

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA, AT KILA  
CIVIL SUIT NO. 591 OF 2007

THE HONOURABLE JUSTICE A.N. KAROKORA  
(RTD JSC)

.....

PLAINTIFF

**VERSUS**

ATTORNEY GENERAL .....

DEFENDANT

**BEFORE: HON. JUSTICE V.F. MUSOKE KIBUUKA**

**JUDGEMENT**

**PLEADINGS**

The Plaintiff is a retired Justice of the Supreme Court of Uganda. He retired on 5<sup>th</sup> November, 2006. He had joined the Public Service during the month of July, 1963, serving some 520 months until he retired in November, 2006.

However, when the commissioner of pensions calculated the Plaintiff's Pension, he based it not upon 520 months but upon 435 months.

Before his retirement, the plaintiff received, as his last monthly emoluments, Shs.4,910,000/= per month or shs.58,264,000/= per annum. But in calculating his pension, the Commissioner based it upon an earlier monthly salary of Shs.2,775,333/- or shs.33,264,000/= per annum.

The plaintiff seeks from this honourable Court, the following reliefs:

- a) an order requiring the defendant to pay to the plaintiff the balance of his pension gratuity of Shs.161,706,400/=;
- b) an order requiring the defendant to pay to the plaintiff arrears of his monthly pension.

- c) an order awarding interest on (a) and (b) above, at the Commercial rate from the date of filing the suit till payment in full;
- d) an order requiring the defendant to pay to the plaintiff a monthly pension of Shs.3,404,497/= with immediate effect;
- e) an order awarding general damages to the plaintiff;
- f) an order awarding interest to the plaintiff on the decretal sum from the date of judgment till the date of payment in full;
- g) a declaration that Section 9(3) and Section 13, of the Pensions Act, Cap.286, are unconstitutional and void to the extent of they are inconsistent with the constitution; and
- h) an order awarding the costs of this suit to the plaintiff.

The Plaintiff claims that the computation of his Pension had not taken into account the increase in the salaries of the justices of the Supreme Court from Shs.33,264,000/= per annum to Shs.58,924,000/= per annum. He also contends that the calculations of his pension based upon both Sections 9 and Section 13, of the Pensions Act, Cap.286, are in breach of Articles 2(2), 128(5) and (7), 154 (1) (a), 144 (1) (a), 175 and 254 (1), of the Constitution of the Republic of Uganda.

The defendant, in the defence, pleaded that the plaintiff was being paid his retirement benefits in accordance with the law.

### **FACTS AGREED UPON**

At the Scheduling Conference, the following facts were agreed upon by both parties:-

- that the plaintiff was employed in the Public Service of the Republic of Uganda from July, 1963 to 5<sup>th</sup> May, 2006, when he retired;
- that the plaintiff's last monthly emoluments were Shs.4,910,000/=,
- that the Plaintiff retired from the Public Service on 5<sup>th</sup> November, 06.

### **ISSUES:**

The issues agreed upon for determination by Court are:-

- a) Whether the computation of the plaintiff's pension should have been based upon his last emoluments;
- b) Whether the computation of the plaintiff's pension should have taken into account the entire period of his service in the Public Service; and
- c) Whether the Plaintiff merits the reliefs which he seeks through the plaint.

### **Whether The Computation Of The Plaintiff's Pension Should Have Been Based Upon His Last Emoluments**

The Plaintiff gave evidence that his last annual pensionable emoluments, as a justice of the Supreme Court of Uganda, had been Shs.58,924,000/= per annum or Shs.4,910,000/= per month. That fact is not in dispute in this case. The Plaintiff testified further that he had received those pensionable emoluments since July, 2006. That fact too was not in dispute. The plaintiff's contention is that in computing his pension and his pension gratuity, his last pensionable emoluments should have been used instead of the pensionable emoluments which he had last received in June 2006.

The defendant produced the Commissioner for Pensions, Mr. Stephen Kiwanuka Kunsu. He appears as DW1 on the record. His evidence was that he computed the Plaintiff's pension on the basis of the annual salary of a Supreme Court Judge which appeared in the first schedule to the Salaries And Allowances (Specified Officers) Act, Cap.291, which was Shs.31,680,000/= or Shs.2,640,000/= per month.

