THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

CIVIL SUIT NO. 113 OF 2008 & 269 OF 2007

MUGISHA M ABRAHIM & ANOR::PLAINTIFFS

VERSUS

G4S SECURITY SERVICES (U) LTD :: DEFENDANT

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

BACKGROUND

The plaintiffs brought this suit against the defendant for breach of their contracts of employment for unpaid overtime work, sick leave, accrued annual, untaken weekly rest, daily lunch break not granted and emergency leave.

The plaintiffs elected to file the suit in respect of these claims after the Labour officer Ms. Adrine Namara in Labour Dispute No. CB.954 of 2006 elected to only arbitrate claims for the long service award and repatriation where she granted the plaintiffs an award of UGX. 125, 000,000/= on the 28th February 2007.

The defendant filed a defense where it denied the allegations on grounds that the suit was an abuse of the court process, barred in law since the same plaintiffs

herein were Plaintiffs before the Labour Officer in Labour Dispute No. CB 954 of 2006.

The plaintiffs were represented by Mr. Mukuve Mugaga and Mr. Nuwandinda Johnan Rwambuka whereas the defendant was represented by Mr. Pope Ahimbisibwe.

Each of the parties proposed several issues for determination by this court as stated below.

The plaintiffs;

1. ***Whether the plaintiffs were employees of the defendant.***
2. ***Whether there was breach of the plaintiffs' employment contracts by the defendant.***
3. ***Whether the plaintiffs are legally entitled to overtime pay, annual accrued leave, emergency leave not taken, weekly rest not taken, untaken lunch break and sick leave.***
4. ***What remedies are available to the parties.***

The defendant;

1. ***Whether the suit is barred by the principle of Res judicata.***
2. ***Whether the loss and or disappearance of the Defendant's documents within the court premises denied the Defendant a right to fair hearing and hence render the suit nugatory.***

3. ***Without prejudice to the above, whether the Plaintiffs are entitled to the reliefs sought and what remedies are available to the parties.***

This court is given the power under **Order 15, Rule 5 of the Civil Procedure Rules SI.71-1** to amend and strike out issues at any time before passing a decree as it thinks fit as may be necessary for determining the matters in controversy between the parties. In the interest of adequate discussion of the legal issues at hand, the court rephrases the issues for determination to reflect as;

1. ***Whether the suit is barred by the principle of Res judicata.***
2. ***Whether the loss and or disappearance of the Defendant's documents within the court premises denied the Defendant a right to fair hearing and hence render the suit nugatory.***
3. ***Whether the plaintiffs are legally entitled to overtime pay, annual accrued leave, emergency leave not taken, weekly rest not taken, untaken lunch break and sick leave.***
4. ***What remedies are available to the parties.***

The parties were ordered to file written submissions and accordingly filed the same. Both parties' submissions were considered by this court.

DETERMINATION OF ISSUES

Issue 1

Whether the suit is barred by the principle of res judicata.

Submissions

Counsel for the defendant submitted that the suit is barred in law since the plaintiffs with the exemption of the 9th plaintiff are parties to a complaint lodged against the defendant before the Labour Officer at Kampala City Council vide Labour Dispute No. CB 954/ 2006. Counsel submitted that the suit is in want of form and is an abuse of Court process.

Counsel relied on section 7 of the Civil Procedure Act which provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that Court.

Counsel also submitted that the claims or issues in the instant consolidated suits are directly the same claims and issues that the plaintiffs herein presented and brought for adjudication before the Labour Officer in the Kampala District Labour Dispute No. CB 954/2006.

He stated that the plaintiffs brought all the said claims and issues for determination before the Labour Officer who only choose to consider two issues namely, the long service award and repatriation and pronounced herself on those leaving out the rest.(see; Exhibits **D.6, D.7** and **D.8** in the Defendant's Trial bundle,

Counsel stated that the Labour Officer's Award delivered on the 2nd March 2007 was a determination by a court of competent jurisdiction and any relief or claim sought by the plaintiffs that was not expressly granted was deemed denied and refused by the Labour Officer.

As such, the only legal option and or choice available to the plaintiffs/ claimants therein if they felt aggrieved by the Labour Officer's refusal to determine the rest of the claim was to prefer an appeal to the Industrial Court to that extent as by law prescribed under Employment Act, 2006.

Counsel therefore submitted that any subsequent suit or action raising the same issues and matters as in HCCS No. 269 of 2007 and HCCS No. 113 of 2008 between the same parties as in Labour Dispute No. CB 954 of 2006 became res judicata as provided in section 7 of the CPA and therefore legally misconceived and unacceptable.

