

THE REPUBLIC OF UGANDA
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA
LABOUR DISPUTE NO. 57/2017
ARISING FROM MGLSD LD NO.471/2017

JOHN KIZITO **CLAIMANT**

VERSUS

FINCA UGANDA LTD **RESPONDENT**

BEFORE:

- 1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
- 2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

PANELISTS

- 1. MR. ABRAHAM BWIRE**
- 2. MS. JULIANNYACHWO**
- 3. MR. EDSON MAVUNWA**

AWARD

INTRODUCTION

The claim is brought against the respondents for unfair and unlawful dismissal, breach of contract of employment, salary arrears, general damages, special damages exemplary and aggravated damages, severance allowance, interest and costs of suit.

FACTS

The Claimant was employed by the Respondent as its chief financial Officer, he was subsequently elevated to the position of Executive Director subject to the approval of Bank of Uganda. On 16/08/2016, bank of Uganda wrote to the Claimant removing him for senior management and the Board of directors. On the 14/09/2016 the respondent terminated his employment. According to him he was terminated following the issuance of a draft an internal Audit report, which alleged without notice, or a hearing.

ISSUES

1. Whether the Claimant was unlawfully dismissed by the Respondent?
2. Whether the Claimant is entitled to reliefs sought.

SUBMISSIONS

1. Whether the Claimant was unlawfully dismissed by the Respondent?

In submission Counsel cited Section 2 of the Employment Act 2006 which states that,

“termination of employment means the discharge from an employment at the initiative of the employer for justifiable reasons other than misconduct such as expiry of contract, attainment if retirement age etc”

Counsel contended that although RW1 testified that the claimant was not terminated for any verifiable misconduct, she admitted that the Respondent supplied Bank of Uganda with a draft internal Audit report in which several allegations of conflict of interest were made against the Claimant by the respondent’s internal Auditors, leading to his removal by Bank of Uganda. He

further contended that the report which was relied upon was a draft report which was only concluded in September 2016 and discussed in October 2016 after the Claimant's dismissal. He insisted that contrary to RW1's testimony the Claimant was terminated for verifiable misconduct. According to him RW1's testimony was intended to mislead court into believing that disciplinary proceedings were not necessary in this case. He refuted the argument that the Claimant's employment was frustrated by the Respondent when she supplied the Bank of Uganda with an unfinished audit Report ,which was the basis of BOU's action against the claimant. He cited page 1130 of the 27th edition of **CHITTY ON CONTRACTS** which states that *"the essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. Thus, a contracting party cannot rely on self-induced frustration, that is on a frustration due to his own conduct or to the conduct of those for whom he is responsible.* He also cites **Bank of Uganda vs Arabe Espanol CA No.23/2000** in which court held that since the appellant had contributed to the frustration, they could not therefore rely on it as a defence.

According to Counsel, RW1's testimony was hearsay because she stated that Bank of Uganda onsite inspections were done routinely, yet she denied ever seeing an onsite inspection report or what was contained in it. He cited Article 44 (c) which guarantees the right to a fair hearing and section 66 of the Employment Act and clause 12.1.9, which is to the same effect and stated that none of them was followed. He also contended that the Rule, Disciplinary code in schedule 1 of the Employment Act 2006, which required the employer to inform the employee about their rights when accused of an infringement and it also sets out the disciplinary procedures to be followed. He asserted that the Claimant was not given a fair hearing because the Claimant's representations were not included in

the report and the audit findings by the audit team chose to take on the role of Judge and jury. He cited **Wakabi Fred vs Bank of Uganda LDC No. 0004/2015** in which this court laid down the tenets of a fair hearing to include; the right to be notified about the allegations to allow for time to prepare a defence, a chance to cross examine or challenge any findings at the hearing and a chance to appear in person before an impartial committee to be heard in the presences of another person if so desired. And **Florence Mufumba vs UDB LDC No. 138/2014** where this court held that whether the employer chooses to terminate or dismiss an employee, the employee is entitled to know the reason(s) for the dismissal or termination.

In reply Counsel for the Respondent submitted that the claimant was neither charged with verifiable misconduct nor subjected to disciplinary proceedings therefore he was not dismissed. It was his argument that his contract was frustrated by operation of the law when he was removed from the management and Board of FINCA Uganda Limited by the Bank of Uganda (BOU). He asserted that the reasons for termination by an employer for reasons other than misconduct under section 2 were not exhaustive and the claimant's removal from the Management and Board of Bank of Uganda was such a reason.