DW1 testified that the plaintiff objected to the salary of 31,680,000/= saying that his last annual emoluments had been 58,920,000/=. The Plaintiff disclosed to DW1, that in fact, before his annual salary rose up to 58,920,000/= in July 2006, he was not receiving Shs.31,680,000/= annually but Shs.33,264,000/=. DW1, found that the salary of Shs.33,264,000/= for a Supreme Court Judge had

also not been approved by Parliament under the Salaries And Allowances (Specified Officers) Act. However, it had been authorized by Government through a circular Standing Instruction No.5, of 1998, issued by the head of the Public Service. He took that as the last salary for calculating the plaintiff's pension.

But the plaintiff still objected to the annual salary of 33,264,000/= insisting upon the sum of shs.58,920,000/= as his last pensionable annual emoluments. DW1 then made a calculation of the plaintiff's pension and pension gratuity upon that sum. But the Auditor General refused to approve the payment saying that there was no law backing the plaintiff's emoluments of shs.58,920,000/=: thus questioning its legality.

DW1 insisted that the salary of Shs.58,920,000/= was outside the law. He stated that salaries for Judges required Parliamentary approval. He also asserted that the approved salary for justices of the Supreme Court was Shs.33,364,000/=.

Court called the Secretary to the Judiciary as a witness. Mrs. Eva Kabasindi, who came to answer the summons to the Secretary to the Judiciary, appears on the record as CW1. She produced exhibit C1, which is a letter containing a directive by His Excellency the President to improve the emoluments of judges. The letter, PO/17, dated 12<sup>th</sup> March, 2006, was addressed to the Rt. Honourable Prime Minister. It was copied to the Hon. Chief Justice, the Honourable Attorney General and the Honourable Principal Judge.

It is not clear from the evidence how the matter was handled. What comes out of the evidence clearly is that a sum of Shs.2,000,000/= was included in the judiciary's budget for the financial year, 2006/7, purposely for the improvement of the judges' emoluments just as His Excellency the President had directed. The judiciary's budget including the figure of Shs.2,000,000,000/= was passed by Parliament. The improved salaries were paid by government effective from 1<sup>st</sup> July, 2006.

It has been submitted, on behalf of the defendant that the improved salary for judges was contrary to the law and that the Pensions Authority was not obliged to compute the Plaintiff's Pension using the plaintiff's last emoluments of shs.58,924,000/=. It has further been submitted that the Pensions

Authority is mandated to act within the confines of the law and computation of any pension outside the law would amount to an illegality. Citing the decision of the Court of Appeal in Makula International Ltd. Vs. H.E. Cardinal Nsubuga And Another (1982) H.C.B. 11, counsel for the defendant urged this court not to sanction an illegality by holding that the Plaintiff's pension ought, in those circumstances, to have been based upon the improved salary which had not been approved in accordance with the provisions of Section 2 or Section 3 (2) and (3) of the Salaries And Allowances (Specified Officers) Act, Cap.291.

Section 3(2) and (3) of that Act provide as below:-

**“3.(2) Parliament may, by resolution, amend the First Schedule to this Act.**

**(3) A resolution passed under this Section shall, as soon as possible be published in the Gazette.”**

From the evidence laid out above, it is not in dispute that by that time the plaintiff's pension was computed, no resolution had been passed, by Parliament to amend the First Schedule to the Salaries And Allowances (Specified Officers) Act, Cap.291 even though for some four months, the Plaintiff had been receiving the improved salary as his pensionable emoluments.

Perhaps if lack of a parliamentary resolution under subsections (2) and (3) of Section 3 of the Act would render the computation of the plaintiff's pension illegal, then, certainly, the pension that was computed for the plaintiff upon the sum of shs.33,264,000/- which the defendant assumed to constitute the plaintiff's last annual emoluments but, which the same defendant says also lacked Parliamentary approval and was only notified by the head of the Public Service through Standing Instruction No.5 of 1998, would be equally illegal for the same reason. For there is no person or body of persons, who can, under the Constitution of the Republic of Uganda, make any rules or publish any Standing Instructions, which override or derogate from an Act of Parliament or which will be enforced by the courts in contravention of an Act of Parliament. The argument, therefore, that the Pensions Authority found the figure of Shs.33,264,000 more acceptable to that of

58,920,000/= when neither figure had been approved by resolution of Parliament, cannot help generating a lot of curious amusement to the legal mind.

