**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE REFERENCE No.019/2014**

**ARISING FROM C.B 74/2014**

**KAKINDA LWANGA ………………………….. CLAIMANT**

**VERSUS**

**ATTORNEY GENERAL …………………. RESPONDENT**

**BEFORE:**

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

**PANELISTS**

**1. MS. JULIAN NYACHWO**

**2. MR. BWIRE ABRAHAM**

**3. MR. MAVUNWA EDISON**

**AWARD**

**BRIEF FACTS:**

The Claimant brought this claim against the Respondent for the payment of salary arrears for the period May 1998 to December 2010, amounting to Ugx.50,960,000/-.

According to him he was appointed by the Education Service Commission as a graduate teacher in May 1998 under minute 107/95. However he was not issued posting instructions. In 2007 his the Permanent Secretary Ministry of Education declared his appointment null and void. He filed High Court Civil Suit No. 226 of 1998, challenging this decision. On 13/07/2010 Court ruled in his favour and found that the Permanent Secretary had no powers to declare his appointment null and Void. In January 2011 he was issued with posting instructions to Nakasongola Army School and he assumed duty on January 2011. He contends that he is entitled to salary arrears as of right and his salary arrears were approved by the CAO Nakasongola District, therefore they should be paid to him by the Permanent Secretary Ministry of Education and Chief Administrative Officer Nakasongola District.

The Respondents on the other hand contend that the claim is bad in law and the Claimant is not entitled to his claim.

**REPRESENTATION**

The Claimant represented himself and the Respondent was represented by Ms. Adong Imelda State Attorney at the Attorney General’s Chambers.

**ISSUES**

1. Whether the Claim is time barred?
2. Whether the Claim is res judicata?
3. Whether the Claimant had a legal right to salary arrears claimed?
4. Whether he is entitled to the remedies sought?

**EVIDENCE**

Mr. Kakinda, the Claimant adduced his own evidence and the Respondent adduced evidence through Mr. Tumusiime Leonard, Deputy Chief Administrative Officer (CAO) of Nakasongola District.

Mr. Kakinda in his testimony restated his claim for salary arrears for the period May 1998 to December 2010. He also restated the fact that he filed a civil suit in 2008, challenging the declaration of his appointment null and void by the Permanent secretary ministry of Education. He said that by the time he filed the Civil Suit he had not been posted and he had never received any salary. It was his testimony that he was only posted in January 2011, after he received judgment which established that his appointment was valid. According to him he could only claim make this claim after he received Judgment and posting instructions.

Mr.Tumusiime, the Deputy CAO of Nakasongola in his testimony stated that on 28/05/2013, Mr.Kasozi Sulaiman, the CAO of Nakasongola erroneously made a submission of residual salary arrears for the Claimant, to the Permanent Secretary Ministry of Education, because he was not yet posted by then. According to him the judgment issued in his favour awarded him damages for not being posted between 1998 and 2010. According to him the Claimant did not work so he should not be paid, because salary is payment for work done. He admitted that whereas the claimant was appointed in May 1998 he was posted in January 2011. It was his testimony that the appointment would only be effective after he has been posted and assigned duties by the head teacher of the school to which he was posted and only then would he be entitled to a salary. In this case, the Claimant having not been posted he did not have a work load, therefore he could not claim for salary for the period before he was posted and besides he was paid damages for not being posted.

**SUBMISSIONS**

The Claimant in his submissions considered the issues concurrently. He restated his Claim and submitted that the subsistence of his contract between May 1998 and December 2010, was settled by Court in HCCS No. 226 of 2008 and further confirmed by his posting instructions which were based on the same appointment. He further submitted that Ministry of Education ought to have provided him with work and was obligated to pay him , even when he was not provided with work as is provided under Section 40(1)(a-c) of the Employment Act 2006.

He quoted Section 40(1)(a-c) as follows:

***“Section 40***

***Duty to provide work.***

1. ***Every employer shall provide his or her employee with work;***
2. ***In accordance with the contract of service;***
3. ***During the period for which the contract is binding; and***
4. ***On the number of days equal to the number of working days expressly or impliedly provided for in the contract.***

***....***

***(4) Where the employer fails to provide work he or she shall pay the employee, in respect of everyday on which he or she fails, wages at the same rate as if the employee had performed a day’s work.***

He also submitted that the Respondents having filed their reply to the memorandum of claim 6 months out of time, they had violated Rule 5(4) of the Labour Disputes (Arbitration and Settlement)(Industrial Court Procedure) rules 2012. In his view this was an illegality which should not be condoned by Court. To support his assertion he cited **National Social Security Fund & Anor vs ALCON International Ltd SCCS No.15/2009, Makula International Vs Cardinal Nsubuga (1987) HCB 11**.

