

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0014 OF 2010

OTTO TOMMY LEE OCAMKER **PLAINTIFF**

VERSUS

1. THE ATTORNEY GENERAL }
2. I. P. DRAGA } **DEFENDENTS**
3. PAKWACH SUBCOUNTY COUNCIL }
4. OLAMGIU B. GIVEN }

Before: Hon Justice Stephen Mubiru.

RULING

The plaintiff sued the defendants for general and special damages for slander, false arrest and imprisonment and malicious prosecution. In the plaint, the plaintiff averred that on or about the 23rd of April 2009, at a meeting convened at Akella Trading Centre in Pakwach Sub-county, Nebbi District by the fourth defendant, as the then Chairman L.C.III Pakwach sub-county, he publicly uttered words implicating the plaintiff as a person involved in the recruitment and training of rebels who were also responsible for the death of one Othen. The fourth and the second defendant later followed the plaintiff to his office, arrested him and caused his subsequent prosecution for the offence of unlawful possession of government property. The plaintiff contends that at all material time, the fourth defendant acted in the course of his duty as servant / agent of the third defendant while the second defendant acted in the course of his duty as servant / agent of the first defendant.

In their joint written statement of defence, the first, second and third defendants contend that the plaintiff's arrest and subsequent prosecution was lawful since he was found in unlawful possession of government property yet his services with the Uganda Wildlife Authority had been terminated. They denied all other averments in the plaint and indicated they would put the plaintiff to strict proof.

In its written statement of defence, the third defendant denied the plaintiff's contention that the fourth defendant was acting as its agent when he uttered the words complained of, denied that the words complained of were ever uttered at all, denied the alleged unlawful arrest and indicated it would put the plaintiff to strict proof of all averments. The third defendant also indicated it would raise a preliminary point of law at the hearing of the suit since it was not served with a statutory notice of the intended suit.

When the suit came up for hearing on 3rd November 2016, counsel for the third defendant, Mr. Paul Manzi raised a preliminary objection seeking dismissal of the suit as against the second and fourth defendants with costs on grounds that the plaint did not disclose a cause of action against them since they are both said to have been acting in the course of their duty as agents of the first and third defendants respectively. He argued that in the circumstances the claim is not sustainable against the second and fourth defendant but rather the first and third defendants who are vicariously liable. In reply, counsel for the plaintiff Mr. Bob Piwang argued that vicarious liability does not absolve the second and fourth defendants but rather they are jointly and severally liable with the first and second defendants for the acts complained of.

A plaint is said to disclose a cause of action when it states "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court (see *Read v Brown (1888) 22 QBD 128 at 131* and *Central Electricity Generating Board v Halifax Corporation [1963] AC 785, at 800, 806*). The claim by the plaintiff comprises three causes of action; slander, false imprisonment and malicious prosecution.

For the claim in slander, the plaintiff must plead that; (a) the defendant made a false and defamatory statement concerning the plaintiff, (b) the defendant made an unprivileged publication of that statement to a third party, and (c) except where the slander is actionable *per*

se, the plaintiff must plead and prove special damages. The requirements of this cause of action are met by paragraphs 6 – 8 of the plaint.

For the claim for false imprisonment, the plaintiff must plead that; (a) wilful detention by the defendant, (b) the detention was without the consent of the plaintiff, and (c) the detention was unlawful. The requirements of this cause of action are met by paragraph 9 of the plaint.

For the claim for malicious prosecution, the plaintiff must plead that; (a) there was a prior criminal proceeding, which (b) successfully terminated in favour of the plaintiff (c) and that it was brought without probable cause, (d) and that it was initiated out of malice of the defendant. There is an attempt in paragraphs 9, 11 and 12 of the plaint to plead these elements but with insufficient particularity. Despite this shortcoming, in my view this would not justify a finding of a total absence of cause of action but rather pleading of a mere semblance of a cause of action “which can be injected with real life by amendment” as was decided by the Court of Appeal of Kenya in the case of ***D.T Dobie and Company Ltd v Muchina and Another [1982] KLR 1*** in the finding of **Madan, Miller and Potter, JJA** thus:-

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.

