THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS CAUSE NO. 253 OF 2013

HON. JAMES KAKOOZA
(Suing by representative action on behalf
Of 397 Members of Parliament and on his behalf::::::APPLICANT

VERSUS

1. **ATTORNEY GENERAL**
2. **PARLIAMENTATY COMMISSION** }**::::::::::::::RESPONDENTS**

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE

RULING

This is an application brought against the Respondent under Article 50, 26, 98 of Civil Procedure Act and all other enabling laws, for orders that:

a) A declaration that the Members of Parliament are entitled to be paid gratuity at the end of a period of 12 months, or at such time as they desire.

b) A declaration that the decision by the 2nd respondent to withhold the Members of Parliament's gratuity payments and deposit it into an account without their consent was unlawful and in contravention of their right to property/constitutional rights.

c) That an order be made that the Members of Parliament are paid the gratuity that has accrued since September 2011 to date.

d) A declaration that the Members of Parliament be paid damages for the inconvenience caused to them due to being the deprived of their money.

e) The costs of the application be provided for.

The grounds on which the application is premised are:

1) The 2nd respondent through the Clerk of Parliament stopped all monthly gratuity payments to Members of Parliament in September 2011.

2) The decision to withhold the monthly payments was done without the consent of the Members of Parliament as is required by law.

3) Members of Parliament are entitled to payment of emoluments and gratuity under Article 85 of the Constitution and it is therefore their constitutional right to receive their gratuity payment as it falls due.

4) The act to deposit the Members of Parliament's money/monthly gratuity into an account without their consent is a violation of their right to property.

5) The Attorney General is sued in his capacity as an advisor of the government.

6) It is just and fair that this application be granted in the interests of justice.

The application was originally brought against two respondents, that is to say, the Attorney General and the Parliamentary Commission. The suit against the Attorney General was later withdrawn leaving the Parliament Commission as the only respondent.

According to the facts as agreed by the parties, the applicant and the beneficiaries of this suit are Members of the Parliament of Uganda whose term officially began on the 17th day of May 2011. Under Section 2 of the Parliament (Remuneration of Members) Act Cap 259 Laws of Uganda, the Members are entitled to a gratuity paid at the end of each period of twelve months of service in office or at such period as the Member of Parliament concerned may desire. The gratuity was paid up to November 2011 where pursuant to a decision by the respondent an account was opened in Crane Bank for purposes of investing the money for and on behalf of the Members of Parliament. The said account has since June 2013 been closed and on the 23rd and the 30th of July 2013, respectively every member was paid their entire gratuity plus accrued interest.

Agreed Issues:

1) Whether the decision of the respondent to withhold the accrued gratuity of the applicant and other beneficiaries of this suit was unlawful and a contravention of their constitutional rights.

2) Whether the applicant is entitled to the remedies sought.

The applicants were represented by Mr. Kavuma Terence and Ms. Kintu Carol, while the respondent was represented by Mr. Kirunda Solomon and Mr. Angura James. Parties were directed to file written submissions which they did.

Resolution of Issue 1;

On whether the decision of the respondent to withhold the accrued gratuity of the applicant and the beneficiaries of this suit was unlawful and a contravention of the members' Constitutional rights, Counsel for the applicant submitted that the right to gratuity of Members of Parliament originated from Article 85 (1) of the Constitution; and the Parliament (Remuneration of Members) Act Cap 259; Sections 1 (1), and Section 2 (1) (a) thereof which provide, inter-alia, that gratuity would be payable to members at the end of each period of twelve months service in office or at

period as the member of Parliament concerned may desire.

Counsel further submitted that the current Members of Parliament commenced on the 17th day of May 2011, and as such their gratuity accrued on the 17th of May 2012 and on the 17th of May 2013. On the 18th of October 2012 and the 5th of December 2012 the applicant requested for his accrued gratuity from the respondent. (See Exhibit P1 and P4). The respondent's refusal to pay the same as contained in Exhibit P2 and P3 was that with effect from November 2011, gratuity deductions were paid into the said account which was a deposit only account and no withdrawals were to be made from it. Consequently the Clerk to Parliament was unable to pay/transfer the applicants' monthly gratuity to their account as requested.

