THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 78 OF 2012

ALEX METHODIOUS BWAYO ::::::::::::::::::::::::::::::::PLAINTIFF

VERSUS

DFCU BANK LIMITED ::DEFENDANT

BEFORE: THE HON. LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiff was employed by the defendant as a Business Support Executive from 5th April 2006 until his employment was terminated on 28th December 2011. At the time of the termination, he was employed as Recoveries Manager. Following a loan recovery saga, which is stated to have involved the plaintiff, he was subjected to investigations which later culminated into the plaintiff's suspension on 5th December 2011, and later a disciplinary hearing on 8th December 2011. After the disciplinary hearing, the defendant decided to terminate the plaintiff's employment. The defendant also withheld some of the plaintiff's terminal benefits and used some to offset his outstanding mortgage liabilities. The plaintiff filed this suit challenging the termination as unlawful and sought for special damages, aggravated damages, general damages, punitive damages, interest and costs of the suit.

At the scheduling conference, the following issues were agreed by the parties:

1) Whether the plaintiff's termination was wrongful.

2) Whether the defendant lawfully withheld the plaintiff's benefits.

3) Whether the plaintiff is entitled to the remedies sought.

Issue 1: Whether the Plaintiff's termination was wrongful;

It was the case for the plaintiff that his employment was wrongfully terminated. Counsel for the plaintiff referred court to the termination letter marked Exhibit P2, jointly signed by Juma Kisaame, the defendant's Managing Director, and Isa Nsereko, the defendant's Head of Human Resource; and contended that although through the letter of termination, the defendant purported to invoke Clause 6 of the plaintiff's Employment Contract to terminate the contract by giving one month's notice, the same Isa Nsereko, DW1 had testified that the defendant terminated the plaintiff's employment due to his poor performance, yet this allegation was not included in the letter of termination. The internal audit investigations commissioned by the defendant's management did not find the plaintiff culpable. Even the disciplinary hearing failed to implicate the plaintiff. And to date 3 years later there is no verdict against the plaintiff as required by the defendant's Human Resource Manual (HRM) (Exhibit 14). After the disciplinary hearing, the only communication to the plaintiff was the termination letter. The defendant had thereby decided to take the law in its hands by pretending to exercise its contractual right to terminate.

Counsel relied on ***Isaac Nsereko Vs MTN Uganda Limited HCCS No. 156 of 2012*** and ***Juma & Others Vs Attorney General [2003] 2 EA, 461*** which laid down the basic necessities for a due process in a disciplinary hearing. He contended further that the reason alluded to in the termination letter was the Elizabeth Lugudde's recovery matter, despite the defendant later trying to change the said

reason to poor performance. This was clearly unlawful because the plaintiff was not accorded any hearing as regards poor performance contrary to the principle of *audi alteram partem*. In any case, poor performance was not disclosed in the termination letter. Further, DW2, testified that the termination was as a result of the employer exercising their right to terminate because there was mutual mistrust. This confirmed the plaintiff was dismissed on unproven allegations, whose disciplinary process had never led to a verdict. Either version, that is to say, that of DW1 and DW2, was conclusive evidence of an unlawful termination. Both witnesses confirmed that the investigations into the Lugudde transaction were still ongoing, three years after the plaintiff's employment was terminated for the same reason, leading to the conclusion that the termination of the plaintiff's employment was premature, prejudicial and unlawful.

Counsel relied on ***Isaac Nsereko Vs MTN Uganda*** (Supra) to state that the defendant had used the provisions in the Human Resource Manual of giving 3 month's salary in lieu of notice, to cover up for their unlawful termination of the plaintiff's employment.

Counsel submitted further that the letter inviting the plaintiff for a disciplinary hearing. It only stated that the plaintiff would give answers in regard to the foreclosure process of "**a Client's Mortgage**". The plaintiff's testimony was that he handled hundreds of recoveries in a year; hence there is no way he would prepare his defence for a recovery which was not stated in the summons. Further, the summon (Exhibit 3) did not show any dates or particulars of the offences that the plaintiff was meant to respond to; nor did the defendant provide the plaintiff with the Internal Audit Investigation Report in advance to enable him prepare his defence, despite the fact that it was signed on 2nd December 2011, therefore it

existed by the time the plaintiff was summoned on the 5th of December 2011. Further still, the plaintiff's suspension letter did not state the reasons for the plaintiff's suspension.

Counsel relied on ***Okurut Vincent Vs MTN Uganda Ltd HCCS No. 169 of 2008,*** where reliance was placed on ***Ridge Vs Baldwin [1964] AC 90*** for the proposition that a decision reached in violation of the principles of natural justice like the right to a fair hearing was no decision at all. He also relied on ***Section 66 of the Employment Act 2006***, which obliged an employer prior to dismissal of an employee on grounds of misconduct or poor performance, to explain to the employee the reason for which the employee is considering dismissal and to give the employee reasonable time within which to prepare his representations. In the present case, reasonable time and disclosure were not accorded to the plaintiff to prepare representations, and defence in the absence of the investigation report.

