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REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT KAMPALA

(CORAM: TUMWESIGYE; KISAACKYE; ARACH-AMOKO; OPIO-AWERI;
10 TIBATEMWA-EKIRIKUBINZA. JJ.S.C.)

CIVIL APPEAL NO: 01 OF 2016

BETWEEN

15 **NYEKO SMITH**
EFIA BERNARD } **APPELLANTS**
ATABA MATTHEW }

AND

ATTORNEY GENERAL **RESPONDENT**
20

[Appeal from the decision of the Court of Appeal at Kampala (Mwangusya, Mwondha and Kakuru, JJ.A) in Civil Appeal No. 44 of 2010 dated 26th February 2014]

25 **JUDGMENT OF THE COURT**

Nyeko Smith, Efia Bernard and Ataba Matthew (the appellants), brought a representative action in the High Court at Masindi on behalf of former workers of National Sugar Works (Kinyara) Ltd against the Attorney General and Kinyara Sugar Ltd for unlawful termination of their
30 services and other related claims.

When the hearing of the suit started, the respondents raised preliminary objections claiming that the suit did not disclose a cause of action and that it was time barred. The High Court, (Ochan, J.) dismissed the preliminary objections. The respondents appealed against the judge’s ruling and

the Court of Appeal allowed their appeal. Being dissatisfied with the decision of the Court of Appeal, the appellants lodged this appeal.

Background.

National Sugar Works (Kinyara) Ltd, a sugar company based at Kinyara in Masindi District and
5 owned by Uganda Government, employed the appellants and those they represent between 1970 and 1985 on Uganda Government's terms and conditions of employment.

In 1985 there was war between the then Government and the National Resistance Army that affected the sugar factory and made it difficult for it to operate properly, so in November of that year the appellants were advised by the management of National Sugar Works (Kinyara) Ltd, to
10 go on leave until the war conditions abated.

After the war ended the appellants returned to the factory in 1986 to resume work, but they were advised by the same management to extend their leave until the factory was fully rehabilitated.

Around 1990, Government established Kinyara Sugar Ltd in place of National Sugar Works (Kinyara) Ltd. The new sugar company recruited workers afresh on new terms and conditions of
15 employment. Some of the workers in the defunct Company were also recruited. Having failed to be recruited, the appellants made effort through correspondence with the Government to get paid their terminal benefits, but apart from the three months salary arrears that were paid to them in 1988 nothing more seems to have been paid.

In July 2009 the appellants brought an action in the High Court at Masindi against the Attorney
20 General, Kinyara Sugar Ltd and National Sugar Works (Kinyara) Ltd for unlawful termination of their employment, terminal benefits and costs of the suit.

At the commencement of the suit, preliminary objections were raised by the defendants including one that the action was time barred. The trial judge overruled the preliminary objection finding that the appellants were under disability because of the war in the North and North East of the country. The learned judge also found that there was acknowledgment of the debt through part-
5 payment made in 2007 by the Government to the appellants.

The respondents being dissatisfied with the ruling appealed to the Court of Appeal which allowed their appeal and overturned the decision of the trial judge, hence this appeal by the appellants.

Grounds of Appeal.

10 The appellants appealed against the decision of the Court of Appeal on two grounds, namely –

1. That the learned Justices of Appeal erred in law when they held that the appellants' action against the 1st respondent in the court below was time barred by section 3(3) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.

15 **2. That the learned Justices of Appeal erred in law when they dismissed the appellants' suit against the respondent in the court below on grounds that the appellants' suit was time barred by section 3(2) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.**

They prayed court to reverse the order of the Court of Appeal dismissing the appellants' suit and substitute it by an order allowing the suit to be heard on its merits in the High Court.

20 **Counsel's Submissions**

At the hearing of the appeal in this court, the appellants were represented by Mr. L. Rwakafuuzi while the Attorney General was represented by Mr. Obum Odoi, Principal State Attorney. Both counsel filed written submissions.

Learned counsel for the appellants, argued both grounds together. He contended that the learned
5 Justices of Appeal erred in law when they made findings on triable issues without evidence on oath. He referred this court to the appellants' pleading contained in paragraph 16 of the plaint which stated that the appellants were cut off from filing the suit because of the rebel insurgency in the North of Uganda that ended in 2007, arguing that this allegation could only be decided by trial.

10 He argued that the Court of Appeal allowed counsel for the respondent to testify from the bar on whether the appellants failed to bring the action owing to the insurgency in the North. He relied on the case of **Mukisa Biscuits vs. Western Distributors** [1969] EA 696 where it was held that a preliminary objection can only be decided on the pleadings and not on evidence.

He referred this court to the question whether the appellants were public servants as defined in
15 Article 175(b) of the Constitution in order for the court to determine whether the Employment Act of 1975 applied and whether the appellants earned their salaries from the Consolidated Fund. He argued that the determination of this issue is vital because if the appellants were public servants then sections 4, 9, 15, 18, 24, 62 and 64 of the Act would not apply.

The learned Principal State Attorney opposed the appeal and supported the decision of the Court
20 of Appeal. He argued that the appeal is misconceived since section 3(3) of the Civil Procedure

Limitation (Miscellaneous Provisions) Act as contained in the appellants' first ground of appeal does not exist.

On the issue of limitation, the learned Principal State Attorney contended that the appellants' cause of action arose in 1985 and that the suit was filed in 2009 nearly 20 years after the cause of
5 action arose, and that this offended section 3 of the Civil Procedure Limitation (Miscellaneous Provisions) Act.

He further argued that the war referred to in the appellants' pleadings was the war between the National Resistance Army and the then Government of Uganda which war ended after the military coup of 27th July 1985, and not the insurgency in the North as contended by the
10 appellants.

It was his contention, therefore, that there was no reason for the appellants to adduce evidence on the issue when it was obvious that the war did not constitute a disability.

Consideration of the Appeal

I respectfully agree with learned counsel for the respondent that s. 3(3) of the Civil Procedure
15 Limitation (Miscellaneous Provisions) Act does not exist, so ground one of appeal is misconceived.

The issue raised in the second ground of appeal is whether the action which the appellants brought in the High Court was time barred by section 3(2) of the Civil Procedure Limitation (Miscellaneous Provisions) Act. The section provides:

“3(2). No action founded on contract shall be brought against the Government or against a local authority after the expiration of three years from the date on which the cause of action arose.”

The same Act provides for an extension of the period in which to bring an action in case of
5 disability. Section 5 provides:

**“If on the date when any right of action accrued for which a period of limitation is prescribed by this Act the person to whom it accrued was under disability, the action may be brought any time before the expiration of twelve months from the date when the person ceased to be under a disability or died, whichever event first occurred notwithstanding that
10 the period of limitation has expired...”**

In their amended plaint, the appellants in paragraph 15 state:

“The plaintiffs shall aver and contend that they are not affected by the Limitation Act in so far as they maintained consistent dialogue with respective defendants up to the time of the statutory notice to the defendants and beyond, at least up to around October 2007.”