The respondent's justification for withholding the accrued gratuity of the applicant and other beneficiaries of this suit were stated to be for the well being of the Members of Parliament which the respondent was mandated to ensure under the Administration of Parliament, Act Cap. 257; and that the decision to pay the gratuity at the end of their term had been communicated by the Speaker and not called in question.

Counsel, however, contended that the respondent's justification was without merit for the following reasons:

i) There was no provision in the Administration of Parliament (Supra) that specifically mandated the respondent to withhold the accrued gratuity of the applicant and beneficiaries of this suit until the end of their term.

ii) Section 6 (h) of the Administration of Parliament Act Cap 257, on which the respondent seemed to rely, had a general provision in so far as related to gratuity of the applicants, and had to be read subject to the specific provisions of Section 2 of the Parliament (Remuneration of Members) Act Cap 259. Counsel relied on ***Henry De Souza Figueiredo Vs George Talbot [1962] EA 166*** at page 171 paragraph G for the preposition that general provisions must be read subject to specific provisions.

iii) Under Section 2 of the Parliament (Remuneration of Members) Act Cap 259 gratuity was automatically payable at the end of each period of twelve months service in office, the only exception being where a member desired to be paid at a different time. The respondent is not given any discretion in deciding when gratuity should be paid.

iv) The decision on when gratuity to the applicant and other beneficiaries of this suit should be paid was a matter for the individual member of Parliament and where the Member of Parliament had not indicated otherwise, gratuity had to be paid at the end of each period of twelve months service in office.

v) There was no evidence on record that in November 2011 when the decision was taken by the respondent to withhold gratuity, the applicant and other beneficiaries of this suit had indicated a desire to be paid gratuity at the end of their term.

Counsel submitted that the decision of the respondent to withhold the accrued gratuity of the applicants, which is property to them under Article 26 of the Constitution, contravened Section 2 of the Parliament (Remuneration of Members) Act Cap 259 and was thus illegal.

Counsel relied further on Articles 20 (2) and 26 (2) (b) of the Constitution, and on ***Attorney General Vs Osotraco Civil Appeal No. 32 of 2002***, to state that the individuals' property had to be protected and respected even by the state.

Counsel prayed that court finds that the decision of the respondent to withhold the accrued gratuity of the applicant and the beneficiaries of this suit from 17th May 2012 to July 2013 was a contravention of their Constitutional right to property under Article 26 and 85 of the Constitution.

Counsel for the respondents was of a different view. He referred court to Article 87A of the Constitution which established the respondent; and Section 6 (h) of Administration of Parliament Act, Cap 257, which made it the function of the respondent "to do such other things as may be necessary for the well-being of the Members and staff of Parliament."

Counsel submitted that the respondent was composed of Members of Parliament, who were not Ministers. It, therefore, followed that decisions taken by the Commission were really decisions by and for and on behalf of the Members of Parliament.

Counsel further relied on the Constitutional Court's ruling in ***Parliamentary Commission Vs Twinobusingye Severino & Attorney General, Const. Application No. 53 of 2011 at page 23*** wherein it was stated that "***it is clear to us that the applicant is charged with taking care of the welfare and the well-being of the Members of Parliament and staff."***

As deposed in the affidavits of Mrs. Jane L. Kibirige (Clerk to Parliament) and Mr. C.A. Kaija – Kwamya (Deputy Clerk – Corporate Affairs) the gratuity owing to the Members of Parliament was invested for and on their behalf. The Commission invoked its mandate properly founded on the law and made a decision, not to

withhold, but to invest the Members' gratuity or and on their behalf and for their benefit. The decision by the Commission was communicated to the Members in a full plenary sitting by the Rt. Hon. Speaker on Tuesday, 29th November 2011 and it was not challenged. (Exhibit D3, the Official Report of the Proceedings of Parliament (Hansard)) It was not, therefore, correct for the applicant to state that the applicants never indicated their desire to be paid at the end of the term.