Counsel contended further that the participation in the disciplinary hearing by DW2, Mrs. Agnes Isharaza (the Head, Legal and Company Secretary of the defendant, was wrongful, in light of her role in the fraudulent sale of the Lungujja property. It rendered the whole process a nullity since she was biased or perceived to be biased. Further, all the witnesses who were interviewed during the investigations were never produced at the hearing, therefore the plaintiff could not cross-examine them on their evidence.

Counsel relied on ***Rosemary Nalwadda Vs Uganda Aids Commission Misc. Cause No. 45 of 2010***, and ***Cooper Vs Wilson & Others [1937] 2 K. B. 309*** for the proposition that the risk that a respondent may influence the court is so abhorrent to notions of justice that the possibility of it or even the appearance of such possibility was sufficient to deprive the decision of judicial force and to render it a nullity. DW2 had contravened the principle of *nemo judex in sua causa*, that is to

say, no man shall be a judge in his/her own case, or the rule against bias. He further relied on ***Asaba Christine Vs British American Tobacco (U) Ltd HCCS No. 100 of 2009*** to state that it is immaterial that a bias had affected the decision made, it is enough that the plaintiff reasonably apprehended that a bias attributable to the initiator operated against her on the final decision.

Counsel concluded that since the plaintiff's suspension was illegal for want of notice as to the reason for suspension; the summons to the plaintiff were illegal for want of particulars of the charges that would have enabled him to prepare for his defence; and the hearing itself was void for *inter alia,* bias; therefore, a termination letter written as a consequence of a chain of illegalities was equally a nullity. He relied on Lord Denning MR. in ***Macfoy Vs United Africa Co. Ltd [1961] 3 ALL ER 1169*** where it was held that;

> ***"……. If an act is void, there it is in law a nullity. It is not only bad but incurably bad. There is no need for an order to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something and expect it to stay there. It will collapse."***

The termination letter was therefore a nullity for as it arose out of illegal proceedings. See also ***Isaac Nsereko Vs MTN Uganda Ltd (Supra).***

He prayed that the termination letter dated 28th December 2011 be declared null and void.

Counsel for the defendant was of a different view. On whether the termination was wrongful, he submitted that the Plaintiff was wrong in his criticism of the reason of

poor performance of the plaintiff as the reason for termination as per testimony of DW1 for the following reasons;

1) There was no legal requirement for the employer to state the reasons for the dismissal in the termination letter, unless the employee requested for them, which was not the case here. (See ***Section 61 (1) (f) of the Employment Act.)***
2) On re-examination, DW1 clarified that the Defendant terminated the plaintiff's employment basing on its right under Clause 5 of the Contract of Employment (Exhibit 1), and that the poor performance was one of the considerations in reaching that decision; as confirmed by DW2 (Agnes Tibayeita Isharaza) in her testimony. An employer retained the right to terminate the employee's service at anytime. (See ***Patel Vs Madhivan International Ltd (1992-93) HCB 189***). Further ***Section 65 (1)*** of the employment Act also provided that a termination of a contract is deemed to have come to an end where the employer ends it with notice.

Counsel sought to distinguish ***Isaac Nsereko Vs MTN Uganda HCCS NO.156 of 2012***, from the present case, in that in the ***MTN case*** **that** the employee had been forced to resign, a resignation which he later revoked before its acceptance, and it was that purported resignation which was used to terminate the employment. Hence the comment by the Judge that the resignation was used as a cover. There was nothing to cover in the present case. The Defendant explicitly stated in the letter of termination that it was invoking its contractual clause to terminate, a position which it was legally entitled to take. Further, in the *MTN case*, it was found that there had been no prior notice of the meeting, given to the employee to

challenge the allegations against him; and generally no hearing had been granted to the employee, which could not be said of the Defendant in the present case.

On the allegation that the letter summoning the Plaintiff for a disciplinary hearing did not indicate which charges the plaintiff was meant to answer and that it only stated that plaintiff would give answers in regard to the foreclosure process of a client's mortgage; and that the summons show any dates or particulars of the offences that the Plaintiff was meant to respond, Counsel responded that there was no legal requirement that a notice of hearing should state the dates and particulars of the offences that an employee was meant to respond to. These requirements are a preserve of criminal proceedings and are inapplicable to administrative proceedings like disciplinary proceedings.