In reply on Counsel for the Respondent submitted on each of the issues separately and on issue 1 she stated that the claimant having filed his claim for the recovery of salary arrears in 2014, when the cause of action arose in 1998, the claim was filed 13 years out of time contrary to Section 3 (2) of the Civil Procedure (Miscellaneous Provisions) Act which provides that;

***“No action founded on contract shall be brought against the Government or against a local authority after the expiration of 3 years from the date on which the cause of action arose.”***

She cited **Revenue authority vs Toro Mityana Tea Company ltd HCCS No. 1 of 2006** and **Uganda Revenue Authority vs Uganda Consolidated Properties Ltd [1997-2001] UCLR 149** whose holdings are to the effect that the time limit set by statute is a matter of substantive law and not merely a technicality and must be strictly complied with. She prayed that the Claimant’s claim should be dismissed for being time barred.

It was her submission that although the issue of time limitation was not raised in the Respondent’s pleading, according to **NSSF & Anor Vs ALCON International Limited SCCA No. 15/2009** which relied on **Makula International Vs Cardinal Nsubuga Civil Appeal No. 4 of 1991,** the principle as stated by law is that an illegality can be raised at any time and a court of law cannot sanction that which is illegal and therefore the court should consider the same and find that the suit is time barred.

**DECISION OF COURT**

1. **Whether the Claim is time barred?**

Section 3 (2) of the Civil Procedure (Miscellaneous Provisions) Act provides that;

***“No action founded on contract shall be brought against the Government or against a local authority after the expiration of 3 years from the date on which the cause of action arose.”***

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***“No action founded on contract shall be brought against the Government or against a local authority after the expiration of 3 years from the date on which the cause of action arose.”***

A perusal of the claim clearly indicates that the Cause of action arose in 1998, when the claimant was appointed Graduate teacher in May 1998 under Minute 107/95 but was not issued posting instructions. He filed the Claim in 2014 which as stated by Counsel for the respondents was 13 years after the cause of action arose.

Section 3(2) of the Civil Procedure (Miscellaneous Provisions) Act is a statute limitation that is strict and inflexible and as Lord Greene MR in **Hilton vs Sulton Steam Laundry [1946] 1 KB at page 81** 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 a benefit of the statute of limitation is entitled of course to insist on his strict rights.”***

However Order 7 rule 6, grants a claimant who is out of time an exemption if he or she can show cause for the delay. It provides as follows;

***“When a suit is instituted after the expiration of the period prescribed the law of limitation the plaint shall show grounds upon which exemption from such law is claimed…”***

Rule 11 (d) of the same order however provides

***“…That the plaint shall be rejected in the following cases***

***11. (d) where the suit appears from the statement in the plaint to be barred by any law. …”***

The Claimant did not advance any grounds in the claim that could exempt him from the statute of limitation neither did he make any rejoinder to the reply to the Memorandum of claim in which the Respondent raised the issue. It is apparent on the face of the claim that the matter is time barred. The Claim is therefore struck out.

Be that as it may , given the checkered history of this case, we are inclined to resolve issue 2 and 3 to set the record straight and shall consider them concurrently.

1. **Whether the Claim is res judicata and Whether the Claimant had a legal right to salary arrears claimed?**

Counsel submitted that that Section 7 of the CPA provides that

***“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the parties or between parties under whom where any of them claim, under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.”***

She also cited **Gurbacham vs Yowani Ekori[1958] EA 450** whose holding was to the same effect. According to Counsel the claimant filed **Civil Suit No. 226/2008, Kakinda Vs Attorney General** wherein he sought a declaration that the actions or the decision of the Permanent Secretary of the Ministry of Education declaring his appointment as a graduate teacher null and void and a claim for general damages. She asserted that the claim for salary arrears should have been made in the former suit and as stated in Gurbacham (supra), Court should not permit the same parties to open up the same subject matter of litigation in respect of matters which might have been brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. She prayed that court finds that the matter is res-judicata.

