

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 461 OF 2002

DISON B.O. OKUMU :::::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

**ELECTRICITY REGULATORY AUTHORITY :::::
DEFENDANT**

BEFORE: HON JUSTICE KIBUUKA-MUSOKE

JUDGEMENT

INTRODUCTION

The plaintiff sued the defendant seeking orders for:-

- a) special damages;
- b) general damages;
- c) interest, on special and general damages at 25% per annum; and
- d) costs of this suit.

PLEADINGS AND FACTS:-

The facts appear to be brief. The plaintiff, during the year 2000, was an employee of the now defunct Uganda Electricity Board (UEB), where he held the post of General Manager, Services, in an acting capacity.

In October, 2000, the defendant advertised the post of it's Chief Executive Officer (CEO). The plaintiff applied. He was,

was on 7th February, 2012, duly appointed CEO, of the defendant. The appointment was upon a renewable contract of a specified duration of 5 years (Exb. P1). The remuneration was a fixed Shs. 5,000,000/= per month inclusive of all benefits.

The plaintiff then immediately wrote a resignation letter (Exh. P2) to UEB. On 26th February, 2001, he wrote to the defendant confirming that he would assume the duties of his new job on 1st March, 2001. The plaintiff claims that he did report, on that day, at his office with the defendant. The defendant, however disputes that claim.

The plaintiff also claims that during the month of March, 2001, the chairperson of the defendant gave him work which he did but was not paid his monthly dues. The defendant denies that claim as well. The plaintiff also claims that towards the middle of March, 2001, he was verbally stopped from work by the chairperson of the defendant upon the pretext that the IGG was investigating the appointment some officers who had served in UEB including himself. The plaintiff stayed at his home until May, 2001. However, his job was advertised and filled with a new appointment, a fact that the defendant does not deny.

ISSUES:-

Four issues were agreed upon for determination in this case:-

1. whether the plaintiff legally entered into a contract of employment with the defendant;
2. If so, whether the plaintiff's contract of employment was breached if so, by who?
3. whether the plaintiff's contract of employment was frustrated.
4. What reliefs are available to each part?

The plaintiff was represented by Dr. John Barya of Barya, Byamugisha and Co. Advocates. The plaintiff was the sole witness in his case. The defendant was represented by Mr. Mbabazi M. of Messers Nyanzi, Kiboneka and Mbabazi, Advocates. The defendant led evidence from two witnesses. Mr. Ben Dramadri, the chairperson, of the defendants Board of Directors who appears on the record as DW1 and Mr. Johnson Kwesigabo, the Board secretary and legal officer, of the defendant. He appears on the record as DW2. Both counsel filed written final submissions.

Whether The Plaintiff Legally Entered Into A Contract Of Employment With The Defendant.

The parties do not dispute the fact that the plaintiff was appointed CEO of the defendant on 7th February, 2001, upon the terms specified in exhibit P1. The only facts which are in dispute are:-

- whether the plaintiff assumed duties as CEO, of the defendant; and
- whether the plaintiff did any work as CEO of the defendant during the month of March, 2001.

On 25th February, the plaintiff wrote to the defendant's chairperson DW1 notifying him, inter alia, that he would report for work on 1st March, 2001. In his testimony in court the plaintiff testified that, indeed he did so report and the chairperson gave him work which he did during the month of March as CEO of the defendant although at some stage, during that month, DW1, advised the defendants to keep away from office because the IGG was investigating the appointment to the defendant of three former officers of UEB, including the plaintiff. According to the plaintiff, he completed the work while at his home.

According to the plaintiff, the work which the plaintiff claims to have done as CEO of the defendant included:-

- preparing tender documents for procurement of personal computers for the defendant, exh. P4;
- preparing document containing criteria for determining licensing fees, exh. P12;
- internally reviewing the draft budget for the first financial year of the defendant, exh. P. 13.

The defendant, vide DW1, did not dispute the plaintiff's claims above. Indeed in cross-examination, DW1 specifically admitted that he had given work to the plaintiff and that the plaintiff did that work during the month of March. That was in departure to the claims in the defence, in paragraphs 9 and 10, which were best summarized in the defendant's summary of evidence in the following words,

“ The Defendant will lead evidence to show that the plaintiff never reported for duty nor did he do any work for the Defendant in the capacity of Chief Executive Officers of the Defendant”.

