**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE FROM HIGHCOURT**

**REFERENCE NO. 109 OF 2014**

**NAMATOVU IMMACULATE …………………………………………………………. CLAIMANT**

1. **NATIONAL COMMUNITY SERVICE COMMITTEE**
2. **ATTORNEYGENERAL …………………RESPONDENTS**

 **(ARISING FROM HIGH COURT CIVIL SUIT NO. 42 OF 2011)**

 **BEFORE:**

 **HON. CHIEF JUDGE ASAPH RUHINDA NTENGYE**

 **HON. JUDGE LINDA TUMUSIIME MUGISHA**

**HON.PANELLISTS:**

1. **MR. MICHEAL MATOVU**
2. **MR. ANTHONY WANYAMA**
3. **MR. FIDEL EBYAU**

**AWARD**

The claimant’s claim is for special damages for unpaid salary, gratuity, compensatory orders, and leave pay due and not taken, severance allowance and lunch allowance, general damages for inconveniences and pain suffered and interest at 25% p.a. on the special damages from December 2004 till full and final payment.

The facts are that on the 3rd December 2001 the claimant Immaculate Namatovu, was employed by the 1st respondent as an Assistant District Community Service Officer in Mpigi District on probation for a period of 15 months and confirmed on 2nd December, 2002 at a salary of (U) Shs. 502,714/- per month. At the time of employment the District Community Service programme was funded by the European Union under the DANIDA Judiciary Project. In November 2004 the EU funded programme closed and reverted to the Ministry of internal Affairs. The former Staff of the programme including the claimant continued working under the Ministry albeit without salary.

The Claimant’s contract of employment expired before the EU funded project closed and was renewed with effect from April 1st 2003 for a period of 6 months up to 30th September 2003. Between the period October, 2003 and October 2010, the claimant continued working but was only paid allowances and no salary.

The Permanent Secretary of the Ministry of Internal Affairs, Dr. S.P. Kagoda sought the intervention of the Ministry of Public Service regarding the remunerations of former staff of Community Service EU funded programme and was advised to verify and pay the salary arrears of all the workers who continued working under the Ministry. All the affected staff was paid except the claimant because she had filed a suit in the high Court for among others the payment of her salary arrears.

On the 25th February 2010 the Claimant was declared a volunteer and informed by an officer from the Ministry of Internal Affairs (AG. PCSO) that management had decided to pay all volunteers Ug. Shs.100,000/= per month due to increased challenges relating to the payment of volunteers.

**The parties appeared before this Court on the 1st December 2014 and Counsel for the Respondents admitted liability, of (U)shs. 17,631,960/=, being salary arrears for the period October, 2003 to March 2009. Court entered Judgment in favour of the Claimant in this sum on admission by the respondents.**

It was further agreed by the parties in court that the Balance of the claims on salary arrears, severance allowance, lunch allowance, leave, gratuity and any unpaid salary, general damages, interest and costs should be the subject of trial in accordance with the agreed facts.

A preliminary Point of Law relating to limitation of actions provided under Section 3(2) of the Civil Procedure and Limitation (miscellaneous Provisions Limitation) Act Cap 72 was raised by Counsel for the respondents in her submissions.

**AGREED ISSUES**

1. Whether the claimant is entitled to payment of a monthly salary of (U) Shs. 502,714/= per month between October, 2003 and October, 2010.
2. Whether the claimant is entitled to gratuity under the Pensions Act, Cap 286.
3. Whether the claimant is entitled to compensatory orders and severance allowance.
4. Whether the claimant is entitled to payment in lieu of leave.
5. Whether the claimant is entitled to unpaid lunch allowance from February, 2010 to October 2010.
6. Whether the claimant is entitled to General damages.
7. Whether the claimant is entitled to interest on her claims and if so at what annual rate.
8. Whether the claimant is entitled to costs.

We intend to dispose of the Preliminary Point of law before we delve into the merits of the case.

**Preliminary Point of Law**

 Ms. Adong for the respondent raised a preliminary point of law as part of her submissions, that the claimant had filed the suit out of time (a period of close to over 9 years from the time when the cause of action arose) in contravention of section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions Limitation) Act Cap 72. The Act bars any action against Government based on contract after a period of 3 years from the date on which the cause of action arose.

