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REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI, AG. J.S.C., ODER, J.S.C., & TSEKOOKO, J.S.C.)

CIVIL APPEAL NO. 19 OF 1993

B E T W E E N

DAVID B. KAYONDO :::::::::::::::::::::::::::::::::::::: APPELLANT

A N D

THE CO-OPERATIVE BANK LTD :::::::::::::::::::::::::: RESPONDENT

(Appeal from the judgment and orders of the High Court of Uganda at Kampala, (Okello J.) dated 24/9/1992)

I N

CIVIL SUIT NO. 899 OF 1989

The respondent Bank terminated the service of the appellant as its Secretary. The appelant sued the respondent in the High Court claiming, inter alia, for a declaration that he was still an employee of the respondent. After the hearing of the suit the learned trial judge dismissed the claim because he thought that the matter was a dispute which should have been referred to arbitration by vertue of the provisions of Section 73 of the Co-operative Societies Act, 1970. The appellant brought an appeal to this Court (Civil Appeal No. 11 of 1991). This Court allowed the appeal and remitted the matter to the Court below for the judge to consider the rest of the issues.

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After considering the rest of the issues, the learned judge still dismissed the suit. Hence this appeal.

The background to this case is this. The appellant had been an employee of the respondent since 1st March, 1985. On 1/3/1987 he was appointed acting Secretary of the respondent and was subsequently confirmed in that post on 1st February, 1988 by letter, now exh. P.1.

In the course of 1989, the Board of Directors of the respondent embarked on recorganization and restructuring the Bank in order to enhahce its performance. The Board set up a task force consisting of some of its members including the Chairman. By his letter dated 18/8/1989 (Exh. P.2) the Chairman directed the appellant to go on leave. The task force recommended the removal of the General Manager and the Chief Accountant from the bank and made some other recommendations not relevant to this appeal. From the evidence of Martin Olobo (D.W.1), the Board held closed session meetings on 11/9/1989 and 12/9/1989 during which the Permanent Secretary of the Ministry of Co-operatives and Marketing advised for the appellant and another officer to be sent on forced leave to facilitate further investigations. It appears that the directive in exh. P.2 was not implemented immediately.

On 13/10/1989, the same Chairman wrote exh. P.6 to the Permanent Secretary advising that the appellant "be retired in the interest of the Bank". Things moved very fast. On 16/10/1989 the same Chairman wrote to the appellant exh. P.3 "terminating forth with" the Appellant's service with the Bank. The appellant was to receive cash payment in lieu of notice and any other entitlements due to him. Eventually the decisions and recommendations

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of the Board were purportedly ratified by the Minister of Co-operatives and Marketing. According to the evidence of D.W.1 and Exh. D.8 which is a letter dated 5/7/1990 written to the Chairman by the Permanent Secretary, Ministry of Co-peratives and Marketing, the appellant was retired from the service of the Bank. P.W.2 who is the Registrar of the Co-operative Societies and apparently the technical officer and therefore expert on the matter disrecommended, in writting, the course adopted by the Board. The Board and the Minister ignored his views. Thereafter the Bank worked out what is deemed to be due to the appellant. A sum of Shs. 2,110,717/= (net) was deposited on some account in the Bank to the appellant's credit as his total terminal benefits. This sum is alleged to include cash payment for 283 days of accumulated leave, gratuity and one month's pay in lieu of notice. The appellant declined to collect the money which is apparently still lying at the Bank.

From the evidence of the appellant and D.W.1, neither the Board of Directors, its task force nor any other authority interviewed the appellant before he was first suspended and then summarily retired from the Bank. The evidence of D.W.1 shows that there was no adverse report against the appellant. D.W.1 stated that:-

> "The Permanent Secretary indicated that the two were closely associated with the Chief Accountant/Financial Controller the General Manager and that it was proper that they too be sent on leave."

and of course removed from the service of the Bank.

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In his plaint, the appellant prayed for,

(a) An injuction restraining the (respondent) from treating the (dismissal) letter dated 16th October, 1989 as effectively terminating the Appellant's employment.

(b) A declaration that the Appellant's contract service with the Respondent is still subsisting.

(c) An order that all dues under the contract withheld since 16th October, 1989, be paid to the Appellant.

(d) Damages.

Four issues framed at the trial for decision were:-

1. Whether the matter should first have gone to arbitration in accordance with the Co-operative Societies Act (30/70)

2. What were the terms and conditions of the Plaintiff's contract of employment.

3. Whether letter of 16/10/1989 by the Chairman of the defendant Bank terminating the Plaintiff's service did or did not terminate the contract of employment.

4. What relief if any is the Plaintiff entitled to?

Issue No. 1 was decided by this Court in Civil Appeal No. 10 of 1991 as noted earlier.

