

**THE REPUBLIC OF UGANDA**  
**IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA**  
**LABOUR DISPUTE REFERENCE No.123 OF 2017**  
**ARISING FROM LD NO. 175/15/12/2016**

**OKECH JOHNSON** ..... **CLAIMANT**

**VERSUS**

**WEST ACHOLI COOPERATIVE UNION** ..... **RESPONDENT**

**BEFORE:**

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

**PANELISTS**

- 1.MS. ADRINE NAMARA**
- 2.MS. SUSAN NABIRYE**
- 3. MR. MICHEAL MATOVU**

**AWARD**

**BRIEF FACTS**

The Claimant was employed by the Respondent Co-operative Union, as its Secretary Manager from 1998 to 2016. On 31/05/2016, he was interdicted from office on charges of causing financial loss to the Respondent, being inefficient unqualified, for insubordination and for putting the name of the Respondent in disrepute. It was his case that on 28/10/2016, he was dismissed, without being accorded a fair hearing, therefore his dismissal was unlawful and unfair. He prayed for declarations and orders that he is paid a sum of Ugx.126, 107, 879/=

for un paid salary between 2014 and 2016, an award of general, specific and exemplary damages for unlawful and unfair termination and costs of this suit.

#### **ISSUES:**

- 1. Whether the Claimant was wrongfully and unlawfully dismissed?**
- 2. What remedies are available to the parties?**

#### **REPRESENTATION**

The Claimant was represented by Ms. Atim Evelyn of M/s Buwembo and Company Advocates Kampala and the Respondent Mr. Geoffrey Bons Anyuru of M/s Odongo and Company Advocates, Gulu.

#### **EVIDENCE ADDUCED**

The Claimant adduced his own evidence and through Mr. Ochan Sabino the Respondent's former chairperson. He testified that, by the time he was relieved of his duties he was 61 years old and at the time, he was the Respondent's Accounting Officer. It was his testimony that the bye laws of the Union provided that retirement age was 60 years. According to his recollection, one of the reasons he was interdicted, was an allegation that he misappropriated the Respondent's funds, amounting approximately Ugx. 77 million, which he gave to cotton agents but failed to recover. He also did not refund Ugx. 4,500,000/- which was given to Kweyo Co-operative Union by WE EFFECT, for purposes of ploughing land. He admitted that the Ugx. 12 million he collected as rent and the money meant for the Unions travel to Dubai were reflected in the Union's receipt book, however he did not adduce the receipt book as evidence. He said that, the Respondent was supposed to give him accommodation but the unit he was supposed to occupy was occupied by another officer and efforts to cause Board to give him alternative accommodation were futile.

He claimed that, the Respondent Union owed him salary arrears and he attached several credit notes to the record as proof. According to him, the credit notes were for different months and they were prepared by the Union Accountant. It was his testimony that the fact that some of the credit notes at pages 25-26 bore the stamp dated 7/03/2016, did not mean that they were a forgery. He also claimed for unremitted NSSF remittances from January 2016.

CW2, Mr. Ochan Sabino, testified that, he founded the Respondent Union in 1997 and was its first chairperson. He participated in the recruitment of the Claimant, as Secretary Manager. According to him the Claimant possessed the required certificate in co-operatives and experience in Co-operative development. However, at the time these qualifications were not stipulated under the byelaws of the Union. Another consideration was the fact that, the Claimant was already acting in the position of Secretary Manager and the recruitment was approved by the Commissioner Co-operatives, although he did not adduce the approval in court. He said that, he was not conversant with the bye laws attached at page 12 of the trial bundle and he was not sure whether they are the ones he handed over to his successor were the byelaws, Mr.Oyugi Jackson the current chairperson. He was not sure whether the byelaws which were shown to him in Court were the byelaws which were he handed over to him.

