**Sempa v National Insurance Corporation & another**

**Division:** High Court of Uganda at Kampala

**Date of judgment:** 14 December 1973

**Case Number:** 107/1972 (69/74)

**Before:** Kakooza Ag J

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*[1] Limitation of Actions – Public duty – Driver employed by National Insurance Corporation –*

*Whether acting in execution of public duty – Civil Procedure and Limitation* (*Miscellaneous Provisions*)

*Act* 1969, *s.*3 (*U*).

**JUDGMENT**

**Kakooza Ag J:** The plaintiff, as “father” and “legal representative” of one deceased, Stephen Muwonge, brought action by the original plaint dated 6 January 1972, filed in the High Court on 5 February 1972 against the first defendant alone alleging negligence and claiming damages arising out of the death of Stephen Muwonge in an accident on 10 January 1971 on Iganga/Tororo Road involving a motor vehicle of the first defendant and a motor scooter of the deceased. In his defence, dated 12 March 1972 and filed on 13 March 1972, the first defendant pleaded that, *inter alia*, “1. The defendant will aver that this suit is bad in law and misconceived in as much as no statutory notice of intention to sue was given to the defendant in accordance with section 1 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act, 1969 and prays that the suit should be dismissed with costs.” Counsel for the first defendant applied by Summons, under O. 6, r. 18, of the Civil Procedure Rules, seeking leave to amend his defence by pleading that the suit was time-barred by the provisions of s. 2 (1) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act. The plaintiff also applied for leave to add one Samwel Wenga as the second defendant. Both applications were granted. An amended plaint was filed and an amended defence was filed pleading *inter alia*: “2. Alternatively the 1st Defendant shall contend that the suit is time-barred by S. 2 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act 1969 and the suit should be dismissed with costs.” Mr. Mugenyi for both defendants made a preliminary objection, pursuing the pleading in the defence, that the suit was bad and time-barred against both defendants. The undisputed facts were that the cause of action arose on 10 January 1971 and the suit was filed on 5 February 1972, more than a year later, the time within which the suit should have been brought against both defendants. He referred to the Civil Procedure and Limitation (Miscellaneous Provisions) Act, 1969, s. 2 (1) (*c*) under which, “No action founded on tort shall be brought against, (*c*) a scheduled corporation, after the expiration of twelve months from the date on which the cause of action arose.” The first defendant is a scheduled corporation. This section therefore barred this action against the first defendant. S. 3 of the same Act, he submitted, barred the action against the second defendant because the suit arose out of an act done by the second defendant in pursuance of authority or public duty of the first defendant and the action cannot lie unless instituted within six months. The suit against the second defendant commenced in November 1972 when the plaint was amended; till then he was not a party. But in November 1972, the time limit was already passed. He referred to paragraph 5 of the amended plaint which says that the act of the second defendant was committed on the orders of the first defendant. Mr. Mugenyi submitted that therefore s. 3 applied and the suit against the second defendant was thus unmaintainable. Mr. Musaala, for the plaintiff, admitted that the action against the first defendant was not maintainable. With regard to the second defendant, he said, he was liable and not affected by the Act referred to because in actions for negligence, vicarious negligence does not mean that the servant is not liable personally. He cited *Daniels v. Vaux*, [1938] 2 All E.R. 271. Counsel added that in the prayer, the defendants were sued jointly and severally. He referred to O. 1, r. 7, of the Civil Procedure Rules. On being asked by me how he specifically refuted the application of s. 3 of the Civil Procedure and Limitation (Miscellaneous Provisions) Act 1969 to the second defendant as submitted by counsel for the defendants, Mr. Musaala replied that he would apply for amendment of the plaint in paragraph five so as to make the second defendant solely and personally liable. Finally, counsel submitted that s. 3 did not apply to joint tortfeasors. He cited *Pioneer Garage v. Barclays