THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi & Gashirabake, JJA]

CIVIL APPEAL NO. 115 OF 2018

(ARISING OUT OF CB NO. 180 OF 2015)

BETWEEN

1. ADAM KAFUMBE MUKASA
2. HERBERT GILBERT EGESA
3. GEORGE KAWEMBA..... APPELLANTS

(For and on behalf of 21 other former UBL employees)

AND

UGANDA BREWERIES LIMITED ..... RESPONDENT

(*Appeal from the judgment in labor Dispute No.191 of 2015 of Hon. Lady Justice Linda Lillian Tumusiime Mugisha and Hon. Justice Ruhinda Asaph Ntenge dated, 12th January 2018*)

JUDGMENT BY CHRISTOPHER GASHIRABAKE, JA

Introduction

The appellants were employees of the respondent company under the sales department, until 29/04/2014, when their positions were declared redundant and their employment terminated. They were required to sign an agreement. According to them prior to their termination they were subjected to an assessment comprising 3 sets of exams yet on the same day they began the exams, their positions were advertised though designated under different titles.

The respondent's case on the other hand was that following a restructuring process, the claimants were terminated because the respondent was unable to find roles that best fitted the claimant's skills and behaviour. The appellants willingly entered into an agreement wherein they relinquished any further claim against the respondent.

The trial Court found in favour of the Respondent. Dissatisfied with the whole judgment of the trial court, the appellants filed an appeal to this court on grounds that:

1. The learned trial judges and panelists erred in law and fact when they held that the appellants cannot bring an action to retract the terms of their termination letter and sue the respondent.

Representation

The Appellants were represented by Mr. Matovu John. The respondent was represented by Mr. Moses Adriko. The parties opted to adopt written submissions on record as their submissions.

Submissions of Counsel

Counsel for the appellants contends that the learned judges erred when they decided this case in the lower court on an issue that wasn't adduced in evidence at the trial. Counsel further argued that this violated the right to a fair trial under Article 44(c) of the Constitution of the Republic of Uganda which is non- derogable. That the proceedings in the lower court were on the basis that the right to sue was not an issue.

He cited the case of **Ms Fang Min vs. Belex Tours and Travel Limited Civil Appeal No. 06 of 2013 & Crane Bank Limited vs. Belex Tours and Travel Limited Civil Appeal No. 01 of 2014 (consolidated) Hon justice Mr. Benjamin Odoki at page 27,** where it was stated that;

> 'This court has on several occasions emphasized the need for pleadings in civil proceedings to describe the respective cases for the parties and to define the issues in dispute for resolution by the court.....It is now established that a party cannot be granted relief which it has not claimed in the plaint or claim'

To emphasize his holding the judge in the above case relied on the earlier cases of **Rwabinumi vs. Hope Bahimbisibwe, Civil Appeal No.10 of 2009** and **Attorney General vs. Paul Ssemogerere and Zachary Olum Constitutional Appeal No. 3 of 2004**

On whether by signing the termination letters the appellants signed an agreement in restraint of legal proceedings contrary to Section **22 (1) of the Contract Act, No. 7 of 2010**, Counsel for the appellants argued that it is prudent to define the meaning of a contract and what makes a contract valid.

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Section 10 of the Contract Act No. 7 of 2010, reads as follows:

> 1. 'A contract is an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.'

Counsel further argued that the alleged agreement did not pass the test in section 10(1) of the Contract Act no. 7 of 2010, because there was never free consent of parties according to section 13 of the Contract Act. Counsel argued that the termination contract was not free of coercion, undue influence, fraud, misrepresentation, mistake and lacked consideration, as defined by the Contract Acts 2010.

Counsel for the appellants averred that the said contract is contrary to section **22(1) of the Contract Act No.7 of 2010**, which provides that;

> An agreement which restricts a party absolutely from his or her rights under or in respect of contract, by legal proceedings or which limits the time within which the party may enforce his or her rights is void to that extent.

Additionally, that the respondent did not comply with section **80 of the Employment Act 2006**, while terminating the applicants. Counsel for the appellants submitted that although the alleged contract is in writing, it is neither signed by both employer and employee and nor does it contain the statement of the labour officer to the effect that the terms of the agreement are fair and reasonable.

Counsel for the appellants prayed that this honourable court sets aside the judgment and decree of the industrial court, allows the appellants appeal with an award of general damages, interest at 25% per annum and costs to the appellants'.

