

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MASINDI**  
**CIVIL SUIT NO. 039 OF 2013**

**ABDU OCHAKI & 98 OTHERS:.....PLAINTIFFS**

**VERSUS**

**BRITISH AMERICAN TOBACCO**

**UGANDA LIMITED:.....DEFENDANT**

**BEFORE: HON. JUSTICE WILSON MASALU MUSENE**

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**JUDGMENT**

The Plaintiffs, Abdu Ochaki & 98 others, filed a representative suit against British American Tobacco, Uganda Limited, for the tort of detinue general damages, interest and costs.

The Plaintiffs claim that they were contracted by the Defendant to grow tobacco for the 2004 season and supplied the said tobacco to the Defendant who has to date continued to keep the tobacco but refused/failed to pay for it. The Plaintiffs further allege that the non-payment has occasioned financial loss and missed investment opportunities to them.

The defendant moved court to try four preliminary issues of law pursuant to O. 15 r. 2 of the Civil Procedure Rules; and also as a test suit with regard to civil Suit [No. 38 of 2013 filed by  
20 James Ongulla & 3700 others, pursuant to o. 39 r. 1 of the Civil Procedure Rules.

On 11<sup>th</sup> February, 2015, the court ordered that the following issues be tried in the test suit as preliminary issues of law:

- 1) Whether the Plaintiffs in HCCS NO. 38 and 39 of 2013 have a tenable cause of action against the Defendant in detinue.
- 2) Whether HCCS NO. 38 and 39 presented as representative suits are complaint with the law.

- 3) Whether HCCS NO. 38 and 39 as presented are barred by limitation.
- 4) Whether HCCS NO. 38 and 39 as presented are barred by the doctrine of *res judicata*.

The Plaintiffs were represented by M/S Alaka & Co. Advocates, while the Defendant was represented by M/S Sebalu & Lule Advocates.

### **Issue No. 1**

#### **Whether the Plaintiffs in HCCS NO. 38 and 39 of 2013 have a tenable cause of action against the Defendant in detinue.**

It was submitted by counsel for Defendant that a cause of action means a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person.

- 10 They cited **Auto Garage vs Motokov [1971] E.A 514**, where it was held that a plaintiff must show that the Plaintiff enjoyed a right, that right has been violated and that the Defendant is liable. They added that for an action in detinue to subsist:-

- i) Right of action, the Plaintiff must have the right to the immediate possession of the goods at the time of commencing the action arising out of an absolute or special property. The injurious act is the wrongful detention of the goods and not the original taking or obtaining of the possession of the goods.
- ii) Description of goods, as a matter of pleading, the goods must be described with sufficient certainty and accuracy for the purposes of identification because the judgment and execution are in the form that the Defendant delivers to the Plaintiff the goods described in the Plaintiff.

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Counsel for Defendant further added that the Plaintiff does not show that the Defendant is in any form of possession of the Plaintiff's tobacco. No evidence by way of annexure or otherwise shows that the Defendant is or took possession of the Plaintiffs' tobacco. Accordingly we submit that no right to the tobacco (as alleged by the Plaintiffs) has been established in the plaintiff for which it can be said that the Defendant is liable for its violation. The violation in this case would be the unlawful detention by the Defendant.

Secondly, that there was no evidence of a demand for the return of the tobacco, by authority cited above (paragraphs 3.4 and 3.5), the injurious act in the tort of detinue is wrongful detention upon demand. The plaintiff's plead that they supplied tobacco to BAT Uganda which is unpaid for to-date. There is no pleading or other evidence contained or annexed to the Plaint to the effect that a demand was made for the return of the tobacco.

Thirdly that no property is established, in a claim for detinue, the Plaintiff must show that he/she has a right to the proprietary interest in the goods. The plaint does not plead this critical element.

10 Lastly, on description of goods, the goods must be described with sufficient certainty and accuracy for the purposes of identification. No details (for example, tobacco type quantities ) are provided by the Plaintiffs in the plaint. This offends order VI rule 3 of the rules.

Counsel for the Plaintiffs submitted that the Plaintiffs have shown that they enjoyed a right which has been violated by the Defendant. The Plaintiffs were engaged by the Defendant to grow and supply tobacco to the Defendant. The tobacco was grown and supplied to the Defendant's stores. The Plaintiffs have never been paid.

