THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-CS-0032-2012

ADONIA TUMUSIIME &
318 O'RS ::::::::::::::::::::::::::;:::::::::: PLAINTIFFS

VERSUS

1. **BUSHENYI DISTRICT LOCAL GO'VT.**
2. **ATTORNEY GENERAL :::::::::::::::::::::: DEFENDANTS**

BEFORE: HON MR. JUSTICE BASHAIJA K. ANDREW

JUDGMENT.

Background.

ADONIA TUMUSIIME & 318 others (hereinafter referred to as the "Plaintiffs") were on diverse dates and years employed by the *BUSHENYI DISTRICT LOCAL GOVERNMENT, (hereinafter referred to as the 1st Defendant)* on permanent and pensionable terms, while others were employed on permanent and non-pensionable terms, and they accordingly discharged their duties.

On various dates, the Plaintiffs were involuntarily and/or prematurely retired from service by the 1st Defendant who undertook to pay them their terminal benefits as stated in their termination letters. The 1st Defendant through the 2nd Defendant, however, only paid the Plaintiffs part of their terminal benefits but never paid their pension. Several persistent demands by the Plaintiffs to be paid their outstanding terminal benefits and pension yielded nothing. They instituted this suit to enforce their claims. At the scheduling conference the following facts were agreed:-

1. ***The Plaintiffs were former employees of the former greater Bushenyi District, the 1st Defendant herein.***
2. ***That on different dates, the Plaintiffs were retired.***

3. ***That payments were controlled by the 2nd Defendant.***

The following were agreed issues:-

1. ***Whether the Plaintiffs' suit is barred by law.***
2. ***Whether the Plaintiff or any of them are entitled to payment of their calculated and ascertained pension arrears.***
3. ***Whether the Defendants are liable***
4. ***What remedies are available to the parties?***

Counsel for the Defendants raised three preliminary objections that:-

1. ***The suit is time barred.***
2. ***There was no statutory notice served on the 2nd Defendant in respect to the 318 and other Plaintiffs.***
3. ***The amended plaint discloses no cause of action as between the 318 Plaintiffs and the 2nd Defendant.***

Counsel for the 2nd Defendant raised preliminary objections, which I will resolve in the order they were raised before considering the main issues.

The first objection is that the suit is time barred. Counsel for the 2nd Defendant submitted that the cause of action arose around 1986 and 1995 as per paragraph 5 (c) of the plaint, and the suit was filed against the 2nd Defendant only in 2012, and no grounds for exemption were pleaded. That this offends provisions of ***Section 3 (2)*** of the ***Civil Procedure and Limitation (Miscellaneous Provisions) Act (Cap 72)*** to the effect that no action founded on contract shall be brought against Government after the expiration of three years from the date on which it arose.

Counsel for the 2nd Defendant relied on the case of ***Uganda Railways Corporation v. Ekwaru D.O [2008] HCB 61*** where it was held that if a suit is brought after the expiration of the period of limitation and no grounds of exemption are shown in the plaint, then the plaint must be rejected. Counsel also relied ***Okeng Washington v. Attorney General, H.C.***

Civil Suit No. 16 of 2004 which relied on the case of ***Iga v. Makerere University (1972) EA 65,*** in which it was held that in considering whether or not a plaint is time barred or discloses no cause of action, the court must look only at the plaint and nothing else; and that a plaint that is deficient in that it shows that the action is time barred or discloses no cause of action must be rejected. Counsel for the 2nd Defendant maintained that the suit is time barred and should be dismissed with costs to the 2nd Defendant.

Counsel for Plaintiffs, *M/s Bashasha & Co. Advocates,* responded that the suit is not time barred since it does not seek to challenge termination of the Plaintiffs' services, but only seeks for the recovery of Shs. 520,000,000= being the cumulative pensions, gratuity and termination package at the time of institution of the suit and/or to be paid their calculated and ascertained terminal benefits and monthly pension arrears till the date of judgment.

