

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 229 OF 2018

RO/10224 RETIRED LIEUTENANT

ALI NANGOSHA KUNDU:.....APPLICANT

VERSUS

THE ATTORNEY GENERAL OF UGANDA:.....RESPONDENTS

BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

RO/10224 Retired Lieutenant Ali Nangosha Kundu, the Applicant, brought this application against the Attorney General, the Respondent herein, under *Articles 20, 21, 40(2), 43(1), 45, 50, 126(2)(c) and 139 of the Constitution of Uganda, Sec 33 of the Judicature Act, Cap.13, Section 98 of the Civil Procedure Act CAP 71, Order 52 Rule 1, of the Civil Procedure Rules SI 71-1 and Rule 3 of the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) Rules - 1992*, seeking for: -

1. A declaration that the action of the Field Engineering Regiment of declaring the Applicant Absent Without Official Leave (AWOL) at a time

when he was present and serving at Junior Staff College, was illegal and unfair.

2. A declaration that the act of retiring the Applicant from UPDF when he had never applied to retire, was unfair, unconstitutional and illegal.
3. A declaration that the Applicant is entitled to payment of professional/qualification allowance.
4. A declaration that the Applicant is entitled to payment of pension and gratuity calculated at consolidated pay from the time when the Applicant joined the army to the time when he was retired.
5. An order that the Applicant be paid all his unpaid salaries from the time when he was declared Absent Without Official Leave (AWOL), to the time when he was discharged from the UPDF.
6. An order that the Applicant be paid in lieu of untaken leave for the six years he actively served in UPDF.
7. An order that the Applicant be paid his housing allowances from the time when he was legally entitled to it to the time when he was retired from the army.
8. An order for general and aggravated damages to be paid to the Applicant for the illegal retirement, stress, suffering and inconveniences caused to the Applicant from the time when he was declared AWOL to the time when he was retired.

9. **An order awarding costs of this application to the Applicant**
10. **Interest to the Applicant at 25% per annum, from date of judgment till payment in full.**

The grounds of this application are contained in the affidavit of the Applicant, Ali Nangosha Kundu but briefly are that: -

- i. **The Applicant, a former Junior Officer of the Uganda People's Defence Forces (UPDF) formerly serving as a Logistics Officer at Junior Staff College - Jinja was declared Absent Without Official Leave (AWOL) vide Reference Message DTG 151515C April, 2007 by his Unit at Jinja Junior Staff College.**
- ii. **As a result of being declared AWOL, the Applicant was immediately struck off the UPDF pay roll effective April, 2007.**
- iii. **The Applicant tried his level best to be reinstated on the pay roll moving to various offices and making various communications but he failed.**
- iv. **On the 30th November, 2017, the Applicant was discharged from the UPDF.**
- v. **Whereas the Applicant joined the UPDF on the 22nd October, 2001 and was officially retired on the 30th November, 2017, hence serving UPDF for sixteen years, he was considered for gratuity for only six years, effective**

from the time when he joined the army to the time when he was declared AWOL.

- vi. The Applicant was discharged from the army without being paid his salary arrears of ten years (127 Months) from the time when he was declared AWOL to the time when he was discharged from the army.
- vii. By the time the Applicant was retired from the army, he was a professional officer entitled to calculation of his pension and gratuity based on a consolidated pay, which was not done.
- viii. On being discharged from the UPDF, the Applicant was not paid his full retirement benefits as provided by law.
- ix. For the 10 years that the Applicant was not getting salary, he did not have a discharge certificate to enable him obtain legal and gainful employment, he passed through untold suffering and did all types of manual odd jobs that were not befitting of a professional army officer, in order to earn a living.
- x. As a result of the Applicant's unfair and illegal retirement, the Applicant lost his career that he had struggled to build for six years.

The Respondent did not file an affidavit in reply.

