

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 548 OF 2016

ONYAIT JULIUS SILVER

(Suing for and on behalf of 877 others) ===== PLAINTIFFS

VERSUS

1. PETER KIMANJE NSIBAMBI

2. THE OFFICIAL LIQUIDATOR UEB

(IN LIQUIDATION) ===== DEFENDANTS

BEFORE HON. MR. JUSTICE SSEKAANA MUSA

RULING

The plaintiff and 1,116 former employees of the now defunct Uganda Electricity Board who were retrenched following the Government structural adjustment policy between 1998-2001. Following the retrenchment, the plaintiffs were paid a retrenchment package under a formula that was later enhanced following the settlement in Miscellaneous Application No. 63 of 2007.

That, upon execution of the said consent, the 2nd defendant proceeded to pay the said monies through the 1st defendant. The plaintiff claims that the 1st defendant has never paid the said monies to the plaintiffs.

The plaintiffs' are also challenging the remuneration agreement entered into between the late Nyabiryo and the 1st defendant and contend that it is illegal and void ab initio and unenforceable against them since they were not party to it.

The plaintiff's claim against the defendants jointly is for an account of all monies paid and received as terminal benefits, cancellation of the remuneration agreements executed between the 1st defendant and the Late Patrick Nyabiryo the former legal representative, general damages, costs and interest thereon all

arising from illegal and fraudulent acts, commissions and omissions of the defendants.

The 1st Defendant in his defence contended that the plaintiff having been a party to the original civil suit No. 1004 of 2001 Vincent Bagamuhunda & Others vs UEB and Miscellaneous Application No. 63 of 2007 arising therefrom which were successfully prosecuted by way of representative action resulting in a decree and later a consent Order, the plaintiff has no locus standi to bring a fresh suit against the defendant.

The acts complained of between the 1st defendant and the late Patrick Nyabiryo who was the plaintiff's representative was contractual and arose between 2001-2007.

The 1st defendant discharged his obligation to the plaintiff in the previous suits and the plaintiffs are estopped from denying Nyabiryo as their representative or from denying having received payments in 2007.

The defendant at the commencement of the trial informed court that he wishes to raise 3 preliminary objections;

- (1) The plaintiff has no right and /or cause of action to bring the present suit against the defendant.

- (2) The plaintiff is barred by law to bring a fresh suit in execution of the decree/consent order dated 6th July 2007 having been a party to the original civil suit No. 1004 of 2001 Vincent Bagamuhinda & Others vs UEB and Miscellaneous Application No. 63 of 2007 arising therefrom which were successfully prosecuted by way of a representative suit.

- (3) The suit is time barred.

The 1st Defendant submitted that he represented retrenched former UEB workers under 10 years and the plaintiff has never been one of them as he worked for UEB for over 10 years and his counsel was Bashasha & Co. Advocates

Secondly, the plaintiff has no cause of action the 1st defendant whose actions and status were premised on a Court Order that has not been set aside. They cannot claim that the 1st defendant is liable for any violation of their rights.

Thirdly, the representative court Order stems from an order made by this court between the plaintiffs and 1st defendant and Uganda Revenue Authority and not the 1st defendant and The Official Liquidator UEB (in liquidation) as the defendants. Therefore the Official receiver UEB was substituted for Uganda Revenue Authority without any court Order and therefore the suit is not permitted by law.

The 1st defendant contended that the plaintiff is barred from bringing a fresh suit in execution of the decree dated 24th October 2002/ consent order dated 6th July 2007. Counsel for the 1st defendant cited section 34 of the Civil Procedure Act and the case of *Kasanga Frank and 2 others v Muhereza Justus & 2 others Civil Suit No. 270 of 2017*.

The 1st defendant further contended that all claimants/retrenched former UEB workers who served under 10 years in service where paid in 2007 in compliance with the decree dated 24th day of October 2002 and a consent Order dated 6th July 2007.

In addition, the acts complained about by the plaintiff are based on contract/agreement which the 1st defendant entered into with the late Patrick Nyabiryo, the then plaintiffs' representative and arose between 2001 and 2007. Therefore, the 1st defendant contends that the cause of action arose between 2001 and 2007 which are over 10 years from the date when the cause of action arose and as such the suit is bad in law and an abuse of the court process.

The plaintiff's counsel in reply to the preliminary objection submitted that all plaintiffs are former employees of UEB seeking accountability from the 1st defendant for money had and received and thus they have similar interest. The 1st plaintiff's counsel acknowledges that he was not under 10 years but he has similar interest that is the need for accountability of their fund received by the 1st defendant.