Bank*, [1969] E.A. 447. In his reply, Mr. Mugenyi said that as counsel for the plaintiff had conceded that the first defendant was not liable, he requested the action against the first defendant to be dismissed with costs against the plaintiff. Regarding the second defendant, he said, the case of *Daniels v. Vaux* was irrelevant to this suit; it merely decided who is or is not an agent. He submitted that it would not be possible, as counsel for the plaintiff suggested, to amend the plaint under O. 1, r. 7. But assuming it were possible, this would lead to a new action altogether against the second defendant alone and not based on the facts as known to the plaintiff and therefore misleading the Court. The defence would still be that the defendant enjoyed immunity under s.3. Counsel further submitted that the law of joint tortfeasors has been altered by s.3. This section had given immunity to a person, who, acting in pursuance or authority or, as here, on orders, could be sued unless the suit was brought within six months next after the act complained of. The interpretation of this section, he said, covered the present situation. Counsel directed my attention to the marginal note on s. 3 that the section covers “public officers”. He submitted that the action against the second defendant should also be dismissed with costs of this application. As it was conceded by counsel for plaintiff that the action against the first defendant was time-barred under the Civil Procedure and Limitation (Miscellaneous Provisions) Act 1969, s. 2, I ruled, on the submission of counsel for the defendants that the action be dismissed with costs, against the plaintiff. I reserved my ruling regarding the second defendant. I now proceed to deal with this defendant. In the first instance, it seems to me, the protection accorded by the section considers both the relationship between the individual doing the act complained of on the one hand and the Government or corporate body concerned on the other and also the nature of the act done and complained of. Thus, for example, if the driver in this case was not an employee or servant of the first defendant, the issue of the protection under this section would not arise. Similarly, if the act done and complained of by the plaintiff was not in pursuance or execution of orders of the first defendant as the plaint says in paragraph five and as counsel for the defendant argues in defence, the section would not be brought into argument. On this basis, the issues I have to decide appear to be: First, was the defendant in the category of persons covered by the section? Secondly, was the act being done by the second defendant “in pursuance or execution or intended execution of . . . any public duty or authority”? In other words, did the protection accorded by the section cover this act complained of? On the first issue, as counsel for the defendant directed my attention, I have to examine the issue of whether, the defendant was or is a “public officer”, who, as the marginal note would seem to imply, could be protected under the section in question. The Civil Procedure and Limitation (Miscellaneous Provisions) Act 1969 itself does not define “public officer”. We have, therefore to turn to other statutes for the definition. The Interpretation Act (Cap. 16), s. 3, defines, “public officer”, “public officer”, and “public service” as having “the same meaning as in the Constitution”. The Public Service Act 1969, s. 29, defines, “public officer” as having “the meaning ascribed to it in clause (1) of article 130 of the Constitution, but does not include teachers”; and “public service” as having “the meaning ascribed to it in clause (1) of article 130 of the Constitution.” The Constitution itself, Art. 130 (1) defines, “public officer” as “a person holding or acting in any public office”; “public officer” as “an office in the public service”; and “public service” “means, subject to the provisions of clauses (2) and (3) of this article, service in any civil capacity of the Government of Uganda, any District Administration or Urban Authority”. Clearly, then, a servant or employee of “a scheduled corporation” in the Civil Procedure and Limitation (Miscellaneous Provisions) Act 1969, is not a “public officer” and, *prima facie*, he would not be in the category of persons protected by s. 3 of that Act. But to determine this category, it is not safe to go by the marginal note alone; the relevant sections and, if necessary, the whole Act, have to be considered. Now s. 3 provides:

“3. Where, after the commencement of this Act, any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any act or other written law, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act or other written law, duty or authority, the action, prosecution or proceeding shall not lie or be instituted unless it is instituted within six months next after the act, neglect or default complained of; or in the case of a continuance of injury or damage, within three months next after the ceasing thereof.” It will be noted that the section does not use the phrase “public service” but “public duty”. Similarly, the long title of the Act uses “public duties” when it says “An Act to provide . . . for the protection against actions of persons acting in the execution of public duties . . .” S.1 of the Act which requires particular notice to be given and s.2 (1) which prevents action to be brought in tort after the expiration of twelve months from the date on which the cause of action arose, list “a scheduled corporation” for this protection. I am of the view, therefore, that the intention of the legislature must have been, in enacting s.3, to extend the protection afforded therein to servants or employees of “a scheduled corporation” such as the defendant in the present suit, as well although such servants or employees are not “public officers”. For this reason, the marginal note “Actions against public officers”, is misleading. But this does not mean that “public service” and “public duty” are, in this context, synonymous; the former is for example, wider than the latter in its extent. My view that the section applies not only where “public service” but also where “public duty”, as that rendered by statutory bodies like the first defendant in the present suit, is concerned, finds support in the case of *Greenwood v. Atherton*, [1938] 2 All E.R. 475. Here, the plaintiff, an infant, was injured at school during an authorised recreation period. More than six months after the accident, a writ was issued against the defendants respectively the headteacher and the managers of the school claiming damages for the breach of duty to supervise the children well. The defendants pleaded the Public Authorities Protection Act 1893, whose relevant section corresponded with our s. 3. The plaintiff contended that the duty to supervise was not a public duty, but was owed only to a particular class of children. It was held that (i) the managers were a statutory body acting in the execution of the Education Acts; (ii) the duty of supervision was a public duty protected by the Public Authorities Protection Act 1893. The action was therefore barred. As I have pointed out above, s. 3 does not use “public service” but “public duty”. The public Authorities Protection Act 1893 and our s. 3 have the same purpose. As the *Greenwood* case indicates, protection is also given to “public duty”. On the first issue, I rule, therefore, that the defendant was or is in the category of persons protected by s.3. But in order to enjoy that protection in relation to a particular act the doer of that act must have done that act, as the section says, “in pursuance or execution or intended execution of . . . any public duty or authority”. I come now to the second issue of whether the act complained of by the plaintiff was being done “in pursuance or execution of . . . any public duty or authority”. The only relevant East African case I have been able to find is *Mohamed v. Attorney-General*, [1971] E.A. 241. The preliminary issue in the instant case also arose in *Njombe District Council v. Kanti Printing Works*, [1971] E.A. 193. The former (a Kenya case) is, however, more to the point here. In that case, the second defendant was a government driver and he was instructed to drive a district officer who was in charge of transport in the district on official district duty to inspect a damaged government vehicle and buy spare parts. Before their destination, the accident, the cause of action, occurred. The plaint was not filed until one year and two months afterwards. The defendants pleaded that the action was time-barred under the Public Officers Protection Act (Cap. 186) and there was also the issue of whether the second defendant was driving in the public interest. S.2 (1) of this Act is similar to our s. 3. It was held that the driver was, as a public officer, driving in public interest and the Act applied. I have found much assistance from this case, as, being the first case on this issue in East Africa, it dealt quite satisfactorily with the case law on this same issue in England where the Public Authorities Protection Act 1895, s.1, afforded the same protection as the Kenya one and our Civil Procedure and Limitation (Miscellaneous Provisions) Act 1969, s.3, now do. In the *Mohamed* case, the trial judge dealt with a number of English cases but more particularly the case of *Bradford Corporation v. Myers*, [1916] 1 A.C. 242. Without going into the facts of this case, I will give a few extracts from that case which are of direct relevancy to the present suit. At p. 247, Lord Buckmaster, L.C. says in his judgment: “. . . it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute or in the discharge of a public duty, or the exercise of a public authority. . . It (the