

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL SUIT NO. 439 OF 2004

FAROUK S. MUKASA :::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

POSTA UGANDA :::::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. AG. JUDGE REMMY K. KASULE

JUDGMENT

The Plaintiff sued the Defendant for payment of his terminal benefits, refund of graduated tax amount wrongly deducted and general damages.

The particulars of the claim are pleaded in paragraph 10 of the Plaint as being:-

- “(i) Three months salary Ugs. 3,250,000 x 3 = Ugs 9,750,000/=.**
- (ii) Repatriation costs: Ugs. 200,000/=**
- (iii) Graduated Tax deduction: Ugs. 50,000/=”**

In his written statement of defence, the Defendant denied the Plaintiff’s claim contending in paragraph 6 of the defence that:-

“----- if the Plaintiff has any claim or at all, then he was fully paid and received the payment in full and final settlement and has therefore no legitimate claims against the Defendant.”

No issues were framed before commencement of hearing. Both Counsel however have agreed in their respective written submissions that only two issues arise for Court determination:

1. Whether the Defendant owes the Plaintiff terminal benefits.
2. The Remedies available to the Parties.

Plaintiff testified in support of his case. He called no witnesses.

For Defendant only Mr. Mbabazi Herbert Kawawa, General Manager, Finance, testified.

As to the first issue: whether the Defendant owes the Plaintiff terminal benefits, the pleaded particulars of terminal benefits constituting the claim have been stated.

However, in his evidence and written submissions, the Plaintiff claimed as part of the terminal benefits, gratuity at the rate of 25% for the three (3) months that he served in the year 2004 prior to his retirement. This amounts to Shs. 2,437,500/=.

Defendant has contended that this part of the claim cannot be considered by Court as it is not pleaded in the Plaintiff. Plaintiff made no attempt to amend the Plaintiff so as to include it.

The law is that a court grants relief founded on pleadings. In **Gandy Vs. Caspair Air Charter Ltd [1956], 23 EACA, 139 the Court of Appeal for East Africa**, Sir Ronald Sinclair, Vice – President, as he then was, held:-

“The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”

In **Francis Sembuya Vs. All Port Services (U) Limited: Supreme Court of Uganda Civil Appeal No.6 of 1999 pages 184 -186: Supreme Court Civil Judgments/Orders: Delivered 2000: Tsekooko, JSC**, explained that whether or not relief should be given by the Court on a matter that is not pleaded, thus:

“The answer to this question depends, I think, on whether any prejudice was caused to the appellant, in that Judgment was given against him on an unpleaded cause of action which he had no reason to anticipate and no opportunity to prepare to meet.”

In this case, there is nothing to show that the Defendant had reason to anticipate and opportunity to prepare to meet the objected to claim. It was thus incumbent upon the Plaintiff to plead the same.

Further, terminal benefits are claimable as special damages. They must thus be specifically pleaded as special damages: See **ELETU VS UGANDA AIRLINES CORPORATION (1984) HCB 39**: where **Manyindo J.**, as he then was, held that:-

“It is trite law that salary and other terminal benefits should be claimed by way of Special damages which must be pleaded and strictly proved. Therefore, there should have been a separate sub-heading particularizing the special damages in the Plaintiff.”

This holding applies with equal force to this case. Court therefore holds on the basis of the above authorities, that the Plaintiff having not pleaded, and therefore having deprived of the Defendant the opportunity to know and to prepare to defend, the claim as to gratuity of shs.2,437,500/=, being the rate of 25% for three months he served in 2004, prior to retirement, such claim is not recoverable in this suit. The same stands rejected.

As to the retirement benefits whose particulars are pleaded, Plaintiff’s testimony is that on 12.06.90 he was appointed bursar of the then Uganda Posts and Telecommunications Corporation’s Training Institute on permanent and Pensionable terms.

On 16.03.98 he was appointed Acting Chief Manager Finance, Accounts and Stores, of the Defendant, after Uganda Posts and Telecommunications Corporation had been privatized, resulting into creation of the Defendant. On 01.01.03 he was appointed, General Manager, Finance, on a three years contract, with a three months Probationary period. On 01.06.03 he was confirmed in this appointment.

On 28.02.04, he voluntarily retired from Defendant's service. He did so following an offer by the Defendant of a voluntary retirement scheme to all staff, which he took.

The terms of the retirement package were contained in a circular of 17.02.04 Exhibit P8, issued and signed by the Defendant's Chairman of the Board of Directors.

According to the circular, staff who had been in service with the Defendant for five (5) or more years, were entitled to payment of three (3) months salary payment in lieu of notice, while two (2) months salary was payable to staff having served for at least one (1) year, but less than five (5) years, and equivalent of one (1) month's salary was payable to those in service for less than a year.