15 In paragraph 16 of the appellants’ plaint it is stated:

“Alternatively, but without prejudice to the immediately foregoing, the plaintiffs shall aver and contend that they were under disability to file this suit any earlier on the grounds that the rebel activities cut off the majority of the plaintiffs especially the leadership, from contact with one another and from access to the defendants.”

Information contained in the appellants' amended plaint and correspondence annexed to it shows that the appellants got out of employment in 1988 following their being sent on leave in 1985 as a result of the war in Masindi between the National Resistance Army and the then Government of Uganda.

- 5 Kinyara Sugar Ltd which replaced National Sugar Works (Kinyara) Ltd for which they worked carried out fresh recruitment of workers on new terms and conditions of employment, and though some workers who worked in the National Sugar Works (Kinyara) Ltd were recruited by the new company, the appellants were not.

There is also information on record that in 1988 Government made payments to the appellants of
10 wage arrears covering three months, and in May 1990 through the Government owned newspaper the New Vision, Government called on workers who had claims relating to their employment with National Sugar Works (Kinyara) Ltd to submit them to Government not later than 60 days from date of that press release.

In July 2009 the appellants filed their action in the High Court at Masindi for unlawful
15 termination of employment and other terminal benefits. If, as is indicated above, the appellants ceased to be employees of National Sugar Works (Kinyara) Ltd in 1988 and Government invited them to lodge their claims for settlement in 1990, it is clear to me that if the Government did not settle their claims as alleged at that time, the period they waited to file their action in court (July
2009) was way above three years that is provided in s. 3(2) of the Civil Procedure Limitation
20 (Miscellaneous Provisions) Act.

However, section 5 of the same Act extends the period of limitation by 12 months if a person bringing the action was unable to file the action owing to disability. Very much aware of this provision, the appellants stated in paragraph 15 of their amended pleadings that they were not affected by the Limitation Act in so far as they maintained consistent dialogue with the
5 defendants up to the time of the Statutory Notice of Intended suit. They also stated in paragraph 16 of the same pleadings that they were prevented from filing their action because of rebel activities which, in their own words, **“cut off the majority of the plaintiffs from contact with one another and from access to the defendants”**.

From the above statements, the appellants are advancing two forms of disability that prevented
10 them from filing their actions within the statutory period of three years: dialogue with the defendants and rebel activities. There are two types of rebel activities that are alluded to in the appellants’ amended pleadings: the first one which occurred in 1985 and caused closure of the company for which they were working, and the second one which is only referred to in general terms and which the trial judge understood to be the Kony war that affected parts of the North
15 and North East of the country.

On dialogue, this court has held that a claim by a plaintiff that he or she was prevented from filing action in the statutory period because he or she was conducting dialogue or negotiations with the defendant is not a disability under section 5 of the Civil Procedure Limitation (Miscellaneous Provisions) Act. In the case of **Peter Mangeni T/A Makerere Institute of
20 Commerce vs. Departed Asians Property Custodian Board**, SCCA No. 13 of 1995, the appellant who was a tenant of the respondent, a Government agency, was asked by the latter to vacate the rented premises. He refused to do so. The police got involved, arrested him and

charged him with criminal offences in respect of which he spent several months in prison before the charges were withdrawn. During the time he was in prison, the respondent forcefully entered the premises and carried away various properties belonging to the appellant.

When the appellant got out of prison, he entered into negotiations with the respondent for release
5 of his property. As a result of those negotiations and the intervention of the Inspector General of Government, some of the appellant's property was restored to him. The appellant brought action in tort to recover the remaining property. The respondent argued that the appellant was barred by the provisions of the Statute of Limitation from bringing his action. The appellant, on the other hand, pleaded disability under section 5 of the Civil Procedure Limitation (Miscellaneous
10 Provisions) Act.

The court held (1) that the period which the appellant spent in prison on remand would not be counted in the computation of time for purposes of the Act and (2) that in engaging in negotiations and correspondence with the respondent the appellant was not under statutory disability which would allow him to extend the period within which to bring his action.

15 Kanyeihamba, JSC, stated in his judgment: **“It is my opinion that even where genuine and active negotiations are going on or contemplated between parties, it is incumbent upon those who need to file documents to do so within the time allowed. Thereafter, they are at liberty to seek adjournments for purposes of negotiations.”**

The above represents the correct position of the law as far as dialogue and negotiations between
20 a plaintiff and a defendant are concerned during the period of statutory limitation. Dialogue and negotiations cannot, therefore, be taken as a disability under the law of Limitation.

In my view, the case of **Charles Lubowa vs. Makerere University**, SCCA No. 02 of 2011, in which the issue of negotiations between the employer and the employees was raised as a factor in delaying the employees' action is distinguishable from the present case. In the Makerere University case the court found that the employer itself initiated an exercise to conclusively
5 determine the scale of employment to which the employees belonged. The employees waited for the verification exercise to end before bringing their action. The court held in that case that it was not a case of negotiations between the parties but a case of the parties determining the facts regarding the employees' scale. Evidence in the instant case does not show such an exercise.

The second issue is whether the appellants were under disability because of rebel activities in
10 parts of the North and North East of the country. In their consideration of paragraph 15 of the appellants' amended plaint the learned Justices of Appeal stated as follows:

The above paragraph 15 cannot be true in view of paragraph 14 already set out above...

**We accordingly find that the learned trial judge erred when he held that the
15 respondents were under disability as they had been caught up in the war in the northern and eastern parts of this country which ended in 2008.**

**However, if it had been pleaded that the respondents had in fact all been abducted or kidnapped or cut off from the rest of the country due to war or insurgency we would have accepted that such circumstances constituted disability under the
20 Limitation Act. This issue is now moot and we shall leave it at that.**

We find that the disability as pleaded in the amended plaintiff lasted up to 25th January 1986 or at most July 1986 when the respondent reported back to work. The action having been commenced twenty years later was certainly barred by limitation.

5 I respectfully agree with the above holding of learned Justices of Appeal except on the dates of disability which are in my view immaterial in this case.

The appellants state, in their amended plaintiff, that they maintained consistent dialogue with the respondent (defendant) up to around July 2007. If this was the case then, rebel activities should not have prevented them from having access to the defendants or to the court. It is my view that
10 this claim in the plaintiff is too general and offers little information for the court to regard it as an entertainable claim in the plaintiff.

I do not think it is correct to say, as learned counsel for the appellants does, that when a plaintiff avers that he or she was prevented from filing an action because of disability, the court should then take the matter to trial even if the plaintiff does not show the nature of disability or the dates of
15 its occurrence. Rebel activities per se cannot be a disability, and the learned Justices of Appeal were right to suggest that more information should have been provided, for example, as to whether the appellants were under abduction or kept in detention camps from where they could not move out.

