THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., KANYEIHAMBA, J.S.C.)

CIVIL APPEAL NO. 6 OF 1998
BETWEEN

GULABALLI USHILLANI .....APPELLANT

AND

KAMPALA PHARMACEUTICALS LTD. ..... RESPONDENT

(Appeal from judgment of Court of Appeal of Uganda at Kampala before Justices Manyindo, DCJ, Berko JA, Mpagi-Bahigeine JA, dated 28th April 1998 in Civil Appeal No 49/97)

JUDGMENT OF MULENGA, J.S.C.

The Appellant successfully sued the Respondent in the High Court for breach of contract of employment. She was awarded special damages in the sums of U Shs. 10,200,000/= and US $102,000, and general damages of U Shs. 4,900,000/= with costs. The Respondent appealed to the Court of Appeal. Its appeal was allowed, and the award of special damages was reduced to U Shs. 1,200,000/= and US $ 12,000 respectively. The award of general damages was confirmed. The respondent (as successful party on the first appeal) was awarded costs of the appeal as well as costs of the original suit. This appeal is against that decision of the Court of Appeal.

The following is a summary of the facts leading to the suit. In 1989, the Respondent, under its former name, Inlex Pharmaceuticals Ltd., set up a factory to manufacture human drugs in Kampala's Ntinda Industrial Area. The company recruited the Appellant, an Indian national, and a highly qualified chemist, to be its Production and Quality Control Manager. She first came to Uganda, from India, in November 1989. After she had worked for only several months, the factory was closed, for reasons which are not clear in the evidence. She returned to India in or about April 1990. Later that year, she was persuaded to come back. She returned and started work in January 1991. In June she was given a letter of appointment, apparently for a period of two years. That letter, however, was not produced in evidence and its contents are not significant in this appeal. What is significant about the letter is that in December 1991, when the Appellant presented it to the Bank of Uganda in support of an application for approval for her to remit money to India in foreign exchange, the letter was ruled to be inadequate, for that purpose. As a result, a formal employment contract was made and executed on 4th December 1991. In January 1992 the Appellant took leave in India. She returned in February to find the company

undergoing substantial changes. The company was beleaguered by financial crisis resulting from fraud by one of its first directors. The other directors had sold their shares. Management had changed, or was in the process of changing, hands. Shortly after her return, even the company name was changed to the present name. She did not go back to work initially because the factory was closed. There is conflicting evidence as to why she never resumed work. I shall return to it later. It will suffice here, to say that, at this stage even the rest of the employees were not working. However, although she was no longer receiving her remuneration, (having been paid for only 9 months), the Respondent continued to pay for her accommodation in a hotel, until May 1992. The appellant also retained the company's car, up to December 1994, when it was seized from her on orders of the new company director. According to the Appellant during much of the period after she returned from leave, she was told by the old director to contact the new director for instructions, but she failed to access the latter because he was too busy on construction of his new hotel. In May 1993, about one year and three months after her return from leave, on advice of a lawyer, she filed suit in the High Court against the Respondent for breach of contract.

The cause of action was described in the amended plaint as follows:

> *"5. since the commencement of the contract, the defendant has breached the agreement by refusing and/or neglecting, to pay the plaintiff's salary for all the duration she was still employed and/or considered for as long as the agreement was in force. The defendant committed a further breach of the contract when it changed its names and directors and the defendant has since refused to provide and facilitate the plaintiff's obligations under the employment contract and completely banished her from the defendant's premises."*

The claim was for special and general damages with costs. The special damages claimed was the remuneration for 4 years and 3 months being the full contract period, less 9 months for which she was paid. The Respondent in its amended statement of defence put up three defences. First it denied the existence of the contract between it and the Appellant. Secondly, it contended that it was not indebted to the Appellant because of the indemnity undertaken by former shareholders/directors when they sold their shares to Dembe Enterprises Ltd. Thirdly, it pleaded, in the alternative, that it was the Appellant who breached the contract by absconding from duty and abandoning her job.

At the trial each party called evidence in support of its case. However, the first defence was not seriously canvassed, and during submissions by counsel it was expressly intimated that the Respondent had abandoned the second defence. In the judgment of the trial court, the learned Principal Judge considered the evidence at length and rejected the defence allegation that the Appellant had absconded from duty, as untrue. He held that ***"upon change of name, the defendant (Respondent) refused to provide for and facilitate for the (Appellant's) obligations. It instead banished her from the employment for a period of 4 years and 3 months."*** He then held that the Appellant was entitled to the special damages claimed, together with general damages, in the amounts I stated earlier in this judgment. On first appeal, the Court of Appeal mainly considered damages, and held that the proper measure for

special damages, in the instant case, was the period provided for notice of termination of the employment. Accordingly, the amounts of special damages were reduced to the equivalent of remuneration for six months in the sums which I also stated earlier in this judgment.

Before turning to the grounds of appeal, it is useful to note the main features of the employment contract on which the suit turns. According to the written contract which was produced in evidence, it was agreed that:-

1. The employment would be for 5 years with effect from 1.1.91;

2. The employment could be determined in one of two ways, namely;
   (a) by either party giving to the other 6 months' notice or the company giving the Appellant 6 months' salary in lieu of notice; or
   (b) By the company, summarily, in the event of the Appellant being guilty of any serious misconduct or breach of the contract, or committing an act of bankruptcy;

3. The Appellant's remuneration would consist of
   (a) Salary in the sum of U.Shs. 200,000/= per month;
   (b) Overseas allowance in the sum of US $ 2,000 per month;
   (c) Commission of 3% of total net sales per annum;

4. The Appellant was to receive other benefits such as fully furnished house with servants, a car, for her transport, fully maintained by the company and free passage for herself and two relatives for overseas leave.