Further, that ***Section 18 (1)*** of the ***Pensions Act (Cap. 286)*** provides that every pension or other allowance granted under the Act shall, unless it has sooner ceased, cease upon the death of the person to whom it is granted, and that as such the claims in issue are within the statutory time limit.

In consideration of the issues raised as they relate to whether the action is time barred or not, it is evident that the Plaintiffs are not challenging their subsequent retirement, retrenchment or lay off; which would obviously have a complete bearing on their contracts of employment, but on the contrary, the claim, as I understood it, is for payment of pension and gratuity arrears due to them from the time their employment contracts were terminated by the 1st Defendant.

Section 18 (1) of the ***Pension Act (supra)*** stipulates that every pension or other allowance granted under the Act, shall unless it has sooner ceased, cease upon the death of the person to whom it is granted. Logically, it would follow that such pension and/or other allowances would continue to accrue to the claimant for the rest of his or her life until death. This being the position, it would be rather futile to argue that the claim for pension arrears in this case is statute barred when in fact the claimants are still alive. It need to be

emphasised, as a matter of fact that even as of this moment pension is still accruing. For the foregone reasons the first preliminary objection is rendered unsustainable.

The second objection is that there was no service of the statutory notice on the 2nd Defendant in respect to the 318 and others Plaintiffs, and that as a result the suit is incompetent and the plaint should be struck off with costs to the 2nd Defendant. Counsel relied on the case of ***Rwakasooro & 5 O'rs.v. Attorney General [1982] HCB 40*** where it was held that ***Section 1*** of the ***Civil Procedure and Limitation (Miscellaneous Provision) Act*** (now ***Section 2*** of the same Act) no suit can lie or be instituted against the Government until the expiration of the mandatory sixty days (now forty - five days). Similar position was taken in ***Gulu Municipal Council v. Nyeko Gabriel & Others H.C. Misc. Application No. 5 of 1997; NIC v. Kafeero (1974) E.A 477 at page 480***.

It is not clear to me why this objection was raised, because the record of court bears *Annexture "E"* to the amended plaint, which is a copy of the statutory notice that was served on the 2nd Defendant on the 9/07/ 2012, and receipt thereof duly endorsed thereon by the same office. The 2nd Defendant was effectively added as party to the suit and the amended plaint was filed in court on the 11/09/2012, which is exactly sixty three days after service of the statutory notice. Since the statutory notice exists, the preliminary objection lacks merit and it fails.

The third objection is that the amended plaint discloses no cause of action as between the 318 Plaintiffs and the 2nd Defendant. That it is averred in paragraph 5 of the amended plaint that on diverse dates and years the 1st Defendant employed the Plaintiffs as parish and sub-parish chiefs in the Bushenyi District on permanent and pensionable terms. A copy of the appointment letter of one of the Plaintiffs, Adonia Tumusiime, was attached and marked as *Annexture "A"* and that the copies of the rest of the Plaintiffs would be availed at a later stage, which was not done for some of them.

Counsel argued that the plaint offended the provisions of ***O 7 r. 1 (e) CPR*** to the effect that the plaint shall contain the facts constituting the cause of action and when it arose.

That in the case of ***Auto Garage v. Motokov [1971] EA 353*** it was held that for a cause of action to be said as having been disclosed, the plaint should show that the plaintiff enjoyed a right that the right was violated and the defendant is liable, and if any of those essentials are missing then no cause of action will have been shown and no amendment is permissible.

Counsel for the 2nd Defendant maintained that the facts in the plaint do not constitute a cause of action against the 2nd Defendant and that the case should be dismissed with costs to the 2nd Defendant.

Counsel for the Plaintiff responded that the plaint discloses a cause of action against the 2nd Defendant in that it sets out the particulars of the claim for pension and outstanding payments on the termination package benefits, and gratuity arrears which the Plaintiffs were entitled to; but were not paid despite several demands and reminders. Counsel prayed that the objection be overruled with costs.

