

UGANDA / JUDGMENT

Twinomugisha v Attorney General (Civil Suit 41 of 2020) [2023] UGHC 283 (29 September 2023)

[2023] UGHC 283

COURT

High Court of Uganda

BEFORE

Mugabo, J

CASE / FILE NUMBER

Civil Suit 41 of 2020

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. 41 OF 2020

| 1.
TWINOMUGISHA AUGUSTINE | |

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| 2.
KABANDA AHMED | :::::::::::::::::::::PLAINTIFFS |

| 3. TIMARIRWA SAMUEL | |

| (On their behalf and on behalf of 317 others) | |

VERSUS

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

BEFORE HON. MR. JUSTICE VINCENT EMMY MUGABO**RULING ON PRELIMINARY OBJECTION.****Introduction**

This ruling arises from a preliminary objection raised by Racheal Atumanyise, counsel for the defendant, challenging the plaintiffs' failure to comply with *order 1 rule 8 of the civil procedure rules S. I 71*. The basis of the preliminary objection was that the representative order dated 26th of November 2019 granted by this court under *Miscellaneous Cause No. 12 Of 2019* wherein the plaintiffs were granted leave to file a representative suit on their own behalf and on behalf of 317 others was not advertised in the monitor newspaper in compliance with *order 1 rule 8 of the civil procedure rules*.

Background

Ruling of Hon. Justice Vincent Emmy Mugabo Page 1 of 13 The plaintiffs instituted this suit against the defendant on their own and in a representative capacity for other 317 people claiming special, general, and aggravated damages for the alleged destruction of their various food and cash crops without compensation. The plaintiffs obtained a representative order *vide Miscellaneous Cause No. 12 of 2019* wherein they were granted leave to file a representative suit against the defendant on their own behalf and on behalf of 317 others. In the same order, the plaintiffs were required to advertise the order in the *Monitor newspaper* which is widely read in the region.

The defendant filed its written statement of defence where she denied all allegations and maintained that the plaintiffs have no cause of action against her. When the matter came up for mention on the 1st of June 2023, the defendant's counsel informed Court that she intended to raise a preliminary point of law challenging the plaintiffs' failure to comply with order 1 rule 8 of the civil procedure rules. Court ordered counsel parties to file written submissions, hence this ruling.

Representation and hearing

M/S Nuwagira, Tusiime Advocates represented the plaintiffs while Ms Racheal Atumanyise from The Attorney General's Chambers represented the defendant. Both counsel filed written submissions which have been considered by this court.

Issues

Both Counsel raised and submitted on two issues for this court's determination, to wit:

- 1. Whether the plaintiffs complied with order 1 rule 8 of the civil procedure rules.
- 2. What is the available remedy for the parties?

Consideration by Court

Issue 1: Whether the plaintiffs complied with order 8 rule 1 of the civil procedure rules.

On the first issue, counsel for the defendant argued that where a person or persons have obtained an order to file a representative suit, *Order 1 Rule 8 of the civil procedure rules* requires such person or persons to give notice of the institution of the suit to all such persons either by personal service or where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

Counsel for the defendant referred Court to the position in the case of *Ibrahim Buwembo and others Vs. UTODA Ltd HC civil suit no. 664 of 2003* where court held thus: "It would appear to me that the wording of O.1 r.8 with regard to notice either by personal service or by public advertisement as the court may in each case direct is mandatory. Furthermore, the requirement to give proper service notice cannot be regarded as mere technicality or direction that can be dispensed with. The notice by public advertisement must disclose the nature of the suit as well as the reliefs claimed so that the interested parties can go on record in the suit either to support the claim or defend it."*

Counsel for the defendant argued that the plaintiffs only obtained a representative order but did not duly advertise the order in the daily monitor as directed by the court to notify all the intended plaintiffs of the suit. It was counsel for the defendant's argument that the 317 persons could not have been effectively notified and neither were they given an opportunity to consent to the institution of the said suit. Counsel for the defendant further argued that the list of all claimants should have been attached to the advertisement.

