

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
AT KAMPALA**

CIVIL SUIT NO. 1323 OF 2000

GEORGE DAVID WAKANYIRA.....PLAINTIFF

VERSUS

KAMPALA CITY COUNCILDEFENDANT

BEFORE: THE HON. MR. JUSTICE STEPHEN MUSOTA

JUDGMENT

The plaintiff **George David Wakanyira** now represented by M/s Bemanyisa & Co. Advocates brought this action against the defendant, Kampala City Council (KCC) which is represented by M/s Sendege Senyondo & Co. Advocates claiming for the following reliefs:

- (a) A declaration that the termination/retirement of the plaintiff's services was unlawful.
- (b) Special damages.
- (c) A declaration that the plaintiff is entitled to pension in accordance with the Pensions Act.
- (d) General damages.
- (e) Interest on (c) at court rate from the date of judgment till payment in full.

- (f) Interest on (a) at a commercial rate of 25% p.a. from the date of filing until payment in full.
- (g) Costs of the suit.
- (h) Any other relief court may deem fit in the circumstances.

The defendants denied liability and urged court to dismiss this suit with costs.

In their joint scheduling memorandum, the following facts giving rise to this suit were agreed upon:

- (1) The plaintiff joined Public Service in 1987 under the Ministry of Local Government at Mpigi, and was transferred to several localities to wit Mbale, Luwero and Pallisa before he was transferred to the defendant council as an exemplary employee.
- (2) The plaintiff was appointed on 9.5.1995 as Principal Accountant (rates and grounds rent) on permanent and pensionable terms.
- (3) The plaintiff worked at Nakawa Division as the Division Finance Officer and during his term of office it was discovered that two cheque leaves had been stolen and were later discovered to have been cashed at former Green Land Bank now housing Cairo International Bank.
- (4) The defendant's officials decided to charge the plaintiff with theft of the said cheque leaves at Buganda Road Chief Magistrate's Court vide CR 2920 of 1998.

- (5) The plaintiff was interdicted and retired from service on 13th August 1999 before the conclusion of the Criminal trial at Buganda Road.
- (6) On 18.2.2005, the plaintiff was acquitted of the charges of theft of the cheque leafs and causing financial loss to the defendant council and the latter never appealed.
- (7) After acquittal, the plaintiff petitioned the defendant to reconsider his position of retiring him in public interest but instead the defendant reinstated the plaintiff on 19.7.2007 and retired him on the same day.
- (8) The plaintiff contends that he was unlawfully retired in public interest contrary to the law and was never fully paid his terminal benefits under the law.
- (9) The plaintiff contends that the act of the defendant in interdicting him, prosecuting him at Buganda Road Court and finally retiring him in public interest embarrassed him and portrayed him as a person unfit to hold public office for which he should be paid special and general damages, costs and interest.

In the same joint scheduling memorandum, the defendant concedes that the plaintiff was its employee but was lawfully retired from work. That the plaintiff's entitlements were processed but he initially declined to collect the same but in the course of hearing this case he collected his entitlements. That the defendant does not owe the plaintiff any monies.

Several documents were agreed upon as listed in the joint scheduling memorandum and numbered 1 to 17 inclusive.

During the hearing, exhibits No.P.1 to P.29 were admitted in evidence for the plaintiff. While exhibits D.1 to D.26 were admitted in evidence for the defendant. The plaintiff gave evidence at the trial as PW.1 reiterating most of the agreed facts in the joint scheduling memorandum. He explained that in 1997 he discovered that the Housing account cheque was cleared by **M/s Kijambu** then Town Clerk but not by him. When he checked with the Cashier, it was discovered that the cheque book was missing. He immediately reported to his boss Ag. Town Clerk **John Gatenge** because **M/s Kijambu** was on leave. He also reported to Police. That the cheque book had been lost by the Cashier **Nkonge Dick** who disappeared thereafter. That the lost cheque leaves were cleared using PW.1's forged signature. Thereafter three people were arrested including **Dick Nkonge, Lubwama** and **Sendaula** but only **Dick Nkonge** was employed by the defendant. Later in time, PW.1 was arrested by police and charged in court for causing financial loss.

