

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT No. 899 OF 1989

DAVID B. KAYONDO:.....PLAINTIFF

VERSUS

THE CO.OPERATIVE BANK LTD:.....DEFENDANT

BEFORE: THE HON. MR. JUSTICE G.M. OKELLO

JUDGMENT:

This action is in breach of contract of employment. The Plaintiff had served the defendant Bank in various capacities since 1975 and was finally appointed by a letter dated 1/2/88 Secretary of the Bank.

This appointment was however later terminated by a letter dated 16/10/89. The Letter was signed by the Chairman of the Board of Directors of the Bank. No reason was contained in that letter for termination of the Plaintiff's services with the defendant Bank. Terminal benefits allegedly due to the Plaintiff were calculated and paid by a cheque to the Plaintiff's Bank A/C with the Defendant Bank. The Plaintiff protested the termination which he described as unlawful and contrary to the laid down procedure. He declined to accept the payment made for his terminal benefits. He instead demanded the defendant to rescind its letter terminating the Plaintiff's services. The defendant rejected the demand. Following that dispute, the Plaintiff instituted this suit.

In it he claimed inter alia, an injunction restraining the defendant from treating the letter dated 16/10/89 as effectively terminating the Plaintiff's employment; a declaration that the plaintiff's contract of service with the defendant is still subsisting; an order that all dues under the contract, withheld since 16/10/89 be paid to the Plaintiff;

Damages for breach of contract; interest and cost of the suit.

The defendant denied the above claim and contended that the plaintiff contract of services with the defendant was terminated in accordance with the standing orders, Rules and Regulations Governing the same, He thus prayed for the dismissal of the suit.

At the end of taking all the evidence, issues were framed amidst disputes between the opposing counsels over the first issue which challenged the jurisdiction of the court. The following were the issues framed.

- (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 Plaintiffs contract of employment.
- (3) Whether Letter of 16/10/89 by the Chairman of the defendant Bank terminating the Plaintiff's services did or did not terminate the contract of Employment.
- (4) What relief if any is the Plaintiff entitled to.

After submissions by counsels on both sides on the above issues, I gave Judgment on 27/8/90. In the Judgment I considered only issues No. 1 which I answered in the affirmative. In view of the affirmative answer in issue No. 1, I declined to consider the rest of the issues. The PLAINTIFF appealed to the Supreme Court against my above decision. The Supreme Court heard the appeal and gave its Judgment on 19/2/92. It reversed my said decision and directed that I proceed to consider the issues which I had left unresolved. Hence the purpose of this my second Judgment in this case. It is to answer the issues which were left unanswered in the first Judgment which I delivered on 27/8/90.

In this second judgment, I Shall proceed on the basis that section 23 of Act 30/70 does not oust the jurisdiction of the court over disputes arising between a Co. operative society and its members, officials or employees on matters touching the business of the society. But that it merely created an alternative method of settling disputes of the nature name therein.

In addressing me on me on issue No. 2 which is "What are the terms and conditions of the plaintiff's contract of employment", Dr. Byamugisha made a general remark to the effect that the evidence regarding the suspension or sending on leave of the Plaintiff and the reasons for termination of his contract of employment are not necessary, That ability and capability of the Plaintiff on the job are not relevant since

defendant was not bound to ascribe reasons for terminating the services of its employees. He thus urged me to ignore those evidence.

Mr. Mulenga disagreed with that view. He contended that while an employer is not under duty to give reasons for terminating the services of his employee, the evidence showing the circumstances which led to the termination of the employees services are necessary to assist the court decide on whether the termination was just and fair.

I share that view. It is indeed an established principle that an employer is not bound to give reasons for terminating the services of his employee. But the evidence showing the circumstances which led to the termination are relevant and necessary to assist the court determine whether the termination was just and fair. To that extent, those evidence will not be ignored.