Equally baffling, is the argument that the Auditor General rejected the computation of the Plaintiff's pension upon his last emoluments of Shs.58,920,000/=, on account of lack of Parliamentary approval, when under Article 154(3), of the Constitution, it was the Auditor General, who had been sanctioning on monthly basis and for 4 months, the payment of those emoluments to the plaintiff with regard to his monthly salary. Under Article 128(5) of the Constitution, salaries and allowances, gratuities and pension payable to judges are a direct charge upon the consolidated fund. Under Article 154(3), no money is drawable from the consolidated Fund unless it is approved by the Auditor General. The salary cannot be found to be legal while the pension that directly arises out of that salary is found by the same authority and for reasons relating more to the payment of the salary itself, to be illegal. Court duly agrees with Mr. Munanura that such reasoning would be self defecting.

Be that as it may, the central question still to be answered is whether as the law stood, at the time of the computation of the plaintiff's pension, it would have been unlawful to compute the plaintiff's pension upon the improved emoluments as the defendant contends?

In the view of this court, the answer to that question lies in the proper interpretation of the provisions of Section 3(4) of the Salaries And Allowances (Specified Officers) Act. That provision reads:-

**“(4) Subject to article 158 of the Constitution, a resolution under the section may be given retrospective effect.”**

Any provision of an enactment is best understood and properly construed through the ascertainment of the intention of the legislature.

The provisions of Section 3(4) of the Salaries And Allowances (Specified Officers) Act can be said to have been enacted with one of only two possible intentions:

- For Parliament to give itself power to be able to pass a retrospective resolution in order to backdate the effective date of the increased salaries of specified officers.
- For Parliament to create an administrative flexibility whereby the executive would increase the salaries of specified officers, effect them and seek the approval of Parliament later.

Regarding the first possible intention, it is trite law that Parliament, indeed, as Professor A.V. Dicey said of the British Parliament, in his classic book, *“The study of the law of The Constitution”*, tenth edition at page 42,

*“it is a fundamental principle with English lawyers, that Parliament can do anything but make a woman a man and a man a woman.”*

That supremacy principle is to a large extent applicable to our legislature in Uganda. Article 79(1) of the Constitution provides that;

**“subject to this Constitution, Parliament shall have power to make laws on any matter for the peace, order, development and good governance of Uganda.”**

Besides, it is also a well known Principle in law that Parliament does not bind itself or the next Parliament. Apart from the Constitutional prohibition, under Article 2(2) of the Constitution, not to enact unconstitutional laws, Parliament in Uganda remains with unfettered legislative authority to enact any law or pass any resolution as the exigencies of the situation requires. Court, therefore, cannot see why Parliament’s intention in enacting section 3(4), of the Salaries And Allowances (Specified Officers) Act could have been to authorize itself to pass a retrospective resolution when that power was already vested in it. To hold so would lead to an absurdity.

The only intention of Parliament then, in enacting section 3(4) of the Salaries And Allowances (Specified Officers) Act, it appears to me, must have been the second one. That is to create administrative flexibility for the executive to act and seek the approval of Parliament at a later date. That window of flexibility bears, indeed, was so generous that Parliament never put a time frame to

it. The executive would seek Parliamentary approval any time chosen by it. During the interim the increased salary would be perfectly legal.

The fact that Section 3(4) of the Salaries And Allowances (Specified Officers) Act was subjected to Article 158 of the Constitution strengthens the above argument. Parliament merely intended to restrict the executive not to use the window of administrative flexibility to reduce any salary or allowance already accrued to a specified officer and charged on the Consolidated Fund during the interim.

