

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION No. 909 OF 2000
(ARISING FROM CIVIL SUIT NO.466 OF 2000)

BYABAZAIRE GRACE THADDEUS :::::::::::::::::::: PLAINTIFF

VERSUS

MUKWANO INDUSTRIES :::::::::::::::::::: DEFENDANT

BEFORE: THE HON. MR. JUSTICE G. TINYINONDI

Civil procedure: cause of action-whether plaintiff had to comply with standards under S.25 NEMA Statute

Civil procedure: locus standi-whether plaintiff could receive remedies under S.4 of the National Environment Statute of 1995

The applicant filed the chamber summons application under Order 7, Rule 11 and 19 of the Civil Procedure Rules seeking order that

- a) the plaint in High Court Civil suit No.486 of 2000 be rejected.
- b) The plaintiff ordered to pay the defendant the costs of the suit and this application.

The main ground of this application was stated to be that the plaintiff disclosed no cause of action. The plaintiff was operating a factory located adjacent to residential homes including the plaintiffs rented apartment at Kibuli mosque, zone 1. The plaintiff alleged that the smoke is obnoxious, poisonous, repelling and hazardous to the community around and to the plaintiff in particular who is already affected in health.

Held.

It is trite law that in deciding the issue of cause of action only the plaint has to be looked:

- The plaintiff stated in parg.3 of his reply to the written statement of defence- “ 3. In reply to the defendants pargs.8 and 9, the plaintiff avers that his legal right to sue emanates from the right to a healthy environment under the same NEMA Statute (Act) Section 4.”

- The plaintiff is bound by this pleading. It is in this vein that I now hold that no right has been defined by NEMA under part VI of the statute.
- I hold that the plaintiff has failed to establish the first essential element for a cause of action, viz., a defined right (enjoyed by the plaintiff).

In view of the above holding, I find little difficulty in holding that the plaintiff fails on the second and third essential elements. The *Auto Garage case* is an authority for the legal proposition that, “ the provision that a plaintiff not disclosing a cause of action shall be rejected is mandatory”

I shall follow this decision in the present case.

NEMA is the only person vested with the power and duty to sue for violations committed under the Statute; further that the only recourse available to every person whose right under this statute is violated is to inform NEMA or the local Environment committee of such violation.

The plaintiff has no locus standi to sue for any violation under this statute.

RULING

The Defendant/Applicant filed this Chamber Summons application under Order 7, Rule 11 and 19 of the Civil Procedure Rules seeking the following orders: -

- “ (a) That the plaintiff in High Court Civil Suit No. 466 of 2000 be rejected;
 (b) That the Plaintiff be ordered to pay to the Defendant the costs of the suit and this application.”

The main ground of the application was stated to be that the plaintiff disclosed no cause of action. An affidavit in support was also filed. It was sworn by Alykhan Kamali who deposed, inter alia:

1. That I am Executive Director of the Defendant applicant company and make this deposition in that capacity.
2. That I have read the plaintiff and reply to our Written Statement of Defence filed by the Applicant and understood them. Copies of the said pleadings are attached hereto as annexures A1 and A2 to this affidavit. A copy of our defence is attached and marked annexure B.
3. That it is clear that from the statements in the plaintiff that the Plaintiff brings a suit based on the alleged emissions of noxious gases into the air by the Defendant.
4. That it is clear from the statement in paragraph 3 of the reply filed by the Plaintiff in response to our written statement of defence that the Plaintiff purports to bring this action under the provisions of Section 4 of the National Environment Statute of 1995.
5. That I am informed by my Advocates whom I verily believe, that the aforesaid

provision does not create a right to bring legal action on any individual but vests it instead in the National Environment Management Authority or on local environment committees formed under the Act.

6. That I am further informed by my Advocates, whom I verily believe, that any actions arising from the alleged emission of gases into the atmosphere must be brought in conformity with the said Statute, which is the overriding law in environmental matters.
7. That I am further informed by my that no action can lie against any person in respect of emissions unless such emissions exceed standards and guidelines prescribed by the National Environment Management Authority under the National Environment Statute.
8. That I have read the plaint and reply carefully and it is clear that they do not allege that the aforesaid standards have been established by the relevant authorities, or that the alleged emissions from our factory exceed the said standards, or that any measurements have been made in accordance with the provisions of the said Statute to determine the quality of gas emissions from the factory, or indeed, that they exceed such prescribed standards in any degree.
9. That I verily believe that in the absence of any statement as to the aforesaid material facts the plaint does not disclose a cause of action against our company.
10. That I have also noted that the plaint has indicated the subject matter of the suit as being valued at Shs. 60,000,000/=.

