

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0005 OF 2016**

5 **WAGA B. FRANCIS** **PLAINTIFF**

VERSUS

**1. THE CHIEF ADMINISTRATIVE OFFICER, MARACHA }
10 2. MARACHA DISTRICT LOCAL GOVERNMENT } DEFENDANTS**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

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The plaintiff sued the defendant for unlawful and unfair dismissal, seeking recovery of general and special damages, unpaid salary of shs. 32,433,448/=, interest and costs. The plaintiff's claim is that at the time of termination of his services he was a Senior Accounts Assistant, posted to Yivu County in Maracha District. Upon allegations that he had misappropriated shs. 4,341,000/=

20 the property of the second defendant, he was arrested and prosecuted but was acquitted on 13th October 2015 after the trial court found he had no case to answer. When he reported back to work for resumption of his duties, he found that his post had been filled by another officer and his name had been deleted from the payroll. .

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In their joint written statement of defence, the defendants denied the plaintiff's claim, contending instead that the plaintiff was never in the employment of the second defendant but rather was an employee of Arua District Local Government. At the time the second defendant came into existence, the plaintiff had been granted a study leave by Arua District Local Government and his service was never transferred to the second defendant. Upon suspending his studies, the

30 plaintiff reported back to Arua District Local Government for resumption of duties from where he was referred to the second defendant who demanded that the plaintiff accounts for shs.

7,964,000/=. The plaintiff never accounted for that sum but instead filed this suit. By virtue of his conduct, the plaintiff is deemed to have absconded. His name was thus deleted from the payroll.

The plaintiff testified that he is a Senior Accounts Assistant of Maracha District since 1st July
5 2010. He was formally recruited into the civil service by the Arua District Service Commission
on 15th November, 1994. In December 1994, he was posted to Yivu ub-county as his first duty
station. Thereafter in December 1995, he went on normal transfer to Nyadri sub-county. He was
confirmed in the appointment on 30th March 1998 and admitted to the pensionable establishment
of the second defendant. On 24th October 2000 he was transferred to Arivu sub-county on normal
10 transfer. On 31st March 2005, he was transferred to Ajia sub-county as Senior Clerical Officer.
On 23rd September 2000, he was appointed on transfer within service as Accounts Assistant in
the restructuring of Local Governments under the Public Service Reform Programme. In January
2006, he was transferred to Yivu sub-county. While still in Yivu, he was appointed on promotion
to the level of Senior Accounts Assistant and earned salary of that grade from September 2007 to
15 March 2008 but was unfairly demoted to the Accounts Assistant grade without a proper reason.
On 15th November 2007, he applied to Kyambogo University for enrolment into the bachelor of
Accounting and Finance course under the mature age scheme.

On 26th August 2008 he applied for study leave with pay after his admission to the University to
20 pursue the course, which study leave with pay was granted by Arua District Local Government
although he was still an employee of Maracha. In August 2008, he joined the University. With
the authority of the Chief Administrative Officer of Arua District, he handed over office to Mr.
Amandu Felix the then Sub-County Accountant of Nyadri sub-county. On 1st July 2006,
Maracha-Terego District was carved out of Arua District, without a district headquarters in
25 place. Resources, of which the human resource was one, were allocated in line with the
decentralisation policy at which point and by law he became a member of staff of Maracha-
Terego District Local Government. On 1st July 2010, Maracha became a one County District.
Terego County bounced back to Arua District. All this time he was a staff of Maracha District
Local Government under the decentralisation policy. His remuneration should have been paid by
30 Maracha District Local Government as evidenced by his salary payment slips, the relevant laws

and the resumption of duty letters dated 29th November 2010, 1st December 2010, 16th December 2010 and 24th February 2011.

While at the University, at the end of the first year but at the beginning of the second year, he
5 received a letter from the Chief Administrative officer Maracha dated 29th November 2010 with
the reference “Misappropriation of funds worth shs. 8,464,000/=” to which he responded on 7th
February 2011 under the reference “request to access books of accounts in Yivu sub-county”.
The Chief Administrative officer Maracha wrote a note on a copy of his reply and instructed the
sub-county Chief Yivu to let him have access to the books of accounts. He made a photocopy
10 and went to the sub-county Chief’s Office and handed to her the original note and having read it,
she declined the instructions, in her own words; “you have no right of access to the books now.”
He withdrew from her his original copy on which the note was made and handed to her the
photocopy. He again went to the CAO after being disappointed with the intent to report the sub-
county chief’s refusal to allow him the said access. He was instead arrested by the police at the
15 District Headquarters in Maracha. He was told that he was charged with embezzlement c/s 19 of
The Anti Corruption Act. He was taken to custody first in Maracha Police Station and later to
Arua Central Police Station up to 17th February 2011 when he was released on Police Bond.

On 2nd March 2011, he reported to the CPS Arua, and was detained and thereafter on 3rd March
20 2011 he was taken to court where he was charged and remanded. He was tried subsequently and
on 13th October 2014 he was acquitted on a ruling of no case to answer. On 6th November 2014,
after securing a copy of that ruling and after inquiring from the CAO Maracha so many times
about his salary arrears and re-deployment, she declined to give him a satisfactory reason as to
whether she would take her back or not and instead she replied that the court did not say he
25 should be paid his salary and that he should return to the office. He had to write a demand notice
and a notice of intention to sue which he delivered on 10th November 2014, at the Central
Registry in Maracha District Local Government following the records management procedures.
He did not receive a reply whereupon he wrote a follow up letter on 2nd December 2014 and
delivered it on the 3rd December 2014. On 12th January 2015, he wrote a notice of intention to sue
30 to the CAO and Maracha District Local Government. On 5th May 2015 he wrote another notice
of intention to the CAO of Maracha and the District Local Government.

After exhausting those avenues, he felt embarrassed, humiliated, agonised and degraded. He lost authority as a family head, and his family was broken. He could not provide the essential needs and consequently separated with his wife. The job was the basis of his livelihood. He had
5 problems in paying fees for his children. He was deprived of his fundamental human rights. This is why he sued the defendants. He was earning shs. 205,160/= per month and the last salary he received was on 30th September 2010. He reverted to subsistence agriculture after he lost the job. He was entitled to allowances; safari day / night allowances, leave packages in lieu of leave, transport refunds. He prayed that the suit be decided in his favour in accordance with the prayers
10 outlined in the plaint.

While under cross-examination, he testified that there is an employment contract between him and Maracha District Local Government as shown in exhibit P. Ex.18 which was written by the Chief Administrative Officer of Arua. He contended that under the constitution, when a new
15 district is carved out of an existing one, all the staff in the new district become employees of the new district, as part of the decentralisation policy. Exhibit P. Ex. 1 is an offer of appointment by Arua District Local Government. It was written by the District Executive Secretary of Arua but he does not hold a similar document from Maracha District Local Government.

20 Although the decentralisation policy provided for secondment, he was not seconded to but was absorbed as staff of Maracha District Local Government. Had it been a secondment it would have been done by the Chief Administrative Officer of Arua, with the approval of the District Council. He did not have the list of staff seconded to the district. He was not serving during the period Maracha District was created because he was on study leave. The study leave was granted
25 by the CAO Arua. Maracha District was carved out of Maracha-Terego District on 1st July 2010. By that time he was on study leave but his employer was Maracha-Terego District. The CAO of Maracha District is now Onzia Martine. He communicated to her but he received no response. He is an employee of Maracha District Local Government. All other staff of Maracha District have not been issued with appointment letters to-date. He was unfairly dismissed by the CAO
30 Maracha, although there was no specific letter written to him. He reported on duty after the criminal case against him had been dismissed. He reported to the then CAO Igga Christopher and

he declined to assign him duties. His duties involved maintaining books of accounts in Yivu sub-county, prepare budgets, prepare final accounts, and to periodically prepare financial statements. Yivu sub-county is in Maracha District. He reported to the duty station on 10th January 2015.

He has no pay slip from Maracha District Local Government. He was dismissed by Maracha District Local Government in October 2010. While under Maracha-Terego there was an audit query about him. He addressed his application for study leave to the CAO Arua (exhibit P. Ex.15). The permission was given by the CAO Arua (exhibit P. Ex.16). Maracha District did not exist then. (Exhibit P. Ex.17) is the letter for resumption of duty. Before he wrote that letter, he had been to the CAO Maracha who told him that he should address the letter to the CAO Arua, after telling him that he was a staff of Arua. He did not respond after he was denied access to the CAO of Maracha because the day he was to report to him was the day he was arrested. After his release from custody, he did not write because he assumed that the CAO had opted for court action. It was the Chairman L.C.III Yivu who was the complainant in the criminal case. He did not write to explain that he had been denied access to the books of account.

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He remembers receiving exhibit P. Ex.16 but he did not formalise his response although he was aware that if one is instructed by a superior and one does not comply, there would be disciplinary action. In this case his conduct did not constitute insubordination. After handing over to Amandu Felix, he was never assigned any other duty station. Maracha District Local Government paid him salary from July to September 2010, although according to the pay slips it reads Maracha-Terego but in actual fact it was already Maracha. His name continued to appear on the pay roll for long although he could not remember whether there were delays in salary payments at the time. He only knew about myself as the only member of staff in this kind of situation. He never attempted to be absorbed in Maracha-Terego since the task of regularising appointments was that of the Human Resource Officer. There was a requirement for applying to be absorbed in the new district. I did not apply because I was already there.

In further clarification of his testimony, in lieu of re-examination since he appeared in person without the assistance of counsel, he stated that he is an employee of the defendants. Evidence to that effect is the first appointment letter by the District Executive Secretary of Arua District Local Government and he does not have a corresponding letter of appointment from Maracha

District Local Government because it is not a requirement of the law. He became an employee of Maracha District by government policy. The CAO issued letters of appointments to all staff who were transferred from Arua who were in the service of the lower Local Governments in Maracha. The transfers were not on secondment but on human resource sharing basis. He delayed to
5 respondent of the audit queries due to failure to access the books of accounts. After he was released from custody, he received a letter from CAO to appear before the Local Governments Public Accounts Committee in Maracha. He appeared there. They resolved that since the matter was in court, the court should first dispose it off and the Committee be given feedback. On the issue of reporting to work, I reported in the second week of January. The date he mentioned
10 earlier he had confused it with the day he went to Mr. Ezaruku on 10th September 2010 to discuss a resumption of duties. That was the close of his case.

D.W.1 Mr. Mokili Cosmas, testified that he is a Senior Human Resource officer with Maracha District Local Government. He started working on 10th May 2014. Before that he was working
15 with Arua Municipal Council as a Human Resource Officer. What he knows about this case is that the plaintiff was in 2008 released by Arua District Local Government to go for studies and he handed over his office to another officer, Amandu B. Felix in November, 2008. Leave does not involve displacement of the officer. When the leave ends the officer is expected to resume duties not necessarily in the same station. He may be re-deployed therefore. The expectation in
20 this case was that at the end of his leave he would probably be redeployed but the decision depends on circumstances which occur during the leave.