There are four grounds of appeal to this Court. I find it expedient to dispose of ground 3 first, and to consider grounds 1 and 2 together next, and lastly to deal with ground 4. Ground 3 reads:

> *"3. The learned judges erred in law and in fact when they decided that the appellant ought to have mitigated her damages by looking elsewhere for alternative employment whereas there are no pleadings and evidence to that effect in the trial court and the need to mitigate never arose."*

Although at the hearing of the first appeal counsel for the appellant (now Respondent), after raising the issue of mitigation of damages in his address to the court, conceded that the issue had not been raised at the trial and that, therefore he would not pursue it, the Court of Appeal took it up in its judgment when considering the quantum of general damages and held that:
"The learned Principal Judge should have considered the respondent's qualifications and therefore the opportunity to get alternative employment."

The court went on to say of the Appellant:-

> *"It was naive of her to sit so idle in a foreign country for five years without taking steps to mitigate her plight. It is clear to us that the learned Principal Judge considered matters which should*

otherwise have been awarded as special damages, which factor he conceded, had they been so pleaded like transport, housing and education. That was improper as these are quantifiable claims and therefore to be claimed as special damages.

Considering the reasoning adopted it is difficult to see in what respect the respondent would be injured after being paid for the six months. .....
She was a very highly qualified person and was not expected to remain idle but should have looked elsewhere for alternative employment....."

Having said all that, the learned Justices nevertheless concluded thus:-

"In the sum the principle applied was wrong but in our view the figure of shs. 4.9m/= was not excessive as general damages,"

In the above quoted passages, two principles appear to be fused, namely the requirement for a plaintiff to mitigate damages; and the requirement to plead and prove special damages separately from general damages. Their Lordships however did not invoke either principle to reduce or otherwise alter the award of general damages made by the trial court. To that extent therefore the issue raised in this ground of appeal is not very material since the error, if any, did not affect the result. I would respectfully agree with the conclusion of the Court of Appeal that the principle applied was wrong in so far as the criticism refers to the inclusion in the assessment of general damages, quantifiable claims which should have been pleaded and proved as special damages. However since there was no cross-appeal on this, I would not pursue the point any further. With regard to the issue of mitigation of damages I need make only one observation. In a case of this nature the burden of proof would have been on the Respondent to show that the Appellant had the opportunity to mitigate her damages. In the judgment of the Court of Appeal for East Africa in *Southern Highlands Tobacco Union Ltd. v. Mcqueen (1960) EA 490 at p. 494*, Windham J.A. said:

"Secondly, as the learned trial judge rightly held, the burden of proving that suitable other employment was available to the respondent lay on the appellant. As Brett J. observed in Roper v. Johnson (1873) L.R. 8 C.P. 767 it is for the plaintiff to prove the damages to which he is prima facie entitled,' leaving it to the defendant to show circumstances which would entitle him to a mitigation'

The appellants manifestly failed to do. They called no evidence at all to show that alternative employment was available, or was likely to be available to the respondent. "

In the instant case also, the Respondent called no evidence on the issue. In my view the burden cannot be discharged merely by evidence that the Appellant was highly qualified. The high qualification has to be matched with availability of a similar job,

and a demand for such high qualification. With due respect to the learned Justices, it appears to me that they did not address themselves to that aspect. To that limited extent therefore, I would hold that ground 3 succeeds.

I now turn to grounds, 1 and 2 which read:

> *"I. The learned judges erred both in law and fact when they held that the appellant had worked for nine months whereas the evidence on record shows that she worked from January 1991 to February 1992 and therefore overlooked to award her wage arrears due for 5 months.*
>
> *2. The learned judges erred in law when they held that the appellant's claim for special damages is limited to the notice period of 6 (six) months without taking into consideration that neither party had given the other the notice to terminate the Agreement."*

I have found it expedient to consider the two grounds together because to my mind, they are inter-linked to each other and to the ultimate question which is: What amount is the Appellant entitled to? This would include unpaid remuneration, as well as damages for breach of contract.

Mr. Mugenyi, Counsel for the Appellant, submitted that the evidence on record showed that the Appellant worked for one year, but was paid for only nine months. He argued that in assessing damages, the Court of Appeal erroneously assumed that the Appellant had worked for only nine months and omitted to award the salary arrears for the period October 1991 to February 1992. Further, he argued that because the employment contract was not formally terminated, it subsisted for the full contract period. He maintained that in absence of formal termination of an employment contract, the employer, by virtue of s.16 of the Employment Decree 1975, remains under obligation to provide work to the employee and to pay for every day he fails to provide the work, unless the employee is in breach of the contract, or the contract is frustrated. He maintained that the Appellant had not been in breach of the contract, and that the contract had not been frustrated. He therefore urged this Court to allow the appeal and reinstate the award made by the High Court or at the very least, to enter judgment for the unpaid arrears.

Mr. Bitangaro, Counsel for the Respondent, conceded that according to the evidence on record, the Appellant was not paid her remuneration for the whole period she worked. He maintained, however, that this point was not canvassed in the Court of Appeal and cannot be raised on a second appeal. He supported the holding, by the Court of Appeal, that the Appellant was entitled to payment of only 6 months' salary in lieu of notice. He pointed out that terminating the employment without giving due notice amounted to breach of the contract on the part of the Respondent, and that it was so held by the trial court. He argued, that consequently the Appellant's contention that the contract subsisted was untenable because a contract which is breached does not continue. He asked this Court to uphold the award made by the Court of Appeal.