The Plaintiff/Respondent did not file an affidavit in reply. At the hearing of the application, Mr. Byenkya, Counsel for the Applicant, rehearsed the contents of both the Chamber Summons application and the affidavit. He referred to paragraphs 4 and 6 of the Plaint – (the Plaint was annexed to the Chamber Summons application) which read –

“4. The cause of action is a continuing tort which persists as follows: -

The Defendant operates a factory located just adjacent to Kibuli Police Barracks which is adjacent to residential homes including the Plaintiff's rented apartment at Kibuli, Mosque Zone 1. The said smoke is obnoxious, poisonous, repelling and a health hazard to the community around and to the Plaintiff in particular who is already affected in health.

The said escape of this smoke from the Defendant's premises are occasioned further by the Defendant's negligence in the following particulars:

Particulars of enhancing negligence:

- Failing to control obnoxious, poisonous and health hazard smoke from emission from the factory.
- Failing to purify the smoke to a safe level before emission.

- Failing to alert the residents in the neighborhood about the possible effects of the smoke emitted.
- Failing to notify the local authorities on the nature and health effect of the smoke being emitted.
- Failing to effect environmental levels established nationally and internationally.
- Failing to enforce smoke emission levels commensurate to a living, working or residential area and neighborhood.
- Failure to submit the National Environmental Management Authority details pertaining to the emission of toxic levels.”

Learned Counsel also referred to paragraph 3 of the Plaintiff’s Reply to the Written Statement of Defence, which reads –

“3. In reply too the Defendant’s paragraphs 8 and 9, the Plaintiff avers that this right to sue emanates from the right to a healthy environment under the same NEMA Statute, section 4.”

Learned Counsel for the Applicant argued that whereas the said section creates a right to a healthy environment, it also specifically provides for who will bring court action. He referred to Section 4 (3). The sub-section reads: -

“(3). In furtherance of the right to a healthy environment and enforcement of the duty to maintain and enhance the environment, the Authority or the local environment committees so informed under subsection (2) is entitled to bring an action against any other person whose activities or omissions have or are likely to have a significant impact on the environment to –

- prevent, stop or discontinue any act or omission deleterious to the environment;
- compel any Public Officer to take measures to prevent or to discontinue any act or omission deleterious to the environment;
- require that any on-going activity be subjected to an environmental audit in accordance with section 23 of this Statute;
- require that any on-going activity be subjected to environmental monitoring in accordance with section 24 of this Statute;
- request a court order for the taking of other measures that would ensure that the environment does not suffer any significant damage”.

Learned Counsel submitted on the right to NEMA or the local environmental committee.

He referred to sections 4(2) and 17 of the Statute (ante). They read –

“4(2). Every person has a duty to maintain and enhance the environment, including the duty to inform the Authority or the local environment committees of all activities and phenomena that may affect the environment significantly.”

17 (1) A Local Government System shall on the advice of the District Environment Committee appoint Local Environment Committees.

When appointed, the functions of the Local Environment Committee shall include the following :

- to prepare a Local Environment work plan which shall be consistent with the National Environment Action Plan and the District Environment Action Plan;
- to carry out public environmental education campaigns;
- to mobilize the people within its local jurisdiction to conserve natural resources through self-help;
- to mobilize the people within its local jurisdiction to restore degraded environmental resources through self- help;
- to mobilize the people within its local jurisdiction to improve their natural environment through voluntary self-help;
- to monitor all activities within its local jurisdiction to ensure that such activities do not have any significant impact on the environment;
- to report any events or activities which have or are likely to have significant impacts on the environment to the District Environment Officer, or to the appropriate Resistance Committee, Council or such other person as the District Resistance Council may direct;
- to carry out such other duties as may be prescribed by the District Resistance Committee or urban council in consultation with the Authority.”

Counsel submitted that the Plaintiff does not claim to be either of the two (the Authority or the Local Environment Committee) and therefore cannot establish a right under section 4 of the Statute and therefore had no locus standi.

Learned Counsel further submitted that even if the Plaintiff had a locus under common, law nuisance he had not pleaded the facts necessary to establish a cause of action. He submitted that Section 109 of Statute provides for what conforms to the Statute. Let me cite the section –

“ 109. Any law existing immediately before the coming into force of this Statute relating to environment shall have effect subject to such modifications as may be necessary to

give effect of this Statute; and where any such law conflicts with this Statute, the provisions of this Statute shall prevail.”

