# THE REPUBLIC OF UGANDA

# IN THE SUPREME COURT OF UGANDA AT KAMPALA

***(Coram:*** *Katureebe; C.J., Tumwesigye; Arach-Amoko; Mwangusya; Mwondha; JJ.S.C.)*

## CIVIL APPEAL NO. 013 OF 2014

## BETWEEN

**KAMPALA CAPITAL CITY AUTHORITY ..... RESPONDENTS**

**AND**

**KABANDIZE AND 20 OTHERS ..... RESPONDENTS**

*(Appeal and Cross Appeal arising from the judgment of the Court of Appeal in Civil Appeal No 28. of 2011 by Nshimye, Kakuru and Tibatemwa JJA dated 4th March 2014)*

**JUDGMENT OF MWANGUSYA JSC**

The respondents/cross appellants were all employees of the appellant for periods ranging from 6 to 36 years on permanent terms. On 4th April 1997 the appellant terminated the services of the respondents who were paid various amounts specified in their letters as their terminal package. The respondents were not satisfied with the said package claiming that some of their entitlements had not been met. They filed a suit in the High Court seeking various reliefs pertaining to what they claim were their unpaid entitlements under the Local Government Act, 1997.

According to paragraph 7 of the plaint, it was pleaded that a Statutory Notice of Intention to sue was duly served on the Town Clerk of the City Council of Kampala in accordance with the provisions of Section 1 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, 1969.

In paragraph 7 of the written statement of defence it was stated that no admission is made of the claim in paragraph 7 of the plaint that the statutory notice of intention to sue was duly served on the City Council. At the scheduling Conference two issues were framed for trial as follows:-

(a) Whether the statutory notice was served on the defendant.

(b) Whether the plaintiffs are entitled to the reliefs which they are seeking in the plaint.

The trial of the case proceeded with the parties adducing evidence to prove their respective cases. The issue relating to service of the statutory notice was not canvassed by any of the parties until after final submissions had been made and the case was pending judgment. It was then that Counsel for the appellant applied to re-open the case for trial of the issue as to whether or not the requisite statutory notice was served on the appellant and if not whether the failure to serve the notice vitiated the trial.

The trial Judge (Vincent Musoke Kibuuka) after a thorough analysis of the evidence regarding service of the Notice made a finding that the Statutory Notice, a mandatory requirement under Section 2 of the Civil Procedure and Limitations (Miscellaneous Provisions) Act had not been served on the appellant and the effect of the failure to serve the notice was that the suit was rendered incompetent. He went ahead to dismiss the suit after finding that it was not necessary to proceed with resolution of substantive issue whether the plaintiffs were entitled to the reliefs sought. He also ordered that each party meets its own costs.

The respondents appealed to the Court of Appeal on ground that the learned trial Judge had erred in law and fact when he held that the respondents had not proved that the statutory notice was served upon the appellant. In the alternative that the Learned trial Judge erred in law when he held that a suit filed without serving a Statutory Notice on the appellant was incompetent and secondly that the learned trial judge erred in law when he

failed to grant to the appellants now respondents the remedies prayed for in the plaint and submissions.

The Court of Appeal after a re evaluation of the evidence agreed with the finding of the trial Court that the Statutory Notice had not been served. However, it disagreed with the finding of the trial Court that the requirement to serve a Statutory Notice of intention to sue is a mandatory requirement the non compliance of which renders a suit subsequently filed incompetent.

The Court of Appeal also found that the appellant had terminated the services of the respondents in contravention of their terms and conditions of service and remitted the file to the High Court for conclusion of the hearing and disposal of the suit on merit. The respondents were awarded half the costs in the Court of Appeal but no order as to costs in the Court below.

This appeal is against the findings and orders of the Court of Appeal.

**Grounds of appeal**

1. That the Learned Justices of appeal erred in law and fact when they held that the requirement to serve a Statutory Notice of intention to sue against the Government, Local Authority or scheduled corporation is no longer a mandatory requirement in view of Articles 20 (i) and 274 of the 1995 constitution of the Republic of Uganda as amended.

2. That the Learned Justices of Appeal erred in law and fact when they held that non-compliance with the requirement to serve a statutory notice of intention to sue upon the Government, Local Authority or scheduled corporation does not render a suit subsequently filed incompetent.

The prayer was for orders that:-

(a) The appeal be allowed.

(b) The judgment of the Court of Appeal be set aside.

(c) Costs of this appeal and the lower Court be awarded to the Appellant

The appellant was represented by Mr. Akena Dickson Ronny and Mr. Byaruhanga Dennis while the Respondent was represented by Mr. Joseph Luswata.