I would start with the issue of unpaid arrears of remuneration. It seems to me that this item was submerged in the broader issues and as a result was overlooked. For my part, I would not blame the Appellant as having failed to canvass the point in the Court of Appeal, as Mr. Bitangaro invited this Court to do. Both in the Appellant's pleadings and in her evidence, the unpaid arrears formed part of her claims. In paragraph 6 of the amended plaint, the particulars of special damages were pleaded to be the unpaid salary and overseas allowance for 4 years and 3 months. Then in her evidence, the Appellant said:

> *"I did not receive my whole year salary for 1991. They were promising payment and they never did. In the year 1992 they paid me for 1991 for the months January to September. This was paid through my account at the Bank of Baroda. The company gave me a return ticket for leave in India for 15 days' leave. This was between January and February."*

That evidence was not challenged or in anyway contradicted. What seems to me to be the origin of the error, appears in the judgment of the trial court where in summarising the facts of the case the learned Principal Judge states:-

> *"the plaintiff alleges that she worked for a total of 9 month out of the employment contract of 5 years.",*

The error is repeated later in that judgment where the learned Principal Judge holds:

> *"It has also been proved that the plaintiff worked for the defendant and was paid for 9 months, whereas her contract of employment was to last for 5 years. This means that she has to recover her salary and allowances in respect of 4 years and 3 months (i.e. 51 months)."*

Evidently this is an error. The evidence was clear that she worked for over 12 months, from January 1991 to January 1992, but was paid for only 9 months. Unfortunately in the judgment of the Court of Appeal the error was not corrected. Instead, it is repeated along with yet a new one. The new error is in the summary of the background to the case. The court first states that the contract period was ***"five (5) years but with effect from 4/12/91 till 3/12/96"*** when in clause 2 of the contract it is expressly provided that the Appellant would be employed ***"for five (5) years from the 1st January 1991 (now past)".***

The error made by the trial court is repeated in the judgment of the Court of Appeal thus:

> *"Out of the five years stipulated in their contract, the Respondent worked for only nine (9) months for which she was paid and after which the appellant made it impossible for her to work."*

Clearly, the erroneous premise that the Appellant was paid for the whole period she worked, led to the claim for arrears of remuneration for the period after September 1991 being overlooked. Although the Appellant had claimed for remuneration for a

total period of 51 months, the evidence was sufficiently clear to make a distinction between unpaid remuneration which was a debt owed to the Appellant, and damages being compensation to her for breach of contract. Admittedly it would have been more articulate to highlight the two components of the claim even in the Court of Appeal. However, in as much as a claim for more includes a claim for less, the Appellant's claim included a claim for arrears of remuneration for the period she worked and was on earned leave subsequent to September 1991. The claim was proved and was not disputed. The Appellant was therefore entitled to judgment for it. The pleadings and evidence were before the Court of Appeal. I have no doubt that if their Lordships had addressed their minds to the whole claim and evidence accurately, they would, in addition to special and general damages, have entered judgment for unpaid remuneration for the period from October 1991 till the employment was terminated. And that leads to the question: When was the employment terminated?

Both the trial court and the Court of Appeal accepted and in effect held that the Respondent had repudiated the employment contract. Indeed, the Respondent concedes the point. This Court, in my view, has no reason to depart from that holding. The failure by the Respondent to provide work to the Appellant, and to give to her remuneration and other benefits due to her under the provisions of the contract, is such a fundamental breach as to amount to repudiation of the contract. However, it is important to know when the contract was so repudiated in order to determine up to when the Appellant was entitled to receive remuneration, and from when she became entitled to damages for breach of contract. Neither the trial court nor the Court of Appeal made a finding of fact on this. It therefore falls on this Court to make that finding, on the evidence on record.

There is paucity of evidence on the point. Such evidence as there is lacks precision and in some aspects is vague. In particular it is to be noted that there is no direct evidence on an unequivocal act constituting repudiation or on the time of its occurrence. Nevertheless, I think that a reasonable conclusion can be drawn from the evidence, at least on when the Respondent should be deemed to have repudiated the contract. I shall do so by elimination process. As observed earlier in this judgment, that time cannot be at the end of September 1991, the last month she was paid for, because it is common ground that she continued to work, albeit without pay, till she went on leave, in mid-January 1992. It cannot be when she went on leave because, apart from being entitled to paid leave, she was provided with a return air-ticket, obviously so that after leave she may return to resume duty. Nor can it be immediately upon her return from leave, when she found the factory closed, because according to the evidence, when she reported to Mr. Angopa, DW1, who was Managing Director at the time she went on leave, he told her that there was a problem to be sorted out first and asked her, on two occasions, to return to him later. Besides, all other employees were not working. According to the evidence of the principal defence witnesses, the factory had been closed for stock taking, and despite the change of management, all the employees were to continue in their respective positions when the factory was re-opened. There is no reason to assume that the Appellant was excepted. Evidently therefore, her employment continued beyond her return from leave. It is useful at this juncture to recall her testimony on what transpired upon her return, bearing in mind that her evidence was accepted by the trial court in preference to that of the two key defence witnesses. She said:-

"I returned 1st week of Feb. 1992 and found the factory locked. I went to see Mr. Angopa; he was working for Victoria Fresh Foods. He told me they had a problem in the factory and they were settling with another party. He told me to come back after 15 days. When I went he told me to come back. Finally he told me in April 1992 to contact Dembe Enterprise which had taken over Inlex. That was the time he was building Hotel Equatoria. He (sic) could not get him for about 6 months. I went back to Mr. Angopa in 1993 Feb. I asked for a letter sacking me so that I could get employment elsewhere. He said he would contact Dembe. For a month he shilly shallied and I reported to Jonathan Kateera who drafted the agreement. He summoned Mr. Angopa and told him to summarise the matter immediately, but he never did anything. Jonathan Kateera advised me to see Karim Hirji but I could not see him. Then Jonathan Kateera advised me to file this case in 1993."

In her evidence, the Appellant on two occasions referred to a significant Incident at the factory which was not clearly put in context of time. First in cross-examination on 4.3.96 she said:-

"I am not working for the defendant company because I was not allowed to enter the factory. The Director I found there abused me and sent me away."

Again when she was re-called on 18.3.96 she said in re-examination:-

"When I came back from India I approached the new company factory Karim Hirji's brother started abusing me. He was refusing me to work. Even Mr. Angopa refused me to enter his house."