Counsel for the defendant further relied on the case of *Kasozi Joseph and Others Vs UMEME (U) Ltd HCCS 188 of 2010* where Justice Hellen Obura stated that: "I wholly agree with the submission of counsel for* the defendant that the list of all persons should have been advertised in the newspaper so as to enable them to respond in accordance with rule 8(2) of order 1.... No intended plaintiff could be said to have been informed about the intended institution of the suit when no specific name was mentioned. I find that failure to list the intended plaintiffs whatever their number was contravenes the provisions of Order 1 Rule 8 and the effect is fatal in that no notice was given to them as required by the rules. I believe that the rules committee by including rule 8(2) of order 1 could not have intended that a blanket notice that does not name any person would amount to proper service of the notice for the purpose of enabling them to apply to court to be made party to the suit. I find that this is an acceptable situation where spirited persons purport to represent a group of persons without their knowledge or consent*."

Counsel for the defendant invited Court to make a finding that no effective service was given to all the intended plaintiffs and consequently, there was no compliance with *order 1 rule 8 of the civil procedure rules*.

Counsel for the plaintiffs opposed the preliminary objection raised by the defendant and stated that the representative order was advertised in the *Monitor newspaper* on 5th February 2020 *(A copy of the newspaper was attached to the plaintiffs' submissions and marked as Annexure "B").*

Counsel for the plaintiffs further argued that the preliminary objection raised by the defendant is based on the old law which has since been amended. I shall reproduce amended *rule 8 of order 1* at a later stage of this ruling.

It was the counsel's argument that the said 317 plaintiffs consented to the application for the representative suit vide *Misc. Cause No. 012 Of 2019* and every plaintiff was named and appended his or her signature.

Counsel for the plaintiffs argued that there was no need to attach the names of the 317 plaintiffs in the advert because the order of the court did not stipulate so and that with the amended rules, it is no longer a requirement. Counsel for the plaintiffs further argued that since the plaintiffs had already consented, there was no need to publish the same and that's why the court did not order so. Counsel for the plaintiffs submitted that the preliminary objection raised by the defendant is based on the old law and should therefore be overruled.

In rejoinder, counsel for the defendant reiterated their argument and cited the case of *Abdu Ochaki & 98 others Vs British American Tobacco Uganda Limited HCCS No 39 of 2013*, where Hon Justice Wilson Musene (as he was then) noted that *"in so far as the list of names has not been advertised by the plaintiffs, the suit is not compliant with the law and is therefore incompetent."* Counsel for the defendant further argued that in as much as there is an amendment to rule 8 of the order, the requirement to give notice to the plaintiffs cannot be dispensed with since the same is provided for under *order 1 rule 8(4) of the civil procedure (amendment) rules 2019.*

Before I delve into the merits of this application, it is very critical to refer to *rule 8 of Order* 1 as amended by *Civil Procedure (Amendment) Rules 2019*

"8. One person may sue or defend on behalf of all in same interest.

- *(1) A person may institute a representative suit on behalf of all plaintiffs or all defendants, as the case may be, who have the same actual and existing interest in the subject matter of the intended suit, for the benefit of all.*
- *(2) An application for a representative order shall be made by an intending plaintiff or defendant who intends to represent all plaintiffs or all defendants for the benefit of all as the case may be, who have the same actual and existing interest in the subject matter of the intended suit.*
- *(3) Before the court grants an order for a representative suit, the applicant shall satisfy the court that—*

- *(a) All the plaintiffs or defendants, as the case may be, have an actual and existing interest in the subject matter of the intended suit;*
- *(b) All the persons represented have authorized the applicant to sue or defend in the suit, and the authorisation shall be in writing duly signed by the represented persons; and*
- *(c) The application is brought with a proposed plaint or defense showing—*
- *(i) a list of all persons so represented; and*
- *(ii) that all persons so represented have the same actual and existing interest in the suit.*

(4) Subject to subrule (2), the court shall, in such case, give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court may in each case direct.

Ruling of Hon. Justice Vincent Emmy Mugabo Page 6 of 13 *(5) Any person with the same interest wishing to be made a party to a representative suit may apply to the court to be made a party to the suit.*

(6) For purposes of this rule, "a representative action" means a suit in which there are numerous persons having the same interest in one suit and where one or more of such persons, may, with the permission of the court, sue or be sued or may defend in the suit on behalf of or for the benefit of all persons interested."