Correspondence annexed to the amended plaintiff shows that the appellants were persistent in
20 pursuing their claim with various Government agencies such as the Inspector General of Government and were not prevented from doing so by rebel activities. They could have equally

taken their papers to court if they had been so minded. The appellants imply in their plaint that some of the appellants (the plaint does not indicate who or how many) were affected by rebel activities while others were not. If this was the case, why then did those who were not affected bring their action within the statutory period? Did they all have to wait to bring their action at the
5 same time?

I find no good reason to fault the decision of the learned Justices of Appeal for dismissing the appellants' claim on disability. In the result, I would dismiss this appeal without order as to costs, considering the fact that the appellants sued as paupers.

As other members of the court except one agree the appeal is dismissed with no order as to costs.

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Dated this11TH.....day ofMAY..... 2018

Jotham Tumwesigye
15 **JUSTICE OF THE SUPREME COURT**

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**THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT KAMPALA**

5 **[CORAM: TUMWESIGYE; KISAAKYE; ARACH-AMOKO; OPIO-AWERI; &
TIBATEMWA-EKIRIKUBINZA, JJ.S.C.]**

CIVIL APPEAL NO 01 OF 2016

BETWEEN

1. NYEKO SMITH

10 **2. EFIA BERNARD**

3. ATABA MATTHEW :::::::::::::::::::::::::::::::::::::::] APPELLANTS

AND

THE ATTORNEY GENERAL:::::::::::::::::::::::::::::::::::::] RESPONDENT

15

[Appeal from the Judgment of the Court of Appeal (Mwangusya, Mwondha & Kakuru, JJA) dated 26th February 2014 in Consolidated Civil Appeals 27 of and 44 of 2010]

JUDGMENT OF DR. KISAAKYE, JSC (DISSENTING)

20 The appellants filed this appeal against the Judgment of the Court of Appeal in consolidated Civil Appeals No. 27 of 2010 and 44 of 2010 in which the Court held that their High Court Civil Suit No. 009 of 2009 was barred by limitation.

I have had the benefit of reading in draft the lead Judgment of my learned brother Tumwesigye, JSC that the appellants’ appeal should be dismissed on ground that: (a) the appellants’ cause of
25 action arose from the date the insurgency ended in 1986 when the appellants reported back to work, (b) rebel activities/civil war that took place in the North and the Eastern parts of the country did not constitute a statutory disability under the law of Limitation, and (c) that appellants’ dialogue and negotiations with the Government between 1986-2007 estopped the appellants from relying on the disability arising from war/rebel activities.

30 Other members on the Coram agree with the learned Justice’s Judgment.

Having read the Record of Appeal and after carefully considering the law and the respective submissions of the parties, I find that the appellants’ suit at the High Court was not barred by limitation. I therefore respectfully disagree from the majority view that the appellants’ cause of action was barred by the law on limitation.

Before considering the submissions and merits of this appeal, it is necessary to provide a brief background to this appeal.

On 31/07/2009 the appellants, all former workers of National Sugar Works (Kinyara) Ltd. filed a representative suit in the High Court at Masindi. The suit (High Court Civil Suit No. 009 of 5 2009) was filed against three defendants, namely: Attorney General, Kinyara Sugar Works Ltd. and National Sugar Works (Kinyara) Ltd.)

The appellants sued for:

- a) *Damages for unlawful termination of their employment services and other terminal benefits;*
- 10 b) *Special damages for recovery of their salary arrears, unpaid salaries, and unremitted NSSF benefits;*
- c) *Aggravated damages for high handedness and unconstitutional acts and omissions of the defendants;*
- d) *interest on all the above; and*
- 15 e) *costs of the suit.*

The Attorney General (who also represented National Sugar Works (Kinyara) Ltd.) and Kinyara Sugar Works Ltd. filed the defendants' respective Written Statements of Defence. In the respective Written Statements of Defence, the defendants contended among others that the plaint did not disclose a cause of action and that the Suit was time barred and frivolous.

20 On 03/09/2009 when the suit came for scheduling the trial Judge, Ochan, J., allowed the parties to submit on the preliminary objections which had been raised in the pleadings. The first preliminary objection related to the issue of limitation. On this issue, counsel for the respondent submitted that: (a) the appellants' alleged cause of action arose in 1985 and that by filing the suit in 2009, they were way over the period of 3 years provided for under the Civil Procedure 25 Limitations (Miscellaneous Provisions) Act; (b) negotiations per se did not disable a party from filing a suit; (c) Rebel activities also did not disable the appellants from filing a suit since the appellants (then plaintiffs) did not state at what point rebel activities ceased, to give Court a clear picture to estimate at what point the appellants ceased to be under a disability.

The second objection related to striking out the 3rd respondent (National Sugar Works (Kinyara) 30 Ltd. on grounds that at the time of filing the suit, it had ceased to exist as a legal entity.

Counsel for Kinyara Sugar Works Ltd., on the other hand, raised 3 preliminary objections. These were that: (a) the plaint did not disclose a cause of action against the Company; (b) the suit was barred by limitation; and (c) the suit was frivolous and vexatious.

5 Counsel for the appellants also responded to the Attorney General and other respondent's submissions.

On 09/11/2009, Ochan, J. delivered his Ruling and overruled the preliminary objection on limitation on grounds that: (a) there was on record an acknowledgment of part payment by National Sugar Works (Kinyara) Ltd. and the Government of Uganda to the former employees of National Sugar Works in Kinyara. He observed that *'it is well established that part payment or*
10 *promise to pay or an acknowledgment of indebtedness will 'take a case out' of the Statute of Limitation'*; (b) he would take judicial notice of the more than 20 years of war that *'bedeviled those regions and only ended a few months ago with the signing of the Ceasefire Agreement in Juba on 26/08/2008.'*

Ochan, J. however sustained the second preliminary objection by striking off the 3rd respondent
15 National Sugar Works (Kinyara) Ltd *'for the clear technical reasons'* advanced by the Attorney General.

Regarding the issue of the suit being frivolous and vexatious the trial Judge found that it was neither frivolous nor vexatious.

The Attorney General and Kinyara Sugar Works Ltd were dissatisfied with the decision of the
20 High Court and appealed separately to the Court of Appeal. The Court of Appeal ordered both appeals to be consolidated and heard together.

From the respective memorandum of appeal, the following five issues were adopted by the parties and the Court of Appeal.