The plaintiff was released by Maracha-Terego Local Government. Maracha District Local Government did not exist at the time since Maracha was not a district at the time. Maracha
25 became a District effective 1st July 2010. According to the guideline of the Ministry of Local Government, when a new district is created the staff at the District Headquarters like heads of Department should be seconded to work in the new district and then their appointment on transfer of service is formalised. The staffs at the lower local governments by the date of commencement of the new District are working in the geographical area of the new district
30 become staff of the new district. By 1st July 2010 the plaintiff was not posted to any of the areas

of Maracha. His last posting was in Yivu before he went on leave. Yivu turned out to be in Maracha but the plaintiff was not physically present in the new district.

5 Amandu B. Felix is a Senior Accounts Assistant and he is supposed to be at sub-county level. He was posted there to execute the duties formally performed by the plaintiff. The plaintiff was sent on leave by Maracha-Terego District. After his study leave he was not deployed. He knew where to go and he went to CAO Arua on 1st December 2010, three months after the new District of Maracha had been created. The traditional staff of Maracha were on 27th July 2010 were issued with letters of appointment on transfer of service from Arua District Local Government to
10 Maracha District Local Government. The plaintiff was not issued with such a letter because he was not working with the District. Amandu Felix was issued with such a letter by the then CAO Mr. Ezaruku Kazimiri of Maracha District Local Government. He remained working to Yivu but later he was transferred to the District Headquarters.

15 The plaintiff's salary was being paid by Maracha-Terego District. After Terego was removed, the pay roll was streamlined and the process went on to September – October. The role of this witness was to ensure that personal files were transferred, have the right staff on the payroll and prepare a submission of their transfer of services. This was done by Asizua Rogers. He did not know why the plaintiff's name was omitted from the payroll. For a long study leave say of three
20 years a new staff will be posted as a substantive office holder. It involves a replacement of staff. In this case it Amandu Felix was posted. It was the CAO of Maracha Terego who replaced the plaintiff with Amandu Felix. This was because the work station Yivu sub-county was under Maracha Terego. The plaintiff should have come to Maracha and indicated interest in posting. He did not come to Maracha. He had a problem of accountability in Maracha. The CAO Maracha
25 then asked him after he was referred there by the CAO Arua. He had to render and explain the accountability. He did not present any. He has not done so to-date.

Failure to respond to the instruction to account would amount to the highest level of insubordination for failing to respond to the request of an accounting officer. The District
30 applies the Public Service Standing Orders. An insubordinate Officer is supposed to be informed in writing that the act constitutes insubordination and is liable for submission to the District

Service Commission for disciplinary action or the Accounting Officer may also give a written warning to the officer. Nothing of this nature was done in this case for the reason that the plaintiff is not recognised as a staff of the Local Government. In their dealings with him the District Officials never recognised him as an employee, hence reference of the matter to police.

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Under cross-examination by the plaintiff, the witness testified that the plaintiff is a staff of Arua District Local Government. After reading a copy of a charge sheet presented to him, the witness explained that the statement of offence in the charge sheet was of embezzlement. Two people were accused, the plaintiff and a one Aliga B. Ombani, the Parish chief of Aroyi Yivu sub-
10 county. The second accused is a Parish Chief in Maracha District. The funds embezzled were of Maracha District. The period was from 30th December 2007 to 16th April 2008. The plaintiff was charged as an employee of Maracha District Local Government. The charge is dated 30th June 2011. Maracha District was existent then. At the time Maracha came into existence there were employees recruited by Arua District Local Government. They did not undergo appointment on
15 probation. The plaintiff was expected to have an appointment letter on transfer of service which was done for the staff inherited from Arua, but the plaintiff does not have any. Such a letter was supposed to be offered by the District Service Commission of the new District for staff who were present and working in the District at the time it was created. The offer to the staff was done in July 2010. There was no District service Commission for Maracha then. It was done by the
20 District service Commission of Arua District on behalf of Maracha District.

This witness was first employed by Arua Municipal Local Government on 29th April 2009 as a Personnel or Human Resource Officer. After serving for five years, he was appointed on 10th May 2014 by Maracha District Local government on transfer of service from Arua Local
25 Government. He was given appointment letters by the two local governments. Employment in Public Service is formal and is in writing. After being presented with exhibit P. Ex.18, he stated that it was a resumption of duties letter dated 1st December 2010 by the CAO Arua District Local government addressed to the plaintiff. It was informing the plaintiff that while he was away on study leave there are administrative changes which took place. It was copied to the District
30 Chairman and the RDC Maracha. The CAO Maracha did not receive this letter. After perusing exhibit P. Ex.20, the witness explained that it was a letter by the Ag. CAO Maracha addressed to

the plaintiff and it is a response to the request for resumption of duties. It is re-deployment. He agreed that one would deploy another who is employed. The plaintiff did not respond and therefore was deemed to have abandoned duties. It was proper to attach resumption of duties to response to audit queries. Although PAC decisions are implemented by the CAO, the plaintiff
5 abandoned duty by running away after the Accounting Officer's request.

In re-examination, after being shown exhibit P. Ex.20, the witness explained that the plaintiff did not respond to that letter. The last paragraph required a prompt response and failure to reply was the highest level of insubordination.

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D.W.2 Mr. Wadia Modest, the Assistant Chief Administrative officer of Maracha District, testified that he knew the plaintiff in 1999 as an Accounts Assistant with Arua before the creation of Maracha. Maracha District Local Government was created in 2010 and it became operational on 1st July 2010. The CAO at that time was Mr. Ezaruku Casmillo. At that time the
15 plaintiff was serving a disciplinary action under Maracha- Terego District. He was an Accounts Assistant at Yivu sub-county in Maracha County under Arua District and later Maracha- Terego District.

The two counties of Maracha and Terego were given a District but the political leaders disagreed
20 on the location of the headquarters. Maracha-Terego thus reverted to the administration of the Arua CAO from 1st July 2005 to 30th June 2010. The two counties were once part of Arua District. Maracha-Terego operated for five years under the CAO of Arua. It was during that period that audit queries were raised for the plaintiff to answer at Yivu sub-county which he failed to respond to, to-date. This led CAO of Arua then who was overseeing the operations of
25 Maracha-Terego to suspend the plaintiff from duties until he responds to those queries. The plaintiff had failed to respond to them to-date. Around the same time he applied for study leave which was granted. Another Assistant Accountant was appointed while the plaintiff was on study leave. It should have been incumbent on the plaintiff upon completion of his studies to report back to his deploying authority which he has not done either.

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Upon the creation of Maracha-Terego, the CAO Arua notified staff who wanted to work in Maracha-Terego or remain in Arua, to indicate so in writing. The same thing happened when Maracha was created in 2010. The CAO Maracha-Terego wrote to staff to show interest. What the witness was not sure of is whether the plaintiff indicated interest to remain in any one of these places. It is not on record that he applied to remain in Yivu, which is now Maracha District. In this context therefore, since the CAO Maracha-Terego was the one who asked the plaintiff to respond to the audit queries that he failed to, the witness now did not know who the plaintiff's employer is. By 1st July 2010 the plaintiff was not at duty because he was still answering his audit queries asked by the CAO Arua who was overseeing Maracha-Terego.

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Appointment and deployment of staff is done by the CAO as Chief Accounting Officer. In a situation where another district is carved out, the staff willing to work in the new district ideally must indicate that choice in writing. If one is a resident staff, it may not be necessary. Those found posted to the geographical area are considered resident. If they don't opt out, they are deemed to be employees of the new District. The plaintiff was a resident staff of Yivu sub-county in Maracha-Terego. He was never posted elsewhere. When Maracha was created, the new staff was substantively deployed to replace the plaintiff who had gone on study leave. He should have reported for posting or deployment after the study leave. If he finished beyond 2010 1st July and since Yivu was under Maracha. If he finished before that, he should have reported to CAO Maracha. If he did not opt out he would be a staff of Maracha but he was already replaced at Yivu. The CAO Maracha should have considered his re-deployment and the pending audit queries. The witness joined the office later but on record he did not find any indication that the plaintiff reported there.

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25 The plaintiff is actually a member of staff of Maracha District Local Government but he has not accounted for audit queries. He never reported back upon completion of his study leave. He absconded from duty and is subject to disciplinary action which could lead to dismissal. The District has not taken any action against him. The District deems the plaintiff as still on study leave. His study leave should have ended in 2014 according to exhibit P. Ex.16. He was and he is still employee of Maracha District Local Government. The District thought the plaintiff had

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reported back to Arua. The witness did not know whether the plaintiff is on the payroll of Maracha District Local Government. Staff who were not validated went off the payroll.

5 While under cross-examination, the witness testified that the plaintiff was not suspended. The plaintiff was asked to account. Upon failure of a member of staff to respond to an audit query, the CAO may refer the matter to the District PAC or take recovery measures. The plaintiff appeared before the PAC of the District. The witness was the Acting Secretary then for the District PAC but could not remember what the outcome was. The plaintiff is deemed to be on Maracha District Local Government pay roll. There were payroll validation exercises and the
10 plaintiff may have been taken off the payroll. The witness could not tell when the plaintiff received his last salary. The witness was then presented with exhibit P. Ex.23A dated 30th September 2010. He stated that Maracha District became operational on 1st July 2010. The first validation was in 2010. The plaintiff was a victim of the validation process.

15 The plaintiff was employed by Arua District Local Government as sub-county Chief on probation and later confirmed. He was not appointed by Maracha-Terego but he was in Maracha at the time and he showed interest to remain there. Upon birth of the new district, those resident could express interest to return to Arua and if they didn't they remained staff of the new district. The witness was presented with exhibit P. Ex.17 dated 29th November 2010 addressed to CAO
20 Arua and exhibit P. Ex.19 dated 16th December 2010, the resumption of duty letter. He explained that there was a pending audit query. The plaintiff could not be re-deployed before clearing the audit queries because public confidence would be undermined and also the plaintiff never made a follow up. This witness was not aware that the plaintiff was prosecuted.

25 Under re-examination, the witness stated that the pay slip he had been shown was from Maracha-Terego. It is not the same as Maracha Local Government. The plaintiff has did not report for any of the validation exercises. By 1st July 2010, the plaintiff was not in Yivu sub-county as an Accounts Assistant. It was one Amandu who was there. Since 24th February 2011 when the CAO requested him to answer, the plaintiff has not been following up with the District.

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D.W.3 Mr. Ezaruku Kazimiro, testified that he served in Maracha District from July 2010 - June 2013, Nakaseke in July 2013, Bukomansimbi, and then Kayunga. He came to know the plaintiff as an employee of Arua District Local Government where the witness served for many years in the Department of Human Resource. The witness rose from the level of Human Resource Officer to Principal Human Resource Officer. From Arua District, he was promoted as Deputy CAO and posted as Acting CAO Abim District in 2008 where he served up to June 2010 and in July 2010, he was posted to begin the new District of Maracha as the CAO and Accounting Officer of the new District.

10 When he was serving as the CAO for Maracha, the plaintiff had been granted a three year study leave by the CAO Arua. Then in 2010, when he was in Maracha, the plaintiff contacted the CAO Arua for resumption of duty. At that time the plaintiff was pursuing studies in Kayambogo University. The CAO of Arua, because of the plaintiff's background of indiscipline, poor working relationship and the rest, advised that the plaintiff should contact the CAO Maracha for advice and appropriate action. The plaintiff contacted the witness in writing and in his letter he sought advice from the witness as the CAO Maracha.

