**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE CLAIM No. 053 OF 2015**

**ARISING FROM HCT CS No. 392/2015**

**KIM JOHANSEN ……………….. CLAIMANT**

**VERSUS**

 **NORTHERN UGANDA AGRICULTURAL**

 **CENTRE LTD …..………. RESPONDENT**

**BEFORE:**

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

**PANELISTS**

**1.MS.ROSE GIDONGO**

**2.MS. HARRIET MUGAMBWA NGANZI**

**3. MR. EBYAU FIDEL**

**AWARD**

**BRIEF FACTS**

The Claimant was employed by the Respondent Company as its chief Executive Officer from 20/01/2010 until his resignation on 30/11/2013. According to him, by the time of his resignation, he was receiving a salary of USD7500 per month.

In 2012, the Respondent faced financial constraints and was placed under receivership . It is the Claimant’s claim that he was not paid his salary and yet the of Board of Directors promised that he would be paid when the Company’s situation got better. According to the Claimant, when the Receiver, Mr. Kabiito Karamagi took over the affairs of the Respondent, he undertook to settle the Claimant’s salary but later changed his position and stated that the Claimant was not entitled to payment of salary arrears in the sum of USD 70,000, hence this suit.

**ISSUES**

1. **Whether the Respondent owes the Claimant salary arrears and if so how much?**
2. **Whether the Claimant is entitled to payment in lieu of any untaken leave and if so how much?**
3. **What remedies are available to the Parties?**

Both Parties called 1 witness each. The Claimant testified on his own behalf and the Respondent through Mr. Soren Naesborg.

It was the Claimant’s testimony that, he was employed by the Respondent as its CEO on 1/01/2010 and he resigned on 30/11/2013. He stated that he sold his shares at USD. 52,000 and he signed a share disposal agreement to that effect. He agreed to resign on 6/05/2013 and 2 months later the Company went into receivership. He said that he was not paid from 6/5/2013 to November 2013 and the Board agreed to increase his salary to USD 7500 from May 28th 2013 to November 2013. He was therefore, claiming salary arrears from 31/12/2012 until he resigned in November 2013.

RW1 Soren Neorsberg, testified that the Claimant was a shareholder and an employee of the Respondent Company. It was his testimony that the Claimant voluntarily resigned. It was his testimony that he was, not aware that the Claimant had salary arrears. He disputed the Claimant’s claim of salary arrears amounting to USD. 70,000. He testified that the Claimant mismanaged the farm and failed to account for the money invested in it and he agreed to forfeit his salary to rescue the which he mismanaged. He said the Claimant was given time to recover the losses but he failed to do so and according to the minutes of the meeting which was held on 28/05/2013, the Claimant agreed not to take salary as a shareholder. He was given 6 months to rescue the farm in vain and according to Soren,the meaning of “defer” his salary as stated in the minutes of 28/05/2013 was; “…*that he was not paid salary arrears because as shareholder he wanted to rescue the farm and everybody did nnnnnnfffcffg they could to get out of that situation…”* It was his testimony that the Claimant resigned in August 2013 and he did not know whether he had been paid his arrears. He claimed he had not seen exhibit cx7, which the Claimant presented as his contract.

**REPRESENTATION**

The Claimant was represented by Mr. Walukaga Isaac of MMAKS Advocates of Kampala and the Respondent was represented by Mr. Kakuru of Ligomarc Advocates Kampala.

**SUBMISSIONS**

1. **Whether the Respondent owes the Claimant money in salary and if so how much?**

It was submitted for the Claimant that, he was employed by the Respondent from January 2010 to 30th November 2013. According to Counsel it was the Claimant’s testimony that he was earning USD 5,500 during the earlier part of his employment but later through mutual agreement, in the meeting held on 28/05/2013 and which RW1 attended, the Board of Directors increased his salary to USD 7500. According to Counsel, it waste Claimant’s testimony that by the time of his resignation, the Respondent Company owed him USD 70,000, equivalent of Ugx. 182,000,000/- at the rate of Ugx. 2600 for a dollar.