If the plaintiff never reported for work then how could the chairperson have give him work? And if the plaintiff remained an employee of UEB throughout the month of March, 2001, how could the chairperson give him that work? Nor were the contradictions and apparent departures from the pleadings restricted only to the defendant. The plaintiff, as learned counsel, Mr. Mbabazi points out in the final submissions, pleaded in paragraph 4 (d), of the plaint, that when he reported for work, he was informed by the chairperson of the board to wait until formally informed to officially assume office. Yet in his evidence, PW1 testified that he reported on 1st March, and remained reporting for work until after some days when the chairperson advised him to wait at home.

Court is not oblivious of the principle that a party to a suit is bound by its pleadings and that during the trial a party to a case cannot be allowed to set up a case which is inconsistent with or a departure from its pleadings. **Interfreight Forwarders Uganda Ltd. Vs. East African Development Bank SC, Civil Appeal No. 13 of 1993.**

In the instant case, court has, however, decided to ignore, with regard to either party, the inconsistencies with their respective pleadings. It appears that those inconsistencies are minor. In the case of the plaintiff, court has doubts whether the inconsistency arose out of the instructions given to counsel who drafted the plaint or from counsel himself; from his way of perceiving instructions and his ability to adequately turn instructions into a plaint. The plaint was not signed by the plaintiff but by his then counsel.

It was argued on behalf of the defendant that the contract of service entered into between the plaintiff and the defendant was invalid because the plaintiff's resignation from UEB had not been accepted by UED and that the plaintiff could not hold two jobs at the same time in the same sector.

With due respect, court finds this argument not to be very well founded. First, it is not in dispute that the plaintiff, vide exhibit P2, notified UEB of his intention to terminate his

services with UEB with effect from 1st March, 2001 retirement his benefit were duly paid by UEB. In law, the plaintiff was not required to do more than forwarding a resignation letter. In any case, UEB was itself being phased out by the end of March, 2001, and all employees had been earlier officially notified of that fact.

Secondly, the fact that UEB never included the plaintiff on it's salary payment list of it's employees for the month of March, 2001, is clear indication that the plaintiff's termination of services with UEB had been accepted by UEB. In the circumstances, UEB had no options but to accept since it had already asked it's employees whether they opted to transfer their services to successor companies or not. Court, of course recognizes the fact that the job which the plaintiff obtained from the defendant from the defendant was outside the official transfer process from UEB to the Successors Companies.

Thirdly there is evidence that the plaintiff's application to terminate his services was processed and his dues paid to him by UEB. Thus, the question of the plaintiff working for both UEB and the defendant during the month of March, 2001, can not arise.

Court accepts the plaintiff's explanation contained in his evidence in court, that his consent to transfer to a successor company, as contained in exhibits D9 and D10, was a mere

bureaucratic process which he was required to fulfill in order to access his benefits. His evidence that he signed those documents at his home and during the month of April, 2001, was not rebutted by the defence

Similarly, court finds that the provisions of section 19 (2) (a), of the Electricity Act, cited by learned counsel for the defendant has no relevance to the instant case.

In light of the above reasons court answers the first issue in the affirmative.

Whether The Plaintiff's Contract Was Breached And If So, By Who?.

The plaintiff case is that the defendant breached the contract between it and the defendant in that:-

- the plaintiff was given work but was not paid
- the plaintiff was denied work without any legal or reasonable cause;
- the plaintiff was not paid for five years because the contract was for a fixed period of five years; and
- the defendant had the option of terminating the contract for whatever reason but they did not do so and merely breached it.

The defendant pleaded, in its defence several reasons why the plaintiff was not allowed to stay in the job of the defendant's CEO. The reasons included:-

- that the plaintiff had not resigned from UEB because his letter of resignation had not been accepted
- that an investigation was being conducted against him by the IGG who recommended that the plaintiff's appointment be rescinded because of the disciplinary action taken against him in UEB.

With regard to the question of whether the plaintiff did resign from the service of UEB, court has already found that he did.

Regarding the question of the IGG recommending that the plaintiff's appointment be rescinded, court agrees with learned counsel, Dr. Barya, that that recommendation appears to have been wrongly premised. It contradicts the substantial finding of the IGG that the plaintiff's recruitment as CEO of the defendant had been proper.