He noted that emission of gases into the air was covered by Section 58 of the Statute.

“ 58 (1).No person shall pollute or lead any other person to pollute the environment contrary to any of the standards or guidelines prescribed or issued under part VI and VII of this Statute.

(2). Notwithstanding sub-section (1), a person may exceed the standards and guidelines referred to in sub-section (1) if authorized by a pollution licence under Section 61 of this Statute.”

That for the Defendant to be labeled a polluter he must have acted under Parts VI and VII of the Statute. Counsel referred to Sections 3 (2) and 58 of the Statute. He also argued that in relation to air, emission standards are set out in Section 25 (1) (a) and (b) by NEMA. That in order for a cause of action to be established the Plaintiff must allege that the standards have been established and their particulars, and it must also allege that the emissions from the factory are in excess of those standards. That the plaintiff must also allege that the polluter has no licence and is therefore in breach. Learned Counsel submitted that none of the above had been pleaded. He cited C.A. No. 1/97: *AG vs. TINYEFUZA (S.C) and AUTO GARAGE & OTHERS vs. MOTOKOV (No. 3: [1971] EA 514*, regarding what constitutes a cause of action.

The next objection by Counsel for the Applicant was that no correct fee had been paid. That while the Plaintiff stated in paragraph 8 of the Plaintiff that the subject matter was valued at Shs. 60,000,000/= (Shillings Sixty million only); the fees paid were only Shs. 9,000/= (Shillings Nine thousand only) for two suits, as per the annexed general receipt. That under Order 7, Rule 11 of the Civil Procedure Rules the plaintiff was liable to be rejected. He prayed accordingly.

Finally, Learned Counsel argued that the plaintiff sought monetary relief purely. That, Sections 3 and 4 of the Statute prescribed the remedies none of which was monetary. That therefore, the plaintiff could not claim to be founded on section 4 of the Statute, and that, therefore, no plaintiff can legitimately claim general or special damages. I do not agree with Counsel that section 3 covers his argument. I however agree with him on the rest of the argument in this paragraph.

Mr. Olanya, Counsel for the Plaintiff/Respondent, replied as follows. The Chamber Summons application had been rendered improper on account of Counsel for the Defendant/applicant introduction of insufficient fees which had not been included in the grounds. Court fees should have been introduced under section 100 of the Civil Procedure Act. Learned Counsel cited *MARGARET KIWANA VS. CHIEF REGISTRAR OF TITLES*: MISC. APPL. 22/92 to say that Court should not entertain the issue of fees in this application.

In answer to the 1st submission by the Applicant’s Counsel, Counsel for the Respondent

submitted that “ this was clearly a common law action occasioned by the Defendants’ negligence”. He referred court to paragraph 3 of the plaint.

With regard to the Plaintiff’s locus standi, Counsel stated that it was derived from the common law of nuisance and could not be negated by the Statute. He also cited Section 109 of the Statute.

With respect to the cause of action, Learned Counsel for the Plaintiff/Respondent alleged that the plaint did not have to comply with Section 58 of the Statute and did not have to plead the standards that were violated. He submitted that paragraphs 3 and 6 of the plaint sufficiently laid out the particulars.

Counsel for the Respondent further contended that the required court fees were in fact paid. That in the plaint the Plaintiff sought four reliefs. That the court fees are paid on the reliefs claimed but not on the value of the subject matter. That Order 7, Rule 11 does not refer to the valuation of the subject matter but to the reliefs. He further contended that the obligation to value and assess court fees was on court and not the plaintiffs. That if the court assessed the Plaintiff’s reliefs at Shs. 4,500/=, which the Plaintiff paid, the court could not, in the absence of revaluation, condemn the Plaintiff to the rejection of his plaint. That, that apart the Court had not ordered any revaluation and so the application was premature. Counsel prayed for the rejection of the Chamber Summons application with costs.

In reply, Counsel for the Applicant briefly stated that there was no need to order a revaluation of court fees where the plaintiff made the value clear.

I shall start with the question of the cause of action. I would settle for the statement of Spry, V.P in the AUTO GARAGE case (ante) at p. 519 D that –

“ I would summarize the position as I see it by saying if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable then, in my opinion, a cause of action has been disclosed.....”

Thus in summary, a cause of action is constituted by the aforesaid three essential elements. Starting with the element that the plaintiff enjoyed the right, I will state this. An action founded on the provisions of a Statute must conform to those provisions and a Plaintiff cannot look beyond those provisions unless so provided by clear provisions of the Statute in question.

