



THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE CLAIM NO. 210/2020
(Arising from KCCA/CEN/LC/185/2018)

EFRANCE MUSIMENTA.....CLAIMANT

VERSUS

UNITED BANK FOR AFRICA.....RESPONDENT

BEFORE:

THE HON. JUSTICE ANTHONY WABWIRE MUSANA,

PANELISTS:

1. Mr. JIMMY MUSIMBI
2. Ms. ROBINAH KAGOYE &
3. Mr. CAN AMOS LAPENGA

RULING

Introduction

- [1] When this matter came up before the panel on the 21st of November 2022, Mr. Emmanuel Wasswa, appearing for the Respondent indicated that he had three preliminary points of law that he wished to raise. The Court invited Counsel to file written submissions on the points of law.

Submissions of Counsel for the Respondent.

- [2] On the first preliminary point, it was submitted for the Respondent that the claim was fatally defective for arising out of an out-of-time reference. The reference to the Industrial Court was made on the 27th of November 2020, almost two years after the complaint had been made to the labour officer on the 13th May 2018. The respondent contended that this offended Section 5 of the Labour Disputes(Arbitration and Settlement) Act 2006("LADASA"), Section 93(7) of the Employment Act, 2006, and Rule 5(1) of the Labour Disputes(Arbitration and Settlement)(Industrial Court Procedure) Rules 2012. Counsel

cited the cases of **Osilo Jackson v Industrial Security Services Ltd**¹ and **Uganda Revenue Authority v Consolidated Properties Ltd**² in support of his proposition.

- [3] On the second preliminary point, it was submitted that the claim was fatally defective for having been brought against a non-existent entity, with no entity known as United Bank of Africa. The known financial institution is United Bank of Africa. Counsel cited **V.G Keshwala & Sons v. M.M Sheik Dawood**³ in support of the proposition that a suit against a non-existent party is a nullity and therefore, no cause of action is disclosed against it.
- [4] On the final preliminary point, it was submitted that Claim is fatally defective for arising out of invalid proceedings before the labour officer. In the Respondent's view, it was a nullity for the labour officer to initiate both mediation and adjudication proceedings in one swap. Counsel cited the case of **AIG Uganda Limited v James Maguru**⁴ in which this Court found it unacceptable for a labour officer to employ more than one method of dispute resolution.

Submissions of the Respondent

- [5] The Claimant countered that the Respondent did not have locus standi, having filed the memorandum in reply six days out of time and without leave. Counsel contended that this offended Rule 5(4) of the LADASA Rules. Counsel relied on the case of **Red Concepts Ltd vs. Uganda Revenue Authority** in support of his objection.
- [6] In respect of the claim being filed out of time, it was submitted for the claimant that the proceedings at the labour office were protracted and would require evidence. Counsel cited **General Parts (U) Ltd vs. Middle North Agencies Ltd & Anor**⁵ to buttress the proposition that where evidence would be necessary to resolve a point, then such point cannot be summarily determined. Counsel submitted that the Respondent did not seek a referral of the matter to the Industrial Court within 4 weeks as provided in Section 5 of the LADASA⁶. As such, the Respondent could not approbate and reprobate. He added that the memorandum of claim was filed within the seven day period after the issue of a Notice of Claim under Rule 5 of the LADASA Rules.
- [7] In respect of the error in naming the Respondent, Counsel submitted that this was a curable misnomer correctable by amendment. Counsel cited the cases of **A.C Yafeng Construction Limited vs The Registered Trustees of Living World Assembly and**

¹ LDC 210/2015

² CACA 31 of 2000

³ HCMA No. 543 of 2011

⁴ LDA No. 029 of 2017

⁵ HCCS No. 610 of 2013

⁶ Counsel cited the case of Fiona Mawadri Mulema vs. Stanbic Bank Uganda Ltd LDR 224/2018 in support of this submission.

Another⁷, **Nyinakiza Loy Rhina vs. Elgon Terrace Hotel Ltd & 2 Others** ⁸ and **Trust Ventures Ltd vs Powerfoam (U) Ltd** ⁹ in support thereof.

- [8] In relation to the nullity in that the labour officer initiated both mediation and adjudication proceedings in one fell swoop, the Claimant contended that the matter before the labour officer did not proceed at all. Counsel suggested that it would be necessary to lead affidavit evidence on the point to establish what transpired. Counsel also cited the Mulema (supra) and AIG Uganda Limited (supra) cases in support of the view that this Court would not strike out a claim where a labour officer had adopted more than one method of resolving a dispute.