The CAO Arua had advised him to contact this witness because they wanted to dump the plaintiff to Maracha and before the plaintiff contacted him, he remembered that before he was granted study leave he had applied to transfer his services from the then Maracha -Terego District back to Arua District in writing and the CAO Arua granted his application for his transfer from Maracha -Terego to Arua District. This was before the creation of the new district of Maracha. At the time the plaintiff contacted the witness in Maracha, the plaintiff had some outstanding accounting issues and in conformity with article 164 (2) of *The constitution of the Republic of Uganda, 1995* and section 90A (2) of *The Local Governments Act* as to accountability for loss of public funds. The plaintiff had occupied the office of Accounts Assistant in Yivu and he had to settle the issue of accountability there before he could move to the next course of action. The witness put this in writing as seen in the letter dated 24th February 2011 when he was CAO Maracha District (exhibit P. Ex.20).

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The letter referred to in exhibit P. Ex.20 was dated 29th November 2010 and was addressed to the witness. It was by Mr. Waga who said he had been advised to come to the witness for re-deployment (P. Ex.17). He sought the advice of the witness. When the witness wrote to the plaintiff the letter of 24th February 2011, the witness never received any response from the plaintiff. There had been an Internal Audit query by Maracha District. It was stated that the plaintiff had misappropriated the funds. The witness exactly replicated what was stated to him in the report about the misappropriation. He did not verify that information first. Since the witness did not receive any reply from the plaintiff, he never took any action. The witness presented a copy of the plaintiff's request of transfer from Maracha - Terego to Arua District (exhibit D. Ex.1).

According to that letter, the plaintiff is under the employment of Arua District Local Government. The witness never interfaced with Waga as an employee of Maracha but as an employee of Arua District. There were two important events that took place when the new district was created; sharing of assets which the witness attended in person. It was followed by appointment of new staff for Maracha District. All the staff under the then Maracha-Terego were invited before the District Service Commission of Arua. The key question posed to the staff was where they wanted to serve; the new district or Arua. Some chose the new and others chose to revert to Arua District. Those who chose the new district were served with new instruments. The witness was the one who issued the appointment letters as CAO and Accounting Officer of the new District.

In the case of staff who were on leave was handled according to the Standing Orders and training Policy. They were to report on completion of study leave. They could not be issued with appointment letters before the end of their study. The plaintiff never presented himself to the District Service Commission. His failure to respond has consequences. The witness could not take the next move. The witness would have communicated to CAO Arua requesting that as a staff of Arua the plaintiff is either re-deployed in Arua or to apply for a transfer of service to Maracha, but the plaintiff has no opportunity in Maracha. If the witness had a say he would have preferred that the plaintiff remains in Arua. In Yivu sub-county the witness got a very a very hard working man Amandu Felix as Accounts Assistant. He was a substantive Accounts

Assistant. The Staff Establishment Structure for lower government provides for only one Accounts Assistant.

Had the plaintiff been a staff of Maracha District, he would have gone straight to the witness for
5 resumption of duty and redeployment. The employees of Maracha-Terego would indicate interest
but the final word would be by the District Service Commission. The witness did do not know
whether the plaintiff's application to transfer from Maracha-Terego to Arua was approved by the
Arua District Service Commission. Once Maracha-Terego was dissolved, the plaintiff returned to
Arua District. It did not matter that the DSC never approved his application for transfer.

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While under cross-examination, D.W.3 testified that the existing staff were considered for
retention by the new district. The plaintiff's last duty station was Yivu. The serving staff would
be absorbed. It means staff who were physically there. After leave a person reports back for
resumption of duties. By 1st July 2010, all the staff of the new District were given letters even if
15 they did not appear by virtue of being located in the lower local governments.

All the staff in the District are accountable to the Chief Administrative Officer. The sub-county
Chief is the Direct Supervisor of an Accounts Assistant. An Audit query report from the
Accounts Assistant goes to the sub-county Chief and then is presented to the CAO. One needs to
20 have access to accounting documents in order to respond to an audit query. The plaintiff
contacted the witness to be given access to the documents. The witness gave the plaintiff
permission in writing to access the accounts records conditional on being done in the presence of
the substantive Accounts Assistant. The witness was not aware that if there is no response the
matter is forwarded to PAC. The witness did not receive a PAC report. The witness was not
25 aware that the plaintiff appeared before the PAC. The witness did not remember writing to the
plaintiff to appear before the PAC. It is from an Internal Audit report that the witness read that
the plaintiff had misappropriated funds. If PAC recommends a recovery of funds the CAO
recovers but after receipt of the report. A staff who fails to comply would face a disciplinary
process. The witness did not institute a disciplinary process in the instant case.

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Under re-examination, the witness testified that upon granting the plaintiff permission to access the books of accounts the plaintiff never went back to him. There was no response to the last paragraph of his letter. That was the close of the defendants' case.

- 5 In civil litigation, issues ordinarily arise when a material proposition of law or fact is affirmed by one party and denied by the other, according to Order 15 rule 3 of *The Civil Procedure Rules*, the court may frame issues from all or any of the following materials;-
- (a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of the parties;
 - 10 (b) allegations made in the pleadings or in answers to interrogatories delivered in the suit; and
 - (c) the contents of documents produced by either party.

Order 15 rule 5 (1) empowers the court at any time, before passing a decree, to amend the issues
15 or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties (see also *Kahwa Z. and Bikorwenda v. Uganda Transport Company Ltd [1978] HCB 318*). In the instant case, I consider the following to be the issues for determination;

- 1. Whether or not the plaintiff is an employee of the second defendant.
- 20 2. If so, whether the any of the defendants unlawfully terminated the plaintiff's employment.
- 3. Whether the plaintiff is entitled to the reliefs sought.

In his final submissions, the plaintiff, argued that he is an employee of the second defendant under supervision of the first defendant. His employment with the second defendant was unfairly
25 and unlawfully terminated. He contends that upon the dissolution of Maracha-Terego District, the second defendant became his new employer. Since Maracha-Terego District had been dissolved by July 2010, the salary he received for the months of July, August and September 2010 should be deemed to have been paid by the then newly created Maracha District. He refuted the defendants' contention that he absconded from duty. He was subjected to criminal
30 prosecution until the case was dismissed on 13th December, 2014. Thereafter, the defendants deliberately refrained from undertaking the disciplinary process provided for in law, rendering

their implicit termination of his services wrongful in law. He therefore prayed for a declaration that he is still in the lawful employment of the defendants.

In his final submissions, counsel for the defendants argued that the plaintiff's action is time
5 barred in so far as the cause of action arose in the year 2011, yet he filed his claim in 2016, two
years out of time. In any event, the first defendant was wrongly added as a defendant and the suit
against him should be dismissed, and furthermore, that the complaint ought to have been lodged
before a Labour Officer and not before this court. In the alternative, he submitted that the
plaintiff is not entitled to any of the reliefs sought because he was never an employee of the
10 second defendant. At the time Maracha District was created, the plaintiff was not physically
working in Yivu and he therefore could not be absorbed as a member of staff of the new district.
On that account, the plaintiff has no cause of action against the second defendant since he was
never her employee. The plaintiff's documentation related to his employment with Arua District
Local Government and the few correspondences with the second defendant related only to
15 misappropriated funds. They were not in proof of employment. Instead of furnishing the required
accountability, the plaintiff absconded. The plaintiff never underwent the process of interview
and absorption into the service of the second defendant. The plaintiff instead opted out and
sought to return to Arua District from Maracha-Terego District. There being no contract of
employment between the plaintiff and the second defendant, the question of breach of contract
20 does not arise. The suit should therefore be dismissed with costs.

Before dealing with the substantive issues, it is necessary to address counsel for the defendants'
contention of this Court's lack of jurisdiction over this matter. It has been held before that section
93 of *The Employment Act 2006* did not divest the High Court of jurisdiction over employment
25 disputes (see *Former Employees of G4S Security Services v. G4S Security Services Ltd, S.C Civil
Appeal No.18 of 2010*). This is because article 139 (1) of *The Constitution of the Republic of
Uganda, 1995* confers unlimited original jurisdiction to the High Court in all matters, subject
only to the Constitution and any Act of Parliament purposely passed to amend the Constitution,
which *The Employment Act 2006* is not since it was not enacted specifically to amend the
30 Constitution. Although there are many employment disputes amenable to the informality of
proceedings before Labour Officers, where the employees and their representatives can

themselves prosecute or defend their cases, there also are situations where one of the parties needs the expertise of a judicial officer in interpreting a complicated factual or legal scenario. It should be kept in mind that there are instances where employment relations lead to disputes of legal and factual complexity, or that other circumstances might exist that could force either party to approach the High Court rather than a District Labour Officer.

For easy access to justice and proximity to the public, especially where the matter in controversy is not complex, but rather of the type that is quickly resolved alternative forums and tribunals all the time, it is reasonable and is court policy that such causes should be instituted in the lowest mandated forum possible or statutorily enabled quasi judicial forums before resort is had to the High Court, so as to avoid unnecessary expenses (see *Uganda Broadcasting Corporation v. Kamukama, H.C. Misc. Application No. 638 of 2014*). For such cases, the High Court has evolved a practice of deferring to the alternative forums and only exercising its original jurisdiction sparingly as a residual power.

Nevertheless, although in situations of concurrent jurisdiction the High Court has evolved a practice of exercising its original jurisdiction sparingly only as a residual power. Under the self imposed rule of restriction, the High Court will not ordinarily exercise its jurisdiction, before the subordinate court or tribunal having concurrent jurisdiction is moved for identical relief, save in exceptional cases. In such situations, the High Court will entertain a case so as to complement, not to weaken, the quasi judicial forums. Such exceptional situations have for example arisen in matters involving the interpretation and application of conflicting provisions of various laws on the same subject (see for example matters of tax laws as was the case in *The Commissioner General Uganda Revenue Authority v. Meera Investments, Civil Appeal No.22 of 2007*). The inherent power vested in the Courts to ensure that the Constitution is adhered to necessarily requires that the High Court retains jurisdiction, where the circumstances are appropriate, to fill the remedial vacuum or shortfalls in competency that may exist in the alternative forums.

The matter before court in the instant case is one that calls for the interpretation and application of a number of employment laws in a situation of considerable factual complexity. It involves a considerably complex set of facts relating to employment in the public sector, traversing a number of local governments, amidst a prolonged study leave, a suspension intended to enforce

accountability for public funds, a criminal prosecution and a resultant uncertainty in the employment status of the plaintiff. It is on basis of these rather complex factual relationships that a determination must be made as to what the rights of the plaintiff are as against the interests of the defendants. It is therefore an exceptional matter where this court is justified to depart from the established practice of deference to the alternative forum, and instead determine the matters in controversy so as to complement, not to weaken, the quasi judicial forum. In any event, according to section 14 (2) of *The Public Service Act, 2008*, a public officer aggrieved by any administrative or other decision taken against him or her has the right to appeal to the relevant authority, including a court of law. The other points of law raised by counsel for the defendants will be dealt with in the course of resolving the substantive issues.

First issue: Whether or not the plaintiff is an employee of the second defendant.

According to section 2 of *The Employment Act, 2006*, a contract of employment, otherwise known as a contract of service, means any contract, whether oral or in writing, whether express or implied, where a person agrees in return for remuneration, to work for an employer and includes a contract of apprenticeship. A person becomes an employee of another by entering into a contract of service or an apprenticeship contract, including, without limitation, any person who is employed by or for the Government of Uganda, including a local authority. For that reason, an employer including a local authority, for whom an employee works or has worked, or normally worked or sought to work, under a contract of service, and includes the heirs, successors, assignees and, transferors of any person or group of persons for whom an employee works, has worked, or normally works.