A representative suit is a legal proceeding in which one or more individuals, known as plaintiffs or class representatives, file a lawsuit on behalf of a larger group of people who have similar claims or grievances against a defendant or group of defendants. The purpose of a representative suit is to allow multiple individuals with similar legal issues to consolidate their claims into a single lawsuit, thereby saving time and resources for both the courts and the parties involved.

As it was held in the case of *Ibrahim Buwembo and 2 others versus M/s UTODA Ltd HCCS 664 of 2003* by Justice Kiryabwire (as he was then): "the object of Order 1 rule 8 is to facilitate a large group of persons who are interested in the same action to sue collectively without recourse to the normal procedure where each one of them would individually maintain a separate action by way of a separate suit..... The person concerned must have the same interest in the suit and can collectively be called plaintiffs or defendants."*

Plaintiffs under representative suit are usually interested in the same remedies and their consent or authorization must be obtained prior to the application of the representative order. In the case of *Bunyoro Kitara Reparations Agency Ltd Vs Attorney General and 3 others CS No 23 of 2016*, Justice Gadenya Paul Wolimbwa stated that "I may equally add that the intended plaintiffs must be interested in the same remedies and their consent must be obtained before an application*

for a representative order is applied for. Order 1 rule 8 further requires that the representative order must be advertised as directed by the court and it must contain the full list of all the identified prospective plaintiffs or defendants."

Indeed, the amendment of rule 8 of order 1 in the *civil procedure (amendment) rules 2019* ushered in a mandatory requirement to obtain the consent of intended plaintiffs before an order of a representative suit is granted. This is the gist of *Order 1 rule 8(3)(b) of the civil procedure rules (as amended)* which provides thus:

"3. Before the court grants an order for a representative suit, the applicant shall satisfy the court that –*

- *(a).....*
- *(b)all the persons represented have authorized the applicant to sue or defend in the suit, and the authorisation shall be in writing duly signed by the represented persons."*

I am aware that the issue here is not whether the consent or authorization was obtained prior to obtaining the representative order but rather whether the plaintiffs complied with order 1 rule 8(4) of the civil procedure rules as amended which requires effective notice of the order to the other plaintiffs, and in this case the 317 others.

Order 1 rule 8(4) of the civil procedure rules as amended states that:

"(4) Subject to subrule (2), the court shall, in such case, give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court may in each case direct."*

I must state that the amendment of rule 8 of order 1 of the civil procedure rules ushered in a two-step process of obtaining consent or authorization from all persons to be represented. The first step is to obtain authorization from the plaintiffs prior to obtaining a representative order whose purpose is to allow the intended plaintiffs to opt-in and the second step is notification of all intended plaintiffs of the representative order so that, for one reason or the other, those plaintiffs who wish to opt out can do so.

Counsel for the defendant argued that the notification *order 1 rule 8(4) of the civil procedure rules* is mandatory while counsel for the plaintiff counter-argued that the notification under the same rule may be dispensed with since the new rule requires obtaining consent prior to obtaining a presentative order.

It appears to me that the purpose of the notification under order 1 rule 8(4) is to notify the class members to be given an opportunity to opt-out if, for instance, they don't wish to be bound by the ensuing judgement of the Court or if at any stage of proceedings, they wish to pursue their own separate legal action.

In the case of **Kiiza Luuka And 4 Others Vs Uganda World Life Authority and Another HCT -01 – CV – CS No. 0039 Of 2010** Hon. Justice Vincent Wagona stated that *“The main import of this requirement is to avoid scenarios for example where parties may find it desirable or convenient to dissociate from the suit by raising excuses of lack of knowledge of the suit and the lack of an opportunity to be heard, or parties prosecuting cases without the consent of the others and exposing them to the associated risks of litigation such as payment of costs and executions against them.”**

It is therefore mandatory that the plaintiffs comply with **Order 1 rule 8(4) of the civil procedure rules (as amended)** so that the class members are given the opportunity to opt out, even though they might have given authorization prior to obtaining the representative order. This avoids excuses for lack of knowledge of proceedings or contestation of courts' judgement since the outcome of the case is binding on all parties.

