

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION
HIGH COURT CIVIL SUIT NO. 664 OF 2003

1. **IBRAHIM BUWEMBO]**
2. **EMMANUEL SERUNJOGI] ::::: PLAINTIFFS**
3. **ZUBAIRI MUWANIKA]**
FOR AND ON BEHALF OF 800 OTHERS

VERSUS

M/S UTODA LIMITED ::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. MR. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The brief facts of this case are as follows. The plaintiffs who are described as members of the Association of Taxi owners and Drivers of Uganda (ATADU) are suing UTODA Limited (another Taxi Association run as a limited liability Company) on behalf of themselves and 800 other members. The suit is therefore brought by the 3 Plaintiffs by way of a representative order.

According to the pleadings the plaintiff's action is for declarations against the Defendant and recovery of alleged illegal fees levied by the Defendant against its nearly 800 members. The dispute revolves around a contract entered into between the Defendants and the City Council of Kampala (KCC) exhibit P 2 whereby the Defendant would manage taxi operations and maintain Taxi Parks in Kampala City (hereinafter called the city).

For the Plaintiff it is contended and pleaded that under the contract the Defendants were not to charge more than Shs 3,500/= as daily sticker fee from taxi drivers (who include the Plaintiffs).

However it is alleged the Defendants have since ignored that understanding with Kampala City Council (KCC) and increased the daily sticker fee to Shs 4000 and even up further to Shs. 4500/=. The Plaintiffs wish to claim from court a refund of the extra 500/= paid to the Defendants over a period of 3 years by approximately 4,500 taxis. The Plaintiffs further allege that the Defendants also charge illegal loading fee per taxi at the stage. The also wish court to make a declaration that said loading fee and extra Shs. 500/= paid to the Defendants is illegal and for court to order a Permanent Injunction against the levying of the said fees.

For the Defendants it is denied that have acted contrary to the terms of their said contract with Kampala City Council (KCC). They plead that the contract left it open for them to set the daily dues "*based on the obtaining contract sum*" which is a set monthly sum. They deny that they levy illegal loading fees but that members are free to contribute to a "*Welfare fund*" to care for the sick, unemployed or other diversities. They also plead that the Plaintiffs cannot base their action on the said contract, as they are not privy to it.

The following issues were then agreed upon for trial.

1. Who are the proper Plaintiffs before Court? During the trial the Defendants applied to have this handled separately from the Main Suit but I directed that to avoid unnecessary delay it be added as an issue for trial.
2. Whether the Plaintiffs have a cause of action against the Defendant?

3. Whether there is a valid existing contract between Kampala City Council (KCC) and UTODA?
4. Who is entitled to determine the charges under the contract?
5. What charges are the Defendants supposed to collect under the contract?
6. Remedies.

Issue No.1 who are the proper Plaintiffs before Court

For the Plaintiffs it is argued that this suit is brought by way of a representative action under 0 8 r 1(1) of the Civil Procedure Rules (CPR). Indeed on the 21st October 2004 leave through the Registrar of this court was granted to the 3 named Plaintiffs to sue on their own behalf and for the benefit of approximately 800 taxi owners and drivers in Kampala. However the Defendants argue that in carrying out the representative order the Plaintiffs did not fully comply with the said 0 1 r 8 (1) in that individual notice to the said parties to be represented was not given.

Counsel for the Defendant argues that individual service according to order (rule 8 (1) could either be through personal service or by public advertisement. Counsel for the Defendant argued that there was no personal service as no proof of personal service was given to court. With regard to service through public advert again counsel for the Defendant does accept that a proper advertisement was placed in the New Vision Newspaper of 5th November 2003 (arising out of Misc. Application 25 of 2003) which read

"

NOTICE

NOTICE is hereby given to the general public and in particular to all the 800 taxi owners and drivers in Kampala that M/S IBRAHIM BUWEMBO, EMMANUEL SERUNJOGI and ZUBAIRI MUWANIKA have been permitted to sue the UTODA LIMITED in the High Court of Uganda (Commercial Division) for themselves and on behalf of the 800 owners and drivers for a declaration that loading fees and extra charges on the stickers are illegal and for orders that all such fees collected from them by the Defendants be refunded to them immediately in accordance with the law and have filed Civil Suit No. 664 of 2003 through their Advocates

*M/S Matovu & Kimanje Nsibambi Advocates
Dated this 29 day of October 2003*

Signed

Registrar

"

However counsel for the Defendant faults the said advert by arguing that it did not mention the said parties by name or give their addresses.