On the issue itself, Dr, Byamugisha contended that the terms and conditions of the Plaintiff's contract of employment are contained in his letter of appointment dated 1/2/88. He quoted paragraph 2 thereof which reads thus:-

"Appointment is subject to Bank standing orders, Rule and Regulation and other administration direction made from time to time".

The letter was tendered in evidence at the hearing. It was received and marked Exh. P1. Unfortunately it together with all the exhibits received in this case, are not in the file now. I am made to understand that these exhibits could not be traced even when they were required for the appeal (see letter dated 27/5/91 by the Asst. Registrar to M/S Mulenga and Karamera Advocates). It would appear that they were misplaced when the record of the proceedings was being prepared for the appeal.

However, it is to be noted that there IS no dispute between the parties AS to the existence or the contents of the letter. The bone of contention between the parties IS whether the By-law of the co-operative Bank also forms part of the terms and conditions of the Plaintiff's contract of employment. Dr. Byamugisha contends for the defendant that the Bylaw of the Co-operative Bank does not form part of the Plaintiff contract of employment for two reasons Firstly because it was not included in the plaintiff's letter of appointment. Secondly that By-law bind only members of the relevant society but not outsiders. For this proposition the learned counsel cited and relied on the case of Eloy vs. Positive Government Security Life Assurance Co. (1876) 1 ex. D 88. This is decision of the court of appeal of England. The Judgment was reproduced in the book entitled "law of Business of Organisations in East and Central Africa" by John. W. Katende .and M.R. Chesterman at Page 321.

In that case the Plaintiff, a solicitor, at the instance of the promoter of the defendant company loaned to the promoter some money to defray the preliminary expenses in promoting the company. The plaintiff loaned the money upon the condition that he would be appointed a solicitor of the company if it was formed and that he would not be dismissed except for misconduct. The Plaintiff prepared articles of association of the Company. It was signed by some members of the company as required by the law. In the articles, the Plaintiff included clause 118 which entrenched the above condition. The Company was eventually formed and the plaintiff was appointed its solicitor. Later however, the company appointed other solicitors as well. The Plaintiff protested the appointment of those other solicitors. He brought this action allegedly to enforce his right under the Articles of Association, of the company.

It was held that the Articles of Association did not create any enforceable right which the Plaintiff

could enforce against the company, That articles of association do not constitute a contract between the company and non members. That articles of Association of a Company constitute a contract only as between members intense in respect of their rights as shareholders.

The learned counsel further cited and relied on HICK man Vs. KENT OR ROMNEY MARSH SHEEP-BREEDER'S ASSOCIATION (1915) ICH.D. 88L.

That case was also reproduced in the Law of Business organisation in East and Central Africa by John W. Katende and M.R. Chesterman. It is on Page 323 to 327. In that case, the Plaintiff who later became a member of the Association claims to enforce his rights under the association's articles. The Secretary of the association was not a member of the association. But he was sued in his official capacity as Secretary of the association. The articles were the common form in private companies.

It was held that general Articles dealing with rights of members "as such" constitute a contract between the members and the company as well as between the members interse.

Applying the Principle stated in the above authorities, Dr. Byamugisha submitted that the By -law of the Co. operative Bank does not form part of the Plaintiff's terms and conditions of Employment because the Plaintiff was not a member of the Bank.

For the Plaintiff it was contended by Mr. Mulenga S.C. that it was immaterial that the Plaintiff was not a member of Bank. That he was a secretary of the Bank rind that the by-law makes approval of the Registrar of Co.operative societies a condition for lawful appointment and dismissal of a Secretary of the Bank. That to that extent the By-law forms part of the terms and conditions of the plaintiff contract of employment.

The Principle stated in the above authorities is that an outsider of an Association to whom rights purports to be given by the articles of association in his capacity is such outsider cannot sue on these Articles treating them is contract between himself and the company to enforce those rights. The reason for this is that the Articles do not constitute contract between him and the Association. A clear contract is necessary to bring the articles to bind an outsider and the Association.

