THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO.111 OF 2011

RICHARD WANDEREMAH & 50 OTHERS :::::::::::::::::: PLAINTIFFS

VERSUS

THE MICROFINANCE SUPPORT CENTER LIMITED:::::: DEFENDANT

BEFORE: HON.LADY JUSTICE ELIZABETH MUSOKE

JUDGMENT

The plaintiffs brought this action in a representative capacity against the defendant claiming to be former employees of the defendant and its predecessors (The rural Microfinance support project and the Poverty Alleviation Project), until they were retired and/or terminated from the employment in **April 2004**. They claimed for payment of a severance package upon termination which was allegedly approved by the resolution of the defendant company to all its staff, calculated according to each employee's period of service and position held in the company.

On the other hand, the defendant contested the claim and contended in its written statement of defence that the plaintiffs were not entitled to any severance or separation package and that the defendant fulfilled its legal obligations at all material times.

At the scheduling conference, the following facts were agreed by the parties;

1. The defendant company succeeded the Rural Micro-Finance Support Project.
2. The Rural Micro-Finance Support project succeeded the Poverty Alleviation Project.
3. All these projects were under the Prime Minister's office.

The following issues were agreed upon for determination;

1. Whether the plaintiffs were former employees of the defendant company.
2. Whether the defendant ever resolved to pay certain packages to its retired employees.
3. Remedies available to the parties.

ISSUE 1;

Whether the plaintiffs are former employees of the defendant company.

PW1; William Agoe Ekallo, testified that he worked as a Finance Manager with the defendant company, before he was discharged by the defendant in April 2004, and all the plaintiffs were formally employed by either the Poverty Alleviation Project or Rural Microfinance Support Project and were subsequently taken on by the defendant as employees in 2003.

PW2; Mary Arutu, testified that from May 1994, she worked as an Administrative Officer with Poverty Alleviation Project and Rural Microfinance Support Project, and when the defendant Company was established, she was appointed as the Acting Executive Director until June, 2003. She contended that the plaintiffs were all employees with Poverty Alleviation Project and Rural Microfinance Support Project who were taken on by the defendant company. She made reference to the defendant's staff schedule of December 2002 [EXH P23], which she endorsed as the defendant's Acting Executive Director, where the names of the plaintiffs were also listed among the staff of the defendant company.

On the other hand, the defendant led the evidence of DW1; John Peter Mujuni, who is the defendant's Executive Director to prove that the plaintiffs had not/never been employees of the defendant or its predecessors. It was his testimony that he had searched the records of the defendant but had not come across any document that showed that the plaintiffs had been employees of the defendant and/or its predecessors. He contended that he had looked at the photocopied documents presented by the plaintiffs, but the documents were not authentic as the documents did not appear in the records kept by the defendant company. During cross examination, DW1 stated that he had not come across any major restructuring of the company from its inception and he was not aware of any laying off of the defendant's employees during the period between 2001 to date.

Counsel on either side filed written submissions in support of and against the claim respectively.

In his submissions, Counsel for the plaintiffs made reference to allegedly minutes of the meeting of the defendant's Board of Directors held on 15th May, 2003 [EXH P9], where a resolution to pay severance package to all staff was passed and a schedule was appended indicating the staff; and the plaintiffs were included among the staff in the appended schedule. Counsel stated that PW2 who was a senior employee of the defendant as Acting Executive Director corroborated this fact. Further, that despite the blanket denial by the defendant in its written statement of defence,

the defendant's current Executive Director had acknowledged that PW2 once served the defendant as an Acting Executive Director. Counsel also made reference to EXH P23, which is a salary schedule for December, 2002, and it lists the plaintiffs alongside other people as employees of the defendant.

Counsel contended that the evidence of DW1 was a mockery of the trial process, dishonest, and a mere blanket denial that does not help in the determination of this matter. DW1 had denied that there had ever been any restructuring by the defendant company, yet it is common knowledge that there was circular, EXH P4, by DW1's predecessor communicating to staff of the separation package for outgoing staff and it talks about the restructuring exercise by the defendant.