In reply, counsel for the respondent submitted that the right of appeal against the decisions of the industrial Court is set out under section 22 of the Labour Disputes (Arbitration and Settlement) Act No 8 of 2006, which limits the appellants to bring grounds of appeal that raise only points of law. This position is well established and has been strictly applied by this court in **Uganda Development bank vs. Florence Mufumba, CACA. No. 241 of 2015** and **Esza**

Catherine Byakika vs. National Social Security Fund CACA No. 193 of 2017.

Counsel for the respondent submitted that the basis of the industrial courts award was that when the appellants were terminated by the respondent, they signed their termination letters accepting their terminal benefits and expressly stating that they have no further claims of any nature whatsoever against the respondent company.

On whether the learned judges could determine the case on an issue that was not canvassed in evidence at trial. Counsel for the respondent argues that, the appellants are in breach of rule 102 (a) of the Court of Appeal Rules S.113-10, which forbids an appellant from arguing an issue or ground that is not part of its grounds of appeal without leave of court. He further argues that this issue did not form a part of the appellant's grounds of appeal and therefore should not be considered by this court. In **Moro Okola v John Lalobo [1979] HCB 54 at 555**, it was stated that, it is trite law that an appellant cannot argue or be heard except by leave of the court in support of any ground of appeal not set out in the memorandum of appeal.

Counsel for the respondent addressed submitted that the appellants wrongly submit that the only issue before the trial court was whether or not their employment was rendered redundant. He averred that the appellants are misleading court by saying the issues was resolved in the negative.

Counsel for the respondent argued that it is unfair and misguided to accuse the trial court of determining issues that were not before it. Before the trial court reached its conclusion, it reproduced verbatim, in its award, the termination letter (which was part of the evidence) of the appellants dated 29th April 2014. This termination letter and its contents were part of the evidence and the trial court's record.

Further he submitted that the case of **Ms. Fang min vs. Belex Tours and Travel Limited, Civil Appeal, No 01 of 2013,** relied upon by the appellants is not helpful because its facts differ from the present. Unlike this case, in *Ms Fang Min*, the Court of Appeal had wrongly invalidated a mortgage whose validity was not in issue

and cancelled a title based on fraud that had neither been pleaded nor proved. In that case, the Supreme Court stated that most of the court of appeal's findings *"were not based on evidence but on conjecture and attractive reasoning"* on that basis reversed the court of appeal decision. In this case the trial court properly relied on the evidence before it. He prayed that this court decides this issue in favour of the respondent.

On the second issue Counsel for the respondent submitted that, it is trite that for one to successfully vitiate an agreement, one should demonstrate through their pleadings at trial and through evidence that there are vitiating factors in existence at the time of signing the agreement. None of the vitiating factors relied on by the appellants in their submissions were either pleaded or proved at trial. It is also noteworthy that they were never made a ground of appeal. He argued that the appellant fell foul of rule 102(a) of the Court of Appeal Rules S1 13-10, which does not permit appellants to argue a ground that is not part of its grounds of appeal without leave of court.

Counsel for the respondent submitted that the appellants relied on Section 22(1) of the Contract Act no 7 of 2010 to advance their argument against the respondent. Counsel argued that the appellants were never barred from initiating legal proceedings in court. He submitted that Section 22(1) only voids agreements in which a party is strictly and absolutely precluded from initiating legal proceedings to enforce their rights under a contract. It does not stop the execution of agreements in which a party admits that they have no further claims against another party if it did, and then all consent settlement agreements would be void. Adopting the position being urged by the appellants would therefore lead to an absurdity.

Counsel for the respondent further argues that it is not mandatory to refer every agreement of termination to the labour officer as provided under Section 80 of the Employment Act. The section only creates that requirement if the agreement between the employer and employee expressly states, *"that no complaint in respect of a termination shall lie to a labour officer."* The agreement in this case does not make such a statement and therefore section 80 does not apply to it. In any event that section does not make such

agreements that have not been signed by labour officer void. Counsel further argued that the appellants are barred under Rule 102 from raising issues Section 80 of the Employment Act since they did not raise it at the trial.

Counsel for the respondent further submitted that the above conduct of the appellants in attempting to deny the enforceability of the agreements they signed and took benefit of is in contravention of the common law principle similar to estoppels that states that one shall not approbate and reprobate.

On whether it was restructuring or redundancy, counsel for the respondent submitted that, the evidence on record shows that the respondent conducted a genuine restructuring and could not fit the appellants into its new structure, thus justifying their termination. This change was triggered by the new objectives set out by the respondent's group owner Diageo Plc in 2014 that required all subsidiaries to come up with performance ambition and the right capabilities to achieve maximum efficiency and productivity.

