THE REPUBLIC OF UGANDA

IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION NO. 28 OF 2022

(Arising from Labour Dispute Reference No. 182 of 2017)

NABULYA WINNIE ::APPLICANT

VERSUS

1. CHILDREN AT RISK ACTION NETWORK (CRANE)
2. VIVA:::RESPONDENTS

BEFORE:
THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA

PANELISTS:

1. MS. ADRINE NAMARA,
2. MS. SUSAN NABIRYE &
3. MR. MICHAEL MATOVU.

RULING

Introduction

[1] This ruling concerns a motion to review the Industrial Court's award in Labour Dispute Reference No. 182 of 2017. The application was brought under **Section 17 of the Labour Disputes (Arbitration and Settlement) Act 2006,** Sections 82 and 98 of the Civil Procedure Act Cap. 71, Orders 46 and 52 Rules 1 & 3 of the Civil Procedure Rules S.I 71-1(CPR).

[2] The grounds of the application, as contained in the affidavit of Winnie Nabulya, the Applicant, were that:

(i) The Industrial Court made an error in awarding the Applicant only entitled to two weeks' notice when the provision for notice was three months' written notice.

(ii) The Court erred when it did not award the statutory four weeks' wages of UGX 1,880,000/=

(iii) The Court erroneously awarded UGX 609,750/= in severance pay instead of UGX 1,253,333/=

(iv) The Court failed to make an award regarding the claimant's compensation for untaken leave of 33 days.

(v) The Court did not award the savings to Hand to Hand VSLA Group.

[3] On 28th February 2022, the Hon Justice Asaph Ruhinda Ntengye and Honourable Panelists declared that the Applicant had been unlawfully and unfairly terminated. The Court granted her UGX 4,000,000 in general damages and declined to award four weeks' pay as compensation under **Section 78 of the Employment Act**. She was also awarded two weeks' notice amounting to UGX 609,750/=. Concerning severance pay, having found that she worked for more than six months, she was awarded UGX 609,750/=. She was also granted a certificate of service and interest on the awards at 15% per year from the award date until payment in full. The Court declined to grant salary arrears, one month's pay for failure to give a disciplinary hearing, and costs of the reference. Aggrieved by this award, the Applicant filed this application.

[4] The Applicant filed affidavits in support and rejoinder whose gist was that this Court, having found that she was unlawfully and unfairly terminated, failed to award three months' notice in the sum of UGX 5,640,000/=, compensation for 33 days of untaken annual leave, one month's pay in the sum of 1,800,880/= for failure to give a fair hearing, recovery of withheld savings from Hand to Hand VSLA Group and severance allowance. It was

deposed that there was a mistake and an error on the face of the record, which warranted a review of the award.

[5] The Respondent opposed the application and raised preliminary objections that the application is moot as it has been overtaken by events since the award had been executed and that the Claimant could not approbate and reprobate. It was deposed that the Applicant earned a monthly salary of UGX 1,219,500/= and not UGX 1,800,000/=. Regarding the specific awards of the Court, the Respondent averred that the award of general damages covered compensation. That the respondent was terminated after working for only half of the month of November 2016. That it was illegal to save with the Hand to Hand Savings group. That the leave claim had not been substantiated. As such, there was nothing to review. If anything, the Applicant could consider an appeal.

[6] The Applicant filed written submissions on the 17th of March, 2022. We directed the Respondent to file written submissions by the 16th of December 2022 to enable the filing of a rejoinder by the 10th of January 2023. As of the 20th of January, 2023, the Respondent had yet to file written submissions.

The Preliminary Points

[7] The Respondent raised two preliminary points;

[7.1] Firstly, the application was moot and overtaken by events because the Applicant had executed the award of this Court. We note that there were no submissions on the point. In our view, the remedy of review concerns itself with re-examining the judgment of a case in respect of a glaring omission, patent mistake, or like grave error.[1] It concerns itself with an error on the record which no Court would permit to remain upon the record.[2] An error cannot be understood to be overtaken by events. The remedy concerns a person considering themselves aggrieved by a decision of the Court upon the conditions set out in Section 83 of the Civil Procedure Act Cap. 71(CPA) and Order 46 of the Civil Procedure Rules S.I 71-1. The object of review[3] is not to change the judgment but to address errors and mistakes that may have

[1] See also M.Ssekaana & S. Ssekaana **Civil Procedure and Practice in Uganda** 2nd Edn, Law Africa at page 451
[2] Per Kawesa J in **Tyakuma v Matovu** H.C.M.A No. 624 of 2018 reported [2022] UGHCLD 101

[3] Per M. Ssekaana & S. Ssekaana(Supra)

occasioned a miscarriage of justice. In this regard, the objection is without merit and is accordingly overruled.

