THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

HCT-00-CV-CS- 1019-2004

NATHAN KAREMA ::PLAINTIFF

VERSUS

THE ATTORNEY GENERAL :::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: THE HON. MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The plaintiff's claim against the defendant is for recovery of special, punitive, exemplary and general damages for trespass to the person and property, loss of earnings/employment, interest and costs of the suit. It is his case that between the years 1986 - 1994, the defendant's agents/employees/servants in their normal course of business did kidnap, unlawfully imprison/detain as well as inflict physical and mental torture on to the person of the plaintiff on allegations of being a servant of the deposed UPC Government. He claims further that between the same dates, the plaintiff was deprived of his liberty, freedom of movement due to false imprisonment, deprived of his property and its enjoyment, e.g. his matrimonial home in Mbarara town contrary to the law of the land to the extent of forcing him to flee the country into exile in 1994.

He avers in paragraph S of the plaint that in the event of objection in as far as time within which to have filed this suit, he will rely on grounds of exemption as long as he fled the country into exile in the United Kingdom in 1994 and only returned in December 2003 to, inter alia, invest in Uganda in addition to pursuing this case.

At the conferencing, the following issues were framed:

1. Whether there was trespass to the person of the plaintiff and property as alleged in the plaint.

2. Whether the plaintiff has a valid claim against the defendant.

3. Remedies, if any.

Counsel:
Mr. J. **B.** Kakooza for the plaintiff.
Ms Patricia Mutesi for the defendant.

It is the defence case that the suit is time barred and incompetent. As such learned Counsel for the defendant has submitted only on issue No. 2. This being a point of law, the same shall be accorded due attention.

As already stated above, the plaintiff claims that between 1986 - 1994, agents, employees, servants of the defendant, in their normal course of business, kidnapped, unlawfully imprisoned him, detained and inflicted physical and mental torture upon him. That on being released in 1994, he fled into exile until 2003 when he returned to Uganda. He filed the suit on 22nd December, 2004.

The law is that in cases of unlawful detention and false imprisonment, the limitation period begins to run after the release of the plaintiff.

From the wording of paragraph 4 (ii) of the plaint, it can be inferred that the trespass to the plaintiff's property and indeed his own unlawful detention stopped in 1994 when he was released but had to flee into exile.

The defendant's argument about the case being time barred is not new. It was also raised before my brother, Remmy Kasule, Ag. J (as he then was). In a ruling delivered on 28/04/2006, he over ruled the defence objection but did not do so conclusively. He stated:

> ***"On the first preliminary point of objection, the court holds that the plaint has in it sufficient averments, at this stage when no evidence has been taken yet, to show that the plaintiff's claims are not time barred."***

From the above, court was of the view that the point of law was not one which could be decided fairly and squarely one way or the other, unless some fact or facts in issue could be proved. That's my understanding of that Ruling.

At the hearing, the plaintiff testified that he was released from detention in 1986 and was in hiding for two years and a half in Busega. That would take us to 1989. Further that he was re-arrested in 1989 and finally released from detention in 1990 but that from 1990 to 1994 he was in hiding, within the country, and thereafter he fled into exile in 1994. He claims, therefore, that the period in which he was in hiding also amounts to a disability. This bit about re-arrest in 1989 and finally being released from detention in 1990, and his alleged being in hiding between 1990 to 1994, are all not pleaded matters in the plaintiff's plaint. The particulars of detention/false imprisonment cover the period 1986 - 1987.

Learned Counsel for the defendant has pleaded that this amounts to a departure from his pleadings which the law frowns upon. She is right. It is settled law that a party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings.

See: ***Interfreight Forwarders (U) Ltd vs East African DeveloPment Bank [1994 – 95] HCB 54.***

In the instant case, no amendment has been sought herein to include acts of detention and/or false imprisonment after 1987. By implication, all the evidence he gave at the hearing regarding those alleged acts is inconsistent with his own pleadings.