On the other hand, Counsel for the defendant submitted that employment is a matter of contract, and the principles of contract law in so far as they relate to employment are applicable. In as far as the plaintiffs' contracts were terminated in April 2004, the law governing Employment matters then was the Employment Act Cap.219, and Section 11 of the same Act provided that a contract of Service for six months or more was to be in writing. Counsel contended that at the scheduling conference, Counsel for the plaintiffs stated that he would avail contracts of employment for the plaintiffs; however, this was not done.

Counsel for the defendant further submitted that Exhibits P 19, 20, 21, 22 and 23, sought to be relied upon by the plaintiffs as proof of employment were un reliable because they were challenged as photocopies which were inadmissible in evidence. Further, that EXH P23 did not mention any where that the plaintiffs were formerly employed by the defendant's predecessors, nor does it show the terms under which the plaintiffs were employed. Counsel contended that if it were the case that the employment agreements were not in the possession of the plaintiffs, the plaintiffs had the option of applying for discovery, inspection or production of the said agreements under the **Civil Procedure Rules** but this was never done.

I have considered the submissions of Counsel and the evidence adduced by both the plaintiff and the defendant and I find that the first issue to be resolved is whether Exhibits P 19, 20, 21, 22 and 23, should be rendered inadmissible because they are photocopies, as prayed for by Counsel for the defendant. It is trite law that the original of the document sought to be relied upon is the primary and the best evidence when tendered in evidence. However, under **Section 64** of the **Evidence Act, Cap 6,** it is provided that secondary evidence may be given of the existence, condition or contents of the document where the original is shown or appears to be in the possession or power of that very person against whom the document is sought to be proved. In

the present case, the plaintiffs adduced photocopies of documents, of which the originals are apparently supposed to be in the possession of the defendant; the defendant however denies their existence. It is my opinion that this is one of the instances where photocopies of documents may be accepted in as secondary evidence. It does not matter that the said documents were never addressed to the plaintiffs; from the evidence adduced, I find that the originals of the above documents were in existence and in the possession of the defendant although the defendant chose to deny the existence of same. I shall therefore accept as admissible the photocopies of the documents for the reasons given above. I agree with the submission of Counsel for the plaintiffs that the evidence of DW1 was dishonest and a mere blanket denial and cannot be relied upon.

I agree with the submission of counsel for the defendant that the applicable law in the present case is the **Employment Act, Cap 219,** because allegedly, the plaintiffs' contracts of employment were terminated in 2004 before the coming into force of the **Employment Act, 2006**. Under **Section 11** of the same Act, it was provided that a contract of service for six months or more, or for a number of working days totaling six months or more was to be in writing. I have taken into consideration that no contracts of employment were tendered in evidence to prove that the plaintiffs had been employees with the defendant. However, it is my view that although the **Employment Act, Cap 219**, provided that the contracts had to be in writing, it is not mandatory that the fact of employment must be proved by tendering the contracts of employment in evidence; it can also be proved by any other documentary evidence or even oral evidence.

In the present case, PW1 and PW2 who were confirmed by the defendant through its documents tendered in court and the testimony of DW1 as having been senior employees of the defendant and its predecessors during the time when the plaintiffs contend to having been employed by the defendant, both testified that the plaintiffs were employees of the Rural Micro-Finance Support Project and the Poverty Alleviation Project who were taken on by the defendant. PW2 made reference to EXH P23 (Salary Schedule for December 2002) which she stated that she had personally endorsed as the Acting Executive Director. The said schedule lists the plaintiffs among the persons who were to be paid salaries. The endorsement on the schedule instructs its recipient to process salaries for the staff in the schedule. In addition, EXH P9 (Minutes of the defendant's Board of Directors held on 15th May, 2009) the plaintiffs are listed among a number of a staff who were allegedly to be paid severance allowance. I find that all the above is prima facie evidence of the fact that the plaintiffs were former employees with the defendant and its

predecessors. There is no clear explanation as to why the plaintiffs would be listed among the staff who were to be paid salaries if they were not employees with the defendant.