According to *Ready Mixed Concrete Southeast Ltd v. Minister of Pensions and National Insurance*, [1968] 2 QB 497, [1968] 1 All ER 433, [1968] 2 WLR 775, a contract of employment exists if these three conditions are fulfilled. (i) the servant agrees that, in consideration of a wage or other remuneration, he or she will provide his or her own work and skill in the performance of some service for his or her master. (ii) He or she agrees, expressly or impliedly, that in the performance of that service he or she will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a

contract of service. In essence, a contract of employment is one by which an employee undertakes to do work for remuneration under the direction or control of an employer. An agreement may thus be characterised as a contract of employment when it requires performance of work by the employee, payment of wages by the employer and a relationship of subordination
5 between the parties. The creation of the relationship of subordination also implies acceptance by the employee of the employer's power of direction and control. Control includes the power of deciding the work to be done, the way in which it is to be done, the means to be employed in doing it, the time when and the place where it is to be done. All these aspects of control must be considered in deciding whether there is a sufficient degree to make one party the master and the
10 other his or her servant.

In the instant case, the plaintiff presented exhibit P. Ex.1, a letter addressed to him dated 15th November 1994 and written by the District Executive Secretary of Arua District Local Government. By that letter, the plaintiff was offered employment on a two-year probation, as a
15 Clerical Officer with Arua District Local Government. His appointment was indicated as having been made subject to *The Constitution of the Republic of Uganda*, *The Public Service Act* and regulations made there under, *The Public Service Standing Orders* and Administrative Instructions as would be made from time to time. On 6th December 1994, he received a posting order to Yivu sub-county as Senior Clerical Officer, to serve as the Sub-county Accountant (see
20 exhibit P. Ex.2). On 30th March, 1998, he was confirmed as an Accounts Assistant, Grade II (see exhibit P. Ex.3). By a letter dated 24th October, 2000 (see exhibit P. Ex.5), he was transferred and posted to Arivu sub-county as Senior Clerical Officer and subsequently by a letter dated 31st March, 2005 (see exhibit P. Ex.6), he was transferred and posted to Ajia sub-county to assist the Sub-accountant, and thereafter to the District headquarters by a letter dated 23rd September, 2005
25 (see exhibit P. Ex.7), then by a letter dated 13th January, 2006 back to Yivu sub-county (see exhibit P. Ex.9), and subsequently on 29th August 2007, he was promoted to the post of Senior Accounts Assistant (see exhibit P. Ex.11).

During or around November 2007, the plaintiff applied to Kyambogo University for enrolment
30 on its Bachelor of Science Degree (Accounting and Finance) Course, under its Mature Age entrant programme (see exhibit P. Ex.13). He was admitted to the course on or about 7th July

2008 (see exhibit P. Ex.14), for the 2008 / 2009 academic year. He then applied for and was on 27th January, 2010 granted a three year paid study leave w.e.f August 2008, by the Chief Administrative Officer of Arua District Local Government (see respectively exhibits P. Ex.15 dated 26th August, 2008 and P. Ex.16 dated 27th January, 2010). Due to financial constraints, the plaintiff applied for a dead year at the University and consequently wrote to the Chief Administrative Officer on 29th November, 2010 seeking a resumption of duty (see exhibit P. Ex.17). In his response, the Chief Administrative Officer of Arua referred him to the Chief Administrative Officer of the second defendant because he was deemed to be an employee of the second defendant by virtue of administrative changes which had taken place as from 1st July 10 2010 when Maracha became a new district, carved out and now independent from Arua District Local Government (see exhibit P. Ex.18). The second defendant contends that despite this communication, the plaintiff was never her employee but remained as an employee of Arua District Local Government, most especially since the plaintiff on 28th December, 2009, he had applied for transfer from Maracha-Terego District back to Arua District Local Government (see 15 exhibit D. Ex. 1).

It is not contested by any of the parties, and more especially in light of the documentary evidence outlined above, that the plaintiff was employed by Arua District Local Government as from 15th November 1994 up to 27th January, 2010 when he was granted the three year paid study leave. 20 However, between then and 29th November, 2010 when he sought to resume his duties, some administrative changes had taken place; Maracha and Terego Counties had been carved out of Arua District Local Government to become the new District of Maracha-Terego. Subsequently, when the political leadership could not agree on the location of the district Headquarters, Terego County reverted back to Arua District Local Government and Maracha County was constituted 25 as an independent District as from 1st July 2010. The question then arises as to whether the creation of Maracha-Terego District and subsequently Maracha District had any impact on the plaintiff's contract of employment with Arua District Local Government, from which the latter emanated. In short, whether the benefits and obligations of Arua District Local Government under the plaintiff's employment contract were assigned to; either Maracha-Terego District, to 30 Maracha District or remained vested in Arua District Local Government.

At common law, an assignment of contractual obligations and benefits will generally be permitted unless there is an express prohibition against assignment in the contract. A contract that is silent on assignment is generally freely transferable unless either: a statute or public policy provides otherwise or there are material adverse consequences to the non-assigning party. An agreement for personal services is an example of a contract where public policy weighs against assignment of the service provider's obligations. Generally, contracts for personal services, or those involving a relationship of confidence, are not assignable by either party except if a specific provision in the contract provides so (see *Nokes v. Doncaster Amalgamated Collieries Ltd. [1940] AC 1041* and *Brace v. Calder and Others [1895] 2 Q.B. 253*). The services of an employee cannot be transferred without his or her knowledge, and possibly against his or her will, from the service of one person to the service of another. This principle is now expressed in section 28 (1) of *The Employment Act* which prohibits transfer from one employer to another without the consent of the employee, except in accordance with sub-section (2) thereof.

A contract of personal service is characterised by;- the employer having the authority to determine the place of work; the principal tools and equipment are furnished by the employer; services are applied directly to the integral effort of the employer or form an organisational subpart in furtherance of assigned function or mission; comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel; the need for the type of service provided can reasonably be expected to last beyond one year; the inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, the employer's direction or supervision of the employee in order to;- adequately protect the employer's interest; retain control of the function involved; or retain full personal responsibility for the function supported in a duly authorised officer or employee. The contract between the plaintiff and Arua District Local Government meets all these descriptors and for that reason it is *prima facie* not assignable by either party.

However, section 2 of *The Employment Act*, by defining an employer as including a local authority, the successors, assignees and, transferors of any person or group of persons for whom an employee works, has worked, or normally works, implicitly allows for the assignment of contracts of employment made between local governments and their employees. Ordinarily, the

term assignment is limited to the transfer of rights that are intangible, like contractual rights and rights connected with property. An assignment in this sense is the transfer of rights held by one party (the assignor) to another party (the assignee). The effect of a valid assignment is to remove privity between the assignor and the employee and create privity between the employee and the assignee. The legal nature of the assignment determines some additional rights and liabilities that accompany the act. The assignment of rights under a contract completely transfers the rights to the assignee to receive the benefits accruing under the contract. There are two ways by which an assignment or transfer may take place; by novation or by operation of law.

10 A novation is a substitution of an original party to a contract with a new party, or substitution of an original contract with a new contract. A novation is similar to the concept of assignment, but there are fundamental differences between the two. A novation can transfer rights and obligations alike; an assignment cannot transfer obligations. An assignment does not always require the consent of the party that benefits from the transfer; a novation does. Finally, 15 assignment does not extinguish the original contract, but novation does. In a novation the original contract is extinguished and is replaced by a new one in which a third party takes up rights and obligations which duplicate those of one of the original parties to the contract.

Novation operates where, there being a contract in existence, some new contract is substituted 20 for it, either between the same parties or between different parties; the consideration mutually being the discharge of the old contract (see *Scarf v. Jardine*, [1882] 7 AC 345). A novation is never presumed; if the novation agreement is not in writing, it must be established from the acts and conduct of the parties. Like assignment in the strict sense, novation transfers the benefits under a contract but unlike assignment in the strict sense, novation transfers the burden under a 25 contract as well. Novations therefore are assignments that arise due to the voluntary acts of the parties. A novation is only possible with the consent of the original contracting parties as well as the new party. For that reason, an assignment of the benefit of a contract without the consent of the contractor and in breach of contract is effective between assignor and assignee but not as against the original contract other party (see *Hendry v. Chartsearch Ltd*, [1998] CLC 1382, 30 [1998] EWCA Civ 1276). Novation naturally requires the consent of all three parties (see for example *In re European Assurance Society* [1875] 1 Ch.D. 334). *Chitty on Contracts* (28th

Edition) para 20-085 notes that most of the reported cases in English law have arisen either out of the amalgamation of companies, or of changes in partnership firms, the question being whether as a matter of fact the party contracting with the company or the firm accepted the new company or the new firm as his debtor in the place of the old company or the old firm. That acceptance may be inferred from acts and conduct. Thus where a banking firm consisted of two partners and one died, the acceptance by a customer from the surviving partner of a fresh deposit note for a balance of a debt due was held sufficient evidence of novation to discharge the estate of the deceased partner, as the customer took the money out of a current account and placed it on deposit at the request of the surviving partner.

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For there to be an effective novation of a contract of employment, there must be evidence on basis of which it may be deemed that the three parties met, that is, the employee, the original employer and the new employer and with the consent of all the three, the transaction was put through. Novation in such a case does not cancel accrued or past rights and obligations under the original contract, although the parties can agree to novate these as well. As the Transferor's successor in interest, the Transferee assumes all obligations and liabilities of the Transferor under the contract by virtue of the transfer. The Transferee is in a position to fully perform all obligations that may exist under the contract. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the contract as if the Transferee were the original party to the contract. The Transferee becomes entitled to all rights, titles, and interests of the Transferor in and to the contract as if the Transferee were the original party to the contract.

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From the available evidence, D.W.3 testified that sometime after 1st July 2006, following the creation of Maracha-Terego District, a meeting was convened at which Arua District Local Government shared assets and personnel with the newly created District of Maracha-Terego. Henceforth, the plaintiff began receiving payment of salary from the new District, Maracha-Terego District, as evidenced by the pay slips for the months of:- November, 2007; March, 2008; July, 2009; and September, 2010 (see exhibits P. Ex. 23A - 23D). Although he was by then on a three year paid study leave granted to him by Arua District Local Government, by his conduct, the plaintiff agreed to receive his salary from the newly created Maracha-Terego District as and

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when it fell due and inversely Maracha-Terego District accepted liability of the plaintiff's previous employer, Arua District Local Government, to pay him that salary. As a matter of fact the plaintiff is deemed to have accepted Maracha-Terego District as his new employer in the place of the old employer, Arua District Local Government. That acceptance may be inferred
5 from acts and conduct of the three parties. Hence as at 29th November, 2010 when the plaintiff sought a resumption of duty (see exhibit P. Ex.17), he was no longer an employee of Arua District Local Government.

