

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO. 142 OF 2021

1. WAIBI ALI

2. DAN MATOVU

3. HUDSON MUKASA T/A NAKABUTWA ESTATES ::::: APPLICANTS

VERSUS

ATTORNEY GENERAL ::: RESPONDENT

BERORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of motion under *Section 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Section 98 of the Civil Procedure Act, Order 51 Rule 6 and Order 52 Rule 1 of the Civil Procedure Rules* seeking orders that:

- (a) Leave be granted to the Applicants to file a suit against the Respondent out of time.
- (b) No order be made as to costs.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit sworn in support of the application by Mulindwa Allan, the managing partner of Mulindwa Associates & Co. Advocates, the firm that represents the Applicant. Briefly, the grounds are that the Applicants vide Civil Suit No. 242 of 2017 had sued Bank of Uganda in

vicarious liability for torture, assault, battery, among others, by military officers who were in a convoy transporting money towards Jinja. During the pendency of the suit, it was realized that the Attorney General was the party liable and not Bank of Uganda. On 22nd July 2020, the Applicant withdrew the above mentioned suit with the consent of the Defendant. The deponent stated that he is aware that the Applicants are barred by the statute of limitation to file a suit against the Attorney General in tort after expiry of two years. But the Applicants have merit in their suit although they were limited in filing the suit within time as a result of a mistake of counsel who did not add or file the suit against the Attorney General. It is just and equitable that time is extended to allow the Applicants to file a suit against the Attorney General.

[3] The Respondent did not file an affidavit in reply but Counsel for the Respondent appeared at the hearing and informed the Court that the Respondent intended to oppose the application on matters of law only. At the hearing, the Applicant was represented by Mr. Allan Mulindwa while the Respondent was represented by Mr. Ojiambo Bichachi. It was agreed that the application be argued by way of written submissions which were duly filed by both Counsel. I have considered the submissions by Counsel, which I will make reference to in the course of resolution of the matter before the Court.

Determination by the Court

[4] The crux of the matter before the Court is whether the Court can extend time within which the Applicant can institute a suit that is barred by time limitation. In ground number 4 as laid out in the Notice of Motion and paragraph 6 of the supporting affidavit, the Applicant

concedes that the suit is time barred. The Applicant then invokes the court's inherent power to extend time within which to institute the suit upon reliance on the ground of sufficient cause. In his submissions, Counsel for the Applicant also invokes the application of Section 6(1)(c) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72 Laws of Uganda.

[5] I will begin by assessing the propriety of this application in terms of its competency. Under the law, once a claim is caught up by time limitation, the same is barred by law and cannot be entertained by the court except where the party seeking to institute the claim can take advantage of any of the exceptions set out by the limitation statute. In such a case, the party has to bring the action itself and plead that they are relying on a particular exception. The provision under Order 7 rule 6 of the CPR is clear to that effect. It provides as follows:

“Grounds of exemption from limitations.

When a suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff shall show grounds upon which exemption from such law is claimed.”

[6] It follows, therefore, that where the plaintiff has grounds for bringing the suit after the expiration of the period of limitation, *he/she* must show sufficient cause in the pleadings themselves and not by way of a separate application. Strictly speaking, therefore, an application such as this one has no legal basis.

[7] Be that as it may, however, I will deal with the merits of the application in the interest of justice. The period of limitation in the

present case is set out under Section 3(1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72 which provides as follows:

“Limitation of certain actions.

(1) No action founded on tort shall be brought against—

(a) the Government;

(b) a local authority; or

(c) a scheduled corporation,

after the expiration of two years from the date on which the cause of action arose.”

[8] Sections 5 and 6 of the Act (Cap 72 above) provide exceptions to the foregoing limitation provision. Under Section 5 thereof, a party gets excepted to the application of the section 3 above if he or she can prove that they were prevented from bringing the suit within time on grounds of disability. On the other hand, under section 6 thereof, the limitation time gets postponed in case of fraud or mistake. Section 6(1) of the Act states as follows:

“Postponement of limitation period in case of fraud or mistake.