In the view of this court, the essence of Section 3(4) is that Parliament has not decided to retain exclusive jurisdiction in the matter of increasing salaries for specified officers. It has chosen to merely pray a complimentary role with the executive. It has allowed the executive flexibility whereby it may increase the salaries and seek the approval by way of amendment to the Schedule to the Act later.

In light of the above brief analysis, court finds that the payment of the improved emoluments to the judges from the first day of July 2006 by the executive, upon the directive of H.E. the President, cannot be said by any stretch of imagination to have been contrary to law for lack of an approving resolution by Parliament. In the same vein, it would have been perfectly legal, in those circumstances, to base the computation of the plaintiff's pension upon the improved emoluments received by him immediately prior to his retirement. By refusing to do so the Pensions Authority acted contrary to law.

Court, therefore, answers the first issue in the positive.

### **Whether the Computation of The Plaintiff's Pension Should Have Taken Into Account The Entire Period of Service In The Public Service**

The Plaintiff's complaint under this issue was that he worked for a total of 520 months in the public service. The Pensions Authority rejected part of those months as un-qualifying service. He



determined the period of service to be, according to DW1, 496 months, dropping some 24 months out of the 520 months.

In addition and perhaps more importantly, in order to conform to the Provisions of Section 13, of the Pension's Act, which places a maximum seal to every pension granted by the Pensions Authority not to exceed 87% of the highest pensionable emoluments drawn by the recipient at any time during the course of his or her service, the pensions authority reduced the 496 months to 435 months, dropping some 61 months off the long service of the Plaintiff in the Public Service.

The Plaintiff argues that as a justice of the Supreme Court of Uganda, he had to retire upon attaining the age of 70, as is required by Article 144(1) (a) of the Constitution. The Plaintiff argues that Section 13 of the Pensions Act is in conflict with Article 254(1), of the Constitution.

**Article 254(1) provides:-**

**“254(1) A public officer shall, on retirement, receive such pension as is commensurate with his or her rank, salary and length of service.”**

This Court is aware of the fact that it possesses no jurisdiction to declare any provision of an Act of Parliament unconstitutional and, therefore, null and void to the extent of the inconsistency. It is also aware that it has jurisdiction in any case where it considers any provision of the law that existed before the coming into force of the Constitution not to be in conformity with the Constitution, to invoke the provision of Article 272(1), of the Constitution and apply that provision of the law with *such modifications, adaptations, qualifications and exceptions as may be necessary to bring it in conformity with the Constitution.* See: **Masaka District Local Government Vs. Angela Nanyonjo Misc. Application No.24 of 2007** (unreported).

In the case of Section 13, of the Pensions Act, in as far as it sets a seal to the pension, that may be granted by the Pensions Authority to 87% of the highest emoluments the recipient of the pension may have received during his or her service in the public service, court does not consider the provision to be in any conflict with Article 254(1) of the Constitution.

It appears to court that Article 144(1) of the Constitution offers a good explanation why section 13 of the Pensions Act cannot be said to be in conflict with Article 254(1) of the Constitution. Under Article 144(1) a justice of the Supreme Court of Uganda, just as any judicial officer, may retire any time after attaining the age of 60. The article is entirely permissive. The age of 70 years provided for under Article 144(1)(a) is only for the compulsory retirement for the Chief Justice and justices of the Supreme Court and the Court of Appeal.

The Constitution does not require a Justice of the Supreme Court to keep in office until he or she attains the age of 70. There is, I think, a presumption that a person serving in the public service is fully aware of his or her pension and other rights. Not all justices enter the judicial service from the lowest ranks in the judiciary. It appears, therefore, that it should be upon each judicial officer to know when to leave after attaining the age of 60, so as to avoid rendering unqualifying service beyond the seal provided under section 13 of the Pensions Act.

It appears, as well that the purpose of the seal, under Section 13 of the Pensions Act, is justifiable because it serves to prevent a retiree, from the Public Service from drawing a pension which would be equivalent or beyond his or her highest emoluments while still in the service. It is a recognized and internationally accepted principle that a pension cannot exceed a salary drawn by the Pensioner while still in service.

Accordingly, court finds that the Pensions Authority was right and acted in accordance with the law in not taking into account the plaintiff's entire long service of 520 months when computing the Plaintiff's pension. To do so would have been contrary to law.