According to Counsel the suit was filed in this court on the 16th February 2011 and yet the grounds leading to the cause of action arose in 2003 when the claimant claimed for unpaid salary and other benefits (paragraph 5 of the plaint/claim, and therefore the suit was time barred because it was filed outside the time limit of three years prescribed by law.

She cited the **Application of Mustapha Ramathan for orders of Certiorari, Prohibition and Injunction Civil Appeal No. 25 of 1996, and Hutton Vs Sutton steam Laundry [1946] 1KB65 at page 73** which were to the effect that the statutes of limitation were strict and inflexible irrespective of the merits of any case and once fixed time has passed one could not proceed with their claim… (Our emphasis). Counsel also prayed in the alternative for the suit to be dismissed on the grounds that it lacked merit.

Prof. Barya , Counsel for the claimant in response, argued that the facts in the claimant’s pleadings showed that she had continued to work as an Assistant Community Service Officer between November 2004 to October, 2008 when she was transferred to Kajjansi Court. That she was being paid allowances and her employment was not contested, thus non-payment of her salary from October 2003 to March 2009 was a continuous breach of contract as admitted by the respondents in the judgment on admission. Accordingly the breach continued up to 2009 and the suit was filed on 16th February 2011 which was within time. Counsel further argued that even if under the Civil Procedure and Limitation (Miscellaneous Provisions) Act Cap 72, the suit was time barred, the respondents had acknowledged the breach and paid some of the former workers like the claimant and had also agreed to pay her by the judgment on admission which rendered the objection redundant.

He further contended that this Court was not bound by rules of evidence and civil Procedure rules that apply to ordinary civil courts because the court had its own procedure and rules.

He further argued that Counsel for the respondent was wasting Courts time by being frivolous because she had consented to a judgment on admission for the claimant’s salary arrears of (U) shs. 17,631,960/- and was now retracting from the same.

We are of the opinion that once a consent Judgment has been entered it can only be set aside if it is proved that there was fraud, mistake, misapprehension or contravention of Court Policy. The principle for setting aside a consent judgment was outlined in  **Harani vs Kassam[1952] EACA 131,** which approved and adopted the following passage from **Seton** on Judgments and Orders 7th Edition Vol.1 page 124:

 **“*Prima facie, any order made in the presence and with a consent of Counsel is binding on all parties to the proceedings or action and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court … or if the consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable court to set aside an agreement”***

We now turn on the Point of law. We have carefully perused the submissions of both counsel and agree to the Principal of law in Civil Appeal No.25 of 1996 cited by Counsel for the respondent that statutes of Limitation are strict and inflexible to that end.  **Lord Green M. R in Hilton Vs Sutton Steam laundry [1946] 1 KB at page 81 (Supra) stated that:**

***“But the statute of limitation is not concerned with merits. Once the axe falls and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled of course to insist on his strict rights”***

Evidence on the record indicates that the claimant was employed as an Assistant Community Service officer in Mpigi District until October 2008 when she was transferred to Kajjansi Magistrates Court where she was declared a Volunteer on the 25th February 2010 and she remained until 28th October 2010 when she was verbally terminated.

The issue raised by the respondent that the claimant had no subsisting contract upon which she could base her case therefore does not hold.

**The question then is whether the case was filed out of time?**

The claimant continued working as an assistant Community Service officer in Mpigi where she worked till 6th October 2008. She was then transferred to kajjansi Magistrates Court where she worked until 28th October 2010, when she was verbally terminated on phone by the Commissioner Community Service one. Paul Kintu.

The claimant filed this suit on 16th February 2011, four months after her verbal termination.

We are of the opinion that the cause of action arose when she was terminated verbally and this being the case we do not subscribe to the contention by Counsel that the case was filed out of time. M. Adongs argument on this point fails and is rejected.

 **Issue 1 : On Whether the Claimant is entitled to payment of a monthly salary of (U) Shs. 502, 714/- per month between October 2003 and October 2010.**

Prof. Barya for the claimant submitted that the claimant’s employment with the respondents was not disputed and that the Respondents admitted liability for the claimant’s salary arrears for the period October 2003 to March 2009 of Ug shs. 17, 631, 960/-.He however contended that what the respondents admitted was Ug.shs. 15,044,450/- less than what accrued to the claimant who was entitled to earning Ug.shs 502,714 per month and for the period in issue, i.e October 2003 to March 2009 the total amount would have been Ug.shs. 32, 674,641/-. He further argued that the claimant was forcefully terminated on phone, by a one Paul Kintu, on the 28th of October 2010 and was thus entitled to payment of salary amounting to Ug.shs 9,551,566/- for the period April 2009 and October 2010, making it a total of Ug shs. 24, 596,016/= in salary arrears owed to the claimant.