In the judgment from which this appeal arises, issues No. 2,3 and 4 were considered before the suit was dismissed.

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Four grounds of appeal set out in the amended memorandum of appeal state that -

1. The learned trial judge erred in holding that the bye-laws of the Respondent Bank did not form part of the terms and conditions of the appellant's contract of service with the Respondent Bank.

2. The learned trial judge erred in holding that the Appellant's employment was lawfully and effectively terminated.

3. The learned trial judge erred in refusing to declare that the Appellant's contract of service was subsisting.

IN THE ALTERNATIVE to 2 and 3 above:

The learned trial judge erred in failing to hold that the termination of Appellant's employment amounting to retirement within the meaning of THE STANDING ORDERS, RULES AND REGULATIONS of the Respondent Bank.

4. The learned trial judge erred in holding that the appellant was not entitled to any relief.

When arguing the first ground, Mr. Mulenga, S.C, learned counsel for the appellant, criticised the learned trial judge for his holding that the Bye-laws of the Respondent Bank did not form part of the contract of employment. Counsel alluded to the contents of Exh. P.2 the letter by which the appellant was appointed Secretary to the Respondent and to the contents of Exh. P.9 and Exh. D.9 which contain respectively, the bye-laws and the Standing Orders of the Respondent. He criticised the learned trial judge's finding that clause 37(i) of the Bye-laws doesn't form part of the

appellant's contract. In counsel's view the bye-laws affected the appellant's terms and conditions of service and so formed part of his terms and conditons of service (see bye-law 41(c)) because the appointment and functions of the Bank Secretary are not set out anywhere else except in the bye-laws.

Counsel contended that bye-laws stipulated the manner in which the Respondent could appoint or terminate the Secretary and further the same bye-law set out the function of the Secretary.

He (counsel) critiised the learned trial judge for relying on the cases of Eley Vs. D.C Sitivelife Assurance Co. (1876) 1 Ex. D 88 and Hickman Vs. Kent or Romney Marsh Sheep Breeders' Association (1915) 1 Ch. D. 881, which counsel contended were distinguishable from the case before us.

Dr. Byamugisha, counsel for the Respondent, submitted on ground one that the bye-laws are not applicable to this cade because of two reasons. First because the provisions of the Co-operative Societies Act, 1970 and The Co-operative Societies Regulations, 1971 (made under the Act) are superior to the bye-laws. That is fact Regulation 27 gave powers of appointment of the Secretary to the committee of the Society (or Board of Directors in this case) and that Regulation 28 sets out duties of the Secretary. According to learned counsel bye-law 37(i) is ultra vires the Co-operative Societies Regulations 1971.

Dr. Byamugisha's second contension is that the bye-laws are inapplicable to this case. That Exh. P.1 (appointment letter) has nothing to show that the appellant's initial appointment was

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approved by the Registrar. I think this point is not valid. The appellant and the Registrar (P.W.2) were not challenged on the approval. Further an act which has been done is presumed to have been properly done. Moreover this was not an issue at the trial.

Dr. Byamugisha submitted further that Exh. P.1 only referred to Standing Orders; that Standing Order 1(iv) (b) shows that all appointments are to be made by the Board and therefore by implication the same board dismisses an employee. On this point of implying power to dismiss, I agree that that would ordinarily be so by virtue of section 24 of the interpretation Decree, 1974. But bye-law 37(i) gives the Board the power to dismiss as I shall show later.

In this case it is clear from the delegation of powers to the respondent by the Minister that the exercise of the power to appoint and to dismiss or terminate services of an employee is subject to express apprpval by the Registrar.

Under Section 79 of the Co-operative Societies Act, 1970 the Minister has power to make regulations for carrying out of the provisions and for the purpose of the Act. By subsection (2) thereof such regulations made by the Minister may -

((a) to (e) inapplicable)

"(f)" Provide for the appointment, suspension and removal of the members of the committee and other officers and for the procedure at meetings of the committee and for the powers to be exercised and the duites to be performed by the committee and

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other officers."

Under S. 87 of the Act, "officer" included Secretary and other employees of a Society. This definition therefore covers the office of the appellant.

The Minister was empowered by the Act, to make regulations to provide for the appointment suspension and removal of the appellant by the respondent. The same Minister was to make regulations to provide for the powers to be execised and duties to be performed by the appellaht. In the exercise of his powers, the Minister enacted the Co-operative Societies Regulations, 1971 (S.1 1971 No. 53) and provided for various matters. By Regulation 6 thereof he authorised three categories of Societies to make their own bye-laws providing for the matters above mentioned which the Minister himself could have provided for specifically by regulations.

