

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
AT MENGO

**(CORAM: ODOKI, C.J, TSEKOOKO, KAROKORA, MULENGA AND
KANYEIHAMBA, JJ.SC)**

CIVIL APPEAL NO. 1 OF 2002

B E T W E E N

NSEREKO JOSEPH }

KISUKYE SARA }

HAJI MUNJI & OTHERS} :::::::::::::::::::: APPELLANTS

A N D

BANK OF UGANDA :::::::::::::::::::: RESPONDENT

[Appeal arising from the judgment and orders of the Court of Appeal (Okello, Mpagi-Bahigeine, Twinomujuni, J.J.A.), dated 3rd December 2001, at Kampala in Civil Appeal No. 72 of 2001).

JUDGMENT OF KANYEIHAMBA, JSC.

This is an appeal against the judgment and orders of the Court of Appeal reversing the decision of the High Court. The background and facts of the case may be summarized as follows:

Up till September, 1990, the appellants together with others were employees of the Bank of Uganda, the respondent. On 21/09/90, the respondent's Governor issued a circular to all its employees informing them that the respondent was due to put in place a restructuring programme in order to reduce the then respondent's current expenditure which would involve a reduction of the employees up to 1/3 of the workforce. Initially, the programme would be based on voluntary retirement. However, if the objective envisaged in the programme could not be achieved by such voluntary retirement, it would then be achieved by involuntary arrangements. Subsequently, on 01/11/94, the respondent's Governor issued another circular offering a compensatory monetary package to those employees who were willing voluntarily to terminate their services to the respondent and those who were willing to take early retirement. Employees who wished to do so had to accept the offer by 30th November, 1994. Following the acceptance, the offered package would then be paid to individual employees concerned. Some hundreds of employees, including the 290 who are now the appellants in this Court, chose to take the package voluntarily and left the Bank which is now the respondent.

Subsequently, what had appeared to be an amicable settlement between the respondent and the employees who opted to leave the former's services under the scheme, turned into two disputes. The first concerned the respondent's unilateral decision to deduct from the appellants' packages all the loans including housing loans which some of the employees leaving the respondent's services had obtained on agreed terms and conditions while still in its employment. That dispute was finally resolved in a judgment of this court in *Bank of Uganda v. Fred Masaba & 5 Others, Civil Appeal No. 3 of 1999, (S.C)*. In that case, this Court confirmed the principle that the circular and the voluntary scheme accepted by the respondent precluded the recovery from terminal benefits of the housing and other loans which could only be recovered by the present respondent in accordance with the instalment repayment and other terms and conditions which the parties had entered into before the appellants left the respondent's services.

A second dispute arose between the respondent and the employees who had opted to leave voluntarily. The dispute was whether those persons who volunteered to quit the respondent's services in order to receive the severance benefits were also entitled to pension under the respondent's retirement benefit scheme. The dispute led to the said employees filing a suit in the High Court. Judgment was delivered on 12/09/98. The learned trial judge, Anna Magezi, J., held that the appellants who sued in a representative capacity were entitled to claim pension notwithstanding that they had also received severance packages. The respondent appealed to the Court of Appeal on several grounds. On whether or not the appellants were entitled to pension, the learned Justices of Appeal held that they were not. Hence this appeal.

There are four grounds of appeal framed as follows:

1. *The learned Judges erred in law and in fact when they held that the appellants were not entitled to pension.*
2. *The learned Judges erred in law and in fact in holding that the appellants had no subsisting cause of action against the Respondent Bank.*
3. *The learned Judges erred in law in holding that the finding of the trial judge was based entirely on negligent misrepresentation.*
4. *The learned Judges erred in law and in fact in finding that no award of Shs. 150,000,000= as nominal damages was made in favour of the appellants.*

Mr. Matovu, counsel for the appellants, argued grounds 1 & 2 together, and grounds 3 and 4 separately. On grounds 1 & 2, counsel for the appellants, submitted that the learned Justices of Appeal erred in law when they held that the appellants were not entitled to pension and that the suit disclosed no cause of action against the

respondent. He submitted that the finding of the learned judge of the High Court that the severance package was not intended to affect the appellants' pension rights is the correct interpretation of the relationship between the appellants and the respondent even after the mutual agreement between the parties regarding the severance packages. Counsel referred this Court to Rule 4 of the Trust Deed of the respondent in favour of its employees which states, *inter alia*, that-

"The Trustees may, with the consent of employers from time to time, amend the provisions of this Trust Deed provides that no such amendment shall be made so as to affect adversely the rights and interests already secured for an Annuitant or member save in so far as may be entailed in securing the approval or continued approval of the scheme by the Commissioner General of Income Tax as a Pension Fund no amendment shall be made which would cause the main purpose of the scheme to cease to be the provision of annuities for members on retirement."

