

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO. 286 OF 2011

- 1. NDUNGO SETI**
- 2. KYOMUHENDO CATHERINE**
- 3. MONICA KAVIRA ::PLAINTIFFS**

VERSUS

- 1. SEKIZIYIVU SAMMY JONES**
- 2. EKAWRU JOHN :: DEFENDANTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiffs filed this suit seeking special damages and general damages for the unlawful impounding and conversion of their fish valued over Ugx. 62,800,000/= interest and costs of the suit.

The plaintiffs allege that in March 2007, the plaintiffs who are fish mongers were transporting their fish worth over Ugx. 48,000,000/= weighing approximately 13 tons to Bwere fish market, Kasese district. The trucks were stopped and the fish was impounded by the 1st defendant who claimed to be Maritime security personnel acting under the instructions of the Commissioner Fisheries to Bugolobi. The 1st defendant claimed that the fish was immature and with the help of the 2nd defendant alleged to have the reported the matter to police and filed Miscellaneous Applic. No. 14/ 2007 before the Chief Magistrates court of

Nakawa. The fish was distributed to different organisations which was unlawful and detrimental to the plaintiffs.

The 1st defendant denied the plaintiffs' claim and raised a preliminary objection to the effect that the plaintiffs' suit is prolix, misconceived, frivolous, vexatious, bad in law and a blatant abuse of the court process and prayed that the same is dismissed. He further contended that whatever he did was in lawful discharge of his statutory duties as a civil servant employed by the Internal Security Organization, an organ of the government of Uganda and as the in charge of the maritime security. He therefore stated that he cannot be held personally liable for his actions as whatever he did was under the ambit of the Fish Act, Cap 197. He stated that the matter was reported to police and the Commissioner Department of Fisheries duly applied for the immediate disposal of the fish to prisons, hospitals police and the army barracks.

The plaintiffs were represented by *Mr. Dennis Mudhola* whereas the defendant was represented by *Mr. John Mary Mugisha*.

The 2nd Defendant was served by way through substituted service but he did not appear. The Plaintiffs' suit against the 2nd Defendant was thereby withdrawn and no order as to costs was made.

The parties filed a joint scheduling memorandum wherein they proposed the following issues for determination by this court.

- 1. Whether the plaintiff's suit is properly before this court.*
- 2. Whether the 1st Defendant is liable for the alleged acts.*
- 3. Whether the Plaintiffs are entitled to the remedies prayed for.*

The parties were directed to file written submissions. Both the Plaintiffs and the 1st Defendant filed their submissions that were considered by this court.

DETERMINATION OF ISSUES

Whether the plaintiffs' suit properly before the court.

The 1st defendant submitted that the plaintiffs' suit is improperly before this court as it is frivolous and vexatious, bad in law and a blatant abuse of the court process and out to be dismissed summarily with costs to the 1st Defendant.

Defence counsel defined the term Frivolous as per the Black's Law Dictionary 8th Edition pg. 629 as lacking a legal basis or legal merit; not serious and not reasonably purposeful. He also defined a vexatious suit as a law suit instituted maliciously and without good cause. *R vs Ajit Singh s/o Vir Singh [1957] EA 822*.

Counsel further submitted that Order 7, r.1 (e) of the CPR, requires a plaintiff to disclose facts constituting a cause of action and when it arose. The plaintiff must show that the plaintiff enjoyed a right, the right was violated and the defendant is the one who violated it. *Auto Garage vs Motokov [1971] EA.314*).

It was the defendant's counsel contention that the plaintiff's claim is based on trespass to goods or chattels or conversion. The term trespass to goods or chattels means the act of committing, without lawful justification, any act of direct physical interference with chattel passed by another. He stated that a closer perusal of the plaintiff's pleadings and its annexures does not show that the plaintiffs pleaded that at all material times they were in exclusive possession, use

and ownership of the fish in issue. They did not attach any document such as an inventory, license, permit to show that the fish in issue belonged to them.

Counsel argued that the 2nd plaintiff who purports to represent the rest of plaintiffs who have never appeared in court did not attach to the plaint any document such as a Power of Attorney, letter any authority or representative order to prove that she had ever been authorised to prosecute this suit on their behalf. Counsel submitted that *locus standi* means the legal capacity of a person which enables him or her to invoke the jurisdiction of the court in order to be granted a remedy. *Fakrudin Vakibhai Kapasi & Anor vs Kampala District Land Board & Anor; HCCS No. 579 of 2015*).

The 1st defendant submitted that the failure to attach any proof of ownership of the fish denies the plaintiffs the requisite locus. Counsel stated that PW1 did not testify at all that she owned the fish in issue. Under cross examination, she conceded that she did not have a health certificate and permit, an export license or anything to prove her ownership of the fish in issue. She never produced any proof of her purported loss of documents of ownership.