As to whether a claim before a Labour Officer is a "suit" in the meaning of section 7 of the Civil Procedure Act and further whether the "Labour Officer" is a competent Court in terms of Section 7 of the Civil Procedure Act, counsel submitted that this has been canvassed in the Industrial Court in ***Abb Limited vs. Lagu Emmanuel & Another Miscellaneous Application No. 30 of 2017 (Arising Out of Labour Dispute No. 238 of 2016)*** where the Industrial Court stated the establishment of a unique specialized industrial court with the status of a High Court however being a court of reference that lie from the Labour officer.

Counsel therefore submitted that indeed the instant suits contravene the provisions of Section 7 of the Civil Procedure Act as they are actions directly

bringing to court matters that were determined by a court of competent jurisdiction in Labour Dispute No. CB 954 of 2006.

He stated that courts have interpreted s.7 of the CPA and guided on when a matter is found to be res judicata**,** this provision of law cannot be waived by parties. It is a law that prohibits courts from trying matters that had already been finally determined. ***(See; Maniraguha Gashumba vs. Sam Nkundiye Civil Appeal No. 23 of 2005)***.

Counsel therefore submitted that the issues or reliefs for unpaid overtime, unpaid weekly rests, unpaid daily lunch break, sick leave, deduction of emergency leave days claimed by the plaintiff were points upon which the first court was actually required to adjudicate upon which properly belongs to the subject of litigation" and therefore res-judicata.

Determination

According to ***section 7 of The Civil Procedure Act***, no court may try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

In short, once a dispute has been finally adjudicated by a court of competent jurisdiction, the same dispute cannot be agitated again in another suit afresh **(see;** ***In the Matter of Mwariki Farmers Company Limited v. Companies Act***

***Section 339 and others [2007] 2 EA 185*).** By *res judicata,* the subsequent court does not have jurisdiction.

For the doctrine to apply, it must be shown that; a) there was a former suit between the same parties or their privies, b) a final decision on the merits was made in that suit, c) by a court of competent jurisdiction and, d) the fresh suit concerns the same subject matter and parties or their privies ***(see Ganatra v. Ganatra [2007] 1 EA 76 and Karia and another v. Attorney-General and others [2005] 1 EA 83 at 93 -94).***

Hon Justice Stephen Mubiru in ***Dubo & Anor v Minduni & Ors (CIVIL REVISION No. 0001 OF 2017)*** stated that; "*The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit; the former suit must have been a suit between the same parties or between parties under whom they or any of them claim; the parties must have been litigating under the same title in the former suit; the court which decided the former suit must be a court that was competent to try the former suit or the suit in which such issue is subsequently raised; and the matter directly and substantially in issue in the subsequent suit must have been heard and finally decided by the court in the former suit. A suit, therefore, will not be res judicata where it is determined that the subject matter is different from that which was considered in the former suit, or the judgment in the former suit was not pronounced by a court of competent jurisdiction, or where it was not a decision given on the merits of the case, or where the parties are different and not privy to those in the earlier suit or if they are not litigating under the same title.*"

The plaintiffs filed Labour Dispute No. CB 954 of 2006 before the labour officer Ms. Adrine Namara against the defendant in respect of the claims made in this court. However, the labour officer only determined whether the plaintiffs were entitled to repatriation and long service term but did not determine the claims sought by plaintiffs in this matter and neither did the parties litigate on the same.

Bearing in mind the authorities above, the subject matter in this suit was not heard and finally decided by the labour officer in the former suit or complaint before the labour officer and therefore this matter does not fall under the ambit of *res judicata*.

Whether the loss and or disappearance of the Defendant's documents within the court premises denied the Defendant a right to fair hearing and hence render the suit nugatory.

The defendant contended that plaintiffs applied for discovery and production of documents and the same were brought to court. These included

i) The employment contract between the Plaintiffs and the Defendant,
ii) The Merger/Acquisition Agreement between Gray Security Services Ltd, Securicor Gray (U) Ltd and Securicor (U) Ltd.
iii) The various employment contracts between the Plaintiff and the Defendant's predecessors,
iv) The payment slips of all the Plaintiffs benefits and dues as at 2006.

v) The Plaintiffs companies resignation form,

vi) Acknowledgement receipt of all benefits due and owing to the Plaintiffs,

vii) Work schedule for the Plaintiffs from 2001 to 2006,

viii) Leave form for annual maternity, sick and emergency from 2001 to 2006,

ix) Application form for cash in lieu forms,

x) Pay slips for payment of lunch break.