It was 1st plaintiff's counsel submission that the plaintiff has requisite capacity to bring this suit which is proper before this court and this court is enjoined to expend justice not injustice by merely dismissing suits on the basis of a misjoinder or mere technicalities.

The present suit is not premised on the court order as alleged by the 1st defendant. The suit is totally different from that alleged under the said court order and cannot enforce the said court order twice since the 2nd defendant complied with all the terms of the said consent by paying the money to the 1st defendant.

The plaintiff further acknowledges that it filed the application under Order 20 of the Civil Procedure Rules but the same was not handled by the previous Judge in the interest of expediting the hearing of this case.

The plaintiffs' counsel submitted that the present suit is premised on the need for accountability and not entirely on the basis of a remuneration Agreement. He further contended that the suit is premised on fraudulent acts of the applicant/1st defendant including the remuneration agreement which was not brought to the attention of the plaintiffs and they did not agree too or sign but it was done between the Late Patrick Nyabiryo.

In sum, the plaintiff pleaded fraud as the basis for the extension of limitation time which had expired. He further contended that this objection if sustained has the effect of ending the entire suit without hearing the pertinent issues for which the plaintiff came to court thereby occasioning a grave injustice.

Determination

Instituting a Fresh suit after Execution

Section 34 of the Civil Procedure Act provides;

All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

It applies only to matters arising subsequent to the passing of a decree; and deals with objections to execution, discharge and satisfaction of a decree. It lays down the principle that matters relating to the execution, discharge or satisfaction of a decree arising between the parties, or their representatives, should be determined in execution proceedings and not by a separate suit.

The underlying object of this provision is to provide cheap and expeditious remedy for the determination of certain questions in execution proceedings without recourse to a separate suit and to prevent needless and unnecessary litigation. There must be an end to litigation. *Manunga Timotheo Makenge and JH Angaine v Minster of Lands and Settlements High Court Miscellaneous Case No. 142 of 1976(k)*

The rule of *res judicata* deals with finality of a decision of a court on matters actually or constructively in issue before it and bars a fresh trial of any kind of such questions in subsequent proceedings between the parties; while section 34 deals with the enforcement of such decisions and enacts that questions specified in the section shall be tried in execution and not by a separate suit.

Section 34 is wide and confers exclusive jurisdiction on the executing court in respect of all matters relating to execution, discharge or satisfaction of a decree between parties or their representatives. Once a suit is decreed, this section requires that executing court alone should determine all questions in execution proceedings and filing of a separate suit is barred. See *Desh Bandhu Gupta v N.L.Anand, [1994] 1 SCC 131*

Whether a subsequent suit is barred under section 35 depends upon the nature of the decree which is being executed and the relief claimed. Where the terms of the decree are vague and ambiguous, it is the duty of the executing court to interpret the decree with a view to find out and ascertain the meaning of the terms used.

Therefore, an executing court has plenary power to determine all questions relating to execution of a decree including power to account for money received in execution and satisfaction of a decree.

In the present case, the plaintiffs are seeking to recover money allegedly recovered in original suit *HCCS No. 1044 of 2001 Vincent Bagamuhunda, John Katongole & Edward Rogers Kiwanuka vs Uganda Electricity Board* and Miscellaneous Application 63 of 2007 *Vincent Bagamuhunda v Uganda Electricity Board U.E.B (In Liquidation)* which in their view was not remitted to them and they have also added the party who they purport did not remit the same. This is a proper case arising out of the recovery process or execution and or arising out of execution that should be brought under section 34.

Instituting different suits or new suits becomes an abuse of court process and only intended to annoy or irritate the parties. Supposing any of the parties was never paid or did not receive their decretal sums, should they all file separate suits.

Litigants must use reasonable expedition in conducting cases. It is in the public interest that litigation should not be protracted unduly, and it should be brought to an end. Re-opening a concluded case would be to make a mockery to the administration of justice and indeed an abuse of the process of court.

This suit is incompetently brought as a fresh suit and for this reason alone it would be dismissed.

Limitation of Action

Secondly, the applicant has raised preliminary objection as to the limitation of action. He contended that the action is based on remuneration agreement and failure to account for money received by the 1st defendant between 2001 and 2007.

The plaintiff submitted that the cause of action indeed also confirmed that their claim is partly on remuneration agreement and failure to account.