Background to the application

The Applicant joined the UPDF on the 22nd October, 2001 as a Cadet Officer. He attended several trainings and attained promotion up to the level of 2nd Lieutenant and was deployed in the Field Engineering Regiment Unit of the UPDF. In December, 2005, he was nominated for a platoon Commander's course at Kabamba Training School from where he received a call from his mother unit (Field Engineering) while he was still attending the training ordering him to report back to the Unit. On arrival, he was detained on grounds that he went for the platoon training without authority. He was kept on detention for 2 months without trial. After the two months, he was released on medical grounds and referred to Mbuya General Military Hospital. The Applicant notified the General Headquarters at Bombo, the Field Engineering Regiment Headquarters at Masaka and the Regiment at Gulu about his hospital admission. His condition deteriorated and he was referred to Mulago Hospital on the 24th March, 2006. While still at Mulago for medical treatment on the 6th June, 2006, the Applicant was declared absent without official leave by his mother unit. He was later cleared and deployed.

On the 14th February, 2007, the Applicant was transferred from the field Engineering Unit to the Junior Staff College – Jinja as Quarter Master. He assumed office on the 26th February, 2007.

On the 15th April, 2007, the Field Engineering Regiment - Masaka communicated to the General Headquarters declaring the Applicant absent from duty without official leave again and struck him off the payroll. The Applicant was kept off the pay roll from the 15th April, 2007 until the 30th November, 2017 when he was re-instated and then retired from the army. He was issued with a discharge certificate, even when he had not applied for retirement from the army. The Applicant now wants to be paid all his salary from the time he was illegally removed from the pay roll until the illegal retirement, his pension, unpaid gratuity, untaken leave allowances, lost income due to forced early retirement, general and aggravated damages, hence this application.

Learned Counsel Ronald Iduuli, appeared for the Applicant while Ojambo Bichachi, State Attorney from the Attorney General's Chambers was for the Respondent. Counsel for the Respondent informed Court that he had preliminary points of law to raise and that it was not necessary for him to file an affidavit in reply. He sought leave of Court to file written submissions. Leave was granted. Mr. Ojambo did not file the preliminary objections, he instead filed written submissions on the merits of the application without filing the affidavit in reply.

Issues for trial are: -

1. Whether the Applicant was illegally declared Absent Without Official Leave (AWOL)
2. Whether the Applicant was illegally struck off the UPDF pay roll
3. Whether the Applicant was illegally retired from the UPDF
4. Whether the Applicant is entitled to the remedies sought.

Submissions

Counsel for the Applicant submitted that **Order 9 Rule 10 and 11 (2) of the Civil Procedure Rules**, allows Court to proceed and hear a matter *ex parte* where the defendant fails to file his defence. He prayed that in this case, the Respondent having failed to file his affidavit in reply, this matter should proceed ex-parte.

In reply, Counsel for the Respondent conceded that he did not file a reply to the application. He explained that the UPDF Joint Chief Staff had indicated to the Respondent that they would settle this matter out of Court. That time has passed without the parties having reached an amicable settlement. This is why he decided to file his submissions.

Analysis

Order 8 Rule 3 of the Civil procedure rules provides that: -

“Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted except as against a person under disability but the court may in its discretion require any facts so admitted to be proved otherwise than by that admission”.

In *Prof Oloka Onyango & Others -v- The Attorney General Constitutional Petition No.6 of 2014* Court held that: -

“where one has alleged a fact and the person against whom the fact is alleged, does not deny, he is presumed to have accepted that fact.”

In the case of *H.G. Gandesha & another –v- G.J Lutaya SCCA NO. 14 of 1989*, Court observed that where facts are sworn to an affidavit, the burden to deny them is on the other party. Failure to do that, they are presumed to have been accepted.

The Respondent in this case was served with the application and the evidence in the accompanying affidavit by the Applicant and he opted not to file a reply. This would mean that all the facts stated in the application and the accompanying affidavit plus all the annexures to the affidavit are not denied by the Respondent. I would therefore find that all facts stated against the Respondent are true that the Applicant

was illegally declared Absent Without Official Leave (AWOL), the he was illegally struck off the UPDF pay roll and that he was illegally retired from the UPDF. Therefore, the 1st, 2nd and 3rd issues are answered in the affirmative. What now remains is for this Court to examine remedies available to the Applicant under the law. I now address each remedy as presented.

1. Payment of unpaid salaries from the time when the Applicant was declared Absent Without Official Leave (AWOL), to the time when he was discharged from the UPDF.

It is the Applicant's evidence that from the time he was struck off the pay roll on the 15th April 2007 he was not paid salary. That this went on up to the 30th November, 2017 when he was re- instated on the pay roll, paid only for that month and then discharged from the UPDF. The Applicant avers that he missed salary for 127 months bringing it to a total of 93, 163,390/- at a monthly salary of 733,595/- It is the Applicant's prayer that this court orders the Respondent to pay all his unpaid salary.