It was his submission that the ***"doctrine of frustration"*** as pleaded in the instant case is different from frustration as used in the strict sense of contract law. According to him frustration as used by the Respondent had the normal English meaning attached to it to mean ***"the prevention of achieving a goal, success or the fulfilment of something."*** According to him, the performance of the Claimant's contract was frustrated by operation of law therefore the Claimant's

arguments in relation to “*frustration*” in strict contract terms was misplaced and **Bank Of Uganda Vs Banaco Arab Espanol** (supra) is irrelevant to this case because the contract therein was not an employment contract but a money lending contract. He quoted, Lord Lowry in, **Tarnesby v Kensington and Chelsea and Westminster Area Health Authority (Teaching) [1981] ICR 615**, who stated that:

“I would finally observe that, in my view, this is not a case of frustration as the term is understood in the law of contract. The Appellant’s suspension from the register was not an unforeseen or unprovided for event brought about by legislation or otherwise but (as erasure had always been) was a contemplated misfortune the effect of which was clearly preordained.”

He argued that the Claimant’s employment with the Respondent and his qualification under the Micro Finance Deposit taking Institutions Act, 2003(MDI Act) was so intertwined that neither could exist without the other. Disqualification under the MDI Act would therefore not leave the Claimant with any employment contract. He cited section 22 of the Act which provides that:

“No person shall become a director of an Institution without the approval of the central Bank and the Central Bank shall have due regard to the fit and proper person criteria prescribed in second schedule to this Act.”

He asserted that pursuant to that Section the Claimant’s appointment letter had a proviso to the effect that his appointment was subject to his successful fit and proper vetting by Bank of Uganda and indeed the Claimant’s appointment was approved by central Bank. He further stated that Section 23(f) of the same Act disqualifies a person who does not satisfy the fit and proper criteria from becoming a director of an MDI and that Section 58(n) and (m) of the MDI Act,

dressed the BOU with authority if it forms the opinion that an institution or its directors or board of Directors had contravened any term or condition of its license or any provision of the Act or any direction, requirement or duty or order made under the Act, among other things;

“to instruct the institution to suspend or remove any director, officer or employee from his or her duties; or to remove or suspend any person from the management of the affairs of the institution.”

Counsel asserted that in this case the BOU chose to remove the Claimant from his position as per letter marked EX13, on the Claimant’s trial bundle which stated in part that:

“ During an onsite inspection of FINCA(U) Ltd as at April 2016, Bank of Uganda noted that you as the executive Director , received preferential interest rates of 14.5 and 21.5% for fixed Deposits, ... therefore pursuant to section 22 and 24 of the MDI Act, 2003, you are hereby removed from the management and Board of Directors of FINCA (U) Ltd with immediate effect ...”

He refuted the claim that the Respondent had intentionally submitted an incomplete audit report to BOU which implicated the Claimant and he was condemned without hearing his side of the story. According to Counsel the letter of removal referred to an onsite inspection in April 2016, and BOU formed its own opinion about the Claimant. It was further his submission that the claimant under paragraph 16 and 17 of his evidence in chief admitted that his input was considered during the audit process and this testimony was not controverted at the hearing in Court. Instead it was corroborated by a trail of e-mails marked EX7,

on pages 157 to 176 of the Claimant's trial bundle, showing that he made his input into the audit process. Counsel was of the view that it was for this very reason that the High court division in **John Kizito v Bank of Uganda, Msic. Cause No. 244/2016**, found that the Claimant was accorded a fair hearing by BOU and the fact that the audit reports were in draft form, did not stifle his right to a hearing. In any case the Respondent was statutorily obligated under section 56 of the MDI Act to hand over any information requested of it by the BOU, and according to RW1 the Respondent had no option but to hand over the draft audit report when it was demanded for by the BOU. He concluded that in the circumstances the claimant's employment was automatically frustrated by operation of law, from the moment the BOU declared the him unfit to hold his position, thus rendering the Respondent incompetent to take any further action regarding the Claimant. He also cited Lord Russell of Kolwen in the **Tarnesby** case (supra) where a psychiatrist consultant was charged with professional misconduct before the disciplinary committee of the General Medical Council and the Council ordered that his name is erased from the register under the Medical Health Act 1956, he stated thus:

“Erasure in my opinion has brought about the statutory ban in this case and an automatic termination by law of the appellant's appointment and the contract with the Board of which has the basis of appointment. The contention put forward was that the appointment was one thing and the contract of employment was another, the section affecting only appointment. I am wholly unable to accept that proposition: the contract of employment and the appointment were not two things but one ...

accordingly I have no hesitation in arriving at the conclusion that this appeal must be dismissed.”