It is therefore my finding that the plaintiffs were former employees of the defendant company who were retired in 2004.

ISSUE 2

Whether the defendant ever resolved to pay certain packages to its retired employees.

It was the evidence of PW1 that basing on the fact that the proposed restructuring in the defendant company would inevitably cause some employees in the defendant company to be out of the employment, it was proposed that a severance package and bonus be paid to members of staff, and the severance package was to benefit only those that were to leave while the bonus would benefit only those that would be rehired. During the company's 5th meeting held on 15th October, 2002, the defendant's board resolved that a comprehensive severance package be prepared and presented to it for consideration [EXH P11], and in November, 2002, during the company's 6th meeting, the board resolved that the intended payment of the severance package to staff be communicated to the permanent secretary, [EXH P8]. It was the further testimony of PW1 that he was a member of the sub-committee on finance and procurement and he is aware that the consideration for the proposed severance package and bonus payment was that staff had never received a salary increment and on the 10 years service input provided by staff. Further, that he was aware that in the meeting of 15th May, 2003, the defendant's board resolved/agreed to pay all staff the severance package, [EXH P9].

PW2, who was a former employee of the defendant as an Acting Executive Director testified that the resolution to pay severance package was passed in the 5th Meeting of the Board of Directors of the defendant company held on the 15th of October, 2002, which she attended in her capacity as the Acting Executive Director. She further testified the formula for computing the severance package was proposed by the defendant's Technical Advisor as advised by the Board to the Finance and Procurement Committee, which was a sub-committee of the Board where she was a member, and the proposal was discussed in the meeting of 15th October, 2002, and duly adopted by the Board in its meeting of 15th May, 2003. The resolution to pay the severance package was never reversed or altered and was communicated to the Donors, African Development Bank, as stated in the follow-up mission Memoire, [EXH P7].

On the other hand, the defendant led the evidence of one witness to show that it had never resolved to pay a severance package to the plaintiffs/retired employees.

It was the evidence of John Peter Mujuni (DW1), who is the Executive Director of the defendant company, that he had looked at EXH D1 (Contract of employment between the defendant and William Agoe-Ekallo), but it did not contain a provision that entitled an employee to a severance package, and he was not aware of any other agreement with the defendant or its predecessors that entitled any of the plaintiffs to the severance package as claimed. Further, that he had looked at the records of the defendant company, and there was no binding decision that had ever been arrived at by the defendant company whatsoever that entitled the plaintiffs to any payment as claimed. DW1 further testified that the severance package being claimed without the backing of any law was illegal and that if staff were discharged, then no obligations could have arisen on the part of the defendant and/or its predecessors.

It was the submission of Counsel for the plaintiff that EXH P9, was as a result of a series of discussions and considerations by the defendant where a final resolution was passed by the board. Further, that the Aide Memoire [EXH P7], clearly shows that the defendant's Board had made a decision to give the former staff of the Poverty Alleviation Project and the Rural Micro-Finance Support Project an *ex gratia* payment as compensation in lieu of the adjustment of their salaries which had not been done since their employment. Counsel further submitted that this honorable court had in the previous cases of ***William Ekallo Versus Microfinance Support Centre Ltd, HCCS No.894 of 2004***, ***and Microfinance Support Centre Ltd Versus Herbert Byabagambi Katuku, HCCS No.002 of 2005***, found and held that the resolution to pay the plaintiffs' packages was indeed made by the defendant.

On the other hand, Counsel for the defendant submitted that the minutes of the meeting, allegedly held on the 15th May, 2003, [EXH P9], could not be relied upon for the following reasons;

1. The minutes were not signed by any of the board members (directors) who were alleged to have attended the meeting.
2. The minutes were never confirmed by any subsequent meeting as the true record of what transpired at the alleged meeting.
3. There was no formal resolution extracted from the minutes and/or registered.