The payment of terminal benefits was to be effected as soon as the Auditor General completed their verification, then expected to be completed within three weeks.

Plaintiff, after retirement, waited in vain for the payment of his terminal benefits. The rest of the retirees were being paid. He, through his lawyers, demanded for payment: Exhibit P16. He received no response. He then filed this suit on 16.06.04. On same date of filing suit, the Defendant sent to Plaintiff a cheque for Shs.3,942,500/=, Exhibit P17. The same was dishonoured with "Refer to Drawer" remarks by Defendant's bankers on presentation. On 09.07.04, Defendant forwarded to Plaintiff's lawyers a cheque for shs. 5,900,000/= without any particulars as to the items of terminal benefits being paid for.

According to Plaintiff, he served the Defendant for almost six (6) years, from 16.03.98 to 28.02.04 when he retired, and is therefore entitled to be paid three (3) months salary in lieu of notice in accordance with the agreed upon terms of the retirement package Exhibit P8.

The Defendant contends otherwise on this point. DW1, Mbabazi Herbert Kawawa's evidence is that the Plaintiff worked for the Defendant for less than five (5) years. This is because Plaintiff's employment as Ag. Chief Manager, Finance, Accounts and Stores, on permanent and pensionable terms that started in 1998, was determined on 27.12.02 when Plaintiff was appointed

by Defendant on a three (3) years contract, as General Manager, Finance. For purposes of the retirement package terms, Exhibit P8, the Plaintiff's period of service is to be calculated, according to DW1, from the date of Plaintiff's contract appointment as General Manager Finance effective 01.01.03: Exhibit P3. Hence Plaintiff's period of service is less than five (5) years. Plaintiff is therefore only entitled to two (2) months salary in lieu of notice, having served for at least one (1) year but less than five (5) years.

It is necessary for Court to decide as to the exact meaning of the language of the 17.02.04 circular, exhibit P8. The material phrase of the circular is: **"those employees who have been in the services of Posta for"** followed by the categories of the notice period.

According to the **"Oxford Advanced Learner's Encyclopedic Dictionary, Oxford University Press, 1994, page 468, "In service" means "carried out while actually working at a job"** **The American Heritage Dictionary of the English language, 4th Edition, by Houghton Mifflin Company, defines the same phrase, amongst other meanings as "of, relating to, or being a full time employee", taking place or continuing while one is a full time employee."** The above meanings of "in-service" support the interpretation and advice given on 09.11.04, through an internal Memo, Exhibit P2 by the Defendant's Acting Company Secretary, Stephen Peter Babiha, to the Defendant's Acting Managing Director: (page 2 paragraph 6 of the Memo):-

"The Chairperson's circular does not refer to appointment but service. In that regard service implied employment in Posta on sequential appointments for such period. Any other interpretation would be severe distortion of the laid down usage of diction in employment or labour law and may not be defensible in Courts of law."

DW1, in his testimony dismissed the above advice, on the basis that the Acting Secretary had joined the Defendant after the event. With respect, Court finds such reasoning of DW1 to be faulty. The Defendant's Acting Secretary interpreted the terms of circular, Exhibit P8, as to their natural and ordinary meaning and how they applied to the Plaintiff's case. Whether or not, he,

Acting Secretary, had joined the Defendant's employment after the event, does not in any way affect the meaning of the language of the circular, Exhibit P8.

In the considered view of Court, the language used in the Circular, Exhibit P8, was intentional and purposeful. The Defendant's Board of Directors intended to have the period of service a staff has worked for the Defendant, regardless of the appointments such a staff may have had in the course of service, as the means to determine the notice period in respect of which salary would be paid in lieu.

Had the intention of the Board of Directors been to have the date of appointment as the determinant of the notice period, then the Board would have expressly stated so in Exhibit P8.

Court therefore holds that the Plaintiff, was in Defendant's service for more than five (5) years, and as such is entitled to be paid three months salary in lieu of notice.

Defendant adduced evidence and contended that Plaintiff was not paid all his terminal benefits because he had, on retirement caused financial loss to the defendant of Shs.17,500,000/= and also he had committed falsification of the Defendant's Management accounts. Therefore payment of his terminal benefits was withheld because the matters were still with the office of Inspector General of Government Business for due resolution.

The Plaintiff on his part, denied causing financial loss of Shs.17,500,000/= to the Defendant. He admitted however that a company whose owners could not be identified, had bought stock cards and then issued to Defendant cheques totaling Shs.17,500,000/= which cheques bounced on presentation for payment to the bankers. The money was not recovered as the company owners could not be traced. On 02.04.03, as General Manger, Finance, being the ultimate head answerable, he took responsibility for this shortcoming, apologized and was reprimanded by the Defendant's Board of Directors, and he undertook to see to it that what had happened does not re-occur. The apology was tendered in evidence as Exhibit P14. Thereafter Plaintiff performed his duties to the satisfaction of Defendant and on 28.05.03, he was confirmed in appointment as General Manager – Finance.