Counsel further submitted that the applicants' contention that section 6(h) of the Administration of Parliament Act is a general provision and should be read subject to section 2 of the Parliament (Remuneration of Members0 Act which is specific, was not entirely correct since the provisions were meant to be complementary of each other. While section 2 granted a right, section 6 empowered the Parliamentary Commission to do all things to ensure that the gratuity was handled in a manner that promotes the welfare and well being of the Members. The decision was legally right and within the mandate of the Parliamentary Commission. No right was violated as the gratuity was only invested with no intention to permanently deprive the Members of it. The investment attracted interest that would only be accessible to the Members of Parliament, and not any other person. Any hardship that was going to accrue as a result of the decision to invest was meant to, and has indeed been atoned for, by the interest that the bank gave. And as admitted on record, the gratuity has already been paid together with interest, leaving no live dispute for the court to arbitrate.

In rejoinder, Counsel for the applicant reiterated the applicant's earlier submission and added that the decision of ***Parliamentary Commission Vs Severino Twinobusingye & Attorney General Constitutional Application No. 53 of 2011*** did not specifically authorize

the respondent to withhold the applicants' gratuity. The above comment by the court which is, *obita dicta*, did not in any way translate into a mandate to withhold the applicants' gratuity especially where there was a clear legal duty under Section 2 (1) (a) of the Parliament (Remuneration of Members) Act Cap 259 to pay the gratuity at the end of each period of twelve months service in office.

Counsel further relied on the Supreme Court decision of ***David Sejjaka Nalima Vs Rebecca Musoke Civil Appeal No. 12 of 1985*** to further emphasize the preposition that general Acts must be read subject to specific Acts.

On the respondent's submission that the Members of Parliaments had their duly elected representatives to the Parliament Commission and that decisions taken by the Commission were by, and for and on behalf of the Members of Parliament; Counsel for the applicants drew court's attention to Section 2 (3) of the Administration of Parliament Act Cap 257 which established the respondent as a body corporate whose functions were specified by law; as such, the decision of the respondent to withhold the accrued gratuity could, impliedly, be the decision of the applicants given that the two are distinct legal entities.

On the respondent's contention that the decision by the Commission was communicated to Members in a full plenary sitting by the Hon. Speaker to no challenge on Tuesday 29 November 2011, Counsel for the applicant drew court's attention to Exhibit D3 which is couched in the following terms;

> ***"In consultation with the Public Service Commission, the Parliamentary Commission took a decision. The decision was that your gratuity should be paid at the end of the term arising from the challenges previous Members have faced."***

Counsel submitted that;

i) The decision to withhold the applicant's gratuity was made by the respondent on the 4th of November 2011 in consultation with the Public Service Commission.

ii) Members of Parliament were informed of the decision after the fact on the 29th of November 2011.

iii) The affected Members of Parliament were not heard by the respondent before the decision to withhold their gratuity until the end of their term in office was made.

iv) The affected Members of Parliament did not indicate a desire to be paid their accrued gratuity at a time other than at the end of each period of twelve months service in office. (No evidence is on record to the effect that the 396 Members of Parliament indicated such a desire).

Counsel further contended that it mattered not whether the same was challenged on the floor or not. He reiterated the applicants' position that the respondent's decision to withhold the accrued gratuity of Members of Parliament was a clear contravention of Section 2 (1) (a) of the Parliament (Remuneration of Members) Act Cap 259, and an infringement of the applicants' Constitutional right to property in the said gratuity.

I have considered the submissions of Counsel on either side.

The right to gratuity as enshrined in Article 85 (1) of the Constitution (Supra); and Section 1 (1) and 2 (1) (a) of the Parliament (Remuneration of Members) Act Cap 259 (Supra); has been well stated by either both Counsel.

Article 85 (1) of the Constitution of the Republic of Uganda states:

> ***"A Member of Parliament shall be paid such emoluments and such gratuity and shall be provided with such facilities as may be determined by Parliament."***

Section 1 (1) of the Parliament (Remuneration of Members of Parliament) Act Cap 259 states:

> ***"There shall be paid to a Member of Parliament in respect of his or her office as a member, or such other office which he or she holds by virtue of being such member, the salary and gratuity specified in the schedule to this Act."***

Section 2 (1) (a) of the said Act states:

> ***"A gratuity under this Act shall be paid:***
>
> ***a) at the end of each period of twelve months service in office or at such period as the Member of Parliament concerned may desire."***

