IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Civil Suit No. 030 of 2011

In the matter between

GASTAPO COMPANY LIMITED **PLAINTIFF**

VERSUS

ATTORNEY GENERAL **DEFENDANT**

Heard: 11 April 2019.
Delivered: 9 May 2019.

Civil Procedure *— Limitation of actions — Disability as legal incapacity — Disability as inability — suit for failure of government in its constitutional duty to guarantee security from rebel armed forces — Action statute barred*.

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] The plaintiff sued the defendant for a declaration that it is entitled to compensation for the loss of its truck that was burnt by the Lord's Resistance Army, general and special damages, interest and costs. The plaintiff's claim is that the defendant failed in its constitutional duty to provide security by as a result of which its truck was on 30th April, 2007 at Bibia Parish, Atiak sub-county in Amuru District ambushed by the Lord's Resistance Army rebels who burnt it to ashes. The truck was on its way from Juba, carrying 455 empty crates of soda. The truck driver and tonne man were injured in the attack, as a result of which the plaintiff incurred costs in medical and other bills. Before the attack, the truck driver had been cleared by soldiers of the Uganda People's Defence Forces to

proceed with his journey upon assurances that it was safe to do so, only for him to be ambushed by the rebels. The Government of Uganda made promises for compensation which it failed to honour, hence the suit.

[2] In the written statement of defence, the defendant refuted the plaintiff's entire claim contending that Government cannot be held liable for the acts of the Lord's Resistance Army rebels. The suit itself is time barred and the disability pleaded is untenable. The defendant prayed that the suit be dismissed with costs.

The preliminary objection:

[3] When the suit came up for hearing, counsel for the defendant raised a preliminary objection to the effect that the suit is time barred since the cause of action arose on 30th April, 2007, the suit was filed on 25th August, 2011 yet the period of limitation is two years. The plaintiff did not plead disability and for that reason the suit ought to be struck out. He prayed that the suit be dismissed.

[4] In response, counsel for the plaintiff argued that disability is constituted by incapacity howsoever caused. By reason of the instability that prevailed in Northern Uganda, the plaintiff was prevented from filing a suit. The plaintiff was further incapacitated by the defendant's promises for compensation, which promises constitute acknowledgement of liability whose effect was renewal of the cause of action. The suit involves issues of fact relating to the defendant's negligence and the date of cessation of hostilities which cannot be disposed of by way of preliminary objection. He prayed that the objection be overruled.

The general principles regarding preliminary objections:

[5] Under Order 6 rules 28 and 29 of *The Civil Procedure Rules*, a point of law may be set down for hearing and disposed of at any time before the hearing. If it substantially disposes of the whole suit, or of any distinct cause of action, ground

of defence, setoff, counterclaim, or reply therein, the court may thereupon dismiss the suit or make such other order in the suit as may be just.

[6] A preliminary objection should consist of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit (*Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696*). The aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of a suit because there is a point of law that will dispose of the matter summarily. A preliminary objection must raise a point of law based on ascertained facts and not evidence. It should be a matter that is capable of determination based only on examination of the pleadings without reference to any evidence.

[7] Even when such a matter is raised, the Court may defer its ruling on the objection until after the hearing of the suit or petition. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the Court to decide whether a cause of action is disclosed or not. I think that it is a matter of discretion of the Court as regards when to make a ruling on the objection (*The Attorney General v. Major General David Tinyefunza, S. C. Constitutional Appeal No.1 of 1997*).

[8] It is trite that preliminary objections draw a distinction between the merits of the suit and the subject matter of the objection. An objection should bear the character of matter that can be dealt with immediately without touching the merits, or involving parties in argument of the merits of the case. It should relate to a matter which can be disposed of by the Court at an early stage without examination of the merits. It should therefore be based on pure points of law or on ascertained, undisputed facts and any reasonable inferences that may be drawn from those facts. Objections should be sustained only in cases which the facts on which they are based are clear and free from doubt. Where an objection

is inextricably linked to facts that are disputed or have to be proved during the trial, then it goes to the merits of the suit and it should be joined to the merits.

[9] When considering a preliminary objection, the court will not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion.. The court will not decide as part of a preliminary objection, facts that require analysis beyond the pleadings. The court should not reach a determination based upon its view of the controverted facts, but must resolve the dispute by receiving evidence thereon.

