

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Owiny-Dollo, DCJ, Egonda-Ntende & Obura, JJA]

CIVIL APPEAL No. 69 of 2011

(Arising from HCCS No. 62 of 1999 at Jinja)

BETWEEN

KAMUNYE MUNTUNWOKA.APPELLANT

AND

UGANDA TELECOMMUNICATION LTD.....RESPONDENT

*(On appeal from the judgment of the High Court of Uganda (Mukiibi, J.) at Jinja
delivered on the 20th February 2002)*

JUDGMENT OF F.M.S EGONDA-NTENDE, JA

Introduction

1. The Appellant filed the original civil suit in the High Court of Uganda at Jinja against the Respondent for recovery of employment benefits, special and general damages for inconvenience, loss of time and non-use. The appellant was an employee of Uganda Post Telecommunications Corporation (hereinafter referred to as 'UPTC'), a government corporation that was, by operation of the law, split into three distinct entities, one of which was the Respondent. Upon termination of the Appellant's services, he was classified as a pensionable employee entitled to terminal benefits.
2. However, in paying his benefits, the Appellant did not receive his salary for the 11 days worked in June 1998, one-month basic salary in lieu of notice, leave allowance, three months' pay in lieu of notice and wrongfully deducted tax all amounting to a sum of Uganda Shillings Five Million Three Hundred Eighty-Four Thousand Fifty-Eight (UGX 5,384, 058).

3. The Respondent in its defence contended that the Appellant was an employee of UPTC at the time of termination of his services and that the Appellant's services were not transferred to the Respondent. The Respondent denied any claims against it by the Appellant as such claims were to be paid by UPTC, the petitioner's former employer.
4. When the case came up for hearing, the Respondent raised a preliminary objection under Order 6 rule 27 now Order 6 rule 30 (1) of the Civil Procedure Rules that the Appellant had no cause of action against the Respondent and prayed for dismissal of the suit. The learned trial judge was of the opinion that the question whether the defendant is liable to the Plaintiff on any claim in the plaint could not properly be disposed of as a preliminary issue. The matter proceeded for hearing.
5. The learned trial judge in his judgment delivered on 20th February 2002 found in favour of the Respondent on the ground that the Appellant had failed to prove by evidence that the liabilities which the Respondent took over from the UPTC included payment of the items claimed by the Appellant in the plaint. That the Respondent should have relied on the memorandum of understanding between Government, UPTC and the UNION and put his claim to either the Government or UPTC or both. The Appellant had no legitimate claim against the Respondent.
6. The Appellant, dissatisfied with the decision of the learned trial judge, appealed to this court and set forth the following grounds of appeal:
 - (1) The learned judge erred in law and fact when he failed to evaluate the evidence judiciously and came to a wrong conclusion.
 - (2) The learned judge erred in law and fact when he came to the conclusion that the plaintiff failed to prove by evidence that the liabilities which the Defendant took over from UPTC included payment for the items claimed by the Plaintiff in the plaint.

(3) The learned judge erred in law and fact when he came to the decision that a claim of general damages against the Defendant does not arise.

(4) The learned judge erred in law and fact when he dismissed the Plaintiff's suit.

(5) The learned judge erred in law and fact when he condemned the Plaintiff into payment of costs on a matter that proceeded ex-parte.'

7. The Appellant prays that this court sets aside the judgment of the High Court and enters judgment for the Appellant with costs here and below.

SUBMISSIONS OF COUNSEL

8. Counsel for the Appellant, Richard Mwebembezi, and counsel for the Respondent, Alunga Patrick, adopted their conferencing notes filed on record as their submissions and made additional submissions in court.
9. Counsel for the Appellant submitted that upon restructuring of UPTC, the Appellant transferred his services to the Respondent. Reference was made to sections 83(1), 88(1) and 90 of the Uganda Communications Act in respect of transfer of liabilities, assets and rights from UPTC to the relevant entities among which is the respondent.
10. Counsel for Appellant further submitted that upon termination of the Appellant's services, he was entitled to a basic salary in lieu of notice, leave allowance, three months' pay in lieu of notice, salary for the 11 days he worked in June before termination and a refund of wrongfully deducted taxes amounting to Uganda shillings Five Million Three Hundred and Eight Four Thousand Fifty-Eight Shillings (UGX 5,384,058) in total from the Respondent. He relied on section 88(1) of the Uganda Telecommunications Act, 1997.