The Respondent adduced evidence through Mr. Oyugi Jackson, her current chairperson, who said that, he was the Claimant's immediate supervisor and the Claimant was the Respondent's Accounting Officer. According to him the Claimant's responsibilities included disbursement of funds to members of the Union. He was terminated for misappropriating the Respondents funds and because of his inefficiency. He said that, these allegations were established by

an investigation which was carried out by the External Auditor and the Commissioner co-operatives. He said these reports were shared with the Claimant at meeting, before he was interdicted. The funds which the Audit established were not accounted for had not been recovered by the time of this hearing and some of the money was recovered from the Claimant at Police.

RW2, Mr. Ogen Bob the Respondent's General Manager, testified that the Claimant made a loss of Ugx. 93 million but it was not a bad debt as the Claimant wanted Court to believe. He said the losses were discovered by the External Auditor and the Board invited him to defend himself followed by a process. It was his testimony that the documents regarding that process were with the Respondent's lawyer.

## **SUBMISSIONS AND RESOLUTION OF ISSUES**

### **1.whether the Claimant was wrongfully and unlawfully dismissed?**

It was the submission of Counsel for the Claimant that, the Claimant was confirmed as Secretary Manager of the Respondent in 1998 and he worked for the Respondent until his termination in 2016. According to him, on 31/05/2016, the Claimant was summoned to a board meeting and issued with an interdiction letter and immediately suspended. He was subsequently terminated in October 2016, on grounds that he was inefficient, unqualified, insubordinate and for putting the Respondent's name in disrepute. She contended that, before the termination, the Claimant was not given an opportunity to defend himself and this was not denied by the Respondent's chairperson a one Mr.Oyugi Jackson.

According to Counsel the termination was done in violation of terms and conditions of service No. 26, which provides for formal disciplinary action, which includes a report of the allegations being given to the employee in issue to

enable him/her prepare a defence. Citing Section 66 of the Employment Act and **Ebiju James vs Umeme Limited CS No. 0133 of 2012**, she argued that a fair hearing was non-derogable, therefore court should find that the Claimant's dismissal was unlawful.

In reply Counsel for the Respondent submitted that the Claimant did not deny that he was invited for an investigation which he attended. He was also given 2 days within which to prepare his report and he admitted that his interdiction letter raised questions about misappropriation of Ugx. 77,385,900/- for cotton, Ugx, 4,500,000/- for ploughing Kweyo Co-operative Society's land and Ugx 12,000,000/- from tenants and entering into illegal agreements with clients. He also received bribes. According to Counsel the Claimant admitted that, all these monies had not been recovered by the time of this hearing.

He contended that the Respondent followed the proper procedure for termination, because, the claimant was interdicted, to pave way for investigation, the investigation was carried out and he participated in it. He was given time to defend himself and the termination letter stated the reasons for his termination. He argued that the termination was done in accordance with Section 69 of the Employment Act, which grants an employee a right to summarily dismiss an employee, where the employee by his or her conduct has indicated that he or she has fundamentally broken his or her obligations under the contract of service. He also cited Clause 26(a) (v) of the Respondent's terms and Conditions of service, which is to the same effect.

He insisted that, during the hearing, the Claimant admitted that he attended the investigation meeting and the report of the same is on the record, at pages 43-46 of the Respondent's trial bundle and pages 3-5 on the Claimant's trial bundle. Therefore, the Respondent complied with sections 66 and 68 of the Employment

Act 2006. He insisted that the disciplinary proceedings in employment matters start with interdiction, to pave way for investigation, then a hearing is conducted. He also relied on **Sakwa Eric Joseph vs A.g & Anor, Misc Appln. No. 10/2020, and Oyaro John Owiny vs Kitgum Municipal Council, Misc. Cause 07/2018**, for the legal proposition that, interdiction was not a disciplinary sanction but a step that is always taken before a disciplinary inquiry, enquiry and adjudication.

He contradicted himself when he stated that, an interdiction did not warrant a hearing but insisted that, the Respondent followed the proper procedure by interdicting the Claimant, because a hearing which was chaired by the Registrar cooperatives was conducted in September 2016, before the termination letter was issued to him. Therefore, the termination was lawful.