statute) assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply.” And at p. 248, he says: “The act complained of arose because one of the servants of the appellants, acting in the course of an errand on which they had power to send him, but on which they were not bound in the execution of any act or in the discharge of any public duty or authority to send him, in breach of his common law duty to his fellow citizens, caused damage by his personal negligence. In my opinion, an action for such negligence is not within the class of action contemplated by the statute.” Lord Shaw, at p. 262 says: “It is not enough that the neglect occurs in the doing of a thing which is authorised by statute, but the thing done must be something in the execution of a public duty or authority, and it is only neglect in the execution of any such duty or authority that is covered by the statute. This restriction appears to me to be vital. The act seems to say: there are many things which a public authority, clothed, say, with statutory power, may do, which the limitation will not cover; but when the act or neglect had reference to the execution of their public duty or authority – something founded truly on their statutory powers or their public position – to that, and that only, will the limitation apply.” In the light of *Mohamed v. Attorney-General* and *Bradford Corporation v. Myers*, the criterion on which a decision in a particular case can be reached as to whether our s. 3 applies is not simply because the act complained of was authorised and it was done by a public officer or a person with a public duty, as here, but basically because that act was done in pursuance or execution or intended execution of a public duty or authority. In the instant case, the element of authority is to be found in the plaint itself – paragraph five, from the phrase, “. . . when under the orders of the 1st defendant and during the course of his employment . . . the second defendant the servant and/or agent and/or authorised driver of the 1st defendant . . .” This is not denied by either party, its admission was indeed the basis of action by the plaintiff against the first defendant and is now the basis for the objection by counsel for the defendants against this action by the plaintiff against the second defendant. Regarding the second element, I have already ruled that the second defendant is in the class of persons, although not a public officer, who are protected under s. 3. And if it is of any significance, it may be mentioned that, as in the *Mohamed* case, the vehicle being driven at the time of the accident and involved in the accident, belonged to the first defendant. As far as the third element is concerned, in the absence of evidence as to what was the purpose of the journey when the accident occurred, it seems to me, guidance may be had from the statutory objects of the first defendant. The National Insurance Corporation Act (Cap. 322), s.4 (which section has now been repealed by Decree 19 of 1971 but was still in force at the time of the accident in this suit) provided that: “4. The objects for which the Corporation is established shall be– ( *a*) t o engage in all manner of insurance business in the same way as any insurer; ( *b*) t o engage in such other insurance business as the Minister may direct; and, ( *c*) t o do all such things as are incidental or conducive to the attainment of the above objects or any of them.” From these objects, it does not appear to me that driving was a direct execution or discharge of a or the public duty or duties of the first defendant. On the contrary, it would be only incidental in the execution or discharge of the public duty. In saying this, I should not be taken to imply that the ordering of the driving was unlawful. Lawful or unlawful is not the question here now. But I need only refer to the judgment of Lord Tucker in *Firestone Tire and Rubber Co. v. Singapore Harbour Board*, [1952] A.C. 452, also referred to in the *Mohamed* case, at p. 222: “The protection of the Ordinance (Public Authorities Protection Ordinance) does not cover all the lawful and authorised acts of a public authority. Some acts are excluded.” In *Reeves v. Deane-Freeman*, [1952] 2 All E.R. 506, Lord Goddard, C.J. at p. 508 says, “. . .I required an admission, not only that the defendant was on duty, but also as to the nature of the duty, for I can conceive that if, let us say, the commanding officer of a battalion or depot had to attend some social function, such as a regimental sports meeting or a special church service, for which it might be proper for him to use an army car, it might be that the driver would not be acting in pursuance of a public duty and if an accident took place on the journey, he might not be protected by the section.” The objects of the first defendant being unspecific as they are on driving as a direct execution of the public duty of the first defendant, and taking judicial notice of the fact that 10 January 1971, when the accident occurred, was a Sunday, it seems to me that the protection of the section does not apply here. I therefore rule, on the second issue, that the action against the second defendant is maintainable. *Order accordingly.* For the plaintiff:

*P Musaala*

For the defendants