He refuted the allegation that, the Claimant was not paid the balance of his salary on account of missing funds. He contended that no evidence was led to prove that the Claimant misconducted himself or that he was the reason the Company went into receivership. It was his submission that, by executing the share disposal agreement marked Ex 6 on the record, the Claimant did not at any point give up his claim for salary arrears. He argued that Ex 6 was executed between the Claimant, S. Naesborg and Kenneth Kabiito Karamagi for sale of his shares in the Respondent and paragraph 4.1.2 of the said agreement provided that the Respondent shall pay all remuneration which was disclosed. He quoted 4.1.2 as follows:

*“the company has not paid nor agreed to pay nor will the company pay or agree to pay remuneration to the vender (Claimant) as an officer of the Company or shareholder or in respect of any service provided by the vendor other than such remuneration as has been disclosed to the purchaser before execution of this Agreement”*

He argued that the Respondent was aware that the Claimant was owed money before the execution of Exh.6 (the share disposal Agreement), because the minutes of the meeting of 28/05/2013 under Minute 6/7/2019, stated that the Claimant would defer his salary on account of the Respondent’s cash flow situation. He argued that it was also of the Board’s resolutions on 23/05/2013, and the Claimant’s claim for salary arears was not disputed by the receiver when notified him in his letter dated 16/08/2013, that he would pay his salary after settling priority Claims. It was also his submission that RW1, testified that he attended the meeting held on 28/05/2013 and the salary was deferred for a period of 6 months.

Counsel contended that had the Claimant fortified his salary as alleged, he would not have demanded for it after leaving the Respondent and the Receiver would have been aware of the fortification but he was not. According to Counsel the Receiver informed the Claimant that he would pay his salary after settling priority claims and no evidence was led to indicate that he was paid.

Counsel also refuted the allegation that the salary was held on grounds of misconduct on the part of the Claimant and this allegation was contrary to the pleadings. He cited **Interfrieght Forwarders (U) Ltd vs East Africa Development Bank SCCA No. 33 of 1992,** whose holding was to the effect that, a party was bound to prove his or her case as alleged and as covered by the issues framedon the basis his or her pleadings and would not be allowed to succeed on a case not set out in the pleadings or to change his or her case or set up a case inconsistent with his or her pleadings, except by way of amendment of the pleadings. Counsel contended that the Claimant was not tried and heard on the alleged mismanagement to have any basis to withhold his salary. He submitted that according to Exh.C1 the Board of Directors agreed to defer the Claimants salary because the Respondent was not doing well financially.

He argued that, the grounds which the Respondent relies on to deny the Claimant his salary are not provided for under section 46 of the Employment Act 2006, therefore the Respondent had no basis to withhold the Claimant’s salary on account of misconduct, which was not proved against him.

He insisted that, the Respondent owes the Claimant USD 70,000 equivalent to Ugx. 182,000,000/- in salary arrears at a rate of Ugx, 2600 to the dollar, therefore this issue should be answered in the affirmative.

In reply Counsel for the Respondent gave a brief back ground to this claim and submitted that, the Respondent was registered in Uganda in 2003 and since its incorporation it was carrying out agricultural business in northern Uganda for over 10 years. He did not dispute the fact that the Claimant was one of its shareholders and its Chief Executive Officer from 2010, until he resigned his position in 2013. According to Counsel, the Respondent suffered distress and was placed under receivership. Mr. Karamagi Kabiito was appointed as the receiver/Manager on 4/07/2013. He commissioned an audit which established a loss of Ugx. 1,470,000,000/- to the Respondent. Subsequently the shareholders and other stakeholders resolved to restructure and recapitalize the business instead of completing the insolvency process. However, prior to this, the Claimant was asked to leave the Company as a shareholder and an employee, because he caused the financial loss when he was CEO. The Claimant agreed to transfer his shares to Soren Naesborg(RW1), one of the shareholders and also to waive other claims which he had against the Respondent, including his remuneration. He was consequently paid USD 52,000 for his shares, stake, interest and involvement in the management of the Respondent. However, the Claimant is turning around to demand for payment from the Respondent.

It was his submission that, the claimant was not owed USD 70,000 and his salary was never increased to USD 7500 per month. Counsel contends that Min 2/7/2013 of the Board meeting marked Exh C1, only proposed to increase the Claimant’s salary to USD 7500, but the same was never given effect or implemented.

He further submitted that as a limited liability Company the Respondent makes decisions by way of resolutions and not through board minutes. He relied on **Irene Kulabakp vs Moringa Limited &2 others (Companies cause No.21 of 2009** whose holding is to the same effect.

He stated that, no evidence of a resolution regarding the increment of the Claimant’s salary was adduced by either party and the Claimant during cross examination affirmed that there was no resolution taken in respect of his outstanding dues and particularly in respect of revising his salary from USD5,500 to USD 7,500.