In the instant case, there is no direct evidence or otherwise that the Plaintiff is a member of the Co.operative Bank. The evidence available show that he is an employee of the Bank. The evidence of Pius Batarinyebwa PW2. shows that clause 37 (1) of the By-law of the Co-operative Bank requires approval of

the Registrar of the Co-operative societies for a lawful appointment and dismissal of a Secretary of the Co-operative Bank.

This evidence was corroborated by the evidence the Plaintiff PW1.

A copy of the said By-law was tendered in evidence at the hearing of the case. It was received and was marked Exh. P9. But like all other exhibits in this case, it is misplaced. There is however no dispute as to the construction of the clause. Both parties agree that clause 37 (I) of the By-law makes approval of the Registrar of Co. operative societies a condition for a lawful appointment and dismissal of a secretary of the Co-operative Bank. This clause of the by-law thus purports to create in favour of the plaintiff and those of category of officers named therein a right. For the appointment or dismissal of such officers to be un lawful, there must be approval of the Registrar of the Co-operative societies.

This is the requirement imposed by that clause 37 (1) of the
said By-law.

On the principle stated in Eley's case and, that of Hickman above, that clause of the By-laws of the Co-operative Bank does not create a contractual obligation between the Plaintiff and the Bank, entitling the Plaintiff to sue the Bank on it to enforce the right so created. There is need for a clear contract to make the By-laws of the Bank bind the Plaintiff as an outsider and the Bank. The clause only creates a contract between the members and the Bank and between the members inters. It is for the internal running of the association. It gives to the Members of the Bank A mandate to insist that their Directors comply with the conditions laid down in the Articles when they are effecting appointment and or dismissal of such category of officers named in the clause. For the terms and conditions of employment of the plaintiff to be regulated by the By-law of the Bank it ought to have been expressly stated so in the letter of his appointment. This was not done. Only the standing Orders, rule and Regulations and other administrative directions made.

from time to time was mentioned in the letter of appointment. In the absence of such clear commitment, the By-law of the Bank cannot be dragged by a sheek implication to form part of the terms and conditions of the Plaintiff's contract of Employment with the Defendant Bank so as to bind the Bank with the Plaintiff as an outsider. On the premise, my answer to issue No. 2 is that the By-laws does not form part of the terms and conditions of the Plaintiff's contract of service with the defendant Bank.

This now leads me to issue No. 3. This issue is "whether the letter of 16/10/89 by the Chairman of the defendant Bank terminating the Plaintiff's services did or did not terminate the contract of Employment".

Dr. Byamugisha contended for the defendant that the letter of 16/10/89 did effectively terminate the Plaintiff's services with the defendant whether the By-law applies or not. He pointed out that the termination of the services of the Plaintiff with the defendant was effect, under tin, standing orders, rule and regulations which, governs the terms and conditions of services of senior staffs of the Co-operative Bank.

That the Plaintiff's terms and conditions of service is governed by this standing orders rule and regulations of service is governed copy of the standing order Rule and Regulations. A revised copy of the standing orders Regulations governing the terms condition of services of senior staffs of the defendant Bank was tend -red in evidence it the hearing of this case. It was received in evidence and was marked Exh. D9. But like all the other exhibits received in this case, it is also misplaced. It is therefore not available as I compose this Judgment. I had however scanned through it before it disappeared. It provides for dismissal for misbehaviour or misconduct. Dr. Byamugisha argued that if the by-law applies to this case, a view which the defendant rejects, the letter of 16/10/89 would still effectively terminate the plaintiff's services with the defendant despite the

Lack of the Registrar's necessary approval. That the defect caused by the refusal of the Registrar to approve the termination was regularised by the Minister who approved the termination under section 85 (2) of Act 30/70. Counsel further argued that Regulation 27 (1) Gives power to appoint a secretary of the Bank to the committee of the Bank. He pointed out that he who his power to appoint also has the power to dismiss. That the fetter imposed by the by-law is ultra vires as the Regulation is Superior to the by-law