In this regard, the response of the Chief Administrative Officer of Arua District Local
10 Government when he referred the plaintiff to the Chief Administrative Officer of the second defendant would be understandable. The only concern being that by that time, Maracha-Terego District was no more and had been replaced by Maracha District as from 1st July 2010. Although in the Arua District Local Government Chief Administrative Officer's view, the plaintiff was by law deemed to be an employee of the second defendant as from 1st July 2010, when Maracha
15 became a new district, carved out and now independent from Arua District Local Government (see exhibit P. Ex.18), the second defendant refutes this on six grounds; - first on ground that the plaintiff did not apply for a transfer from either Arua District Local Government or Maracha-Terego District to Maracha District; secondly, on ground that he never received a letter of appointment from the second defendant; thirdly on ground that he never underwent any of the
20 employee interviews and verification exercises conducted by the second defendant; fourthly on ground that he is not on the second defendant's pay roll and has never received any salary from the second defendant; fifthly on ground that he has never been deployed by the second defendant since he was replaced by another officer at the commencement of his study leave; and lastly on ground that the plaintiff expressly applied to be transferred back to Arua District Local
25 Government (see exhibit D. Ex. 1).

Practically all of these arguments fail in light of section 28 (2) of *The Employment Act* which specifically provides that; "where a trade or business is transferred in whole or in part, the contracts of service of all employees employed at the date of transfer shall automatically be
30 transferred to the transferee, and all rights and obligations between each employee and the transferee shall continue to apply as if they had been rights and obligations concluded between

the employee and the transferee." Although couched in terms that focus on employment in the trade or business sector, I am of the view that it applies with equal force in the realm of public service or local government employment. This provision creates a transmission of employment contracts in general, not by novation but rather by operation of the law, where there is a transfer
5 of the whole of the business, services or undertaking from one entity to another.

Transmission is a term used to describe situations where rights or liabilities are conferred automatically, instead of as the result of a specific legal action. These include the passage of claims to heirs and devisees, transfers made incident to proceedings in bankruptcy or receivership, transfers by the succession of one business entity for another, assignments made by
10 judicial sale or order, and assignments produced by operation of the law of subrogation. For example, subrogation has been defined as "a transfer of rights from one person to another, without assignment or assent of the person from whom the rights are transferred and which takes place by operation of law in a whole variety of widely different circumstances" (see Lord Diplock in *Orakpo v. Manson Investments Ltd*, [1978] AC 95, [1977] 3 All ER 1). Since in
15 circumstances of that nature, the contract is assigned to the new entity by operation of law, then no novation is required or in other words, it is a "statutory novation or transfer."

Under section 185 of *The Local Governments Act*, any person being an employee of the original local government immediately before the coming into effect of a new local government and
20 deployed or assigned responsibility in the new local government, is deemed to have been appointed under the Act, and is to hold office in the new local government until removed from office under the Act. In light of that provision, the Ministry of Local Government issued the guidelines of 20th May 2010, on the operationalisation of new local governments, entitled "*Implementation Modalities on the Newly Created Local Governments*," Ref ADM/288/293/01,
25 which provided as follows, in part;

- (1) All staff who were in the Counties and Sub-counties that are now located in the new Local Governments must be retained in the new Local Government in accordance with section 185 of *The Local Government Act*.

(2) In case some staff in category (1) above had been transferred away from the Lower Government located in the new District, the transfer should be reversed as a soon as possible.

5 The plaintiff's last posting before he went on study leave was by a letter dated 13th January, 2006 by which he had been transferred back to Yivu sub-county (see exhibit P. Ex.9), from where he was subsequently, on 29th August 2007, promoted to the post of Senior Accounts Assistant (see exhibit P. Ex.11). Yivu sub-county is geographically located in Maracha District. In accordance with section 185 of *The Local Governments Act*, immediately before the coming into effect of a
10 Maracha District, the plaintiff was a person deployed or assigned responsibility in the new local government, and is by virtue of that provision deemed to have been appointed under the Act, and to continue holding office in the new local government until removed from office under the Act. For the plaintiff, the creation of Maracha District on 1st July 2010, saw the extinction of the liability of one employer (Maracha-Terego District Local Government), and its replacement by
15 the liability of a new employer, (Maracha District Local Government). While a novation is effected by the act of parties, transmission takes place where a person acquires an interest in property by operation of law. Although the plaintiff had taken study leave at the time the same having been granted by letter dated 27th January, 2010 (exhibit P. Ex.16), his employment contract was transmitted to the second defendant. Transfer by operation of law does not depend
20 on the intention of the parties; it takes place independently and, even in spite of their intention.

Once that transmission took place, reversal of the transfer of the plaintiff's employment from Maracha District Local Government back to Arua District Local Government would require a reverse transmission by operation of law or a reverse-novation, more especially since section 185
25 of *The Local Governments Act*, which deemed the plaintiff to have been deployed or assigned responsibility in the new local government, required him to hold office in the new local government until removed from office under the Act.

There being no statutory provision that has the effect of replacing Maracha District Local
30 Government with Arua District Local Government such as section 28 (2) of *The Employment Act* and section 185 of *The Local Governments Act* did upon the creation of Maracha District Local

Government on 1st July 2010, the only way in which its effect could be reversed was by a reverse-novation; by way of evidence of consent of the plaintiff and Maracha District as the original contracting parties as well as Arua District Local Government as the new party, either expressly or by inference from their conduct. There being no evidence of an express agreement
5 of that nature, the court then has to examine their conduct and determine whether or not a reverse-novation did take place, bearing in mind that novation is never presumed and the intention to effect it must be evident on the part of all concerned that such is the purpose of the agreement.

10 There must be evidence to show that the parties came to a tripartite agreement that the plaintiff's transmitted employment contract with Maracha District Local Government was to cease and be replaced by one with Arua District Local Government. There is never any novation produced by the bare fact of a second obligation unless it appears that the employer and employee had an intention to extinguish the first contract. The existence of such an intention need not be shown by
15 express words to that effect, but the same may be implied from the facts and circumstances attending the transaction and the conduct of the parties thereafter. A party asserting a novation has to prove that there was;- (1) a previous valid obligation, (2) agreement of all parties to the new contract, (3) extinguishment of the old contract, and (4) validity of the new contract. The will of the parties to make a contract replacing the old one must appear clearly from the
20 circumstances; in case of doubt, the original contract remains in force.

In the instant case, it was the testimony of both D.W.2 and D.W.3 that upon the creation of the new district, although the existing employees of Arua District Local Government had the option of indicating their district of preference, the final decision lay with the District Service
25 Commission. The evidence before me is that on 28th December, 2009 (exhibit D. Ex. 1) the plaintiff indicated his preference to revert to Arua District Local Government from Maracha-Terego District. However, there was no response from the Arua District Service Commission to this request, hence it was not met with a corresponding acceptance by Arua District Local Government. A mere expression of intent cannot alter existing contractual obligations.

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Consequently, by 1st July 2010, the plaintiff was still an employee of Maracha-Terego District and by virtue of section 28 (2) of *The Employment Act*, his employment contract was transmitted to Maracha District. There is no evidence, whether express or by conduct, indicating that Arua District Local Government ever accepted the plaintiff back as her employee, despite his expressed wish. The mere fact that an employee applied to return to the employment of his previous employer will not alone support a presumption that the previous employer accepted the employee and that the current employer released him from the existing contract. Therefore, exhibit D. Ex. 1 was a mere expression of intention or a wish that had no effect on the plaintiff's legal status as an employee of the second defendant.

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To establish novation, the proof must be clear and satisfactory. There is no evidence before me of a mutual agreement among all parties concerned for discharge of the valid existing contract between the plaintiff and the second defendant, by the substitution of a new valid contract on the part of the plaintiff and Arua District Local Government. There is no clear and satisfactory proof that the three parties intended, contemplated or effected a novation. This issue is thus answered in the affirmative. The plaintiff is an employee of the second defendant and not of Arua District Local Government as suggested by the second defendant.

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Second issue: If so, whether the any of the defendants unlawfully terminated the plaintiff's employment.

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The plaintiff's claim is for unfair dismissal. The claim has its foundation on a contract of employment. There is no evidence before court that the first defendant is a party to that contract nor privy to it. For that reason, the first defendant cannot incur any liability for its wrongful termination, of the nature claimed by the plaintiff, simply because the first defendant was the plaintiff's supervisor. A contract cannot confer rights nor impose its obligations upon any person who is not a party to the contract (see *Dunlop Pneumatic Tyre Co Ltd v. Selfridge & Co Ltd*, [1915] AC 847). The doctrine of privity requires that only a party to a contract can sue, and also that a person with whom a contract not under seal is made is only able to enforce it if there is consideration from the promisee to the promisor. For the plaintiff to sue, he must have paid consideration for the first defendant's promise which he seeks to enforce. The plaintiff has no

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contract, express or implied, with the first defendant. There being no relationship of employment between the plaintiff and the first defendant, the claim against the first defendant is therefore misconceived and is hereby dismissed with costs to the first defendant against the plaintiff.

5 As regards the second defendant, under *The Employment Act, 2006*, a contract of employment imposes reciprocal obligations on the parties. The employer must provide and allow the employee to perform the work agreed upon (s 40), pay the employee remuneration (s 41), and take any necessary measures to protect the employee's health, safety and dignity (Part VI). On the other hand, the employee is bound to carry out his or her work with prudence and diligence
10 and to act faithfully and honestly toward the employer (implicit in s 62 of *The Employment Act, 2006* as well as section 12 (c) and (d) of *The Public Service Act, 2008*). The relationship is one of subordination signified by the fact that the employee agrees not only that the employer must make necessary decisions in the undertaking's interest but also that his or her own work must be performed in a manner consistent with those decisions and with the guidance they provide,
15 subject to any express or implied agreements between the parties.

According to section 61 (1) of *The Local Government Act*, the terms and conditions of service of local government staff should conform with those prescribed by the Public Service Commission for the public service generally. Some of the terms of the employment contract between the
20 plaintiff and the second defendant are thus contained in *The Uganda Public Service Standing Orders, 2010*. According to Part (C - d) Regulation 4 thereof, approved study leave is required to be on full salary. In the instant case, the plaintiff applied for and was granted a three year paid study leave by the Chief Administrative Officer of Arua District Local Government (see exhibits P. Ex.15 and P. Ex.16 respectively), effective from August 2008. His study leave was thus
25 expected to end in August 2011. Due to financial constraints, he cut his study leave short and sought to resume his duties, hence his letter of resumption of duty dated 29th November, 2010 (exhibit P. Ex.17), incorrectly addressed to the Chief Administrative Officer of Arua District Local Government.

30 The Chief Administrative Officer of Arua District Local Government referred the plaintiff to the second defendant who upon being contacted by a letter dated 16th December, 2010 (see exhibit P.

Ex.19), as a condition precedent to re-deploying the plaintiff, he demanded that the plaintiff first accounts for shs. 7,964,000/= which he was alleged to have misappropriated. The details of the alleged misappropriated funds had earlier on before the plaintiff sought to resume his duties, been outlined in a letter dated 29th November, 2010 (exhibit P. Ex.21) which concluded by asking the plaintiff to show cause by 13th December, 2010, why disciplinary action should not be taken against him. By a letter dated 7th February, 2011, the plaintiff sought permission to access the books of account at the sub-county headquarters (see exhibit P. Ex.22), which permission was granted, but according to him access was denied by the then sub-county Chief. By a letter dated 24th February, 2011 (exhibit P. Ex.20), it was indicated to the plaintiff that his resumption of duty was conditional upon his satisfactorily accounting for the shs. 7,964,000/= which he was alleged to have misappropriated before he proceeded on his study leave, while he was Accounts Assistant at Yivu sub-county. The combined effect of those correspondences was that the plaintiff's employment with the second defendant was suspended until such a time as he would have accounted for those funds.