Finally, Section 6 (h) of the Administration of Parliament Act Cap. 257 states:

> ***"Functions of the commission;***
>
> ***The functions of the commission shall include;***
>
> ***(h) to do such other things as may be necessary for the well-being of the members and staff of Parliament."***

It is common ground that the term of office for the current Members of Parliament commenced on 17/5/2011; and that as such, their gratuity accrued on the 17/5/2012 and on 17th May 2013. Members of Parliament got monthly payments of gratuity until November 2011, when the Clerk to Parliament informed Members that gratuity deductions were, with effect from November 2011, to be deposited into on account opened with Crane Bank as a deposit only account, and that the deposits plus interest could only be accessed at the end of the Members' term of office.

The respondent relied on the Administration of Parliaments Act Cap 257 which mandated the respondent to do any such things as may be necessary for the well being of Members of Parliament.

Further justification of the respondent's action was stated to be found in the fact that the Speaker of Parliament had on 29/11/2011 communicated the decision of the respondent to Members of Parliament and it had hitherto not been called into question.

I note that the action of the respondent to put the Members' gratuity on an interest earning fixed deposit, was most probably done in good faith and for the well being of the Members. The only problem is that the cart was put before the horse. The respondent apparently took the decision in consultation with Ministry of Public Service on the 4/11/2011, but without first consulting the members whose gratuity the respondent was planning for.

According to the Hansard of 29/11/2011, the Rt. Hon. Deputy Speaker informed Members as follows:

> ***"You have been seeing some correspondences about some deductions that have been made in your – something about gratuity. I think you remember, there was a discussion before, in consultation with the Public Service Commission, the Parliamentary Commission took a decision. The decision was that your gratuity should be paid at the end of the term, arising from challenges previous Members have faced. That decision has been taken in your interest. So, the money is not being taken anywhere, but is being kept safely for you; just for a rainy day – just in case. Do not be surprised. I have seen some correspondences to that effect."***

This suit was filed on 19th March 2013, and on 15/4/2013, a meeting of Members of Parliament was convened by the Clerk to Parliament and was attended by some of the Members of Parliament. It was agreed at the said meeting that individual Members indicate to the Clerk of Parliament how they wished to be paid their gratuity. Indeed some Members returned forms that were circulated to that effect, indicating preferences of when their gratuity should be paid.

It is not disputed that as of July 30th, 2013, gratuity had been paid out to Members' accounts with interest; which leads the respondent to the contention that the application had been thereby rendered nugatory.

It should be noted that Members of Parliament are responsible adults who have indeed been entrusted with the previous duty and responsibility to represent their constituents. They are not children who would require an adult to decide or plan for them what to do with their emoluments. If the Members had not yet indicated

how and when they wished their gratuity to be paid, then their gratuity payments should have been made on a yearly basis, or at best, on earlier intervals if that was more convenient to the authorities that be.

It is true that the respondent is charged with the responsibility of looking after the welfare of the Members of Parliament. However, the letter and the spirit of this law could not be interpreted as extending to the administration of the private lives of the members without their consent; by appropriating the Members of Parliament's entitlement in any other way other than by law provided, without their consent. By the time the Hon. Deputy Speaker informed the Members, a decision had already been taken and effected. The Members of Parliament had not been consulted. The meeting that took place on 15/4/2013 should have taken place prior to any decision to open the fixed deposit account. Only Members agreeable to the venture, ought to have been taken on board.

It is, therefore, the court's finding and conclusion that the decision of the respondent to withhold the accrued gratuity of the applicant and other beneficiaries of this suit was unlawful and a contravention of their constitutional rights. The first issue is therefore answered in the affirmative.

The last issue relates to remedies available to the parties.

The applicant had sought the following remedies from the court.

1) A declaration that the Members of Parliament are entitled to be paid gratuity at the end of 12 months or such time as they desire.

The above is among the facts admitted at the scheduling conference. The parties agreed that under Section 2 of the Parliament (Remuneration of Members) Act Cap 259, Members of Parliament are entitled to be paid gratuity at the end of 12 months or such time as the member concerned may desire.