Before proceeding with the appeal Mr. Akena applied to this Court to bring on board the Attorney General to address the Court on what he described as a "serious matter of gigantic and legal importance". He made the application pursuant to Rule 2(2) of the Rules of this Court which empowers the Court to make such orders as would ensure the ends of justice are met. He also referred to Rule 42(3) (a) of the Rules of this Court which allows informal applications of this nature and Rule 98(c) which provides that the Court shall not allow an appeal or cross appeal on any ground not set forth or implicit in the memorandum of appeal or notice of cross-appeal, without affording the respondent, or any person who in relation to that ground should have been made a respondent, or the appellant, as the case may, be an opportunity of being heard on that ground. According to Counsel the Attorney General should be heard on the issue to assist Court in its resolution of this issue.

Mr. Luswata opposed the application to serve the Attorney General on three grounds. First that the case is a very old case of 1998 which should be disposed of as soon as possible. Secondly, he contended that an opportunity was availed to the Attorney General by the Court of Appeal and they showed no interest in the matter and thirdly, that the Attorney General was a party to the case of **Ostraco Ltd Vs Attorney General (2003) 2 EA 654** and **Rwanyarare and others Vs Attorney General (2003) 2 EA. 664** and his views on this matter are well known. I will comment on these authorities in the course of this judgment.

On perusal of the record, it was noted that at the hearing of the appeal at the Court of Appeal, the Attorney General had, at the request of Counsel for the appellant been served with the necessary documents and proceedings to enable him address the same issue at the Court of Appeal but the Attorney General never appeared in Court. The Court of Appeal went ahead to

determine the issue on the basis of the legal arguments and available authorities supplied by both parties.

This Court decided to proceed without summoning the Attorney General because apart from the objections of Mr. Luswata which I find valid, this is a legal matter which was well canvassed by Counsel representing the parties at both the High Court and the Court of Appeal and both Courts ably addressed it to the extent that with or without the Attorney General this Court can resolve the issue of non compliance with a statutory provision that appears to be mandatory and the implications of non compliance. I only wish to observe that as an officer of Court and Chief Legal Adviser to Government the Attorney General should be the last person to ignore a Court Summons when required by Court to explain an issue. The Court of Appeal must have had strong reasons to summon the Attorney General and he was expected to comply with the order of Court and attend Court without fail. I take exception to the failure of the Attorney to attend Court without giving any reason and hope that the practice will stop.

On the first ground Mr. Akena faulted the Court of Appeal for having decided that it is no longer a requirement in light of Articles 21 and 274 of the Constitution to issue such a statutory notice. In his view the Court of Appeal decision places an unusually heavy burden on the appellant as well as government or a scheduled corporation to defend suits which would otherwise be settled without recourse to litigation. The decision makes it difficult for the respondents or government for that matter to marshal resources, collect evidence and ensure that it files an appropriate defence in any suit of such a nature and so if the requirement to give the notice is done away with, an unnecessary number of cases will flood the Court's Registries. The other argument Mr. Akena advanced is that in order to achieve parity and equality before the law, other than doing away with such a notice, it would have been better if the Court has instead expanded the scope of the provision so that both the private individual and the government entities are required to issue a similar notice.

In reply Mr. Luswata supported the decision of the Court of Appeal which is to the effect that the requirement to serve the Statutory Notice under S.2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act violates Article 20 which is now Article 21 of the Constitution to the extent that it discriminates between parties who are individuals and the Government. He relied on the authorities of **Ostraco Limited Vs Attorney General** (Supra) and **Rwanyarare and Others Vs Attorney General (Supra)** for the proposition that unjustified state protection is not fashionable these days. He however, conceded that there is absolutely no problem with the issuance of the notice to enable Government or Statutory body to investigate a matter before deciding whether to defend it or not. According to Counsel the only problem is whether the failure to serve the notice is fatal and it vitiates the whole trial as was urged by the respondents.

In my view the cases of **Ostraco Vs Attorney General** and **Rwanyarare and Others Vs Attorney General** cited by counsel for the respondent for proposition that unjustified state protection is no longer fashionable, are not relevant to this case. In the case of Rwanyarare the Constitutional Court was considering an application for a temporary injunction to preserve the rights of the applicants as the Constitutionality of some provisions of the political parties and organisational Act 2002 was being investigated. The Court made an order for stay of the operation of Section 6 (3) and (4) of the Act pending final disposal of petition regarding their Constitutionality.

In the case of **Ostraco** the issue was whether the Government which had refused to vacate the suit property registered in the name of the plaintiff could be evicted and the Court ordered its eviction. There is no question that the issuance of a statutory notice affords the Government or Statutory defendant any protection because it will still be sued if the matter is not settled.

