**IN THE COURT OF APPEAL FOR EAST AFRICA**

**AT NAIROBI**

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

**CIVIL APPEAL 43 OF 1975**

**AG NYAGA ……..……..……..APPELLANT**

**VERSUS**

**HJ NYAMU**

**THE ATTORNEY-GENERAL …….. RESPONDENTS**

**JUDGMENT**

The appellant filed an action against the respondents for general and special damages for having unlawfully evicted her from her flat and for damaging or destroying her goods. On what amounted to a preliminary ruling, the trial judge held that the plaint disclosed no cause of action and dismissed it with costs, hence this appeal.

In her amended plaint the appellant alleged, *inter alia*, as follows:

(2)The first [respondent] was at all material times employed as the principal, Kenya Institute of

Administration, run as such under the President's Office by the Government of the Republic of Kenya ….

(3)The second [respondent] is the Attorney-General and joined as a party in this suit in accordance with the provisions of section 4 the Government Proceedings Act, chapter 40 of the Laws of Kenya … At all times material to the torts complained of hereafter the said Office was the employer of the first [respondent.]

(4)On or about 17th November 1973 at about 7.30 am five administrative policemen, two police constables, a government carpenter, a government driver and Messrs Ashonio and Gathuri acting under clear instructions of the first [respondent] who was at the material time acting in the course of his employment drove to flat No 19 … The said person broke the doors, trespassed upon the said flat and forcibly and without any lawful or justifiable cause evicted the [appellant]. The [appellant] was … a lawful occupier of the premises.

I think that from the averments in the plaint it is clear that the appellant had alleged that the first respondent was a senior government servant, and in the course of his duty had instructed certain subordinate government staff unlawfully to evict the appellant from her flat and that she had suffered damages thereby. To my mind, the plaint showed that the appellant enjoyed the right to live at her flat,

that that right had been violated, and that the first respondent was liable as he had put into motion the acts which resulted in her being unlawfully evicted therefrom. The plaint would seem to have complied with the conditions establishing a cause of action as laid down in *Auto Garage v Motokov* (No3) [1971] EA 514, a decision of this Court.

However, in his ruling the trial judge said, *inter alia*: All [the plaint] does is to say that at all material times the torts complained of the President's Office [under which the Kenya Institute of Administration was run and of which the first respondent was stated to be the principal] was the employer of the first [respondent]. It is true that nine of the eleven persons who are alleged to have evicted the [appellant] are stated to be government servants … For either of the named defendants to be liable it must be alleged and proved they were acting within the scope and in the course of their employment. It is not enough to aver they were acting under [the first respondent's] clear instructions. These instructions must be shown to have been given or at least acted upon in the course of the alleged fortfeasor's employment.

In these circumstances applying the principle … in *Republic of Peru v Peruvian, Guano Co* (1887) 36 Ch D 489 … I have no option but to hold that the plaint discloses no cause of action against either [respondent] … It … would be futile to grant any further leave to amend.

With respect I fail to understand the trial judge's reasoning, especially his statement "… for either of the named defendants to be liable it must be alleged and proved they were acting within the scope and in the course of their employment". The emphasis is mine. In dealing with a submission of no cause of action, it is trite law that only the plaint is to be looked at.

In these circumstances how can a plaintiff "prove" anything? All he can do is to allege or aver; the matter of proof arises at the hearing. Here, to my mind, the allegations in the plaint are clear enough. The first respondent was a government servant, and acting in the course of his employment, he instructed a number of subordinate government servants to do what was alleged to have been a tortuous act for which, if true, both the subordinate government servants who actually evicted the appellant and the first respondent who gave such instructions would have been personally liable and, by virtue of section 4 of the Government Proceedings Act, the Government would be liable, and by virtue of the same Act, the Attorney- General was properly joined as a party. A Government only acts through its servants, and the first respondent was alleged to have acted for the Government. The trial judge referred to *Republic of Peru v Peruvian Guano Co*; I have read the case and, in my view, it is not particularly relevant; if anything, that authority is in favour of the appellant.