For our purpose the relevant providions in Regulation 6 are Sub. Reg. (1) (k) and sub. Reg. (3). They read as follows -

> "6 (1) A Society shall make bye-laws providing for the following matters, that is to say,
>
> (a) - (j) not applicable.
>
> (k) the appointment, suspension and removal of the Committee and officers of the society and the power and duties of the committee and officers of the Society;"

Sub Regulation (3) provides that -

> "If the members of the Society are registered Societies, the Society shall make bye-laws providing for the following matters that is to say,
>
> (a) .....

.../9.

(b) the terms and conditions of employment (to be approved by the Registrar) for any paid staff.

and

(c) the authority of the committee in relation to the employees of the Registered Society."

By the interpretation Section 89 of the Act the respondent is an "apex Society" to which Reg. 6(3) refers.

It is clear in my opinion that the Minister delegated his powers of making regulations to provide for the appointment, suspension and removal of the appellant to the respondent. The respondent was also authorised by the Minister to make bye-laws to provide for the appointment, suspension and dismissal or termination of service of the appellant. In my view section 30 of the Act is inapplicable to this case. The Minister further authorised the respondent to make bye-laws to provide for the duties and functions of the respondent.

In my opinion the matters provided for in regulations 27 and 28 alluded to by Dr. Byamugisha are general and do not or did not preclude the respondent from making its bye-laws to provide for matters such as are contained in its bye-laws No. 37 and 41. The bye-laws have incorporated the provisions of those regulations any way. Accordingly I am of the view that the provisions of bye-laws 37 and 41 are intra vires the enacting section 79 of the Act and of the Regulations of 1971. In so far as the bye-laws dealt with the appointment, suspension and termination of service, bye-law 37(i) was not inconsistent with or repugnat to the provision of Co-operative Societies Act, 1970.

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I think that although the letter of appointment (Exh. P.1) did not refer to the bye-laws it is very clear that bye-laws 37(i) and 41(c) affect the terms and conditions of the appellant and are therefore relevant to this case. With respect I think that the learned judge erred when he ignored the bye-laws and relied on the cases of Eley and Hickman. Those two cases are distinguishable on the facts. In each case the Plaintiff, founded his action on articles of Association. In the present case the complaint of the appellant is that the respondent failed to follow the procedures for his removal provided for in the bye-laws which themselves have legitimacy in Section 79 of the Act and the provisions of the Co-operative Societies Regulations, 1971.

The learned judge accepted that appointment and dismissal of the appellant was subject to approval under bye-law 37(i) and that the Directors had to comply with the same bye-law. In that case his conclusions on the second issue was contradictory and erroneous.

I think that the first ground must therefore succeed.

Ground 2 states:-

> "The learned trial judge erred in holding that the appellant's employment was lawfully terminated."

This ground is based on the judge's conclusions on issue No. 3. This issue concerns the question whether by his letter dated 16/10/1989 (Exh. P.3) the Chairman lawfully terminated the service of the appellant. The learned judge relied on his findings under the 2nd issue that bye-laws 37(i) did not form part of the

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the terms and conditions of the appellant's contract of service and therefore the judge held that the letter effectively terminated the appellant's employment. In other words the judge held that termination was lawful.

I have held when considering ground one that the appointment and termination of services of the appellant was subject to approval by the Registrar. Two witnesses (P.W.1 and P.W.2) for the appellant and (D.W.1) the only withess for the respondent proved that there was no such approval. P.W.2 (the Registrar himself) testified that he disrecommended termination of appellant's services because proper procedure was not followed. Further even if dismissal had been approved by the Registrar the evidence of D.W.1 (Martin Olobo) who participated in the Board meeting at which termination was effected stated that the appellant was not at all given a hearing. This is a violation of rules of natural justice.

I accept part of Byamugisha's submission that the Board had powers to terminate the appellant (see bye-law 37(i)). But as I have earlier stated the termination was subject to the approval of the Registrar. There was no such approval. It was argued that the Minister could direct the Registrar to approve the termination. As the learned judge found there is no evidence that in fact this was done. It appears that after the termination had been effected, the directors asked the Minister to ratify their decision. This leads to the inference that the directors realised they had acted unlawfully. Termination was effected by Exh. P.3 on 16/10/89.

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Judging from the contents of Exh. D.2 dated 14/11/1989 and Exh. D.8 dated 5/7/1990, the purported ratification by the Minister was effected belatedly, if ever it was. Moreover under S.85 of the Act, the Minister directs the Directors how to exercise their powers. He cannot ratify their illegality. I therefore think that ground two must succeed.