Secondly, it was clear from the evidence that the Plaintiff was aware of the charges against him and the purpose of the hearing, and which client it was, as in cross examination, the Plaintiff had stated that he was aware of the mortgage transaction between the Bank and Elizabeth Lugudde, which was problematic, and that the bank had lost money, and at the time he was not aware of any other problematic transaction; and that one Pious Olaki had also informed him to be prepared as Managing Director had instructed Chris to investigate the issue. (See Exhibit 6 at page 4 number 12.) The Plaintiff was therefore aware of why the meeting had been called and especially so which client in respect of which it had been called and it was immaterial as to how he obtained that notice; since also as testified by DW2, the Plaintiff did not protest to being unready when the matter came up for hearing. Further, there was no legal requirement that the employee should be informed in writing always. Thus, ***regulation 2 (2) (a) of Schedule 1 to the***

Employment Act is to the effect that the employee shall be informed "preferably in writing" but not always in writing.

Counsel relied on ***Dr. E. B Mwesigwa Vs The East African Development Bank and Anor M.A 639 of 2003 (Arising out of C.S 625 of 2003)***, to state that once the plaintiff got in possession of the information, it was immaterial how he had obtained it. As long as the Plaintiff was aware of the accusations against him, he could not seek to vitiate that by saying that the letter never mentioned expressly which client was involved. And, as a general rule, it was not appropriate for the courts to intervene to remedy minor irregularities in the course of disciplinary proceedings between employer and employee. (***Kulkarni Vs Milton Keynes Hospital NHS Foundation Trust (2010) ICR 101, para 22 cited in West London Mental Health NHS Trust v Chabra (2013) UKSC 80 at para 39.)***

On the allegation of bias on the part of the defendant, because of the presence of Agnes Tibayeita as a member of the disciplinary committee, who is alleged to have had an interest in the case as she would have no job in case the case did not go against the Plaintiff, hence being a judge in her own case, Counsel submitted that bias was a very serious allegation that should not be made lightly.

On actual and perceived bias, Counsel relied on ***Porter Vs Magill 2001 UKHL 67 and (2002) 2 AC 357,*** to state that a claim of actual bias required clear and direct evidence that the decision maker was in fact biased; and should not be made out by suspicions, possibilities or such other equivocal evidence. In the present case, the "incidents of bias" alluded to by the Plaintiff were all mere suspicions since every member of the committee was part of Management, and that according to the Plaintiff's, such proceedings would only be valid if conducted by non bank staff.

Although DW2 is stated to have signed the instrument that appointed Micheal Agaba as auctioneer, who later committed the fraud, DW2 testified that it was her duty as head legal to sign the document. There is no direct evidence that she made the error or that she had an interest in the matter. The Plaintiff's submission that she would have lost her job is mere conjecture. The Plaintiff has, therefore, failed to prove actual bias.

On whether bias could have been apprehended on Ms. Agnes Tibayeita, (perceived bias), Counsel contended that when the plaintiff came up to attend the hearing, he did not object to the presence of Ms. Agnes Tibayeita, or anyone else for that matter on the committee. On the contrary, according to the minutes, he stated that he had been given a fair hearing. See Exhibit 9 page 4, (minutes of the hearing). He could not, therefore, claim now that there was perceived bias on the part of Ms. Agnes Tibayeita. He relied on ***Blue lines Enterprises Limited Vs East African Development Bank***, (**Civil Application No. 21 of 2012) Court of Appeal Tanzania**, to state that if the plaintiff honestly never believed in the impartiality of the composition of the panel, he did not have to wait until the outcome of the disciplinary proceedings.

Counsel sought to distinguish ***Rosemary Nalwadda Vs Uganda Aids Commission***, (supra) from the present case because in Nalwadda, an objection had been made at the hearing as to the presence of Dr. Kihumuro Apuuli. And in ***Asaba Christine Vs British American Tobacco***, (supra) the issue of bias had been raised during the hearing but was ignored by the panel. So was ***Cooper Vs Wilson*** (supra).

It was the defendant's further case that the bank had lawfully withheld the Plaintiff's money on the basis of contract as the plaintiff had obtained a mortgage

from the Defendant, which had to be repaid by deducting the Plaintiff's salary at source (Exhibit 12, the Mortgage Deed). Under Clause 1.3 thereof, the Plaintiff agreed to assign his rights and benefits under the Staff Provident Fund to the Defendant until repayment in full of borrowed sums. Under Clause 1.4 thereof, the Plaintiff undertook to ensure that his contribution to the Provident Fund was to be continuous until full repayment of the borrowed money. Under Clause 4.2.5 thereof, in case of an event of default, the Defendant would be entitled to exercise a right of set off at any time on all monies lying to the borrower's credit within the Defendant's group.

Counsel contended that when the Plaintiff's employment was terminated, it was no longer possible for the Defendant to deduct his money at source. As such, he made no payments towards the settlement of his mortgage. In addition, at the time of the termination, he never made any alternative arrangements to pay. These constituted events of default. It followed therefore that the Defendant was entitled to trigger the set-off clause under the mortgage deed and retain the Plaintiff's money under, among others, the Provident Fund.