From the submission of both Counsel it is clear that the requirement to serve the statutory notice is well founded. I do not understand Mr. Akena's argument that in order to achieve parity and equality before the law, other

than doing away with the Notice the scope of the provision should be widened so that individuals and government entities are required to issue a similar notice. In my view an individual does not require as much time as the Attorney General or Statutory body to investigate a matter before defending it. While the individual may have the facts on which to defend a suit readily available the Attorney General has to consult and seek instructions from the various departments of Government before deciding on whether or not to defend a suit. The appellant would also require time to investigate a matter before defending it and Mr. Luswata acknowledges that the rationale for service of the Statutory Notice is still relevant and should not be done away with. However, the question that remains to be answered is whether the desirability of the requirement necessarily makes it mandatory.

Section 2 of the Civil Procedure (Miscellaneous Provisions) Act provides:-

**"2. Notice prior to suing**

**(1) After the coming into force of this Act, notwithstanding the provision of any other written law, no suit shall lie or be instituted against –**

**(a) The Government**

**(b) A Local Authority; or**

**(c) A scheduled Corporation,**

**Until the expiration of forty five days after a written notice has been delivered to or left at the office of the person specified in the first schedule to the this Act, stating the name, description and place of residence of the intended plaintiff, the name of the Court in which it is intended the suit be instituted, the facts constituting the cause of action and when it arose, the relief that will be claimed and, so far as the circumstances admit, the value of the intended suit.**

(2) **The written notice required by this section shall be in the form set out in the second schedule to this Act, and every plaint subsequently filed shall contain a statement that such notice has been delivered or left in accordance with the provisions of this Section."** (Underlining provided)

The use of the word "shall" was interpreted by the High Court to mean that the requirement to issue statutory notice was mandatory. In the case of **Sitenda Sebalu vs Sam K. Njuba and the Electoral Commission (Election Appeal No 26 of 2007)** (unreported) the Supreme Court of Uganda discussed Section 62 of the Parliamentary Elections Act where the word "shall" is used and held as follows:-

**"It is common ground that although prima facie the use of the word "shall" in a statutory provision gives the provision a mandatory character, in some circumstances the word is used in a directory sense. Much as we agree with learned Counsel for the appellant to the extent that where a statutory requirement is augmented by a sanction for non compliance it is clearly mandatory that cannot be the litmus test because all too often, particularly in procedural legislation, mandatory provisions are enacted without stipulation of sanctions to be applied in case of non compliance. We also find that the proposal by Counsel for the 2nd respondent to restrict the directory interpretation of the word "shall" to only where it is shown that interpreting it as a mandatory command would lead to absurdity or to inconsistence with the Constitution or statute or would cause injustice, to be an unreliable formula, which is supported by precedent or any other authority"**

The Supreme Court cited with approval the observation of Lord **Steyner** in **Regina Vs Soveji and other [2005] UKHL 49** (HL Publications and internet where he stated as follows:-

**"A recurrent theme in drafting of statutes is that Parliament casts its Commands in imperative form without expressly spelling out the consequences of failure to comply. It has been the source of a great deal of Litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement was mandatory, a failure to comply invalidates the act in question. Where it is merely directory a failure to comply does not invalidate the act in question. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of purely regulatory character where a failure to comply would never invalidate an act provided there was substantial compliance."**

Lord Steyner after reviewing decisions from the English Court of Appeal, the privy Council and Courts in New Zealand, Australia and Canada made the following conclusion:-

**"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements have out lived their usefulness. Instead, as held in Attorney General's Reference (No. 3 of 1999) the emphasis ought to be on the consequences of non- compliance, and posing the question whether parliament can be fairly taken to have intended total invalidity".**

As already stated in this judgment the rationale for the requirement to serve a statutory notice was to enable a statutory defendant investigate a case before deciding whether to defend it or even settle it out of court. There was a claim that no statutory notice was served but the appellant was able to file a written statement of defence and adduce evidence in support of his defence. There was also nothing that stopped the parties from settling the case if ever a settlement was an option. This is a clear illustration that

failure to serve the Statutory Notice does not vitiate the proceedings as the Court of Appeal rightly found. A party who decides to proceed without issuing the Statutory Notice only risks being denied costs or cause delay of the trial if the Statutory defendant was unable to file a defence because she required more time to investigate the matter.

In my view the emphasis should not be on the failure to serve the Statutory Notice but on the consequences of the failure so long as both parties are able to proceed with the case and Court can resolve the issues which the High Court should have done after going through the hearing. Parliament could not have intended that a plaintiff with a cause of action against a Statutory defendant would be totally denied his right to sue even where the defendant knew the facts and was able to file a defence as it was in this case simply because of the failure to file a statutory notice.