Court finds that Plaintiff's retirement was allowed by Defendant on 28.02.04. He was never told, at that time, that his terminal benefits would not be paid to him by reason of this financial loss. No independent evidence was adduced that the issue was with the office of Inspector General of Government, apart from the bare statement of DW1. There was no evidence that the loss was ever reported to police. No explanation was given as to how the Plaintiff came to be confirmed in the Post of General Manager – Finance, if the issue of causing financial loss was still on his head.

On the evidence availed, Court holds that the alleged causing of financial loss was and is not a valid reason for the Defendant not to pay the Plaintiff his terminal benefits in full. The said issue was dealt with and closed on 02.04.03. Otherwise the Plaintiff would never have been confirmed in appointment as evidenced by Exhibit P15.

The assertion that Plaintiff falsified management accounts by the time of his voluntary retirement is not supported by any credible evidence. No police report or any writing by Defendant to the Plaintiff, before he retired, was produced to Court. Court finds the allegation not at all proved. The same is therefore held not to be valid ground for withholding payment of terminal benefits to the Plaintiff.

Finally, it was the case for the Defendant that what was paid to Plaintiff was all that was due to him according to the recommendations of the Deloitte and Touche report, Exhibit P20.

DW1, however, had no explanation to give to Court when it was put to him that what the Report, Exhibit P20, contained were proposals for approval by the Defendant's Board of Directors; which approval was never given, the Board choosing to proceed on the retirement package terms contained in Exhibit P8.

Court rejects the Defendant's contention and holds that the retirement package to which the Plaintiff is entitled is that set out in Exhibit P8.

The evidence of the Plaintiff that he is entitled to Ug. Shs.200,000/= repatriation costs, and Shs.50,000/= graduated tax reduction was not in any way contested by the Defendant. Court holds that Plaintiff is entitled to the same.

Court therefore finds on the first issue that the Defendant owes the Plaintiff terminal benefits being:-

- (a) three (3) months salary in lieu of notice i.e $(3,250,000 \times 3) = \text{Shs.}9,750,000/=$
 - (b) Repatriation costs = Shs.200,000/=
 - (c) Graduated Tax Reduction = Shs. 50,000/=
- Total : Shs.10,000,000/=

The second issue is what remedies are available to the parties.

The Defendant never filed any counter-claim against the Plaintiff. There is thus, on the basis of pleadings, nothing that Defendant claims against the Plaintiff.

It is however agreed by Plaintiff that on 09.07.04 Shs.5,900,000/= was paid by Defendant to Plaintiff, through his lawyers. The Defendant did not indicate the particulars of terminal benefits that the amount covered. In Court DW1 explained that the amount covered good will and costs of the Plaintiff's lawyers. He gave no detailed breakdown.

In absence of particulars of items of terminal benefits paid for, Court holds that the amount was partial settlement of what the Defendant owed to the Plaintiff. The same will thus be deducted from the total sum of Shs.10,000,000/= terminal benefits to which Plaintiff is entitled so as to arrive at the sum, still outstanding: = Shs. $(10,000,000 - 5,900,000/=) = \text{Shs.}4,100,000/=$. Court finds Shs.4,100,000/= as the outstanding sum due to the Plaintiff from the Defendant.

Plaintiff claimed general damages against the Defendant. He contended that the non-payment of his terminal benefits purportedly due to his having caused financial loss had caused him embarrassment amongst the members of the Rotary Club of Kololo where he was president, at the material time. No member of that Club testified in support of the Plaintiff. At any rate the issue of causing financial loss, was not all that far afetched given the fact that it happened and Plaintiff took some of the blame by even tendering an apology.

Court will therefore, in the circumstances, award no general damages to Plaintiff on the basis of this particular ground.

Court however takes cognizance of the fact that the Plaintiff has been deprived of his money for the period of almost three (3) years since he retired in February 2004 to date. Plaintiff is thus entitled to be awarded adequate interest on the sum of Shs.4,100,000/= for the period of deprivation. Court finds an annual interest of 22% on the said amount appropriate. The same is awarded.

Accordingly judgment is entered for the Plaintiff against the Defendant in the sum of Shs.4,100,000/= being balance of terminal benefits due from the Defendant to the Plaintiff.

The said sum of Shs.4,100,000/= shall carry interest at the rate of 22% per annum from the retirement date of 09.02.04 till payment in full.

The Plaintiff is also awarded the costs of this suit.

Remmy K. Kasule

Ag. Judge

16th March 2007