PW2 in cross examination stated that he did not know whether the 2nd plaintiff was the rightful owner of the fish. It was therefore submitted that the 2nd plaintiff failed to prove that she owned the fish which was purportedly impounded by the 1st defendant and lacks the requisite locus standi to make the instant claim.

The plaintiff's counsel submitted that the suit is properly before this court and that the plaint discloses a cause of action for special damages and general damages for the unlawful impounding and or conversion of their plaintiffs' fish. Counsel for the plaintiffs stated that the cause of action is not premised on trespass to goods or chattel as the defendant seems suggest. He submitted that the 1st defendant does not deny having impounded the plaintiffs' fish and that the fact of not attaching any document does not count.

Counsel submitted that the 2nd plaintiff has never purported to represent the plaintiffs as they sued jointly and severally. Counsel stated that it is not denied or controverted that the 2nd plaintiff was the owner of the business.

It was submitted that the defendant cannot determine who the owner of the fish was and neither did he have any proof or evidence to confirm that the fish belonged to only two Congolese. The plaintiffs therefore submitted that they owned the fish jointly and the same was impounded by the defendants to unjustly enrich themselves.

Analysis

In the circumstances before court, DW1, the 1st defendant relying on Exh. D2 testified that on the 29th of August, 2003, he was appointed as the in charge Maritime Security. He was later deployed by the Ministry of Fisheries in 2007 when the Maritime Agency was invited to ensure that there were no fishing malpractices (see: Exh.D3, Exh.D4, Exh.D5, Exh.D6). It is upon this that the defendant was acting on behalf of the government of Uganda when he received information of the smuggling of immature fish that he instructed to have it impounded from Rakai district and the same was later brought to Bugolobi and

transferred to Jinja Road police station before it was disposed of by court order from Nakawa Chief Magistrates Court as per the Fisheries Act and the Inter Agency Operational Procedures. The defendant in conducting these duties was acting for and on behalf of the government of Uganda and within the law as the fish was disposed of in accordance with the law.

The evidence before court is to the effect that although the defendant had the fish impounded, he later had it transferred to Jinja Police station where the fish was dealt with under a court order as provided for by the law. The evidence of DW.1 and exhibit D.3, D.4, D.5 and D.6 being uncontroverted, I find that it is the Government of Uganda that would have been vicariously liable for the acts of the Defendant (if at all there was any wrongdoing). If the employee is found not to be liable for the tort, neither will the employer. Therefore vicarious liability is a form of secondary liability premised on the primary liability of the employee.

Once that is established, an employer is in general liable for the acts of his employees or agents while in the course of the employer's business or within the scope of employment (see: *East African Cases on the Law of Tort by E. Veitch (1972 Edition) at page 78*). This liability arises whether the acts are for the benefit of the employer or for the benefit of the agent. In deciding whether the employer is vicariously liable or not, the questions to be determined are: whether or not the employee or agent was acting within the scope of his employment; whether or not the employee or agent was going about the business of his employer at the time the damage was done to the plaintiff. When the employee or agent goes out to perform his or her purely private business, the employer will not be liable for any tort committed while the agent or employee was a frolic of his or her own.

An act may be done in the course of employment so as to make his master liable even though it is done contrary to the orders of the master, and even if the servant is acting deliberately, wantonly, negligently, or criminally, or for his own behalf, nevertheless if what he did is merely a manner of carrying out what he was employed to carry out, then his master is liable (see: *Muwonge v. Attorney General* [1967] EA 17). On basis of the evidence availed to court, I find that the defendant has proved on the balance of probabilities that he impounded the fish in the scope of his duty and course of his employment for which the Attorney General is vicariously liable. The defendants were not ordinary Ugandans committing a tort as alleged but rather public servants deployed to stop illegal fishing activities in Uganda.

In the instant suit, it is evidently clear that the plaintiffs in bringing this suit sued the defendant in his personal capacity. Looking at the elements of a cause of action as stated in the case of Auto garage (supra), it is very clear that the plaintiffs could not sue the defendant in his personal capacity but the Government of Uganda/ Attorney General for which the defendant lawfully acted for in doing the acts of impounding the fish. The decision to file a suit against the defendants was intended avoid the limitation period that had caught the plaintiffs of two years as provided under Section 3(1)(a) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act. Since the fish had been impounded in 2007 the plaintiff could only bring this case within two years against Attorney General that is by 2009. The said suit was time barred against the government and the same could not be entertained.

The plaintiffs case is also baseless in law and an abuse of the court's process or is otherwise fundamentally improper for being frivolous and vexatious. A court will strike out a claim when it is manifest that there is an answer immediately destructive of whatever claim to relief made.