Karim Hirji who is referred to in this evidence, and who also gave evidence as DW2, is the Managing Director of Dembe Enterprises Ltd., the company which bought shares of Inlex Pharmaceuticals Ltd. from the shareholders severally, between 12th December 1991 and 29th January 1992. The incident when the Director/Karim Hirji's brother at the factory abused the Appellant and refused her to work would have been probably the best indicator of repudiation of the employment contract by the Respondent. However its timing is not indicated in the evidence. The most I can deduce from the evidence is that it must have been sometime after the factory was re-opened. According to Karim Hirji the factory was closed for about three weeks. His evidence however, apart from having been rejected by the trial court, is not precise on the point, in as far as his version is that the Appellant had absconded from duty when he took over management rather than that her employment was terminated when or after he took over. Furthermore, I am unable to conclude that the incident took place immediately, or long after, the factory was re-opened. The other four times I have considered in this regard are May 1992 up to when the Respondent paid for the Appellant's accommodation in the hotel; February 1993, when the Appellant demanded for a letter of termination; May 1993 when she filed suit; and December 1994 up to when she retained the company's car. According to the Appellant and her witness, Kisiriko Isa, the Respondent paid her hotel bills, at Hotel Summer, up to early May 1992. Although in cross-examination by counsel for the Respondent, it was

put to PW4 that he was lying, no evidence was adduced for the defence to contradict the Appellant or PW4 on that fact. However, I would not base my decision on the failure, or stoppage, of payment of the hotel bills. This is in view of the conduct of the Respondent in the discharge of its obligations under the contract, both before and after change of management. Thus remuneration for nine months of 1991 was not paid until 1992, and that for the rest of the period she worked, has never been paid. I am, therefore, not inclined to hold that non-payment of hotel bills is an unequivocal indicator of termination of the employment, or repudiation of the contract.

It has to be recalled that the Respondent had opportunity to terminate the contract expressly but failed or refused to do so. It also had opportunity to adduce evidence indicating when it terminated the employment but it chose to deny the existence of the employment contract, and in the alternative to claim that it did not terminate it. In my view it would not be just to permit the Respondent to benefit from its failures or evasiveness. Nor would it be just for the Appellant who was kept in the dark about her employer's intentions, to incur loss as a result of the employer's failures. In my opinion, the risk, if any, should be borne by the Respondent, being the party whose conduct led to the suit. To put it in another way, the benefit of doubt on this issue must go to the innocent party. With that in mind, I consider that the cut off time, when the employment should be deemed to have been terminated, must be the time when the Appellant was left in no doubt that the Respondent would not take her back on her job. Doing the best that I can in the circumstances, I would hold that that time is, February 1993, when the Appellant was driven into asking for a letter terminating the employment which, according to her, would have enabled her to find another job. In view of this holding, I do not consider it necessary to discuss the two later times. May 1993 and December 1994, save to observe, in respect of the latter, that in my opinion she retained the car for that long most probably due to the new management's ignorance of the fact that she was keeping it.

In his submissions, Mr. Mugenyi asked that if this Court does not reinstate the award which the High Court had made, it should, at the very least, award arrears of remuneration for the period October 1991 to February 1992 when she worked and took leave, i.e. five months. In my opinion, to that period, should be added the period of March 1992 to February 1993 during which she was kept in apparent suspense and should be deemed to have remained in employment. Under the provisions of s.16 of the Employment Decree, 1975, during that period, the Respondent, as the employer, ought to have provided work to the Appellant, and is under obligation to pay to her the contractual remuneration even in default of providing the work. I would therefore hold that she is entitled to recover the arrears of remuneration for those twelve months also, as a debt.

I now turn to the issue of damages. As I said earlier in this judgment the lower courts held, and it is supported by the evidence, that it was the Respondent who repudiated the employment contract. As a general rule, where one party to a contract wrongfully repudiates it, the innocent party has the option to either accept the repudiation and sue for damages, or to treat the contract as subsisting, and hold the party in fault to the terms of the contract and seek other remedies for enforcing it. It appears to be settled at common law, however, that the contract of employment is an exception to the general rule. Save in very special circumstances, where a contract of employment is repudiated, the innocent party has no option to treat the contract as subsisting. In

Denmark Productions Ltd. v. Boscobel Productions Ltd. (1968) 3 All ER 513, Harman L.J. said at p.533 H-l:

> *"I am therefore of opinion .... That the true cause of act/on of the plaintiff company was for damages for wrongful dismissal and that the action as framed for an account is misconceived. An employee dismissed in breach of his contract of employment cannot choose to treat the contract as subsisting and sue for an account of profits which he would have earned to the end of the contractual period; he must sue for damages for the wrongful dismissal and must of course mitigate those damages so far as he reasonably can."*

Needless to say that the reason for treating the contract of employment differently, in this regard, is that the contract of employment is based on confidential relationship between the employer and the employee. Where the personal confidence has ceased, as when one party has repudiated the contract, the court will not enforce the contract. It is only in exceptional cases, where the court is satisfied that despite repudiation the personal confidence between the parties remains, that the court may enforce a contract of employment by restraining an employer from wrongfully dismissing an employee: See *Hill v. C.A Parsons & Co. Ltd. (1971)3 All ER 1345.* But it must be emphasised that such are exceptional and rare cases and the instant case is not one of them.

As noted earlier in this judgment, Mr. Mugenyi sought to argue that s.16 of the Employment Decree 1975, changes that common law position. The section provides:

> *"16. (1) an employer shall, unless the employee has broken his contract of service or the contract is frustrated, provide his employee with work in accordance with the contract, during the period for which the contract is binding on a number of days equal to the number of working days expressly or impliedly provided for in the contract. (2) Where an employer fails to provide work in accordance with a contract of work he shall pay to the employee in respect of every day on which he shall so fail, wages at the same rate as if the employee had performed a day's work."*

In my opinion, the import of that provision is no more than to state the obligation of the employer to provide to the employee work; and the right of the employee to be paid for every working day, as long as the contract is subsisting. To my mind it is clear that the purpose of the provision is to protect an employee from exploits of an employer who may wish to withhold pay on the ground that on any given day there was no work available to be done and that none was done. It is that interpretation that is consistent with the stipulation in subsection (1) limiting the employer's obligation to *"the period for which the contract is binding";* and with the wording in subsection (2) where clearly what is envisaged is *"failure"* by the employer to provide work, rather than deliberate termination of the employment. In my opinion the provision does not apply to a contract of employment which has been terminated albeit by repudiation. I would therefore hold that the provision in s.16 of the Decree does not change the position at common law. Where a contract of employment is repudiated by the employer through dismissal of the employee, even in a case of employment for a fixed period, the employee cannot insist on continuing to be provided with work and

payment. If the dismissal, be it express, implied or even constructive, is unequivocal, then the only remedy available to the wronged employee is damages. The issue that remains to be decided therefore is the measure of damages, to which I now turn.