According to him the claimant was not entitled to the rights envisioned under section 66 of the Employment Act, because he did not commit any disciplinary infraction nor was, he charged with any as was confirmed by RW1, who stated that the audit was routine and not disciplinary in nature. And in any case, it was not limited to the Claimant alone. In Counsel's opinion although the findings of an audit could form a basis for a disciplinary process, it was not a disciplinary process and therefore it was not a hearing. In the instant case the audit was routine which escalated into the onsite visit to the Respondent, by the BOU.

He contended that it was not the respondent's role to determine the fit and proper test, but the BOU, therefore there the Respondent had no obligation to follow the principles of natural justice when discharging the Claimant and the High Court Civil division found as a matter of fact that the Claimant was accorded a fair hearing.

DECISION OF COURT

1. Whether the Claimant was unlawfully dismissed by the Respondent?

Before we resolve this issue, we think it is important to discuss the basis of the employment relationship between the Claimant and the Respondent. The Claimant was appointed to the position of Executive Director by the Respondent. However according to Section 22 (2) of the Micro Finance Deposit-Taking Institutions Act, 2003(MDI) the assumption to the position of Executive Director was subject to the approval and regulation by the Central Bank, Bank of Uganda (BOU). Section 22(2) provides that:

“(2) No person shall become director of an institution without the approval of the central Bank and the Central bank shall have regard for the fit and proper person criteria prescribed in the schedule to this Act.”

The Respondent as a Micro Finance Deposit taking Institution is governed by the MDI Act, 2003, which provides for its licensing, regulation and supervision of the Respondent by the Central Bank of Uganda (BOU). The Claimant’s letter of appointment stated in part as follows:

“... ”

This appointment takes effect on the first day of April 2015 and it is subject to your successful fit and proper vetting by Bank of Uganda.

Upon your successful vetting your new salary shall be ...”

It is not disputed that the Claimant’s appointment was approved by the BOU as provided for under the MDI Act, 2003. The wording of the Claimant’s letter of appointment (supra) left no doubt in our minds that his appointment could not stand without the approval and regulation of the Central Bank (BOU). It follows therefore that whereas the Respondent determined the Claimant’s job description his appointment to this position could not stand without the approval of BOU. We are further persuaded by the holding in **Tarnesby** (supra), which is to the effect that in a situation where a person’s appointment was subject to the approval, control or supervision by another body, renders the appointment and the contract of service (terms and conditions of appointment) as one and the same thing.

We therefore are inclined to believe Counsel for the Respondent that the Claimant's appointment and his terms of the appointment were so intertwined and were one and the same thing. In the circumstances we agree with his argument that **Bank of Uganda Vs Banaco Arab Espanol** was not relevant to this case because the contract in that case was a money lending contract and not a contract of service/employment.

However the Central Bank (BOU), later invoked Section 58 of the MDI Act and removed the Claimant from the Position of Executive Director on the grounds that he did not comply with the fit and proper criteria as provided under Section 23(f) of the same Act. Section 58(n) of the MDI Act provides that:

"If the Central Bank is satisfied that an institution or its director(s) or board of directors has contravened any term or condition of its license or any provision of this Act or any direction, or requirement or duty or order made under this Act, the Central bank may subject to this Section do any or more of the following

...

(n) remove or suspend any person from the management of the affairs of the institution..."

His removal was upheld by the High Court in **John Kizito v Bank of Uganda Misc. Appl. No.244/2016.**

The contention of the Claimant in the instant case as we understand it is that, the Respondent owed him a duty to follow the procedure for termination as provided

under Article 44 of the Constitution of Uganda and Section 66 of the Employment Act 2006, before discharging him and she did not do so.

He contended that his removal was caused by the Respondent, when she furnished the Central Bank with an incomplete audit report which implicated him, and he was removed without being accorded a fair hearing in accordance to Article 44 and Section 66 of the Employment Act.

