

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL SUIT NO. 494 OF 1995

JUSTIN E. M. N. LUTAAYA::PLAINTIFFS

V E R S U S

STIRLING CIVIL ENGINEERING CO.
LIMITED:.....:DEFENDANT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Plaintiffs who are the Administrators of the estate of the late Justin E. M. N Lutaaya brought this suit against the Defendant for general damages for trespass upon the Plaintiff's land and consequential loss, the value of the blasted and uncrushed stones at shs. 8,535/- (*eight thousand, five hundred thirty five shillings*) per metric ton as the reasonable market price, punitive and aggravated damage for wilful conduct for contempt of Court, for disobedience of a Court injunction, interest at a rate of 6% on the decretal amount and 20% respectively, exemplary and aggravated damages for the Defendant's arbitrary, high handed and oppressive acts dealing with the Plaintiffs and costs of the suit.

The brief background of this case is that;

In 1995, the deceased; Justin E. M. N Lutaaya instituted this suit against the Defendant for a declaration that the Defendant trespassed on her land comprised in Kyaggwe Block 191 Plot 34 at Gwawanya, Kinga and Kapeke, where the Defendant excavated stone, gravel and murram without her consent. That the deceased was the undisputed owner of the suit property between August 1981 to April 1995 and the claim to the suit was restricted to the trespass committed, while the deceased was the registered proprietor of the suit land.

It was the Plaintiff's case that in the year 2003, the Supreme Court found that the Defendant had trespassed on the suit property and remitted the file back to the High Court to determine the appropriate remedies.

It was still the Plaintiff's case that the Defendant's trespass on the suit land which began in 1988, comprised of carrying out operations on the suit land by excavating stone, murrum and gravel for road construction in Uganda. The Defendant filed its written statement of defence which shall be equally relied on by this Honourable Court.

When the matter came up for hearing on 12th April 2018, Counsel for the Defendant raised two preliminary objections to the effect that;

1. The Plaintiffs sued a nonexistence party/Defendant,
2. The suit is time barred contrary to Section 3(1) (a) of the Limitation Act.

It was the Defendants' case in its written statement of defence that according to the amended plaint, the Defendant was registered as a foreign company on the 26th day of September 2002 and that the suit registered as Civil Suit No. 494 of 1995, whose cause of action is stated to have arisen in 1988 is against a non-existent party as of 1995 or when the cause of action allegedly arose.

In oral submission to this objection, the Defendants' Counsel contends that the Defendant is a Limited Liability Company incorporated in Uganda and that no evidence in the amended plaint showing incorporation of the Defendant Company is given. That the Defendant in the suit is in the names of a wrong Defendant or a non-existent Defendant. He called upon Court to scrutinize the names of the Defendant. Counsel relied on the case of **Abdulrahman Elamin versus Dhabhi; civil appeal No. 15 of 2013**, where it was held that;

*'If a Company is not registered in Uganda, then it does not exist as a body corporate'.
He added that a suit in the names of a wrong Plaintiffs cannot be cured.*

Counsel further invited Court to consider the case of **Paul Nyamarere versus UEB; Civil Appeal No. 27 of 2012** and **Chemonges Khamis versus Kapchorwa Referral Hospital Civil Suit No. 27 of 2012**, where it was held in both suits that 'a suit in the names of a nonexistence party is a nullity'.

In reply to this objection, Counsel for the Plaintiffs contended that this suit is a subject of a **Supreme Court Judgment; Civil Appeal No. 11 of 2002** which is to the effect that, the case be remitted back for assessment of damages. That the matter before this Court therefore is to hear evidence on damages, liability having been conclusively determined. Counsel argued that the High Court cannot alter the Supreme Courts' Judgment and that this same objection was raised in the Supreme Court which dismissed it on the 19th day of December 2004.

Counsel contended that *Justice Opio (as he then was)* ruled in May 2011 that the application was *res-judicata* having been heard by the Supreme Court. The Judge also found that the current Defendant had taken over the liabilities that the Applicant was the right party to be sued. He concluded that the issue has already been decided.

In rejoinder, Counsel for the Defendant argued that the Supreme Courts' decision did not determine this issue, that though the Supreme Court ordered as it did, it did not oust Courts' power to hear the objection. That as to whether an illegal entity had been sued, this question did not arise at the time.

On the second preliminary objection raised by the Defendants' Counsel, he argued that the suit is time barred contrary to Section 3(1) of the Limitation Act. Those actions founded on *Tort* or Contracts have a limit of 6 years from the date of action. Further that if the trespass began in 1988 (*when the cause of action arose*), then the alleged trespass ended in 1994 and that the 6 years period, would run up to 1994. He further argued that the suit was registered in 1995, meaning that it was time barred and that it should have been filed before December 1994. He prayed that this Court upholds the objections raised and strikes out the suit with costs.

In reply to this objection, Counsel for the Plaintiffs contended that trespass is a continuing *tort* and that it is too late to raise limitation since the Supreme Court had already determined liability.

Decision

According to the record of proceedings, it is not in contention that the file is before this honourable Court for assessment of damages and recovery of money. What is in contention is whether at the time the suit was instituted, the Defendant was legally in existence and secondly, whether at the time the suit was instituted in 1995, it was barred, given the fact that the cause of actions arose in 1988.

Before I proceed with the resolution of the objections, it is good practise that preliminary objection should be raised at the earliest time possible. In **Ruth Asimwe Kanyaraju versus Hon. Grace Namara; Civil Suit No. 198 of 2010**, Justice Eldad Mwangusya (as he then was), observed that;

“A preliminary objection should be raised at the earliest time possible and not when the file has been called several times and scheduling conference has been completed”.

The delay to raise a preliminary objection at the earliest opportunity raises a presumption that the same is deemed unnecessary.

Be that as it may, the Defendants’ Counsel strongly contends that Civil Suit No. 494 of 1995 is against a non-existent party and that the suit should be struck out. This Court held in the case of **Chemonges Khamis & Anor versus Kapchorwa Referral Hospital** (*supra*), that; *a non-existent entity is a nullity and so is any judgment arising therefrom...therefore all things being normal.*

I would be in agreement with Counsel for the Defendants’ contentions, given the above authority that a suit against a non-existent party is a *nullity* which cannot be cured.

However, according to the record availed to Court, it is evident that Justin E. M. N. Lutaya sued Sterling Civil Engineering Co. Ltd. on the 10th day of June 1995 and Judgment was entered against the Plaintiffs (Justin). On page 3 of her Judgment, Justice C. K. Byamugisha stated that;

“Counsel for the defence did not call any evidence so the matter was to be determined under the provisions of O.15 R4 of the Civil Procedure Rules.....”

This statement alone indicates that the Defendant has been represented from the very beginning of the matter, that is to say even in 1995 when the suit was instituted, the Defendant filed a defence and was legally represented by a lawyer, the Defendant Company as it were then entered appearance at the time and did not raise the objection that it was not in existence, gave unequivocal representation that it was the Company for which Counsel Mutaawe acted for in Court. Therefore it was in existence; a Defendant who participated and the Defendant now is hence *estopped* from contending otherwise at this stage.

It is trite law that, appearance under the rules means attendance in person or by an advocate in Court on the date stated in the summons. Where parties appear by Advocate, it is the duty of the Advocate to state in Court the names of the parties for whom he is appearing.

Adding to the above, where a person defends a Company, it is presumed that such an Advocate has received instructions from the Company he is representing. This brings doubt as to how and where M/s. Ssawa, Mutaawe & Co. Advocates together with BKA Advocates got instructions to represent the Company if at all it was non-existent.

According to the plaint dated 22nd May 1995 and received in Court in 1995, paragraph 2 of the plaint specifically provided for the fact that the Defendant is a Limited Liability Company.....

I may state it verbatim

“The Defendant is a Limited Liability Company incorporated in Uganda, owned and managed by foreign nationals and is a Civil Engineering enterprise whose principal activities in Uganda for profit include construction of roads using, among other materials, stone products”.

In its defence dated 6th July 1995, the Defendant admitted the above paragraph under paragraph 2 of its written statement of defence it vehemently stated that;... “Paragraph 1, 2 and 9 are admitted and the Defendant submits to the jurisdiction of this Court”.

It is my finding therefore that the Defendant was in existence even before 1995 when the suit was instituted. The Defendants’ and its failure to raise the fact of its nonexistence until this stage, renders the preliminary objection unsustainable. Why did the defence sit on its rights

to the stage when the matter was entertained by the Supreme Court, Under the same entities as of the parties?.

My finding is further premised on the fact that, the Supreme Courts' decision herein by *J. Mulenga*, conclusively determined all such preliminary matters and made final orders which are binding on this Court, rendering the said objection moot and left only for academic purposes. In its conclusion, in the lead Judgment, by **J. Mulenga at page 16** it was held as follows:

“For reasons I have indicated, I would allow this appeal..... I would instead enter Judgment for the Appellant as her claim for trespass and exploitation of the suit land by the Respondent, while she was the registered mailo owner therefore. I would remit the case to the High Court for assessment of the appropriate remedy and order that the Court rehears and receives from either party, all admissible evidence that will enable it to reach a just decision”

The Supreme Court specifically sent this file for rehearing on the question of damages and appropriate remedy.

It is regrettable therefor that Counsel is seeking to re-open the trail on other issues which were finally determined by the previous Court. This objection is accordingly unsustainable.

The second objection relates to time limitation founded under Section 3(a) of the Limitation Act which provides that *actions founded on contract or on tort, shall not be brought after the expiration of 6 years*. As noted *inter-alia*, Counsel for the Defendant avers that between 1988 when the cause of action accrued and 1995 when the suit was brought, the 6 years had elapsed and as such, the suit was time barred.

According to the facts of the case, the suit was for trespass to land. Therefore I am in agreement with Counsel for the Plaintiffs that trespass to land is a continuous *tort* which cannot be affected by time limitation. It is trite that the more you stay on a persons' land, you bring in a new cause of action. See **Oala Lalobo versus Okema Jakeo Akech; Civil Suit No. 20 of 2004** where *Justice Remmy Kasule (as he then was)* held that;

“In this particular case, Court finds it sufficient that the cause of action and the evidence adduced all centred on the continuous tort of trespass and as such the case should not have been caught by the provisions of the Limitation Act, or those of the land Act”

I do need to point out however that the issue of liability is a foregone conclusion; and that the issue before this honourable Court is to assess damages to be awarded to the Plaintiffs. It is in the interest of justice that Court has to administer justice as provided for under Article 126(2) (e) of the Constitution which provides that; *Courts should administer justice without undue regard to technicalities.* Article 126 (2) of the Constitution subjects the victims of wrong to adequate compensation.

Under the same Article clause (b) emphasises that justice shall not be delayed. In line with the aforementioned, it is evident that the Defendant raising these preliminary objections at this stage was unnecessary given the long history of this case.

For reasons above, I find no merit in the preliminary objections as raised. The same is overruled.

Costs in the cause.

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Henry I. Kawesa

JUDGE

23/05/2018

23/05/2018:

Joseph Luswata present.

Patrick Alunga for Defendants.

1st Defendant present.

Habib: Defendant administrator present.

Court: Matter for Ruling and Ruling is communicated to parties above.

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Henry I. Kawesa

JUDGE

23/05/2018