[10] Under section 3 (1) (a) of *The Civil Procedure and Limitation (Miscellaneous Provisions) Act*, no action founded on tort may be brought against the Government after the expiration of two years from the date on which the cause of action arose. However section 5 thereof provides that if on the date when any right of action accrued the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of twelve months from the date when the person ceased to be under a disability, notwithstanding that the period of limitation has expired.

[11] Order 7 rule 11 (a) and (d) of *The Civil Procedure Rules*, requires rejection of a plaint where the suit appears from the statement in the plaint to be barred by any law. On the other hand, *Order 7 rule 6 of The Civil Procedure Rules* requires that *w*here a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint should show the grounds upon which the exemption from that law is claimed. This requirement *was* considered by the Court of Appeal in *Uganda Railways Corporation v. Ekwaru D.O and 5104 others, C.A. Civil Appeal No.185 of 2007 [2008] HCB 61***,** where it was held that if a suit is brought after the expiration of the period of limitation, and no grounds of exemption are shown in the plaint, the plaint must be rejected (see also *Murome Sayikwo v. Kuko Yovan and another [1985] HCB 68*).

Disability as legal incapacity;

[12] A person may temporarily or permanently be impaired by mental and / or physical deficiency or illness, or by the use of drugs or by reason of age to the extent that he or she lacks sufficient understanding to make rational decisions or engage in responsible actions. This perspective of disability focuses on legal or physical conditions of a nature inherent in an individual, that constitute obstacles to bringing a suit. It primarily connotes the lack of legal capacity to perform an act due to mental or physical impairment (functional limitations), i.e. inability to file a suit, based on some mental or physical impairment recognised by a legal rule or policy, which inability must be existent at the time the cause of action arose (for example section 1 (3) of *The Limitation Act* provides that a person is under a disability if an infant or of unsound min). From this perspective, a plaintiff is under disability for the purposes of tolling *The Civil Procedure and Limitation (Miscellaneous Provisions) Act* if he or she is a minor under the age of eighteen years, declared mentally incompetent or under other legal disability rendering him or her incapable of the management of his or her affairs due to the impairment of his or her physical condition, or because of disease or other impairment of his or her physical or mental condition.

Disability as inability;

[13] Whereas “disability” primarily means want of capacity of the legal qualification to act, sometimes inability may constitute disability. “Inability” means want of physical power or facility to act. Inability assumes that the plaintiff is fully capable to sue in that there is no personal incapacity to sue but some extraneous circumstances render him or her unable to file the suit. Although there is no express provision in law to extend the time for a person who is unable to file a suit apart from his or her disability arising from want of capacity of the legal qualification to act, the expression has been liberally construed to include inability due to extraneous circumstances which make commencing a suit more difficult,

even if it does not make commencing a suit impossible, such as such as imprisonment on a criminal charge, or in execution under order of court (see *Siya John v. The Attorney General [1972] HCB 86*; *Mungecha Fred M. v. Attorney General [1981] HCB 34* and *Sempa James v. Attorney General [1981] HCB 32*), and absence from jurisdiction.

[14] From this perspective, the thinking is that disability need not be inherent in an individual but may also be a relational concept existing without functional limitation but rather as a result of disabling conditions. The disability that a person experiences may depend on both the existence of a potentially disabling condition (or limitation) and the environment in which the person lives. The environment can be either enabling or disabling for a person to take a particular step and the court may examine how accommodating or not accommodating to the particular step the external factors were at the material time. Whereas a person is required to perform an act, the environment may create an overwhelming barrier that limits action

[15] A condition that is limiting must be beyond the control of the plaintiff and defined as problematic by the standard of a reasonable person for it to become a disability. Whether external environmental factors are seen as disabling will depend on the actions and capacities necessary to satisfy the required conduct. If certain actions are not necessary for a step to be taken, then the person who is limited in ability to perform those actions does not have a disability. For a person to rely on such external factors as having created a barrier to the required action, the court ought to be satisfied that there were no alternative, reasonable, enabling avenues that could serve to compensate for the condition, or ameliorate the limitation. The plaintiff has proffered the conditions of insurgency as a disabling condition that existed at the time.