I, accordingly, answer the second issue in the negative.

The plaintiff, in his pleadings raised the question of the Constitutionality of the provisions of Section 9 of the Pensions Act, in particular, Section 9(2). The defendant did not, in the defence or in his submissions, answer the plaintiff's submissions. It would appear that the complaints were accepted by the defendant. The defendant also appears to have abandoned his claim that the plaintiff did not

disclose a cause of action presumably basing it upon the provisions of Section 9(2) of the Pensions Act.

In **Masaka District Local Government Vs. Angela Nanyonjo, Miscellaneous Application No.24 of 2007** (Supra), this Court fully discussed the question of Section 9, of the Pensions Act. Court concluded as it does now, that Article 254 of the Constitution leaves no doubt in anyone's mind that a pension is an enforceable right in Uganda. Even without Article 254 of the Constitution, but by merely reading section 9(1) of the Pensions Act in conjunction with Article 45, of the Constitution, the inevitable conclusion would be that a pension is an unshakable and enforceable right to any pensioner in Uganda. Thus any suit intended to enforce a pension right would be competent.

#### **WHETHER THE PLAINTIFF IS ENTITLED TO THE RELIEFS HE SEEKS**

The plaintiff sought an order requiring the defendant to pay to him the balance of his pension gratuity. Court issues that order. The balance is to be calculated upon the plaintiff's last emoluments of Shs.58,264,000/= per annum for the period of service of 435 months which qualifies as his pensionable service.

Similarly, the plaintiff sought an order requiring the defendant to pay to the plaintiff, a monthly pension of based upon his last annual emoluments. In light of the findings of court, this order also issues. The monthly pension is to be calculated upon the last emoluments of Shs.58,264,000/= per annum effective from April, 2009.

As a consequence of the above, court also order that the defendant pays to the plaintiff the arrears on the monthly pension effective from November, 2006 to March 2009, inclusive;

Court would award interest at 8% per annum on both the arrears on gratuity as well as on the monthly pension from November, 2006 to the date of payment in full. Court finds no justification to award interest at a commercial rate as the plaintiff prayed.

The plaintiff sought general damages for the inconveniences he has had to suffer owing to the unlawful withholding of almost half of his pension gratuity and monthly pension for a period of well over two and a half years to date. Court agrees that the situation and circumstances justify the award of general damages. Considering the status of the plaintiff, the intensity of the inconveniences and the amounts involved, Court is constrained to award a sum of shs.36,000,000/= as general damages.

In view of what is stated in this judgment the declaration sought by the plaintiff in respect of Sections 9(2) and (3) and Section 13 of the Pensions Act cannot issue as court does not possess competent jurisdiction to issue it;

The costs of this suit are awarded to the Plaintiff.

Interest at 8% per annum shall accrue to the decretal sum, from the date of judgment until payment in full.

## **Result**

Judgment is, therefore, entered in favour of the Plaintiff against the defendant. The following orders are made:-

- (a) an order requiring the defendant to pay the arrears on pension gratuity.
- (b) an order requiring the defendant to pay arrears of the Plaintiff's monthly pension from November 2006 to March 2009;
- (c) an order requiring the defendant to pay interest on (a) and (b) above at 8% per annum from November 2006 to the date of payment in full;
- (d) an order requiring the defendant to pay a monthly pension to the Plaintiff which is based upon the Plaintiff's last emoluments of shs.58,264,000/= per annum effective from April, 2009;
- (e) an order awarding the sum of Shs.36,000,000/= as general damages to the plaintiff;
- (f) an order awarding interest on the decretal sum at 8% per annum, from the date of judgment till the date of payment in full; and
- (g) an order awarding the costs of this suit to the Plaintiff.

**V.F. Musoke-Kibuuka**

**Judge**

**27/03/09**

**27.03.09**

Ms Nshemeriirwe - for Respondent

Ms. Akello Rose – holding brief for Mr. Munanura

Mr. Wakulira – Court Clerk

**Court:** Judgment read and signed.

**V.F. Musoke Kibuuka**

**Judge**

**27.03.09**