I have considered the submissions of learned Counsel on either side together with the law and authorities relied on.

The events preceding the termination of the plaintiff's employment commenced with a suspension letter dated 5th December 2011, (Exhibit P.7). It states thus:

> ***"Our Ref: STAFF/SUS/AB***
>
> ***PRIVATE AND CONFIDENTIAL***
>
> ***Alex Bwayo***
> ***DFCU Bank***

Kampala

Dear Alex,

<u>SUSPENSION FROM WORK</u>

This is to advise that you have been suspended from work with immediate effect on half pay, to allow further investigations into the foreclosure process of a client's mortgage.

You will be contacted by the HR Department as soon as this investigation is completed.

Please arrange to hand over any Bank property in your possession including keys, nametag, and identification card to the Head of Credit.

Please sign the attached copy as acknowledgement of receipt of this letter.

Yours faithfully

……..sign……	***…….sign…….***
Juma Kisaame	***Isa Nsereko***
Managing Director	***Head – Human Resource***

<u>Acknowledgement</u>

….Bwayo Alex M……..
Signature
Date"

Then the plaintiff received a letter dated 28th December, 2011 (Exhibit 2) terminating his services. It reads:

"PRIVATE & CONFIDENTIAL

Alex Bwayo
DFCU Bank
Kampala

Dear Alex,

TERMINATION OF YOUR EMPLOYMENT WITH DFCU BANK LIMITED

We make reference to your contract of employment dated April 25, 2003, under which you have served to date.

Clause 6 of the said contract of employment provides that "either party may terminate the contract by giving one month's notice in writing or by payment of one month's gross salary in lieu of notice.

We write, in accordance to the above clause, to terminate your employment with dfcu Bank. This termination shall take immediate effect.

The following terms and conditions will apply;

- ***You received your half salary for the month of December and the balance amounting to UGX 1,680,000= (Uganda Shillings One Million Six Hundred Eighty Thousand only), subject to statutory deductions will be paid to you.***

- ***You will be paid a sum of UGX 10,080,000= (Uganda Shillings Ten Million Eighty Thousand only), being the value of Three (3) months in lieu of notice, subject to statutory deductions.***

- ***You will be paid a sum of UGX 3,360,000= (Uganda Shillings Three Million Three Hundred Sixty Thousand only), being the value of your 22 outstanding leave days, subject to statutory deductions.***

- ***You are indebted to the Bank to the tune of UGX 86,542,156= (Uganda Shillings Eighty Six Million Five Hundred Forty Two Thousand One Hundred Fifty Six only) as at December 20, 2011, for a mortgage facility extended to you respectively.***

- ***In August 2009, you accessed part of your personal contribution amounting to UGX 11,470,765= for real estate investment. You will therefore be entitled to the remaining balance of 100% of your***

personal contribution to the provident fund amounting to UGX 6,685,268= (Uganda Shillings Six Million Six Hundred Eighty Five Thousand Two Hundred Sixty Eight only). The employer's contribution to your Provident Fund totaling to UGX 22,653,457= (Uganda Shillings Twenty Two Million Six Hundred Fifty Three Thousand Four Hundred Fifty Seven only) will be withheld pending conclusion of the investigation into the Elizabeth Lugudde's recovery matter that you are familiar with.

- ***Your total entitlements for Provident Fund, outstanding leave and payment in lieu of notice amounting to UGX 15,498,768= (Uganda Shillings Fifteen Million Four Hundred Ninety Eight Thousand Seven Hundred Sixty Eight only) will go towards reducing your mortgage facility as per the Provident Fund Deed, and the balance amounting to UGX 71,043,388= (Uganda Shillings Seventy One Million Forty Three Thousand Three Hundred Eighty Eight only) will attract a commercial rate effective December 29, 2011. Please arrange to meet with the Head of Business Support and agree on a payment plan for this remaining balance.***

Please arrange to hand over any Bank property in your possession including keys, medical cards and identification card to the Human Resources Officer.

Kindly acknowledge receipt of this communication and confirm acceptance of the terms contained herein by signing and returning a copy of this letter.

Yours sincerely

……sign…….	***……sign…….***
Juma Kisaame	***Isa Nsereko***
Managing Director	***Head – Human Resources."***

A perusal of the above two letters reveals that the suspension letter did not mention which client's foreclosure process the plaintiff was being suspended for. Suspension, and indeed termination of employment, is a very serious matter which an employer should take seriously and be very sensitive about, as it renders an

employee jobless with reduced, or no income at all. A lot more people are affected especially the employees immediate defendants, and they end up suffering greatly when termination is effected, rightly or wrongly. The employer ought, therefore, to put on a human face while dealing with such matters that have an adverse effect on an individual.

