IN THE COURT OF APPEAL FOR EAST AFRICA,

AT NAIROBI

(Coram: Law V-P, Mustafa & Musoke JJ A)

CIVIL APPEAL NO 22 OF 1975

ANDREW NGANGA MUNYUA & 64 OTHERS ….. APPELLANTS

VERSUS

ATTORNEY GENERAL…..……..…RESPONDENT

JUDGMENT

This is an appeal by, or on behalf of, the plaintiffs in a suit filed in the High Court which has been dismissed with costs by Waiyaki J after hearing an application by way of chamber summons brought by the Attorney- General, for the plaint to be struck out, under order VI, rules 8, 13 and 14, and order VII, rule 5, of the Civil Procedure Rules as then in force. The original plaint was filed on 10th November 1973. There were five plaintiffs. An amended plaint was filed on 17th December 1973. The body of the amended plaint is in the same words as the original plaint; it was filed to enable a further sixty plaintiffs to be added. The fifth plaintiff is described in the original plaint as "Memory Fig Tree Mwangi and Irungu Self Help Group" and in the amended plaint as "Memory Fig Tree Mwangi and Irungu Self Help." Both plaints were signed by the first plaintiff only, describing himself as "Chairman, Memory Fig Tree Mwangi and Irungu Self Help Group". The amended plaint reads as follows:

1.The plaintiffs are Kenya adult individuals among the community who fought and tortured (sic) for Kenya's freedom. The [fifth plaintiff] is a registered organization registered under Community Development Act. The address for service for the purpose of this suit is care of P O Box 425, Thika.

2.The defendant is the Attorney-General of the Republic of Kenya and his address for service for the purposes of this suit is care of Attorney-General's Chambers, PO Box 40122, Nairobi.

3.Despite demand and notice to sue in default being given the defendant refused and/or neglects to pay for compensation.

4.During the period of emergency the plaintiffs and members of Fig Tree Mwangi and Irungu Self Help Group duly registered under Community Development Act were tortured and their properties confiscated during notorious colonial Government. Plaintiffs and other members joining in this suit claim for compensation and properties confiscated by the colonial Government and compensation for lives lost during notorious emergency and pensions.

5.The reasons whereof the plaintiffs and members jointly in this suit pray for judgment against the defendant for ruling of each claim be filed in Court for the following: (a) Compensation and properties for

lives lost during the period of emergency and pensions (b) Costs of this suit (c) Any other relieve the honourable Court may deem just and equitable.

The amended plaint is stated to have been drawn and filed by Andrew Nganga Munyua, who is the first plaintiff.

Making every due allowance for the fact that the amended plaint was drawn by a layman, it is irregular and defective in the extreme. It is only signed by the first plaintiff, whereas order VI, rule 14, requires a plaint to be signed by an advocate or recognized agent or by "the party if he sues .. in person". There is nothing on record to show that the first plaintiff is the "recognised agent" for the other 64 plaintiffs, within the meaning of order III, rule 2. The fifth plaintiff is stated to be a "registered organization registered under the Community Development Act". Our researches lead us to the conclusion that no such Act is, or ever has been, on the statute book; and that no such Act exists or ever has existed is confirmed by state counsel. The fifth plaintiff has therefore not been shown to be a legal person with the capacity of suing or being sued. If the first plaintiff was purporting to act for the other plaintiffs, or for the members of the fifth plaintiff, in a representative capacity as the sole plaintiff signing the plaint, then order 1, rule 8, has not been complied with. Furthermore, the causes of action, so far as they can be ascertained from a perusal of the plaint, appear to relate to events which occurred during the late emergency, which, according to the proclamation published under Legal Notice No 38 of 1960, officially came to an end on 12th January 1960, so that *prima facie* the causes of action in the plaint are barred by the law relating to limitation.

It is not surprising in these circumstances that on 20th December 1973 the Attorney-General filed an application for the plaint to be struck out. Many of the grounds relied on in the application were technical, and might possibly have been cured by amendment of the plaint. The other grounds raised the question of limitation, and the question of immunity arising out of the Indemnity Ordinance.

The judge found in favour of the Attorney-General. He held that it was unnecessary to go into "fine points of procedure", as he was satisfied that the plaintiff's claim must fail under the Indemnity Ordinance and that it was statute barred under the Fatal Accidents Act and the Public Officers Protection Act. He did not in terms strike out the plaint and dismiss the suit, but we think that those matters are the inevitable consequence of his holding that the claim must fail, as appears from the formal order that "the plaint be struck out" and that "the suit be dismissed", with costs.