It is, therefore, hereby declared that Members of Parliament are entitled to be paid gratuity at the end of 12 months or such time as the member concerned may desire under Order 13 rule 6.

2) A declaration that the decision of the 2nd respondent to withhold the MP's gratuity payments and deposit it into an account without their consent was unlawful and in contravention of their right to property.

From the court's findings above, a declaration is hereby made that the decision of the 2nd respondent to withhold Members of Parliament's gratuity payments and deposit it into an account without their consent was unlawful.

However, as to whether it was in contravention of the Members' right to property is another matter. The gratuity was being deposited in a special account for the eventual benefit of the MPs. There was no intention of the respondent to deprive the Members of Parliament of their gratuity permanently, or for anyone else's use or benefit. The interest was to accrue to the individual Members of Parliament. The only problem was that their consent was not sought prior to the taking of the decision by the respondent.

The claim that the gratuity was withheld in contravention of the MP's right to property is, therefore, not justified under the circumstances.

3. An order be made that the MPs are paid the gratuity that has accrued since September 2011.

   It is admitted by the applicant that the respondent has since paid the applicants' accrued gratuity so far. The prayer has therefore been overtaken by events.

4. A declaration that the Members of Parliament be paid damages for inconvenience to them for being deprived of their money.

   Counsel for the applicants submitted that the applicants have been deprived of the use of their gratuity from 17/5/2012 to July 2013 in a manner that was illegal and a contravention of their constitutional right; "as such he ought to be awarded general damages in the sum of Shs. 50,000,000= for breach of statutory duty."

The claim for damages appears to be in respect of only one of the applicants, that is to say, the main applicant.

The respondent's Counsel, however, submitted that although the case was at the time of filing viable, the same was left "lifeless, spent, academic, speculative, hypothetical, and an abuse of judicial process."

Further, Counsel submitted that without prejudice to the already made submission the applicants were not entitled to the sought remedies because the decision to invest was taken by and under lawful authority, the investment was bonafide and not tainted with *malafides* or bad intention and the decision to invest was duly communicated to the Members to no challenge. In terms of any inconvenience that may have been occasioned by the decision to invest, this was atoned for by the interest that was paid.

Secondly, whereas it is true under Section 2 (1) (a) of the Parliament (Remuneration of Members) Act, Cap 259 Members of Parliament are entitled to gratuity "at the end of each period of twelve months service in office or at such period as the member of Parliament concerned may desire," no member expressed the desire to be paid at any other duration. Indeed the Members were paid monthly up to November 2011 when the decision in issue was taken. No MP expressed the desire to be paid at any other interval except at the end of the year. As such, no member merits damages or even costs.

In the further alternative, Counsel submitted that only two Members made a demand to receive their gratuity and as such only two persons were inconvenienced if at all. Any orders as to costs, therefore, if any, should be made in respect of the two MPs.

He concluded that the case before court be dismissed as the same was overtaken by events; and or alternatively that the decision to invest was done in accordance with the law, was proper and was in the interest of the welfare and well being of the Members of Parliament and as such no orders as to damages and costs against the respondent be made.

In his submissions in rejoinder, Counsel for the applicant submitted that on the 19th of August 2013, the parties appeared in court and scheduled Misc. Cause 253 of 2012 wherein issues for trial by this court were framed. The applicant and the respondent have made extensive submissions on the above issues in support of their respective cases, for which this court is being called upon to adjudicate. As such, the respondent's contention that there is no live dispute for this court to determine is misconceived. Unlike ***Legal Brains Trust (LTB) Limited Vs Attorney General No. 4 of 2012*** has been relied upon by the respondent, Misc. Cause 253 of 2012 is premised on a live legal dispute where the applicant and other beneficiaries of the suit demand for their gratuity (See Annexture E to the Application). The respondent's refusal to pay gratuity is the event that prompted the applicants to file Misc. Cause 253 of 2013. The court still has to decide the question concerning the legality of the respondent's action in withholding the applicants' gratuity from 17th of May 2012 to 30th July 2013. Counsel concluded that the respondent's submission that there was no live dispute was untenable and ought to be disallowed.