Both the second and fourth defendants are implicated as the primary or direct tortfeasors while the first and third defendants are cited as being vicariously liable. Counsel for the third defendant contends that since vicarious liability attributes liability to the first and third defendants, the second and fourth defendants cease to be liable for the conduct complained of, hence the absence of any cause of action against them.

The doctrine of vicarious liability is partly a recognition that more than one tortfeasor may be involved in contributing to a tort. Joint torts within the context of vicarious liability usually arise when there is an employer / employee relationship, an agent / principal relationship, or a

common course of action to a common end which links the tortfeasors. In that respect, the principal and the agent or the employer and employee are considered as joint tortfeasors and are held responsible for the same wrongful act which resulted in the tort. By virtue of that relationship, they incur joint and several liability; as joint tortfeasors they can be sued together (joined) and sued individually (severally) for the full amount of the plaintiff's damages. This is because the common law considers a joint tort to involve a single wrongful act, for which the plaintiff has a single, indivisible cause of action (see *Duck v. Mayeu*, [1892] 2 Q.B. 511 at 513 (C.A.)).

The Principal or employer cannot be held liable unless the agent or employee is liable. For that reason, section 3 (1) of *The Government Proceedings Act, Cap 77* provides that no proceedings may lie against the Government in respect of any act or omission of a servant or agent of the Government "unless the act or omission would, apart from the Act, have given rise to a cause of action in tort against that servant or agent or his or her or estate." Vicarious liability of the principal or employer is thus founded on the primary or direct liability of the agent or employee. Under that doctrine, the Principal or employer is thus a joint tortfeasor with the agent or employee.

Joint and several liability under the doctrine of vicarious liability allows a plaintiff to sue for and recover the full amount of recoverable damages from any of, or all the joint tortfeasors as defendant(s), regardless of a particular defendant's percentage share of fault. Joint and several liability exists to make sure that the injured party or plaintiff is able to be made whole, even if one or more of the defendants are unable pay their share of their liability in monetary damages. It enables plaintiffs to recover for the harm suffered regardless of whether or not all of the defendants are solvent. It insures that even if one or more joint tortfeasors is insolvent the plaintiff may still recover the full amount of the judgment from each of the remaining tortfeasors. Where the doctrine applies therefore, the tendency and practice is for the plaintiff to sue the employer of principal who usually is the financially viable defendant with a sufficiently "deep pocket" to ensure full recovery. This tendency or practice though does not mean that the agent or employee has no liability for the tort. Therefore, a plaintiff is not precluded from joining them in one action and recovering judgment from any one of them. The grounds advanced therefore cannot sustain the preliminary objection raised.

With regard to the second defendant, under section 43 (1) of *The Police Act*, a police officer is not be liable for an act done in obedience to a warrant issued by a court of competent jurisdiction. However, in the written statement of defence, the second defendant did not invoke this defence, probably because the arrest was without a warrant. Nevertheless, under section 4 of *The Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72*, where any action or proceeding is commenced personally against any public officer for any act done in pursuance or execution or intended execution of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, the action or proceeding does not lie or cannot be instituted unless it is instituted within six months after the act, neglect or default complained of, or in the case of a continuance of injury or damage, within three months after the ceasing of the injury or damage.

In this regard, the slanderous statements complained of were allegedly made on 23rd April 2009 and so was the unlawful arrest complained of effected. The plaint does not disclose when the unlawful prosecution complained of was terminated in the plaintiff's favour. The suit was instituted on 24th September 2010, one year and five months later. The plaintiff did not plead any disability for his failure to commence the suit within the six months required by *The Civil Procedure and Limitation (Miscellaneous Provisions) Act*. The causes of action in slander and unlawful arrest and imprisonment are glaringly out of time in respect of the second and fourth defendants. As regards the claim for malicious prosecution, the plaintiff has not pleaded facts to show that the action as against the second and fourth defendants is within the period of time specified by the Act.

In the final result, for the foregoing reasons, the preliminary objection is sustained on grounds other than those advanced by counsel for the third defendant. The suit against the second and fourth defendants is consequently dismissed with costs to the two defendants. Hearing of the suit against the first and third defendants will continue. I so order.

Dated at Arua this 1st day of December 2016.

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Stephen Mubiru,

Judge