First issue; Whether or not insurgency constitutes a disability;

[16] There exists a phrase in Latin, *lex non cogit ad impossibilia* (See Black's Law Dictionary, 1844 app. (9th ed. 2009), which means that the law does not compel the doing of impossibilities. It is a fact that access to courts may be inhibited on account of war. War can be expected to interfere with a plaintiff's ability to *inter alia* serve process upon a defendant, to investigate and locate witnesses, and so on. The existence of a state of sustained armed conflict may therefore constitute a disability. It is an established principle of international and municipal law that a statute of limitation is tolled during the period when the existence of a state of war prevents access to the courts, whether or not the particular statute of limitation expressly provides for such suspension thereof. The period during which the plaintiff was denied access to the courts by reason of the war cannot be included in the computation of the limitation period.

[17] However, there are instances, such as this, where the nature of the case in controversy requires a judicial determination of whether war existed, and the time of its commencement and cessation. By virtue of article 124 of *The Constitution of the Republic of Uganda, 1995*, recognition of belligerency as a war or terrorist activity is an executive function or responsibility. While the recognition of belligerency is an executive function, courts are authorised to interpret specific issues dealing with war when proclamations from the executive do not provide an answer. This is one of such instances when judicial pronouncements tangential to armed conflict are simply unavoidable. The court must necessarily engage in a two-step approach, determining in the first instance whether there was a war, and in the second instance, the measurable number of calendar days to credit between the commencement and cessation of the conflict, despite the lack of any formal declaration of war by the executive. In many public pronouncements, Joseph Kony and The Lord's Resistance army have been categorised as terrorists (see for example "For the global security and human rights fraternity,

Kony is a terrorist" in *Is Kony a terrorist, myth or just a misunderstood man?* Daily Nation Newspaper of Friday November 5 2010).

[18] In many ways war and terrorism are very similar. Both involve acts of extreme violence, both are motivated by political, ideological or strategic ends, and both are inflicted by one group of individuals against another. The consequences of each are terrible for members of the population, whether intended or not. War tends to be more widespread and the destruction is likely to be more devastating because a war is often waged by states with armies and huge arsenals of weapons at their disposal. Terrorist groups rarely have the professional or financial resources possessed by states. The differences are not always clear-cut and even experts may disagree about whether a violent campaign counts as terrorism, civil war, insurgency, self-defence, legitimate self-determination, or something else.

[19] For the purpose of the law of limitation, disability applies not only to wars formally declared by the executive, but also to sustained armed conflicts where the use of armed forces is specifically authorised by the state. For that reason, this court is prepared to recognise the armed conflict with the Lord's Resistance Army as a “war” in a classic legal sense, even if it was not officially declared so by the executive.

[20] Once so recognised, the time of the continuance of the war is not reckoned as a part of the period limited for the commencement of suits. War and related hostilities are bound to break down, undermine and sideline the legal system. However, even in the midst of such a breakdown, some aspects of the law will continue to operate, albeit in a weakened state. At this stage, the court is prepared to give the plaintiff the benefit of the doubt as to the impact of that conflict that notoriously pervaded much of Northern Uganda, irrespective of its sporadic nature in some geographical locations therein, as having substantially impaired the plaintiff's ability to file the suit within the time limited by law.

[21] However, according to section 56 (1) (j) of *The Evidence Act*, a court may take judicial notice of the commencement, continuance and termination of hostilities between the Government and any other State or body of persons. In such cases, the court may resort for its aid to appropriate books or documents of reference. By virtue of that provision, this court takes judicial notice of the fact that from the middle of the year 2004 onwards, rebel activity dropped markedly in the entire Northern Region of Uganda, and in mid-September, 2005, a band of the active remnants of Lord's Resistance Army fighters, led by Vincent Otti, crossed into the Democratic Republic of Congo. Thereafter, a series of meetings were held in Juba starting in July, 2006 between the government of Uganda and the LRA (see Wikipedia, "*Lord's Resistance Army insurgency*" at https://en.wikipedia.org/wiki/Lord%27s_Resistance_Army_insurgency, visited 25th April, 2019). The implication is that in 2006, northern Uganda was nearing the end of the brutal Lord's Resistance Army insurgency (see IRIN, "*How the LRA still haunts northern Uganda*," at http://www.irinnews.org/analysis/2016/02/17/how-lra-still-haunts-northern-Uganda, visited 25th April, 2019).