- i) *Whether the suit is barred by statute of limitation;*
- 25 ii) *Whether the suit discloses any cause of action;*
- iii) *Whether the suit is frivolous and vexatious;*
- iv) *Whether the trial judge erred in law and in fact in finding that there was acknowledgment of part payment by the High Court which fact was not pleaded nor argued in Court;*

v) *Whether the trial judge erred in law and in fact when he held that the decision in **Allen Nsibirwa v. NWSC, H.C.C.S No. 88 of 1992** is distinguishable and inapplicable and failed to demonstrate its inapplicability and distinguished ability.*

The learned Justices of Appeal held that the appellants filed the suit way out of time and that there was no acknowledgment of the debt by the respondents. The Court set aside the Judgment of Ochan, J and found in favour of the Attorney General and Kinyara Sugar Works Ltd.

Dissatisfied with the decision of the Court of Appeal, the appellants appealed to this Court on the following two grounds:

1. *That the learned Justices of Appeal erred in law when they held that the appellants' action against the respondent in the Court below was time barred by section 3(3) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.*
2. *That the learned Justices of Appeal erred in law when they held that the appellants' action against the respondent in the Court below was time barred by section 3(2) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.*

The appellants prayed that this Court reverses the order dismissing the appellants' suit and substitute it with the order to have the suit heard on its merits by the High Court.

Ladislaus Rwakafuzi represented the appellants while Oburu Odoi, Principal State Attorney represented the Attorney General. Both parties filed written submissions.

I note that Kinyara Sugar Works Ltd was not involved in this appeal, since the appellants lodged this appeal against the Attorney General only.

Consideration of the Appellants' Appeal

It is important to note that having found that the suit was barred by limitation, the learned Justices of the Court of Appeal did not find it necessary to consider the issue of cause of action and frivolity of the suit. I will therefore focus only on the Court of Appeal finding on limitation of the appellants' High Court Civil Suit.

To avoid unnecessary repetition I have incorporated the parties' contentions and their submission in my resolution of the contentions raised by the parties.

Ground 1 of Appeal

The appellants' contention under ground 1 was based on section 3(3) of the Civil Procedure Limitation (Miscellaneous Provisions) Act which does not exist. The respondent raised it in

their submissions and counsel for the appellants conceded it as an error and at the hearing of this appeal, amended it to section 3(2) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.

5 Since section 3(2) Civil Procedure Limitation (Miscellaneous Provisions) Act is the subject of the ground 2 of appeal, I have not found it necessary to consider ground 1 of the appeal. Instead, I shall now proceed to consider ground 2 of appeal.

Ground 2 of Appeal

Ground 2 of the appellants' appeal was framed thus:

10 *“That the learned Justices of Appeal erred in law when they held that the appellants’ action against the respondent in the Court below was time barred by section 3(2) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.”*

Under this Ground 2, the appellants contended that the learned Justices of Appeal erred in law when they held that the appellants' action against the respondent in the Court below was time barred by section 3(2) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.

15 My review of the appellants' ground and the submissions there under show that proper disposal of this ground will necessitate me to consider three main issues arising out of this ground. These are:

20 1. *Whether the appellants' employment status as employees of the Government of Uganda takes them out of the ambit of section 3(2) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.*

2. *When did the appellants' cause of action against the respondent arise?*

3. *Whether all or some of the appellants were under a disability as a result of war/rebel activities that occurred in the Northern and Eastern part of Uganda?*

I will now proceed to consider and dispose of these issues in the same order.

25 1. **Whether the appellants' employment status as employees of the Government of Uganda takes them out of the ambit of section 3(2) of the Civil Procedure Limitation (Miscellaneous Provisions) Act.**

Counsel submitted that the appellants pleaded that they earned their salaries from the Consolidated Fund through their mother Ministry of Agriculture. In counsel's view, it is a triable issue whether the appellants were public servants as defined under Article 175(b) of the Constitution.

5 Counsel further argued that if indeed the appellants were public servants, then sections 4, 9-15, 18-24 and 62-64 of the repealed Employment Act did not apply to the appellants. This, he argued, was because section 6 of the repealed Employment Act provides that those sections did not apply to any Government service or undertaking or to any public officer or any other person employed by the Government in all capacity.

10 Relying on section 9 of the repealed Employment Act which provides for contracts of service, counsel submitted that this section did not apply to the appellants by virtue of section 6 of the Act.

Counsel for the appellants contended that the contracts of service for public servants such as the appellants are statutory and follow a standard form under the Public Service Act.

15 Further relying on section 18 of the Act which provides for change of employer, counsel for the appellants submitted that this provision was also not applicable because where Government is the employer, a successor Government enterprise is affected by the previous contractual obligations under a public service contract.

20 Counsel further submitted that terminal benefits under a Government employment contract are under a different legal regime such as the Pensions Act. In his view, pension is a constitutional right that cannot diminish by effluxion of time and that payment of pension by Government when it accrues is always a pending legal obligation and a claimant's action for pension cannot be limited by time.

25 Counsel for the appellants also contended that the appellants also prayed for their NSSF contributions in their suit. He submitted that NSSF contributions can be recovered any time and that there cannot be a time limit, as payment of these dues is always a pending legal obligation. All these issues, according to counsel were triable issues necessitating Court to allow a full trial.

30 In conclusion, counsel for the appellants submitted that during trial, the issue whether or not the appellants' action was time barred may be framed and evidence thereon led and decided on evidence. He prayed that this Court allow the appeal with costs and also award the appellants costs in the two courts below.

The Respondent's submissions

The Attorney General did not make any specific response to the appellants' contentions above.

However, the Attorney General contended that the appellants alleged that they were employed by Kinyara Sugar Ltd (formerly National Sugar Works (Kinyara) Ltd.

- 5 Furthermore, the Attorney General contended that that following the insurgency caused by the war preceding the change of Government in Kampala by the then rebels of the current regime, the appellants' contracts were terminated resulting into damages worth Uganda Shillings 2,000,000/= to 10,000,000/=.

10 The Attorney General further argued that the appellants' suit was filed on 31st July 2009, more than 20 years later after the date when the cause of action arose.

I have carefully perused the Court of Appeal Judgment and I have noted that the learned Justices neither considered nor made any findings on the parties' submissions above.

I will turn to consider the law on limitation vis-à-vis its applicability to the appellants.

15 One of the main provisions of the law governing this appeal is section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 Laws of Uganda which provides as follows:

“No action founded on contract shall be brought against the Government or against a local authority after the expiration of three years from the date on which the cause of action arose.”

20 As the section indicates, it governs actions or legal suits founded on Contracts.

I have noted from the record of appeal that: (a) formerly National Sugar Works (Kinyara) Ltd. was wholly owned by the Government until its privatization under the Public Enterprises Reform and Divestiture Act, Cap 98 Laws of Uganda, (b) it was not contested by the respondent that the appellants were employed by National Sugar Works (Kinyara) Ltd which was wholly owned by
25 the Government until when it was taken over by Kinyara Sugar Works Ltd. And that in 1990 National Sugar Works (Kinyara) Ltd was incorporated and subsequently took over the assets and liabilities of the National Sugar Works (Kinyara) Ltd. in accordance with the Public Enterprises Reform and Divestiture Act, Cap 98 Laws of Uganda.