In rejoinder, citing **Kalengutsa Vs Bugoye Hydro Ltd, LDR No. 138/2016**, Counsel for the Claimant insisted that it was mandatory to comply with the basic principles of a fair hearing as enshrined in Article 44(c ) of the Constitution of Uganda as Amended and as provided under section 66 of the Employment Act 2006, before terminating an employee. She insisted that this was not done in the instant case, therefore the termination was unlawful.

#### **DECISION OF COURT.**

It is not in dispute that by the time of his termination, the Claimant was the Respondent's Secretary Manager and her Accounting Officer. It is also not in dispute that the Respondent interdicted him on allegations of insubordination, misappropriation of Ugx. 77, 356,000/- for cotton, Ugx. 4,500,000/- for Kweyo Society, failing to account for Ugx, 12,000,000/ from rent, and for putting the Respondent's name in disrepute. It is further not in dispute that an investigation

was carried out by the external Auditor and Commissioner Cooperatives and the Claimant was given 2 days to respond to the investigation.

What is in dispute is, whether the Respondent complied with the principles of a fair hearing as enshrined in Article 44(c) of the Constitution of Uganda and section 66 of the Employment Act, which provide that, before the termination/dismissal of an employee, the employer must explain to the employee the reason why he or she is considering the termination/dismissal and the employee must be given an opportunity to respond to the reasons in writing and or before an impartial disciplinary body as elucidated in **Ebiju James vs UMEME Ltd CS No. 0133 of 2012,(supra)** that:

- i. *“Notification of the allegations against the plaintiff was served on him and sufficient time for the plaintiff to prepare a defence.*
- ii. *The notice should set out clearly what the allegations against the plaintiff and his rights at the oral hearing were. Such rights would include the right be accompanied at the hearing, the right to cross examine the defendants witness or call witnesses of his own.*
- iii. *The plaintiff should be given a chance to appear and present his case before an impartial committee in charge of the disciplinary issues of the defendant.” ....*

After carefully perusing the evidence on the record and the one adduced in court, it is our finding that, the allegation that, the Claimant was not qualified to hold the position of Secretary Manager could not hold because, at the time he was recruited in 1998, he possessed the required certificate in Cooperatives and the necessary experience to hold the position. In any case it was the Respondent who recruited him after finding him qualified for the job. No evidence was adduced by the Respondent to the contrary, therefore she cannot

turn around now to argue that he lacked the necessary qualifications for the Job, especially after rendering his services to her for about 18 years. This Court in **Douglas Lukwago vs Uganda Registration Services Bureau, LDC No.057/2016**, held that:

*“...it is the employer who sets the standard and qualifications for the job, the processes and procedures for recruitment and any other preliminary requirements which the employee must fulfill before the appointment. Therefore, the employee only subjects him or herself to the pre-employment requirements before recruitment. Once the parties have entered a contract of service, they are both bound by the terms of the contract....”*

In the Circumstances, the Claimant qualified to hold the position of Secretary Manager when he was recruited in 1998, because, he had the required qualifications.

The fact that he had reached the mandatory retirement age was not in dispute, either. However, he was still in the employ of the Respondent at the time he was terminated. In our considered view, this meant that the Respondent had acquiesced, to his remaining in office beyond the retirement age and as already stated, it is the employer who determines the terms and conditions to employment. In the circumstances, the Claimant cannot be faulted for being employed by the Respondent beyond the mandatory retirement age.

It is trite, that the right of an employer to terminate an employee cannot be fettered by the Courts so long as he or she follows the procedure for termination under the Employment Act. Therefore, termination on grounds of misconduct, must be done after proving the allegations of misconduct in accordance with section 66 and 68 of the Employment Act.