The reading of paragraph 4 of the plaint clearly demonstrates that the claim against the 1st Defendant is for Shs. 520,000,000= arising out of cumulative pension, retirement/termination package benefits and gratuity arrears, general damages, costs of the suit and interest thereon. Paragraph 5 of the plaint plainly outlines facts which show that the Defendants are indebted to the Plaintiffs in the sums to which the latter are entitled, but have not received despite several demands. Even though the figure of Shs. 520, 000,000= is highly inaccurate and contestable, that only goes to the question of proper computation and ascertainment of the actual figures, which however, does not negate the liability of the Defendants to the Plaintiff. To my mind this is a clear cut cause of action, and I do see how it offends the provisions of ***O. 7 r. 1 (e) CPR.***

If the 2nd Defendant's major contention is that copies of appointment letters for some of the 318 others Plaintiffs were not annexed to the plaint or that they were not availed at hearing as indicated in the pleadings, it should be noted that under paragraph 3 of the amended plaint the 2nd Defendant was sued in its capacity as the representative of

Government under the ***Government Proceedings Act (Cap. 77)***. This being the position, it ought to be noted that for a plaint to disclose a cause of action it does not necessarily mean that it should disclose each and every fact of the cause of action as if it were a trial. In my view, it is sufficient if the facts constituting the cause of action as disclosed by the plaint can enable the Defendant to precisely know the nature of the case he or she is to meet. This appears to be the spirit of ***O 7 r. 1 (e) CPR.***

The above latter stated view is fortified by the position in ***Lake Motors Ltd. v. Overseas Motor Transport (T) Ltd. [1959] E.A 603 (HCT)*** which was cited in ***Auto Garage v. Motokov (supra).*** It is settled law that a plaint may disclose a cause of action without necessarily containing all the detailed facts constituting the cause of action, provided that the violation by the defendant of the right of the plaintiff is shown.

In the instant case the particulars of some of the other Plaintiffs were actually supplied at trial and are on court record, while others were not. This notwithstanding, the facts averred in paragraph 5 of the plaint, and the plaint read together as a whole disclose a cause of action as against the 2nd Defendant. The preliminary objections raised are thus unsustainable. They are overruled, with costs to be in the main cause.

I now proceed to consider the agreed issues as stated in the joint Scheduling Memorandum in the order they were framed.

Issue 1: Whether the Plaintiffs' suit is barred by law.

I believe that this issue has been duly canvassed and put to rest altogether when resolving the first preliminary objection. It is thus not necessary to repeat the same, save to emphasise that the Plaintiffs' claim is not statute barred.

Issue 2: Whether the Plaintiffs or any of them are entitled to payment of their calculated, ascertained pension arrears.

The Plaintiffs' case is that their termination letter which was authored and endorsed by the 1st Defendant (*Annexture "B"* to the plaint) state in paragraph 2 thereof that:-

> ***"Pursuant to the above and in accordance with current regulations you are entitled to-***
>
> ***(c) pension in accordance with the Pensions Act Chapter 281."***

Flowing from the above quotation, Counsel for the Plaintiffs submitted that the wording of the letter is a clear and unequivocal testimony that the Plaintiffs are entitled to payment of their pension, and that this amounts to an admission by the 1st Defendant that the Plaintiffs are so entitled, and as such it is only proper that court enters judgment on admission of the fact in accordance with ***O.13 r. 6 CPR.***

Counsel further supported his view with the case of ***Dembe Trading Enterprises Ltd v.Global Electricity & Electronics Ltd, Commercial Court Misc. Application No. 202/2011*** which relied on the Court of Appeal decision in ***Kibalama v. Alfasan Belgie [2004] 4 E.A 146*** that under ***O. 11 r. 6 CPR (now O.13 r.6 CPR)*** judgment can be entered at any stage of the suit where an admission of facts has been made. That such an admission, however, must be unequivocal in order to entitle the party to judgement without waiting for the determination of any other question between the parties.

Similarly, in ***Matovu Luke & O'rs v. Attorney General, H.C Misc. Application No. 143 of 2008*** the stated position is that where the admission is not ambiguous, the court ceases to have discretion whether to enter judgment or not.