Counsel submitted that in light of these provisions, no scheme or arrangement by the respondent could in any way affect the pension rights of the appellants even after they had voluntarily accepted the severance packages.

Counsel further submitted that the Court of Appeal erred in treating early retirement and voluntary retirement as different things. Counsel referred us to the circular, G. 019, in which the Governor of the respondent stated that under the current Personal Policies, a staff member is eligible for early retirement if he or she is 50 or more years of age. However, the circular added that all pensionable staff would be eligible to apply for voluntary termination of services irrespective of age or rank.

According to counsel for the appellants, this statement by the respondent's Governor meant that there was no difference between early retirement and voluntary retirement created by the severance package scheme, yet the learned Justices of Appeal found that there was. Counsel submitted that such a holding by the learned Justices of Appeal was erroneous. He submitted that, there being no distinction between voluntary retirement and early retirement therefore, if an

employee took early retirement and another volunteered to leave under the scheme offered by the respondent's circular, both employees would be equally entitled to receive their pensions after leaving the services of the respondent bank.

Mr. Matovu further submitted that the record shows that the respondent treated employees taking early retirement and those volunteering to retire under the severance scheme as one and the same group of people. He contended that this is shown by a passage in the circular which states that in order to facilitate the settlement of staff who will elect to leave the Bank under early retirement and/or voluntary termination of the scheme, the Board of Directors had decided to pay a compensation package.

Counsel contended further that the right of an employee to a pension is a contractual right which cannot be surrendered until that employee dies. He submitted that the severance packages which were not intended to affect pension rights were simply devices to save wages of employees. He contended that the pension scheme established for the respondent's employees was non-contributory, showing that it could continue in the respondent's scheme of things even if the holder of the pension rights had taken voluntary retirement. Consequently, it was counsel's submission that the appellants were entitled to their pensions either immediately or deferred in cases where the holders had not reached the retirement age. In the opinion of counsel for the appellants, it was a general rule that an employee cannot forego his pension rights.

Counsel further contended that since a pension right is a deferred right, there is no way that right can be paid in a package scheme as was contended by the respondent's counsel.

On ground 2, counsel contended that the cause of action was a breach of contract. In his opinion, the appellants' case is strengthened further by the fact that whereas the voluntary retirement scheme was a matter between the employees concerned and the respondent, the latter has no direct control over matters relating to pension rights. It was counsel's contention that those rights are exclusively under the control

of the Trustees. He therefore submitted that the learned judge of the High Court was right when she held that a scrutiny of the Trust Deed and the Rules governing the appellants' pension scheme indicates that even if the respondent's purported circular had amended the rules, the appellants would still not forfeit their pension benefits.

Mr. Matovu cited the cases of *Bank of Uganda -vs- Fred Masaba & Others, Civil Appeal No. 3 of 1998 (S.C)*, *Mettoy Pension Trustees Ltd. -vs- Evans (1991) 2 ALLER 513 and Group Pension Trust Ltd. -vs- Imperial Tobacco Ltd. (1991) ALLER 597*, *David Hayton's Commentary on the Law of Trust and Webster's New Collegiate Dictionary*, in support of his submissions.

