

**THE REPUBLIC OF UGANDA**

**IN THE COURT OF APPEAL OF UGANDA AT KAMPALA**

**CIVIL APPEAL NO. 110 OF 2012**

*(Arising out of HCT-05-CV-MA-29 OF 2009)*  
*(Arising out of HCT-05-CV-MA-036 OF 2007)*  
*(Original HCT-05-CV-MA-030 OF 2006)*

**HAMANYA JOHN ::::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**NTUNGAMO DISTRICT LOCAL**

**GOVERNMENT COUNCIL::::::::::::::::::::::::::::::::::::: RESPONDENT**

**CORAM: HON. JUSTICE ALFONSE C. OWINY DOLLO, DCJ**

**HON. JUSTICE KENNETH KAKURU, JA**

**HON. JUSTICE STEPHEN MUSOTA, JA**

**JUDGMENT OF COURT**

This is an appeal against the decision of the High Court at Mbarara before Justice Lawrence Gidudu in Misc. Application No. 029 of 2009.

**Background**

The appellant was employed by the respondent as a Head teacher and posted to Kako Primary School. The respondent's Chief Administrative Officer on 13<sup>th</sup>, December, 2005 due to some audit queries interdicted the appellant and decided to withhold his salary.

The appellant sought leave vide **Miscellaneous Application No. HCT-05-CV-MA-030 OF 2006** to apply for Judicial Review of the decision by the chief administrative officer Ntungamo interdicting the appellant and withholding his salary. The leave was granted and he filed **Miscellaneous Application No. HCT-05-CV-MA-036 OF 2007**.

By consent on 20<sup>th</sup> November, 2007 the parties agreed that;

1. The respondent re-instates the appellant to his station of duty and pay all his salary arrears.
2. The decision of the Chief Administrative Officer Ntungamu contained in the letter dated 13<sup>th</sup> December, 2005 inter alia withholding the appellant's salary be set aside.
3. The respondent also agreed to pay the costs of the application.

The parties failed to agree on payment of general damages and court on 1/2/2008 ordered that the appellant be paid general damages of **Shs.12,000,000/= (Twelve Million only)**.

The respondent paid the appellant the general damages, costs of the suit and salary arrears up to 30<sup>th</sup> August, 2006 and refused to pay salary arrears beyond that date on ground that the appellant clocked 60 years, the mandatory retirement age, on 30<sup>th</sup> August, 2006. As a result, the appellant filed Misc. **Application No. HCT-05-CV-MA-029 OF 2009 under section 34 of the Civil Procedure Act** seeking an order to compel the respondent to pay salary arrears beyond 30<sup>th</sup> August, 2006. The High Court dismissed that application with costs hence this appeal.

The appellant filed this appeal on the following grounds;

1. That the Learned Trial Judge erred in law and fact in holding that the consent order of 1<sup>st</sup> February 2008 entered between the appellant and the respondent did not entitle the appellant salary beyond his retirement age.

2. That the Learned Trial Judge erred in law and fact when he held that the appellant was not entitled to a six months retirement notice under the Public Service Regulations.

3. That the Learned Trial Judge erred in law and fact when he wrongly dismissed the application seeking to enforce a consent order.

4. That the Learned Trial Judge erred in law and fact when he held that when the respondent paid the appellant salary arrears up to 30/8/2006 the date upon which the applicant reached 60 years , the appellant was treated as a retired officer.

### **Representation**

At the hearing of this appeal, Mr. Kwemara Kafuuzi appeared for the appellant while counsel for the respondent was absent. The respondent was present in the person of Kiiza Fidelis, Principal Assistant Secretary Ntungamo Local government.

### **Submissions of the appellant**

Counsel submitted that whereas the appellant was paid according to the terms of the consent up to 30<sup>th</sup> August 2006, the district refused to pay him for the entire money that he was entitled to and also refused to reinstate him contrary to the consent. Also, that the district was required to give him a notice of retirement according to the public service standing orders.

Counsel relied on **Regulation 23** of the **Public Service (Commission) Regulations S1 288-1** which provides that the responsible officer should inform an officer that he intends to recommend that the officer be compulsorily retired from public service on ground that he has attained the age of retirement under the Pensions Act and such notice should be of 6 months. That the respondent did not issue such notice to the appellant before or when the consent was made on 20<sup>th</sup>, November, 2007.