It was the Claimant's evidence in chief that he was responsible for recording agents who supplied the Respondent Union with cotton and for issuing them with supply agreements. It was also his testimony that, as Secretary Manager he was also responsible for recovering the money from these cotton agents. He did not deny that there was accumulation of a list of debtors owing the Respondent Ugx. 77,385,900/-, which he had not recovered by the time of the hearing. It was also his testimony that some of the agents listed as debtors were not properly registered under the Respondent Union, yet he knew that he was not supposed to trade with non-registered agents. He also admitted that he did not pay Kweyo Co-opertive society a balance of Ugx. 4,500,000/ meant for ploughing 82 acres of their land, despite reminders to do so by the Union members themselves and a warning from Mr. Oyugi, the Respondent's Chairperson, as evidenced by letters at page 179 and 180 of the Respondent's trial bundle respectively. He also admitted that, he received Ugx. 12,000,000/- from a Company called GASCO for a sub- lease/rent, but he did not furnish court with the receipts on which he claimed he remitted the said money to the Respondent's cashier nor did he furnish court with any evidence to show that he accounted for the money which was meant for the Unions travel to Dubai. He admitted that, it was his responsibility to allocate houses to senior staff and although he was entitled to a free house, he decided to rent one on account that the unit which was meant for him was occupied by another person. He however did not attach evidence of the several complaints he claimed he made to the Board, or any negative responses by the Board regarding the Housing issue, to warrant him claiming housing allowance.

Given his admissions above, we found no reason to fault the Respondent for summarily dismissing him in accordance with section 69 of the Employment Act,

for fundamentally breaching his key responsibilities as the Respondent's Secretary Manager and Accounting officer. Section 69 provides that:

**69. Summary Termination**

***(1) summary termination shall take place when an employer terminates the service of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.***

***(2) Subject to this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term***

***(3) An employer is entitled to dismiss summarily and the dismissal shall be termed justified, where the employee has, by his or her conduct indicated that he/she has fundamentally broken his or her obligations arising under the contract of service"***

Clearly the Claimant fundamentally breached his responsibilities as the Respondent's Accounting officer. Notwithstanding these breaches, he was entitled to be subjected to a proper disciplinary process as provided under the Employment Act under section 66 of the Employment Act 2006 and the holding in **Ebiju**(supra).

Having interdicted him to pave way for an investigation, the Respondent was expected to give him an opportunity to respond to the findings of the investigation, before terminating him. It is not in dispute that he was invited to participate in the investigation, which was carried out from 29<sup>th</sup> to 30<sup>th</sup> August 2016, but there was no evidence to indicate that after the investigation, he was given an opportunity to respond to the findings. Section 26 of the Respondent's terms and conditions of service attached on the record, provides for a formal

disciplinary mechanism to the effect that a report of the allegations are given to the employee in issue to enable him/her prepare a defence, the employee shall be given opportunity to discuss his/written defence with the chief executive and under 26(g):

*"... where the employee is aggrieved, he/she shall appeal to the committee and the case shall be disposed off in two months. However if the aggrieved employee is in grade A&B then he/she may appeal to the Registrar of Co-operatives, within 2 months from the date of dismissal."*

The Union terms and conditions define "Chief Executive" as "... refers to either Secretary Manager as to manager in the organisation...".

It also provides that;

*"The Management" refers to Grade A employees (Secretary Manager and Head of Departments).*

We respectfully disagree with the submission of Counsel for the Respondent that, the fact that the Claimant was interdicted and he was given opportunity to participate in the investigation, did not warrant a hearing to be conducted. As rightly pointed out by the same Counsel, an interdiction is the first step taken in a disciplinary process and it is intended to pave way for investigations. An interdiction in our considered view is not different from a suspension pending investigations as provided under section 63 of the Employment Act 2006. The investigation is intended to establish or justify the reason why the employer is considering termination or dismissal. It is intended to prove the infraction/allegation leveled against the employee, as provided under section 68 of the Employment Act. Therefore, even if the employee in issue participates

in the investigation, the investigation cannot be construed to be a hearing within the meaning of section 66 of the Employment Act. Section 66 provides that;