4. Both PW1 and PW2 did not attend the alleged meeting and as such cannot speak as to what transpired at the said meeting because that would amount to hearsay.
5. DW1 confirmed that the alleged minutes were nowhere in the records of the defendant company.
6. The minutes tendered in court were a photocopy and not original signed minutes.
7. The signature of the minute Secretary not Company secretary on the minutes cannot bind the defendant.
8. The payment schedule allegedly attached to the minutes did not bear any signature.

It was the contention of Counsel for the defendant that minutes of a company meeting are required to be signed in accordance with the law; Section 145 of the Companies Act, Cap 110, requires that minutes shall be signed by the chairperson of the meeting at which the proceedings were had or by the chairperson of the next succeeding meeting. Further, that EXH P11 being the minutes of the meeting held on 19 to 20th November, 2002, did not in any way state that a resolution was made to pay any package and EXH P10 being minutes of a meeting of a subcommittee held on 5th May, 2003, could not be relied upon as no such decision was ever made and the subcommittee had no powers to bind the defendant.

Counsel for the defendant further contended that during the trial, the plaintiffs were put to task to explain under which law the severance package was being claimed but they failed to explain, and there is no provision for severance allowance in any of the applicable local law.

Counsel contended that while the plaintiffs pleaded fraud and stated that the defendant had received the funds for payment of the severance package from the Government, the plaintiffs had failed to point out specifically where it was stated that the funds had indeed been received. Counsel relied on ***Kampala District Land Board and anor Versus National Housing and Construction Corporation (2005) 2 EA 69***, to submit that fraud must strictly be pleaded and proved.

In rejoinder, Counsel for the plaintiff stated that the minutes were duly signed by one Mrs. Lucy Businge Kugonza as minute's secretary and there has never been any other record of the defendant's Board disowning them or disputing their authenticity, and no subsequent meeting of the defendant's Board disowned and challenged the authenticity of the said minutes. It was the further submission of Counsel that the plaintiffs having established that the said meeting took

place and a resolution was made, the burden of proof shifted to the defendant to prove otherwise or that the said resolution was subsequently set aside.

Counsel for the plaintiff further contended that there need not be a formal resolution extracted from the minutes and/or registered as submitted by counsel for the defendant; the resolution as contained in the minutes was sufficient. Further, that the argument by counsel for the defendant that PW1 and PW2 did not attend the alleged evidence and thus their evidence is hearsay, is erroneous, because hearsay does not arise where there are records/documents which came into their possession by virtue of their offices in the defendant company, and besides, the two witnesses had themselves participated in the meetings that finally yielded the said resolution.

It was the further contention of Counsel for the plaintiff that **Section 145** of the **Companies Act, Cap 110**, did not in any way restrict the signing of the minutes to chairpersons of meetings, but suggested that minutes purportedly signed by the chairperson would be *prima facie* evidence of the proceedings. Further, that the plaintiffs had no control over the defendant's internal procedures as to signing the Board Minutes or any other internal management issue; therefore, failure by the defendant to comply with the required procedures could not be visited on the plaintiffs, and neither can court allow the defendant to hide behind its failure to comply with legal procedures to escape liability. Counsel relied on ***Marjaria Versus Kenya Batteries [1981] 2 E.A 479***, to support the above contention.

The plaintiffs abandoned the allegations regarding fraud and therefore did not prove the same.

I reiterate that I do not believe the testimony of DWI that he had not found the documents tendered in court by the plaintiffs in the records of the defendant company; therefore, I do not agree with Counsel for the defendant's submission that the minutes sought to be relied upon by the plaintiffs were nowhere in the records of the defendant company and I accept the minutes in issue as secondary evidence. I also agree with the submission of Counsel for the plaintiffs that the plaintiffs had no control over the defendant's internal procedures as to the signing the Board Meeting Minutes and if the minutes were signed by the Minutes secretary instead of the Chairperson and the company did not extract a formal resolution thereafter, it was the defendant which was at fault in flouting the procedures and therefore court cannot allow the defendant to use its failures in evading legal liability. I shall therefore accept the minutes of the meetings tendered in evidence by the plaintiffs, in reaching my decision on this issue.