The appellants having been employees of National Sugar Works (Kinyara) Ltd which later became Kinyara Sugar Works Ltd, the logical conclusion from the above is that the appellants were employed by the Government.

5 The other law which is relevant in this appeal is the now repealed Employment Act, Cap 219 which was then governing employment matters in Uganda.

Section 6(3) of this Act provided as follows:

“Sections 4, 9 to 15, 18 to 24 and 62-64 shall not apply to any Government Service or undertaking or to any public officer or any other person employed by the Government in civil capacity.”

10 Since the appellants were not governed by the Employment Act by virtue of section 6(3), it is not clear from the Record of Appeal what law governed their employment. And because this was not clear on the Record of Appeal, it was wrong for the Court of Appeal to find and hold that they were employed on Contract and that their action was founded on contract and that they were therefore barred by section 3(2) of the Civil Procedure and Limitation (Miscellaneous
15 Provisions) Act from filing a civil suit against the Attorney General to recover unpaid salaries, pension and gratuity among others.

Since this evidence was not on record, I find that the Court further erred when they held that the appellants’ suit was time barred by section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, since such a finding could only safely be reached by a Court
20 after hearing the appellants’ case on merit and certainly not on a preliminary objection.

It is on the same grounds that I am unable to agree with the majority decision upholding the decision of the Court of Appeal.

I take judicial notice of the fact that until the Government of Uganda introduced performance contracts for some categories of employees mostly in the senior ranks, persons employed by
25 Government either in the mainstream public service or what was known as Government parastatals were employed on permanent and pensionable terms. This situation pertains to the present day for those in the public service and other related civil service such as Judicial Officers, Teachers and Medical workers, to mention but a few.

This Court has on two occasions pronounced itself on dismissing actions on preliminary
30 objections. In ***Wycliff Kiggundu v. Attorney General, Supreme Court Civil Appeal No. 27 of 1992***, the High Court had dismissed the appellants’ suit on a preliminary objection that the plaint

did not disclose a cause of action. This Court set aside the holding of the trial Judge and held ‘once questions of fact arise, then the issue must surely go to trial.’

More recently in *Charles Lubowa & 4 ors v. Makerere University, Civil Appeal No. 02 of 2011*, this Court unanimously allowed an appeal by the appellants over dismissal on a Preliminary
5 Objection and ordered that the matter be heard on its merits.

I am aware of another decision of this Court of *Peter Mangeni t/a Makerere Institute of Commerce v. Departed Asians Property Custodian Board, Civil Appeal No. 13 of 1995* where this Court upheld the striking out of another action on the basis of the suit being time barred. Although this appeal also involved a preliminary objection, the appeal was dismissed on ground
10 that negotiations, however genuine per se did not take a party out of the limitation law.

2. When did the appellants’ cause of action against the respondent arise?

I shall now proceed on the next issue arising out of ground 2 of Appeal which necessitates me to determine when the cause of action arose.

Section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act has a second
15 leg to it, that is that an action against Government should not only be based on contract but that the period of limitation of 3 years starts running from the date on which the cause of action arose. (underlining added for emphasis).

I have noted with concern that both parties did not canvass this issue of when the cause of action arose at the Court of Appeal. Similarly even the respondent did not. I also note that the Court of
20 Appeal did not.

In this particular appeal under consideration, I am of the firm view that before the Court of Appeal could determine that the appellants’ action was time barred, it had to determine when the cause of action arose.

The failure by the learned Justices to determine when the cause of action arose was a grave error
25 of law because this determination was crucial to determining when the cause of action arose and therefore when the time begun to ran. Without determining when the cause of action arose, there is no way one could determine when the three year period begun to run.

In the Attorney General’s submissions before this Court, counsel for the Attorney General contended that the appellants’ suit which was filed in 2009, had been filed more than 20 years
30 later after the date the cause of action arose. 20 years from 2009 would imply that the

appellants' cause of action arose in 1990. However, since the Attorney General contended it was more than 20 years, it was incumbent of the Attorney General to indicate the actual year and preferably the event that in their opinion makes the date when the appellants' cause of action arose.

5 So, when did the cause of action begun to run in the present case?

I find the guidance of two decisions of this Court quiet apposite in this aspect. The first is **Wycliff Kiggundu** (supra) where the Attorney General had raised a preliminary objection at the High Court on ground that the appellant's plaint did not disclose a cause of action. This Court held as follows:

10 ***"We agree that in the case of a preliminary objection of this nature, it is important to observe the nature of the plaint, because as Order 7 Rule 11(a) of the Rules provides, the plaint shall be rejected where it does not disclose a cause of action. We consider therefore, that it is primarily a matter of construing the plaint, there being no other pleadings, and as the authorities show, the plaint must be construed without access to***
15 ***evidence on affidavit...We are not here concerned with the part that further and better particulars may be allowed to play because there were none in this case. Assuming then that the averments in the plaint have been proved, it must be asked whether by themselves they disclose a cause of action."***

The second one is **Charles Lubowa** (supra) where Katureebe, JSC (as he then was) held as
20 follows:

"I agree with the decision of this Court in the Otabong case that limitation begins to run from when the cause of action arose. But one has to determine when the cause of action arose. To do that, in my view, one has to look at all the facts and peculiar circumstances of the case...It would appear to me that in establishing when the cause
25 ***of action arose, it is necessary to consider the pleadings in their entirety to be able to conclude that there were present all the facts which were material to be proved to entitle the plaintiff to succeed."***

It therefore follows that in determining when the cause of action arose with regard to the appellants' suit at the High Court, recourse should be sought in reviewing the pleadings before
30 the trial Court. This implies that focus should not only be on the period when the war ended but also other factors like dialogue (evidenced by various correspondences on record) between the parties, the employment status of the appellants and when the dialogue between the appellants and the Government broke down, among others.