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Before the plaintiff could revert to the second defendant's Chief Administrative Officer, he together with another member of staff of the second defendant (the Parish Chief of Aroi Parish, Yivu sub-county), on 17th February, 2011 was arrested and charged with the offence of Embezzlement, whereupon he was released on police bond (see exhibit P. Ex.24). He was subsequently on or about 4th March, 2011 formally charged before the Chief Magistrate's Court of Arua and released on bail (see exhibits P. Ex.25; the bail bond form, and P. Ex.26; the charge sheet). The case was on 13th October, 2014 dismissed after the prosecution failed to establish a case to answer against the plaintiff (see exhibit P. Ex.27). Since his application for redeployment on 29th November, 2010 (exhibit P. Ex.17), the plaintiff has never been re-deployed. Since his last salary received on 30th September 2010, the plaintiff has not been paid any salary. The question then is whether the second defendant's decision not to re-deploy the plaintiff upon his application for resumption of duty, and particularly after dismissal of the criminal case and failure or refusal to pay him salary constitute a breach of his contract of employment.

30 As noted before, the combined effect of the second defendant's correspondences to the plaintiff was that the plaintiff's employment with the second defendant was unilaterally suspended until

such a time as he would have accounted for those funds. By reason of the fact that an employer has all the powers it needs to manage its undertaking properly and protect the interests of the undertaking, it follows that an employer has a unilateral power to temporarily suspend the effects of an individual contract of employment or certain of the obligations under the contract, subject to the limits imposed by law.

The employer's power of unilateral suspension of a contract of employment would seem to be a necessary component of the power of direction the employee is deemed to accept as embedded in the employer's authority to make decisions regarding the employee's performance of his or her work which includes to decide not to have the work performed. This is exercised in two ways; first, through the imposition of a disciplinary suspension; and secondly, an administrative suspension for reasons related to the undertaking's or business's interest. A suspension is disciplinary where it is prompted by a serious fault committed by the employee, or a good and sufficient reason that relates to the employee's conduct or failure to perform the work. A suspension is administrative where it is prompted by factors that are completely extrinsic to the employee's conduct, such as redundancy because of financial constraints on the employer.

Where the employer's unilateral suspension of the contract is for disciplinary reasons, the employer must follow the procedures agreed upon with the employee in the contract of service and the rules and regulations governing the employment. If this is not done, the resultant decision will constitute a breach of contract. On the other hand, where the employer's unilateral suspension of the contract is for administrative reasons, when the action is necessary for the survival, and even for the proper operation, of the business or undertaking and not because of reasons relating to the employee's conduct or failure to perform the work, then the requirement is that it should demonstrably be in the legitimate business interests and driven by the employer's good faith. In this regard, the employer has the burden of showing that its decision is fair and reasonable. At a minimum, acting in good faith in relation to contractual dealings means being honest, reasonable, candid and forthright.

In the determination of whether or not the decision meets that requirement, the court may consider the following factors: whether there is a sufficient connection between the decision and

the kind of employment the employee holds; whether there are reasonable grounds for believing that maintaining the employment relationship, even temporarily, would be prejudicial to the business or to the employer's reputation or image; whether there are immediate and significant adverse effects that cannot practically be counteracted by other measures (such as assigning the
5 employee to another position), the need to protect the public, the employer's motives and conduct during the term of the suspension, whether the employer acted in good faith, and absence of intent to harass or discriminate against the employee, and so on (see *Cabiakman v. Industrial Alliance Life Insurance Co.* [2004] 3 SCR 195).

10 In some cases, the distinction between a disciplinary suspension and an administrative suspension can itself pose difficult problems. Some suspensions occur in situations that may be given different and successive legal characterizations depending on the stage they are at, which may well be the case here. In this case, the decision to suspend the plaintiff was to a certain extent administrative in so far as it was not punitive in nature but eventually, whether by design
15 or default, took on a punitive outlook or had such a result to the extent that it was subsequently justified by misconduct which the plaintiff was accused of. It is therefore from both perspectives that its propriety will be analysed.

By virtue of exhibit P. Ex.20, by which the second defendant's Chief Administrative Officer
20 indicated that the plaintiff's resumption of duty was conditional upon his satisfactorily accounting for the shs. 7,964,000/= which he was alleged to have misappropriated before he proceeded on his study leave, the *de-facto* suspension initially took an administrative outlook. It is a suspension whose purpose ostensibly was meant to enforce compliance with accounting procedures and requirements, not for professional incompetence or misconduct. It was *prima*
25 *facie* justified by the need to protect the public interest in enhancing the integrity and professional responsibility of public servants, and for promoting public confidence in Local Government personnel. In that regard, the suspension was administrative, not punitive, in nature.

Procedurally, administrative suspensions do not attract rigorous evidentiary hearings such as are
30 attendant to disciplinary suspensions due to the requirements in the latter case, of meeting the natural justice standard. This is because administrative suspensions are usually taken in rare and

extraordinary situations, where summary action is necessary to prevent imminent harm to the public, protection of the fundamental interests, the reputation or image of the business, trade or undertaking, such that the private interest infringed is reasonably deemed to be of less importance. In such situations, the employer can take action with no notice and no opportunity
5 given to the employee to defend, subject to a later full hearing. For example under *The Uganda Public Service Standing Orders, 2010* under Part (F - r) Regulation 16 on discipline, if a public officer is arrested under *The Penal Code Act* on an allegation of having committed a felony, he or she must be immediately interdicted under the appropriate legal provision for the public service. Such interdiction is not preceded by any hearing. Generally, a suspension taken as an
10 administrative decision does not require implementation of the more extensive procedures that apply where an employee has been accused of misconduct or incompetence.

In terms of Regulation 16 of Part (F - r) of *The Uganda Public Service Standing Orders, 2010*, a reasonable member of the public would understand that a temporary administrative suspension
15 pursuant to an arrest for failing to account for public funds is not akin to a more serious disciplinary suspension. This is because the effects of the alleged offence on the employment relationship are such that continuation of the employment pending the decision of the competent authorities would create sufficient serious and immediate risk, contrary to the employer's legitimate interests, which encompass the employer's financial integrity, the safety and security
20 of its property and of the other employees, and its reputation. In cases of that nature it is clear that the continuing presence of the employee at work would present a serious and immediate risk to the legitimate business interests of the employer.

Nevertheless, despite such a suspension not entailing any procedural protections, it should not be
25 made arbitrarily. The decision is subject to the common law duty of fairness, a duty that supplements existing statutory duties and fills the gap where procedures are not provided for explicitly. The employer must be guided by good faith and the duty to act fairly in deciding to impose an administrative suspension. Although an employer does not have to make its own inquiries, either of the employee or of the competent public authorities, to ensure that the charges
30 are well founded, it does have an obligation to allow the employee to explain the situation if the employee wishes to provide his or her version of the facts. Secondly, the temporary interruption

of the employee's performance of the work must be imposed for a relatively short period that is or can be fixed, or else it would be little different from a dismissal pure and simple. Finally, the suspension must, other than in exceptional circumstances, be with pay.

5 In the instant case, strong public interest in the integrity of Local Government personnel justified administrative suspension of the plaintiff with no pre-suspension hearing. Before his contract of employment was suspended, the second defendant had in her letter dated 29th November, 2010 (exhibit P. Ex.21) asked the plaintiff to show cause by 13th December, 2010, why disciplinary action should not be taken against him for failure to account of the specified funds. This was
10 before his resumption of work was pegged to his ability to account for the funds. However nearly three months later, two months after that deadline had expired, when on or about 24th February, 2011 (exhibit P. Ex.20), the decision was taken that his resumption of duty would be conditional upon him satisfactorily accounting for those funds, thus practically suspending his contract of employment, the duration of the period within which the plaintiff was to account was never
15 specified. The implication is that only the plaintiff could end the suspension by complying with the requirement, albeit within an indeterminate period. By the time this communication was made, he had already been arrested on 17th February, 2011, and later charged on 4th March, 2011.

It emerges from that sequence of events that exhibit P. Ex.20, communicating the decision that
20 his resumption of duty would be conditional upon him satisfactorily accounting for the specified funds, was written seven days after the plaintiff had been arrested and released on police bond and twelve days before he was charged in court. Upon his being arrested, Regulation 16 of Part (F - r) of *The Uganda Public Service Standing Orders, 2010* and Regulation 38 (1) (b) of *The Public Service Commission Regulations, SI No.1 of 2009* required the second defendant to
25 immediately interdict the plaintiff from exercising the powers and performing the functions of his office, since he had been arrested and criminal proceedings instituted against him under *The Penal Code Act*, on an allegation of having committed a felony of embezzlement, the very subject matter of which was the shs. 7,964,000/= for which he had been asked to account.

30 Contrary to that mandatory requirement, the plaintiff was never interdicted. Instead the second defendant took neither administrative nor disciplinary action against the plaintiff for the next

three years, up to 13th October, 2014 when the criminal charges were dismissed. Even following dismissal of the criminal case, the second defendant never took any administrative or disciplinary action against the plaintiff. Consequently, the plaintiff's contract of employment remained under a *de-facto* administrative, indeterminate suspension from 24th February, 2011 (see exhibit P. 5 Ex.20), henceforth to-date, a period of six years and nine months. In the meantime, the plaintiff has not been assigned any work, and has not received any salary from the second defendant, the last payment having been made on 30th September 2010. The question to be determined then is whether this state of affairs constitutes a breach of the plaintiff's employment contract.

10 A breach of contract occurs when a party neglects, refuses or fails to perform any part of its bargain or any term of the contract, express or implied, written or oral, without a legitimate legal excuse, resulting in damage or loss to the other party. It should be recalled though that there is no general implied duty of good faith performance in contracts (see *Chitty on Contracts* (31st ed. 2012), vol. I, General Principles, at para. 1-039). The reason advanced for this is that such a term 15 is too wide and too uncertain to be implied in those terms (see *Post Office v. Roberts [1980] IRLR 347*). It would create commercial uncertainty and undermine freedom of contract to recognise a general duty of good faith that would permit courts to interfere with the express terms of a contract. Thus good faith notions have been applied to particular types of contracts, particular types of contractual provisions and particular contractual relationships.

20

Although it is not possible to imply a condition of reasonableness as to the exercise of the employer's discretion generally, there is an obligation to act in good faith in every contract of employment (see *Imperial Group Pension Trust Ltd v. Imperial Tobacco Ltd, [1991] 2 All ER 597, [1991] 1 WLR 589*). In this context, good faith means an honest, candid, forthright 25 contractual performance, a sincere intention to deal fairly with the employee, an honest intent to act without taking an unfair advantage of the employee, or the use of honesty and best efforts in dealings with the employee.

There is implied in a contract of employment a term that the employers will not, without 30 reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (see

Woods v. W. M. Car Services (Peterborough) Ltd, [1981] IRLR 347, [1982] ICR 693 and *Courtaulds Northern Textiles Ltd v. Andrew* [1979] IRLR 84). Good faith also plays a role particularly with respect to terms implied by law. For example the requirement to be just and equitable in an employer's decision to terminate the services of an employee evinced in sections 5 72, 73, and 77 of *The Employment Act, 2006*. The principle of good faith embodies the notion that, in carrying out his, her or its own performance of the contract, the employer should have appropriate regard to the legitimate contractual interests of the employee. There is a general presumption that the parties to a contract of employment will deal with each other so as to not destroy the right of the other party to receive the benefits of the contract.