In the result I do not find any merit in the appeal and it should be dismissed with costs to the respondents.

The Respondents filed a cross appeal in which the following grounds were raised:-

1. The learned Justices of Appeal erred in Law when they failed to evaluate the evidence on record thereby erroneously holding that statutory Notice of Intention to sue had not been served upon the respondents.

2. The learned Justices of Appeal erred in Law in remitting the file back for hearing and disposal of the suit.

3. The learned Justices of Appeal erred in Law in not awarding to the respondents costs in the High Court and full costs in the Court of Appeal.

It was prayed that:

(a) The order remitting the file back to the High Court be set aside.

(b) The Court grants the remedies prayed for in the High Court.

(c) The respondents pay to the respondents' costs of this Cross Appeal and costs in the lower Courts.

At the hearing of this appeal, this Court established that following the order of the Court of Appeal to refer the matter to the High Court to conclude the case on merit, the case was remitted to the High Court which dealt with the computation of the respondents' terminal benefits and the outcome is subject of Appeal to the Court of Appeal. So ground 2 of the cross appeal was abandoned because it had been overtaken by events.

On the first ground Mr. Luswata stated that the Court of Appeal had failed in their duty as a first appellate Court to re-evaluate the evidence and come to its own conclusion that the Statutory Notice had not been served. He submitted that this case is one of those rare cases where the Supreme Court, as a second appellate Court, should re-evaluate the evidence regarding service of the Statutory Notice given that a Statutory Notice was exhibited indicating proof of service of the Notice. He cited the decision of **Kifamunte Henry vs. Uganda (Supreme Court Criminal Appeal No. 10 of (1997)** for the proposition that where the lower Courts have not appreciated the evidence that was tendered in Court the Supreme Court can re-evaluate the evidence.

The circumstances under which the Supreme Court as a second appellate Court may intervene and reverse a concurrent finding of the trial Court and first appellate Court was indeed discussed in the case of **Kifamunte Henry vs. Uganda** (Supra) where this Court stated as follows:-

**"Once it has been established that there was some competent evidence to support a finding of fact, it is not open, on second appeal to go into the sufficiency of that evidence or the reasonableness of the finding. Even if a Court of first instance has wrongly directed itself on a point and the Court of first appellate Court has wrongly held that the trial Court correctly directed itself, yet if the Court of first appeal has**

**correctly directed itself on the point, the second appellate Court cannot take a different view R. Mohamed All Hassan vs. R (1941) 8 E.A.C.A. 93."**

**On second appeal the Court of Appeal is precluded from questioning the findings of fact of the trial Court, provided that there was evidence to support those findings, though it may think it possible, or even probably, that it would not have itself come to the same conclusion; it can only interfere where it considers that there was no evidence to support the finding of fact, this being a question of law: F vs. Hassan bid Said (1942) 9 E.A.C..A 62"**

I do not see any justification for this Court to interfere with the concurrent finding of the two Courts below that there was insufficient evidence that the Statutory Notice had been served on the defendant. Both Courts arrived at this finding after an exhaustive analysis of the evidence which I need not delve into. Secondly, the order of the Court of Appeal to remit the file to the High Court for resolution of the matter on merit renders the issue whether or not a Statutory Notice was served irrelevant. Further, the finding of this Court that non service of the Statutory Notice did not vitiate the trial makes it unnecessary to belabour the matter of the service of the Notice any more.

The issue raised in the third ground of appeal is whether or not the cross appellant should have been awarded costs in the High Court and full of costs in the Court of Appeal. The order of the Court of Appeal giving rise to this ground was as follows:-

**"Since the appeal succeeded on the alternative grounds, we award the appellant half of the costs in this Court.**

**We make no order as to costs in the Court below."**

According to section 27 of the Civil Procedure Act Court has the discretion to award costs and a successful party is awarded costs unless there are good reasons to deny such a party costs.

Although the Court of Appeal did not assign any reason for not awarding costs at the High Court, my own understanding of the order is that through no fault of the respondents, the trial Judge had prematurely terminated the trial of the case without resolving the substance of the dispute. On appeal to the Court of Appeal the respondents succeeded in getting the case remitted to the High Court for resolution of the matter which the original trial has failed to do. In the circumstances, the Court of Appeal rightly decided not to condemn the appellants in costs and I do not see any justification for interfering with the order.

In the result the cross appeal is also dismissed with costs to the appellant.

Dated at Kampala this ..... day of ..... 2017

Hon Justice Mwangusya Eldad
**JUSTICE OF THE SUPREME COURT**