For the respondent, Mr. Masembe-Kanyerezi opposed all the grounds of appeal. On ground 1 & 2, counsel submitted that in order to appreciate the meaning and implication of the respondent's circular on voluntary retirement, it was important to look at the terms and conditions of service of the respondent's employees and the respondent's Retirement Benefit Scheme Trust Deed and Rules thereof. Each employee joined separately and his or her contractual rights were based on that individual relationship with the respondent. Thus, clause 3 of the terms and conditions of service stipulates that no employee shall belong to the permanent staff of the Bank unless given written notice in that regard. Clause 4 of the same terms and conditions provides that every notice to terminate employment shall be in writing and shall be deemed to be sufficiently given if served personally upon the Secretary of the Bank, and upon employee if served personally on the employee or sent by pre-paid registered post addressed to him at his address last known to the Bank. Clause 6 deals with responsibility for pension and provides that members of the permanent staff are eligible for pension in accordance with the terms and conditions of the Pension Scheme currently in force which may be seen by employees on application to the respondent's Secretary's office. From all this, counsel submitted that the rights and obligations which arose between the appellants and the respondent were purely contractual and not founded either on the fact that they were permanently employed or on any law governing group employees.

Mr. Masembe-Kanyerezi contended that the proper interpretation of the respondent's Governor's circular should show that there were two categories of pensionable staff of the respondent envisaged. Those who wished to voluntarily terminate their services to the bank and those who had reached the age of 50 or more years, and who were entitled to opt for early retirement.

Counsel conceded that respondent's employees who had attained the age of 50 or more years were entitled to their pension under the early retirement scheme but contended that those below 50 years of age were not eligible to claim pension.

Counsel contended that the reason the Governor's circular distinguished between employees who were 50 years or more old and all other pensionable staff who were below that age was that on retirement, the former were entitled to their pension and other retiring benefits, while the latter could only receive severance packages.

Counsel contended that after retirement, it is only those employees who will have retired at the age of 50 or more years who would be entitled to pension and other retirement benefits for themselves and their dependants even after they have severed their services with the employer. He contended that according to the terms of their service contract with the respondent, if employees leave the respondent's service before the normal pension date and are not within the provisions of Rule 6 regarding early retirement, they would cease to be entitled to any benefit under the pension and retirement scheme. Rule 6 deals with employees who are disabled or otherwise handicapped.

With regard to ground 2 of appeal, Mr. Masembe-Kanyerezi contended that the plaintiff had raised no cause of action. Counsel contended that the pension dues were governed by the Retirement Scheme Trust Deed which is managed by the Trustees. In fact, the Trust Deed provides that the Trustees shall have powers of general management and administration of the scheme. Only Trustees may amend the Trust Deed. The respondent who is the employer has no power on its own to amend the Deed. The employer's only role is merely to consent to amendments, if any, proposed by the Trustees. Consequently, counsel submitted that in so far as the employees' pension and other retirement benefits are governed by the Trust Deed,

there is no privity of contract between the respondent and the employees. Counsel further contended that it was a condition precedent that where a dispute arises between the Trustees and the employees regarding pension and other retirement benefits, the parties should first seek arbitration under the terms of the Trust Deed. This was not done in this case. Counsel therefore submitted that the appellants had no cause of action in either alternative.

The thrust of the appellants' contention is that since the appellants were all permanent and pensionable employees of the respondent bank, and were induced by the respondent's circular either to retire early or leave under the voluntary termination of service scheme, they were all entitled to their pension and other retirement benefits. Through its counsel, the respondent conceded that its employees who accepted to retire while aged 50 or more years were fully entitled to receive and shall continue to receive their pension and retirement benefits. However, it disputed the claims of those whose ages were below 50 years when they accepted to leave the respondent's services, albeit induced by its voluntary termination of service scheme which was governed by the current personnel policies of the respondent.

The terms of early retirement and the voluntary termination of service were published and notified to employees in a circular, Ref. G. 019, entitled, "Bank of Uganda Restructuring Programme Early Retirement/Voluntary Termination of Service", and dated 21st September, 1994. The circular was addressed to the respondent's employees who included the present appellants, informing them that the respondent was experiencing problems in meeting its operational costs at the current rate which was too high and that the Board of Directors had approved a Business Plan which would result in restructuring the Bank with the objective of reducing the operating expenditure to match its income. The employees were further informed that the Bank had decided to work out a compensatory package to be offered to employees who may wish to voluntarily terminate their services to the Bank or opt for early retirement.