Indeed, on the 24th March 2010, the Defendant's employees namely Ms. Emily Akora, the Company Secretary and Ms. Catherine Achanda, the Human Resource Manager in the presence of the Defendant's Counsel Mr. John Fisher Kanyemibwa appeared in court that morning before the Hon. Justice Ann Magezi with the original physical documents sought under the said Application save for the Merger Agreement.

Counsel submitted that by a letter dated 23rd March 2010 **exhibit D4** which was written to the then Lawyers for the Plaintiffs M/s Muwema & Mugerwa Advocates informing them that the said documents in their original form were to be delivered and deposited in court the following day on the 24th March 2010.

The fact of delivery of the said documents in the Chambers of Hon. Justice Ann Magezi is also well collaborated by the testimony's of DW1, Ms.

Catherine Achanda, court witnesses CW2, Ms. Nabirye Betty and CW3 Mr. John Fisher Kanyemibwa.

From line 740 on page 29 of the typed proceedings, DW1 candidly tells court how these documents were duly brought to the Chambers of Her Lordship Justice Ann Magezi and even during cross examination by Mr. Mafabi Counsel for the Plaintiffs then, she on page 35 confirms the delivery.

Further, the delivery of the said documents is confirmed by CW2 Ms. Nabirye Betty who on page 63-64 tells court that these documents were brought and taken to the Judge's Chambers.

This same fact is also collaborated by CW3 Mr. John Fisher Kanyemibwa in his testimony stretching from pages 71 to 86 of the record of proceedings before Hon. Justice Stephen Musota.

However, for some reason counsel for the Plaintiffs Mr. Godfrey Mafabi sometime during the hearing filed Misc. Application No. 282 of 2010 seeking court of dismiss the Defendant's statements of Defence in HCCS No. 269 of 2007 and HCCS No. 113 of 2008 on grounds that the Defendant had failed to honour the court's order for the production of the documents as sought in MA No. 550 of 2010.

The above application was heard and determined by Hon. Justice Eldad Mwangusya who did not only dismiss the said application but also in his ruling dated 4th March 2011 made very candid and confirmatory remarks as follows;

"***Court: After preparing this ruling I established that boxes containing documents are lying at the Land Division of this Court. The Deputy Registrar (Civil) is to retrieve all the documents for inspection by the parties and then fix a date for hearing of the suit on its merits.***

Signed

Judge

04-03-2011"

Counsel further submitted that CW2 Ms. Nabirye Betty tried to tell lies before this court that the said documents were later handed over to Mr. John Fisher Kanyemibwa on the 1st April, 2010, this clearly proved to be a lie as the same documents were established to still be within court almost a year after as confirmed by His Lordship Justice Eldad Mwangusya in his ruling of 4th March 2011.

Indeed the said documents that were the bedrock of the Defendants case/defence have never been seen and received by the Defendant to use in her defence. The said documents in their original form disappeared within the court premises and have put the Defendant defence at a great substantial and detrimental disadvantage.

It was defence counsel's submission that a fair hearing or trial entails a hearing where all parties are able to present their different arguments, their witness and have the right to cross examine the opposite witness and be able to present their evidence upon which their cases lay.

The respondent counsel submitted that the testimony of DW1 was contradictory regarding these documents and therefore her testimony is very unreliable. It is not true that she ***candidly tells*** court how these documents were brought to court.

In para 780 at page 28 she stated and I quote;

> *"I was part of the team that submitted the documents to court. The others were Harriet Ayo the HR officer and Emilly Akora Butiime the Company Secretary"*

In cross examination when she was asked to whom the documents were delivered she responded in para 890 at 33 of the record of proceedings and I quote;

> *"We took those documents through our lawyers Katera and Kagumire Co. Advocates who delivered them as we witnessed to the chambers of Her Lordship Ann Magezi"*

She further states that they were given to the clerk of the Judge in para 900. However the lawyers while opposing the application for production of

documents the deponent stated that they had been delivered to the Registrar.

When she was asked further when the documents were delivered she confirmed that she could not recall those details in para 920.

It is clear that from the above her evidence is full of contradictions as to who delivered the documents and to whom they were delivered.

CW2 Nabirye Betty who was the clerk to Justice Ann Magezi gave the following testimony regarding these documents and how John Fisher Kanyemibwa took back the boxes on 1st April 2010.