***“66. Notification and hearing before termination***

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

***(2) Notwithstanding any other provision of this part, an employer shall before reaching a decision to dismiss an employee, hear and consider any representations which the employee on the grounds of misconduct or poor performance, and the person, if any chosen by the employee under subsection (1) may make.***

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

***(4) Irrespective of whether any dismissal which is a summary dismissal is justified, or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to four weeks' net pay...***

It is therefore insufficient that, the Claimant in the instant case participated in the investigation. The Respondent should have taken a step further to give him an opportunity to respond to the findings of the investigation and to explain his

defence in a disciplinary hearing as provided under section 66 of Employment Act before the termination took place. In any case, Clause 26 (c) of the Respondent's terms and conditions of service provide for the same process. But this was not the case in the instant case. It is also not in dispute that, the Claimant lodged an appeal to the Registrar Co-operatives but no evidence was adduced to indicate that his Appeal was considered.

In the circumstances, we fault the Respondent for violating the procedure for termination as stipulated under sections 66 and 68 of the Employment Act and its own terms and conditions of service. The Penalty for this violation is provided for under section 66(4) (supra ) which provides that:

***(4) Irrespective of whether any dismissal which is a summary dismissal is justified, or whether the dismissal of the employee is fair, an employer who fails to comply with this section is liable to pay the employee a sum equivalent to four weeks' net pay...***

In conclusion, having established that the Claimant admitted to committing the infractions leveled against him, by the Respondent and they were a fundamental breach of his contract of service as the Respondent's Accounting Officer, the Respondent was justified to summarily dismiss him in accordance with section 69 of the Employment Act 2006,(supra), therefore the dismissal was substantively lawful.

The Respondent is only faulted for not following the correct procedure for termination as laid down under Section 66 of the Employment Act 2006 and in her Terms and Conditions of Service as provided under clause 26(c)(supra). She is therefore, ordered to pay the Claimant 4 weeks wages for procedural impropriety.

## **2.What remedies are available to the parties?**

Although it is our finding that the Claimant was lawfully dismissed, we shall discuss this issue for completeness.

### **a) Unpaid salary**

The Claimant prayed for unpaid salaries of Ugx. 18,340,000/ for some months between 2014 and 2016, based on credit notes which he attached to the record as evidence and to show that his net pay was Ugx. 509,089./=per month.

His appointment letter on the record indicates that, his basic pay was Ugx. 119,240/- per month. There is no evidence to show when and how his salary was increased to Ugx. 509,089/-. We were not able to establish the authenticity of the copies of the Credit notes he attached as evidence, especially given that he testified that they were prepared by Accountant without the Board's approval. It was not clear to this court how the arrears claimed accrued or how they were computed, therefore, there was no basis upon which we could make this award. It is therefore, denied.

### **b) Unremitted NSSF.**

It was his submission that 213 months were unremitted amounting to Ugx. 10,568,057/=. This court has held that given that, NSSF contributions are part of the an employee's remuneration, the his or her property. Therefore an employee has a right to ensure that the Employer remits this contribution to the Fund, notwithstanding section 46 of the NSSF Act, which provides that, any criminal or civil cases regarding among others non-remittance of contributions can only be brought against an employer by Inspector or other officer of the Fund. Therefore an employee should not be barred from pursuing a claim for

non-remittance of NSSF in this court. However, once he or she succeeds, the court shall order that the employer makes the remittance to the Fund in accordance with the NSSF Act.

According to the evidence on the record, in the instant case, the NSSF remittance statement attached at page 29 of the Claimant's trial bundle, shows that his NSSF contributions were remitted until December 2015. He was terminated on 26/10/2016, therefore his claim is for 10 months and not 213 months as claimed. The Respondent having not adduced evidence to show that these contributions were remitted, are hereby ordered to remit the same to the Fund.

### **c) Payment in lieu of leave**

It was the Claimant's submission that he did not take leave in 2016.