Ms. Adong in response submitted that the contract which showed that the claimant was entitled to a gross monthly pay of (U)Shs. 502,714/= ended on the 30th September 2003 (Annexture B). She argued that the claimant had not adduced any evidence to prove that she continued in the employment of the respondents after the expiration of that contract and thus she was precluded from asserting that the respondents acquiesced to her employment with them. She cited Sections 101 and 102 of the Evidence Act.

She contended that the claimants assertion that the respondents had admitted liability of salary arrears of (U).Shs.17, 631,960/= for the period October 2003 to March 2009 and that she earned a salary of 502, 714/- per month could not stand because among others her salary had been mainstreamed into the Ministry of Public service when the EU project ended.

We agree with Ms. Adong counsel for the respondents that the salary earned between the March 2003 and April 2009 as admitted, was salary as established within the Ministry of Internal Affairs salary structure and not as per the EU project.All the former workers of the Community Service Programme, who continued working after the EU project ended, had been mainstreamed into the Ministry of Internal Affairs and their positions had been aligned to conform with the Public Service Staff Structure. The implications of the mainstreaming as per the court record were that the staff positions and salaries were aligned with their equivalent in the Public Service structure. This meant that the terms and conditions of service under the Public Service structure, would apply. The computation of their salary arrears was thus based on these equated terms and the claimant was no exception.

It is our decision therefore that the claimant was entitled to the payment of her salary arrears for the period October 2003 to 25th February 2010, as aligned and equated under the Public Service Structure and not as per the EU structure. The Claimant was an Assistant Community Service Officer which position had been equated to the position of an officer at level U5 and was therefore entitled to the salary attached to this position.

**Issue 2: Whether the claimant is entitled to Gratuity under the Pensions Act, CAP 286?**

Relying on Section 10(1&2) of the Pensions Act, Prof Barya reiterated the fact that the claimant worked for the National community Service from the 3rd December 2001 and later under the Ministry of Internal affairs and was therefore entitled to earn gratuity as provided under regulation 16 of the Pension regulations.

Ms. Adong for the Respondent cited L.B. Curzon 4th Edition at page 171 which defined gratuity as money given in recognition of services rendered. She disagreed with the claimant’s assertion that once she and other employees on the community service programme had been mainstreamed into the Public Service they became Public Servants. She cited the Employment Act, section 2 which defined an employee to mean “*any person who has entered into a contract of service…including without limitation any person who is employed by or for the Government of Uganda including the Uganda Public Service…”* and made reference to Section 59 and Section 60 of the Employment Act, regarding the particulars of contract itself. She was of the view that the particulars of the contract should have formed the basis of this case. She argued that, in the absence of a contract the claimant could neither claim gratuity nor pension as provided under Section 10(2) of the Pensions Act.

We have carefully reviewed both counsels’ submissions and the record and we find that the Claimants letter of appointment of, 3rd December 2001 stated that her employment would take effect on 2nd January 2002 for a period of 15 months (see Annexture “A” of the claim). The effective date of appointment was therefore 2nd January 2002, which date is confirmed by the renewal of contract which took effect on the 1st of April 2003 for 6 months (Annexture “B” of the claim).

It is not disputed by both Counsels that the claimant had worked for the respondent from 2003 to 2010. It is clear from the record that the claimant effectively assumed the office of Assistant Community Service Officer on the 2nd of January 2002, until February 25th 2010. She was however mainstreamed into the Public Service with effect from November 2004 when the EU project ended. Her service in the Ministry of Internal Affairs therefore is 7 years and 1month. We take the 25th of February 2010 as the end of her service as an officer, because this was the date on which the claimant was declared a volunteer a situation she did not contest.

We found no evidence in support of the respondent’s submission that the claimant had failed interviews for mainstreaming staff into the Ministry Of Internal Affairs.