The defendant's case is that between 1986 - 1989, and between 1990 - 1994 when he left the country and started life in exile, the plaintiff was not under any physical or legal disability.

Further, that by the time he fled into exile in 1994, his claims were already stale.
Under Section 2 (1) of the Civil Procedure and Limitation (Miscellaneous Provisions Act (Act 20/1969) as it was at the time in issue, before its amendment in 2000, no action founded on tort could be brought against the Government after twelve (12) months from the date on which the cause of action first arose. The period has since changed to twenty four (24) months (Section 3 (1) of Civil Procedure and Limitation (Miscellaneous Provisions) Act, Cap. 72 Laws of Uganda. The defence argument is that even assuming the several causes of action alleged were continuing torts, time started to run upon his release in 1989. That under the law in force at the time, the plaintiff should have filed the suit within 12 months thereafter, that is, in 1990.

What then is the substance of the plaintiff's evidence in this case?

It is that he was released from Luzira Prison in June 1986 and thereafter he stayed with a friend in Kampala for two and a half years, fearing to go out lest he be re-arrested until 1989 when he was allegedly re-arrested and detained at Lubiri barracks for six months. I have already indicated that the plaint is silent on this alleged re-arrest. Be that as it may, he admits that he was released from Lubiri in 1990 by Major General Kazini, after which he stayed with a friend at Busega till 1991. That between 1991 - 1993 he lived with his mother in Mbarara still in hiding till he fled into exile somewhere in February/March of 1994. The long and short of his testimony is that between 1990 - 1993 he was in hiding. He stated in crossexamination that he did not file a suit in 1990 - 1993 because he was in hiding and that he did not seek redress during that time for fear of arrest.

The issue here is whether such fear of arrest amounts to a disability in law.

Under S. 8 (2) (a) of Civil Procedure and Limitation (Miscellaneous Provisions) Act (Act 20 of 1969, supra), a person is deemed to be under a disability while he is an infant or of

unsound mind. From the authorities, these two categories are not exhaustive. It has been defined to mean and include any incapacity whatever that would hinder a person from performing a required act. By way of illustration, a person on remand facing a criminal charge has been held to be under disability to institute a suit. That is why in cases of unlawful detention and false imprisonment, the Limitation period begins to run after the release of the plaintiff.

See: Eridad, Otabong Waimo vs Attorney General SCCA No. 6 of 1990

In ***David Oruk & Others vs Attorney General HCCS No. 2 of 1996*** *(Unreported),* an authority cited to me by learned Counsel for the defendant, the trial Judge held, and I agree, that to be incapacitated is to be rendered physically or mentally incapable of taking the action required. That to hold that fear of reprisal also amounts to disability would be over stretching that definition.

In the instant case, the defence has presented to court a decided case, ***Nathan Karema vs Attorney General HCCS No. 103 of 1990.*** The Nathan Karema in that case is the plaintiff herein. He filed that case seeking redress against the Attorney General, the same party herein, for acts of NRA soldiers when they were still in the bush. From the records, they took away his vehicle in 1985 upon his arrest in Luwero. It is noteworthy that in the instant case, he is seeking redress for, among others, the very same arrest in Luwero.

He admitted that he was able to attend court and give evidence in that very case at the High Court of Uganda, Kampala. He is indicated to have attended court on 01/02/1991 when judgment was delivered. This waters down his evidence that he was in hiding throughout that period. It also waters down his evidence that he was too afraid to file any case against Government for fear of reprisals. At least he was able to file the case and give evidence personally relating to the circumstances of his arrest and how the army took his car.