### **Resolution of the appeal**

We are required as a first appellant Court, to re-evaluate all the evidence on record and to make our own inferences on all issues of the law and fact. See: **Rule 30(1)** of the Rules of this Court and **Supreme Court Civil Appeal No. 17 of 2002: Fr. Narcensio Begumisa & 3 others -vs- Eric Tibebaga.**

We shall proceed to do so.

At scheduling, the following issues were raised for this court to resolve.

1. Whether the appellant was entitled to salary arrears beyond 30<sup>th</sup> August, 2006 when he clocked his retirement age. (Grounds 1, 3 and 4).
2. Whether the appellant was entitled to a retirement notice of 6 months (ground 2).

The appellant attained the age of 60 on 30<sup>th</sup> August 2006. As per the consent of 1<sup>st</sup> February 2008, it was ordered that the respondent re-instates the appellant to his station of duty and pay the applicant all salary arrears, the decision of the Chief Administrative Officer in the letter dated 13<sup>th</sup> December 2005 be set aside and the respondent pays taxed costs. Court awarded Shs.12,000,000/= general damages. All the above were duly complied with by the respondents apart from re-instating the appellant to his station of duty and salary arrears beyond 30<sup>th</sup> August 2006.

Section 12(1) of the Pensions Act provides that;

*"12. Compulsory retirement.*

*(1) An officer shall retire on attaining the age of sixty years."*

Rule 23 of the Public Service (Commission) Regulations provides that;

*"23. Compulsory retirement.*

5 If a responsible officer is of the opinion that a public officer who is serving in his or her Ministry or a department within his or her Ministry and who holds a pensionable office should be called upon to retire from the public service on the grounds that he or she has attained the age at which he or she can, under the Pensions Act, lawfully be required to retire from the public service, the responsible officer shall—

(a) inform the officer that he or she intends to recommend that the officer be compulsorily retired from the public service;

10 (b) ask the officer concerned whether he or she wishes to make, within a period of time appointed by the responsible officer, any representations why he or she should not be so retired; and

15 (c) after the expiration of that period, forward his or her recommendation to the secretary together with a copy of any representations made by the officer concerned and his or her comments on the representations.”

We note that the consent was entered into on 1<sup>st</sup> February 2008 and the appellant attained retirement age on 30<sup>th</sup> August 2006. The appellant had also been interdicted on 13<sup>th</sup> December 2005 due to audit queries and as such, the procedure laid down in rule 23 above could not be implemented because he was already out of service. We do not accept the submission of counsel for the appellant that a notice of retirement should have been given when the appellant had already attained the age of 60 years. A notice which was sought could not have been given to an interdicted officer until the reasons for interdiction had ceased to exist. The notice of retirement could not be given after 1<sup>st</sup>, February 2006 when the applicant was over 60 years old, neither could it have been given in February 2006, as the appellant was on interdiction at that time. That notwithstanding, it is unreasonable for the appellant to expect the respondent to remind him of his age which he knows very well and is not a secret. We therefore agree with the learned trial Judge's finding that the

appellant was entitled to his salary up to 30<sup>th</sup> August 2006 when he reached the age of 60 years.

5 Regarding the consent relied upon by the appellant, it could not override the provisions of S. 12(1) of the Pensions Act. A consent order between parties and sealed by court cannot override the clear provisions of a statute- in this case the Pensions Act.

10 We agree with the trial Judge's finding that the terms of the consent which permitted the appellant to be re-instated in service was for enabling the appellant retire formally and be able to get the benefits of retiring officers.

15 The appellant argues that the trial Judge should not have awarded costs to the respondent in Misc. Application No. 29 of 2009 the subject of this appeal because it arose out of a consent between the parties. Under section 27 of **The Civil procedure Act**, the award of costs of and incidental to all suits are in the discretion of the court or Judge. Courts generally must award costs to the successful or prevailing party unless that party is guilty of some fault, misconduct, or default worthy of punishment. Although the order made on 1<sup>st</sup> February 2008 was out of consent of both parties, Misc. Application 20 No. 29 of 2009 was an independent application arising out of the consent.

In the circumstances, the trial court rightly decided to award costs to the respondent and we do not see any justification for interfering with the order.

25 We find that this appeal is misconceived and has no merit whatsoever. It is accordingly dismissed with costs.

Dated this 10<sup>th</sup> day of April, 2019

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**Hon. Justice Owiny Dollo, DCJ**

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**Hon. Justice Kenneth Kakuru, JA**

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**Hon. Justice Stephen Musota, JA**