After trial PW.1 was acquitted. He was later dismissed from the job in public interest without being given a hearing before the case against him was concluded.

PW.1 further testified that after acquittal he applied for reinstatement but on the same day he was reinstated, he was dismissed. That the defendant did not retrieve any information about the plaintiff's record in other work stations in Mpigi, Mbale, Luwero, Pallisa to find if his case warranted retirement in public interest.

PW.1 however acknowledged receiving from the defendant payment of about 17,000,000/= as retirement benefits which he says he received without prejudice. He contended that the said figure was wrongly computed because it left out the time he served before joining the defendant. That as a result of the dismissal, the

plaintiff (PW.1) who was a senior officer working for the defendant lost friends, was ridiculed and lost esteem in church. That he could no longer fend for his family and lost a wife for being broke. He borrowed money he could not repay to a money lender and in 2007 lost property thereby.

PW.1 further testified that as of now he is earning pension from the Ministry of Public Service. That he started earning pension in October 2010.

That since his dismissal PW.1 has never got another job. He now seeks compensation from KCC, now KCCA, to the tune of 500,000,000, special and general damages, costs and interest on the awards.

In cross-examination by **Rita Sendege**, the plaintiff testified that his duties entailed *inter alia* to ensure that staff were assigned duties and carried out the assigned duties. He also ensured that accounts and financial statements were presented and audited and monthly returns for the Division in Nakawa were made. He and Town Clerk were signatory to the cheques. That using the stolen cheque leaf money was fraudulently deducted from the defendant's bank account. That as the Chief Finance Officer, he had to account or explain. He acknowledged receiving Exhibit D.11 concerning the plaintiff's appeal against retirement from service asking him to file a defence and being given a hearing by the District Service Commission but said it was not a fair hearing. As a result, PW.1 acknowledged that he appealed the decision to the Public Service Commission which gave him a hearing and made a decision which required KCC to recompute his benefits from 1995 when he was appointed to KCC as per Exhibit D.23.

That PW.1 was denied training but acknowledged that money spent on training depended on availability of workshops.

PW.2 was **Lubaale Samuel** a friend to the plaintiff. He testified that we read about the plaintiff's problems in newspapers. He asked him whether the allegations were true which he denied. He confirmed that the plaintiff's properties were confiscated by money lenders and that before dismissal the plaintiff's financial status was stable.

In cross-examination PW.2 denied being privy to the money lenders transactions and did not know the amounts involved. This was the close of the plaintiff's case.

In his defence, the defendant called in evidence one witness **DW.1 Simbwa Mutebi** a pensions officer attached to the Directorate of Human Resource of KCCA formerly KCC. He was an accountant in KCC. DW.1 testified that he looked at the plaintiff's record and discovered the same showed he was given a hearing by the District Service Commission and there was a feedback from the plaintiff to that effect. That the plaintiff appealed to the Public Service Commission which responded to his appeal and gave him a hearing and instructed the defendant to recompute the plaintiff's benefits as in Exhibit D.23. That this was complied with. That as an accountant, DW.1 was instructed and he computed what was due to the plaintiff as per the manual from Public Service and it totaled to 15,336,820 plus. That money was paid to the plaintiff's account as well as his monthly pension. DW.1 based his calculation on the date of appointment of the

plaintiff of June 1995 and date of retirement of July 1999. That the plaintiff served the defendant for 4 years and 2 months.

The payments included the following;

- (i) Transport/Baggage to Jinja 820,000/=.
- (ii) 3 months pay in lieu of notice of 560,000/= basic pay times 3 = 1,681,521/=.
- (iii) $\frac{1}{2}$ pay salary arrears for the months spent on interdiction which was 560,507- 48758= 511749/= as balance unpaid. This was multiplied by 10 months and it came to shs.5,117,490.
- (iv) Arrears due to Union agreement which had not been paid was 174,000/=.
- (v) Pension arrears from 1.7.1999 to 30.6.2007 of 7,240,671/=.