Counsel for the respondent submitted that it is not true that the respondent advertised the same roles after terminating the appellants' employment. The respondent advertised new modified roles that did not suit the appellant's ability and behaviour character.

Rejoinder

In response to the respondent's submission, counsel for the appellant argues that the basis of rule 102 (a) of the Court of Appeal rules is to restrict litigants from introducing a new ground on appeal; the appellant has not introduced a new ground on appeal. Counsel further submitted that this issue is a point of law and derived from the same agreement that the lower court relied on to make a judgment in favour of the respondent, there is no departure from the ground of appeal as alleged by the respondent.

Regarding section 80 of the Employment Act, Counsel for the Appellant argues that all the arguments relating to the said agreement are before this court because like earlier stated, the lower court denied the parties the opportunity to be heard on the matter but, made its decision basing on the same agreement.

It is the contention of the appellants that the principle of approbation and reprobation is misplaced in the circumstances, the appellants did not take any benefit from the alleged new agreement, any monies paid to them at the point of termination was due to them under their terms and conditions of service in the previous employment contract with the respondent.

Analysis

This is the first appellate court and I am alive to its duty of re-evaluating afresh the evidence adduced before the trial judge. The re-evaluation enables this court to make up its own mind on the issues to be determined before it. This was the holding in **Kifamunte Henry vs. Uganda SCCA, No..10 of 1992 See Pandya vs. R. (1957) E.A. 336 and Okeno vs. Republic (1972) E.A. 32 Charles B. Bitwire vs Uganda - Supreme Court Criminal Appeal No. 23 of 1985 at page 5.**

Preliminary objection.

Before delving into the ground of appeal the respondent objected to the appeal on ground that the appellant offended rule **102 (a) (Judicature (Court of Appeal) Rules 13-10,** it provides that,

> At the hearing of an appeal in the court—
>
> (a) no party shall, without the leave of the court, argue that the decision of the High Court should be reversed or varied except on a ground specified in the memorandum of appeal or in a notice of cross-appeal, or support the decision of the High Court on any ground not relied on by that court or specified in a notice given under rule 93 of these Rules;

I agree with the position of the law as stated in **Moro Okola vs. John Lalobo 1979 HCB, 55**, where court held that,

> 'It is trite law that an appellant cannot argue or be heard except by leave of the court in support of any ground of appeal not set out in the memorandum of appeal.'

The law and practice that a party is bound by their pleadings is the same as that in rule 102(a). The essence is to ensure that each side is alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before court for its consideration.

The sole ground of appeal in question is, in my view, wide enough to cover the case put forth by the appellant in this appeal. The question that has to be decided is whether or not, at law, the appellants were precluded from initiating an action for the termination of their employment. If I am wrong in this view I would still invoke Article 126 (2) (e)of the Constitution to entertain this appeal given that the evidence adduced in the case is sufficient to investigate the complaint of the appellants.

Merits of the appeal.

The ground of appeal is based on an alleged agreement executed between the appellants and the respondent at the point of termination which was the basis for the decisions of the lower court. This agreement was not traversed at the trial in evidence by either party nor did the learned judges of the lower court call any of the parties to articulate it. The issue in the lower court was to establish whether the termination of the appellant was lawful. According to section 2 of the **Employment 2006** termination is defined as,

> The discharge of an employee from an employment at the initiative of the employer for justifiable reasons other than misconduct, such as expiry of contract, attainment of retirement age, etc

And section 68(1) of the same act provides that,

> In any claim arising out of termination, the employer shall prove the reason or reasons for dismissal and where the employer fails to do so, the dismissal shall be deemed to have been unfair within the meaning of section 71

Section 71 (1) provides that,

> "An employee who has been continuously employed by his or her employer for at least thirteen weeks immediately before the date of termination, shall have the right to complain that he or she has been unfairly terminated"

The provision does not actually define what amounts to unfair dismissal which I believe gives the court wide discretion to determine what would amount to unfair dismissal depending on the circumstances of every case. Section 68(1), however, mandates the employer to have reasons for dismissal. In absence of the said

reasons the termination is then considered unfair according to Section 71 of the same Act. In **Barclays Bank vs. Godfrey Mubiru SCCA No.1 1998** it was held that;

> 'Where the service contract is governed by a written agreement between the employer and employee, termination of the employment services would depend on the terms of the contract'

According to the termination letter the appellants were dismissed due to redundancy. According to section **9.3.3** of the respondent's human resource manual defines redundancy as,

> 'An employee whose job is declared superfluous by **abolition of office or responsibility** shall be declared redundant and shall be served with appropriate notice to cease employment.'