Counsel further submitted that the claim in detinue has been stated in paragraph 3 of the Plaint;

*"The Plaintiff brings this suit for the tort of detinue, for general damages, declaratory order for costs and interest thereon.*

*The facts giving rise to the cause of action are as follows:*

20 *In 2004 the Defendants contracted the plaintiffs to grow tobacco for them.*

*The Plaintiffs then supplied the tobacco to the Defendants stores, as per annexure "A" attached to this plaint as part thereto.*

*The Defendant have continued to keep the tobacco unpaid for todate."*

It was emphasized that the Plaint shows the continued retention and detention of the plaintiffs' tobacco without pay which amounts to unlawful possession.

For as long as the tobacco remained unpaid, the plaintiffs' proprietary interest in the goods is not in doubt.

Further information was that the goods are properly described in the annexure "A" to the Plaint showing the number of kilograms and the respective amount due for the same and the names of the people and the villages.

Counsel for the Plaintiff called upon this court to overrule the preliminary objections in the interests of Justice. They quoted the Court of Appeal of Kenya case of **Trust Bank Ltd vs Amalo Co. Ltd [2003] 1 EA at 351**, while following the decision in **Essanji and another vs Solanki [1968] E.A 224** held:

- 10 The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the Court ought to hear and consider the case of both parties in any dispute in absence of any good reason for not to do so. Whereas the arguments of counsel for the Plaintiffs are that the goods are described in terms of number of kilograms and the names of the people and villages, my view is that is not enough. There are no vouchers attached to show how much was received from each farmer, on what date and where it was received and the amount of value.

- 20 Secondly, there was no demand of the cotton by the Plaintiffs, which demand was refused and what was the form of demand. The whole claim in detinue is therefore confusing, un clear and amorphous and cannot be sustained. This court cannot invoke Section 98 of the civil procedure rules, (inherent powers) as it would amount to abused of court process. To state that the Plaintiffs were engaged by the Defendant to grow tobacco for them is ambiguous. Growing of tobacco is subject to weather conditions which are unpredictable. The Plaintiffs are not constituted in a company or a cooperative union of some sort for purposes of working as an umbrella Association. It needs further inquiry as to how the arrangement between the Plaintiffs and Defendant was concluded, and therefore that insufficiency in pleadings leads me to no other conclusion but strike out the Plaint. No cause of action in detinue is sufficiently disclosed.

## **Issue No. 2**

**Whether HCCS NO. 38 and 39 presented as representative suits are complaint with the law.**

Counsel for the Defendant raised the issue of Advertising the list of interested Plaintiffs in the National news paper and not the Court orders alone. They argued that it is a fundamental point in representative actions is that the list of persons to be represented, on whose behalf the action is brought must, as a matter of law be advertised where the Court has directed such mode of service. In other words, the requirement to give proper notice cannot be dispensed with, even by the Court. The case of **Ibrahim Buwembo & others v UTODA Ltd** was quoted .It was held in that case by Kiryabwire J (as he then was) that;

10           *“It would appear to me that the wording of O. 1 r 8 (1) with regard to notice either by personal service or by public advertisement as the court may in each case direct is mandatory. Furthermore, the requirement to give a proper notice cannot be regarded a mere technicality or direction that can be dispensed with. The Notice by Public advertisement must disclose the nature of the suit as well as the reliefs claimed so that the interested parties can go on record in the suit either to support the claim or to defend against it.”*

In reply, Counsel for the Plaintiffs submitted that whereas the object of o. 1 r. 8 of the Civil procedure rules was to avoid a multiplicity of similar litigation, that in the present case the  
20 Plaintiffs were very few and ascertainable in number. With respect, I disagree as 98 people are very many and their names have to be published in a paper of National circulation, as directed.

The representatives of the plaintiffs had to comply with the law by advertising the orders together with the lists of names of persons on whom the orders are to be served by way of Advertisement.

In the case of **Thomas Okumu vs B.A.T & Mastermind Tobacco, HCCS NO. 465 of 2000**, Katutsi J held,

*“The Court can’t accept the argument that any spirited person can represent any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences.”*

In conclusion therefore , in so far as the lists of names has not been advertised by the Plaintiffs, the suit is non compliant with the law and is therefore incompetent. Accordingly I dismiss the suit with costs to the Defendant.