Counsel further contended that, the contract relied on by the Claimant was neither signed by him or the Respondent, therefore it was not binding on either. He argued that the Claimant did not adduce any evidence to show that, there was an oral contract between him and the Respondent and in any case, it was his responsibility as the CEO to ensure that all Company Policies and Processes are effected and implemented, therefore he had no basis to claim salary arrears,

According to Counsel, the Claimant forfeited his claim if any. He argued that the Claimant’s relationship with the Respondent was intertwined as a shareholder and the CEO and it was difficult to separate the two. It was also his submission that one of the conditions the other shareholders gave in order for them to consider recapitalizing the Respondent, was for the Claimant to leave, which he accepted to do hence the execution of EXh.6, the share disposal agreement. He quoted paragraphs, 11, 12, 13,14,17,18, 19 and 20 of RW1’s evidence in chief in support of this argument.

He also quoted clause 4.1.2 of the share disposal agreement which was quoted by Counsel for the Claimant as follows:

*“4.1.2 the Company has not paid or agreed to pay nor will the Company pay or* ***agree to pay remuneration*** *to the vendor as an officer of the Company or a shareholder or in respect to any service provided by the vendor or claim made by the vendor other than such remuneration as has been expressly disclosed to the purchaser before execution of the Agreement:*

*4.1.3 The Company as at the date of this agreement is not under any direct or contingent liability to pay to the vendor any form of compensation for loss of office or employment as in respect of any claim or potential claim: …*

*4.1.7 Full disclosure has been made by the vendor on all material issues…”*

Counsel cited **Andes(EAS) Ltd vs Akoong Mulik Systems &2 others HCCS No.184 of 2008, Words and Phrases Legally Defined Volume 4, Blacks law dictionary and Agri- Industrial Managaement Agency vs Kayonza Growers Tea factory Ltd & Anor HCCS No. 819/2004,** whose definitions of the term **“*waiver”***  *in contract, can be summed up as, the relinquishment or abandonment express or implied of a legal right or advantage the effect of which bars a party from later seeking a remedy for breach of the term waived.*

Counsel insisted that, Clause 4.1.2 of the share disposal agreement(supra) constitutes a waiver on the part of the claimant including remuneration other than those expressly disclosed to the purchaser who is RW1 Soren Naesborg. According to Counsel no evidence was led to show that the Claimant expressly disclosed his claim herein, to the purchaser, Soren Naesborg, therefore he received USD 55,000 in full and final settlement of whatever his claim he had against the Respondent.

He argued that the Respondent adduced evidence to show that the Claimant as the directing mind and will when he was CEO of the Company, caused financial loss to it and any balance due was withheld by the Company on account of among others his general mismanagement of the Respondent.

He also made reference to the Audit report which states that the Company incurred a net loss of Ugx. 1,469,837/- during the year 31/12/2013 and according to paragraph 8 of the RW1’s witness statement, that the Claimant mismanaged the Respondent’s finances by, using them for personal gain, such as paying medical bills for his self-inflicted accident without the Respondent’s authorization, facilitating flights and untimely and unplanned hiring of staff.

He refuted the assertion by Counsel for the Claimant that, the issue of mismanagement of the Respondents funds was a departure from its pleadings. He argued that **Interfrieght Forwarders (U) Ltd vs East Africa Development Bank** (supra) was cited out of context because the evidence adduced in this court in support of the mismanagement by the claimant falls within the Respondents pleadings.

**DECISION OF COURT**

1. **Whether the Respondent owes the Claimant money in salary arrears and if so how much?**

We have carefully analysed the evidence on the record and submissions of both counsel and find as follows:

It is not in dispute that the Claimant was both a shareholder and employee of the Respondent Company as CEO, from 20/1/2010 to 16/08/2013. It is also not disputed he was paid a salary of USD 5,500 per month. It is also not disputed that at the time he resigned on 16/08/2013, the Company was in bad financial stead and as a result he sold his shares in the Respondent Company, to RW1, Soren Naesborg. Therefore, there is no doubt in our minds that the Claimant was an employee of the Respondent, notwithstanding his unsigned contract on the record.

The issue for resolution however, is whether at the time of his resignation, his salary was raised from USD 5,500 to USD 7500, and the Respondent owed him salary arrears amounting to USD 70,000, and leave arrears for the year 2013.