In the present case, would a mere advert in the newspaper which had no attachment of the names of the intended plaintiffs suffice? I am of the view that the class members could not know that the order was granted when no single name was mentioned in the advert.

It, therefore, follows that even when authorization from the class members is obtained in accordance with order 1 rule 8 (3)(b), a notification by way of public advertisement if a court deems that it is the most appropriate, should have the list of all intended plaintiffs attached to it for it to be effective.

As such, I find that the plaintiffs did not comply with the requirement in **order 1 rule 8(4) of the Civil Procedure Rules (as amended)** to the extent that the advert run in the **Monitor newspaper** on 5th February 2020 did not have an attached list of 317 other plaintiffs.

Issue 2: What is the available remedy?

Counsel for the defendant submitted that noncompliance with order 1 rule (8) is not a mere technicality but a breach of procedural law and consequently, this suit should be struck out with costs.

I note that a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit **(see**

****Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696)****

The question I need to address now is whether, in the circumstances of this case, non-compliance with **order 1 rule 8(4) of civil procedure rules (as amended)** would be fatal to the suit.

The facts in the cases of **Bunyoro Kitara Reparations Agency Ltd case (Supra)*, *Kasozzi Joseph (supra)*, and *Ibrahim Buwembo and others case (supra)** ought to be distinguished from the present case. In all the cited former cases^{*}, the plaintiffs had not particularized other intended

plaintiffs to be represented and had not sought their consent prior to obtaining the respective representative orders. In the instant case, there was authorization by other plaintiffs prior to obtaining the representative order. What was not done by the plaintiffs was a notification of the representative order to the other 317 plaintiffs so that those who may wish to opt-out can do so.

In the case of **Kiiza Luuka (Supra)** court dealt with the same scenario where the plaintiffs had obtained the representative order with authorization from the class members but did not give an effective notice of the representative order under the amended civil procedure rules. In that case, my learned colleague, Hon. Justice Vincent Wagona stated thus:

*"I am guided by Section 98 of the Civil Procedure Act that provides for the inherent powers of the High Court and states as follows: 'Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.' I believe the court when exercising its inherent powers would consider what would be the just decision to take in all the**

circumstances of each particular case. I am also alive to Section 33 of the Judicature Act that provides for the need to grant remedies that guard against generating multiplicities of legal proceedings. Further, Article 126 (2) (e) the Constitution requires me to administer substantive justice without undue regard to technicalities."

I am persuaded by the observation of Hon. Justice Vincent Wagona in the case of **Kiiza Luuka (supra)**. I hasten to add that the court is cognizant of the very purpose of representative suits which is to allow multiple individuals with similar legal issues to consolidate their claims into a single lawsuit, thereby saving time and resources for both the courts and the parties involved. Representative suits also ensure consistency in judgements and allow fair compensation especially when the damages suffered by individual class members are relatively small, making it impractical for them to pursue individual lawsuits.

In the present case, the plaintiffs obtained a representative order on the 22nd of November 2019 to represent themselves and 317 other persons. The list of the other 317 is ascertainable from the record where the majority appended their signatures or fingerprints. This is an indication that they consented to the application for a representative order.

I, therefore, find that the failure to attach the list of 317 class members in the advert that ran in the monitor newspaper on 5th February 2020 is not fatal but curable by way of re-advertisement in order to meet the ends of justice. I am convinced that this will not in any way cause inconvenience to the defendant since court records show that there is an ongoing engagement between the parties.

In conclusion, the preliminary point of law raised by the defendant is overruled with the following orders:

- (1) The Plaintiffs shall re-advertise the representative order with a full list of all 317 persons represented by the Plaintiffs in a Monitor newspaper and file a copy thereof in court within 30 days from the date of this ruling.

- (2) Civil suit No. 41 of 2020 is accordingly fixed for mention on the 24th day of January 2024.
- (3) Each party shall bear its own costs.

It is so ordered.

Dated at Fort Portal this 29th day of September 2023

Vincent Emmy Mugabo Judge

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