THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-CS-27-2012

1. **CHEMONGES KHAMIS**
2. **CHELEGOI MUSOBO……..……..PLAINTIFFS**

VERSUS

KAPCHORWA REFFERAL HOSPITAL……DEFENDANT

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING ON PRELIMINARY OBJECTION

The plaintiff sued the defendants to secure a permanent injunction to restrain the defendants, their agents, and workmen from trespassing on the plaintiff's land or in

any other way interrupting the plaintiff's use and enjoyment of the suit land. And further for the cancellation of the land title issued to the second defendant.

In response, the defendant in the written statement of Defence (paragraph 1) averred that they would raise a preliminary objection to the effect that the plaint is incurably defective and should be rejected, it doesn't disclose a cause of action, it's irregularly before court, unfounded and is an abuse of court process.

On 18. 11.2014, when the matter came before court for hearing, counsel **Illukor** for defendants, argued the preliminary objection on behalf of defendants. He pointed out that the board of Governors of Kapchorwa Referral Hospital is not a body corporate. The land in issue is registered in the names of Kapchorwa Local Government and plaintiffs therefore sued the wrong party. He averred that, it was for that reason that the defendant in the written statement of defence intimated that the plaint is incurably defective. He referred to section 6 (1) of the Local Government Act. He inferred that Local Governments should be the ones to be sued since they have a right to sue and since they have a right to sue and be sued. He referred court to a copy of the land title in his possession showing that the suit land is registered in the names of Kapchorwa Local Government. He referred to section 59 (RTA) that a Certificate of Title is conclusive evidence of ownership.

Finally he referred to O.7 r. 11(a) of the Civil Procedure and (e), to conclude that the plaint sued a wrong party and hence does not disclose a reasonable cause of action.

He further argued that this case cannot be remedied by Article 126 (e) of the Constitution because it is not a mere technicality but hinges on substantive law. He also pointed out that it's not a disjoinder remidable by O. 1 r.9 of the Civil Procedure Rules. He prayed that the suit be dismissed.

In reply counsel for plaintiff in his written submissions refers to paragraph 4 (e) of the plaint which names Kapchorwa Hospital's action of forcefully entering upon the plaintiff's land in 2010. He then referred to the title and claimed that the land or any property can be registered in the name of the department, which is evidence on the land title in issue. He argued that for that reason the plaintiff honestly believed that the land was/is registered in the names of Kapchorwa Referral Hospital.

He further argued that as a department within Kapchorwa Local Government, the Kapchorwa Referral Hospital is an agent of the district and both of them could be

sued, and that it is not fatal and prayed that Kapchorwa Local Government be added or substituted as a defendant in the suit.

He referred to O.6 r. 2 of the Civil Procedure Rules, and argued that defendant's pleadings were defective as they did not comply with the rule above as they did not attach the list of documents. In praying further for allowance to amend the pleadings counsel referred to O.1 r. 10 (2) of the Civil Procedure Rules which empowers court to add parties at any stage. Reference was made to order 1 rule 19 of the Civil Procedure Rules, which empowers court to allow parties to alter or amend pleadings; and section 77 RTA which voids a title for fraud. He also referred to the case of ***KIGOZI MAYAMBALA V. SENTAMU AND ANOTHER (1987) HCB 68*** which held that a certificate of title issued to a party in the face of protest is void on account of section 76 (77 as amended) of the RTA.

In further rejoinder the defendants, restated the fact that the preliminary objection was raised against plaintiffs for suing a wrong party. The defendants re-emphasized. Section 30 (1) (b) of the Local Government Act, Part 2 of the 2nd Schedule of the Local Government Act, especially part 2 of 2nd Schedule of Local Government Act item 2 (a) which provides that District Councils are responsible for "medical and health services including;

a) Hospitals

b) Health Centers.

They referred to *Paul Ngamarere v. UEB (in liquidation), (2008) HCB pg. 126*: "*A non-existent entity cannot sue or be sued. Any suit against or on behalf of a non-existent entity is a nullity and so is any judgment arising therefrom….*"

He argues against the use of section 77 RTA to overlook section 59 RTA, and also makes mention of the need for a fair trial under Article 28 of Uganda's Constitution. He reiterated section 6 of the Local Government Act, to argue that a department cannot be sued in place of a principal who has the capacity to sue and be sued.