It is our decision therefore that the claimant was qualified to be mainstreamed into the Ministry of Internal Affairs save that at that time she had filed a case in the high court and was thus not paid with the others as an officer of the Public service governed by the laws and regulations governing the Public service.

The Claimant had however worked under the Public Service from September 2003 to February 2010 , a period of 7 years and 2months and thus did not qualify to be paid pension or gratuity as provided under Section10(1&2) of the Pensions Act. The prayer for gratuity therefore fails.

**3: On whether the claimant is entitled to compensatory orders, severance allowance, payment in lieu of leave, unpaid lunch allowance from February 2010 to October 2010.**

Prof. Barya contended that the claimant had been unlawfully terminated when Mr. Paul kintu summarily terminated her without any notice and without payment of her dues. He asserted that because the claimant was terminated verbally without notice she was entitled to claim a basic compensatory order of four weeks wages in accordance with section 78(1) of the Employment Act and an additional three months wages compensation depending on the length of the employees service, as prescribed under section 78(2) of the same Act.

He prayed that court awards the claimant the maximum four months wages amounting to u.shs 2,010, 856/- and severance allowance of one month pay per year worked in accordance with section 87 and 89 of the Employment Act, 2006.

Prof. Barya also submitted that it was not disputed that the claimant did not take leave for a period of six years and therefore she should be paid in lieu thereof as per section 54(5). She should therefore be paid 6 Months salary for the 6 years she did not take leave which amounted to (U).Shs 3,016,284/=

He further submitted that the claimant used to receive (U). Shs 54,999/- per month, and she did not receive the same for 8 months between March 2010 and October 2010. He asserted that she should therefore be paid the correct figure of( U).sh,. 439,992/-

Ms. Adong for the respondent was of the strong view that the claimant was not entitled to any of the above claims because the evidence she had relied on to prove the claims (Annexture B1 and B2) were mere payment Vouchers and not a contract.

She argued that the claimant had not proved that she was entitled to leave, neither had she stated the number of days or weeks owing to her nor the cost of payment in lieu of leave. She further argued that the claimant had not proved that she applied for and was denied leave; therefore she could not claim such payment. In the premises she prayed that the claim is denied.

After careful consideration of both submissions and the evidence on the record, we find that the period in contention was the period when the claimant worked as a volunteer that is 25th February 2010 to 28th October 2010 when the claimant was verbally terminated.

According to clause 6 of Annexture “C” on the record, Volunteers under the National Community Service programme, were not entitled to payment of salary but a facilitation allowance which would be paid as and when funds would be available. Further the guidelines under clause 4(viii) provide for the reimbursement of reasonable expenses incurred (with prior approval of such costs/expenses) in the course of carrying out approved volunteer tasks such as transport.

The claimant did not adduce evidence to prove that Lunch allowance was such an expense. We agree with Counsel for the Respondents that the claimant was not entitled to mandatory payment of lunch allowance.

With regard to payment of leave allowance, Ms.Adong had submitted that the Claimant had not proved that she had applied for and been denied leave and so she could not claim, she however did not dispute the fact that the claimant had not taken leave for a period of 6 years as attested by the agreed facts on the record, signed by both herself and Prof. Barya, on the 10th of January 2015. The Public Service Standing Orders Section c-b (11), provides that leave is a right which has to be applied for otherwise it should be forfeited. The claimant did not prove that she had actually applied for and was denied leave.

Accordingly the claimant cannot claim payment in lieu of leave in accordance with section 54(4) of the Employment Act and Section C-b (11) of the Public Standing Orders.

We also find that the claimant ceased to be employed by the respondent as an officer on the 25th of February 2010, when she was declared a volunteer a situation which she did not disagree with. She was therefore not terminated from employment but as a volunteer. The verbal termination of her services as a volunteer cannot be equated to termination of employment and therefore she cannot claim Compensation under section 78( 2) of the Employment Act nor can she claim severance allowance under section 87 and 89 of the Employment Act 2006.

However clause 8.0 of the National Community Service Programme Volunteer and Intern guidelines marked as “C” on the record indicates that the claimant should have been given 2 weeks written notice before termination of her engagement as a volunteer. The guidelines are however silent on penalties for non- compliance with this clause.

It is the decision of this court that the claimant’s prayer for compensation and severance allowance also fails.

The prayer for compensatory allowance, payment in lieu of leave, severance allowance and unpaid lunch allowance therefore fail.