Counsel for the Defendant then referred me to the author Muller on Code of Civil Procedure Vol 1 para 18 at p 616 which is to the effect that where notice is not given as contemplated by rule then a decree can only be passed against those Defendants (read parties) who are on record. Furthermore that observance of Order 8 rule 1 is essential and that unless its provisions are strictly complied with persons interested in the right will not be bound unless they are on record. I

was also referred to the case of **R.H. BHANJI & Anor Vs. L. Burton** [1965] E A 522 (TZ) where **Sir Ralph Windham J.** held

"Nobody could, for the purpose of being bound by a judgment or decree be considered a party who had not been notified and was not aware of the proceedings"

Counsel for the Defendant attacked Exhibit. D8, which was a list of 288 persons who had according to the evidence of PW1, E. Serunjogi signed up before he filed the suit. He said even those 288 names were not put in the notice so could not be said to be on court record.

Counsel for the Defendant then submitted that for the above reasons this case was not a representative suit and the 3 original Plaintiffs are the only proper parties before the court.

For the Plaintiffs it is argued that the authorities cited to me are distinguishable. In this case there is no complaint by any person who has not been served and the Defendants cannot be heard to complain on behalf of the said Plaintiffs. I was referred to the case of

Nsereko & Others Vs. **Bank of Uganda** Supreme Court C A 1 of 2002 for the proposition that *"a Court does not go behind the Court Order in representative actions"*.

I have reviewed the arguments of both counsel and the law in question.

To begin with I find that both parties do not contest the existence of a representative order as granted by the Registrar of this court. Indeed I find that

there is a representative order. The problem seems to lie as to whether those to be represented were served on accordance with the law. Order 8 rule 1 provides:

"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of court sue or be sued, on behalf or for the benefit of all persons so interested. But 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 any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct" (emphasis mine).

The object of order 8 rules 1 is to facilitate a large group of person 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 main benefit to the judicial system is to avoid a multiplicity of similar litigation. The persons concerned must have the same interest in the suit and can collectively either be Plaintiffs or Defendants. In this case a representative order was given to 3 Plaintiffs to represent themselves and approximately 800 other taxi drivers and owners. In such a case the principle of a representative order would be to prevent the Defendant from being vexed and or molested by persons individually with similar suits.

It would appear to me that the wording of order 8 rule 1(1) 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 a proper notice cannot be regarded as a 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 relief's claimed

therein so that the interested parties can go on record in suit either to support the claim or to defend against it.

In this case I find that the necessary notice by way of public advertisement was given but that said notice failed to show the names of the intended 800 Plaintiffs. I have no doubt in my mind that the method of Public advertisement was chosen because it was seen not to be reasonably practical to effect personal service.

I further find that exhibit D8 which has a list of 288 persons who had signed up on a paper does not cure this apparent defect because it was not part of the public advertisement within the meaning of order 8 rule 1(1).

What then would be the effect of such non-compliance? Counsel for the defendant argued that only the named 3 Plaintiffs namely Ibrahim Buwembo, Emmanuel Serunjogi and Zubairi Muwanika can be regarded as the proper parties before court. Counsel for the Plaintiffs on the authority of **Nsereko & ors Vs. Bank of Uganda** (Supra) said that court should not go behind an order given for a representative action. In any case even the 800 Plaintiffs have not complained.

I have reviewed the **Nsereko VS. Bank of Uganda** case (supra) and must agree with counsel for the Defendant that it does not say that a court cannot go around such an order. Secondly how can any of the 800 persons said to be represented (or for arguments sake any of the 288 in Exhibit. D8) complain when they have not been served notice (with their names being mentioned) by way of public advertisement.