Secondly, the recommendation was based upon an earlier report which had been made by the IGG with regard to UEB a different entity altogether during the year 2000. The recommendation that the plaintiff be demoted was in respect of his employment with UEB. It could not be

implemented against the plaintiff with regard to his employment with the defendant, which was a different legal entity altogether with its own criteria and procedures for recruitment of staff. In any case, UEB ceased to exist as a legal entity at the end of the month of March 2001. It does appear from exhs. D2 and D7 that the Board of UEB attempted to implement the recommendation of the IGG, in respect of the plaintiff, in May and April, 2001 respectively, though it is doubtful whether the board could legally do that as UEB had legally ceased to exist by then. The plaintiff was no longer within the employment of UEB then. The recommendation by that board was "**to withhold the eminent confirmation as General Manager in the Successor Company**". That is according to exh. D7. However, exhibit D7, informed the plaintiff that he was being demoted one rank below his substantive rank of Manager to that of principal officer. There is nothing on record to show that the plaintiff's appointment as CEO of the defendant was ever rescinded in accordance with the recommendation of the IGG or that he was demoted. There was, instead, total silence. The plaintiff merely saw his job advertised. When he consulted DW1 about it, DW1 advised him not to apply.

The defendant produced exh D5 in order to prove that the plaintiff's services were transferred to UEDCL during or at the end of March, 2001. The plaintiff testified that he

performed adhoc jobs for UEDCL while he was waiting for communication from the defendant. He only got the formal appointment with UEDCL on 1st October 2001, when nothing was forthcoming from the defendant. From a mere glance at exhibit 15, court would easily agree with the plaintiff that until October 2001, the plaintiff did not have any formal contract or appointment with UEDCL. Thus he was not an employee of UEDCL.

From the evidence on record, court agrees with the plaintiff, that, upon the balance of probabilities, he has proved that the defendant, having offered him a contract of employment for five years and he having accepted and not only reported but done some work, for the defendant, that contract was breached by the defendant.

Whether The Plaintiff Contract Was Frustrated.

This matter was not raised in the pleadings. However, it was raised as an issue at the agreement of the parties. A decision on it is, therefore, competent. **William Nuwe Mugizi Vs. National Water & Sewarage Corporation SC Civil Appeal No. 26 of 1993.**

A contract is frustrated when its terms become impossible to perform. **Victoria Industries Ltd. Vs. Ramanbhai And Brothers Ltd [1961] E.A. 11.** In the above case, it was held that when there was a ban on transportation of maize by steamer from Jinja to Kampala and to Mwanza the

contract was frustrated. There was no possible alternative. The principle earlier laid down in the English case **Shirlaw Southern Foundries (1926) Ltd. (1) (1939) 2 K.B. 206,** was applied.

Learned counsel, Mr. Mbabazi, on his part reasoned that since the defendant's contention was that the plaintiff's contract was illegal, it could not be frustrated since it was illegal in the first place. In the alternative, he submitted that the defendant had no alternative but to implement the IGG's recommendation. In court's view the latter submission is far from being persuasive to court. Apart from the fact that the IGG's recommendation was not well founded because the earlier report referred to and upon which the recommendation to demote the plaintiff had been based, had actually cleared him as evidenced by exhibit D3, dated 9th April, 2001. The report in which the recommendation was made was made to UEB and for the purposes of UEB. It was not directed to the defendant which had entered the contract in question with the plaintiff; In court's view, the authority of **John Ken Lukyamuzi Vs. Attorney General And The Electoral Commission SCCA No. 2 of 2009** (unreported) is not of pertinent relevance to this case.

In any case, there is no evidence on record to show that the defendant ever communicated any reason for denying the defendant the performance of the contract it was the case

with Lukyamuzi's case (supra). The defendant in the instant case merely keep quiet. The plaintiff was not demoted but merely denied his entire employment. In court's view, there was no frustration of the contract in this case. There was mere breach by the defendant. The IGG never recommended breach or dismissal or termination of the contract.

What Remedies Are Available To The Parties.

Special Damages

The plaintiff in his pleadings, presumably in compliance with the rule that special damages must be specifically pleaded and strictly proved **Musoke Vs. DAPCD (1990-94) E.A 219**, claimed as special damages:-

(1) salary unpaid between March 1st and October 31st, 2001 at 5/m per month= **40,000,000/=**

(2) the different between the salary of CEO of the defendant and salary the plaintiff was receiving in UEDCL for 52 months 5,000,000/= - 352,847/= 1,479,153

1,479,153 x 52 = **76,915,956/=**

However, in the final submissions and in fragrant breach of the procedural rule that requires parties to suits to be bound by their pleadings, **Interfreight Forwards Uganda Ltd. Vs. East African Development Bank, SC CA No. 13 of**

1993, the plaintiff made almost noval claims based upon purported enhanced earnings of the CEO, of the defendant during the period of claim. He did so without seeking any leave to amend his earlier pleadings or leading any evidence to show that there had been any changes in the earnings derived from the office of CEO of the defendant by the holder. In addition, he did so obviously overlooking the important fact that the plaintiff's case is based upon a specific contract with specific terms. Even if it were true that the person who subsequently filled the post of CEO of the defendant obtained a contract with better terms, that fact alone would not, necessarily, affect the plaintiff's own contract or its specific terms. Court would, therefore, reject the plaintiff's noval claims contained his final submissions. It will stick, with regard to the plaintiff's claim to payments, the contract which specifies, **"you will receive a fixed and inclusive salary and inclusive of all benefits amounting to five million Uganda shillings"**.