The above payments amounted to 15,033,682/=.

DW.1 further testified that due to financial constraints the money was paid in installments. First 7,500,000/= was paid on 13.9.2007 and another payment of 7,533,682/= was made on 24.10.2007.

DW.1 further testified that the Ministry of Public Service communicated to the Town Clerk saying it was taking over pension management. As a result the plaintiff's file was sent to Public Service. Further that the plaintiff was paid commuted pension gratuity of shs.9,424,240/= and is now earning pension.

In cross examination, DW.1 testified confirming that the plaintiff was retired w.e.f 1 July 1999. That he did not calculate pension before the plaintiff joined KCC because periods before that are supposed to be managed by the Ministry of Public Service not KCC. That KCC only handled the period the plaintiff served them.

Court allowed both **Mr. Bemanyisa** for the plaintiff and **Ms Rita Sendege** for the defendant to file written submissions. I will not reproduce the respective submissions by learned counsel but suffice to mention that I have meticulously studied the same and will take the same into account while deciding this matter.

At the commencement of hearing of this suit only two issues were framed for determination that is:

- (1) Whether the plaintiff was lawfully retired in public interest.
- (2) What are the remedies available to the plaintiff.

As rightly submitted by learned counsel for the plaintiff under S.101 of the Evidence Act, the burden of proof lies on the one who alleges the existence of facts to be proved and it is on a balance of probabilities in civil cases.

After a careful consideration of the evidence adduced on both sides including the multitude of documentary evidence on both sides as well as the contents of the joint scheduling memorandum, I will go ahead and determine the issues as argued by respective counsel.

Issue 1:

On this issue, I agree with the submission by **Ms. Rita Sendege** for the defendant. Since the filing of this case, KCC ceased to exist and was succeeded by Kampala Capital City Authority (KCCA). It was the latter authority which retrieved the plaintiff's service file and the record retrieved therefrom were tendered by **DW.1 Simbwa Mutebi Godfrey** a pensions officer with the defendant's Human Resource Directorate.

From the evidence adduced at the trial and especially by the plaintiff himself at the time of hearing the instant suit the cause of action in this suit had been superseded by the ruling of the Public Service Commission on appeal by the plaintiff against the decision of the District Service Commission (DSC). The plaintiff elected to pursue his claim with the DSC and Public Service Commission (PSC) parallel to his suit by High Court.

As rightly submitted by learned defence counsel, the decision of PSC has never been challenged to date. By electing to handle his claim through another mechanism other than this court, the plaintiff is estopped from turning around to pursue the same claim through this trial.

It has been revealed by evidence that during the subsistence of this suit the plaintiff made a complaint to PSC regarding the manner in which the DSC handled his case. As a result, the DSC was directed by PSC to revisit the plaintiff's case and that

charges be communicated to him formally. This was communicated through Exhibited D.10.

Indeed according to DW.1, the defendant dully revisited the plaintiff's case, formally framed the charges against him for negligence of duty which led to financial loss of shs.16,004,800/= to the defendant. This was communicated to the plaintiff as per Exhibit D.11. The plaintiff duly revealed that he responded to the about actions by the defendant vide Exhibit D.18.

Upon receipt of the plaintiff's response in writing, under Minute 57/07 the DSC upheld its decision of retirement of the plaintiff in public interest. The decision was communicated to the plaintiff.

The plaintiff appealed to the PSC vide exhibit D.18 and D.17 but the appeal was dismissed vide Exhibit D.23. Thereafter the plaintiff was paid and he received payment of his benefits. See Exhibits D.1-5 and D.24. With the above facts, I am in agreement with the submission by learned counsel for the defendant that the plaintiff was accorded a hearing before his fate was determined. There is therefore no basis for the submission by learned defence counsel that his client was not accorded a fair hearing. Both the DSC and PSC ruled against him after considering the plaintiff's written defence.