800 is large number and it would be chaotic if a person not so named simply showed up in court to say he/she is part of that number or conversely should not be regarded as part of that number.

I am inclined to agree with counsel for the Defendant that this defect means that the original 3 named Plaintiffs are the proper parties to the suit and the 800 unnamed persons are not and I accordingly so find. I do not find that such a defect as in this case can led to the dismissal of this suit and the proper remedy would have been for the Plaintiffs to apply to rectify the defect rather than contest that proper notice had been given.

Issue No. 2 whether the plaintiffs have a cause of action against the Defendant?

For the plaintiffs it is contended that this issue is a point of law. Counsel for the Plaintiffs submits that this is an action for money had and received. The plaintiffs claim that the Defendants inter alia should be charging daily fees of 3,500/= which they wish to recover. The Plaintiff's also to claim by way of relief a declaration namely:

" A declaration that loading fee (daily stage subscription) per stage and extra 500/= per car are illegal"

Which need not be a cause of action.

Lastly the Plaintiffs claim:

" An order of permanent injunction restraining the Defendants from levying the so called loading (daily stage subscription fee) and the extra Shs. 500 and restoring the sticker fee to the lawful sum of Shs. 3,500 daily and an order not to levy any fee higher than that set by City Council of Kampala".

For the Defendants it is argued that the Plaintiffs have no locus standi in the matter and the suit ought to be dismissed on this ground alone.

Counsel for the Defendant submits that the Plaintiff's claim is founded on a contract (Exb. P 2) between the Defendants and Kampala City Council (KCC) to which the Plaintiffs are not parties and so legally have no privity of contract.

- Dunlop Neumatic type Co. Limited Vs. Selfridge Co Limited (1915) AC 847
- Secretions Limited Vs. Midland Silicones Limited [1962] 1 ALL ER 1
- Twiddle Vs. Akinson 121 All ER 162

Were all cited to me for the general proposition that no stranger to a contract can take advantage of it although it was made for his benefit because he has no privity to it.

Secondly Counsel for the Defendant argues that the Plaintiff's claim for money had and received, which is an action in quasi contract, is not available to them because it was not pleaded.

The Defendants for the above reasons therefore pray that the entire claim of the Plaintiffs be rejected.

I have read the submissions of both the parties. The Defendants have put up spirited argument that the Plaintiffs cannot sue on the contract between themselves and KCC as the Plaintiffs are not privy to it; even though they are the subject of the contract. Indeed in their written reply Counsel for the Plaintiff concedes this point in law and I find that he does so rightly too. Only the parties to the said contract that is KCC or the Defendants can enforce it. Strangely enough neither party found it necessary to move court to add KCC to be a party

to the suit. This could have been done under order 1 rule 10(2) of the CPR. More importantly the Plaintiff as the most aggrieved party to the dispute could have done so under order 1 rule 6:

"The Plaintiff may at his option join as parties to the same suit all or any of the persons severally or jointly and severally liable on any one contract..."

Which they did not. Having gone through the case now, KCC would have provided an important insight into this contentious contract regarding the management of taxi business in Kampala.

The Plaintiff however puts another twist to claim itself by relying on quasi – contract for money had and received between the Plaintiffs and the Defendants and not strictly on the contract between KCC and the Defendants.

The Plaintiffs argument, simply put is that based on the agreement between KCC and the Defendant, the Defendant is over charging them and they have wrongly been paying this money to the Defendants, it is based on this over charged amount that a quasi contract exists between the Plaintiffs and the Defendants.

Counsel for the Defendant states that the issue of a quasi contract was not pleaded so should not be considered. A review of the plaint however shows that the Plaintiff at para 6 pleaded

"The Plaintiffs further avers that the extra fee on the stickers and loading fee (daily subscription fee) levied against their approximately 4500 Motor Vehicles is illegal and they seek a refund thereof".