The principles which govern the recovery of special damages, with regard to lost earnings from a contract of a specified period of duration without provision for notice for termination, when breached or wrongly or unlawfully terminated, have been well laid down by the Supreme Court of Uganda in **Gulaballi Ushillani Vs. Kampala Pharmaceuticals Ltd, SCCA No. 6 of 1998** (unreported) and in **Barclays Bank Uganda Ltd Vs. Godfrey Mubiru,**

SC CA No. 01 of 1998 (unreported). In the more recent decision of the Supreme Court in **Bank of Uganda Vs. Betty Tinkamanyere, SCCA No. 12 of 2007,** the court stated, per Kanyeihamba JSC, as he then was, to the effect that an employee whose contract of employment is terminated unfairly and wrongly or prematurely or illegally, should be compensated for the remainder of the years of the contract in both the salary and allowances which the employee would have enjoyed as per the contract had it run for its full duration.

Lastly, court appreciates the fact, that in his pleadings, the plaintiff in making his claim for special damages took into account the statutory prohibition by the Electricity Act, Cap. 145 to the effect that a person cannot work for more than one successor Company at any one time. Thus, he claimed special damages up to the date when he got employed formerly by UEDCL. Court agrees that the difference in the salary as CEO of the defendant and the job of manager which the plaintiff obtained in UEDCL with effect from November 2001, is recoverable and should be recovered by him as part of the loss which he suffered with regard to salary. Since the contract specified that the salary of 5,000,000/= was inclusive of all allowances, court finds the plaintiff's claim for annual leave misplaced. In any case it was never specifically pleaded nor strictly proved.

Court would, therefore, award special damages to the plaintiff as follows:-

a) unpaid salary - March to October, 2001

$$\text{Shs. } 5,000,000 \times 8 = \mathbf{40,000,000/=}$$

b) unpaid salary - November 2001 to February, 2006

$$5,000,000 \times 52 = \mathbf{\underline{260,000,000/=}}$$

$$\text{Total} = 40,000,000 + 260,000,000/= = \mathbf{\underline{300,000,000/=}}$$

Less what the plaintiff earned from his job with UEDCL during the 52 months of the duration of his contract with ERA;
 $= 3,550,847 \times 52 = 182,084,044/=$

Total special damages awarded

$$= 300,000,000 - 182,084,044 = \mathbf{\underline{117,915,956/=}}$$

The plaintiff sought general damages. In his submission, learned counsel for the plaintiff asked court to award a sum of Shs. 50,000,000/= as general damages. There is no doubt, in court's mind, that the plaintiff's enthusiasm and excitement were extinguished after some months of anxiety and disappointment. He deserves general damages for the mental anguish, disappointment and inconveniences. However, court is also aware that the plaintiff, during the period of waiting, did some work, at adhoc basis for UEDCL which eventually took him on upon a formal basis. In those circumstances, court thinks that a sum of Shs. 15,000,000/=

would be appropriate as general damages. It awards that amount to the plaintiff.

The plaintiff sought interest at 25% per annum on both special and general damages. Court finds no reason to justify that high interest rate. The plaintiff himself has given none. Payment of a salary is not a commercial transaction strictly speaking. Court awards interest at 8% per annum upon both the special and general damages and from the date of filing, in the case of special damages, and from the date of judgment, in the case of general damages, till the date of payment in full.

The plaintiff is also awarded costs of this case.

Result:-

Court enters judgment in favour of the plaintiff against the defendant. It issues the following orders:-

- a) an order awarding Shs. 117,915,956/= to the plaintiff as special damages;
- b) an order awarding Shs. 15,000,000/= to the plaintiff as general damages;
- c) an order awarding interest on (a) & (b) above, at 8% per annum, with regard to (a), with effect from the

date of filing and with regard to (b), from the date of judgment to the date of payment in full; and

d) an order awarding the costs of this suit to the plaintiff.

V.F. Musoke-Kibuuka

(JUDGE)

12.04.12