Min.5, item 3 of **EXH P9** reads as follows;

> *"**Severance package for staff***
>
> ***Agreed that the severance package equivalent to a prorated 12 months salary plus 30% of prorated 12 months salary be paid to all staff. A schedule of the severance package is appended."***

I find that the above was an unequivocal decision that was reached by the board and the defendant cannot turn around and say that no decision had ever been reached with regard to a severance package that was to be paid to staff. To note is that the above decision was reached as a result of a number of prior discussions and considerations by the defendant's Board. I agree with the submission of Counsel for the plaintiff that EXH P7; the Aide Memoire on Rural Microfinance Support Project follow up mission (21-16 September 2003), in clause 2.7 is clear evidence that the defendant's Board had made a decision to give the former staff an *ex gratia* payment as compensation in lieu of the adjustment of their salaries. I therefore find that the defendant through its board had resolved to pay a severance package to its employees.

According to the evidence adduced for the plaintiffs, the severance package was awarded in consideration of the years the plaintiffs had worked for the defendant and its predecessors without any salary increment, and I find that upon the defendant making a decision to make such a payment, it became an entitlement due to the plaintiffs and the defendant was bound by it thereof. In ***Vicent Bagamuhunda Versus John Katongole, HCCS No.44 of 2001***, it was held that;

> ***"Retrenchment is no magical formulation. Used in the context of this case it means that the defendant was reducing its staff strength or numbers to cut down on costs. Otherwise it does not mean anything more than termination of service of its staff. The retrenchment package is no more than a termination package. It is a package paid in consideration of an abrupt end to what may have been regarded as permanent service with an organization."***

It is therefore my finding that the resolution of the defendant's Board to pay a severance package to its staff became part of their contracts of employment and therefore their entitlement.

Accordingly, the defendant was bound by its Board's resolution to pay the plaintiffs the severance package.

ISSUE 3

Remedies Available to the plaintiff.

The plaintiffs claimed for special damages, unremitted NSSF contributions and general damages against the defendant. However, the claim for unremitted NSSF contributions was abandoned.

Special Damages;

The plaintiffs relied on EXH P24 as the computation of the severance package due to the plaintiffs by the defendant based on the formula passed by the defendant's Board in EXH P9.

It was the submission of counsel for the defendant that the remedy of special damages is not available to the plaintiffs as the same had not been specifically pleaded and proved; that while the payment schedule in EXH P9 is for a total sum of UGX 356,722,094/=, it is totally at variance with the schedule attached to the plaint claiming for UGX 282,734,200/=, and the figures were not simply clerical errors but were grossly overstated. Counsel invited court to follow the decision in ***Christopher Kiggundu Versus UTC, SCCA No.7 of 1993***, where it was held that special damages should be specifically pleaded and strictly proved. Counsel further contended that considering the grave inconsistency in the amounts pleaded and the amount claimed, the claim for special damages was unproved. He relied on ***John Nagenda Versus Sabena Belgian World Airlines (1992) KALR 13***, where it was held that lack of receipts and inconsistency between testimony and pleadings left a claim for special damages un proved.

Counsel for the defendant made reference to the testimony of PW2, where she admitted that six plaintiffs had died between the period between 2007 and 2010 before the date of filing this suit in 2011; despite their death, suits were brought in their names.

In rejoinder, Counsel for the plaintiffs submitted that special damages had been specifically pleaded and proved as contained in EXH P24, which is a computation of the severance packages due to them based on the formula in EXH P9 pleaded in paragraph 4(b) of the plaint. Further, that it has never been the position that for an award of special damages to be made, the figures/amounts must tally with the figures/amounts set out in the pleadings, and the correct position is that one must specifically plead the special damages but court only awards that which

the party has proved. Counsel relied on ***Uganda Breweries Ltd Versus Uganda Railways Corporation [2002] 2 E.A 634***, to support the above submission. Counsel further contended that in the present case, the special damages was a matter of arithmetic, and these were very minor and should be ignored since the more accurate computations were worked out and are contained in EXH P24.