[22] Although for purposes of limitation the time between the commencement of the war and the termination of hostilities is excluded, the Lord's Resistance Army insurgency in Northern Uganda having ended during or around the year 2006, a suit filed five years later in 2011 is clearly time barred. The plaintiff ought to have pleaded circumstances external to it as the person to whom the cause of action accrued, over which it had no control which prevented it from taking the necessary step by occasioning physical or mental incapacitation. It is not pleaded in the instant case that there was any physical or mental incapacitation occasioned by the war, nor any overwhelming external conditions thereafter that created a barrier as a result of that war. A person who advances fear as the reason for failure to file a suit is not prevented by anything external but only his or her own trepidation. Apprehension is not a physical incapacitation. In any event,

it is not pleaded that the insurgency significantly impacted on the operations of the High Court in Gulu, or that advocates and litigants could not access the court for any significant period of time even during that insurgency. For those reasons this ground is not available to the plaintiff.

Second issue; Whether or not protracted negotiations constitute a disability.

[23] It is contended by counsel for the plaintiff that by reason of pleas made by the plaintiff to the defendant, repeated promises were made over the years for compensation which the defendant has failed to honour. In essence the plaintiff alludes to attempts to negotiate and promises made out of court, as the reason for the belated filing of the suit.

[24] The choice to go into negotiations is based more on self-efficacy beliefs rather than conditions of mental or physical impairment. Self-efficacy beliefs are concerned with whether or not a person believes that he or she can accomplish a desired outcome. Beliefs about one's abilities affect what a person chooses to do, how much effort to put into a task, and how long an individual will endure when there are difficulties. The choice to negotiate over the decision to sue is a behavioural choice rather than a functional limitation. It therefore is neither a legal incapacity inherent in an individual nor an extraneous circumstance beyond the control of the plaintiff that renders the plaintiff unable to file the suit. It is therefore no surprise that courts have taken the view that protracted negotiation of a settlement out of court does not constitute a disability to justify exemption from limitation (see *Allen Nsibirwa v. National Water and Sewerage Cooperation H.C. Civil Suit No. 220 of 1995; Peter Mangeni t/a Makerere Institute of Commerce v. Departed Asians Property Custodian Board, S.C. Civil Appeal No. 13 of 1995* and *Nyeko Smith and another v. Attorney General S.C. Civil Appeal No. 01 of 2016*).

Third issue; Whether promises to compensate constitute acknowledgement that renewed the cause of action.

[25] In the first place, this was not pleaded as one of the grounds tolling *The Limitation Act* in this case. On the other hand, according to section 23 (1) of *The Limitation Act* such acknowledgment is required to be in writing and signed by the person making the acknowledgment. There is no such attachment to the plaintiff's pleadings nor is there a reference to a signed document in the plaintiff's list of documents.

[26] Furthermore, according to section 23 of *The Limitation Act*, acknowledgments and part payments renew causes of action founded only on; (i) recovery of land; (ii) right of a mortgagee of personal property to bring a foreclosure action in respect of the property; (iii) recovery of debts or other liquidated pecuniary claims; (iv) claims to the personal estate of a deceased person or to any share or interest in it. The plaintiff's action is not in any of those categories. Lastly, in order to satisfy the stipulations of section 23 of *The Limitation Act*, the following essentials must be present:- (i) there must be a promise to pay a debt; (ii) there must be a debt of which the creditor might have enforced payment but for the law for the limitation of the suits; (iii) the promise must be made in writing; and (iv) the writing must be signed by the person to be charged therewith or by his or her agent generally or specifically authorised on his or her behalf. None of this is pleased by the plaintiff. Accordingly, this ground too is not available to the plaintiff.

Fourth issue; Whether the merits of the suit is a justification for tolling *The Limitation Act*.

[27] It is trite that the law of torts does not normally impose on government a duty to protect, consequently it is a principle of common law that the Constitution retrains government from depriving persons of their rights, and from taking lives or liberty

except in a manner consistent with the law. When it comes to the a government duty to protect persons from bad private actors, Courts have been reluctant to find such a duty, even when reasonable government actors could easily have saved lives or prevented serious bodily harm (see Michael L. Wells and Thomas A. Eaton, *Affirmative Duty and Constitutional Tort*, University of Michigan Journal of Law Reform, Vol. 16, No. 1 (Fall 1982), pp. 1-44). The state has no affirmative constitutional duty to protect individuals since the bill of rights, phrased as a series of prohibitions, not an affirmative commands, is a charter of negative rather than positive liberties (see *Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982*). The Constitution is meant to protect citizens from oppression by state government, not to secure them basic governmental services.