Claimant's rejoinder

- [9] In rejoinder, the Respondent asserts that it was served on the 9th March 2021 and filed its memorandum on 16th March 2022 within the 7 day period as prescribed under Rule 5 of the LADASA Rules. Counsel cited the authority of **Stop and See (U) Ltd v Tropical Africa Bank Ltd** ¹⁰ for the proposition that time is computed from when summons are served on the defendant.
- [10] Counsel contended that the principle of estoppel was not applicable to the facts at hand in that it did not override substantive law.¹¹ Counsel reiterated the prayers that the preliminary objections be upheld and the claim dismissed with costs.

Analysis and Decision of the Court

- [12] Upon perusal of the pleadings, and written submissions of Counsel, this Court was invited to consider and determine the following issues:
- (i) Whether the Respondent has the necessary locus standi?
 - (ii) Whether the reference was filed out of time?
 - (iii) Whether the claim was brought against a non-existent party? and;
 - (iv) Whether a reference arising from proceedings where a labour officer adopted more than one method of dispute resolution, is a nullity?
- [13] In definitive terms, in the case of **Mukisa Biscuits Manufacturing Co Ltd vs. West End Distributors Ltd**¹² a preliminary objection was defined as follows:

⁷ H.C.M.A No. 0001/2021

⁸ LDMA 146 of 2018

⁹ H.C.C.S No. 699 of 2017

¹⁰ H.C.M.A No.33 of 2010

¹¹ Maritime Electric Co. Ltd v General Diaries Ltd [1937] 1 All ER 748 at 753

¹² (1969) EA 696

"So far as I am aware, 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."

It follows therefore, that the objection must be on a pure point of law and not any facts that have to be ascertained.¹³ We will resolve the issues/preliminary points in the manner spelt out in paragraph 5.0 above.

Locus Standi

- [14] It was submitted that the Respondent did not have locus standi in the claim before us. The terms has been defined thus;

"The term locus standi literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no locus standi means that he has no right to appear or be heard in a specified proceeding".¹⁴

Mr. Bazira submitted that the memorandum of reply was filed out of the statutory time frame provided under Rule 5(4) of the **Labour Disputes (Arbitration and Settlement) (Industrial Court Procedure) Rules, 2012**, (LADASA Rules) which requires a respondent to file a memorandum of reply within 7 days of service of a notice of claim. The respondent is required to serve the same on the claimant and file an affidavit of service as provided under Rule 5(5).

- [15] In the case before us, the memorandum of claim was filed in this Court's registry on the 2nd day of March 2021. The memorandum in reply was filed on the 16th of March 2021. Neither of the parties appear to have complied with rule 5(3) and 5(5) in filing an affidavit of service accompanying their respective memoranda. The Claimant contended that service was effected on the Respondent on the 2nd of March 2021. The Respondent contends that it was served on the 9th of March 2021 and filed the memorandum on the 16th of March 2021. It appears to us that absent of an affidavit of service, the claimant's assertion that the memorandum of claim was filed out of time is refutable. In the case of **Dr. James Bunoti vs AAR Healthcare Uganda Ltd & Anor**¹⁵, this Court found these provisions to be couched in mandatory terms. The onus of proving the filing out of time lies on the claimant on the premises of Section 100 of the Evidence Act Cap. 6.
- [16] The provisions of Order 9 Rule 5 of the Civil Procedure Rules S.I 71-1 is of very instructive analogical purpose. Where a plaintiff seeks to progress and the defendant has failed to file a defence under the rules, the Plaintiff is required to file an affidavit of service of

¹³ (Ibid) Per Sir Charles Newbold P. "A preliminary objectionraises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained" This passage was cited in General Parts(U) Ltd vs Middle North Agencies and Anor H.C.C.S No. 610 of 2013

¹⁴ Per Mubiru J in Dima Dominic Poro Vs Inyani Godfrey Civil Appeal No.17 of 2016

¹⁵ LDMA 140/2022

summons detailing the defendant's failure to file a defence within the prescribed time. In the case before us, to afford herself of the advantage of documents filed late, the Claimant ought to have filed an affidavit of service detailing the date of service of the memorandum of the Respondent. Absent of any affidavit of service, we are constrained to accept the proposition that the Respondent did not have locus standi. On the issue, we find in the negative. Accordingly, the objection is overruled.