It is trite law that special damages should be specifically pleaded and proved. (See ***Adonia Tumusiime Versus Bushenyi District Local Government and AG HCCS No 32 of 2012*****).** I have taken note of the variance in figures claimed in the plaint and in the payment schedule attached to EXH P9. However, I find that it is not fatal to a claim for special damages when the amount proved is different from the amount claimed in pleadings. I have taken into consideration the decision in ***John Nagenda Versus Sabena Belgian World Airlines (Supra)***, where it was held that inconsistency between testimony and pleadings left a claim for special damages unproved. However, I find that in the present case, although there was an inconsistency as stated above, the claim was proved through the evidence of the plaintiff's witnesses. I find that the inconsistence in the figures was just an arithmetic and computation error which was not in any way intended to mislead court. In ***James Fredrick Pool Nsubuga Versus Attorney General, Civil Suit No.1296 of 1987***, it was held that minor contradictions caused by lapse of time can be ignored in proof of specific damages. In my opinion, the plaintiffs proved the special damages as stated in EXH P24, claimed in accordance with the formula stated in EXH P9.

It was also the submission of Counsel for the defendant that six plaintiffs had died between the period between 2007 and 2010 before the date of filing this suit in 2011 and despite their death, suits were brought in their names. I do not agree with Counsel for the plaintiff that this matter was commenced in September 2004 when a representative order was issued by Court. This matter was commenced in June 2011 when the suit was filed in court, and no suit can be commenced by a deceased person. By the time the suit was filed in court, the six plaintiffs namely **Livingstone Bakyumira, Titus Auku, Gidion Lukeca, Peter Ungei, Ogole Yeko** and **Opiro Ayoko,** had died. I therefore disallow the claim with regard to the six deceased plaintiffs named above.

Accordingly, I award special damages to the plaintiffs severally in accordance with each plaintiffs' entitlement as claimed and stated in EXH P24, with the exception of the six plaintiffs

named above. Therefore, the total award of **UGX 215,332,707/=** is hereby made to the plaintiffs as special damages.

General damages.

The plaintiffs also prayed for an award of general damages for the pain, suffering and inconvenience they were subjected to by the defendant. They prayed for an award of **UGX 300,000,000/=** as general damages.

On the other hand, Counsel for the defendant submitted that this is not a case where general damages can or should be paid. He cited ***Harlsbury's Laws of England 3rd Edition Volume 11 at page 268***, where it is stated that;

> ***"No damages are recoverable for any loss, injury or damage which is not the direct, immediate or proximate consequence of the act or omission complained of. Damage which is an indirect consequence is said to be too remote…"***

I find that the plaintiffs have proved that the defendant's failure/neglect to pay the severance package as had been resolved caused them a lot of inconvenience, pain and suffering. I find that the pain and suffering was as a direct result of the defendant's actions in failing/refusing to advance the severance package to the plaintiffs as had been resolved by the Board. I therefore award **UGX 60,000,000/=** as general damages to the plaintiffs, with the exception of the six plaintiffs who died before this suit was instituted. The general damages of 60,000,000/= shall be shared equally amongst the plaintiffs.

The sum of **UGX 215,332,707/=** awarded as special damages shall carry interest of 15% per annum from April 2004, till payment in full, and the general damages shall carry interest of 10% from the date of judgment till payment in full.

The defendant shall pay costs of the suit to the plaintiffs.

In conclusion, the court makes the following orders;

1. Special damages - UGX 215,332,707/=
2. General damages - UGX 60,000,000/=

3. Interest on (1) above at 15% per annum from the date of filing the suit, till payment in full.
4. Interest on (2) above at 10%per annum from the date of judgment till payment in full.
5. Costs of the suit are awarded to the plaintiffs.

Orders accordingly.

Elizabeth Musoke
JUDGE
30/09/2015