Analysis

From the Court record, the Applicant has not attached his last pay slip to confirm the amounts that he was earning by the time he was discharged from service. What is attached is a bank statement (annexure "K" to the Applicant's affidavit in support of the Application) showing that the Applicant was paid 733,595/ - [Seven hundred

thirty- three thousand five hundred ninety-five shillings only] on the 1st December, 2017. I believe this is the salary that the Applicant refers to in paragraph 28 of his affidavit in support of the application when he was restored to the pay roll, paid the salary of November, 2017 and discharged from service. From the 15th May, 2007 to November, 2017 when the Applicant was re- instated to the pay roll is a period of 126 months. This means that at a monthly salary of 733,595 for 126 months, the Applicant was denied salary amounting to 92,432,970/- [Ninety –two million, four hundred thirty- two thousand nine hundred seventy shillings only]. This is the amount of money that the Respondent should pay the Applicant as his unpaid salary for 126 months, the period that he was illegally removed from the pay roll, before being discharged from the Military Service.

2. Payment of pension and gratuity calculated from the time when the Applicant joined the army to the time when he was retired.

Annexure "J" is a directive to the Chief of Legal Services UPDF, Mbuya. It states in paragraph three that the Applicant's duty status should be well established to enable him be entitled to his terminal benefits. This evidence was not challenged.

S. 71 (1) of the UPDF Act provides that an Officer or militant who is released from the Defence Forces shall be entitled to pension or gratuity in accordance with regulations made under this Act.

Under Regulation 4 of the UPDF (pensions and Gratuities) Regulations, a pension may be granted to every officer who retires or a man who is discharged from the service—

(a) having completed at least thirteen years' reckonable service

The Applicant in this case served for a period of 16 years, from 2001 up to 2017 when he was discharged from services. He therefore, qualifies for pension.

Under S. 71(3) of the UPDF Act, the formula to be used in the computation of pensions and gratuities under this Act shall be that applied in the computation of pensions and gratuities for public officers.

Under regulation 5 of the UPDF (Pensions and Gratuities) Regulations;

A pension granted to any officer or man under these Regulations shall be assessed at the monthly rate of one six-hundredth of his pensionable emoluments for each completed month of his reckonable service.

In the case of **Lt. Col Levy Vicent Mugenyi & 51 Ors Vs Attorney General Msc. Application No. 300 of 2013 (arising from High Court Civil Suit No. 285 of 2010)**, Where judgment on admission was entered, the Attorney General admitted that soldiers are entitled to payment of their terminal benefits.

The Applicant should therefore, be paid pension and gratuity based on computations by the pensions Authority established under Rule 3 of the Regulations.

The Applicant states under paragraph 34 of his affidavit in support of the application that he has so far been paid gratuity amounting to 13, 030, 530/- [thirteen million, thirty thousand and five hundred thirty shillings only]. This gratuity amount already paid should be deducted from the total gratuity due to be paid to the Applicant so that only the outstanding balance is paid, if any. All the Applicant's pension arrears from the time he was discharged from service until payment should be paid and he should thereafter be put on the UPDF pension roll.

3. Payment in lieu of untaken leave for the six years

There is no evidence to show that the Applicant is entitled to payment in lieu of untaken leave for the six years that he actively served in UPDF.

4. Payment of professional allowance.

Regulation 24 (2) of the Uganda Peoples Defence Forces (conditions of Service) (officers) Regulations provides that: -

“ In order to be considered as a professional in the army, the Officer shall fulfill the conditions specified in the ninth schedule to these Regulations.”

Under the ninth schedule, to be considered a professional in the army, one has to fulfil the following Conditions -

- (a) he must declare that he wants to join the army as a professional and he should be ready to undergo basic military training.***

- (b) he must possess a University degree or its equivalent from a recognized Institution*
- (c) he must be a registered or registrable member of a recognized professional organization; except that a University Graduate upon completion of basic military training should go for a cadet course within one year of that completion*
- (d) he must be a practicing member of that profession*

The Applicant has not presented evidence to satisfy any of the above. It is therefore, my finding that the Applicant does not qualify to be paid a professional allowance.