Ground three is a complaint that the judge refused to declare that the appellant was still in the employment of the respondent. As both counsel correctly conceded, no employer can be forced to retain an employee for the rest of the employee's working life. Ground three must therefore fail.

The alternative to ground 2 and 3 is to the effect that the learned judge should have held that the termination of the appellant's service amounted to retirement within the Standing Orders, Rules and Regulations of the Respondent (Standing Order 24). I shall consider this complaint as an alternative to ground 3. I shall consider this alternative complaint together with ground four which criticised the judge for holding that the appellant was not entitled to any reliefs. The reliefs claimed in the plaint have been reproduced above.

Mr. Mulenga submitted that the appellant should have been given notice of 3 months. He criticised the judge for his failure to consider the various modes of termination of services in respect of the appellant and submitted that if the judge had in his possession the exhibits (including Standing Orders) the judge would have held that this is a case of retirement.

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Dr. Byamugisha submitted in essence that the appellant's service were properly terminated. Learned counsel submitted that Standing Order 24 was complied with in that the appellant was paid a package of Shs. 2,110,717/=. Counsel was however unable to explain how the figure was arrived at. Counsel conceded that the appellant could have been given 3 months notice before termination of services.

It is a pity that such vital exhibits as Standing Orders and Bye-laws were not available to the learned judge when drafting his judgment. The prudent course could have been for the learned judge to ask parties to furnish him with copies of the exhibits. Copies of exhibits appearsto have been in possession of the parties. Otherwise we would not have had them on the record of appeal. The exhibits were valuable evidence.

Thus Exh. P.6, P.7, D.7 and Exh. D.8 all show that the appellant was retired. In his letter (exh. D.8) dated 5th July, 1990 to the Chairman of the respondent the Permanent Secretary stated this in the first paragraph which sums up the position -

> "Please refer to your letter No. CB/Board Chairman/90 of 22/6/1990 which was addressed to the Commissioner for Co-operative Development and copied to me concerning your Board's decision to retire Mr. Kayondo and Mr. Biretwa and to returnnMr. Miraze back to this Ministry. As indicated to you in my letter of even reference dated 14/11/89, the Minister approved your recommendations and agreed that Mr. Biretwa AND MR. KAYONDO SHOULD BE RETIRED. in this connection please refer to Section 85 of the Co-operative Societies Act, 1979"
>
> (Capital letters and underlining mine)

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This clearly shows that the appellant was retired. It is the package for the retirement benefits which is really in dispute. One reason for the dispute is lack of its details. Otherwise there is no doubt at all that ~~that~~ the appellant was retired in the interest of the Bank.

Dr. Byamugisha agrees that the appellant was retired in terms of Standing Order No. 24 but submits that the appellant was paid all normal dues up to 30/11/1989 and a total sum of Shs. 2,110,717/= as his final retirement benefits. Although no details were given about the said sum of Shs. 2,110,717/= Dr. Byamugisha suggests that as the appellant has not disputed the figure the same should be treated as correct. This last point is attractive. I think that appellant behaved unreasonably by not finding out what Shs. 2,110,717/= represented.

In paragraph 6 of the Plaint, the appellant claimed for loss of gratuity and pension. The appellant repeated this in his memorandum of appeal.

The most relevant part of Standing Order 24 is paragraph (ii) which reads:-

> "A pensionable Bank staff shall retire from the Bank service as follows:-
>
> (i) .....
>
> (ii) An employee of the Bank shall also retire from the Bank service either voluntarily ..... he retired from the Bank service by the appointing authority whichever case is applicable. An employee shall be entitled to his/her terminal benefits and Bank gratuity" (sic)

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Clearly the appellant is entitled to terminal benefits and Bank gratuity because he was retired by the appointing authority. Since there is no evidence to the contrary, I take it that Shs. 2,110,717/= includes gratuity due to the appellant as stated by DW1.

I think that the wording of S.O 24 makes the appellant also eligible for pension; the mode of the calculation of any pension due to the appellant is set out in S.O 24 (vii).

In conclusion I think that the learned trial judge was right in refusing -

(a) to grant the injuction as prayed and

(b) to declare that the contrart of employment still subsists.

But in my view the learned judge erred when he failed to declare that the appellant was entitled to gratuity and pension according to S.O 24. Thus the appellant succeeds in part on ground 4.

Accordingly I would allow the appeal set aside the order of dismissal of the suit. I would order that in addition to one month's pay included in Shs. 2,110,717/= the respondent should pay to the appellant cash in lieu of two months. I would order that the appellant be paid pension according to the Standing Orders. I would award the costs of this appeal and of the Court below to the appellant.

Dated at Mengo this ...12th... day of ...July..... 1995.

J.W.N. TSEKOOKO
JUSTICE OF THE SUPREME COURT.