calender months in the 1964 Revised Edition of the Laws of Uganda and consequently the extract in the grey book is a law reform revision error…"

I have considered the provisions of **Section 3(1)** of the **Civil Procedure and Limitation (Miscellaneous Provisons) Act, Cap 72**, and **Section 3(1) (d)** of the **Limitation Act, Cap 80**, which stipulate different times of limitation. In ***Komakech Charles Versus Attorney General, HCCS No.021 of 2001***, the learned judge while relying on the above provisions, in reference to the time of limitation for actions under the **Law Reform (Miscellaneous Provisions) Act**, stated as follows;

"This Court has already decided in H.C.C.S No.548 of 2001; Lydia Agnes Mujaju Versus Makerere University & Another, that the period of limitation for such action is three (3) years under the proviso to Section 3(1) of the Limitation Act, Cap.80, where the action is not against the Government or scheduled corporation. Otherwise, if against Government or scheduled corporation corporation, then the period within which the action must be instituted is a period of two (2) years from the date of the cause of action pursuant to Section 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap.72.

Both the Limitation Act, Cap.80, whose commencement date is 07.05.59, and the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap.72, whose commencement date is 28.04.69, are later legislations than the Law Reform (Miscellaneous Provisions) Act, Cap.79, with the commencement date of 03.12.53. As such, the stated later Acts are regarded as having repealed the earlier Act on this issue of limitation. It is a legislative anomaly that section 6(3) of the Law Reform

(Miscellaneous Provisions) Act, Cap.79, is to date not formally repealed. This court takes it as repealed, both by implication and inference by the said later acts."

However, I find that **Section 6(3)** of the **Law Reform (Miscellaneous Provisions) Act, Cap.79,** has never been repealed; I agree with the decision in ***Velestom Onyom Versus Stephen Wekomba & Two Others, Civil Suit No.34 of 1997,*** that the mention of 12 calender months in the said law was just a revisibonal error, which has not yet been rectified. This Court has on a previous occasion in ***Milburga Versus Women's Hospital International and Fertility Centre Ltd and 3 ors, Civil Suit No.298 of 2011***, pointed out that the Commissioner had most likely, inadvertently re-enacted the position as it was prior to the amendment effected on Section 8(2) (ii) of the Law Reform (Miscellaneous Provisions) Ordinance, by Section 36 of the Limitation Ordinance, 1958. I, therefore, consider that the limitation period in the present case was three years. Court stated as follows;

"In my view the courts should always strive, in adjudicating cases, to ensure that, as much as possible the law and justice meet. The justice of this case demands that the plaintiff should not be penalized for the fault of the commissioner. In this case, all parties appear to be in agreement that an error was committed. In a case like this where there is such a glaring error as to what the law in place should be, the court would not close its eyes to the truth of the matter and pretend as if no error was committed. This court will not lend its hand to the furthering of an illegality perpetuated, albeit inadvertently, by a commissioner… I am in total agreement with the observation and conclusions of Katutsi, J, in Lydia Agnes Mujaju Versus Makerere University and Another (Supra) that the law applicable is that to be found in the Limitation Ordinance of 1958."

I accordingly find that the proposed amendment to include a local Government as a party to the suit is not barred by limitation.

I, therefore, strike out the suit against the 2nd respondent/defendant with costs. However, in the interest of justice, and in order to avoid multiplicity of suits, I order that the applicant shall be allowed to amend the proceedings in order to add Wakiso District Local Government Council as a defendant.

It is so ordered.

Elizabeth Musoke

JUDGE

29/09/2015