From this order an appeal has been lodged in this Court in the name of all sixty-five plaintiffs, but signed by only six of them (Nos 1, 2, 3, 4, 14 and 34). We can find no notice of appeal against the order of Waiyaki J on the record of appeal, but we assume there must be one in existence, as this Court extended time for filing it, on 24th September 1974. Like Waiyaki J we will overlook these points of procedure, and deal as best we can with the points of substance.

Mr Kirenga, who was retained at a late stage by the plaintiffs (or by some of them) to argue this appeal on their behalf, was allowed to argue additional grounds of appeal filed at the last minute. The first two are to the effect that the judge should not have entertained the application to strike out the plaint as the defendant, the Attorney-General, had not filed his defence. We see no merit in these grounds. The Attorney-General had entered an appearance. When he filed his application, the time for filing a defence had not yet expired. By order VI, rule 13 (as then in force), the High Court can entertain an application to strike out a plaint "at any stage of the proceedings". In A*ttorney-General of Duchy of Lancaster v London & North Western Railway* [1892] 3 Ch 274, it was held, under the corresponding English rule, that where a statement of claim is being attacked, the application to strike out may be made before the defence is served. We think that the position in Kenya is the same. The other additional ground is that the High Court erred in refusing the plaintiffs' application for the suit to be set down for formal proof. The answer to that ground is simply that the High Court did not refuse that application, which was filed one day after the Attorney-General's application to strike out the plaint. As the Attorney-General's application succeeded, and the plaint was struck out, the plaintiff's application never had to be heard as there is no longer in existence a suit capable of formal proof.

As regards the reasons given by the judge striking out the plaint, Mr Kirenga submitted first that the judge erred in relying on the Indemnity Ordinance, as that Ordinance only confers immunity on public officers and members of the forces for acts "done in good faith", and Mr Kirenga submitted that there was no evidence that the acts complained of in the plaint were done in good faith. We think the answer to this submission is two-fold. Where "good faith" is referred to in a statute, it is deemed to exist unless the contrary is alleged and proved. Secondly, the Indemnity Ordinance itself, in section 3(4), provides that any act referred to in that Ordinance shall be deemed to have been done in good faith unless the contrary is proved.

Mr Kirenga's next submission was that the judge erred in relying on the Fatal Accidents Act which he described as "inapplicable". But the plaint includes a claim for "compensation for lives lost", and such a claim can only lie under the Fatal Accidents Act, section 4 whereof requires that any action under that Act must be commenced within three years after the death of the deceased person. Mr Kirenga also submitted that the Public Officers Protection Act was irrelevant, as it only applied to suits against public officers in their capacity as such, but he cited no authority for this proposition. The allegations of confiscation of property, and of torture, made in the plaint, are said to have occurred "during notorious colonial Government". It is not made clear who precisely committed the acts complained of, presumably the persons concerned must have been soldiers, policemen, administrative officers and quasi-military forces employed by the then Government. These persons were public officers. If these persons were sued individually, then by section 2 of the Act, suits against them for wrongs committed by them in the execution of nay public duty or authority, such as the suppression of insurrection, would have had to have been brought within six months. The present Government of Kenya, as successor to the colonial government, is now being held responsible by the plaintiffs for the wrongful acts of those public officers. In *Attorney- General for Kenya v Hayter* [1958] EA 393, it was held that: The Crown is entitled to rely on the limitation prescribed by the Public Officers' Protection Ordinance to the same extent that the officer concerned could do so.

In our opinion, the judge was entitled to hold, as he did, that the plaintiffs' claim was statute-barred under the Fatal Accidents Act and the Public Officers Protection Act. It was also barred, in our view, by section 4(2) of the Limitation of Actions Act which provides that an action founded on tort may not be brought after the end of three years from the date when the cause of action accrued. At least thirteen years have passed in this case.

For these reasons we have no doubt that the application, the subject of this appeal, was correctly decided by the judge, and we dismiss this appeal with costs.

Appeal dismissed with costs.

Dated at Nairobi this 10th day of March 1976.

E.J.E LAW

……..…

VICE-PRESISDENT

A. MUSTAFA

……..……

JUDGE OF APPEAL

J. S. MUSOKE

……..……

JUDGE OF APPEAL