Applying the above principles to the instant case, under ***Section 144*** of the ***Pensions Act (supra)*** it is provided that every pension or other allowance granted under the Act shall cease upon the death of the person to whom it is granted. This provision has been adopted under ***Section 18 (1)*** of the ***Pensions Act (supra).*** Clearly, the payment of the Plaintiffs' pension is continuous until death, and as such, they are entitled to the same. Even for those Plaintiffs whose names appear in *Annexture "D"* to the plaint, but who have since passed on are also entitled to pension arrears, but only for a period up to the date of their demise.

Counsel for the Plaintiffs also relied on provisions of ***Article 254 (1) of the Constitution*** which provides that a public officer shall, on retirement, receive such pension as is commensurate with his or her rank, salary and length of service. ***Article 254 (3)(supra)*** also stipulates that the payment of pension shall be prompt and regular and easily accessible to pensioners.

Mr. Tumwesigye Charlie, Counsel for the 1st Defendant, insisted arguing that not all the Plaintiffs were employed on permanent and pensionable terms, and that 100 of them did not supply their employment particulars. Counsel listed the concerned Plaintiffs by their names who did not supply their particulars and some other 100 or so whose records were incomplete lacking appointment, confirmation and /or termination letters.

Counsel went on to submit that whereas the suit was instituted on behalf of 319 Plaintiffs, inclusive of Adonia Tumusiime, some of names were replicated; such as Ntanda G, Bangizi G.K, Mwaka R, Rwantebe A. among others. Counsel submitted that even with the few documents supplied they show the majority as being appointed on permanent and "non-pensionable", which would require leading evidence to determine how their status changed.

I have found from the record that actually a number of the Plaintiffs submitted their termination (or call them retrenchment) letters whose terms included payment of pension to them. In my view, this would essentially preclude the 1st Defendant from questioning how their status changed or to require them to lead evidence to prove their status; short of which they should not be entitled to pension.

In addition, it is actually the 1st Defendant who conceded, in the said termination letters, that the Plaintiffs are entitled to pension, and hence should not turn around and require them to prove whether they are entitled to pension. Other than merely disputing that particular fact, the 1st Defendant never showed or led evidence to controvert the Plaintiffs'

termination letters which clearly showed that they were to receive pension as considered by the retrenching / terminating authority- the Bushenyi District Local Government.

Further, in the agreed facts, particularly fact No.1, it is instructive on the wherein it states that:-

> ***"The Plaintiffs were former employees of the former greater Bushenyi District, the 1st Defendant herein."***

As was held by this court in ***Annet Zimbiiha v. Attorney General, H.C. Civil Suit No. 0109 of 2011,*** where parties to a suit duly agree and unequivocally admit to certain facts in the suit at the Scheduling Conference the facts are taken as established and the defendant is estopped denying them, and they cannot be litigated upon.

Relying on the cases of ***Stanbic Bank (U) Ltd v. Uganda Cros Ltd, S.C.Civ.Appeal No. 04 of 2004(UR); Tororo Cement Co. Ltd. v. Frokina International Ltd., S.C.Civ. Appeal No.2 of 2001*** this court went on to underscore the purpose and object of a Scheduling Conference under ***O 12 r. 2 CPR,*** which are, *inter alia*, to expedite trials before court by enabling the parties to sort out points of agreements at the earliest, which need not be litigated upon.

It is, therefore, untenable for the 1st Defendant who unequivocally admitted to facts on court record at the commencement of the trial to turn around and attempt to renege on the same facts freely agreed upon and admitted. Such attempt is rather futile and would amount to legal dishonesty - an absurdity no reasonable court of law would uphold.

Regarding the issue of the replicated names, this is a simple matter which is purely a practical question of a harmonising the list and supplying of clear and unambiguous documents pertaining particularly to the appointment, confirmation and termination of the Plaintiffs. This would invariably enable the elimination of possible repetitions, and should

be done by the 1st Defendant, which will ascertain and calculate the amounts of the pension and termination due to the Plaintiffs.