Section 4 of the Statute expressly vests a right to a healthy environment in every person, including the Plaintiff hereon. One needs to know what is meant by a “healthy environment”. It is my considered view, that parts VI and VII of the Statute provide, in technical terms, how a “ healthy environment” can be described. Part VI describes standards in respect of “air quality”, “water quality”, “standards of discharge of effluent into water”, “standards for the control of noxious smells”, and many other standards. This part of the Statute goes a step further in stating that the Authority, i.e. NEMA, is the body entrusted with the duty of establishing these standards. In my considered view, it is only after the standards have been established that one can gauge the totality of the right to a

healthy environment. It is at this point that violation of the right can be described or pointed without any difficulty both by the victim of the violation and the arbiter in any dispute.

Finally it is only at this point that the victim can invoke Section 58 of the Statute. Learned Counsel for the Applicant contended that the plaintiff did not allege the establishment of the said standards, that they had been violated and in what manner. Learned Counsel for the Respondent replied that paragraphs 3 and 6 of the plaintiff had clearly pleaded the particulars. That the Plaintiff's case was not based on the Statute and so he need not plead the particulars therein. This Court would have settled for the latter argument but for what I am going to point out here below.

It is trite law that in deciding the issue of cause of action only the plaintiff has to be looked: In the present action the plaintiff stated in paragraph 3 of his reply to the written statement of defence –

“3. In reply to the Defendant's paragraphs 8 and 9 the plaintiff avers that his legal right to sue emanates from the right to a healthy environment under the same NEMA statute (Act) Section 4.”

The plaintiff is bound by this pleading. It is in this vein that I now hold that no right has been defined by NEMA under part VI of the Statute. I proceed from this premise to hold that the plaintiff has failed to establish the first essential element for a cause of action, viz., a defined right (enjoyed by the plaintiff).

In view of the above holding, I find little difficulty in holding that the plaintiff fails on the second and third essential elements. The AUTO GARAGE case (ante) is authority for the legal proposition that “ the provision that a plaintiff not disclosing a cause of action shall be rejected is mandatory.” I shall follow this decision in the present case.

The second point raised by Counsel for the Applicant concerned the right to sue. Section 5 of the Statute reads –

“5 (1). There is established a body to be called the National Environment Management Authority in this Statute referred to as the “Authority”.

(2).The Authority shall be a body corporate with perpetual succession and a common seal.

(3).The Authority shall, in its own name be capable of suing and being sued and doing and suffering all acts and things as bodies corporate may lawfully do or suffer.” [Emphasis is mine]

Contrast this with the provisions of section 4(2), which reads –

“ (2) Every person has a duty to maintain and enhance the environment, including the duty to inform the Authority or the local environment committees of all activities and phenomena that may affect the environment significantly.”

[Emphasis is mine].

I find and hold that NEMA is the only person vested with the power and duty to sue for violations committed under the Statute; further that the only recourse available to every person whose right under this Statute is violated is to inform NEMA or the local environment committee of such violation. The plaintiff has no locus standi to sue for any violation under this Statute.

Counsel for the Applicant also sought to have the plaint rejected under Order 7, r. 11 (c) because of payment of insufficient fee. I consulted with the High Court Civil Registry and was given to understand that based on paragraph 8 of the plaint, the correct fee ought to have been Shs. 157,000/= (Shillings One hundred and fifty seven thousand shillings only). As a matter of fact, there was a general receipt on the court file showing Shs. 9,000/= (Shillings nine thousand shillings only) as “fees for Civil Suit 465 and 466/2000” i.e. two suits. As is clear from the head of this ruling, the parent suit for this application is C.S. 466, I was utterly amazed by the vehement assertion by Counsel for the Respondent that the required fees were in fact paid etc. I would not buy this argument. Rather I would not reject the plaint under rule 11(c) without first ordering the Plaintiff to pay the correct fee and after the plaintiff disobeys the court order.

To conclude the application is hereby upheld and the plaint rejected for the reasons I have endeavoured to give. The Plaintiff shall pay the costs of this application.

G. Tinyinondi

JUDGE.

24/01/2001

7/2/2001: 9:20 am

Ms. Kembabazi holding brief for Mr. Byenkya for the Applicant/Defendant.

Mr. Alenyo for the Respondents.

Jolly – Court Clerk.

Court: An affidavit of service dated 6/2/2001 indicates that Counsel for the Respondent was duly served but he is not here.

Signed

Deputy Registrar