In deciding that issue, the Court of Appeal appreciated that the employment in the instant case, was for a fixed period. The court made distinction between a contract which makes no provision for termination prior to expiry of the fixed period, and one in which there is a provision enabling either party to terminate the employment. The learned Justices stated the law to be that in the event of wrongful termination by the employer, the employee in the former contract would be entitled to recover as damages, the equivalent of remuneration for the balance of the contract period, whereas in the latter case the wronged employee would be entitled to recover as damages, the equivalent of remuneration for the period stipulated in the contract for notice. I respectfully agree that this is the correct statement of the law. I would add that it is premised on the principle of *restitutio in integrum.* Damages are intended to restore the wronged party into the position he would have been in if there had been no breach of contract. Thus, in the case of employment for affixed period which is not terminable, if there is no wrongful termination, the employee would serve the full period and receive the full remuneration for it. And in the case of the contract terminable on notice, if the termination provision is complied with, the employee would serve the stipulated notice period and receive remuneration for that period, or would be paid in lieu of the notice.

In the instant case, clause 8 of the employment contract reads:

> *"8. The Production and Quality Control Manager's employment hereunder may be determined at any time by either of the parties hereto giving to the other of them six months' written notice to that effect or by the company paying her in addition to any salary or commission that may be due to her a sum equivalent to six months' salary in lieu of such notice."*

If, therefore, the Respondent had, in accordance with this clause given to the Appellant 6 months' written notice of terminating the employment or had paid her in lieu of the notice, there would have been no breach of contract and the Appellant would have had no cause of action. Accordingly, the holding by the Court of Appeal, that the Appellant could recover only damages equivalent to remuneration for the notice period, puts her in the position she would have been in, if there had been no breach of contract. In clause 8 the parties freely bargained and agreed that the employment contract was to be terminable and agreed the mode of termination. In my opinion they also indirectly agreed on the measure of damages in default of adhering to the agreed mode. The court cannot overlook this. It is this that distinguishes the instant case from the case of *Southern Highland Tobacco Union Ltd. v. MC Queen (supra).* There the parties had similarly freely bargained and agreed that the employee would not be dismissed before expiration of the fixed term of the employment. When this was breached the measure of damages was held to be the equivalent of pay for the balance of the term. In the instant case I agree with the holding of the Court of Appeal that what the Appellant was entitled to by way of special damages was the amounts equivalent to remuneration for six months. In my view, therefore, ground 1 should succeed but ground 2 ought to fail.

The final ground of appeal reads as follows:

> *"4. The learned Justices erred both in fact and in law when they awarded the respondent cost of the suit in the trial court."*

Mr. Mugenyi's submission on this ground was simply that by the nature of its judgment the Court of Appeal ought to have allowed to the Respondent only costs of the appeal. He did not attempt to show in what way the order for costs was erroneous in fact or in law. Mr. Bitangaro said he would leave the issue to the Court since costs are a matter of the court's discretion.

There are three general principles which govern the question of costs. The first is that costs of, and incidental to, all suits, are in the discretion of the court. The second is that the costs ordinarily follow the event. The third is that where the trial court has exercised its direction the appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. See *Sheik Jama v. Dubat Farah (1959) EA 789*. In the judgment of the Court of Appeal for East Africa in *Kiska Ltd v. De Angelis (1969) EA 6*, at p.8G Sir Clement de Lestang Ag. P said:

> *"Thus, where a trial court has exercised its discretion on costs, an Appellate Court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given, if it considers that those reasons do not constitute "good reason" within the meaning of the rule."*

The result of the appeal in the Court of Appeal was not to set aside the judgment entered for the plaintiff (now Appellant) by the High Court but in effect to reduce the damages she was entitled to. She therefore remained a successful litigant to the extent of the reduced damages. Therefore, she was entitled to costs of the High Court suit but on basis of the reduced amount. In making its award of costs the Court of Appeal simply stated:-

> *"The appellant shall have the costs of the appeal and of the suit."*

While this order was within the discretion of the court, no reasons were given for awarding the costs *"of the suit"* to the party who substantially remained the unsuccessful party, or for depriving the other party of these costs. In my opinion it was wrong and can only have been done inadvertently. I think on the authority of *Kiska Ltd. v. De Anglelis (supra)* this is a proper case for the appellate court to interfere and hold that only the costs of the appeal (in the Court of Appeal) ought to have been awarded because the success was, as it were, limited to the appeal. I therefore would hold that ground 4 also ought to succeed.

In the result I would hold that the appeal succeeds substantially and would order that judgment be entered for the Appellant for arrears of remuneration for the period October 1991 to February 1993 (17 months) in the sum of U.Shs. 3,400,000/= and US $34,000 in addition to the special damages of U.Shs. l, 200, 000/= and US$ 12,000

and general damages of Shs 4,900,000/= assessed by the lower courts. I would also give costs of this appeal and of the suit in the High Court, to the Appellant. Since in the Court of Appeal, the present Respondent scored some reasonable success, which has not been overturned though substantially varied, I would award half of the costs in the Court of Appeal to the present Respondent.

Dated at Mengo this ...24th day of ....February 1999.

J.N. MULENGA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., KANYEIHAMBA, AND J.S.C.)