The trial judge was persuaded by Mr Mureithi for the respondents to hold that it was necessary for the plaint to have alleged that the subordinate government servants, in evicting the appellant, were acting in the course of their employment. On that point, Mr Lakha for the appellant referred this Court to a number of authorities. I will only deal with a few. In *Commissioner of Transport v Gohill* [1959] EA 936 the High Court in Tanganyika (Crawshaw J) held that it was sufficient in a plaint to plead that the driver was the servant of the defendant and whether the servant was or was not driving in the course of his employment was a fact peculiarly within the knowledge of the defendant to be pleaded by him in his defence. Crawshal J allowed an appeal against a magistrate's ruling in that case that no cause of action was disclosed because it was not pleaded that the servant or agent was driving at the material time in the course of his employment. He referred to an unreported Tanganyika High Court case *Labhuben v Jivraj* in which Mahon J arrived at the same decision, and was upheld by this Court on appeal. Another case referred to was *Kangave v Attorney-General* [1973] EA 265, where the Uganda High Court (Phakde J) extensively reviewed a number of authorities including the *Gohil and Labhuben* cases, and came to the same conclusion. With respect, I think that is correct. An omission to aver in a plaint that a servant or an agent of a defendant was acting in the course of his employment or within the scope of his authority is not fatal and cannot result in the plaint disclosing no cause of action. Authorities to the contrary, if any, are no longer good law in East Africa. This point is not, in my view, particularly relevant to this appeal; here the plaint had alleged that the first respondent was acting in the course of his employment when he instructed the eleven subordinate staff to carry out certain alleged unlawful acts; in such an event the first respondent would be liable for the acts of his subordinates who acted under his authority or as his agents.

Mr Mureithi referred to the provisions of order VI, rule 1, of the Civil Procedure (Amendment) Rules 1975, which, he submitted, were made in pursuance to section 30 of the Government Proceedings Act. The rule provides that in civil proceedings against the Government a pleading shall contain information as to the circumstances in which it is alleged that the liability of the Government has arisen and as to the government departments and officers concerned. Mr Mureithi had asked for particulars, and from the record, it was not shown if such had been supplied. However, Mr Mureithi stated from the bar that some particulars as regards the eleven subordinate staff were supplied, but he claimed that the names of all of them were not given. However, it seemed that the appellant gave as full details as she could and there was no complaint to the trial judge as regards the insufficiency of such particulars, nor were further and better particulars asked for. From the bar it was stated that all the eleven persons were government employees, and from the particulars supplied by the appellant, there should have been no difficulty in tracing them, especially as she was stated to have given details of their places of work. In any event this point was not taken before the trial judge, and it was not referred to by him in his ruling, and in my view, in the circumstances, it is of no significance.

In my opinion the plaint as filed discloses a cause of action against both the respondents. I would allow the appeal, set aside the ruling and decree of the High Court, and direct that the case should proceed to hearing in the usual course. I would allow the costs of the appeal and the costs of the hearing of the High Court on 23rd June 1975 to the appellant.

**Law V-P:** I have read in draft the judgment prepared by Mustafa JA and I agree with it.

Out of respect for Hancox J from whose decision we are differing, I would add a few words of my own. He said in his ruling that for the respondents to be liable, it must be “alleged and proved” that the eleven persons who are said to have carried out the actual unlawful eviction were acting within the scope and in the course of their employment. As Mustafa JA has pointed out, the question of proof does not arise until the hearing. On a preliminary objection that a plaint does not disclose a cause of action, only the plaint can be looked at. The plaint does not cite the eleven persons as defendants; it alleges that they carried out the unlawful eviction “on the clear instructions of the first [respondent],” that is to say, in the capacity of servants or agents of the first respondent. It is the first respondent who is being sued as the principal responsible for the eviction. It is clearly pleaded that at the material time the first respondent was acting in the course of his employment, and that he was employed by the President’s Office. If so, his employer is responsible for his torts committed in the course and within the scope of his employment. In my view, a sufficient cause of action was pleaded to make the suit maintainable against both respondents, and the suit should not have been dismissed on a preliminary objection. The appeal must in my view be allowed, and it is so ordered. There will be an order in the terms proposed by Mustafa JA.

**Musoke JA:** I agree with the judgment of Mustafa JA and with the proposed order.

*Appeal allowed with costs.*

Dated at Nairobi this 10th day of March 1976

**E.J.E. LAW**

**…….**

**VICE -PRESIDENT**

**A.MUSTAFA**

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**JUDGE OF APPEAL**

**J.S. MUSOKE**

**……**

**JUDGE OF APPEAL**