The plaintiff stated in his evidence that in a year he handled hundreds of clients' mortgages in which case he would not be clear which client was referred to in Exhibit P7. Surely a whole Managing Director and Head, Human Resource of a Bank could do better than sign a letter as Exhibit P7 which does not portray the seriousness of what it is supposed to communicate.

The termination letter itself did not make reference to the investigations referred to in the suspension letter; that is to say, whether they had been completed and hence the decision to dismiss. The reason given in the termination letter (Exhibit P2) is that the bank was exercising its right to terminate the plaintiff's employment allegedly vide clause 6 of the Contract of Employment. Mention is, however, made of Elizabeth Lugudde's recovery matter in the termination letter, which means that the termination was related to that lady's dealings with the bank.
I note that DW1, Issa Nsereko, in his testimony as to why the plaintiff was terminated, stated that it was due to poor performance by the plaintiff. However, in his clarification during re-examination, he mentioned the reason given in the termination letter, that is to say, the bank was exercising its right to terminate the contract, according to the contract.

DW2, Agnes Tibayeita, Head, Legal and Company Secretary, on the other hand stated that the bank exercised their right to terminate due to mutual mistrust after

the matter of Lugudde, and that plaintiff had offered a letter of resignation. This alleged letter of purported resignation, was however, not presented to court.

So far it is a total of 3 allegations/reasons for termination, that is to say;

1) Poor performance
2) The Bank (defendant) exercising the right to terminate the contract.
3) The plaintiff's role in the Lugudde recovery process leading to mutual mistrust.

The employer, that is to say the defendant, however appears to want to rely more on the reason that the bank exercised its right to terminate the contract.

Whatever reason the Bank may have used to terminate, the Employment Act, 2006 Section 66, now provides for a mandatory right to be heard in such dismissals as the present one.

Section 66 states;

> ***(1) Notwithstanding any other provision of this Part, an employer shall, before reaching a decision to dismiss an employee, on the grounds of misconduct or poor performance, explain to the employee, in a language the employee may be reasonably expected to understand, the reason for which the employer is considering dismissal and the employee is entitled to have another person of his or her choice present during this explanation.***
>
> ***(2) Notwithstanding any other provision of this Part, an employer shall, before reaching any decision to dismiss an employee, hear and***

consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.

(3) The employer shall give the employee and the person, if any, chosen under subsection (1) a reasonable time within which to prepare the representations referred to in subsection (2).

Section 68 states:

"Proof of reason for termination

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

(2) The reason or reasons for dismissal shall be matters, which the employer, at the time of dismissal, genuinely believed to exist and which caused him or her to dismiss the employee."

The question here would be whether the plaintiff was accorded such rights as are spelt out in the above provisions prior to his dismissal. There is a summon to appear for a disciplinary hearing calling the plaintiff to the hearing. (See Exhibit 8). It states as follows:

"Our Ref: HR/STAFF/DISC-11

Alex Bwayo
DFCU Bank
Kampala, Uganda

Dear Alex,

SUMMON TO APPEAR FOR A DISCIPLINARY HEARING

In reference to the above, this serves as a summon to you to appear before a Disciplinary Panel on Thursday 8th December 2011 at 9.00 a.m. at Plot 2, Jinja Road, Boardroom. You shall at the said hearing be expected to provide explanations/answers in regard to the foreclosure process of a client's mortgage.

The panel shall be constituted of the Head of Credit, a representative from the Legal Department, a representative from the Internal Audit Department, and a representative from the Human Resources Department as per the Staff Hand Book – page 47, and a member of the staff consultative forum, who will be there as an employee representative.

Please acknowledge receipt of this summon by signing and returning a copy hereof.

Yours sincerely,

…..sign……
Isa Nsereko
Head – Human Resources

c.c. Head of Legal
c.c. Head of Audit
c.c. Head of Credit."

Again, like the suspension letter, this letter also refers to a client's mortgage. No client's name is given; neither are the particulars of the offence; or the dates when the alleged offences were committed. Counsel for the defendant states that there was no legal requirement to state in the notice, the dates and particulars of the offence, which he states is a requirement only in criminal matters, inapplicable to civil proceedings. I don't agree with Counsel, and this shows how insensitive the

defendant and Counsel are in handling matters that affect/impact the livelihood of their employees and his dependants.

In court's view, the basics of a right to be heard must of necessity include;

1) Notice of allegations against the employee to be served on him within reasonable time to allow him prepare his defence.

2) The notice has to set out clearly what allegations against the plaintiff are and what his rights are at the oral hearing. Such rights would include the right to respond to the allegations against him orally or in writing; the right to be accompanied at the hearing and the right to cross-examine the defendant's witnesses or call witnesses of his own.