CIVIL APPEAL NO. 6 OF 1998
BETWEEN

GULABALLI USHILLANI .....APPELLANT

AND

KAMPALA PHARMACEUTICALS LTD. ..... RESPONDENT

(Appeal from judgment of Court of Appeal of Uganda at Kampala before Justices Manyindo, DCJ, Berko JA, Mpagi-Bahigeine JA, dated 28th April 1998 in Civil Appeal No 49/97)

JUDGMENT OF ODER, J.S.C.

I have had the benefit of reading in draft the judgment of Mulenga, J.S.C...

I agree with it and the orders proposed in that judgment. As Tsekooko, J.S.C. and Kanyeihamba, J.S.C also agree, it is so ordered.

Dated at Mengo this 24th day of February 1999.

A. H. O. ODER
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., KANYEIHAMBA, AND J.S.C.)

CIVIL APPEAL NO. 6 OF 1998
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JUDGMENT OF TSEKOOKO, J.S.C.

I have had the advantage of reading in draft the judgment prepared by my learned brother the Hon. Justice Mulenga which he has just delivered. I entirely agree with his reasoning and conclusions and the orders he has proposed, I have nothing useful to add.

Dated at Mengo this ...24th day of ....February 1999.

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

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., KANYEIHAMBA, AND J.S.C.)

CIVIL APPEAL NO. 6 OF 1998
BETWEEN

GULABALLI USHILLANI .....APPELLANT

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KAMPALA PHARMACEUTICALS LTD. ..... RESPONDENT

(Appeal from judgment of Court of Appeal of Uganda at Kampala before Justices Manyindo, DCJ, Berko JA, Mpagi-Bahigeine JA, dated 28th April 1998 in Civil Appeal No 49/97)

JUDGMENT OF KAROKORA, J.S.C.

I have had the advantage of reading in draft the judgment of my Lord, Mulenga, J.S.C., and have for, reasons which will appear in this judgment not been able to agree with his conclusions. The facts of the case are ably and clearly set out in his judgment and so I do not need to repeat them.

The appellant had been employed by Inlex Pharmaceutical Ltd. in 1989 as production and quality control Manager. She entered into written contract of employment with her employers for 5 years ending on 31st December, 1995. However, early 1992 the Company changed its name to the appellant's name - Kampala Pharmaceutical Ltd. Owing to managerial and operational problems, the appellant worked for 14 months instead of 60 months. Thereafter she was not assigned any more work by the respondent although the DW1 stated in his evidence that she abandoned her work. The learned Principal Judge accepted appellant's evidence that she was not permitted to see the new management and was not assigned any work.
The appellant filed an action in the High Court claiming general damages for breach of contract, for salary due to her until the end of the life span of the contract and costs of the suit.

The trial Judge found, rightly in my view, that the change of name of the respondent company did not affect the contract of employment. He held that the respondent was in breach of contract and awarded Shs. 4,900,000/= general damages to appellant. He awarded special damages of Shs. 10,200,000/= for loss of salary for 51 months and awarded US$ 102,000 for loss of expatriate allowance for 51 months plus costs of the suit to appellant.

The respondent appealed to the Court of Appeal which reversed the High Court decision. The award of special damages by the Principal Judge was substituted with Shs. 1,200,000/= as salary for 6 months' in lieu of notice which the respondent had failed to give and US $ 12,000 overseas allowance for 6 months. The appellant was ordered to pay costs of the appeal and in the High Court.

The appellant was dissatisfied and hence this appeal. There are four grounds of appeal which, were argued separately.

The first ground complained that the Justices of Appeal erred when they held that that appellant had worked for 9 months whereas the evidence showed that she had worked from January 1991 to February 1992 and therefore overlooked to award her wage arrears due for 5 months.

This ground raised no controversy as Mr. Bitangaro, Counsel for respondent conceded that the Court of Appeal was in error when they overlooked 5 months she had worked.

I would, in view of the above, hold that the Justices of Appeal were in error when they held that she had worked for 9 months when she had worked for 14 months. Therefore, in the result, the 1st ground of appeal succeeds.

The second ground of appeal complained that the Justices of Appeal erred when they held that the appellant's claim for special damages was limited to the notice period of 6 months without taking into consideration that neither party had given the other the notice to terminate the contract. He argued that in the instant case the appellant was willing to work but the employer/respondent never provided work to her. He contended that unless the employee was in breach of the agreement which she wasn't she was entitled to full payment. He agreed with the Justices of Appeal when they cited with approval the case of *Southern Highland Tobacco Union Ltd v. David MCOueen (1960) EA 490* where the appellant had sued for wrongful dismissal for breach of the said agreement, the Court of Appeal awarded him damages representing the remainder of the term of contract, because they held that the agreement was for a specific term with an express provision that the appellant could not be dismissed before the expiration of the agreed term. In the instant case, however, he disagreed with the following passage of the Justices of Appeal's judgment on page 10 of the record of appeal:-

> *"In the instant case, clause 8 (employment contract) stipulates that a six months notice is to be given in writing by either party desirous of terminating the contract. This means that the employer may choose to discharge the employee and pay the agreed salary for the time of notice or discharge the employee and risk suit for the recovery of the amount of salary for the time of the required notice. The recovery is limited to the notice period. This is the most important aspect of this case. We do consider this is the approach the learned Principal Judge should have adopted. A multiplier of six months should have been used to award the special damages..."*

Mr. Mugenyi contended that clause 8 in the employment contract between the employee and employer was not a liability clause. He contended that the clause meant that if the contract was not terminated in accordance with that clause, then the contract subsisted up to the end of the contract. He referred the court to section 16(1) of the Employment Decree 4/75.

In the instant case, he further contended that the appellant had a contract and never breached it. It was the respondent who refused to give her work. The appellant was, under Section 16(2) of the Employment Decree entitled to full payment.