Reference Out Of Time

[17] It was submitted for the Respondent that the Claimant filed the reference 2 years after the complaint had been made to the labour office. For a proper resolution on this point, it is important to lay out the procedural history of the matter before the labour officer. Counsel for the Claimant was of the view that there is a need to take evidence on these proceedings. We respectfully differ. The proceedings of the labour officer are forwarded to the Industrial Court in every event of a reference or appeal. The said records are made available to this Court by statute. Under Rule 3(3) of the LADASA Rules, a reference by a labour officer is accompanied by a report describing the dispute and steps taken to resolve it and all documents and information furnished to the labour office by the parties. Sitting as a referral Court, we have the benefit of the lower record. Having perused the same, this is the procedural history at the labour officer:

- (i) On 15th May 2018, the Claimant filed a complaint with the Labour Officer.
- (ii) On 11th July 2018, the Labour Officer at the Directorate of Gender Community Services and Production at Kampala Capital City Authority forwarded the complaint to the Respondent.
- (iii) On 24th September 2018, the Labour Officer received the Respondent's response.
- (iv) The parties appeared before the labour officer on the 31st September 2019, 17th March 2020, and 23rd November 2020
- (v) On the 27th November 2020, the Labour officer referred the dispute to this Court.
- (vi) On 2nd March 2021, the Registrar of this Court issued a notice of claim. On the same day, the Claimant filed her memorandum of claim.
- (vii) On the 16th day of March 2021, the Respondent filed its memorandum in reply.
- (viii) By letter dated the 11th of August 2021, the Labour Officer forwarded a copy of the record to this Court.

[18] From a review of the procedural history, it determinate that the proceedings before the labour officer spanned a period of 16 months. The Respondent submits that the reference was in contravention of Section 5 of the LADASA, which requires a reference within 4 weeks after receipt of the dispute is it has not been settled. Further that this contravened

Section 93(7) of the Employment Act in that it exceeded the 90 day period within which a labour officer is required to have issued a decision on the complaint. On his part the claimant submits that the claim was filed in time. **Under Section 5(1) of the LADASA**, the labour officer may refer a dispute to the Industrial Court if it has not been resolved within 4 weeks or within an extended period of 2 weeks. In **Section 5(3) of the LADASA**, a party may refer the labour dispute to the Industrial Court within 8 weeks from the date it is reported and under **Section 93(7) of the Employment Act 2006**, a party may pursue a matter at the Industrial Court if there has been no decision on the complaint within 90 days from the date it is reported. In **Kizza Gerald and Bwokino Patrick Vs Camusat Uganda Limited**¹⁶ we found that under **Section 93(7) of the Employment Act** a claimant had an option to seek redress at the Industrial Court if a labour officer had not determined the case within 90 days or to await a decision of a labour officer. We found that there was no requirement in the section that a labour officer must dispose of a dispute within 90 days but should he or she not to do so, then the claimant would have an option to seek a referral or refer the matter to the Industrial Court.

- [19] We think the case of Osilo Jackson (supra) cited by the Respondent is distinguishable from the present case. In that case, the Claimant was terminated in the year 2005 and filed his claim in 2015, 10 years after his termination. The Court found that the Limitation Act Cap. 70 barred that claimants claim.
- [20] It is our conclusion that the Labour Officer was entitled to consider the matter beyond the 90 day period provided under Section 93(7) of the Employment Act. The matter was properly considered until the 27th of November of 2020 when the Labour officer decided to refer the same to this Court. We have not been persuaded to depart from our decision in the Kizza Gerald Case (op cit). Issue 2 is answered in the negative. Accordingly, the preliminary objection is overruled.

Non-Existent Party

- [21] The Respondent submitted that the claim had been filed against United Bank of Africa (a non-existent entity) as opposed to United Bank for Africa which is a registered financial institution in Uganda. It is trite that a suit cannot be maintained against a non-existent party or person. There is a plethora of authorities on the point including the cases of V.G Keshwala and Trust Ventures, cited by the Respondent.
- [22] The facts in the claim before us are that the memorandum of claim bearing the court stamp dated the 2nd March 2021, lists the respondent as United Bank For Africa. At paragraph 2 of the memorandum, the respondent is described as a limited liability company duly established under the laws of Uganda. Counsel for the Respondent refers to a memorandum of claim dated 2nd March 2022 brought against United Bank of Africa. The Notice of Claim dated 2nd March 2021 and the Reply to the Memorandum of Claim bear the reference to United Bank of Africa. In view of these facts, we are unable to accept

¹⁶ LDR 081 of 2017

the contention that the memorandum of claim was filed against a non-existent party. The memorandum speaks for itself and bears the name United Bank For Africa as the listed Respondent. For this reason alone, we would answer issue 3 in the negative and overrule the objection.