The testimony below clearly shows how the issue of the documents was handled. In para 1270 at page 50 when she was being examined by Mr. Kanyemibwa she stated and I quote;

> ***"On that day, counsel for the Respondent came to the chambers of Justice Magezi with boxes of those documents, the matter was mentioned and adjourned for hearing to another date. Later in the day, I received a letter from Counsel Kanyemibwa addressed to the registrar requesting for the boxes that he had delivered earlier for the purpose of photocopying them and delivering them to the applicant"***

In para 1280 she was asked the date on the letter and she stated on the following;

> ***"24th March 2010. I forwarded the letter to the Deputy Registrar then and upon his minute <u>on 1st April, I gave the boxes back to Counsel Kanyemibwa. My Lord, that was the last time I saw those boxes and they have never come to the chambers.</u>"***

He later asked whether he signed for the boxes. She stated and I quote;

> *"He didn't and the reason was that since the documents had not been formally received in court, he could not sign for them"*

What followed there were never captured by the transcriber.

Counsel for the plaintiff further submitted that the Defendant's contention that that CW2 was a liar has no basis and there was no reason why CW2 would lie on a matter like this which involved Judges and Registrar of the Court. There is no reason why she would lie in front of the very person she knows took the documents on 1st April 2010.

The above remarks by the then Trial Judge (Justice Eldad Mwangusya) do not prove anything. There is nothing to show whose boxes they were. It could have been boxes of any other person. There is nothing to show that the Learned Judge established the contents of the said documents.

Like the Justice Stephen Musota guided during the cross examination of **DW1** in para 810 at page 37 where DW1 had claimed that the documents had been seen by Court. He noted and I quote:

> "**Did they see the documents or they saw the boxes? <u>Seeing will be removing the contents, examining and inspecting them.</u>"**

From the above we submit that the Defendant brought boxes on 24th March 2010 and Mr. John Fisher Kanyemibwa retrieved them on 1st April 2010. Accordingly the documents never disappeared in Court premises as alleged and the Defendant's right to a fair hearing was never denied.

According to the plaintiffs' counsel no single judicial Officer ever saw any specific document belonging to the Defendant in the boxes. The Content of the documents alleged to have been delivered by the Defendant remains a mystery. The only thing noted in the ruling above is a box containing documents. It is possible that the CW2 was telling the truth when she indicated that in April 2010, Mr. John Fisher Kanyemibwa took the documents away. What the judge saw in 2011 is not clear.

The Defendant has not been prejudiced in any way since at all times it was their defence that that the Plaintiffs never worked overtime (DW1), all the other claims have always been denied that the plaintiffs are not entitled to the same therefore we submit that the Defendants never had any documents to show that these claims were ever paid.

<u>Analysis</u>

I have perused the record of the court and established that the court ordered discovery and production of documents under Order 10 of the

Civil Procedure Rules. The defendant against whom the order was made brought somethings in a box contending that they were the documents ordered for discovery.

Unfortunately, the said 'things'documents were never properly tendered in court and the exercise for discovery was never concluded. Instead, the parties proceeded with the matter and ignored the discovery process but the plaintiffs' counsel continued to make reference to documents that were not brought to court.

Generally, a party is entitled to inspection of all documents which do not themselves constitute exclusively the other party's evidence of his case or title. Once the court has made a discovery, the opposite party is bound to make an affidavit of documents sought in discovery, setting forth all the documents which are, or have been in his/her possession or power relating to the matter in question in the proceeding.

After the party disclosed the documents by affidavit, he/she may be required to produce for inspection of such documents as he/she is in possession of and as a relevant.

It appears, the above procedure was not followed and the defendant counsel merely brought a box to court and the same was never received in accordance with set out procedures and this would have enabled the person receiving the same to verify what was being delivered to court. It was the duty of the defendant to have the same tendered in court and retain proof of delivery.

Secondly, the defendant had a duty to ensure that they retain copies of the same documents as a precaution and not to turn around to fault court for poor storage of the same documents just in case something went wrong. Indeed as it may have happened in this case.

Thirdly, the defendant was not obliged under the law to produce documents that formed the basis of his evidence. Documents constituting evidence of a party cannot be ordered to be produced. The provision relating to discovery cannot be used by the party " to come into court knowing how his opponent is going to prove his case". See ***M.L Sethi v R.P Kapur[1972]2 SCC 427***

The defendant cannot at the end of the trial claim that her case was prejudiced when the documents which formed the basis of his defence were lost in court. It appears some of the said documents were supposed to prove the defence case were attached to Written Statement of Defence. It would imply those were the most relevant to their case. This court would take it that the only documents attached to the defence where the necessary evidence in her case.