As regards to the Plaintiff's prayer for a declaration that the Plaintiff's contract of Employment with the defendant still subsists, Dr. Byamugisha contended that it is a settled law that where a contract of employment is wrongly terminated the employee has his remedy in action for damages but not for a declaration that the contract still subsists. The courts cannot compel an employer to employ an employee when he does not wish to. It cannot be specifically enforced. He cited and relied on a number of case authorities in Support of this view:- Judgment No. 13/72 of the Civil appeal of Zambia in RAINE Engineering Co. Ltd. Vs. Baker Civil Appeal No. 3/72 from Zambian High Court Civil case No. 387/70; Vidyo daya University of Ceylon V. Silvia (1964) 3 ALL ER 865; John Okori Atto Vs. UEB (1981) HCB 52 holding No. 9 and 10.

For the Plaintiff it was contended by Mr. Mulenga that the letter of 16/10/89 did not terminate the Plaintiff's services with defendant because the competent authority to terminate the Plaintiff's services was not invoked. He pointed out that the standing orders and regulations (Exh. D9) provides for dismissal only for misconduct. That the evidence on record show that there was no adverse Report about the Plaintiff at his work. That in those circumstances termination of service of the Plaintiff could only have been effected under the common law by giving him reasonable Notice e.g. three months Notice for a top executive.

Counsel further argued that the defendant Bank was bound by its By-law in dealing with its members and non members alike. That there was no conflict between the By-law and the Regulation. That under clause 37 (1) of the By-law, dismissal of a secretary of the defendant Bank requires approval of the Registrar of Co. operative societies to be lawful. Counsel pointed out that the termination of the Plaintiff's services as contained in letter of 16/10/89 was not approved by the Registrar of Co.operative societies. That even the Claim that the Minister regularised that defect by approving the termination under section 85 (2) of Act 30/70 is not correct. He pointed out that this section does not empower the Minister himself to do that duty or function which the Registrar was required under the act to do or perform. That the vet merely empowers the Minister where he is of the opinion that the Registrar's veto or refuse to approve a dismissal was prejudicial to the public interest to

direct the Registrar to approve and the Registrar Would approve as directed. That in the instant case there was even no approval by the Minister. That the defect in complying with clause 37 (1) of the By-law and with section 85 (2) of Act 30/70, left the termination in the letter of 16/10/1989 unapproved. That in those circumstances it cannot effectively terminate the Plaintiff's services with the defendant.

On the plaintiff's prayer for a declaration that his contract of employment with the defendant still subsists, Mr. Mulenga conceded that it is a general rule of law that courts would not in the normal circumstances order an employer to employ an employee whom he does not wish to. He submitted however that the above was a general rule. That there are certain circumstances where the above general rule can be held not to apply He cited and relied on the case of Hill vs. Parson & Co. Ltd. (1971).3 ALL ER 1345 at 1350. He submitted that the instant case offers such exceptional circumstance to justify declaring that the contract of employment of the Plaintiff with the defendant still subsists.

For the Reasons which I had given therein, I issue No. 2 that the By-law of Co. operative Bank does not form part of the terms and conditions of contract of services with the defendant. The effect of that answer is that the condition imposed by clause 37 (1) of the By-law as regards appointment and or dismissal of a secretary of the Bank would not apply in this case. It follows then, that the letter of 16/10/89 is not affected by such condition. Therefore the letter effectively determines the plaintiff's services with the defendant.

In case I am wrong in that holding and it is found as it were, that the By-law forms part of the terms -and conditions of the plaintiff's contract of services with the defendant, then there would be need for the Registrar of Co.operative societies to approve the termination of the Plaintiffs contract of services in terms of clause 37 (1) of the By-laws.

Dr, Byamugisha contended that even if it is held that the Bye-laws form parts of the terms and conditions of the Plaintiff's contract of services with the defendant, the letter of 16/10/89 would still effectively determines the Plaintiff's contract of services with the defendant despite the refusal by the Registrar to approve the termination. That the defect caused by that refusal is regularised by the Minister who approved the termination under section 85 (2) of Act 30/70.