In this case there was no detailed account or any account of the allegations against the plaintiff provided by the defendant in the letter inviting him for the disciplinary hearing. And, unlike what DW2 stated, a disciplinary hearing presupposes that an employee is suspected to have breached the rules of discipline of the employer or engaged in misconduct, or did not perform in accordance to the expectations of the employer.

I entirely agree with the principles laid down in ***Juma & Others Vs Attorney General [2003] EA 461***, which was relied on with approval in ***Isaac Nsereko Vs MTN HCCS No. 156 of 2012***; that;

"……. It is an elementary principle in our system of the administration of justice that a fair hearing, within a reasonable time, is ordinarily a judicial

investigation and listening to evidence and arguments, conducted impartially in accordance with the fundamental principles of justice and due process of law of which a party has had reasonable motion as to the time, place, and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a Lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be appraised of the evidence against him in the matter, so that he will be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence."

Further, although there was an Internal Audit Investigation report dated 02/12/2011, (Exhibit 6), it was not availed to the plaintiff to put him on notice of all the allegations so as to enable him to prepare adequately to respond at the hearing. In any case the recommendations in the report did not find the plaintiff guilty of any offence in the matter of Lugudde's recovery. It appears that's why the defendant had to look for all sorts of excuses to get rid of the plaintiff. And though there is mention of resignation, the alleged resignation letter was not availed in evidence.

As already stated, whatever reason the bank would choose the plaintiff had to be given a hearing.

The right to a hearing is now constitutional. Article 42 of the Constitution provides;

"42. Right to just and fair treatment in administrative decisions.

> ***Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her."***

Article 44(c) also makes the right to a fair hearing non-derogable. The above provisions are buttressed by those of the ***Employment Act, 2006 (S. 66) (supra).***

I have already found that the basics of a fair hearing were not adhered to by the employer (bank) during the processes that led to the termination of the plaintiff's employment. Counsel for the defendant contended that the plaintiff knew which client was referred to in the letter of suspension and that of notice of a disciplinary hearing, but the evidence does not bear this out. It is true that when asked in cross-examination whether he knew of the mortgage transaction between the bank and Ms. Lugudde Elizabeth which was problematic, the plaintiff said he did; and that one Pious had told plaintiff to be prepared as there were investigations commenced in the matter. Clearly, during cross-examination, the plaintiff was not asked whether he knew of "a client's mortgage transaction." The question was clear; whether he knew of a mortgage transaction between the bank and Lugudde. The client's name was disclosed, so he answered as he did. But in the letters referred to above the client was not mentioned as the plaintiff was probably left to await to hear of which client would be mentioned during the hearing. That made him be on the loosing side as he did not have sufficient information to enable him to defend himself adequately. But if as the defendant says, the plaintiff was dismissed based on the right of the defendant to terminate, resulting from poor performance, it is clear that the plaintiff was not given any hearing relating to the above grounds. The poor performance was never a ground cited in any disciplinary proceedings.

I, therefore, find that basing on the events that led to the dismissal, the plaintiff was not accorded the right to a fair hearing.

The first issue is answered in the affirmative.

Issue 2; Whether the defendant lawfully withheld the plaintiff's money;

Counsel for the plaintiff reiterated their submission on the first issue and submitted that the defendant withheld the plaintiff's money on the basis of its illegal termination proceedings. He prayed that in case court finds the termination of the plaintiff's employment was unlawful, the only logical conclusion would be that the subsequent withholding of the plaintiff's money was unlawful.

He relied on ***Ridge Vs Baldwin [1964] AC 90 at page 80***, where it is held;

> ***"……. a decision reached in violation of the principles of natural justice like the right to a fair hearing is no decision at all. It is void and unlawful. If the principles of natural justice are violated, it matters not that the same decision would have been arrived at if there was no violation. A person in a cause cannot be condemned unheard – audi alteram partem ….. under S. 66 of the Employment Act 2006, an employer is obliged, prior to dismissal of an employment on grounds of misconduct or poor performance, to explain to the employee the reason for which the employee is considering dismissal and give the employee reasonable time within which to prepare the representations. The defendant contravened this provision in its entirety; see Desouza Vs Tanga Town Council [1961] EA 377."***

Counsel concluded that although in this case the defendant tried to camouflage their actions by seeking to rely on a provision empowering the defendant to terminate on giving of notice or payment in lieu, this attempt had made matters worse because the evidence on record was clear that there was a reason for termination, resulting from the Lugudde recovery matter.

Counsel for the defendant on the other hand submitted that the defendant lawfully withheld the plaintiff's money on the basis of contract. He contended that plaintiff obtained a mortgage from the defendant, which was to be repaid by deducting the plaintiff's salary at source. Under Clause 1.3 thereof, the plaintiff had agreed to assign his rights and benefits under the Staff Provident Fund to the defendant until repayment in full of borrowed money. Under Clause 4.2.5 thereof, in case of an event of default, the defendant would be entitled to exercise a right to set off at any time on all monies lying to the borrower's credit within the defendant's group.