Against the above submission on the 2nd ground of appeal, Mr. Bitangaro Counsel for respondent submitted that the Justices of Appeal were correct and had applied correct principles in awarding the appellant wages for six months in lieu of the notice stipulated by the employment contract. He conceded that there was not six months' notice of termination of contract or payment in lieu of the notice. Therefore the respondent was in breach of contract. His question was then, why should the respondent continue paying, if the contract was breached? He contended that *McQueen's case* (supra) was distinguishable from the instant case, because the agreement was for a specific term with an express provision that the appellant could not be dismissed before the expiration of the agreed term. However, he argued that in the instant case, the contract of employment of appellant was terminated by her non-performance, because there was no work for her. He referred to the case of *Addis v. Gramophone Co., Ltd. (1909) AC 490-91* and *Latchford Premier Cinema v. Ennion (1931) 2 Ch 408* In supported of the award of 6 months salary in lieu of notice.

There is no doubt in my mind that the appellant worked for 14 months and was paid for only nine months. This point was resolved in the 1st ground of this appeal. There is, however, the period of six months notice which was not given pursuant to provision of clause 8 of the employment contract. Even on this 6 months' notice supposed to terminate the contract, the date on which it would be given does not come out clearly from the evidence. Would it be assumed that it should have been given when the appellant filed the suit in Court, or when the car was removed from the appellant in December 1994 or when she was last booked out of the Hotel where the respondent used to provide her accommodation or when she asked to be sacked so that she could look for alternative employment elsewhere?

It is not disputed by respondent that the appellant returned from her leave in India in the 1st week of February 1992. When she returned to work, no work was assigned to her. Later, Angopa PW1 who had recruited her from India told her that there were problems. He asked her to return after 15 days. When she returned, there was nothing forthcoming. She finally requested for a letter sacking her so that she could try elsewhere for employment, as she had been recruited to come to Uganda for the specific job of production and quality control manager in the pharmaceutical company. Her request to be sacked was ignored.

The appellant is arguing that the breach of contract amounted to wrongful dismissal. She contended that since there was no notice as contemplated by clause 8 of the employment contract, the contract is deemed to have subsisted to the end of its life span.

Clause 8 of the employment contract provided as follows:-

> *"The production and quality control manager's employment hereunder may be terminated at any time by either of the parties hereto giving to the other of them six months' notice to that effect or by the Company paying her in addition to any salary or commission that may be due to her a sum equivalent to six months' salary in lieu of such notice."*

What must be noted is that the contract of employment of the appellant was subject to section 8(1) of the Employment Decree 4/1975. Subsection 1 of section 8 of the Decree provides as follows:-

> *"No person may employ another or be employed, under any contract of service except in accordance with the provisions of this Decree."*

Then section 16 provides that the employer shall provide work unless the employee has broken his contract of service. It reads as follows: -

> *"(I) an employer shall, unless the employee has broken his contract of service or the contract is frustrated, provide his employee with work in accordance with the contract, during the period for which the contract is binding, on a number of days equal to the number of working days expressly or impliedly provided for in the contract.*
>
> *(2) Where an employer fails to provide work in accordance with a contract of work he shall pay to the employee, in respect of every day on which he shall fail, wages at the same rate as if the employee had per formed a day's work"*

Needless to say, considering the facts of this case, clause 8 of the employment contract and the above provisions of the law, I think that justice would demand that a broader, liberal and purposive interpretation of subsections 1 and 2 of section 16 of the above Decree would be necessary in order to give effect to the above section. To give restrictive interpretation of the section would be importing common law principles of repudiation of contract and mitigation of loss of damages which the section impliedly ousted where the employer was in breach of contract of employment.

Following the above approach, in my view, if clause 8 of the employment contract had not contained enough safeguard of the contract of employment, subsection 1 of section 16 of the Employment Decree (Decree 4/75) went further to safeguard the appellant during the life which the contract had expressly provided to last. In my view, a liberal interpretation of subsection 1 of section 16 is that unless the employee has broken his or her contract of service or the contract was frustrated, the employer had to provide the employee with work in accordance with the contract of employment for the period expressly spelt out in the employment contract.

Furthermore, my interpretation of subsection 2 is that where the employer fails to provide work to his employee in accordance with the terms of the employment contract, he shall pay to the employee in respect of everyday on which he shall so fail, wages at the same rate as if the employee had performed the contract for the entire period of contract. In my view, the appellant and respondent had mutually agreed as to the mode of termination of employment by either party. If the respondent no longer had any trust and confidence in the appellant, their hands were not tied on to her. They had the option of terminating the contract in accordance with clause 8 of their written contract of employment.

However, the respondent left the appellant in suspense and kept maintaining her in a hotel. Later, they stopped maintaining her in the hotel. She demanded to see the management of the respondent company but could not see him. Finally she demanded to be sacked so that she could look for an alternative employment elsewhere. The respondent ignored her request.
However, she still retained the vehicle belonging to respondent until it was removed from her in December, 1994.

It must be noted that this was a lady who had been recruited from India to come to Uganda to do a specific job. It is my considered view that if the respondent no longer wanted her in their employment, then being a foreigner, under section 26 of Decree 4/75, they were under obligation to terminate her contract and repatriate her back to India at their own expense. They never terminated her employment, never gave her work and never repatriated her back to India.

In my view, if the respondent, in complete disregard of the employment contract abandoned the appellant or repudiated the contract, the abandonment or repudiation of the contract would be wrongful. I would not see how the dismissal in *David McQueen's* case (supra) was wrongful and not in this case, where the purported dismissal (abandonment of appellant) or repudiation of contract contravened the provisions of section 16 of Decree 4/75. In my view, if there is a case where the employer should be ordered to pay the employee for the remaining period of the life span of the full contract, this is a proper case for such order. Under clause 8 of the employment contract, the contract could be determined by either party giving six months' notice. None of the parties gave notice of termination of contract. Further section 8 of Decree 4/75 categorically stated that no person may employ another under any contract of service except in accordance with the provisions of the Decree. But then, if under section 16 of Decree 4/75 the employer failed to provide work, to the employee, in accordance with the terms of the contract of employment, like in this case, the employer was under obligation to pay to the employee in respect of everyday on which it so failed, wages at the same rate as if the employee had performed work for the life span of the contract of employment.

