

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

MISCELLANEOUS APPLICATION NO. 0032 OF 2016

(Arising from HCT – 01 – CV – CS No. 0032 of 2014)

1. TUMUSIME ARTHUR JOSEPH suing through
ASIIMWE RONALD as next friend
2. ASIIMWE RONALD (Administrator of the
Estate of the Late Kamakune Stella)**APPLICANTS**

VERSUS

SARACEN (U) LTD.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK, JUDGE

Ruling

This is an Application by notice of motion under **Section 82** and **98** of the Civil Procedure Act and **Order 46** Rules **1, 2 &8** of the Civil Procedure Rules by which the Applicants seek for review and to set aside the order of Court rejecting the plaint in Civil Suit HCT – 01 – CV – CS NO. 0032 of 2014 and reinstatement of the main suit for hearing.

The grounds of the Application are;

1. The Applicants filed Civil Suit HCT-01-CV-CS NO. 0032 of 2014: Tumusiime Arthur Joseph suing through Asiiimwe Ronald as next friend and Another versus Saracen (U) ltd on 10th September 2014.
2. The suit was dismissed on 10th February 2016 with each party to bear its own costs on the basis that the suit was time barred having been filed after the period prescribed by law to institute such a suit.

3. The Applicants are aggrieved by the said decision which caused a substantial miscarriage of justice on their part since the main suit was filed well within the period prescribed by law.
4. The decision to dismiss the Applicant's suit was based on a mistake or error apparent on the face of the record which led to an erroneous decision that caused injustice to the Applicants.
5. That it is therefore necessary, just, fair and equitable and in the interest of justice that the order in HCT-01-CV-CS-No. 0032 of 2014 be reviewed and set aside.

Background

The 1st Applicant is a minor aged 7 years suing through the 2nd Applicant as a next friend and the 2nd Applicant is also the Administrator of the Estate of the Late Kamakune Stella. The Applicant's claim was for special damages against the Respondent of UGX 15,550,000/=, general damages, and costs as a result of negligence and recklessness of the Respondent's servant who unlawfully and negligently caused the death of Kamakune Stella and her child, one Biyonse while in the course of his employment.

That on the 13th May 2011, the Respondent's guard one Tayebwa Julius at about 5pm during the course of his employment using his gun wrongfully, unlawfully and negligently shot at and caused the death of the late Biyonse at her shop and home at Harukooto. That the matter was reported to Police and a post mortem was carried out which confirmed the cause of death as being hemorrhage caused by gunshot wounds.

That the 2nd Applicant after the burial of the deceased approached the manager of the Respondent stationed at Fort Portal and he assured him that the Respondent would pay compensation after their insurance company had released the money however, that has not been done to date.

That after the death of Kamakune Stella the shop she originally operated has made losses of UGX 10,000,000/= and the deceased also left behind another child being the 1st Applicant. That in the circumstances the Respondent is vicariously liable for the actions of their employee. The Applicants also prayed for general damages for loss of dependency.

The Respondent is a limited liability entity duly registered or incorporated in Uganda carrying on business as a private security firm offering security services with capacity to sue or be sued. The Respondent averred that the suit is bad and time barred in law and in the

alternative denied being vicariously liable for the actions of Tayebwa Julius who was on a frolic of his own and not on the course of his employment. Thus, the Respondent cannot be held liable for the acts of their employee which are outside their mandate and authority.

It was agreed by both parties that Tayebwa Julius was an employee of the Respondent and had committed the shooting for which the community members had lynched him.

The agreed issues were that;

1. Whether the Plaintiffs' suit is time barred?
2. Whether the lynching of the said Tayebwa Julius extinguished the Plaintiffs claim against the Defendant and/or consequently no cause of action is disclosed against the Defendant?
3. Whether the Defendant's employee caused the deaths of the Late Kamakune Stella and the Late Biyonce while in the scope of his employment with the Defendant Company?
4. Whether the Defendant is vicariously liable for the actions of the said Tayebwa Julius in the circumstances?
5. What remedies are available to the parties?

A preliminary objection was raised by Counsel Denis Sembuya for the Respondent at the commencement of the suit to the effect that, the suit was time barred basing on the following ground;

That the suit was filed 3 years and 4 months after the incident had occurred, being 4 months late from the statutory period. The cause of action having arisen on 13/5/11 and the suit filed on 10/09/14.