What then were the peculiar circumstances of this case? In my view, it is clear that: (a) At the
35 time the insurgency broke out culminating into the closure of the sugar factory, some of the

appellants had some arrears pending; (b) once the appellants and those that they represent returned to work, after the war, they were advised (according to the appellants) by the Management of the Sugar Factory and later by the President to extend their leave until the sugar factory had been fully rehabilitated; (c) once the rehabilitation of the Sugar factory was completed, some of the employers were retained whereas others were not; (d) There is evidence of communication between the Government and appellants regarding benefits and arrears of some of the employees. There is on record evidence of some correspondences among certain departments of the Government like the IGG, Privatization Unit on the issue and the appellants; and (e) The Government acknowledged being indebted to the appellants and indeed made some payments to them in this regard. The evidence of the acknowledgment can be inferred from the letter written by the General Manager of Kinyara Sugar Works Ltd to the Director Privatization Unit which I discuss later in my Judgment. Suffice to say, the letter was to the effect that the NRM Secretariat had 'authorized the Ministry of Finance to release about Uganda Shs 7,800,000/= to settle the company debt of salaries and wages.' The letter further shows that it was acknowledged in the Company annual report for the year 1988 that the outstanding claims submitted by the employees '*was still a problem.*'

In some of my observations above, it is not clear for instance when the Sugar factory was reopened after rehabilitation or when the negotiations started or when they stalled, when the Sugar Factory was privatized, when some of the former employees were taken on and others not, among others. All this in my view could be determined in the course of the trial when the parties could adduce evidence. In the circumstances, it is apparent that the issue of limitation could not be determined on a preliminary point of law.

I further note that there is absolutely no evidence on Record of Appeal of termination of the appellants' employment by the Government.

Thus it is clear that basing on the *ratio* in ***Charles Lubowa*** (supra), the cause of action, would start running from the time the negotiations broke down between the appellants and the respondent or when what was owed to them by Government was determined and not paid. This is simply because at the stage of negotiations the appellants could not be in possession of all the facts which would give rise to a cause of action. Such facts would include what was owed to who, how it arose and when the liabilities arose and/or when the appellants concluded that the Government was not willing to pay them their arrears.

Effect of part payment and acknowledgment of the debt on date when the cause of action arose.

An exception to the law on limitation that was at play in this appeal is part payment and acknowledgment. The learned Justices of the Court of Appeal held that whereas the issue of part payment was not pleaded or argued before them, it was set out in their notice of intention to sue that between 1988 and 1990 the appellants received part of their salaries. Since it was
5 annexed to the plaint, it was considered.

The learned Justices further quoted a letter written by the appellants to the Minister in Charge of Privatization wherein they state that between July 1988 and 18th May 1990, the Government paid out their 3 months or wages of August, September, October 1985 only and that the rest of the months remain unpaid.

10 The learned Justices further noted that this fact was not challenged by the respondents (then appellants) and in the circumstances treated it as an admitted fact. Having treated it as an admitted fact, the learned Justices of Appeal agreed that the part payment of the debt revived the action, but only up to 18th May 1990. The learned Justices reasoned that from 18th May 1990, the limitation period began to run again. The learned Justices then concluded that by
15 the time the suit was filed in 2009, the limitation period had run out again.

Regarding the acknowledgment of the debt, counsel for the appellant had argued at the Court of Appeal that there was acknowledgment of the debt through various correspondences between the parties. The learned Justices in dismissing the appellants' assertion that there was an acknowledgment of the debt by the respondents stated that 'we have not found anywhere in
20 the pleadings or in the accompanying documents where the respondents ever acknowledged indebtedness after 18th May 1990.

In my view, I find this holding contradictory to their earlier holding that the respondents had not objected or challenged the appellants assertion that '*between July 1988 and 18th May 1990, the Government paid out their 3 months or wages of August, September, October 1985
25 only and that the rest of the months remain unpaid*' and therefore treated it as admitted fact.

Be that as it may, a letter on record dated 14th May 2006 written by the General Manager of Kinyara Sugar Works Ltd to the Director Privatization Unit shows some interesting pointers to this whole issue of acknowledgment. I should note that the General Manager was responding to the Director's letter (Ref. PURSP 02.01.00).

30 The letter the General Manager was referring to written by the Director Privatization Unit bears a reference of PURSP 02.01.00, which appears to be an abbreviation of the date of 2nd January 2002. Unfortunately, this letter is not on record. Indeed the General Manager

acknowledged that he is not aware of what transpired after the communication that Ug. Shs. 7.8 million had been released to settle the company debt. Were there other rounds of negotiations? Whereas it is not clear about what transpired, it is evident that by filing a suit in the High Court, the appellants were still demanding payment.

5 This re-emphasizes my view that the issue of limitation needs to be examined further before it can be properly determined whether the appellants were barred by limitation or not. This would necessitate the High Court hearing the parties on the evidence and arriving at an appropriate determination.

10 In light of my analysis and findings above, I am of the view that we should allow the appeal and let the issue of limitation be a triable issue before the High Court where the parties would lead evidence to help the Court determine the issue properly.

I note that the majority are of the view that the proposition by *Kanyeihamba, JSC* (as he was then) in *Peter Mangeni (supra)* reflects the correct position of the law as far as dialogue and negotiations between a plaintiff and defendant are concerned during the period of statutory
15 limitation.

In *Peter Mangeni (supra)* Kanyeihamba, JSC observed as follows:

20 ***“I agree ... that an offer to negotiate terms of settlement between parties to an action, admirable as it may be, has no effect whatsoever on when to serve statutory notice or file a suit in time. It is my opinion that even where genuine and active negotiations are going on or contemplated between parties, it is still incumbent upon those who need to file documents to do so within the time allowed. Thereafter, they are at liberty to seek adjournments for purposes of negotiations.”***

25 With due respect to my learned colleagues, I am unable to share their view basically for two reasons. First, this position has one fundamental flaw. It presupposes that all the facts or documentation supporting a cause of action are all available even though the parties are alive to the fact that there is a dispute. It is therefore not surprising that exceptions have cropped up as is evident in the decision of this Court in *Charles Lubowa (supra)*.

30 The second reason, relates to *Charles Lubowa*. I am of the view that *Charles Lubowa* is not only a later decision of this Court but also reflects the correct position of the law on negotiations vis-à-vis the law on limitation.

In light of my analysis above, it is my finding that the pleadings on their own could not show when negotiations broke down. It therefore follows that the issue of limitation could not be

disposed of on a preliminary point since there was need for more evidence to enable Court determine when the cause of action actually arose, so that it could in turn determine, if the limitation period applied to the appellants' claims and when the 3 years began to run.

I reiterate what was stated by this Court in **Kiggundu** that '*once questions of fact arise, then the issue must surely go to trial.*'

3. Whether the appellants were under a disability as a result of war/rebel activities in Northern Uganda?

In the event that it is determined that it is determined that section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act applies to the appellants, did the appellants breach the provisions of section 3(2) in their High Court Civil Suit in July 2009?

Counsel for the appellants submitted that the learned Justices of Appeal erred when they considered and made findings on the appellants' pleadings in Para 16 of the Plaint. Paragraph 16 was to the effect that the appellants were cut off from filing the suit due to rebel insurgency in the North of Uganda that ended in 2007. Counsel contended that once this was pleaded, its veracity could only be decided by a trial.