10 The question of good faith is necessarily a question of fact, which has to be determined from the materials before court. Whether the requirements of fairness and good faith were met will depend upon the nature and weight of the interest at stake. This can be determined by consideration of three distinct factors: first, the private interest that was affected by the action; second, the risk of erroneous deprivation of such interest through the procedures used, and 15 probable value, if any, of additional or substitute procedural safeguards; and, finally, the employer's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. The extent to which procedural safeguards must be afforded the employee is influenced by the extent to which the employee may be condemned to suffer grievous loss and whether the employee's interest in 20 avoiding that loss outweighs the employer's interest in summary adjudication.

The interest of the employee in retaining his or her job, the employer's interest in the expeditious removal of unsatisfactory employees, the avoidance of administrative burdens, and the risk of an erroneous termination combine, even for an administrative suspension, to require the provision 25 of some minimum pre-interdiction notice and opportunity to respond, followed by a full post-interdiction hearing, complete with all the procedures normally accorded and payment of arrears if the employee is successful. An interim suspension or interdiction without a hearing would be justified upon the existence of facts such as do in the instant case, provided the employee was assured that a prompt judicial or administrative hearing would follow suspension, at which the 30 issues could be determined.

In the instant case, although the second defendant was initially justified in placing the plaintiff's contract of employment under an administrative suspension, since that decision was taken for a reason demonstrably in her legitimate undertaking's interests, the duty to act fairly not only required the second defendant to impose this suspension for a relatively short period of time that should and could have been fixed, but it also required a post-suspension judicial or disciplinary hearing within a reasonable period of time after the fact. The suspension of over six years, that it has turned out to be, is not the relatively short period envisaged. By this suspension with an indeterminate duration, the plaintiff has been deprived of his right to the minimum guarantees of natural justice, of a progressive approach to disciplinary action, as enshrined in Part (F - s) of *The Uganda Public Service Standing Orders, 2010*, and Part IV of *The Public Service Commission Regulations, SI No.1of 2009* such as;- a formal warning; a final written warning; being informed of the reasons for such an interdiction; ensuring that the investigations into his conduct were done expeditiously, in any case within six months; receiving salary, not being less than half of his basic salary, subject to a refund of the other half, in case the interdiction was lifted and the charges are dropped, a hearing before the District Service Commission after a full investigation, and so on.

Interdiction is defined by Regulation 7 in Part (F - s) of *The Uganda Public Service Standing Orders, 2010*, as the temporary removal of a public officer from exercising his or her duties while an investigation over a particular misconduct is being carried out. In light of that definition, this *de-facto* suspension has been effectively deprived of its administrative character and instead evolved into a disciplinary one, rendering it no different from a dismissal pure and simple. Considering the above provisions meant to protect public officers against unfair disciplinary action, when looked at from the disciplinary perspective, the unexplained failure to interdict the plaintiff and accord him the pre and post interdiction procedural rights, failure to fix a reasonable period of suspension, the employer's good faith is cast in serious doubt. The power to suspend for administrative reasons does not entail, as a corollary, the right to suspend the payment of salary. Good faith requires due care and attention. It consists of that belief that a prudent and sensible man would hold in the ordinary conduct of his own business affairs. Where the manner of dealing with the employee is inconsistent with the statutory scheme of labour

relations or is otherwise illegal, it cannot be said that it was done or believed to be done with due care and attention.

Although the general position is that a master may terminate the contract with his servant any
5 time for any reason or even for no reason at all (see *Okori v. U.E.B. [1981] HCB 52*), where the
contract has been reduced in writing, the parties are bound by its terms and the employee will
expect to be dismissed in accordance with the procedure as expressly agreed upon by the parties
or as implied by law. According to section 14 (2) of *The Public Service Act, 2008*, public officers
are to be disciplined and removed from the public service only in accordance with laid down
10 regulations and procedures. For that reason, the employer cannot unilaterally avoid its obligation
to pay the employee's salary if it denies the employee an opportunity to perform the work.
Similarly, there is an implied condition that the legal relation between the parties is to be restored
after the cause of non-performance of the employee's duties has ceased to exist. Thus, an
employee on whom an administrative suspension without pay is imposed might, as a rule,
15 properly regard that measure as a constructive dismissal.

Under normal circumstances, when an employer decides to dismiss an employee, that decision of
dismissal will either be communicated in writing or verbally. The employee will be informed
that he or she has been dismissed. On the other hand, the concept of constructive dismissal
20 pertains to situations where the employer does nothing to communicate to the employee that he
or she is being dismissed but by reason of the employer's actions, words or omissions, the
employee feels that he has been dismissed. What is emphasised in this concept is the
"employer's conduct" with respect to the particular employee concerned against the backdrop of
the employee's contract of employment.

25

Where the employer's conduct is such that it constitutes a significant or fundamental breach
going to the root of a contract of employment and it shows that the employer no longer intends to
be bound by one or more of the essential terms of the contract, an employee is entitled to walk
out on his or her employer and to treat himself or herself as discharged from any further
30 performance of his or her obligations under his or her contract of employment, on the ground
that he or she has been "constructively dismissed." In this context, fundamental breach of the

contract is also regarded as “repudiatory conduct” which goes to the root of the contract of employment. It is a fundamental breach if it deprives the employee of substantially the whole benefit that was intended to be conferred under the contract.

5 When an employer’s conduct evinces an intention no longer to be bound by the employment contract, the employee has the choice of either accepting that conduct or changes made by the employer, or treating the conduct or changes as a repudiation of the contract by the employer and suing for wrongful dismissal (see *In re Rubel Bronze and Metal Co. and Vos*, [1918] 1 K.B. 315, at p. 322 and *General Billposting Co. v. Atkinson*, [1909] A.C. 118 (H.L.), at p. 122). In this
10 context, the word “constructive” indicates that the dismissal is a legal construct: the employer’s act is treated as a dismissal because of the way it is characterised by the law. Constructive dismissal means no more than the common law right of an employee to repudiate his contract of service where the conduct of his employer is such that the employer is guilty of a breach going to the root of the contract of where he has evinced an intention no longer to be bound by the
15 contract. In such a situation, the employee is entitled to regard himself as being dismissed and walk out of his employment (see *Western Excavating (ECC) Ltd v. Sharp* (1978) IRLR 27).

Constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the
20 employer intended to no longer be bound by the contract. In all cases, the primary burden will be on the employee to establish constructive dismissal. The first part of the test for constructive dismissal requires a review of specific terms of the contract, and this too involves two steps: first, the employer’s unilateral change must be found to constitute a breach of the employment contract and, second, if it does constitute such a breach, it must be found to substantially alter an
25 essential term of the contract.

For that second step of the analysis, the court must ask whether, at the time that the breach occurred, a reasonable person in the same situation as the employee would have felt that the essential terms of the employment contract were being substantially changed. To constitute a
30 constructive dismissal, the repudiatory conduct complained of may consist of a series of acts or incidents, some of which may be quite trivial but cumulatively can amount to a breach which is

calculated to destroy or seriously damage the relationship of confidence and trust between the employer and employee (see *Lewis v. Motorworld Garage Ltd (1985) IRLR 465*).

In determining whether the irregular suspension constituted a substantial breach, the Court must
5 consider whether a reasonable person in the employee's circumstances would have perceived, *inter alia*, that the employer was acting in good faith to protect a legitimate business interest, and that the employer's act had a minimal impact on him or her in terms of the duration of the suspension. For a suspension to constitute a breach, it is not necessary to show that the employer intended any repudiation of the contract: the court looks at the employer's conduct as a whole
10 and determines whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it (*Woods v. W. M. Car Services (Peterborough) Ltd, [1981] IRLR 347, [1982] ICR 693*).

In the instant case, the plaintiff was faced with a *de facto* suspension of indefinite duration
15 during which he was not deployed, not assigned work, not paid salary or other employment benefits receive benefits, and yet no formal steps were being taken to subject him to any disciplinary proceedings. These facts weigh in favour of a finding that the suspension constituted constructive dismissal. The employer's unilateral change of the plaintiff's employment status constituted a breach of the employment contract and, by substantially altering the above
20 mentioned essential terms of the contract. Such fundamental changes involving the compensation, work assignments and place of work were both unilateral and substantial constituting a fundamental or substantial change to the plaintiff's contract of employment.

It was the plaintiff's testimony that on 6th November 2014, after being acquitted, he inquired from
25 the Chief Administrative Officer of Maracha District Local Government so many times about his salary arrears and re-deployment, but she declined to give him a satisfactory reason as to whether she would take her back or not and instead she replied that the court did not say he should be paid his salary and that he should return to the office. He wrote a demand notice and a notice of intention to sue which he delivered on 10th November, 2014, at the second defendant's Central
30 Registry in Maracha. He did not receive a reply whereupon he wrote a follow up letter on 2nd December, 2014 and delivered it on the 3rd December, 2014. On 12th January, 2015, he wrote a

notice of intention to sue to the Chief Administrative Officer of Maracha District Local Government. On 5th May, 2015 he wrote another notice of intention to the CAO of Maracha and the District Local Government, and there was no response to any of these notices.

5 An employee upon whom such a prolonged administrative suspension is imposed without pay is and without any prospect of resolution, may properly regard that measure as a constructive dismissal. As a general rule, contracts of employment do not survive deviations of this kind, which are equivalent to unilateral termination. The employer cannot unilaterally, and without further cause, avoid the obligation to pay the employee's salary if it denies the employee an
10 opportunity to perform the work. An employer may always waive his or her right to performance of the employee's work, but cannot avoid the obligation to pay the salary if the employee is available to perform the work but is denied the opportunity to perform it. By choosing not to terminate the contract of employment, with its associated compensation, the employer will, as a rule, still be required to honour his or her own reciprocal obligations even if he or she does not
15 require that the employee perform the work. In the circumstances, the plaintiff was justified in considering the contract of employment as having been terminated and sue for compensation. The fact that the plaintiff was yet to account for the stipulated funds, in absence of a proper disciplinary process having been commenced by the second defendant, cannot justify the treatment he received at the hands of the second defendant. This issue is therefore decided in the
20 affirmative. The second defendant breached the plaintiff's contract of employment.

Third issue: Whether the plaintiff is entitled to the reliefs sought.

In the plaint. the plaintiff claims unpaid salary from October 2010 to January, 2016 (being shs.
25 32,433,448/=) and thereafter until the final judgment in the suit, re-instatement to his office as Senior Accounts Assistant, general and special damages for breach of contract of employment, interest on the pecuniary awards and the costs of the suit. The special damages although claimed, were not neither specifically pleaded nor strictly proved as required by law (see *Asuman Mutekanga v. Equator Growers (U) Ltd, S. C. Civil Appeal No.7 of 1995*). That part of the claim
30 is thus rejected.

As regards the prayer for re-instatement, according to section 71 (6) of *The Employment Act, 2006*, upon the finding that an employee has been unfairly terminated, the court "shall" require the employer to re-instate or re-employ the employee unless; - (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that
5 a continued employment relationship would be intolerable; (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or (d) the dismissal is unfair only because the employer did not follow a proper procedure.