He stated in that case that after his release in 1986, he reported the loss of his car to the then Director of Military Intelligence, one Mugisha-Muntu, following which a search for his vehicle begun. That in 1987, upon seeing the car parked at the President's office, he reported the matter to Major Kaka, the Director of Transport in NRA. That he visited Lt. Col. Kashillingi at Republic House Army Headquarters who advised him that they would look for the car. He stated in that case that he saw both Major Kaka and Lt. Col. Kashillingi many times, evidence which also waters down his assertion in the instant case, that he was all the time in hiding. He testified further in that case that on 2/02/1989 Lt. Col. Kashillingi wrote a letter certifying that the plaintiff's vehicle was being used by NRA. He adduced another letter of 1989 from one Lt. Muhumuza confirming that NRA used his car. It has been submitted by learned Counsel for the defendant that this evidence disproves his present claim that between in 1986 and 1989 he was in hiding since he was freely going about town. That it also disproves his claim to be living in fear of re-arrest even after 1989, since he was brave enough to regularly visit Army offices, including the Army Headquarters, and was freely interacting with soldiers. I accept this submission.

In that suit the trial Judge observed (at p. 9 of the judgment):

> ***"The plaintiff was unlawfully denied the use of his vehicle for over four years. He was even arrested and apparently confined for over a year without obvious reason. Unfortunately he did not claim for the arrest and confinement so I don't have to consider it any more."***

This was the plaintiff's undoing in my view. He was not diligent enough to follow up the issue of his arrest with a suit at the time he sued for recovery of his car or soon after judgment in that case. He fled to exile in 1994. For reasons stated above, court is in agreement with the submission of learned Counsel for the defendant that the fact of filing a suit in High Court of Uganda, Kampala, in 1990 is sufficient evidence that he was able to bring the present suit then, within the time allowed by law.

As further proof that he was under no disability or fear, he, by his own admission, appeared as a witness in a public inquiry into violations of Human Rights and later participated in

NOCEM activities relating to voters civic education.

Learned Counsel for the plaintiff has submitted that it was much easier to file an action for the recovery of a motor vehicle, but it was much harder to gather all the evidence of his arrest, detention and torture. That he was forced to flee the country before he had put together the evidence necessary to file a law suit. With the greatest respect to the plaintiff, court is unable to find merit in this submission, especially so when all the plaintiff has done in this case is to give a chronological narration of his ordeals at the hands of Government agents at the time of his arrest in 1985 and subsequently. If anything, the sad events were more fresh in his mind then than a few years later after return from exile. Learned Counsel has also submitted that should court be inclined to find that the plaintiff could amidst all odds have been in position to bring this action before fleeing the country, this is a classic case to which Article 126 (2) (e) of the Constitution should apply. This law enjoins courts to dispense substantive justice without undue regard to technicalities. It is trite that the Article does not do away with rules of procedure which must be adhered to. In any case Limitation is not a mere procedural issue. It is a matter of law and a plaintiff barred by limitation is barred by law and must be rejected.

See: ***Iga vs Makerere University [1972] EA 65.***

With the greatest respect to the plaintiff, therefore, this argument also cannot be accepted. The law of limitation is so fundamental in its practical application that to hold that its breach is curable under Article 126 (2) (e) of the Constitution would be to go against the wealth of authorities on the matter for no proper reason.

For the reasons given above, I find merit in the objection raised by learned Counsel for the defendant on the question of the competence of this suit. I would therefore uphold it, dismiss the suit on account of being time barred and therefore incompetent and find, in respect of issue No. 2 that the plaintiff has no valid claim against the defendant. In view of this conclusion, there shall be no findings in respect of issues (1) and (3).

As regards costs, the usual result is that the loser pays the winner's costs. This practice is, however, subject to the courts discretion so that a winning party may not necessarily be awarded costs. In the instant case, I have considered the circumstances of the case in its entirety and come to the conclusion that it is just and equitable that I order each side to bear its own costs.

Orders accordingly.

Yorokamu Bamwine
JUDGE
27/02/ 2009

27/02/2009:
Ms Mutesi Patricia for the defendant.
Mr. Kakooza John B. for the plaintiff.