[28] However, there are exceptions to that general rule, to wit; (i) persons in government's physical custody; and (ii) if the government is responsible for creating the danger. If the state puts a person in a position of danger and then fails to protect him or her, it is as much an active tortfeasor as if it had thrown him into a snake pit (see *Bowers v. Devito, 686 F.2d 616, 618 (7th Cir. 1982*) and *Spence v. Staras, 507 F.2d 554, 557 (7th Cir. 1974*). Therefore, based on the pleadings before court, the plaintiff would possibly be in position to put up a plausible case, but for limitation.

[29] From the defendant's perspective, it is arguable that government does not place the plaintiff in a place or position of danger, but simply fails adequately to protect him or her as a member of the public from harm, that failure is not actionable at common law. Secondly the defendant suggests that if a person voluntarily assumes a position of danger, then liability may not arise. *Volenti non fit injuria* (no injury can be done to a willing person i.e. voluntary assumption of risk) is a common law doctrine which states that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party in tort. Where the defence applies it operates as a complete defence absolving the defendant of all

liability. Knowledge of the risk of injury is not enough. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree expressly or impliedly to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or more accurately due to the failure by the defendant to measure up to the duty of care which the law requires of him (see *Nettleship v. Weston [1971] 3 WLR 370; White v. Blackmore [1972] 3 WLR 296; Morris v. Murray [1991] 2 QB 6* and *Smith v. Charles Baker & Sons [1891] AC 325*). Therefore, based on the pleadings before court, the defendant would possibly be in position to put up a plausible defence, but for limitation.

[30] Despite the presence of such triable issues apparent on the face of the pleadings of both parties, the whole idea of *The Limitation Act* is to prevent stale claims. Statutes of limitation are in their nature strict and inflexible enactments. Their overriding purpose is *interest reipublicae ut sit finis litium*, meaning that litigation is automatically stifled after a fixed length of time, irrespective of the merits of a particular case (see *Re-Application of Mustapha Ramathan, (1996) KALR 86* and *Hilton v. Sutton Steam Laundry [1946] 1 KB 61 at 81*).

[31] Statutory provisions imposing periods of limitation within which actions must be instituted seek to serve several aims. In the first place, they protect defendants from being vexed by stale claims relating to long-past incidents about which their records may no longer be in existence and as to which their witnesses, even if they are still available, may well have no accurate recollection. Evidence may largely depend on the recollection of witnesses, which deteriorates over time. t may depend on the preservation of written records which may be lost or destroyed. Secondly, the law of limitation is designed to encourage plaintiffs to institute proceedings as soon as it is reasonably possible for them to do so.

[32] Thirdly, the law is intended to ensure that a person may with confidence feel that after a given time he or she may regard as finally closed an incident which might have led to a claim against him or her (see *Birkett v. James [1977] 2 All ER 801*).

The legislature must be taken to have sought, and achieved, proper balance between all these competing interests in enacting that, if actions are to be heard at all, they must be instituted within the various specified periods from the accrual of the cause of action.

[33] Public interest has always been concerned that litigation should be brought within a reasonable time. This enables cases to be dealt with properly and justly. Moreover the public interest requires the principle of legal certainty, defendants may have changed their position or conducted their businesses in the belief that a claim would not be made. It is for these and other reasons that limitation statutes have been described as “acts of peace” or “statutes of repose”. People should be free to get on with their lives or businesses without the threat of stale claims being made. *The Limitation Act* also encourages claimants to bring their claims promptly and not, in the old phrase, “to sleep on their rights.” The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he or she had lost evidence for his or her defence from being disturbed after along lapse of time. It is not to extinguish claims (see *Dhanesvar V. Mehta v. Manilal M Shah [1965] EA 321*; *Rawal v. Rawal [1990] KLR 275*, and *Iga v. Makerere University [1972] EA 65*). Once limitation begins to run, it will not be suspended by the subsequent disability of any of the parties unless specified by statute.

[34] I have carefully perused the plaint and find that the cause of action is stated to have arisen on 30th April, 2007 yet the suit was filed on 25th August, 2011 two years and four months out of time. In the circumstances, I find that the suit is barred by limitation.

Order :

[35] Consequently the preliminary objection is sustained. The plaint is struck out with costs to the defendant.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the plaintiffs :.

For the defendant :.