5. Payment of housing allowance.

It's the Applicant's claim that he was entitled to housing allowance amounting to 71,700,000/- [seventy-one million, seven hundred thousand shillings only] from 2002 to 2017 (see paragraph 37 of the affidavit in support of the application) Rental receipts are attached as annexure "N" to his affidavit in support of the application. Counsel for the Applicant submitted that accommodation for soldiers is an entitlement provided for by law. He relied on S. 96 of the UPDF Act and Regulation 34 (4) of the UPDF (Conditions of Service) (Officers) Regulations and explained that under part one of the seventh schedule of the Regulations, a 2nd Lieutenant is entitled to a 2 bed roomed house and that an officer not housed shall be paid an amount calculated according to his rank and profession at the current value. Counsel

explained that an Officer shall be deemed eligible for a house after service in the UPDF for four years. He relied on the case of ***Major Noel Drago Nuwe –v- AG MC No. 428 of 2017 where Court held that: -***

“.....a serving Officer ought to be accommodated or given housing allowance in accordance with the UPDF Act. The Applicant is entitled to housing allowance computed in accordance with the rates applicable during the different years and rank in the army at the given point in time.”

Counsel submitted that since it was not in contention that the Applicant was not staying in the barracks and he has availed receipts to show that he was paying rent, this Court should be pleased to order that the Applicant be paid housing allowance.

Analysis

S. 96 of the UPDF Act provides that accommodation for officers and militants shall be prescribed by the Defence Forces Council.

Regulation 34(4) of the UPDF (conditions of service) (officers) Regulations S.I 307-2 provides that: -

“ An officer who has no quarters may receive a housing allowance in respect of accommodation suitable and according to his rank.”

Under part one of the seventh schedule of the Regulations, a 2nd Lieutenant is entitled to a 2 bed roomed house.

Where the officer is not housed he is entitled to payment of an amount calculated according to his rank and profession at the current value. In this case, the Applicant is entitled to a two bedroomed house or to be paid a housing allowance if he was not given accommodation for the period claimed. I find the Applicant's receipt exhibits wanting as they are not clear on the specific months being paid for and whether the amounts claimed is what the Applicant would be entitled to under Regulation 34(4) of the UPDF (Conditions of Service) Regulations. It is my view that the Applicant is entitled to housing allowance which should be worked out and paid to him according to his rank by the responsible authority in UPDF.

6. Compensation for lost income from the time when the Applicant was illegally retired from the army to the time when he would have officially retired

The Applicant claims in paragraph 38 b of his affidavit in support of the application that he was discharged at the age of 35 years, making him to miss out on the 30 years of service if he was to retire at the right age of 65 years. He prayed for lost income in form of salaries from the time of discharge to the time of retirement amounting to 264, 094, 200/ -.

Analysis

The Applicant has already been paid part of his gratuity and this Court has established that he should be paid the balance of his gratuity if any and pension

beginning with the period when he was discharged from service. It would not be proper for the Applicant to be paid lost income and yet he is going to be paid pension for the rest of his life. This would amount to double payment which is illegal. In the case of ***Omunyokol Akol Johnson –v- Attorney General CA No. 6 of 2012*** that Counsel for the Applicant has relied on to claim for lost income, the Appellant was not awarded Gratuity and Pension like in this case. Here, the Applicant has already been paid part of his gratuity. Secondly, lost income is not among the claims in the application. It has only come in as an afterthought. Parties are bound by their pleadings. **See the case of Interfreight Forwarders (U) Ltd -v- East African Development Bank, SCCA No. 33 of 1992, where Court noted inter alia that: -**

“A party is expected and bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not set up by him and be not allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by the way of amendment of the pleadings.”

7. An order for General Damages

Counsel submitted that the justification for the Order of general damages for the Applicant is that the Applicant suffered in various ways at the hand of the Respondent’s servants, including stress, inconvenience, embarrassment, physical and

psychological torture. That the Applicant was declared AWOL while he was on duty. He was removed from the pay roll for ten years. This made him move up and down to try and solve the problem. That as soon as the Applicant seemed to have solved the problem and re- instated on the pay roll he was paid for only one month and then discharged from service and he has not been paid his full benefits to date. Counsel relied on various authorities where Court has awarded sums of general damages including *150,000,000/- in the case of Omunyokol-v- Attorney General (supra)*, *200,000,000/- in the case of Fredrick Zaabwe-v- Orient Bank Ltd SCCA No. 4 of 2007*, *750,000,000/- in the case of General David Sejusa –v- Attorney General MC No. 176 of 2015* and *300,000,000/- in Asobasi Daniel Okumu –v- Attorney General MA No. 43 of 2016 .*

In the case of *Robert Coussens -v- Attorney General, SCCA No. 08 of 1999*, Court held that;

“The object of the award of damages is to give the plaintiff compensation for the damage, loss or injury he or she has suffered....”