The defence ought to have opposed any discovery which involved production of documents that are relevant for its defence and not to prejudice her case by surrendering their evidence to the plaintiff before the hearing of the defence case. Therefore, by the time the defendant

surrendered the documents, it is clear they were not part of his evidence or necessary in her defence.

Therefore the defendant was not prejudiced in her defence and the absence of the documents would not render the trial nugatory as contended by counsel.

Whether the plaintiffs are legally entitled to overtime pay, annual accrued leave, emergency leave not taken, weekly rest not taken, untaken lunch break and sick leave.

Submissions

On overtime pay, counsel for the plaintiff submitted that section 53(8) of the Employment Act; 2006 provides that where hours in excess of 8 hours a day or 48 hours per week are worked, they shall be remunerated at the rate of one and a half of the normal hourly rate if on the normal working days and two times the hourly rate if worked on gazzated public holidays.

He stated that the employment agreement which was entered between the employer and the employee provides clearly in the fourth clause on "Appointment" that the total hours of normal duty per week will not exceed 48 hours. All the 5 plaintiffs' witnesses testified that they were working for 12 hours a day and had no day for resting rather than the legally recommended 8 hours which was the statutory requirement. Counsel therefore submitted that the plaintiffs were being forced to work for 5 or 4 extra hours as normal time basing on which under the laws of Uganda actually constituted overtime.

PW1 who was a section leader and used to fill out the shifts indicated that the night duty guards would work from 6:30 pm to 7:30am, while those who came to relive them during the day time would work from 6:30am to 6:30pm. This implies that those of the night shifts used to work for 13 hours while those of the day shift used to work for 12 hour making it 5 extra hours and 4 extra hours per day consecutively as indicated in the time sheets marked as EP6.

It was therefore counsel's submission that the plaintiffs are entitled to their overtime pay having worked 4 extra hours per day than they are required to by law.

Counsel for the defendant submitted that DW1 Ms. Catherine Achanda testified that the defendant had clearly calculated the working hours allowed by the Employment Act. He stated that this was very important because of the Defendant's unique area of operation being in security where some people would have to work at night and day hence requiring a shift system which is well allowed under the Law.

Counsel further submitted that DW1 testified that the defendant duly paid for any genuine overtime claims and unfortunately, the evidence for that payment was part of the documents that got lost within court.

For annual accrued leave, counsel for the plaintiffs submitted that an employee is entitled to a holiday with pay of seven days after every 4 months of continuous service and where not taken; and such employment is terminated, they are to receive compensation in lieu of the holiday. (See; ***Section 54 of the Employment Act; 2006***) The contracts of service of the plaintiffs marked as EXP4 at P. 2

equally provided for paid annual leave of 18 days per year under the article entitled "**Company Benefits"**.

The Plaintiffs' witnesses testified that they were not granted their mandatory annual leave/ holiday for two years (2005- 2006) in accordance with the provisions mentioned above. PW1 testified that leave was no granted to him between 2005 and 2006 because the company had large volumes of work due to an increase in the number of contracts they were receiving and yet the manpower was insufficient. The same position was reiterated by PW2 and PW3. Counsel therefore submitted that the plaintiffs are entitled to compensation for their accrued annual leave not taken.

For the defendant, counsel denied the same as testified by DW1 on pages 20 – 21 of the typed record. He stated that the plaintiffs did not prove that they were never given leave. Counsel also stated that the party that alleged needed to show and prove that they actually worked without a break for any leave and it's only then that the defendant can be called to defend herself. He therefore prayed that court denies them this claim.

In respect to the claim of weekly rest, the plaintiffs' counsel submitted that an employee shall not be required to work for an employer for more than 6 consecutive days without a day's rest which shall be taken on any day which is customary or as shall be agreed by the parties and this should be with pay (see; ***Section 51 (1) of the employment Act; 2006)***.

The Plaintiffs' witnesses testified that they worked for 6 days and thereafter would discontinue work for 3 days and resume the 6 (six) days. As per their

contracts, the defendant would only pay them for the hours they worked in the 6 days period. The 7th day which was to be accounted for as their day of weekly rest and equally remunerated was not paid for which was an anomaly. The plaintiffs' witnesses adduced time sheets and work schedules jointly marked ExP6 and pay slips as well marked ExP9 clearly indicating that for all the days that the plaintiffs were off duty, no payment was allocated to them which is contrary to the law.