That in accordance with the Limitation Act and the Law reform (Miscellaneous) Provisions Act, the suit is time barred therefore should be dismissed. Counsel for the Respondent cited the case of **Komaketch Charles versus Attorney General, H.C.CS No. 21/2001 (Unreported)** where it was held that the period of limitation is 3 years under **Section 3 (1)** of the Limitation Act, Cap. 80.

Senior Counsel Kateeba for the Applicants replied to the objection that this suit was an exception to the above provisions as per **Order 7 Rule 6** of the Civil Procedure Rules since

the 1st Applicant was a minor. And that the 2nd Applicant is an Administrator of the Estate of the deceased who had to first process the Letters of Administration.

That in the circumstances the 1st Applicant can sue through a next friend or wait until he becomes of age and that the Law reform (Miscellaneous) Provisions Act, provides for instances where one can sue during or after a disability. And that infancy is defined as a disability in the interpretation section and falls in the ambit of the instant case.

Counsel for Respondent in reply contended that it was not proper for the 1st Applicant to sue yet there was an Administrator of the estate who had capacity to sue.

The trial judge found the suit time barred and held that the Administrator of the Estate was negligent and did not file the suit on time. The plaint was therefore rejected under **Order 7 Rule 11(d)** of the Civil Procedure Rules.

The Applicants being dissatisfied with the decision of the trial Judge then lodged this Application.

The respondent represented by the Human Resource Manager Moses Mutalaga swore an affidavit in reply averring that there was no mistake/error on the face of the record. That the Applicants' negligence and inadvertence and their Counsel is not sufficient ground to review this Court's decision. Further that there is no discovery of new evidence that was not available to the Applicants at the time of the hearing. That therefore, the Application is a waste of Court's time and lacks merit.

Counsel Busingye A. Victor appeared for the Applicants and Counsel Denis Sembuya for the Respondents.

The Applicants filed a supplementary affidavit in further support to the Application through Asimwe Ronald stating that the suit was not time barred and that the deceased had died on 13/11/14 and not 13/5/14 as was stated in paragraph 3(a) of the plaint. That there was therefore an apparent error/mistake in the plaint which caused a miscarriage of justice.

Counsel for the Applicants submitted that the plaint was erroneously rejected allegedly because it was time barred on the ground that in the Plaint it was pleaded that the deceased had died on 13th May 2011 instead of 13th November 2011 a date that was clear and apparent in the Certificates of death as attached to the pleadings. That the decision to have the plaint rejected was solely on the fact that the suit was time barred which was a mistake apparent on

the face of the record. Counsel for the Applicants admitted that there was an error on the record which occasioned a miscarriage of justice. Thus, this Application.

Section 82 of the Civil Procedure Act provides that;

“Any person considering himself or herself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.”

Order 46 of the Civil Procedure Rules provides;

“1. Application for review of judgment:-

(1) Any person considering himself or herself aggrieved:—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party, except where the ground of the appeal is common to the applicant and the appellant, or when, being respondent, he or she can present to the appellate Court the case on which he or she applies for the review.

2. To whom applications for review may be made.

An application for review of a decree or order of a court, upon some ground other than the discovery of the new and important matter or evidence as is referred to in rule 1 of this Order, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed.

3. Application where rejected or where granted.

(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant it; except that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his or her knowledge, or could not be adduced by him or her when the decree or order was passed or made without strict proof of the allegation.”

In the case of **Edison Kanyabwera versus Pastori Tumwebaze, Supreme Court Civil Appeal No. 6 Of 2004** as cited by Counsel for the Applicant it was stated that;

“In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of a fact and includes also error of law.”

Further Counsel submitted that the Applicants were aggrieved by the rejection of the plaint which caused a substantial miscarriage of justice on their part since they were still within the prescribed statutory period of time.

In the case of **Matayo Okumu versus F. Amudhe & 2 Others [1979]HCB 229**, it was held that a decision appears to have caused a miscarriage of justice where there is a prima facie case that an error has been made.

In the instant case it is evident that the record had an error in regard to the dates of the deceased’s deaths which occasioned a miscarriage of justice. The typographical error as caused by Counsel should not be visited on the Applicants. In the interest of justice this error

ought to be corrected so that the main suit may be heard on its merits since it was not time barred.

The Application is therefore allowed and the ruling of this Court set aside, the main suit be reinstated and costs in the cause.

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OYUKO. ANTHONY OJOK

JUDGE

21/09/2016