In the resource manual an employee is declared redundant when his job has been declared superfluous by ***abolition of office*** or ***responsibility***. This court has the task of establishing whether the above was the case. The lower court in its award noted that the jobs substantially remained the same but the assessment undertaken emphasized the identification of behaviour skills. The Black's Law dictionary sixth edition defines abolition as;

> To do away with wholly; to annul, to repeal; to rescind, to abrogate, to dispense with.

Redundancy in the case quoted by the lower court in **R VS INDUSTRIAL COMMISSIONER OF SOUTH AUSTRALIA EXPARTE ADELAIDE MILK SUPPLY CO. LTD (1977)16 SASR 6** was defined by BRAY J as,

> *"... simply this, that a job becomes redundant when the employer no longer desires to have it performed by the employee. A dismissal for redundancy seems to be a dismissal, not on account of any personal act or default of the employee dismissed or any consideration peculiar to him but because the employer no longer wishes the job the employee has been doing to be done anymore."*

The lower court rightly held that, the roles in the sales department were not abolished. They were simply enhanced to enable the respondent to achieve their desired ambition. This enhancement is not the same as abolition defined in the resource manual. Court however went ahead and held that since the parties signed the

agreement, they were bound by the agreement, unless the appellant demonstrated that there was fraud or duress, which was not the case herein.

The evidence in the lower court leaned towards proving whether the appellants were rendered redundant or not. There was no evidence led as to the validity of the termination contract *per se*, it is only mentioned as the court concludes its finding.

The lower court was satisfied that by signing the termination agreement, the appellants were satisfied with the process of dismissal as well. No evidence was led concerning the validity of the termination contract during the trial. Neither did court examine any party on the same. However, this point is a matter of law. Once the termination contract was proved in evidence, it was open to the court to apply the law to it and determine its validity, given that the appellants were questioning the lawfulness of their termination or dismissal.

Where as it is not in dispute that the appellants signed the termination letter, the termination procedure in the human resources manual section 9.3.3, that preceded the so called termination agreement, was not adhered to by the respondent. The appellants could therefore not be held to this agreement, that was preceded by wrongful acts of the respondent.

In **Makula International Ltd v His Eminence Cardinal Nsubuga & Anor (Civil Appeal 4 of 1981)**, it was held by court;

> 'A court of law cannot sanction what is illegal. Illegality once brought to the attention of court overrides all questions of pleadings including an admission thereof.'

In my analysis it was illegal for the respondent to terminate the employment contract under the guise of redundancy if the conditions justifying the termination in the human resource manual were not met. Signature alone cannot justify what is illegal as decided in the above case or does not legalise an illegality. It is a well settled position of the law in *Makula international (supra)* that once an illegality is brought to the attention of court overrides all admissions made by the party. It was well observed by the lower court that there was no abolition of office or responsibility, by this the respondent had no right to terminate the contracts under

redundancy as defined by the company manual under section 9.3.3.

The law requires that the employer shall prove the reason for dismissal and where the employer fails, it is deemed unfair dismissal under Section **68(1) and 71 of the Employment Act**. The respondent in the lower court failed to justify the decision to dismiss according to the definition of redundancy. Court cannot sanction what was illegal, or also make its finding on un pleaded matters, that were not supported by the evidence on record.

In his submission counsel for the appellants averred that the termination contract did not pass the test of a valid contract because the appellants did not give their required consent. He averred that the termination contract was characterized with coercion, misrepresentation, mistake, undue influence and lack of consideration.

It is a trite law of pleading that all facts which are necessary to prove the cause of action of the Plaintiff are to be averred in the Plaint. What a party has not pleaded cannot be proved and cannot be relied on at appeal. In considering the relevance of cause of action in pleadings Justice Wambuzi, C. J at Page 18 – 19 ***Attorney General V Major General David Sejusa (formerly known as Tinyefunza) Constitutional appeal No. 1 of 1997*** held that,

"On the authorities referred to us, I obtain guidance from the definition given by **Mulla on the Indian Code of Civil Procedure, Volume 1, and 14th Edition at page 206**. The learned author says:

> *'A cause of action means every fact, which, if traversed, it would be necessary for the Plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the Plaintiff a right to relief against the Defendant..... Everything which if not proved would give the Defendant a right to an immediate judgment must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the Plaintiff to prove in order to succeed in the suit.'*