The plaintiffs' case is frivolous and vexatious as submitted by the defence counsel. "Frivolous" connotes the absence of seriousness or the lack of validity or legitimacy. A frivolous pleading would also be vexatious in that its effect would be counterproductive. See *Re Singapore Souvenir Industry (Pte) Ltd [1985-1986] SLR(R) 161*.

Secondly, the case is also "Vexatious" i.e it is oppressive to the opposing party and it obstructs the court from gaining a full understanding of the issues and a party acts with an ulterior motive. The action is vexatious if the party bring it is not acting *bona fide* and merely wishes to annoy or embarrass the opponent or when it is not calculated to lead to any practical result. See *Lehman Brothers Special Financing Inc v Hartadi Angkosubroto [1998] 3 SLR(R) 664*; *Goh Koon Suan v Heng Gek Kiau [1990] SLR(R) 750*

As noted above, this action was deliberately brought against the defendants who are agents of government (employees) or who were acting in the course of their employment in order to vex them. There was nothing personal about their conduct and indeed said fish was disposed of in manner provided Fish Act by way of the court order. The plaintiffs were trying to hit back at the defendants for arresting them and causing their fish (allegedly) to be seized by them in the

execution of their duties. In addition, the action was brought out of the stipulated limitation time against government.

The suit was basically an intentional or even reckless misuse of the court's process in order to escalate a futile exercise and some of the alleged plaintiffs abandoned the suit or where never part of the suit and the 2nd defendant remained stuck with the case without any basis. There was no good faith in the conduct of litigation which is consistent with the interests of justice. The pursuit of this case was not for a legitimate pursuit of a remedy since the 2nd plaintiff did not have any iota of evidence to show that she owned the seized fish and did not have any documents to support her claims apart from a blanket statement that they were confiscated by 1st defendant. The 2nd plaintiff was aware that the fish had been given out under a court process by the officers of the fisheries department.

In sum, the suit is not properly before the court since it does not disclose a cause of action against the defendants, it was frivolous and vexatious and it was also time barred against the government. The same stands dismissed with costs.

The court shall also proceed to determine the remaining issue for completeness in case the court is wrong on the first issue.

Whether the 1st Defendant is liable for the alleged acts.

The plaintiffs alleged that their fish was impounded in 2007 as they were transporting the same to Bwera Fish Market by the defendant in execution of their duties as Maritime Security Personnel as they were acting allegedly acting on behalf of the Commissioner Fisheries.

The 2nd plaintiff claimed ownership of the said impounded fish with others and contended in her evidence that the said fish was illegally confiscated/seized when it was not actually immature fish. They lodged a police case but the DPP did not sanction the file for prosecution.

Analysis

Furthermore, the plaintiffs failed to produce any evidence or documentation before this court that they were indeed the owners of the fish so impounded. PW 1, Kyomuhendo Catherine did not have a health certificate, health permit, export license or anything to prove her ownership of the fish in issue. She purported to have lost all documentation and could not prove whether the fish belonged to her or the Congolese men as controverted by the Defendant or any other person. She also did not have any proof to show that she had lost any business.

In her testimony during cross examination, she stated that the fish belonged to all of them without stating in what proportions of percentages. It was a case of 'my word against your word'. The basis of confiscating the immature fish is not disputed except that the plaintiff contends that the fish was not immature and now wants the defendant to prove that the confiscated fish was immature. The plaintiff had the evidential burden to prove that the confiscated fish was compliant with the law i.e it was not immature.

The plaintiff testified in her witness statement that indeed after arrest they were taken to Bugolobi which is government office responsible for fisheries. The said fish was disposed off by a court order from Nakawa Chief Magistrates court. DW.1 stated that the fish belonged to the Congolese but the 2nd plaintiff was

planted by some people to claim ownership of the fish. The evidence on record shows that the fish was smuggled fish to Congo and the same was being transported to Bwera border point. The plaintiffs ought to have had export permits and other documentations authorizing their business in fish trade.

The fisheries officer Ekwaru was involved in determination of the status of the fish as immature and it was the basis of seizure from the trucks. The fish was distributed to different government departments after the Chief Magistrates court had issued an Order. The 1st defendant does not become personally liable for enforcing the law as a security officer and there were letters from his immediate supervisors deploying him.

The acts of the 1st defendant were lawfully done in execution of his duties and he is not liable for any acts complained of. In the same vein, the plaintiff has failed to prove that the impounding of the fish was illegal.

This court would still have dismissed the suit even on the merits of the case.

This suit is dismissed with costs to the 1st Defendant.

I so order.

SSEKAANA MUSA

JUDGE

21st June 2021