Counsel for the defendant stated that the plaintiffs' claim for weekly rest is false and with no legal basis. DW1 testified that it was agreed by all the plaintiffs that especially during their cross-examination that the defendant run a shift system where each employee would get rest days according to their shift. He submitted that these were waged employees as per their contract and the wages were specifically provided per hour worked as can be seen in say the contract submitted as Exh.P.4 of Musasizi James PW4. With the shift system of deployment, each employee was availed rest days and in some cases more than 2 days rest in a row.

In respect of the claim for lunch break that was not taken, counsel for the plaintiffs stated that section 53 (6) of the Employment Act provides that employees who work for a maximum period of at least eight hours a day are entitled to a thirty minutes break. He submitted that this requirement is mandatory and its breach can lead to repudiation of the employment contract.

He argued that the nature of the work of a security guard is such that they cannot take thirty minutes off without leaving premises insecure and unguarded.

The Plaintiffs witnesses all testified that this was the case with them as well. Most Security companies therefore provide lunch for their personnel at their stations to obviate the need for a lunch break. The Plaintiffs testified that this was done by the Defendant between 2001 -2002 at the rate of UGX. 27,000/= but ceased between 2002- 2006. Counsel therefore submit that the plaintiffs were entitled to compensation for the 30 minutes break that was not granted to them.

Counsel for the defendant submitted that counsel for the plaintiff rightly stated in paragraph 2 on page 11 of the submission that the law does not provide for lunch as an entitlement and neither did the contracts of the plaintiffs.

He submitted that the claim is baseless and relied on the testimony of DW1, in line 338 onwards on page 25 of the typed record that the defendant knew and had always known that its employees certainly needed to have some time / break to eat some lunch. For that matter, every post would have two officers so that at lunch time one would excuse himself for a meal as the other took guard and vice versa. Further, DW1 testified that these employees were always provided with tog bags to enable them carry packed food from home to their places of work.

In respect to the claim of sick leave, counsel for the plaintiffs relied on Section 55 of the Employment Act; 2006 which provides that an employee is entitled to full wages and benefits if they are incapable of work due to injury or sickness. The employee however has to notify the company of the sickness as soon as possible and the company doctor has to issue a certificate indicating the incapacity of the employee and how long they will be absent from work.

He stated that the contracts of the Plaintiffs under the company benefits equally provided that absence from work due to sickness would not exceed 30 days and sick leave would be paid for upon production of medical certificate. The plaintiffs' witnesses testified that they fell sick at different times and could not work but they were not granted their full pay in respect of the days they went on sick leave.

In order to assert this claim, the plaintiffs had to furnish their sick forms indicating that they notified and asked the employer for sick leave and their medical certificates. A template of this form was furnished in Court marked asExP15. In a company memo marked ExP5 written on the 12th February 2004, the general manager of the company admitted that UGX. 25,000,000/= was pending payment to employees as a direct result of sick leave. Counsel stated that there is no evidence that this money had ever been paid out to those affected and therefore submitted that defendant company is liable to make the plaintiffs whole in this regard.

Counsel for the defendant submitted that the claim for unpaid sick leave is claimed as a special damage to which the plaintiff ought to have shown when each fell sick, applied for sick leave, supplied the requisite documentary evidence and that the same was rejected.

He also submitted that it defeats common sense that all the plaintiffs fell sick and hence are entitled to some sick leave allowance. He further stated that the plaintiffs' witnesses when asked during cross-examination could not provide any thing to show they ever fell sick and none could remember when they ever did.

DW1 took court through the logical procedures an employee had to take to get any sick leave which was never rebutted and no evidence was submitted by the plaintiffs to support this special damage claim. He therefore prayed that this claim ought to fail.

In respect of emergence leave, the plaintiffs' counsel submitted that Section 41 of the Employment Act; 2006, provides that where an employee is absent from work due to the death of a member of their family or dependant relative or due to any other exceptional circumstance that prevents them from working or reaching work, they are nevertheless entitled to their wages as if they had not been absent from work. This absence should be for 3 days at a time and not more than 6 calendar days in a year.

The plaintiffs testified that they were denied this right as well. PW3 stated that whenever emergency leave was applied for, it would instead be deducted from the annual leave accumulated and just like sick leave, emergency leave had to be requested using the forms template tendered in Court. The defendant however declined to furnish these forms in court following the application brought the plaintiffs. He therefore submitted that the plaintiffs are entitled to their emergency leave not paid for.