In *Kibimba Rice Ltd. -v- Umar Salim, SCCA No.17 of 1992*, it was held that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in, had she or he not suffered the wrong. In *Takiya Kashwahiri & A'nor -v- Kajungu Denis, CACA No. 85 of 2011*, General damages should be compensatory in nature in that they should restore some

satisfaction, as far as money can do it, to the injured plaintiff. In this case Counsel prayed for General Damages of 400,000,000/- I have considered the cases relied on by Counsel for the Applicant, I note that in this case, the Applicant has been given pension running from the time of discharge from service till death. He has been given gratuity. The Applicant has already been paid part of his gratuity. He has been given his lost income from the time he was illegally removed from the pay roll until when he was retired. Counsel prayed for 264,094 200/- as his lost income until the period he would have retired at 65 years. I find a sum of 70,000,000/- [seventy million shillings only] reasonable as General Damages for the Applicant for all the inconvenience that he was subjected to.

Aggravated damages

Aggravated damages are "extra compensation to a plaintiff for injury to his feelings and dignity caused by the manner in which the defendant acted (*See the case of Zabwe- v- Orient Bank*) (*supra*)

Common examples of 'aggravating circumstances' or 'aggravating factors include malice, ill-will, or persistence in a falsehood exhibited by a defendant to the detriment of the plaintiff. (*see Ntabgoba v. Editor-in-chief of the New Vision & Another [2004] 2 EA 234*)

In this case, the Respondent made a payment of gratuity to the Applicant upon retiring him. This in my view is positive conduct in recognition of the Applicant's pain by the Respondent which is a mitigating factor for the Respondent. I find that the Applicant does not qualify for aggravated damages.

Costs

Section 27(2) of the Civil Procedure Act provides that the award of costs is in the discretion of court and costs of any action shall follow the event unless for good reasons court directs otherwise. In *Francis Butagira -v- Deborah Mukasa SCCA No.6 of 1989*, it was held that a successful party should not be deprived of costs except for good reasons. The Applicant in this case was compelled to file this suit after the Respondent's agents discharged him from service illegally and failed to settle this matter out of Court. This in my view renders this a proper case for award of costs to the Applicant, and I hereby award him costs for this application.

In the result therefore, the following declarations and orders are made: -

- 1. The action of the Field Engineering Regiment – Masaka declaring the Applicant Absent Without Official Leave (AWOL) when he was on duty at the Junior Staff College- Jinja was illegal.**
- 2. The act of retiring the Applicant from the UPDF service without any justifiable reason was unconstitutional and illegal.**
- 3. The Respondent is hereby ordered to pay the Applicant all his unpaid salaries from the 15th April, 2007 when he was illegally removed from the pay roll to the 30th November, 2017 when he was illegally retired from Service, amounting to a sum of Ugshs. 92,432,970/- [Ninety –two million, four hundred thirty- two thousand nine hundred seventy shillings only].**

4. The Respondent pays the Applicant his gratuity for the 16 years of service. The amount already paid should be deducted from the total gratuity due to be paid to the Applicant so that only the outstanding balance is paid.
5. All the Applicant's pension arrears should be paid and he should be put on the pension pay roll
6. The Respondent pays the Applicant housing allowance for a two bedroomed house for the period of default.
7. The Respondent is hereby ordered to pay the Applicant General Damages amounting to Ushs. 70,000,000/- (seventy million shillings only).
8. The Respondent will pay interest on item 3, 4, 5, 6 & 7 at a rate of 8% per annum, from the date of this ruling until payment in full
9. The Respondent pays costs of this application.

I so order.

Dated, signed and delivered at Kampala, this 26th day of February, 2021.

Esta Nambayo

JUDGE

26th February, 2021.