With respect to the learned counsel, I do not agree with his interpretation of the section. The section as pointed out by Mr. Mulenga correctly in my view, does not empower the Minister to himself do that duty which the registrar is required under the Act to do. The section the Minister where he is satisfied that the refusal of the

Registrar to do his duty under the Act is prejudicial to the public interest to only direct the Registrar to do the duty in a particular manner. On such direction, the Registrar shall comply. The relevant section reads as follows

"85 (2) If the Minister is at any time satisfied that the Registrar or a committee of a registered society is exercising his or its power or is carrying out his or its duties and functions under this Act or regulations made there under in a manner prejudicial to the Public interest, the Minister may require the Registrar or the committee to exercise his or its powers or carry out his or its duties and functions in such manner as the Minister may direct and the Registrar or committee shall thereafter exercise his or its powers or carry out his or its duties and functions as the case may be in the manner so directed."

In the instant case, the evidence of PW1 and that of PW2 show that the Registrar had refused to approve the termination of the plaintiff's services contained in a letter of 16/10/89. A letter of 3/10/89 Exh. P7 from the commissioner for Co-operative to the Chairman of the Board of Directors is that evidence of PW2 rejecting to approve the termination of the Plaintiff's services with the defendant. The evidence on record shows that upon that Refusal, there was no direction from the Minister to the Registrar to approve the termination. In these circumstances it is my view that the condition imposed by clause 37 (1) of the By-laws remains uncomplied with.

As regards the alleged approval of the termination by the Minister himself, there is even no evidence to support the claim. There is a letter of 14/11/89 Exh.8 from the Permanent Secretary Ministry of Co-operatives to the Chairman of the Board of Directors of the Bank. In that letter the P/S informed the Chairman that the Minister has approved the termination of the Plaintiff's contract of services. In my view this is no evidence that the Minister in fact approved the termination of the Plaintiff's contract of services with the defendant.

The Plaintiff prayed that this court makes an order declaring that the plaintiff's contract of services with the defendant still subsists.

It is rightly agreed by both counsels that it is a general rule of law High courts would not order

an employer to employ an employee when he does not wish to. Such an order cannot be specifically enforced. I agree with that view. Available authorities support that view. The following cases to which I was referred by counsel for the defendant are on the point. They are: - Raine Engineering Co. Ltd. V. Baker; Vidyodaya University of Ceylon v. Silvia Wakiso Vs. Burris u Co. operative U n i o n (1 9 6 8) EA 5 23. John Okori Atto v. UEB(1961)UCP, 32.

Mr. Mulenga submitted however that the above was a general rule.

That there are certain circumstances under which the above general rule can be held not to apply. He cited and relied on HILL Vs. PARSON AND CO LTD. (1971) 3 ALL ER 1345 at 1350.

In Hill's case the Plaintiff was a chartered Engineer aged 63. He was employed by the defendant for 35 years. He was due to retire in two years time at 65. His salary was £300 per year and was due to be increased. This was necessary to determine the amount of his pension. Following an Industrial negotiation the defendant signed an agreement with a Trade Union called DATA. Under this agreement all the employees of the defendant under the rank of head and Assistant head of department were to become member of DATA trade union. The plaintiff fell in that category to become member of DATA. Resulting from the agreement, the defendant wrote a letter giving his affected employees one month's Notice to join D A T A trade union as a condition of their employment with the defendant. The plaintiff refused that new condition. Whereupon the defendant served him with one month's Notice terminating the Plaintiff's services with the defendant. Faced with that termination, the Plaintiff brought this action as a test case.

Lord Denning held:-

- (1) That tie one month's notice terminating the plaintiff's contract of employment with, the defendant was too short for a professional of the plaintiff's standing who was entitled to a longer Notice. That the short Notice amounted to a wrongful repudiation of the Plaintiff's contract of service.
- (2) That where a master unlawfully repudiated a contract of service by giving too short n notice to comply with the terms of the contract, the notice was not effective to terminate the contract of service unless the servant accepted it.
- (3) That if a master insisted on the servant's employment terminating on the day named in the notice despite the fact that the Notice was unlawful, the contract of service will come to an

end because the master is not to be compelled to employ a servant if he does not wish to.