Whenever a party participates in investigations by recording his statement, it is taken that he/she has been accorded a right to be heard

- *Katamba Fred vs. Mukono District,*
- *Local Government & Anor. HCMA.091 of 2009.*
- *Onyait David Steven vs. Busia Local Government & Anor HCMA 34 of 006.*

In the absence of irregularity, arbitrariness, bias or malafide being raised by the plaintiff it would be irregular for court to inquire into the merits of the PSC or to proceed to deal with a parallel claim in this suit. If the plaintiff was dissatisfied with the decision of the PSC he would have applied for Judicial review of the decision of the PSC.

As I have mentioned herein above since the plaintiff has acknowledged being paid his benefits and he is earning his pension from the Ministry of Public Service, he cannot turn around and claim further compensation. He assented to the result of the proceedings of the Service Commissions and accepted payment of his benefits from the defendant. He ought not to have claimed more for it is against public policy to claim compensation twice. That would tantamount to turning his injury into a windfall. It was held in *Batanda Stephen v. SDV Transami (U) Limited HCCS 182/2010* by **Mulyagonja J**, and I agree, that no right would accrue to a plaintiff to bring another suit for a claim in respect of which he has already been compensated. The plaintiff's assertion that he accepted the payments and is earning pension "without prejudice" is indeed misconceived and irregular because he has already benefited and continues to benefit through pension. This would dispose of the suit.

However in the unlikely event that my above decision is not correct, still I have not found any illegality in the manner in which the plaintiff was retired worth vitiating the process. The documentary evidence adduced by both sides show that indeed the plaintiff was retired. It is immaterial whether the termination of service is referred to as dismissal, laying off, retirement or otherwise. The issue is whether the termination was in accordance with the law and terms of employment.

In the instant case, the decision of the DSC was superseded by that of the PSC which considered the plaintiff's appeal and upheld the DSC decision. This rendered the plaintiff's termination lawful.

In his evidence, the plaintiff acknowledged that the defendant lost 16,004,800/= when he was the defendant's Principal Accountant (Chief Finance Officer). The plaintiff was in charge of finances of the Division he worked in. The plaintiff was responsible for presentation of the Division's financial statements and ensuring that the accounts were audited by internal and external auditors. The plaintiff testified that the Division had a Bank Account and he was co-signatory to the Account with the Senior Principal Assistant Town Clerk of the Division. He was in charge of the custody and safety of the defendant's financial stores including cheque books. Inevitably he had to explain the loss of the cheques and money from the Division account.

Learned counsel for the plaintiff labored very much to explain how the charges against his client were framed and the fact that the plaintiff's conduct in his previous work stations was not done but I agree with learned counsel for the

defendant that these omissions ought to have been raised during the appeal to PSC if at all. As I have stated earlier the plaintiff participated in the proceedings then. The defendant cannot be held liable for the commissions or omissions of the PSC which made the final decision and has agreed to pay the plaintiff his pension, nor can it be held liable for the charges preferred against the plaintiff by the Director Public Prosecutions.

In conclusion of this issue I will contend that the decision of the PSC still stands since it has never been challenged by the plaintiff.

I will accordingly answer issue 1 in the negative.

Issue 2:

Having answered issue 1 in the negative, it follows that the plaintiff is not entitled to the remedies sought in his plaint. The defendant is not liable to compensate the plaintiff for the period he did not work with it. Indeed the Ministry of Public Service has taken over the plaintiff's pension management.

The plaintiff's further claims have to be referred to the right offices, be it payment in lieu of leave or payments owing from the time he served outside KCC. He served the defunct KCC between 1997-1999. The plaintiff's claim for training allowance has no basis at all since he has not shown that it is him who would have been chosen to attend any training. In any case institutional training only imparts knowledge to the participants. They do not get any monetary benefits. This claim was therefore speculative and hypothetical. The plaintiff is also not entitled to a

refund of legal expenses incurred during his trial from the defendant. This is not a suit for malicious prosecution or defamation.

In any case the case the plaintiff was accused of was independently prosecuted by the Director Public Prosecutions and not by the defendant.

All in all I will order that this suit be and is hereby dismissed with costs.

Stephen Musota

JUDGE

21.02.2013