11. Counsel for the Respondent submitted that the learned trial judge properly evaluated the evidence before him and made a finding of fact that the Appellant was an employee of UPTC. That the evidence on record shows that the Appellant regarded himself and was an employer of UPTC until 11th June 1998. He relied on exhibit P5 (a payment slip from UPTC) and exhibit P4 (Letter of termination).
12. Counsel for the Respondent further submitted that by virtue of exhibit P4, the Respondent was in existence but the Appellants services had not been transferred to the Respondent entity. He relied on section 90(2) now section 89 of the Uganda Communications Act CAP 160 that provides for retirement benefits and pensions for employees who fell redundant as a result of implementation of section 82 to 84 of the Act. That the employees who were absorbed or who transferred their services to the Respondent were catered for under section 88 and 89(3) of CAP 106 and that the Appellant did not plead that he was absorbed into the employment of the Respondent.
13. Counsel for the Respondent submitted that the Appellant is not entitled to any of the claims raised against the Respondent as he did not prove or plead that he transferred his services to the Respondent hence was not entitled to any of the reliefs sought.

ANALYSIS

Grounds 1, 2, 3 and 4

14. Grounds 1, 2, 3 and 4 all relate to whether the action by the appellant can be sustained against the respondent on the facts presented to court. I shall deal with them jointly.
15. Section 88 (1) of the Uganda Communication Act, (Act 8 of 1997), Chapter 106 of the Laws of Uganda, (hereinafter referred to as the Act), now section 87(1) vested in the Respondent all assets, rights and liabilities relating to telecommunications services to which UPTC was entitled or subject to, before the commencement of Act. It is on that basis that the appellant claimed that the respondent was responsible for the dues to the appellant, as such claims are liabilities that the respondent inherited under the foregoing section.

16. Section 87 (1) states,

‘All assets, rights and liabilities relating to telecommunications services to which the corporation was entitled or subject to, before the commencement of this Act, shall vest in Uganda Telecom Limited.’

17. The foregoing provision is a general provision relating to the vesting of assets, rights and liabilities of UPTC to the respondent. There is a more specific provision that deals with the employees of UPTC. Firstly the employees whose services were transferred. Section 89 (1) of the Act, now section 88, provided for transfer of service contracts of people who were employees of UPTC immediately before the commencement of the Act to either Uganda Telecom Limited (Respondent) or any of the other established relevant entities on similar or better terms to those enjoyed by those employees before the transfer.

18. Under section 89(2), now section 88(2) of the Act, the Respondent was mandated to assume the terms and conditions of service applied to UPTC upon implementation of the Act.

19. The Appellant testified that he was absorbed into the Respondent when UPTC ceased to exist. He relied on exhibit P7 a photocopy of a list entitled: “staff Absorbed into UTL” as the evidence of transfer of services to the Respondent. This is the only evidence on record supporting this testimony. There is no evidence of exhibit P7 having been executed by the Respondent. Its maker is unknown. The respondent denied absorbing the appellant into its employment.

20. Section 101 of the Evidence Act provides,

‘Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove those facts exist.’

The evidence on the record is not sufficient to prove that the Appellant transferred his services to the Respondent. Not having been absorbed into the employment of the respondent no claim by the appellant can be raised against the respondent.

21. The second category related to employees of UPTC who would fall redundant as a result of the implementation of sections 83- 85, now sections 82, 83 and 84 of the Act. Under section 90(2) of the Act, now 89(2), this category of employees was entitled to retirement benefits and pension that were to be calculated, ascertained and paid to the relevant individuals before the repeal of the Uganda Posts and Telecommunications Corporation Act of 1983 that governed UPTC. It states,

‘All employees of the corporation who may fall redundant as a result of the implementation of sections 82 to 84 shall be paid the calculated and ascertained retirement benefits and pensions before the repeal of the Uganda Posts and Telecommunications Corporation Act.’

22. According to exhibit P5 (termination letter), the Appellant’s services were terminated on 30th April 1998 due to failure of placing him in any of the new companies. This implies that he fell under the category of employees who became redundant upon implementation of the Act. Further, under paragraph 2 of the termination letter, it is indicated that the Appellant’s terminal benefits had been calculated and ascertained on the basis of the Agreement between Government, Union and UPTC. There is no copy of the agreement on record. According to exhibit P3 (employees’ terminal benefits payment voucher slip), the Appellant acknowledged receipt of a sum of Uganda Shillings Fourteen Million One Hundred Seventy-One Thousand Five Hundred Sixty-Four (UGX 14,171,564) as terminal benefits. Paragraph 3 stipulates that *UPTC will in addition pay you one’s month salary in lieu of notice*. It appears that salary paid to the Appellant on 27th May 1998 as evidenced by exhibit P3 was in compliance with the above paragraph though UPTC had not anticipated the late receipt of the termination letter by the Appellant.