Upon perusal of the record of appeal, the appellants did not make mention of undue influence, misrepresentation. Coercion, or mistake in their pleadings neither did they lead any evidence in this

regard. It is a requirement of the law that such causes of action are particularized, According to **Order 6, rule 3 of the Civil Procedure,**

> 'In all cases in which the party pleading relies on any *misrepresentation, fraud, breach of trust, willful default* or *undue influence*, and in all other cases in which particulars may be necessary, the particulars with dates **shall be stated in the pleadings'**

In ***Okello vs. Uganda National Examinations Board CA No. 12/1987 reported in [1993] II KALR 133 at 135*** , Lubogo JSC held that Order 6 rule 3 of the CPR is mandatory in that the particulars of fraud and dates regarding the alleged fraud should be given. This mandatory requirement is also applicable to misrepresentation, coercion, undue influence, mistake, breach of trust and whenever it is necessary. Failure to plead those particulars is fatal.

Considering general damages I will be guided by the position of the law in **Issa Baluku Vs SBI INT Holdings (U) Ltd HCCS NO.792 OF 2005,** where Justice Remmy Kasule held that;

> "However, another additional principle has been developed by courts overtime in cases of unlawful dismissal. This is the principle that courts, where appropriate in exercise of their discretion, may award damages which reflect the court's disapproval of a wrongful dismissal of an employee. The sum that may be awarded under this principle is not confined to an amount equivalent to the employees' wages"

The fact that the claimants were dismissed contrary to the law, and the terms of the employment contract, the appellants are entitled to general damages. The claimants prayed for Ugs. 250, 000,000/= (Two hundred fifty million shillings only). Considering the factors relating to this case i.e. they were dismissed wrongfully and at the prime age of their careers, each party is awarded Ugs. 20,000,000/= (Twenty million shillings only).

According to **Section 26 of the Civil Procedure Act**, court is empowered to award any rate of interest it deems reasonable. In **Charles Lwanga Vs Centenary Rural Development Bank, CA NO. 30/1999**, it was held that interest in cases of wrongful dismissal runs from the date of dismissal. In the circumstances the court

awards interest of 10% on the general damages from the time of dismissal.

I am not persuaded by the finding of the lower court. I would find in favour of the appellants. I would declare that the appellants' dismissal was unlawful and propose the following orders:

1. **The lower court's judgment and orders be set aside.**
2. **An award of 20,000,000/= (Twenty million shillings only) to each appellant as general damages.**
3. **Interest on 2 above at 10% per annum from the date of dismissal until the satisfaction of the judgment**
4. **Costs of both the lower court and this court will go to the appellants.**

Dated at Kampala this 15th day of July 2022

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C. GASHIRABAKE

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi & Gashirabake, JJA]

CIVIL APPEAL NO. 0115 OF 2018

(Arising from High Court Appeal No. 180 of 2015)

BETWEEN

1. **ADAM KAFUMBE MUKASA**
2. **HERBERT GILBERT EGESA** ::**APPELLANTS**
3. **GEORGE KAWEMBA**

(For and on behalf of 21 other former UBL employees)

AND

UGANDA BREWERIES LIMITED ::**RESPONDENT**

JUDGMENT OF MUZAMIRU MUTANGULA KIBEEDI, JA

I have had the benefit of reading in draft the Judgment prepared by my brother, Gashirabake, JA. I concur and I have nothing useful to add.

Dated at Kampala this ....15th....day of....July.....2022

Muzamiru Mutangula Kibeedi
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

[Coram: Egonda-Ntende, Kibeedi & Gashirabake, JJA]

CIVIL APPEAL NO. 115 OF 2018

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2. HERBERT GILBERT EGESA
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(For and on behalf of 21 other former UBL employees)

AND

UGANDA BREWERIES LIMITED ..... RESPONDENT

(*Appeal from the judgment of the Labour and Industrial Court dated 12th January 2018 in Labour Dispute No.191 of 2015*)

JUDGMENT BY FREDRICK EGONDA-NTENDE, JA

[1] I have had the opportunity of reading in draft the judgment of my brother, Gashirabake, JA. I agree that this appeal should be allowed.

[2] As Kibeedi, JA, also agrees this appeal is allowed with the orders proposed by Gashirabake, JA.

Signed, dated, and delivered at Kampala this 15th day of July 2022

Fredrick Egonda-Ntende
Justice of Appeal