The 1st Defendant also raised issue with the accruing of pension to such officers who were appointed on permanent and non-pensionable terms. I find no problem with this particular point since it appears to have been put to rest in the response (See *Documents for the Plaintiffs marked "4(d)"*) of the Permanent Secretary of the Ministry of Local Government to the query which was raised by the Chief Administrative Officer - Bushenyi Local Government regarding whether permanent and non-pensionable terms of employment ever existed in Public Service (See *Documents for the Plaintiffs marked "4(C)").* The Permanent Secretary duly clarified that no such status exists as permanent and non-pensionable in Public Service.

It is my considered view that the Permanent Secretary's response was essentially in line with the spirit and letter of ***Article 254 (1) of the Constitution (supra)*** as regards pension issues that;

> ***"A public officer shall, on retirement, receive such pension as is commensurate with his or her rank, salary and length of service."***

Article 175 (a)(supra) defines a "Public Officer" to mean any person holding or acting in an office in the Public Service and "Public Service" is defined as service in any civil capacity of the Government the emoluments for which are payable directly from the consolidated fund or directly out of monies provided by Parliament.

Under ***Section 61 (1)*** of the ***Local Governments Act (Cap 243)*** it is provided that the terms and conditions of service of Local Government staff shall conform with those prescribed by the Public Service Commission for Public Service generally.

Based on the foregone statutory and constitutional provisions, the Plaintiffs who supplied the complete records of their employment, in form of the appointment letters, confirmation and termination letters, are entitled to pension and arrears thereof – whether

appointed on permanent and pensionable terms or not, since evidence is that there is no such position or public office that is permanent and non-pensionable in the Public Service.

For avoidance of any doubt, the same position as above applies to all those Plaintiffs whose documents were never supplied or were incomplete. Owing to the agreed fact at the Scheduling Conference that the Plaintiffs were employees of the 1st Defendant, that alone should fully entitle them to their claim subject to the ascertainment and calculation of such claims by the 1st Defendant.

It should also be noted that the ascertained and calculated claims must be done by the 1st Defendant which was, at any rate, the undisputed employer of the Plaintiffs, and for that matter is in possession of all the records pertaining to the Plaintiffs' appointments from which verification could be easily done. It is only in the event where a claimant disputes the ascertained and calculated amounts due of him or her that he or she would be required to avail complete documents to prove otherwise. Failure to prove otherwise, the claimant would be entitled to only the amounts ascertained and calculated by the 1st Defendant without any further claim.

The next issue concerns those who are as of now already deceased yet their employment particulars are on record as entitling them to pension for the period prior their death. It is settled that no litigation can be maintained in the name of, or orders made for or against a non-existent or dead person except by or for or against the legal representative of the estate. However, the burden to show that a person is dead lies on the one who alleged the death. In the instant case, for as long as no evidence to prove the contrary exists on record, all the Plaintiffs therein are deemed to be alive for purposes of their pension and other claims due.

Issue 3: Whether the Defendants are liable.

It is an agreed fact on record that the Plaintiffs were former employees of the former greater Bushenyi District - the 1st Defendant herein, and that on different dates they were

retired. It is also an agreed fact that payment of their pension and other benefits was controlled by the 2nd Defendant. For the foregone reasons, the Defendants are liable.

Issue 4: What remedies are available to the parties?

1).It is declared that all the listed Plaintiffs are entitled to their termination benefits and pension and arrears thereof. The 1st Defendant is accordingly ordered to ascertain and calculate all the amounts due to each of the Plaintiffs based on the relevant records in the 1st Defendant's possession as a former employer. Any claimant who disputes the ascertained and calculated amounts due to him or her by the 1st Defendant shall be required to furnish full proof otherwise. Failure to furnish contrary proof, the claimant shall be entitled only to the ascertained and calculated sums by the 1st Defendant as the final and conclusive figures.