**5: On whether the claimant is entitled to General damages?**

Prof. Barya asserted that the claimant pleaded general damages as a remedy for the breach of contract and unfair termination. He cited the case of **Jabi Versus Mable Municipal Council[1975] HCB page 191** in which it was held that it is generally accepted that a dismissal is wrongful if it is made without justifiable cause and without reasonable notice. He contended that because the claimant was unfairly treated and verbally terminated without payment of salary for such a long time she had suffered damage and should be awarded Ug shss.15, 000,000/- for the same.

Ms Adong in reply based her submission on this issue on the case of ***Gulaballi Ushillani Vs Kampala pharmaceuticals SCCA No.6 of 1998:*** which was to the effect that damages are intended to restore the wronged party to the position he would have been in if there had been no breach of contract.

She argued that in this case the claimant could not claim damages because the contract on which she was relying to claim had expired and therefore no breach had occurred. She added that the employment Act defined termination of employment as discharge of an employee from employment at the initiative of the employer for justifiable reasons other than misconduct such as expiry of a contract, attainment of a retirement age etc. she also noted that The Public Standing Orders, 2010 provided that one of the ways that an officer could leave the Public Service was upon the expiry of one’s contract of employment, on notice of termination of one’s agreement.

She contended that the claimant could only succeed where the contract of employment was still subsisting and she had been terminated before its expiry and not where the period of service had come to an end/expired. Counsel noted that the claimant’s contract of employment had expired on 30/09/2003 and not 2010 and therefore she could not claim based on an expired contract. Counsel therefore prayed for court to find so and to dismiss the claim with costs.

We have already resolved that the other workers having been mainstreamed into the Public service, the claimant should have been absorbed as well. The fact that she had petitioned Court did not preclude the Ministry of Internal Affairs from engaging her on the same basis as the other workers which would have resolved the matter then. She is accordingly entitled to damages for the delayed payment of her salary as an officer in the Public Service.

The claimant is granted General damages for delayed payment of salary of U. Shs. 10,000,000/-

**6: On whether the claimant was entitled to interest on her claims and if so at what rate?**

Prof. Barya, for the claimant prayed for the award of 20% interest rate per annum for each claim and for general damages, from the date of judgment till payment in full. Counsel’s justification for this rate was the non-payment of salary to the claimant for so long. He further demanded that the admitted claim of (U). Shs. 17, 631,960/- is paid with interest.

Ms Adong was of the view that this should be considered after the assessment of damages by the Court and this should be from the date of Judgment.

We have considered the claimants claim we think it is fair and proper that the claimant is granted interest on delayed payment of her salary. It is our considered opinion therefore that the claimant is granted interest of 12% on delayed salary and other benefits from the date of filing the suit and 12% on damages from the date of this award till full and final payment.

**7: On whether the claimant was entitled to costs:**

Counsel asserted that the claimant was entitled to costs because the respondents owed the claimant salary arrears, balance on salary arrears, compensatory orders, severance package, and gratuity, payment in lieu of leave, unpaid lunch and general damages. He also contended that the claimant had incurred costs since October 2003 when the respondents stopped paying her salary, and since she filed this suit in the High Court in February 2011.

We already decided that the claimant could not claim compensatory orders, severance packages, gratuity or payment in lieu of leave. We however found that she was entitled to salary arrears as aligned to the Public service Structure.

In the final result the preliminary Objection raised by the respondents Counsel is overruled, the claimants claim of payment of a monthly salary of U shs. 502, 714 per month between October 2003 and October 2010 is denied, the claim for gratuity is denied, the claim for compensatory orders, severance allowance, payment in lieu of leave, unpaid lunch allowance from February 2010 to October 2010 is denied, the claim for general damages is allowed, the claim for interest is allowed. Because the claimant did not succeed on all her prayers, she is awarded 50% of the taxed costs of the suit.

Signed:

**HON. CHIEF JUDGE ASAPH RUHINDA NTENGYE ……………………………………**

 **HON. JUDGE LINDA TUMUSIIME MUGISHA ……………………………………**

**HON.PANELLISTS:**

1. **MR. MICHEAL MATOVU …………………………………………………..**
2. **MR. ANTHONY WANYAMA ……………………………………………………**
3. **MR. FIDEL EBYAU ……………………………………………………**

DATE: