

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO.62 OF 2009

1. HENRY B. KAMOGA
2. ROSE BAWUNA
3. ANITA KYOMUHENDO
4. ELIZABETH KAKAI
5. JUMA BINEHE
6. ALFRED EGESA

} :::::::::::::::::::::::::::::::::::::::PLAINTIFFS

VERSUS

BANK OF UGANDA :::::::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: THE HONOURABLE JUSTICE STEPHEN MUSOTA

RULING:

The six Plaintiffs to wit Henry B. Kamoga, Rose Bawuna, Anita Kyomuhendo, Elizabeth Kakai, Juma Binehe and Alfred Egesa represented by M/s Enoth Mugabi Advocates and Solicitors and later by M/s Muhebwe & Co. Advocates and Solicitors brought this action against Bank of Uganda the Defendant represented by Masembe, Makubuya, Adriko Karugaba & Ssekatawa Advocates (MMAKS ADVOCATES) for a declaration that:

- i) The Defendant owed the Plaintiffs a statutory duty to supervise, regulate and control the activities of the financial institution known as Dutch International Limited.
- ii) The Defendant breached the statutory duty owed to the Plaintiffs.

- iii) An order that the Defendant compensates them for the loss suffered by a refund of the amounts deposited with Dutch International Limited by each of them together with the interest accrued thereon.

The Plaintiffs contended *inter alia* that whereas the Defendant knew about the operations of Dutch International it failed to regulate, supervise and control its activities leading to the loss by the Plaintiffs of their deposits. Further that the Defendant failed to promptly or at all to exercise the statutory power to take steps to recover monies deposited by the Plaintiffs from Dutch International Limited thus causing great loss to them.

In addition to seeking compensation, the Plaintiffs claim for general damages and costs of the suit together with interest thereon.

Annexed to the plaint is *inter alia* a list of 423 (four hundred and twenty three) other Plaintiffs. This is contained in the notice of intention to sue Annexure 'B'.

In its written statement of defence, the Defendant denies that the Plaintiffs have any claim and against it. That it carried out its statutory duty and took steps by:

- (a) Writing to Dutch International on 19th August 2008 summoning them for a meeting on 21st August 2008. But the officials of Dutch International did not respond to the summons nor did they attend the proposed meeting.
- (b) On 27th August, 2008 the Defendant's Director supervision wrote to the Governor of the Defendant forwarding the preliminary outcome of inquiries undertaken in response of the complaint and on 28th August 2008, the Defendant's Governor lodged an official complaint on the matter with the Director CID as per annexures 'C' and 'D'.

(c) On 10th December 2008, the Director CID wrote to the Defendant's Governor seeking financial assistance for a computer forensic examination of Dutch International's computers and the said financial assistance was availed.

At the commencement of hearing the suit, Mr. Owor for the Plaintiffs applied under Order 1 rule 13 of the Civil Procedure Rule to add Plaintiffs to the suit because the suit was instituted on behalf of 423 other Plaintiffs and the six listed Plaintiffs derived power from a Power of Attorney from the 423 persons. That on further scrutiny, the Plaintiffs feel the power of Attorney may be inadequate and the list of the people they seek to add is attached to the statutory notice to sue served onto the Defendant prior to filing the suit.

In reply to the application, Mr. Ssembatya opposed the application because the suit was filed on 17th April 2009 by 6 Plaintiffs purportedly on behalf of 423 others. That the written statement of defence was filed on 5th Nat 2009 and in paragraph 2 thereof the defence clearly pleaded that the Plaintiff cannot in law bring a representative action without a representative order issued by court as required under Order 1 rule 8 of the Civil Procedure Rule.

That the order must be sought before and not during the pendency of the suit. That the order must be advertised. Further that the suit having been filed over 3 years ago and the Plaintiffs having known the defects of the suit, they cannot be seen to seek for amendment now under the guise of adding other Plaintiffs. Learned Counsel referred to the case of **Paul Kanyima vs Rugoora Per Pre Kicumbi Bavista Katwerana Society 1982 HCB 33** to support his submission.

That there is no proof that the suit under consideration was brought under a Power of Attorney.

I have considered the request by Mr. Owor to add a multitude of Plaintiffs to this suit and the reasons advanced to justify the same. I have also considered the submission by Mr. Ssembatya objecting to the request.

The application by Mr. Owor has been brought under Order 1 rule 13 of the Civil Procedure Rule which provides that:

“Any application to add or strike out or substitute a Plaintiff or Defendant may be made by court at any time before trial by motion or summons or at the trial of the suit in a summary manner.”

This provision clearly empowers this court to add or strike out or substitute a Plaintiff or Defendant at any time before trial. The application for this can be made, inter alia, in a summary manner. This rule however is applicable to valid suits filed in accordance with the law.

According to Mr. Ssembatya, this application has been made for amendment of a suit which is not valid at law because it was filed in a representative capacity without permission from court under Order 1 rule 8 of the Civil Procedure Rule.

It is provided under this rule that:

“Where there are persons having the same interest in one suit, one or more of such persons may, with permission of court sue or be sued or may defend such suit on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where from

the number of persons or any other cause, such notice is not reasonably practicable, by public advertisement, as the court in each case may direct.”

This provision has been interpreted by this court before to be mandatory and if not complied with would render suit incompetent and incapable of amendment.

In *Kanyima vs Rugoora (supra)* a decision I agree with, Manyindo J as he was then held ***inter alia*** that:

“This being a representative suit, it was mandatory under Order 1 rule 8 of the Civil Procedure Rules for the Plaintiff to obtain leave of court before filing it and a suit that is brought without leave of court is incompetent and cannot be stayed but should be struck out.”

In that suit, the Plaintiff a member of an unregistered society sued the Defendant on his own behalf and on behalf of his fellow members for trespass to land. Counsel for the Defendant raised three preliminary objections one of which was that since the suit was a representative one the Plaintiff had to obtain leave of court to sue under Order 1 rule 8 of the Civil Procedure Rules. The trial Magistrate overruled all the objections arguing that the failure by the Plaintiff to obtain leave of court was a mere procedural irregularity which was not fatal to the suit.

The learned trial Magistrate Grade I stayed proceedings to enable the Plaintiff to apply for leave of court to sue in a representative capacity. The Defendant appealed against the order hence the above quoted holding.

Another decision of this court with which I agree is TARLOGAN SINGH VS JASPAL PHAGUDA& ORS 1997 – 2001 UCLR 408, 410 where Ntabgoba P.J (as he was) held in a similar way that:

“In my opinion, the taking of steps necessary to enable the Plaintiff institute a suit in a representative capacity is taking the procedure under Order 1 rule 8 of the Civil Procedure Rules and Order 7 rule 4 of the Civil Procedure Rules which is rendered in mandatory terms. With respect, therefore, the none compliance with Order 1 rule 8 of the Civil Procedure Rules and Order 7 rule 4 of the Civil Procedure Rules cannot be said to be a matter of mis joinder or non-joinder. It is a matter that must be complied with and failure to so comply renders the suit incurably defective.....”

The mandatory nature of this requirement is fortified in Order 7 rule 4 of the Civil Procedure Rules which provides that:

“Where the Plaintiff sues in a representative character, the plaint shall show not only that he/she has an actual existing interest in the subject matter but that he or she has taken steps if any, necessary to enable him or her to institute a suit concerning it.”

I therefore agree with the submission that the plaint before me is incurably defective for being brought in a representative capacity without a representative order. Leave to file such a suit must be sought before and not during the pendency of the suit. When such order is obtained it must be made known to the intended

Defendant or Plaintiffs or advertised if the number is very big like in the instant case.

With this clear position of the law, Mr. Owori's application to amend the plaint to add more 433 other Plaintiffs is untenable and bad in law since the plaint he filed without leave of court was invalid abinitio and cannot be amended under Order 1 rule 13 of the Civil Procedure Rules.

Consequently this suit will be struck out with costs.

It is so ordered.

STEPHEN MUSOTA

JUDGE

17.12.2012