23. According to exhibit P4, the Ministry of Finance was in charge of payment of terminal benefits that had accrued up to 15th March 1998. The ones that accrued after the said date were to be paid by UPTC, the Appellant’s former employer or in accordance with the terms of the agreement.

24. The Respondent is not liable to the Appellant for any of the claims raised. I find that the learned trial judge properly evaluated the evidence on the record as a

whole and came to the right conclusion. The appellant failed to prove by evidence that the liabilities which the respondent took over from UPTC included payment for the items claimed by the appellant in the plaint. A claim of general damages against the respondent does not arise.

25. There is no ~~merit in~~ grounds 1, 2, 3 and 4 of the appeal. I would dismiss the same with costs.

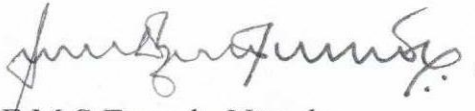
Ground 5

26. The law on costs is clear. According to section 27 of the Civil Procedure Act an award of costs is in the discretion of the court. However, the award of costs must follow the event unless the court for good reasons orders otherwise. See Iyamulyemye David v Attorney General, SCCA No.4 of 2013 (unreported). An appellate court should not interfere with the discretion of the trial court unless the court exercised its discretion wrongly or acted on wrong principles. See Mbogo and Anor v Shah, [1968] E A 93 and Kiska Ltd v Augelias, [1969] EA 6.

27. The learned trial judge awarded the respondent nominal costs in view of the fact that the hearing was *ex parte*. I am unable to agree with the appellant that the award of costs was wrongly made. Even though the matter proceeded *ex parte* the respondent had nonetheless incurred costs on filing a defence and conducting pre-trial proceedings including arguing preliminary points of law. There is no reason why the respondent should not be entitled to the costs it had incurred. Obviously it would not be able to claim costs for the trial at which it was absent. I find no reason to interfere with the decision of the learned judge on costs though it may be a matter of interpretation as to what nominal costs are in the circumstances.

28. I would dismiss ground 5 of the appeal.

Signed, dated and delivered at Kampala this 31 day of May 2018


F.M.S Egonda-Ntende
Justice of Appeal

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5 KAMUNYE MUNTUNWOKA } APPLICANT

VERSUS

10 UGANDA TELECOMMUNICATION LIMITED } RESPONDENT

CORAM:

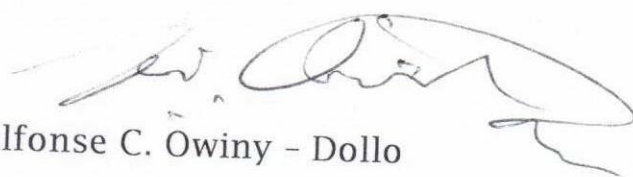
[Owiny - Dollo, D.C.J.; Egonda-Ntende & Obura, JJ.A.]

15 JUDGMENT OF A. C. OWINY - DOLLO DCJ.

I have had the benefit of reading, in draft, the judgment made by my learned brother Egonda-Ntende JA; with which, I fully agree that this appeal must fail. I have nothing to add thereto.

Since Obura JA also agrees, there will be orders in the terms proposed
20 by Egonda-Ntende J.A.

Dated at Kampala; this ³¹ day of May 2018


Alfonse C. Owiny - Dollo
DEPUTY CHIEF JUSTICE

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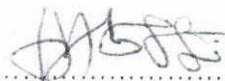
UGANDA TELECOMMUNICATION LTD.....RESPONDENT

(Coram: Owiny-Dollo, DCJ, Egonda-Ntende & Obura, JJA)

JUDGMENT OF HELLEN OBURA, JA

I have read in draft the judgment prepared by my brother Egonda-Ntende, JA and I concur with his conclusion that this appeal be dismissed with costs as it lacks merit.

Dated at Kampala this 31 day of May 2018.



Hellen Obura

JUSTICE OF APPEAL