(1) Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

(a) the action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent;

(b) the right of action is concealed by the fraud of any such person as is mentioned in paragraph (a) of this section; or

(c) the action is for relief from the consequence of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the

fraud or the mistake, or could with reasonable diligence have discovered it.” [Emphasis added]

[9] In the instant case, the Applicant sought to rely on paragraph (c) of Section 6(1) of the Act. Counsel argued that the suit was not brought within time owing to the mistake of Counsel who first brought the suit against a wrong defendant. Counsel argued that such mistake gives the Applicant an exception to bring the suit out of time. Counsel further argued that the said mistake should not be visited on the litigant and the same amounts to sufficient cause for extension of the time within which to bring the suit. Counsel for the Respondent opposed this argument and invited the Court to take into account the strict nature of provisions of a limitation statute.

[10] It is clear to me that paragraph (c) of Section 6(1) of Cap 72 has been erroneously invoked by the Applicant’s Counsel. A reading of that provision shows that the ‘fraud or mistake’ referred to is that which is related to the arising of the cause of action and not one related to the manner of bringing the action. It is clear that by the time the action is brought to court, the cause of action must have arisen before. As such, for the limitation period to be postponed under paragraph (c) thereof, the action being brought should be seeking a relief from the consequence of a mistake. An example is a contract that is alleged in a suit to have been vitiated by mistake. In such a case, the time shall start running from when the mistake was discovered. That provision does not extend to a mistake committed by Counsel or the party in the course of bringing the suit.

[11] On the case before me, the suit is for recovery of damages for alleged tortious acts of the agents of the Respondent herein. There is no allegation that owing to any mistake, the Applicants were not aware of existence of the cause action, such that they are seeking a relief from the consequence of such a mistake. It is clear they were aware of existence of their cause of action only that they brought it against a wrong defendant. The mistake in bringing the suit does not relate to the arising of the action and cannot be used as an exception under paragraph (c) of Section 6(1) above. In this regard, I agree with Counsel for the Respondent that this exception is not available to the Applicants.

[12] Counsel for the Applicants also sought to rely on the presence of sufficient cause for extension of time and heavily relied on the Supreme Court decisions in ***Mulindwa George William v Kisubika Joseph, SCCA No. 12 of 2014*** and ***Banco Arabe Espanol v Bank of Uganda, SCCA No. 8 of 1998***. While the said authorities present the correct legal position on what amounts to sufficient cause for purpose of extension of time, and the same have binding effect on this Court, the same were made in totally different contexts and have been cited by the Applicants' Counsel out of context. In ***Banco Arabe Espanol v Bank of Uganda (supra)***, the sufficient cause in issue therein was in regard to setting aside dismissal of a suit under the Civil Procedure Rules. The Rules bear specific provisions that allow exercise of that discretion by the Court. In ***Mulindwa George William v Kisubika Joseph (supra)***, the matter concerned extension of time set by the Supreme Court Rules which was specifically provided for under Rule 5 of the Rules.

[13] In the present case, the situation is totally different. The time sought to be extended is set by an Act of Parliament enacted as a limitation statute. It is settled law that unless where the particular statute states so expressly, the court has no residual power to extend time set by an Act of Parliament. In the instant case, the matter does not fall within the ambit of the statutory exceptions. As such, the Court has no discretion or inherent power to exercise under such circumstances. It is, further, the position of the law that a limitation statute is strict in nature and inflexible and is not concerned with the merits of the case. Non-compliance with the limitation period renders the suit a nullity. See: ***Hilton v Sutton Steam Laundry [1956] 1 KB 73*** cited with approval in ***Madhvani International S A vs Attorney General, SC Civil Appeal No. 23 of 2010***. In ***Hilton v Sutton Steam Laundry (supra)***, Lord **Greene M.R** at P. 81. Stated thus:

“But the statute of limitations is not concerned with merits. Once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights.”

[14] In the circumstances, therefore, faced with the limitation provision under Section 3 of Cap 72 and in absence of exceptional cover under Section 6 of the Act, there is no discretion or inherent power of the Court that is available to the Applicants. The suit by the Applicant is expressly and strictly barred by law and the same cannot be cured by the court's exercise of discretion or inherent power under Section 98 of the CPR or even Article 126(2)(e) of the Constitution. As such, even if the application was properly before the Court, it would still fail for lack of merits.

[15] In all, therefore, the application is dismissed with costs to the Respondent.

It is so ordered.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala

JUDGE

24/06/2022