Section 54 (1)(a) provides that:

1) Subject to the provisions of this section-

(a) ***"An employee shall once in every calendar year be entitled to a holiday with full pay at the rate of 7 days in respect of each period of a continuous four months' service to be taken at such time during such calendar year as may be agreed between the parties."*** ( emphasis ours).

(b) **An employee shall be entitled to a day's holiday with full pay on every public holiday during his or her employment or, where he or she works for his or her employer on a public holiday, to a day's holiday with full pay at the expense of the employer on some other day that would otherwise be a day of work.**

2) **where an employee who works on a public holiday receives, in respect of work, pay at not less than double the rate payable for work on a day**

**that is not a public holiday, that employee shall not be entitled to a day's holiday with full pay or payment in lieu of the public holiday.**

**3) Subject to subsection (2), any agreement to relinquish the right to the minimum annual holidays as prescribed in this section, or to forgo such a holiday, for compensation or otherwise, shall be null and void.**

**4) This Section shall only to employees-**

**a) Who have performed continuous service for their employer for a minimum period of six months**

**b) Who normally work under a contract of service for sixteen hours a week or more.**

**5) An employee is entitled to receive, upon termination of employment, a holiday with pay proportionate to the length of service for which he or she has not received such a holiday, or compensation in lieu of the holiday.**

The effect of Section 54 is that, even though an employee is entitled to take annual leave, and the employer is obliged to grant his or her employees this annual leave, the dates on which the annual leave is taken must be agreed between the employer and employees( 54(1)(a)). Employees are therefore, expected to apply for leave days and agree with the employer on the dates on which it will be taken. Therefore, a claim for untaken leave can only succeed where the employee can prove that, he or she applied for annual leave and it was denied.

The Claimant in the instant case, did not adduce any evidence to show that he applied for leave and it was denied. In any case he was the Chief Executive of the Respondent, clothed with authority to grant himself leave in agreement with the Board. It is the expectation that as the chief executive who had to grant leave



to his subordinates, he was conversant with the procedure, which he did not apply to himself. In the circumstances this claim has no basis it is denied.

**d)Housing allowance**

His contract clearly stipulated that he was entitled to free housing and it was his testimony that, he was the Officer responsible for allocating senior houses. We do not believe that as the Chief Executive in charge of the Respondent, he could not prevail over the staff who was purportedly occupying his unit to get out. We also do not believe that he failed to formally cause the Board to provide him with alternative accommodation. In any case, there is no evidence that he applied for alternative accommodation or that the Board approved an allowance to cater for his accommodation to warrant this claim. In the circumstances we have no basis to award it. it is denied.

**e) Retirement Benefits.**

Although he stated that he was 61 at the time of his dismissal, the fact that he was still in employment meant that he had opted to disregard Section 40(c) (1) of the Respondent's Terms and conditions of service, which provides for mandatory retirement on attainment of the age of 60 years. By staying on the job after cloaking the retirement age, the Claimant had opted to forfeit his benefits at that point. Having been terminated for misconduct, his claim for retirement benefits cannot hold. The Claim also fails.

**f) General Damages**

Having established that his termination was substantively lawful, he was not entitled to an award of general damages. It is therefore denied.

**g) interest**

The claimant is awarded interest of 15% per annum on the award for 4 weeks' pay for procedural impropriety on the part of the Respondent and on the unremitted NSSF contributions from the date of this award until payment in full.

### **Conclusion**

1. The Claimant's termination was substantively lawful.
2. The Respondent is ordered to pay the Claimant 4 weeks pay for failure to follow the correct procedure for termination.
3. The Respondent is ordered to make the NSSF remittances to the Fund, for the months of January to October 2016.
4. Interest of 15% per annum shall accrue 2 and 3 , from the date of judgment until payment in full.
5. No order as to costs is made.

Delivered and signed by:

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

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

### **PANELISTS**

**1.MS. ADRINE NAMARA** .....

**2.MS. SUSAN NABIRYE** .....

**3. MR. MICHEAL MATOVU** .....

**DATE: 23/03/2021**