We have carefully perused the record, and the evidence adduced by both parties in chief and during cross examination and found nothing to indicate that there was any salary increase was made in favour of the Claimant. The minutes of the Board Meeting held on 28/05/2013, on which the Claimant relies to support this claim of salary increase show that, the Board majorly dealt with addressing the Company’s bad financial stead and focused on proposals towards returning it to solvency. Although Minute 2/7/2013, regarding the position of the CEO stated that:

*“The meeting reviewed the minutes of previous meeting and approved them subject to the following amendments:*

* *Amendment of minute 8/6/2013 to reflect the proposed CEO remuneration as US $7500 gross. ...”*

The minute did not expressly state that the “proposed USD $7500” was approved. What was approved were the previous minutes which were not attached on the record for our consideration. It was the Claimant testimony that, *“… there was no Board resolution extracted… the Company became insolvent in July 2013…”*

In the absence of unequivocal evidence that the “proposed salary of USD$7500 was approved by the Board, or by resolution of the shareholders, we are inclined to agree with Counsel for the Respondent that, by the time of his resignation the Claimant’s salary was still standing at USD 5,500 and SD$7500 as claimed. We are fortified by the fact that at the time, the salary was claimed to ave been increased the Company was bad financial stead and it was therefore not in a position to consider increased expenses. It is clear from the Board minutes that the Board was trying to find ways and means to return it to solvency and in our considered view this could not involve increasing salaries. We therefore have no doubt in our minds that the Claimant’s salary was not increased from USD$5,500 to 7,500.

The issue whether the Claimant mismanaged the Company or not in our view is irrelevant at this point in this case, because it was not in dispute that the company was in financial distress and the Claimant who was the CEO agreed to terminate his employment by mutual agreement as shown in the minutes of the Board on 28/05/2013. **The question is whether the Claimant could claim salary arrears or any other claim arising from loss of employment given the terms of the share disposal agreement which he signed?**

Minute 6/7/2013, of the Board meeting on 28/05/2013-resolved in part as that:

*“… the CEO shall serve notice on the Company expressing his interest to leave office by writing to the Chairman. After giving notice, the CEO shall serve six(6) Months …*

* *While serving the six months’ notice period, the CEO shall defer as much of his salary as necessary on account of the Company’s cash flow situation…”*

The claimant testified that *“it was agreed that I should defer my next six months’ salary until November until there is money to pay me...”*

The record shows that Subsequent to the meeting of 28/05/2013, on 16/08/2013, the Claimant entered into a share disposal agreement between him and the Respondent Company, in which he sold his shares to RW1 Soren Noersborg at USD 52,000 and among others the agreement also provided that:

 *“4.1.2 the Company has not paid or agreed to pay nor will the Company pay or* ***agree to pay remuneration*** *to the vendor as an officer of the Company or a shareholder or in respect to any service provided by the vendor or claim made by the vendor other than such remuneration as has been expressly disclosed to the purchaser before execution of the Agreement:*

*4.1.3 The Company as at the date of this agreement is not under any direct or contingent liability to pay to the vendor any form of compensation for loss of office or employment as in respect of any claim or potential claim: …*

*4.1.7 Full disclosure has been made by the vendor on all material issues…”*

The Claimant admitted that he signed this agreement although he denied ever forfeiting his claims against the Respondent.

Clause 4.1.2 of the disposal of Shares agreement clearly shows that although the vendor is a company officer, he is not entitled to any renumeration other than remuneration disclosed before execution of the agreement. It was his responsibility to make the disclosure about any outstanding claims at the time of executing the agreement but it seems he did not do so. The Clause applies to all claims including claims for remuneration, compensation on any legal ground, provided that, this information ought to have been disclosed to the purchaser prior to the execution of the agreement.No evidence was adduced in court to indicate that this information was disclosed, save for the minutes of the Board held on 28/5/2015 which stated that. “*… While serving the six months’ notice period, the CEO shall defer as much of his salary as necessary on account of the Company’s cash flow situation…”.* We believe that if it was the parties had agreed to carry the Board’s decision forward such a disclosure should have formed part of the agreement and clause 4.1.2 would not be worded differently. Further, clause 4.1.3 indicates that the purchaser /Claimant had no claim against the company at the time of the execution or in the future for the loss of office or employment. The implication of clause 4.1.3 is that the vendor/Claimant is jestopped from presenting a claim for loss of office or employment, which is the claim before us in Court.

In the absence of any evidence to the contrary, Clause 4.1.2, of the share disposal agreement, supersedes the minutes of the 28/5/2013, because there is no evidence to indicate that, these minutes were taken into consideration at the time of execution of the agreement. Clearly the vendor/the claimant made no disclosure of any information about any claim he had against the Company and as already stated before had he done so, the claims would have formed part of the share disposal agreement, rendering 4.1.2 and 4.1.3 redundant.