Referring to the Advocates (Professional Conduct) Regulations SI 267-2 Regulations 16 and 17 (2), he argued that if counsel was honest in committing the error, then he was duty bound to inform court of the irregularity without delay. Counsel ought not to have indulged in guesswork basing on honest beliefs, but should have acted with diligence.

Reference was also made to O.7 rule 17 of the Civil Procedure Rules which makes it mandatory to attach documents establishing the cause of action.

In answer to the prayer to fall back to O.1 r.10 (2) and have the Kapchorwa Local Government added as a party, the defendant pointed out the legal requirement under section 2 of the Civil Procedure and Limitation Miscellaneous Pr. Act Cap.72, that a legal entity requires a 45 days statutory notice. He referred to *Gulu Municipal Council vrs. Nyeko Gabriel & Ors (1997) 1 KARL 9* which held that:

> "*It is a mandatory requirement to serve a statutory notice for 60 (now 45) days*."

Defendants faulted reliance on O.1 r.19 of the Civil Procedure Rules as an attempt to introduce a new cause of action.

Further, in pleading, he referred to O.6 r. 19 of the Civil Procedure Rules, that no pleading except by amendment should raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading. He therefore argued that the principle agent relationship did not accrue.

He also argued that the arguments that the preliminary objection was a technicality are not justifiable. He referred to *Tororo Cement Co. Ltd v. Frokina International*

Ltd SCCA No. 2 of 2001, Kasirye Byaruhanga & Co. Advocates vs Uganda Development Bank, SCCA No. 02 of 1997.

He finally referred to O.6 r. 30 (1) of the Civil Procedure Rules which directs that pleadings which disclose no cause of action or are frivolous should be dismissed, stayed or judgment be entered accordingly.

Given the above arguments these are my findings:

The main issue in this preliminary objection is that the plaintiff sued a wrong party. The arguments of counsel for defendants averred that for that reason the plaint is incurably defective.

Plaintiff's reply is also an attempt to show that though right, the omission is not fatal and can be cured, basing on the arguments as reviewed above. I find it as a fact from the onset that the defendant named in the plaint as "Board of Governors Kapchorwa Referral Hospital" is not capable of being sued in this matter by virtue of the operations of section 6 (1) of the Local Government Act. This is so because the law specifically vests the capacity to sue and be sued in the Local Governments. It is a fact that Local Governments operate departments as per Part

2 of the 2nd Schedule of the Act. Item 2(a) of the 2nd Schedule of the Act. Item 2 (a) lists the hospitals and medical health centres as such departments.

The question to further ask is that, what actually did the plaintiff come to court for? It is clear from the pleadings under the amended plaint paragraph 3 thereof that plaintiff was seeking for cancellation of the land title issued to the second defendant. But, who is the second defendant?

The pleadings have only one defendant. The plaintiff's Counsel while trying to justify why he sued defendant stated that:

> "*Whereas it's true that Kapchorwa Referral Hospital is a department within Kapchorwa district local Government, it's also true that the land or any property can be registered in the name of the department*.
>
> *This is evident on the land title which was presented by the Counsel for defendant that shows in the highlighted part that the land is in the names of Kapchorwa Referral Hospital.*
>
> "*It is on the ground that the plaintiffs honestly believed that the land was or is registered in the names of Kapchorwa Referral Hospital the user of the encroached land*."

Counsel further adds;

> "*It's a mistake that Kapchorwa district government was not made a party as the plaintiff was not aware of who acquired the land title to the suit land*."

I find the above submissions strange in lieu of paragraph 3 of the plaint. The amended plaint was filed on 07.05.2013, long before the matter came up for hearing on 18.11.2014, when defendants raised the preliminary objection, and plaintiff's counsel alleges its then that he just saw the title documents from defendants. If that is true, what title did plaintiff seek to cancel, and in whose name was it?

With the above scenario in mind, I find credence in defendant's arguments against plaintiffs' resort to the use of order 1 rule (10 (2) of the Civil Procedure Rules to seek an amendment of pleadings at this stage. This is because the plaint in paragraph 3 names a nonexistent 2nd defendant, as a party to their own suit, notwithstanding the fact that even the named defendant is a wrong party.