According to the plaintiffs' claim or cause of action as set out in the plaint;

"The plaintiffs' claim against the defendants jointly and severally is for an account of all monies paid and received as terminal benefits, cancellation of the remuneration agreement executed between the 1st defendant and the late Nyabiryo the former representative, general damages, costs and interest thereon all arising from illegal and fraudulent acts, commissions and omissions."

Section 3(2) of the Limitation Act provides that;

An action for an account shall not be brought in respect of any matter which arose more than six years before the commencement of the action.

The plaintiffs were indeed aware that they had brought their action out of the limitation period and that is why they sought to amend their pleadings to fall within the exceptions by introducing fraud. They added the following words to the cause of action, '*all arising from illegal and fraudulent acts, commissions and omissions of the defendants*'. They proceeded to add particulars of fraud in order to camouflage their suit which was time barred to come into the exceptions of limitation.

It is clear from the pleadings; the plaintiffs do not allude to any facts which bring them within the exceptions of fraud. The plaintiffs do not show court when they discovered the alleged fraud and it is clear the amendment to the plaint was introduced in the amended plaint in order to defeat the 1st defendant's defence of limitation.

Order 7 rule 6 of the Civil Procedure rules provides;

Where the suit is instituted after expiration of the period prescribed by the law of limitation, the plaint shall show the grounds upon which exemption from that law is claimed.

The provisions of this rule are mandatory and the plaintiff did not set out any grounds upon which exemption from the law of limitation is sought. The plaintiff merely threw particulars of fraud to court and hoped that this was sufficient to bring this claim within the exemption. I do not agree.

The primary purpose of limitation period is to protect a defendant from the injustice of having to face a stale claim which he never expected to have to deal. See *Donovan v Giventoys* [1990] 1 WLR 472.

Therefore defendants should not have to live with the risk of legal action indefinitely if for one reason or another, the potential plaintiff does not pursue his remedy and that old cases are difficult to try when memories are clouded, and evidence is probably lost. See *Civil Procedure and Practice in Uganda 2nd edition page 117 by Ssekaana (M)&(S)*

The plaintiffs in the present case are trying to cancel a remuneration agreement/contract executed and duly performed in 2007 over 10 years ago and one of the parties who represented the plaintiffs' Nyabiryo has since died. Was it intentional or deliberate that they should pursue such a claim after his death or it was inadvertence on their part? They do not deny receiving any money from the 1st defendant but rather they are demanding for the accountability. It would imply that since the time they received money in 2007, they were fully aware of the existence of the said remuneration agreement which they want to court to cancel or nullify.

This suit is barred by limitation and for this reason the plaint is struck out with costs.

Competence of suit without a Representative Order.

The plaintiff brought this action as a representative suit against the defendant under Order 1 rule 8 of the Civil Procedure Rules. The plaintiff obtained a representative order was obtained from court dated 2/6/2016.

The applicant filed High Court Miscellaneous Cause No. 85 of 2016 seeking a representative order against Uganda Revenue Authority and Kimanje Nsibambi & Co Advocates. This same order was granted and advertised in a newspaper of wide circulation.

The 1st plaintiff brought a suit against different parties without a representative order of court in this present suit. The actions of the 1st plaintiff or his advocate were fraudulent to that extent and it is unexplained why the same was done. I cannot fathom out the reason behind this, whether it was professional negligence or incompetence.

The plaintiffs' counsel submitted consistently about administering justice and not to expend injustice by merely dismissing suit on the basis of misjoinder or mere technicalities. The failure to obtain a proper representative order is breach of the procedural law and ought not to be ignored as a technicality. A party who wishes to represent several persons must come to court with clean hands. A court will not be used or called to aid the indolent to cause injustice and hardship to blameless parties.

Counsel need not urge on a court the necessity of administering justice in the course of execution of its mandate as a custodian of justice and rule of law. A court needs no persuasion of that, but justice must be applied to both sides. The defendant is as much entitled to justice as is the plaintiff.

The main preoccupation in a judge's life is to do justice each time, every time. The horizons are vast and wide; discipline dictates that the inclinations be exercised within the restrictions of the common law, circumspectly within the limits enacted by statutes and the ordered procedures. Justice must be done according to law. Madan, JA in *Alan Kiama v Ndia Mathunya and Others Court of Appeal Civil Appeal No. 42 of 1978(26 January 1981)*

This representative suit without a court order is incompetently before the court and the same is struck out with costs to the defendants.

I so order.

SSEKAANA MUSA

JUDGE

26th March 2020