With regard to his claim for salary arrears, Counsel stated that according to Section(B-a), of the Public Service Standing Orders 2010, salary is a payment to a Public officer during the course of executing his or her official duties while in the employment of the public service. It further states that the Public officer would only be entitled to receive salary if he or she had been properly appointed, deployed and had assumed duty of the post. She contended that in the instant case the Claimant’s date of appointment was 18/09/2011, therefore he was not entitled to salary arrears and in any case he was awarded damages for the period he was not working. To award him arrears would amount to a double reward.

She argued that although the claimant asserted that the Ministry of Education was under statutory obligation to pay him even in default of providing work, salary was only paid for work done and given that he had not assumed duty he could not be paid.

In response to the illegality due to late reply to the memorandum of claim Counsel argued that both parties had participated in the court proceedings and no prejudice had been occasioned to the Claimant. However if court was inclined to find otherwise, it should still consider the points of law raised and make a finding that the suit was time barred, res-judicata and that the claim for salary arrears was not tenable because he assumed duty in January 2011.

DECISION OF COURT

It is not disputed that the Claimant filed **Civil Suit No. 226/2008, Kakinda Vs Attorney General** wherein he sought a declaration that the decision by the Permanent Secretary of the Ministry of Education to declare his appointment as a graduate teacher null and void was wrong and a claim for general damages. Judgment was entered in his favour and he was awarded damages. Mr. Kibbuka Musoke J as he then was elaborately discussed the claimant’s right to the job. A prayer for salary arrears properly belonged to the subject of litigation in this case and should have been pleaded by the claimant as one of the possible remedies and His lordship on page 7 of the Judgment having established that the appointment vested in the Claimant on the date the Education Service commission and subsequently declared the decision of the Permanent Secretary to declare the Claimant’s appointment null and void unlawful, went ahead to compensate him for the wrong suffered. We associate ourselves with **Gurbacham vs Yowani Ekori [1985] EA 450** cited by Counsel for the respondent in which the Court of Appeal for Eastern Africa while considering the doctrine of res-judicata cited at Page 453, cited the Vice Chancellor in **Henderson vs Henderson(1), 67 E.R 313** at page 319 as follows:

*“In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject matter of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident , omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.”*

It is our considered opinion that the claim for salary arrears belonged to the subject of litigation under CS No. 226/2008 and had the Claimant exercised reasonable diligence he would have pleaded it. The reason that he could not make the claim before Judgment yet is not sufficient to move this Court to treat the claim as a special circumstance and therefore to open the same subject under CS No 226/2008 between the same parties yet it could have been brought in the same case. In the circumstances the Claim for salary arrears fails.

On page 12 of the Judgment His lordship Kibuuka J, further stated that:

***“For the period of thirteen years, from 1995 when the Education service Commission appointed him to 2007 when the appointment was invalidated by the Permanent Secretary, Ministry of Education, the plaintiff lived in uncertainty and anxiety and suffering. He deserves general damages… Court considers the sum of Shs. 60,000,000/= as an appropriate compensatory sum in the circumstances.***

Having granted the Claimant damages, we are inclined to agree with Counsel for the Respondent’s that, the Claim for salary arrears is not tenable. Even if Section 40(4) provides that:

***“… (4) Where the employer fails to provide work he or she shall pay the employee, in respect of everyday on which he or she fails wages at the same rate as if the employee had performed a day’s work,”***

The Claimant was already compensated in damages. To award the payment of salary arrears in this case would be excessive. Therefore the prayer for salary arrears is denied.

**Issue 4. What remedies are available to the parties?**

Counsel submitted that the Claimant was not entitled to his claim Of Ugx. 50,960,000/- being salary arrears from 1998 t0 December 2010 and costs of the suit because as she had already stated the suit is time barred and res-jusdicata.

In conclusion the Claim fails for being time barred and res judicata. No order as to costs is made.

Signed and delivered by

**1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE ………………..**

**2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ..………………**

**PANELISTS**

**1. MS. JULIAN NYACHWO .……………….**

**2. MR. BWIRE ABRAHAM ………………..**

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**DATE: 16TH AUGUST 2019**