This anomaly, cannot be corrected by court merely stepping in and ordering that Kapchorwa District Local Government be made a party. This as rightly pointed out by defendants poses/creates the following problems:

a) Kapchorwa District Local Government is a statutory entity. By virtue of section 2 of the Civil Procedure Limitation (Miscellaneous Provisions) Act requires a statutory notice to be served before proceedings commence. The case cited of Gulu Municipal Council v. Nyeko Gabriel & Ors (1997) 1 KARL 9, emphasizes that;

> "*It is a mandatory requirement to serve a statutory notice for 60 (now 45) days*."

It would therefore create a procedural problem for court to order this amendment.

b) The other problem would be that parties are bound by their pleadings. The plaint in paragraph 2 names the "defendant as a body corporate with capacity to sue and be sued and in that capacity it is sued."

This assertion is a statement of law. If the defendant is already named as a body corporate, and now in submission the plaintiff is conceding that it is merely a department, then defendants' reference to this as an irregularity of the type mentioned in section 16 of the Advocates Act, (and Regulations 17 (2) thereof) to hold water.

Regulation 17 (2) of the Advocates (Professional Conduct) Regulations SI 267-2 directs that:

> "*If an irregularity comes to the knowledge of an advocate during or after the hearing of a case but before a verdict or judgment has been given, the advocate shall inform the court of the irregularity without delay*."

I agree with defence counsel that as an officer of court, the plaintiff's counsel acted without due diligence contrary to Rule 2(2) of the Advocates (Professional Conduct) Regulations SI 267-2 which requires Advocates to act diligently in carrying out client instructions. In this plaint it is clear that plaintiff's counsel did not know which party to proceed against and on which specific claim. However even after getting to know that Kapchorwa District Local Government had title to the claimed lands; he took no positive action to rectify the anomaly.

The provisions of O.6 r. 2 of the Civil Procedure Rules which plaintiff referred to, would have aided him if the defendant's written statement of defence did not comply. However attached to the written statement of defence is a summary of evidence, a list of witnesses, list of documents and a list of authorities. All these

were in compliance with O.6 r. 2 of the Civil Procedure Rules. There is no requirement for attachment. Plaintiff's assertion that defence pleadings were defective is therefore unsustainable. Indeed as pointed out by defendant's Counsel O.7 r.14 of the Civil Procedure Rules, mandatorily requires the plaintiff to produce a document he relies upon at time of filing the plaint.

Since plaintiff in paragraph 3 mentions a title to be cancelled and even went further in paragraph 4 (d) to mention existence of the title and in paragraph 5 alluded to fraud on this title, it is assumed that they had documentary proof regarding this title which they ought to have presented alongside the plaint at filing. It was not defendant's duty therefore to avail the plaintiff a copy of the title which plaintiffs themselves were aware of and sought to impeach in court.

Regarding the reliance on O.1 r.19 of the Civil Procedure Rules I find that it is not applicable as it refers to 3rd party costs which is not the concern of this court. However the text quoted refers to O.6 r.19 of the Civil Procedure Rules which allows for amendments at any stage of the proceedings.

I have already shown the problems associated with these pleadings and I do not think that O.6 r. 19 of the Civil Procedure Rules was invented to remedy a situation where the pleadings are totally incurably defective. In the pleadings before me, the

amendment would give rise to further questions of law as already demonstrated. It would lead to parties going back to the drawing board to issue statutory notices, and even to a total amendment of the plaint especially paragraph 3 which names two defendants yet the defendant sued is one defendant. Court would therefore not invoke O.6 r. 19 of the Civil Procedure Rules because it would complicate the pleadings further.

I agree with defendants that matters raised in this preliminary objection are substantive and do go to the root of the entire pleadings. They are not mere technicalities which can be cured by a resort to article 126 (2) (e) of the Constitution.

I do not see any bad faith on part of defendants. In their written statement of defence they pointed out that they would raise the preliminary objection. They complied with O.6 r. 28 of the Civil Procedure Rules.

In conclusion I uphold this preliminary objection for all reasons stated above. I agree with defendants that the plaint is against a wrong party and is incurably defective. As per O.6 r. 30 (1) of the Civil Procedure Rules. This plaint is hereby dismissed with costs to the defendant.

Henry I. Kawesa

JUDGE

11.03.2015