In light of that provision, I have considered decisions such as that of *Executive Committee of
10 Vaish Degree College Shamli and others v. Lakshmi Narain and others, (1976) AIR 888*, where the Managing Committee of a college terminated services of the Principal of a college in violation of a rule requiring the Vice-Chancellor's approval. The Supreme Court of India held that a contract of personal service cannot ordinarily be specifically enforced and a Court, normally, would not give a declaration that the contract subsists and that the employee even after
15 having been removed from service, can be deemed to be in service against the will and consent of the employer. This rule is subject to three exceptions, (i) where a public servant is sought to be removed from service in contravention of the provisions of the law; (ii) where a worker after dismissal is sought to be reinstated under Industrial Law, and (iii) where a statutory body acts in breach or violation of the mandatory provisions of the Act establishing it. The court observed
20 that;

It can have little relevance to conditions of employment in modern large-scale industry and enterprise or statutory bodies or public authorities where there is professional management of impersonal nature. It is difficult to regard the contract of employment in such cases as a contract of personal service save in exceptional cases.
25 There is no reason why specific performance should be refused in cases of this kind where the contract of employment does not involve relationship of personal character. It must be noted that all these doctrines of contract of service as personal, non-assignable, unenforceable, and so on, grew up in an age when the contract of service was still frequently a "personal relation" between the owner of a small
30 workshop or trade or business and his servant. The conditions have now vastly changed and these doctrines have to be adjusted and reformulated in order to suit

needs of a changing society. We cannot doggedly hold fast to these doctrines which correspond to the social realities of an earlier generation far removed from ours. We must rid the law of these anachronistic doctrines and bring it in accord "with the felt necessities of the times". It is interesting to note that in Fry's classic work on Specific Performance, contracts of service appear in a small group under the sub- heading "Where enforced performance would be worse than non- performance". We may ask ourselves the question: for whom it would be worse and for whom it would be better. Where, in a country like ours, large numbers of people are unemployed and it is extremely difficult to find employment, an employee who is discharged from service may have to remain without means of subsistence for a long period of time. Damages equivalent to one or two months wages would be poor consolation to him. They would be wholly insufficient to sustain him during the period of unemployment following upon his discharge. The provision for damages for wrongful termination of service was adequate at a time when an employee could without difficulty find other employment within the period of reasonable notice for which damages were given to him. But in conditions prevailing in our country, damages are a poor substitute for reinstatement: they fall far short of the redress which the situation requires. To deny reinstatement to an employee by refusing specific performance in such a case would be to throw him to the mercy of the employer: it would enshrine the power of wealth by recognising the right of the employer to fire an employee by paying him damages which the employer can afford to throw away but which would be no recompense to the employee. It is, therefore, necessary and I venture to suggest, quite possible, within the limits of the doctrine that a contract of personal service cannot be specifically enforced, to take the view that in case of employment under a statutory body or public authority, where there is ordinarily no element of personal relationship, the employee may refuse to accept the repudiation of the contract of employment by the statutory body or public authority and seek reinstatement on the basis that the repudiation is ineffective and the contract is continuing

30 The Court pointed out that the third exception applied not only to employees in the service of bodies created under statutes, but also to those in the employment of other public or local

authorities. This exception is really intended to cover cases where by reason of breach of mandatory obligation imposed by law, as distinct from contract, the termination of service is null and void so that there in law no repudiation at all.

5 For example in the case of *McClalland v. Northern Ireland General Health Service Board*
[1957] 2 All ER 129, the plaintiff's contract was one of master and servant, the only special
condition being that her post had been advertised as "permanent and pensionable" and it
provided specific reasons, such as gross misconduct and inefficiency, for which she might be
dismissed. The defendant Board introduced a rule after her appointment that women employees
10 must resign on marriage and since the plaintiff got married, the respondents terminated her
service by giving what they thought was a reasonable notice. The plaintiff contended that the
defendant Board was not entitled to terminate her service and claimed a declaration that the
purported termination was null and void and she continued in service. The House of Lords held
that the contract was exhaustive as regards the reasons for which the defendant-Board could
15 terminate the service of the plaintiff and since none of those reasons admittedly existed, the
termination of service of the petitioner by the defendant-Board was nullity and the plaintiff
continued in service of the defendant-Board. This was a case of a pure contract of master and
servant and yet the House of Lords held that the termination of employment of the plaintiff by
the defendant-Board which was not accepted by the plaintiff was ineffective and the plaintiff was
20 entitled to a declaration that she continued in service.

It should thus be possible to hold that even where a Local Government, Statutory body or other
public authority terminates the service of an employee in breach of a contractual obligation, the
employee could disregard the termination as ineffective and claim a declaration that his service is
25 continuing. In the instant case, the plaintiff's contract of employment having been with a local
government of and consequently not involving a relationship of personal character, I would be
inclined to regard it less as one of personal service and more as one of professional management
of impersonal nature. Considering that currently large numbers of people are unemployed and it
is extremely difficult to find employment, and that an employee who is discharged from service
30 may have to remain without means of subsistence for a long period of time, this is a situation
where, all things being equal, an order for a re-instatement would have been appropriate.

However, I have to bear in mind that section 71 (6) (b), (c), and (d) of *The Employment Act, 2006*, require that such relief should be considered undesirable where the circumstances surrounding the dismissal are such that a continued employment relationship would be
5 intolerable, or if it is not reasonably practicable for the employer to reinstate or re-employ the employee, or where the dismissal is unfair only because the employer did not follow a proper procedure. I find that the circumstances surrounding the dismissal, viz.; preceded by an accusation of misappropriation of funds, followed by a prosecution that lasted three years and four months, and there not having been any semblance of a procedure followed for termination
10 of the employment, a continued employment relationship with the second defendant would be intolerable.

Any breach of contract in such a case is enforced by a suit for wrongful dismissal and damages. Just as a contract of employment is not capable of specific performance similarly breach of
15 contract of employment is not capable of founding a declaratory judgment of subsistence of employment. It seems to be generally recognized that wrongful repudiation of the contract of employment by the employer effectively terminates the employment: the termination being wrongful, entitles the employee to claim damages, but the employee cannot refuse to accept the repudiation and seek to treat the contract of employment as continuing. The claim for re-
20 instatement is therefore rejected.

In the circumstances, I am more inclined to follow the more dominant principle that, "if a master in breach of contract, refused to employ the servant, it is trite law that the contract will not be specifically enforced.....The only result is that the servant albeit he has been prevented from
25 rendering services by the master's breach, cannot recover remuneration under the contract, because he has not earned it. He has not rendered the services for which remuneration is payable. His only money claim is for damages for being wrongfully prevented from earning his remuneration. And like anyone else claiming damages for breach of contract, he is under a duty to take reasonable step to minimize the loss he has suffered through the breach. He must do his
30 best to find suitable alternative employment. If he does not do so, he prejudices his claim for damages" (see *Decro - wall International SA v. Practitioners in Marketing Ltd. [1971] 1 WLR*

361and *Denmark Production case [1969] 1 QB 699*). This principle has been applied in *Doreen Rugundu v. International Law Institute S. C. Civil Appeal No. 8 of 2005* and other cases.

5 The plaintiff has suffered substantial damage because of the second defendant's failure to perform its obligation to provide the plaintiff with work and pay him since his last salary paid on 30th September, 2010. It must be recognised that a person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. He was earning shs. 205,160/= per month at the time and has thus been denied that income for the last seven years and two months. However, according to the decision in *Vine v. National Dock Labour*
10 *Board [1956] 1 QB 658*, it has long been well settled that if a man employed under a contract of personal service is wrongfully dismissed, he has no claim for remuneration due under the contract after repudiation. His only money claim is for damages for having been prevented from earning his remuneration. His sole money claim is for damages and he must do everything he reasonably can to mitigate them.

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In the instant case, due to the duty to mitigate, the plaintiff cannot recover lost earnings for the entire duration of that period. He can only recover income accruing until the time of constructive dismissal took effect, and general damages by way of salary in lieu of notice. Considering that the plaintiff's study leave had not ended when he was arrested, he is deemed to have continued
20 in employment until the end of his criminal trial upon his acquittal on 13th October, 2015. Thereafter, he could and should only have waited for a reasonable period for re-deployment or disciplinary action to be taken against him. In my view, having waited for up to three months without his employer taking either step, he was justified from that point to have considered his employer's stance a repudiation of the contract, hence a constructive dismissal and henceforth he
25 was under an obligation to mitigate his loss or damage. From the circumstances, I deem the plaintiff's constructive dismissal to have occurred on 13th January, 2016, a period of three months following his acquittal. He is therefore entitled to arrears of salary from 30th September, 2010 to 13th January, 2016 (a period of 64 months) at the rate of shs. 205,160/= per month, hence a total of shs. 13,130,240/= which is accordingly awarded. This sum will carry interest at the rate of
30 12% per annum from the date of filing the suit, 9th February, 2016 until payment in full

When an employee is successful, he or she is then entitled to damages in lieu of reasonable notice of termination. In *Ombaya v. Gailey And Roberts Ltd [1974] EA 522*, it was held that where a person was employed and one of his terms of employment included a period of termination of that employment, the damages suffered are the wages for the period during which his normal notice would have been current. The same principle was applied in *Central Bank of Kenya v. Nkabu EA [2002] 1 EA 34* and *Githinji v. Mumias Sugar Co. Ltd (1991) LLR 1373*. However, another additional principle has been developed by courts overtime in cases of unlawful dismissal. This is the principle that courts, where appropriate in exercise of their discretion, may award damages which reflect the court's disapproval of a wrongful dismissal of an employee. The sum that may be awarded under this principle is not confined to an amount equivalent to the employees' wages (see *Bank of Uganda v. Betty Tinkamanyire S. C. Civil Appeal No. 12 of 2007* and *Issa Baluku v. SBI INT Holdings (U) Ltd H. C. Civil Suit No.792 of 2005*). It follows therefore that general damages are awarded to an employee, whose employment has been unlawfully terminated, if that employee proves facts that call upon court's disapproval of the employer's conduct in terminating the services of the employee.

In accordance with 58 (3) (d) of *The Employment Act, 2006*, the plaintiff was entitled to a minimum of three months' notice of termination of his contract of employment. Since none was given, he is awarded three months' payment in lieu of notice, as general damages, hence shs. 615,480/=. By reason of the insensitivity with which the plaintiff was handled by the second defendant, the award is enhanced by shs. 3,000,000/= to reflect the court's disapproval of the second defendant's conduct in the constructive termination the services of the plaintiff. The total sum of shs3,615,480/= will carry interest at the rate of 8% per annum from the date of judgment until payment in full. He is also awarded the costs of the suits.

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In the final result, the suit against the first defendant is dismissed with costs. Judgment is entered for the plaintiff against the second defendant in the following terms;-

- a) Shs. 13,130,240/= arrears of salary.
- b) interest on the sum in (a) above at the rate of 12% from 9th February, 2016 until payment in full.
- c) Shs. 3,615,480/= general damages.

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- d) interest on the sum in (c) above at the rate of 8% from the date of this judgment until payment in full.
- e) The costs of the suit.

5 Dated at Arua this 30th day of November, 2017

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Stephen Mubiru
Judge,
30th November, 2017.