Counsel for the defendant submitted that emergency leave or compassionate leave wasn't a monetary allowance as claimed by the plaintiffs. It simply meant that if you were off for some allowed days because of a loss of dear one, then your pay wouldn't be withheld. It is not that the company would instead pay

you some money because you lost a relative as the plaintiffs seem to argue and suggest.

He further submitted that the Plaintiffs failed to prove that indeed such occasions arose and they were denied time off and that their allowances were chopped off. He therefore submitted that this claimed being presented as a special damage fails the test and prayed that court finds so.

Determination

The Employment Act under section 53 provides that the maximum working hours for employees shall be forty eight hours per week. However, an employer and employee may agree that the normal working hours in a week shall be more than forty eight hours.

The Act further provides that where persons are employed in shifts, it shall be permissible to employ persons in excess of ten hours in any one day or forty-eight hours in any one week.

Wages payable under a contract of employment shall be assumed to be in respect of a forty eight-hour week in the absence of an agreement to the contrary and, hours worked in excess of forty eight hours in any one week shall be regarded as "overtime hours".

The plaintiffs claimed that they worked for more than the 48 working hours stipulated under the law and were never paid for overtime.

The defendant through its witness DW1, Ms. Achanda testified to court that the plaintiffs worked in shift system for a total of 210 hours a year which she acknowledged was over and above the stipulated 48 hours per week. She testified that the plaintiffs that worked overtime received their overtime payment from the defendant.

This is quite unbelievable as the defendant did not furnish court with any evidence or documentation to the effect that unpaid overtime renumeration was made to the plaintiffs. She however stated that all documentation was lost in court during the filing process.

Section 101 of the Evidence Act, Cap 6 clearly stipulates that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. The defendant failed to prove that all the unpaid overtime renumeration to the plaintiffs was made after it made this assertion. Court further availed an opportunity to the defendant to produce duplicate documentation as evidence having lost all the original copies but failed to.

I note further that this claim was included in the initial claim before the labour officer in 2007. However, the defendant denied the same and contended in his defence; "The company denies owing any of the complainants any unpaid overtime dues and avers that where the employees were required to work overtime they were duly remunerated at 1.5times the hourly wage. Further submissions on this issue shall be made after the files of the complainants have

been audited by the Arbitrator for the purpose of establishing whether or not any overtime was worked and if so, whether it was actually paid."

Since that time the defendant was aware that this was in issue and never came up with the report on overtime pay. This court would not take the excuse made by DW 1 Achanda that the payslips for overtime pay went missing in court.

I therefore find that the plaintiffs indeed worked overtime during the shift system for the defendant. They worked an average of 11 hours a day and they ought to be paid for the overtime for the period in issue.

In respect of the annual accrued leave, plaintiffs contend that they did not go on leave for the year 2005-2006. The defendant witness testified that all the plaintiffs received their annual leave. The plaintiffs had to furnish evidence of application for leave and they had to show whether the said leave was denied by the defendant. A mere statement that leave was not taken is not sufficient and it upon denial of taking leave that an employee is entitled to payment in lieu of annual leave.

This court will not take the blanket denial of taking leave since each of the plaintiff would have taken leave during the specific time of the year to their convenience. In absence of any applications for leave by the plaintiffs, it would be difficult for the court to establish whether the plaintiffs indeed never took their leave. The Employment contract provided for mandatory taking of leave for any balance of leave accumulated up to a maximum of two years.

The claim for payment of in lieu of untaken leave is not proved. The alleged contention of untaken leve cannot be taken to mean all the employees at the time had not taken leave. The plaintiffs had a duty to prove that each of them did not take their leave and thus are entitled to payment in lieu thereof.

In respect of the plaintiffs' claim for weekly rest, the plaintiffs testified that much as they took a 3 days' rest as stipulated by the contracts; the defendant withheld their pay for all these days as they were paid for the times they were on duty. This therefore meant that they did not receive any pay for the day stipulated under the law as a day's rest.

The defendant's witness argued that the plaintiffs' were not paid salary but wages per hourly rate.

Section 52 of the Employment Act provides that where an employee is employed on a contract under which wages are calculated by reference to a period of one week or more, a deduction shall not be made from his or her wages on account of his or her not working, or not attending at his or her place of work, on the weekly rest day.

From the evidence adduced by both parties, court is satisfied that the plaintiffs took their weekly rest during the time of employment. The law provides that the employee's salary or wages shall not be deducted for the day taken as weekly rest. The defendant contended that it pays for 'wages per hour worked'; therefore section 52(1) of the Act does not apply to its employees as wages are not calculated with reference to a period of one week.