Counsel further submitted that when the plaintiff's employment was terminated, it was no longer possible for the defendant to deduct his money at source. As such, he made no payments towards the settlement of his mortgage. In addition, at the time of the termination, he never made any alternative arrangements to pay. These constituted events of default. It follows, therefore, that the defendant was entitled to trigger the set-off clause under the mortgage deed and retain the plaintiff's money under, among others, the provident fund.

I note that the plaintiff in his witness statement stated that the defendant unlawfully withheld his terminal benefits amounting to Ug. Shs. 42,778,725= yet there was no default in repayment of the loan; it amounted to a breach of the Mortgage

Agreement between the plaintiff and the defendant. It is, however, not indicated how the amount withheld builds up to Shs. 42,778,725=.

According to the termination letter, Shs. 15,498,768= (Uganda Shillings Fifteen Million, Four Hundred Ninety Eight Thousand Seven Hundred Sixty Eight only) constituting the personal contribution to the Provident Fund, outstanding leave days, and payment in lieu of notice, were applied towards the plaintiff's mortgage facility as per the Provident Fund Deed. Shs. 22,653,457= which was the defendant's contribution to the Provident Fund was to be withheld till the investigations into the Elizabeth Lugudde's recovery matter were concluded.

However, Issa Nsereko, during cross-examination by the plaintiff's Counsel, when questioned about the amount stated to have been withheld as stated in Exhibit P2, he stated that "***This money has already been paid***". I find that the plaintiff is entitled to the amount so withheld, since according to DW1, after the Disciplinary Committee hearing regarding the same matter of Lugudde there was no verdict of guilty or not guilty; and that it was in light of performance related issues that the employer decided to invoke the termination clause. "The grounds were more than sufficient. We did not wait for further investigations," said DW1.

I therefore find that unless the plaintiff has already been paid this sum, as alleged but not proved by DW1, he should be paid the said sum.

As the amount of Shs. 15,498,768= (Fifteen Million Four Hundred Ninety Eight Thousand Seven Hundred Sixty Eight only) which was due to the plaintiff but which was applied to the repayment of his mortgage, the court is not able to order that it be repaid to the plaintiff since he does not deny that it was applied for that

purpose. All the court can do is consider the inconvenience caused to him, if any, when awarding general damages.

Issue 3: Whether the plaintiff is entitled to the remedies sought;

General and aggravated damages

On the prayer for general damages and aggravated damages, Counsel for the plaintiff submitted that the plaintiff testified on the fact that his dismissal was unlawful; there was a deliberate contravention of the provisions of the Employment Act by the defendant. The plaintiff suffered grave humiliation, psychological torture; he had worked for 8 years in DFCU bank without any scandal whatsoever and his position as Recoveries Manager would demand better treatment from the defendant. He relied on ***Bank of Uganda Vs Betty Tinkamanyire SCCA No. 12 of 2007***, where the Supreme Court awarded aggravated damages to the employee for the arrogance and highhandedness of the defendant in terminating the employee's contract; and on ***Isaac Nsereko Vs MTN Uganda Ltd*** where court granted a total sum of Shs. 304,000,000= as both aggravated and general damages for the humiliation that the plaintiff underwent; and ***Okurut Vincent Vs MTN Uganda (supra),*** where court granted a sum of Shs. 120,000,000= as general damages.

Counsel contended that in the instant case, the defendant acted maliciously, with bias and lacked compassion, callousness and was indifferent. The defendant stage managed a disciplinary hearing, to cover its injustices with the view of defeating justice. He is unable to pay his mortgage and the defendant has commenced recovery proceedings to evict him from his house. All the above arrogant actions by the defendant aggravate the plaintiff's loss. He prayed for a sum of Shs. 100,000,000= in aggravated damages, a sum of Shs. 50,000,000= in general

damages; and also prayed for interest at the rate of 24% per annum from the date of termination until payment in full, plus costs of the suit.

On the prayer for aggravated damages, the principles governing this kind of damages were well stated by Counsel for the defendant, and in ***Uganda Revenue Authority Vs Wanume David Kitamirike, Civil Appeal No. 43 of 2010 (pages 20),*** thus;

> ***"Aggravated damages are compensatory in nature, but they are enhanced as damages because of the aggravating conduct of the defendant. They reflect the exceptional harm done to the plaintiff by reason of the defendant's actions/omissions. Both general and aggravated damages focus on the conduct of the defendant in causing the injury to the plaintiff that is being compensated for."***

The defendant's Counsel stated that the plaintiff was not entitled to aggravated damages for the reason that he had led no evidence to show any egregious and high handed behavior by the defendant. As seen in the preceding paragraphs, the plaintiff was subject to a lawful disciplinary hearing. He was given adequate notice. At the end of the hearing he stated that he had been given a fair hearing. Indeed in the cross-examination, the plaintiff stated that the Bank people were his friends and were friendly during the entire process. The plaintiff did not show how the defendant was malicious and callous. It is not automatic that every termination makes the defendant's conduct high handed. And as conceded by the plaintiff in the cross-examination, given his appraisal history, he could not say that he gave good service to the Bank.