### **Issue No 3**

#### **Whether HCCS NO. 38 and 39 as presented are barred by Limitation.**

10 The contention of counsel for the Defendant was that the plaintiff’s action which is founded on contract of 2004 is time barred. Reference was made to S. 3 (1) (a) of the limitation Act which bars actions founded on contract to be brought after the expiration of 6 years from the date the cause of action arose. They concluded that since no grounds of exemption were shown by the Plaintiffs in their respective complaints, then their cases are time barred. Counsel for the Plaintiffs replied that the tort of detinue is a continuing tort and cannot be barred by limitation. However, I have already dealt with the tort of detinue and held that no cause of action in detinue can be maintained under issue one. The objection of limitation is accordingly hereby upheld.

### **Issue No. 4**

#### **20 Whether HCCS NO. 38 and 39 as presented are barred by the doctrine of *res judicata*.**

It was submitted on behalf of the Defendant that Section 7 of the Civil procedure Act bars actions where a Court has previously adjudicated the matter in controversy. They quoted the case of **Kamunye & others vs The Pioneer General Assurance society Limited** cited with approval in **Frostmark EHF –vs- Uganda Fish Packers Ltd.**

*“The test whether or not a suit is barred by res judicata seems to me to be is the plaintiff in the second suit trying to bring before the court, in another way and in the*

***form of a new cause of action, a transaction which he has already been put before a court competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. “***

The following reasons were given as to why the cases are barred by Doctrine of *res judicata*.

- 10 i) The Plaintiffs plead under paragraph 3 of both complaints and the summaries of evidence attached to the complaints (a pleading in itself) that they were excluded from the claim in which other farmers obtained compensation for the 2004 season tobacco and are therefore entitled to compensation for tobacco for that season.
- ii) The Plaintiffs in both suits have brought before the Court, in another way and in the form of a new cause of action (detinue) a transaction which has already been put before the Courts.
- iii) The transaction on which the plaintiffs' suit is founded has already been put before courts competent jurisdiction in earlier proceedings and has been adjudicated upon. Refer to annex A1, A2, A3 and A4 annexed to the Defendant's written statement of defence.
- 20 iv) The points raised by the plaintiffs in the instant suits properly belonged to the subject of litigation which has already been adjudicated.
- v) The plaintiffs ought to have exercised reasonable diligence and should have brought forward their claims at the time but now purport to bring the same claim clothed in another form after 10 years.

Counsel for the Defendants' final submissions were that the Plaintiff's claims are hypothetical and that goes against the cardinal principles of jurisprudence. Counsel for the Plaintiffs in reply stated that the plaintiffs in the two cases were never parties to the former case and do not claim or litigate under the same title, and that the cause of action is not the same as in the former case.

They added that none of the Plaintiffs were parties to the former case.

This court has already ruled that no cause of action in detinue is disclosed against the Defendant. And whereas the two causes of action of detinue and contract can be joined together, that can only be done if they are both within time. And that was the decision in **SCCA No. 4 of 2000 between Christine Bitarabeho vs Edward Kakonge**.

In the present case which is distinguishable the contract for the plaintiffs alleged cause of action (detinue) is time barred. So both actions cannot co-exist.

10 Finally, in the case of **Legal Brains Trust (LBT) Limited vs Attorney General, Civil Appeal No. 4 of 2012 of the Appellate Division court in the East African Court of Justice**, it was held that a Court of Law will not adjudicate hypothetical questions. A Court will not hear a case in the abstract, or one which is purely academic and speculative in nature, where no underlying facts in contention exist.

I find and hold that the decision in the above case applies squarely to the circumstances of this case. The Courts must handle real live disputes, based on contracts which clearly spell out terms and conditions and set time lines for performance. Otherwise it would be a waste of Court's time to indulge in hypothetical and speculative matters aimed at self enrichment to the detriment of the due process of the law. Such claims if entertained would amount to an abuse of court process.

20 In the circumstances, and in view of what I have outlined above, I do hereby uphold all the preliminary objections raised by counsel for the Defendant, and dismiss the plaintiffs claims in High Court Civil Suits No. 38 and 39 of 2013. I also order that each side meets their own costs. This is because I don't want to unleash costs to unsuspecting litigants or persons apparently not properly consulted and brief and who are no doubt peasants sought to be used for personal aggrandizement by the Advocates concerned.

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**W. Masalu Musene**

**Judge**

**10/07/2017**