Therefore, since the respondent conceded being in breach of contract, by failing to provide work to the appellant and refusing to terminate her employment in accordance with clause 8 of the employment contract and failing to repatriate her back to India the question of special damages being limited to 6 months would not arise in view of subsections 1 and 2 of sections 16 and section 26 of Decree 4/75.

In the circumstances this ground of appeal should succeed.

The 3rd ground of appeal complained that the learned Judges erred in law and in fact when they decided that the appellant ought to have mitigated her damages by looking elsewhere for alternative employment whereas there were no pleading and evidence to that effect in the trial Court and the need to mitigate never rose.

I must point out here that the Justices of Appeal were heavily influenced by the common law principles of mitigation of loss of damages resulting from respondent's implied repudiation of contract when the respondents failed to assign any work to her. If by conduct they no longer had trust in her to work for them, it could be argued for respondent that then the contract ceased. The contract having ceased, then the appellant ought to have mitigated the loss, by looking for alternative employment. The principle of mitigation of loss of damages resulting from defendant's breach of contract is clearly stated in Sutton & Shannon on contract 7th Edn. At page 415 as:-

> *"A party to a contract who suffers by reason of a breach committed by another party must take reasonable steps to mitigate the loss. He should not sit back and make no attempt to repair it. If he behaves in that way, he cannot hold the defendant responsible for more than the loss which he would have suffered if the had done his best to mitigate it. But the plaintiff's duty to minimize damage is limited to doing what is reasonable having regard to all the facts of the case, and the onus of showing that he has failed in his duty is on the defendant See Pilkington v. wood (1953) 2 All ER 810".*

It must be observed that the above statement is a common law principle. We have applied it in our Courts before. It was considered in the case of McQueen (supra) by the East African Court of Appeal, but it was found not applicable in the circumstances of the case. I wish to state that in the instant case, the contract of employment was entered into when Decree 4/75 was operative. It is clear from section 8 of the Decree that no person may employ another under any contract of service except in accordance with the provisions of the Decree. Then section 16 (1) (2) of the same Decree makes no reference to common law principles of repudiation or mitigation of loss of damages. In fact subsections 1 and 2 of section 16 of Decree 4/75 implicitly ousts common law principles of repudiation of contract and mitigation of loss of damages where the employer is in breach of contract when the law provided, inter alia, that:-

> *"If the employer fails or refuses to provide work in accordance with the contract of work, he shall pay to the employee in respect of everyday on which he shall so fail. ..... As if the employee had per formed a days work ....."*

It is worthy noting at this juncture that even if the common law principles did apply, the provisions of the Judicature Act 1967 Section 3 on jurisdiction of High Court would prevail over the common law principles. The Judicature Act 1967 Section 3(2) provides as follows:-

"(2) Subject to the provisions of the Constitution and of this statute, the jurisdiction of the High Court shall be exercised.

(A) In conformity with the written law including any law in force immediately before the commencement of this statute.

(B) Subject to any written law and in so far as the written law does not extend or apply, in conformity with:

(i) The common law and the doctrine of equity;

(ii) Any established and current custom or usage;

(iii) the powers vested in, and the procedure and practice observed by the High Court immediately before the commencement of this statute in so far as any such jurisdiction is consistent with the provisions of this statute; and

(c) Where no express law or rule is applicable to any matter in issue before the High Court in conformity with the principles of justice, equity and good conscience".

It is pertinent from subsection 2(a)(b)(1) of section 3 of the Judicature Act that principles of common law can be invoked to resolve a matter if there is no express provisions of the written law providing the answer. But in the case before us, sections 8 and 16(1) and (2) of Decree 4/75 adequately provide the answer. In fact, it does not allude to the common law principles of repudiation of contract and mitigation of loss of damages in contract of employment with fixed life span if the employer in complete disregard of the terms of contract, refused to give her work and abandoned its employee like the appellant was treated in this case.

It must be observed further more that section 40 of the Judicature Act empowers the Supreme Court to exercise the jurisdiction of the High Court exercisable under Section 3 of the same Act. I would, pursuant to the above provisions of the Act, say that the purported removal of the appellant from her employment was unlawful. It could only be lawful if it was done in accordance with clause 8 of the employment contract. In the circumstances, the appellant was entitled to treat the contract of employment as continuing until the end of its life span. This, in my view, is not unreasonable considering the provisions of clause 8 of her contract of employment, sections 8, 16, and 26 of Decree 4/75.

In the circumstances, this ground of appeal should succeed.

In view of my findings on grounds 1, 2 and 3 of appeal, it would not be necessary to discuss the 4th ground, which concerns costs, because generally costs are within the discretion of the trial Court and secondly, they normally follow the event unless the Court otherwise orders.

I would, in view of the above, allow the appeal, set aside judgment of the Court of Appeal, and restore the judgment of the learned Principal Judge. I would award to the appellant costs in this court and in the Courts below.

Dated at Mengo this ...24th day of ....February 1999.

A.N. KAROKORA
JUSTICE OF THE SUPREME COURT.

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODER, J.S.C., TSEKOOKO, J.S.C., KAROKORA, J.S.C., MULENGA, J.S.C., KANYEIHAMBA, AND J.S.C.)

CIVIL APPEAL NO. 6 OF 1998
BETWEEN

GULABALLI USHILLANI .....APPELLANT

AND

KAMPALA PHARMACEUTICALS LTD. ..... RESPONDENT

(Appeal from judgment of Court of Appeal of Uganda at Kampala before Justices Manyindo, DCJ, Berko JA, Mpagi-Bahigeine JA, dated 28th April 1998 in Civil Appeal No 49/97)

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have had the benefit of reading in draft the judgment prepared by Mulenga, J.S.C., and I agree with his judgment and the reasons he has given. I have nothing further to add.

Dated at Mengo this ....24th day of ....February 1999.

G.W. KANYEIHAMBA
JUSTICE OF THE SUPREME COURT.