On the submission that only two Members made a demand to receive their gratuity and as such costs if any should be in respect of only two of the Members, Counsel rejoined that Misc. Cause No. 253 of 2013 was a representative action which fully complied with the terms of Order 1 rule 8, and as such the decree that would arise from the same would bind all Members of Parliament, and not just the 2 Members who are alleged to have demanded for their gratuity.

I have considered the above submissions. Court does not agree that this case is lifeless as indicated by the respondent's Counsel. The issues that were agreed were live issues based on live circumstances, not hypothetical at all. The only prayer that was overtaken by events is the one for order that the Members of Parliament be paid gratuity that had accrued since September 2011. I shall therefore go ahead to consider the prayer for damages of Shs. 50 million to the applicant (Hon. James Kakooza). The attachments to the pleadings reveal that over 90% Hon. Kakooza's earnings were directed to payments of loans and other charges. This would mean that he really needed the gratuity which hitherto had been paid monthly to members on top of the amount left after the other deductions, for his survival. (See Exhibit C). He was deprived of this source of income for the period the gratuity was held up in the special deposit account. I am alive to the fact that the deposits were generating interest for the period the same was at Crane Bank. The interest earned by him is not indicated by either party. With the above in mind, it is court's view that an award of Shs. 20 million (Twenty Million Shillings only) will atone for the inconvenience he suffered.

There is no evidence of inconvenience to any other Member of Parliament brought out by the evidence on record. No damages are awarded to any other Member of Parliament.

I have considered the submissions on the issue of costs. It is true this is a representative action and that the declarations are to benefit the other Members of Parliament other than Hon. Kakooza, the main applicant. However, it is also true that even if it was not a representative action, the same declarations would have

been sought and indeed awarded by court; and they would still benefit the other Members of Parliament, even if they were not party to the suit.

I have already indicated that the actions of the respondent were meant for the benefit of the applicant and other Members of Parliament, albeit that the respondent did what they did without consulting the individual members. It would be a grave injustice to make the respondent incur heavy costs under such circumstances. In any case the same remedies would have been secured without a representative action. Furthermore, there is nothing on record to show that, apart from two Members of Parliament, (Hon. Kakooza and Hon. Sofia Nalule) the rest of the members of Parliament had made any demand for their gratuity from the respondent after it was deposited on the special account at Crane Bank. This was so even after the Honourable Deputy Speaker informed the house of the project. Once a party decides to go to court without making a formal demand for settlement of his claim from the other party, he stands to forego the costs of the suit.

The court also noted that when members of Parliament were asked by the Clerk to Parliament to indicate when they would wish to have their gratuity paid, the results from the 148 who had responded to the Clerk's call, as per paragraph 7 of the supplementary affidavit in reply of Chris Kaija-Kwamya, the Deputy Clerk in charge of Corporate Affairs at Parliament of Uganda, were as follows: -

> ***"That pursuant to this agreement to-date 148 Members of Parliament have communicated how they desire their gratuity to be paid and a comprehensive analysis of the returns reveals that 92.4% of the 148 Members of Parliament do not want their gratuity paid on a monthly basis as prayed for the applicant. A further breakdown***

reveals that only 8.2% of the 148 Members of Parliament want their gratuity paid monthly, 48.6% of the 148 Members of Parliament want it paid annually, 25.7% of the 148 Members of Parliament want their gratuity paid every 2 years, 4.7% of the 148 Members of Parliament want theirs paid after every 4 years, 7.4% of the 148 Members of Parliament want their gratuity paid every 5 years and 5.4% want it to be paid in other ways. A copy of an illustrative tabulation is attached hereto and marked as Annexture "C".

The above shows that not all Members of Parliament want their gratuity yearly or monthly.

Regarding costs therefore, I shall award costs in respect only of the two Members of Parliament who are shown to have made the demand to the Clerk to Parliament, that is to say, Hon. James Kakooza, and Hon. Sofia Nalule.

In conclusion, the court finds that although the decision to invest the Honourable Members' gratuity was in good faith and in the interest of the said members, the decision was unlawful in that it was done without the consent of the members.

The issues herein are decided in favour of the applicant to the extent indicated.

It is so ordered.

Elizabeth Musoke
JUDGE
13/12/2013