Relying on the authority of **Mukisa Biscuits v. Western Distributors [1969] EA 696**, counsel for the appellants submitted that a preliminary objection can only be decided on the pleadings and not evidence. Counsel faulted the learned Justices for allowing counsel for the respondent to submit on whether the appellants failed to bring the action due to rebel insurgency in the North. He further contended that counsel were allowed to submit on when the rebel insurgency in the North ended yet they were never put on oath. Counsel argued that their Lordships erred to have decided the issue of limitation on evidence submitted by counsel from the bar.

Respondent's submissions

Having set out the provisions of section 3 of the Civil Procedure Limitation (Miscellaneous Provisions) Act, the Attorney General submitted that the cause of action as alleged by the appellants arose in 1985.

The Attorney General contended that the appellants alleged that they were employed by Kinyara Sugar Ltd (formerly National Sugar Works (Kinyara) Ltd. Furthermore that following the insurgency caused by the war preceding the change of Government in Kampala by the then rebels of the current regime, the appellants' contracts were terminated resulting into damages worth Uganda Shillings 2, 000,000/= to 10,000,000/=.

The Attorney General submitted that the war referred to in the pleadings is different from the insurgency in the North of Uganda that ended in 2007. The Attorney General submitted that the war referred to in the appellants' pleadings was the war between the National Resistance Army (as it was then) that was fighting the military Government that had taken power after a military
5 coup of 27th July 1985.

The Attorney General further argued that the appellants' suit was filed on 31st July 2009, more than 20 years later after the date when the cause of action arose.

It was also the Attorney General's contention that the learned Justices of Appeal: (a) dealt with the issue of time limitation exhaustively at page 13 of the Judgment; (b) comprehensively dealt
10 with the issue of disability on pages 13-16 of the Judgment; (c) rightly concluded that the respondents did not adduce evidence at any one time that they were held in IDP camps or that they were in any way restricted by the insurgence in either the northern and eastern parts of Uganda.

Furthermore, counsel for the respondent concluded that the evidence indicated that immediately
15 after the NRM had taken over power, the war ended and so did their disability and that the appellants have been consistently and continuously pursuing their claim from 1986 to date without a break.

The Attorney General therefore submitted that there was no basis for the appellants to adduce evidence when it was abundantly clear from the pleadings that the basis of the exemption was
20 nonexistent. The Attorney General prayed that the appeal be dismissed with costs.

In holding that the appellants were under no disability, the learned Justices of the Court of Appeal held as follows:

“The learned Judge accepted the respondents’ submissions that the respondents were under disability and that is why they were unable to file the suit within the time prescribed by the law.
25

...

With respect we do not agree. There is nothing in the pleadings that alludes to the fact that the respondents were under disability because they were in internally displaced peoples’ camps or anywhere in Northern or Eastern Uganda at the material times.
30

The temporary displacement of the respondents is pleaded in paragraph 6(c) of the amended plaint as follows...

It is clear to us that the war referred to in the above pleadings is not the same as the insurgency or war referred to in the Ruling...

5 ***The respondents were actually pleading that they were displaced by the war between National Resistance Army (as it was then) a rebel force that was fighting the Military Government that had taken power after a military coup of 27th July 1985. This war lasted only up to 26th January 1986 when the then rebels overthrew the military junta and took over power. When that war ended, peace returned to the area and the respondents were able to go back to their work as set out in their own pleadings.***

Section 5 Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap 72 Laws of Uganda provides instances when the limitation period can be extended in cases of disability as follows:

10 ***“If on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of 12 months from the date when the person ceased to be under a disability or died, whichever event first occurred, notwithstanding that the period of limitation has expired; ...”***

15 The Civil Procedure and Limitation (Miscellaneous Provisions) Act does not define what amounts to disability. Black’s Law Dictionary 9th Edn at page 958 however defines the word ‘disability’ in the following terms:

“The inability to perform some function; especially the inability to alter a given relation with another person.”

20 In my view, the question whether a party was under a disability or not is a question of fact that can be determined on particular facts of each case. For instance, in ***Peter Mangeni*** (supra), this Court held that the period the appellant spent in prison constituted a disability.

The rationale for statutory provisions relating to limitation was stated by Lord Edmund-Davies in ***Burkett v. James [1977] 2 All E.R. 801 at 815,816*** as follows:

25 ***“Statutory provisions imposing periods of limitation with in which actions must be instituted seek to serve several aims. In the first place, they protect defendants from being vexed by stale claims relating to long-past incidents about which their records may no longer be in existence and as to which their witnesses, even if they are still available, may well have no accurate recollection. Secondly, the law of limitation is designed to encourage plaintiffs to institute proceedings as soon as it is reasonably possible for them to do so... Thirdly the law is intended to ensure that a person may with confidence feel that after a given time he may regard as finally closed an incident which might have led to a claim against him, and it was for this reason, that Lord Kenyon describes statutes of limitation as ‘statutes of repose’.”***

30

35 The above rationale for limitation notwithstanding, I note that the Civil Procedure Limitations (Miscellaneous Provisions) Act was enacted prior to our Constitution and therefore it is

debatable whether the limitation period provided for under section 3(2) would pass the constitutional test especially Article 26 which protects the right to property and requires that deprivation of such property should be done under a law providing for: (a) prompt payment of fair and adequate compensation by the Government; and (b) a right of access to a court of law by any person with an interest over the property.

I note that the Constitution does not define what constitutes property. However, the law and Courts overtime have not only protected the right to immovable property but also other forms of property such as intellectual property and a Judgment debt among others.

Turning to the present case were the appellants were seeking payment of their unpaid salaries and terminal benefits among others, it is inconceivable that such a claim could be extinguished by a mere provision of the law providing for time within which to bring a claim and enforcement of the right to seek recourse in the Court of law as provided in section 3(2) of the Civil Procedure Limitations (Miscellaneous Provisions) Act.

This becomes more perturbing were the claims are against the Government which is supposed to protect the rights of citizens to receive their hard earned income that they toiled for through their sweat. In my view, it is very unjust that the law instead of protecting such weak citizens from such exploitation instead protects the Government through a technicality of time rather than on the merits of the claim.

Be that as it may, in *Peter Mangeni T/A Makerere Institute of Commerce v. Departed Asians Property Custodian Board, Civil Appeal No. 13 of 1995* (where the cause of action was founded on tort), this Court considered two aspects which were argued as bringing the appellant's suit within the exceptions to the law on limitation as provided for under sections 4 and 5 of the of the Civil Procedure and Limitation (Miscellaneous Provisions) Act. The first exception related to the issue of disability. This Court agreed that it was right for counsel to argue that *'the period, which the appellant spent in prison and under the charges of criminal nature should be discounted in the computation of the time for the purposes of the Act.'* It suffices to note that the Court in *Mangeni* (supra) was not dealing with the issue when the disability started or ceased.