I therefore find that the plaintiffs were accorded weekly rest during their terms of employment but the rest day was not paid for since the defendant computed their salary as wages per hour worked. This was intended to circumvent the law to that extent it was wrong and erroneous since they received payments at the end of the month as a lumpsum payment which is a salary. The payslips clearly indicate that they were paid a salary. The plaintiffs are entitled to the payment for the unpaid weekly day rest.

In respect of the claim for lunch break, the plaintiffs claimed that they were not granted the mandatory thirty minutes break in accordance with section 53 (6) of the Employment Act.

The court has considered both the parties' evidence on record and must state that it is quite unbelievable that the plaintiffs did not receive any 30 minute rest while on duty stations to even accommodate their lunch time as claimed. The plaintiffs testified that the defendant provided lunch for their personnel at their stations to obviate the need for a lunch break at the rate of UGX. 27,000/= but they ceased between 2002- 2006. The plaintiffs were also allowed to pack and also carry their own lunch during work.

As rightly stated by the plaintiffs' counsel, the law does not provide for lunch time break or lunch time allowance as claimed by the plaintiffs. It rather provides for at least a mandatory thirty-minute break where the maximum working hours are at least eight hours each day to the employees.

This court is therefore satisfied that the plaintiffs were accorded a thirty minute break during their shifts and are therefore for not entitled to their claim in this respect.

In respect of the claim for sick leave, the plaintiffs' witnesses testified that they were not granted their full pay in respect of the days they went on sick leave. It was submitted that in order to assert this claim, the plaintiffs had to furnish their sick leave forms to the defendant indicating that they notified and asked the employer for sick leave and their medical certificates or documents.

Much as the defendant witness testified that the defendant made all payments in respect of the sick leave, it did not adduce evidence to support this claim.

The plaintiffs had a duty to show court that when they went on sick leave, there salary was deducted off due to absence from work or that they were not paid any sick leave allowance. This is a question of fact and it had to be proved by some form of evidence as the employment contract provided; *…..Any absence due to incapacity will only be paid for, up to entitlement, upon production of a medical certificate signed by a registered medical practitioner….*

The plaintiffs' counsel in his submissions contended that the defendant's general manager admitted that 25,000,000/= was pending payment to employees as a direct result of sick leave. This admission did not mean it was only the plaintiffs who had a claim for the sick leave allowance. The same could have been for all other employees of the defendant. This court should not make an assumption that all this money should be shared out to all the plaintiffs in absence of any evidence to prove attendance to a medical practitioner duly registered.

In absence of any such evidence to prove deduction of salary due to sick leave, this court cannot grant the said claim for payment of sick leave allowance.

In regards to the plaintiffs' claim of emergency leave, the plaintiffs testified that they were denied this right as provided for under the law. PW3 stated that whenever emergency leave was applied for, it would be instead deducted from the annual leave accumulated. The defendant witness denied this allegation and contended that compassionate leave was taken and whenever allowed they would compute their wages inclusive of the compassionate leave.

As submitted by the defence counsel, the plaintiffs had to prove that they sought emergency leave and that when the same was granted it was later deducted from computation of their salary. The plaintiff have merely alleged that they were deducted and this court cannot assume that all the employees lost dear ones during their employment in order to be entitled to such emergency leave or that the same was deducted from their annual leave.

I therefore find that the plaintiffs are not entitled to their claim in respect of emergency leave.

Issue 3

What remedies are available to the parties.

The plaintiffs sought orders in respect of general damages worth UGX. 200,000,000/= for each of the 153 plaintiffs which would result in a total sum of UGX. 30,600,000,000/= and special damages for overtime, annual leave,

emergency leave, sick leave, weekly rest, and untaken 30 minutes break worth UGX. 455,502,895/=, commercial interest and legal costs.

The plaintiffs prayed for interest on the special and general damages at the rate of 30% per annum from the date the cause of action arose until payment in full as well as legal costs.

This court hereby grants the plaintiffs the following orders;

1. A declaration that the plaintiffs are entitled to claims in respect of unpaid overtime and weekly rest day.
2. The same shall be computed and agreed upon between the plaintiffs' counsel and the defence counsel and submitted before the court (Registrar) for endorsement in a tabular form within two weeks.
3. The plaintiffs are awarded interest on the said amount at 8% per annum from the date of filing this matter.
4. The plaintiffs are awarded costs.

I so order.

SSEKAANA MUSA
JUDGE
18th September 2020