We are further fortified by Minute 6/7/2013, of the Board meeting on 28/05/2013-resolved in part as that:

*“… the CEO shall serve notice on the Company expressing his interest to leave office by writing to the Chairman. After giving notice, the CEO shall serve six(6) Months …*

* *While serving the six months’ notice period, the CEO shall defer as much of his salary as necessary on account of the Company’s cash flow situation…”*

Which implied that the salary could only be paid based on the Company’s cash flow. There was no evidence to indicate that the Company’s cash flow improved. Instead, it was clear that the company went into receivership. The Claimant did not plead any duress that could have disenabled him from making this disclosure at the point of negotiating the share disposal agreement neither did he adduce any evidence of duress. Therefore,s he cannot turn round to claim after the execution of the share disposal agreement.

In the circumstances, we are inclined to agree with Counsel for the Respondent that, by signing the share disposal agreement the Claimant relinquished or abandoned any claim arising out his loss of employment and he was estopped from seeking any remedy after the execution of the same agreement. This issue is disposed in the negative.

1. **Whether the Claimant is entitled to payment in lieu of any untaken leave and if so how much?**

It was submitted for the Claimant that he was entitled to leave and he had not taken from 2013. According to counsel the claimant worked single andledly to manage the Respondent Company and on several occasions the board asked him to defer taking leave. He submitted that he was entitled to 1 month’s pay in lieu of leave as provided for under section 54(1) (a) of the Employment Act 2006. Counsel cited clause 2 of the Claimant’s contract which entitled him to 6 weeks annual leave including payment of his return tickets to Canada. Therefore, he was entitled to 1 months pay in lieu of untaken leave and given his s enhanced salary of USD 7500 he w entitled to payment of USD 7500 as payment in lieu of leave.

in reply Counsel for the Respondent argued that the Claimant had not adduced any evidence to prove that the Respondent had required him not to take leave and had agreed to pay him in lieu of the leave. he cited **Emazunvi Micheal vs National Curriculaum Development center LDC No. 52of 2014 and Kangaho Silvver vs Attorney General LDC No. 276 of 2014,** for the legal proposition that an employee will only be entitled to payment in lieu of leave where he or she is aware of his or her right to leave expresses interest in taking the leave but the employer denies him or her the right. He insisted that the Claimant did not adduce an evidence to show that he applied for leave and it was denied, therefore this claim should not be granted.

**DECISION OF COURT**

Section 54 of the Employment Act obligates an employer to grant his or er employees rest days as follows:

1. *Subject to the provisions of this section-*
2. *“****An employee shall once in every calendar year be entitled to a holiday with full pay at the rate of 7 days in respect of each period of a continuous four months’ service to be taken at such******time during such calendar year as may be agreed between the parties.*** *(0ur emphasis).*
3. ***An employee shall be entitled to a day’s holiday with full pay on every public holiday during his or her employment or, where he or she works for his or her employer on a public holiday, to a day’s holiday with full pay at the expense of the employer on some other day that would otherwise be a day of work.***
4. ***where an employee who works on a public holiday receives, in respect of work, pay at not less than double the rate payable for work on a day that is not a public holiday, that employee shall not be entitled to a day’s holiday with full pay or payment in lieu of the public holiday.***
5. ***Subject to subsection (2), any agreement to relinquish the right to the minimum annual holidays as prescribed in this section, or to forgo such a holiday, for compensation or otherwise, shall be null and void.***
6. ***This Section shall only to employees-***
7. ***Who have performed continuous service for their employer for a minimum period of six months***
8. ***Who normally work under a contract of service for sixteen hours a week or more.***
9. ***An employee is entitled to receive, upon termination of employment, a holiday with pay proportionate to the length of service for which he or she has not received such a holiday, or compensation in lieu of the holiday.***

It is the legal position that although leave is an entitlement it can only be taken ***at such******time during such calendar year as may be agreed between the parties. (see section 54(1)(a).*** Therefore, the employee is expected to formally apply for leave in accordance with the leave application procedures of the company. The Claimant was the CEO of the Respondent and therefore the custodian of all it’s policies including those governing leave. We carefully perused the record but did not find any evidence to indicate that he did apply to take his annual leave and it was deferred by Board as he claimed. Merely stating that the Board always asked to defer leave without any evidence to that effect is not sufficient. In absence of any evidence to show that he applied for and was denied leave, we have no basis to make the award for his claim for payment in lieu of untaken leave. In the circumstances it is denied.

In conclusion this claim fails. The claimant is not entitled to an remedy. No order as to costs is made.

delivered and signed by:

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

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

**PANELISTS**

**1. MS. ROSE GIDONGO ………………..**

**2.MS. HARRIET MUGAMBWA NGANZI ………………..**

**3. MR. EBYAU FIDEL ……………….**

**DATE: 22ND JULY 2021**