As already established the Claimant's contract of Service was a unique one given that it was subject to the approval of the Central Bank (BOU) which plays a supervisory role over the Respondent. In the instant case therefore the removal of the Claimant from the position of Executive Director by the Central Bank, frustrated the terms and conditions of the Claimants contract thus rendering the contract incompetent.

We however do not agree with the argument of Counsel for the Respondent that the removal of the Claimant in the instant case was not as a result of his misconduct or for an alleged infraction on his part. The letter of removal clearly states that the reason for his removal was a result of the findings by the BOU onsite inspection that he was in conflict of interest for receiving preferential interest rates on his fixed deposits Accounts with the Respondent. The contention as to whether the removal followed due process was settled in **John Kizito v Bank of Uganda, Msic. Cause No. 244/2016** (supra) in which Lady Justice Henrietta Wolaya held that the Claimant had been accorded a fair hearing by the BOU and therefore due process was followed.

So what was the effect of the Respondent's letter discharging the Claimant from employment?

The letter discharging the Claimant made reference to the Central Bank's letter which removed him from his position at the Respondent, on the grounds that he was receiving preferential interest rates on his fixed deposits Accounts he held with the Respondent. The removal as already discussed rendered the terms of his contract incompetent and impossible to implement by the Respondent.

The letter stated as follows:

"We refer to the letter dated 16th August 2016 and referenced EDS. 123.2B from the Executive Director Supervision, Bank of Uganda removing you from the Management and Board of Directors of FINCA(U) Ltd with immediate effect.

As a result of the above directive exercised pursuant to powers conferred on the Central Bank under Micro Finance Deposit- Taking Institutions Act No. 3 of 2003, your contract of employment with FINCA has become impossible to perform and it is therefore frustrated by operation of law.

FINCA has been left with no choice but to treat the employment contract as discharged effective from 16th August 2016 on grounds of frustration; tht is to say your removal by the Central Bank from the Management and Board of Directors of FINCA Uganda Limited..."

Section 40 of the Employment Act provides that:

"(1) Every employer shall provide his or her employee with work-

(a) in accordance with the contract of service;

(b) during the period for which the contract is binding and

(c) on the number of days equal to the number working days express or impliedly provided for in the contract

(2) The duty in subsection (1) shall not apply if-

(a) the contract is frustrated ...”

The Claimant’s contract having been rendered incompetent by his removal from the position of Executive Director by the Central Bank (BOU) left the Respondent with no obligation to provide him with work under this contract, as provided under Section 40. It is our considered opinion, that in accordance with Section 40(2)(a) and in the circumstances of this case, the only option left for the Respondent was to discharge the claimant which was done via the letter discharging the Claimant (Supra).

The Claimant’s contention however was that the removal was done without following due process. The holding of the High Court in **Kizito vs Bank of Uganda Misc. Cause No. 244/2016**, as already stated, was to the effect that the Central Bank followed due process before removing the Claimant, therefore we shall not dwell on it.

We respectfully do not agree with the argument by Counsel for the Claimant, that notwithstanding the removal by the Central Bank, the Respondent contravened Article 44 of the Constitution of the Republic of Uganda and Section 66 of the Employment Act 2006, because she issued the Bank of Uganda an incomplete Audit report which implicated the Claimant and led to his removal, given the decision in **Misc. Cause No. 244/2016(supra)**.

We do not agree with the contention that the Respondent owed the Claimant a duty to follow Article 44 and Section 66(supra), given that the removal was done by the Central Bank and given that **John Kizito v Bank of Uganda**(supra), has not been set aside by any other decision. It is our considered opinion that after the Central Bank's withdrawal of its approval when it removed the Claimant from the position of Executive Director, the Respondent's obligation to accord him the rights envisaged under Article 44 and Section 66(supra) ceased.

In the circumstances, the contract having been rendered incompetent by his removal by the Central bank, the Respondent in our view was left with no option to discharge him and in our view the letter of discharge did not contravene any law, therefore it was lawful. This issue is therefore resolved in the negative.

2. Whether the Claimant is entitled to reliefs sought?

Having found that his discharge by the Respondent was done lawfully, the Claimant has no remedies under this claim.

In conclusion this claim fails with no order as to costs.

Delivered and signed by:

1. THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE .

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2. THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ...

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PANELISTS

1. MR. ABRAHAM BWIRE ..

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2. MS. JULIAN NYACHWO

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3. MR. EDSON MAVUNWA

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DATE: 25/SEPTEMBER/2019