(4) But that this rule is not inflexible. Where special circumstances existed, the court has power to grant a declaration that the contract of service still subsists and to grant an injunction to stop the master treating the contract as at end. The special circumstances considered to justify the declaration and the grant of an injunction in this case were:- That the Plaintiff had suffered wrong by receiving Notice which was too short. That damages would be inadequate remedy for him who had served for 35 years and was due for pension in two years time. There was personal confidence which continued between him and the defendant.

The above is no doubt a very respectable decision. But it is in my view distinguishable from the instant case on their facts.

In the instant case, in paragraph 2 of its written statement of defence, the defendant pleaded that the termination of the plaintiff's contract of services with the defendant was effected under the standing orders, rule, and Regulations governing his terms and conditions of employment with the hearing, the defendant conducted, its defence through cross examination of the Plaintiff's witnesses and by the evidence of its sole defence witness to show that the Plaintiff's contract employment with the defendant was terminated under the standing order, rule and Regulations. A revised copy of the standing order and Regulations was tendered in evidence and was marked Exh. D.9. It provided for dismissal for misconduct. But the evidence on record shows that the plaintiff had no adverse report on him about his job. It is however established that a master can dismiss his employee at any time and for any reason or for none at all. The Plaintiff served in various capacities with the defendant for 14 years. He was aged 42 years. He testified in cross-examination that the standing order, rule and regulations provides for a one month's notice on either side to end the services. DW1 testified that when the Plaintiff's services were terminated, he was offered payment in lieu of Notice and his full terminal benefits including payment for accumulated earned leave of 283 days and gratuity.

It is clear from the above that while Hill was given too short a notice, the plaintiff in this case was given cash payment for one month in lieu of Notice in compliance with the terms and conditions of his employment. While Hill, had served the defendant for 35 years, Plaintiff in this case had served for 14 years. While Hill was left with only two years to two years¹⁵ to his retirement, the plaintiff

still had a long way to go about 13 years if he retires at 55. In those circumstances I am of the view that no special circumstances have been shown in this case to justify making a declaration that the plaintiff's contract of services with the defendant still subsists and to grant an injunction. Damages would be adequate. No injunction would therefore be granted.

In the whole, my answer to issue No. 3 is that the letter of 16/10/89 by the Chairman of the Board of Directors of the Defendant Bank did effectively determine the plaintiff's contract of services with the defendant.

In view of the above answer, the answer to issue No.4 is that the Plaintiff is not entitled to any relief. However, if I am wrong in my Finding in issue No, 3 and shouldn't be found as it were that the letter of 16/10/89 did not effectively terminate the Plaintiff's contract of services, he would be entitled to some reliefs.

I would however not make the order declaring that the plaintiff's contract of service still subsists and no injunction would also be granted. The reason for this is that from the facts of this case no special circumstances exist to justify the making of that order and for the granting of the injunction because damages would be adequate compensation.

As to the measure of the damages that would be awarded, the contract of services will have come to an end on the date stated in the letter of 16/10/89 because the defendant so insists. The court cannot force the defendant to employ the plaintiff when the defendant is opposed to it. The Plaintiff would be entitled to payment in lieu of proper notice; payment for all his accumulated earned leave. He cannot claim for benefit he would have earned since 16/10/89 because there was already no contract for that (Hill vs. Parson & Company Ltd. above). As it is the plaintiff's claim stands dismissed with costs,

G.M. OKELLO
JUDGE
24/9/92.

27/1/93: Mr. Mulenga for the Plaintiff

Dr. Byamugisha for the Defendant

Rose Akech Court Clerk

Judgment delivered as directed.

STEPHEN MUSOTA
DEPUTY REGISTRAR.