Counsel further distinguished the present case from the cases cited by the defendant in that in those cases, high handedness of the defendant was so clear to see; the forced resignation in ***Isaac Nsereko Vs MTN***, the public notice labeling the plaintiff incompetent in ***Bank of Uganda Vs Betty Tinkamanyire.***

I have followed the checkered history of the events leading to the termination of the plaintiff and the way the proceedings were carelessly handled. From his suspension letter, which did not disclose any reason for suspension, to the Notice of disciplinary proceedings and the disciplinary proceedings themselves; all culminating into the evidence brought to court by the defendant through its witnesses, one could see that the defendant was all bent to get evidence geared towards getting rid of the plaintiff at whatever cost.

The defendant's witnesses knew very well that the investigations that were carried out by the Audit Department did not put any blame on the plaintiff in their recommendations, so they decided to try other charges. DW1 stated on page 17 of the proceedings that the Lungujja property was part of the reason for the dismissal.

Then he stated on page 21 "***There was no verdict of guilty or not guilty." Then in light of performance related issued, the employer decided to invoke the termination clause. The grounds were more than sufficient. We did not await further investigations."***

If the reasons were sufficient, why were they not put to the plaintiff to defend himself on this aspect of poor performance.

The defendant went ahead to terminate the employee's employment and even recalled the mortgage. The defendant states the plaintiff did not show that he would have alternative means to pay but there is no indication that he was asked to show that he had alternative means to pay. On his part the plaintiff stated that the mortgage was recalled before he defaulted.

The act of dismissal was unlawful as I have already found. The defendant is not remorseful at all but up to submission time he is trying to justify the bank's unlawful actions, which caused so much inconvenience and embarrassment to the plaintiff. He did not deserve to be treated that way. I find that Shs. 110,000,000= will be sufficient as both general and aggravated damages.

Special damages

The plaintiff prays for Shs. 1,680,000= being the half salary withheld during the time of his suspension. According to the defendant, the bank was legally allowed to deduct the half pay during a suspension to allow for an inquiry, as per ***Section 63 (1) of the Employment Act 2006.*** It does not matter how the investigation ends. As such, the Shs. 1,680,000= was lawfully withheld and cannot be claimed back.

I must say that I am surprised by Counsel's contention that the amounts withheld on half pay cannot be claimed back, even if the investigations don't find him guilty. It is trite that where the plaintiff is not found guilty by investigations as in this case, he is entitled to get his withheld half pay. This is therefore granted.

The plaintiff also claims Shs. 3,360,000= as one month's salary for failure by the defendant to notify the plaintiff the valid reasons for termination. However, there is no basis in law for this kind of claim. What the law provides for under ***Section***

66 of the Employment Act is failure to give notification and a hearing before termination. It does not concern anything after termination. The plaintiff's prayer for failure to notify reasons for termination is evidently after the termination and is therefore not caught by ***Section 66 (4)*** which provides for compensation in case of non-compliance with the section 66.

I agree with defendant's Counsel that failure to notify the plaintiff of the reasons for termination did not attract special penalties as he claims. The general damages would cover any shortcomings caused by this.

As for the Shs. 4,000,000= for transport, Counsel for the defendant submitted that the plaintiff did not prove it but during the cross-examination, he stated that he went to the Bank twice during the investigations; and that he lived in Namugongo. He submitted that transport to and from Namugongo to Jinja Road Kampala on two occasions could not be Shs. 4,000,000=. I would also agree here that the claim has been exaggerated moreover without specific proof. Shs. 100,000= would suffice.

In conclusion the case against the defendant succeeds in the respects stated above. The plaintiff is awarded the following:

1. The defendant's contribution to the plaintiff's Provident Fund amounting to Shs. 22,653,457= (Twenty Two Million Six Hundred Fifty Three Thousand Four Hundred Fifty Seven only), if not yet paid to him.
2. Shs. 1,680,000= (One Million Six Hundred Eighty Thousand only) being ½ salary withheld during suspension.
3. Shs. 100,000= (One Hundred Thousand only) for transport.

4. Shs. 110,000,000= (One Hundred Ten Million only) for general and aggravated damages.
5. Interest on the awards in (1) and (2) above at 20% per annum from date of termination till payment in full.
6. Interest on awards in (3) and (4) above at court rate from date of judgment till payment in full.
7. The plaintiff is awarded costs of this suit.

It is so ordered.

Elizabeth Musoke

JUDGE

3/03/2015