- [23] Assuming, however, that the Claimant had indeed filed the claim against United Bank of Africa, there is now a school of thought that holds that expressions of names should be construed objectively. In the case of AC Yafeng Construction Limited (op cit) which was cited by the Claimant, a preliminary objection was raised in respect of an applicant named as AC Yafeng Construction Limited and AC Yafeng Construction Company Limited. It was contended that the former was a non-existent entity without capacity to sue and whose pleadings were fatally defective and incurable. Invoking the misnomer principle, the Honourable Mr. Justice Stephen Mubiru, stated that 2 things were required; (i) the author intended to name the subject to whom the name is now being attributed; and (2) a reasonable person would attribute the name to the person to whom it is now intended to be attributed. The principle was found to be applicable where corporations were named as partnerships, a parent company instead of a subsidiary and a corporation in liquidation instead of its successor. His Lordship found that AC Yafeng Construction Limited did not exist in fact but was inadvertently given an incorrect name by omission of the word "company" from its true name. A reasonable person would attribute the name to "AC Yafeng Construction Company Limited".
- [24] We thought it prudent to discuss the A.C Yafeng case in some detail because we think it to be applicable to the present case. Would a reasonable person attribute the name United Bank of Africa to United Bank For Africa? We think that in the answer to this question the two names may easily be taken to be directly connected. In other words, United Bank of Africa would be easily attributable to United Bank For Africa. Applying the misnomer test to the facts of this case, we are of the reasonable conclusion that any reference to United Bank of Africa in these proceedings was a reference to United Bank for Africa. Such misnomer is curable by amendment and should this be the case, we order the misnomer corrected by amendment. As a consequence, the preliminary objection is overruled.

Nullity of proceedings

- [25] It was submitted for the Respondent that the labour officer carried out both a mediation and adjudication in one swap. From our procedural history, we determined that the;
- (i) The labour officer conducted sessions in which facts were taken and advised the parties to settle the matter.
 - (ii) The labour officer did not determine any of the issues placed before her.
 - (iii) Evidence may have been placed before the labour office but was not evaluated.

- (iv) The complaint was referred to this Court in November 2020 without a determination.

[26] While it is true that the labour officer did in fact issue adjudication and mediation notices, the proceedings before her were not recorded as adjudicatory. There were no issues spelt out, evidence was not taken, there was no examination in chief, cross examination and re-examination, no submissions were made and finally no decision was rendered. The steps taken reflect a mediation. Therefore, we cannot accept the Respondent's submission that the proceedings were a nullity and as, such the present claim is fatally defective. In the AIG Uganda Ltd case (supra), where a labour officer attempted mediation, failing which, proceeded to adjudication of the matter, this Court proceeded to hear the matter as if it had been referred under Section 5(2) of LADASA. The result was not to render the proceedings a nullity. We agree with this position. While we have not found evidence of adjudicatory proceedings, we do not think that proceedings by a labour officer involving more than one method of dispute resolution, render a reference before this Court a nullity. Far from it but tis Court would have jurisdiction to hear and conclude the matter. We answer issue four in the negative and overrule the objection.

Decision and Orders:

[27] Accordingly and in all circumstances, the preliminary objections are overruled. As the parties have filed their respective witness statements and trial bundles, Labour Dispute Reference No. 210 of 2022 is set down for hearing on the 3rd day of July 2023 at 9:30 a: m

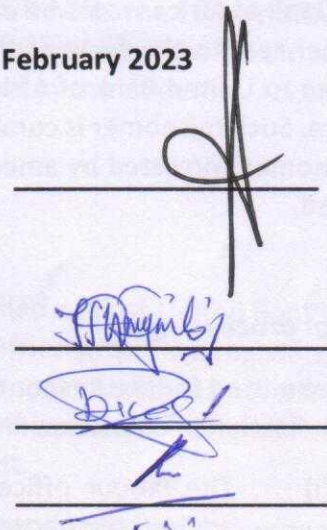
Dated, signed, and delivered at Kampala this 10th day of February 2023

SIGNED BY:

ANTHONY WABWIRE MUSANA, Judge

PANELISTS

1. Mr. JIMMY MUSIMBI
2. Ms. ROBINAH KAGOYE
3. Mr. AMOS CAN LAPENGA



The image shows three handwritten signatures in blue ink, each written over a horizontal line. The top signature is the largest and most prominent, followed by two smaller signatures below it.

Delivered in open Court in the presence of:

1. Mr. Thomas Oosan for the Respondent.
2. Ms. Rachel Ashaba H/B for Mr. Anthony Bazira for the Claimant.

Court Clerk. Mr. Samuel Mukiza.