Turning to the present case, the issue of limitation was raised by the Attorney General (then defendant) as a preliminary point of law in Para 10 of his written statement of defence as follows:

*"10. In the alternative and without prejudice to the foregoing, the 1st and 3rd defendants shall raise preliminary objections that the plaint does not disclose a cause of action; **it is time barred;...**"*

The appellants in their amended plaint pleaded the issue of limitation under two distinct circumstances. Paragraph 16 that is relevant in this section stated as follows:

5 16. *Alternatively, but without to the immediately foregoing, the Plaintiffs shall aver and contend that they were prevented from filing this suit any earlier on account of rebel activities which cut off the majority of the Plaintiffs from contact with one another and from access to the defendants.*" (underlining mine).

10 Section 5 of the Civil Procedure Limitations (Miscellaneous Provisions) Act which I have already cited in this Judgment provides one of the exceptions when the period of limitation cannot be included in computation of time. This is when the intending plaintiff was under a disability.

In the present case, the appellants submitted that they were under a disability on account of rebel activities which cut off the majority of the plaintiffs from contact with one another and from access to the defendants.

15 With all due respect to the learned Justices of the Court of Appeal, I find their holding quiet problematic. First, I find that they misconstrued the holding of the trial Judge with respect to the appellants being in IDP Camps. A perusal of the Ruling of the learned Judge shows that he took judicial notice of the fact that one of the consequences of the war that bedeviled those regions was that many citizens found refuge in IDP camps and could not even move from one IDP camp to another without grave risk to their lives. He did not state in his Ruling that the appellants or
20 those they represent were in IDP camps.

25 Ironically, having misconstrued the learned trial judge's view, the learned Justices went ahead to hold without evidence that the war between the NRM rebels and the then military Government lasted only up to 26/01/1986 when the NRM rebels overthrew the military junta. Further that when the war ended, *'peace returned to the area and the respondents were able to go back to their work as set out in their own pleadings.'*

30 It suffices to note that nowhere in the pleadings is it shown that the war or the period of insurgency lasted only up to 26/01/1986 in the whole of Uganda or in the Northern Region and/or that peace returned immediately thereafter. I therefore find it strange that the learned Justices made such a finding without basis. It is also not clear whether they took judicial notice of that fact or not, especially when one notes that there was no evidence on record to support their finding.

The respondent raised the preliminary objection that the suit was time barred. **One of the fundamental principles in the law of evidence is that a party that asserts must prove. This is clearly provided for under Section 101 of the Evidence Act which provides as follows:**

5 “(1) *Whoever desires any Court to give judgment as to any legal right or liability dependant on the existence of facts which he or she asserts must prove that those facts exist.*

 (2) *When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”*

10 I am aware that this provision is subject to some statutory exceptions which are not relevant in this appeal.

Section 102 emphasizes this duty more succinctly by providing as follows:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

15 It therefore follows that the respondent had a duty to prove to the Court that the appellants’ suit was time barred by showing: (a) when the cause of action arose; and (b) that the appellants were not under any disability.

In support of his contention that the appellants’ suit was time barred, the respondent submitted as follows at the Court of Appeal:

20 a) *Appellants did not state at what point the rebel activities ceased, to give Court a picture to help it estimate the time they ceased to be under disability;*

b) *The defence of disability was an afterthought of the respondents (present appellants) to include it in the amended plaint since it was not included in the original plaint; and*

c) *No evidence on record to show that all the respondents (appellants) came from war ravaged areas and that it was not pleaded.*

25 I have already observed the fact that in considering a preliminary point on a matter of law, the Court is restricted to consider only the pleadings on record. This nevertheless does not lessen the duty of the party raising the preliminary objection to show Court that it has substance. In this case, the respondent did not in his written statement of defence show at what point the rebel activities ceased and/or which of the appellants were not under a disability owing to the
30 insurgency.

By attempting to submit that the appellants did not show in their pleadings at what point the rebel activities ceased and/or failing to plead that the respondents were from war ravaged areas, the respondent was in my view shifting the burden to the appellants. The learned Justices of the Court of Appeal took the bait and faulted the appellants for failing to show in their pleadings
5 when the insurgency ceased or how it amounted to a disability on their part.

Having stated as above, could it then be proper to hold that from the pleadings Court could conclude that the appellants were not under a disability? In my view, the answer is no. The pleadings on their own could not help Court to ably determine whether or not the appellants were under a disability. There was no sufficient information in the pleadings to help Court
10 determine when the war in the northern part of Uganda ended or when the insurgency ceased following the change of Government or even when the effects of the war/insurgency ceased. Did the war/insurgency cease with the coming in of the new Government on 26/01/1986.

It is important to note that the appellants filed a representative suit on behalf of hundred of former workers. As with representative suits, it is always essential for those bringing the suit
15 to show that they had authority from all those they represent. How do we know for instance when all these plaintiffs gave in their consent, or how many of them suffered the effects of the insurgency?

In the pleadings, the appellants contended that they lost touch with their leaders and each other owing to the insurgency. We should not lose sight of the fact that these were paupers
20 with some doing menial jobs. The answers to these queries in my view, required a thorough investigation by Court since they were factual issues. It would be after investigating all these issues that the Court would determine whether the facts alleged fit within or without the disability argument. I again reiterate what was stated by this Court in **Kiggundu** (supra) that ‘*once questions of fact arise, then the issue must surely go to trial.*’ This was a matter that
25 required parties to adduce evidence to enable Court to make a finding of fact as well as of law.

Indeed my brother Tumwesigye, JSC observes in his lead Judgment that ‘*this claim in the plaint is not specific and lacks concrete information showing how the rebel activities constituted a disability to them.*’

In the circumstances, I find that the proof whether the suit was time barred on ground of ceasing
30 of a disability required evidence and could therefore not be determined by a preliminary point of law.

In my view, the lack of evidence on the pleadings provides this Court with more ground to appreciate the fact that the preliminary objection on ground of limitation could not be determined at the preliminary stage because the evidence showing when the disability ceased was not before Court. With respect, it could also be stretching it too far to expect to find the evidence in the pleadings. We cannot, at the same time also start speculating what evidence the appellants were going to adduce to prove their case that they were under a disability.

In light of my analysis above, it is my finding that the Record of Appeal did not have sufficient information for the learned Justices of Appeal to base on and conclude that the appellants' suit at the High Court was barred by limitation on ground that they were not under a disability.

10 Conclusion

I would therefore allow this appeal with the following orders:

- (a) That the High Court should proceed to hear ***High Civil Suit No. 009 of 2009: Nyeko Smith & others v. Attorney General & 2 others*** and dispose of it on its merits.
- (b) The appellants are awarded costs of this appeal and in the Courts below.

15

Dated at Kampala this .11TH ... day ofMAY..... 2018.

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JUSTICE DR. ESTHER KISAAKYE
JUSTICE OF THE SUPREME COURT.

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