The circular gave further details of how each group of employees would benefit under the scheme. An employee who was 50 or more years of age was eligible for early retirement. However, all other pensionable staff would be eligible to apply for voluntary termination of service irrespective of age or rank. The circular stated that employees who were on temporary or contractual terms in the service of the respondent Bank were not eligible to apply under the scheme.

The acceptance of any employee's application to benefit under the scheme was to be at the discretion of the Board of Directors of the respondent Bank. The compensatory sums offered were different for each group of employees. They were listed either as early retirement or long service. There were to be adjustment allowances depending on periods spent in the service of the Bank, ranging from long service, 15 years or more and 10 years or more. The circular included item 5 headed, "Staff Indebtedness To The Bank" which later resulted in the first dispute between the employees who had accepted to leave under the scheme and the Bank and which dispute was eventually resolved by this court in *Bank of Uganda v. Masaba & Others*, (supra). Item 6 of the circular indicated that any Income Tax payable on the compensatory package would be met by the respondent Bank.

In resolving the issues raised by ground 1 of appeal in the Court of Appeal, Okello, J.A. who delivered the lead judgment said:

"In the instant (sic.) the purpose of Exh. PIA was to invite pensionable staff to voluntarily leave the Bank in order to reduce its workforce and thus cut down its operations costs. Counsel for the respondent submitted that payment of pension or early retirement was a term of the new scheme. I do not with respect agree. The Circular letter, Exh. PIA, above is clear. Paragraph 2 thereof shows that the compensatory package was the intended general offer to two categories of pensionable staff of the Bank of Uganda:

1. *Those staff who may wish to voluntarily terminate their service to the Bank and*
2. *Those staff who may wish to opt for early retirement.*

Paragraph 3 sounded a warning regarding those who may wish to opt for early retirement that under the current personal policies only those aged 50 above were eligible. The paragraph explains however, that the new scheme allows all pensionable staff irrespective of age or rank to apply for voluntary termination of service. The words "early retirement" were left out of this explanation. This was significant and deliberate. The obvious reason for it is that "early retirement" was not intended to apply to all pensionable staff irrespective of age or rank since the objective of the scheme was to cut down operational costs. The age restriction for eligibility for early retirement in the current personal policies was thus recognised in the new scheme. Payment of pension was therefore not a general term of the new scheme."

The other two Justices of Appeal concurred. I am unable to fault the findings and opinion of the Court of Appeal.

In my view, the appellants must have or ought to have understood the import and meaning of the different terminologies used in circular, Ref. G. 019. In the first place, a distinction must be made between eligibility for and entitlement to a pension. Indeed, the appellants' plaint in the High Court acknowledged this distinction when they stated that permanent staff of the respondent bank were eligible for pension but to be entitled to receive it one must reach the date at which a person is entitled to start receiving his pension payments. There is evidence that the question of pension was raised early in the negotiations between the respondent and representatives of the appellants. However, when the respondent offered its scheme of early retirement and voluntary termination, it kept silent on the matter of pension. The appellants readily accepted the scheme and signed for their respective packages which were described in part as compensation. It may have been nice for the bank to explain why pension was not mentioned. It is equally inexplicable that the appellants or their representatives did not insist that the pension be dealt with before they readily signed for their compensation packages.

However, whatever opinion one may have one way or the other, the respondent was under no obligation to comment on an issue in which the appellants had no legal

entitlement. Had the negotiations ended in forcing the respondent to preserve and pay pension and other retirement benefits to all its permanent and pensionable employees, this should have been stated clearly in the Governor's circular. It would not have been necessary then for the respondent to distinguish between employees aged 50 or more years who would be entitled to receive the benefits under the scheme as well as their pension and other employees who though not eligible to receive pension were eligible to apply for voluntary termination of service and receive compensation packages. In my view, the acceptance of the latter position by employees below 50 years, meant severance of any relationship with respondent bank, whether present or future including the right to receiving anything else beyond benefiting from the severance packages.

As the evidence and submissions in the record of proceedings show, the employees who stood to benefit under the early retirement scheme were very few in number. The other permanent and pensionable employees of all ages meant all employees other than temporary or contractual or those who were still on probationary periods and below 50 years of age. It is to all these latter category of employees that the term *termination of services* applied without the hope that one day that termination would be converted into early retirement. With respect therefore, I do not agree with the submissions by counsel for the appellants that the terms *early retirement* and *voluntary termination* mean one and the same thing. Consequently, ground 1 of this appeal ought to fail.