2). The Plaintiffs prayed for general damages. The position of the law is that the award of general damages is at the discretion of court, and always as the law will presume to be the natural consequence of the defendant's act or omission. ***See James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993***. Secondly, in the assessment of the quantum of damages, courts are mainly guided, *inter alia*, by the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach. See ***Uganda Commercial Bank v. Kigozi [2002] 1 EA. 305***. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong**.** See ***Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.Civ.Appeal No.17 of 1992.***

Thirdly, the party should lead evidence or give an indication that such damages should be awarded on inquiry as the quantum. ***See Ongom v. Attorney General. [1979] HCB 267.***

Apart from praying for general damages in the instant case, no evidence was led or indication given as to what would be the appropriate quantum of damages to be awarded

in the circumstances. This being the case, this court has been guided by the formulation used in ***Uganda Commercial Bank v. Kigozi (supra)*** and applied the principles in case of ***Kananura Joseph & Or's v. Mbarara District Local Government & Or's, H.C Civil Suit No. 98 of 2008.*** The latter case was similar in circumstances as the instant case, and this court awarded as general damages Shs. 4,000,000/= per claimant. The same amount of Shs 4,000,000/= is awarded per claimant in this case.

3).The Plaintiffs also prayed for special damages. It is now established that special damages are such a loss as will not be presumed by law. They are special expenses incurred or monies actually lost, which a party has incurred up to the date of the hearing. The cardinal principle is that a claim for special damages should be specifically pleaded, particularised and proved. See ***W.M Kyambadde v.Mpigi District Administration (1983) HCB 54; Bonham Carter v. Hyde Park Hotel Ltd (1948) 64 TL P 177;*** Hassan ***v. Hunt [1964] EA 201; Kainamura Melvin Consultant Engineering & 7 Or's v. Connie Labada, S.C.Civ. Appeal No. 61 of 1992; J.B. Semukima v. John Kaddu (1976) HCB 16.***

Under paragraph 6 of the plaint, the Plaintiffs averred that the Defendants have not fully paid them their packages, gratuity, pensions and monthly arrears to date. The Plaintiffs then state as special damages the pension and termination package arrears amounting to Shs. 520,000,000= as at the date of instituting this suit, and that that chart showing how the figure was computed would be availed at the hearing. No chart showing the above figure was availed at the trial or in submissions of Counsel, which would have enabled court to take evidence thereof or for the Defendants to challenge or admit. As Sheldan J stated in the celebrated case of ***Bonharm Carter v. Hyde Park Hotels Ltd. (1948) TLR 177***;

> ***"On the question of damages, I am left in an extremely unsatisfactory position. The plaintiff must understand that if they bring an action for damages, it is for them to prove their damages, it is not enough to write down the particulars and so to speak, throw them at the head of the court saying; this is what I lost; I ask you to give me these damages. They have to prove it . . ."***

The evidence in this case with regard to the claimed special damages of Shs. 520,000,000/= is extremely unsatisfactory and to that extent no such an award can be made by this court ordering payment of that specific amount. The exact figure shall be determined after the ascertainment and calculation have been done of the Plaintiffs' claims by the 1st Defendant on the terms as already issued in remedy *No. (1)* above.

Regarding the issue of costs, ***Section 27(2) Civil Procedure Act*** is to the effect that costs follow the event, unless for some reasons court directs otherwise. ***See Jennifer Behange, Rwanyindo Aurelia, Paulo Bagenze v. School Outfitters (U) Ltd., C.A.C.A No.53 of 1999(UR).*** There is no reason to deny the successful Plaintiffs costs. The Plaintiffs are accordingly awarded costs of the entire suit.

4).The general damages and the ascertained and calculated claims for each claimant shall attract an interest rate of 25% per annum and costs of the suit shall attract interest at rate of 14% per annum - all from the date of judgment till payment in full – in order to cushion the amounts awarded against the economic vagaries of the rising inflation and drastic depreciation of the Uganda currency.

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BASHAIJA K. ANDREW
JUDGE
15/04/2013