I now turn to ground 2 of the appeal. I agree with the submissions of counsel for the appellants that whether or not an employee is entitled to pension depends first on the contractual relationship between the employee and the respondent and, secondly, on the interpretation of circular G. 019. Circular G. 019 also created a contractual relationship between the respondent and two categories of employees, namely those opting for early retirement and those opting for termination of their services. It is immaterial that the trustees of the pension fund had its managerial control. In my opinion therefore, the appellants had a cause of action in the suit.

Consequently, ground 2 of the appeal ought to succeed.

On ground 3 of the appeal, counsel for the appellants contended that the learned Justices of Appeal were in error in holding that the findings of the trial judge were based entirely on negligent misrepresentation. He submitted that, in fact, the findings of the learned trial judge were based on breach of contract and not on the tort of negligence. Mr. Masembe-

Kanyerezi for the respondent supported the findings and decision of the Court of Appeal on this ground which in that court was ground 5.

Ground 5 of appeal in the Court of Appeal which is related to ground 3 of the appeal in this court was framed as follows:-

"5. The learned trial judge erred in law in dealing with the unpleaded and unframed issues of negligent misrepresentation in tort which issue was time barred as against the appellant and in deciding the case on the basis of this issue."

On this ground, counsel for the appellants in that court contended that the trial judge did not decide the case on the basis of negligent misrepresentation but rather on the basis of breach of contract which entitled the respondents to damages, and that any reference by the trial judge, to misrepresentation was made *"obiter dictum"*, arising from her extensive analysis of *Bank of Uganda v. Fred Masaba & Others, (S.C), Civil Appeal No. 3 of 1998*.

The record of proceedings in the High Court shows that the learned trial judge dealt with this ground. In her judgment she said:

"In the instant case, the defendant BOU misrepresented the plaintiffs' right upon which facts the plaintiffs prematurely retired thinking that Rule 4 had been repealed. It is irrelevant whether this misrepresentation was made intentionally or carelessly. The defendant BOU owed a duty of care to the plaintiffs. It therefore follows that the defendant BOU must take responsibility for indemnifying the

plaintiffs who acted on their perils when they prematurely retired as shall be determined below."

When considering grounds 5, 6 and 7 in the Court of Appeal, Okello, J.A. analysed this passage and concluded:

"The above passage clearly shows a finding of liability based on the tort of misrepresentation, a claim which was rejected by Atwoki J. as being time barred. It was therefore wrong for the trial judge to make the claim on the basis of her finding for the appellant's liability. Counsel for the respondent's contention that the trial judge's reference to misrepresentation was made "obiter dictum" is not supported by the above passage in her judgment. The finding based on that claim thus cannot stand. I therefore find merit in these grounds and they must succeed."

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Nowhere does the learned Justice of Appeal or his colleagues on the panel state that the trial judge's finding in the whole case was based on negligent misrepresentation. This was one single finding on several aspects of the appeal before the learned Justices of Appeal and they were obliged to find on it as they did since it was clearly one of the specific grounds of appeal before them. I find no merit in this ground of appeal and therefore it ought to fail.

In light of my findings on the first three grounds, I do not find it necessary to consider ground 4.

In the result, I would dismiss this appeal with costs to the respondent in this court and in the courts below.

This appeal arose from a representative suit. It is not apparent from the record whether all the appellants and all those they represented in the suit were aged below 50 years at the time they accepted the terms of their respective compensatory packages. In my opinion therefore, the dismissal of this appeal does not affect the pension rights of any appellant who was aged 50 years or more at the time of accepting to terminate his or her employment under the voluntary scheme.

JUDGMENT OF ODOKI, CJ

I have had the advantage of reading in draft the judgment of Kanyeihamba JSC and I agree with it and the orders he has proposed.

As the other members of the Court also agree with the judgment and orders proposed by Kanyeihamba JSC, this appeal is dismissed with costs to the respondent here and in the Courts below.

Dated at Mengo this 21st day of March 2003