[7.2] Secondly, the Applicant cannot approbate and reprobate. We did not benefit from the expanded arguments of the Respondent on this point. That notwithstanding, the principle of approbation and reprobation has had some reasonably expansive discourse in the case of **Mubende Parents School vs. Uganda Development Bank Ltd and 2 Others.**[4] In that case, citing Halsbury's Laws of England, 4th edition, Reissue Volume 16 Paragraph 957, which states that:

> *"The principle that a person may not approbate and reprobate expresses two propositions;*
>
> *(i) That the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and*
>
> (ii) *That he will not be regarded, in general at any rate, as having so elected, unless he has taken a benefit under or arising out of the course of conduct which he has first pursued, and with which his subsequent contact is inconsistent. Thus, a plaintiff, having two inconsistent claims, who elects to abandon one and pursue the other may not, in general afterwards, choose to return to the former claim and sue on it; but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them."*

In the case before us, the Applicant seeks to review an award of the Industrial Court, such award having been made in her favour. She does not pursue a claim in any manner inconsistent with her initial claim or challenge the validity of the award. Rather, there are errors apparent on the face of the record. In our view, the application for review does not amount to approbation and reprobation. We do not find any merit in the objection. It is overruled.

[4] H.C.C.S No. 662 of 2015

[8] The primary issue for determination is **whether the Applicant has sufficient reason to review the award of the Industrial Court in LDR 182 of 2017**?

Submissions of the Applicant on the merits of the application

[9] It was submitted for the Applicant that she had a right to seek review of the award of this Court, having applied for review within 21 days of the effective date of the award as provided under **Section 17(1) of the Labour Disputes(Arbitration and Settlement Act) 2006** (from now on the LADASA). The mistake and errors apparent on the face of the record were in respect of the Court's award of two weeks' notice instead of three month's notice, compensation for 33 days of untaken annual leave, one month's pay for failure to give a fair hearing, severance allowance payable and recovery of withheld savings from Hand to Hand and was, which warranted a review of the award. The Applicant cited the case of **Edison Kanyabwera v Pastori Tumwebaze SCCA No. 6 of 2004,** where it was stated that

> *"...in order that an error may be a ground for review, it must be one apparent on the face of the record, that is, an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error may be one of fact, but it is not limited to matters of fact, and includes error of law"*

The Applicant also cited the case **MK Creditors Limited v Owora Patrick HCMA No. 143 of 2015** in support of the proposition that an error apparent on the face of the record must be patent, manifest, a self-evident error which does not require elaborate discussion of evidence or argument to establish.

[10] On the matter of notice pay, it was submitted that under the employment contract, it was provided that the Applicant was entitled to 3 months' written notice after the completion of the probationary period. Counsel submitted that there was an error on the face of the record when the court awarded two weeks' pay instead of three months' notice. This court was asked to review the award and find that the applicant's contract clearly provided for the sum of UGX 5,640,000/= as three months' written notice.

[11] Regarding these statutory four weeks' wages, it was submitted that under **Section 66(4) of the Employment Act**, an employer who fails to comply with that section is liable to pay the employee an equivalent of four weeks' net

pay. Counsel contended that having found that the applicant was dismissed unlawfully and unfairly, she was entitled to UGX 1,880,000/= being four weeks net pay.

[12] Regarding severance allowance, this Court granted the sum of UGX 609,750/=. The Applicant's case was that having worked eight months, she would be entitled to UGX 1,253,333/=. This Court was invited to review the award and grant this order.

Analysis and Decision of the Court

[13] The Law:

Section 17 of the LADASA provides that where any question arises as to the interpretation of any award of the Industrial Court within twenty-one days from the effective date of the award or, where new and relevant facts concerning the dispute materialize, a party to the award may apply to the Industrial Court to review its decision on a question of interpretation or in light of the new facts. Therefore an applicant seeking review under the LADASA must demonstrate the following;

(i) A question as to interpretation of an award and,
(ii) New and relevant facts concerning the dispute materialize.

[14] Counsel referred us to Section 82 of the Civil Procedure Act Cap. 71(CPA) which provides for any person aggrieved by a decree from which no appeal has been preferred to seek the remedy of review. Order 46 of the Civil Procedure Rules S.I 71-1(CPR) repeats the provision of Section 82 CPA with the addition there has to be discovery of a new and important matter of evidence which was not available at the time of the trial or on the existence of a clerical or arithmetical mistakes or error apparent on the face of the record, or some sufficient reason. [5] We note that the practice of the Industrial Court has been to resort to the Civil Procedure Rules where the Industrial Court Rules do not make provision for a given procedure. As it stands, **Section 17 of the LADASA** now provides a standard upon which a party to a matter before it can seek review.

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[5] See H.C.M.A NO. 497 of 2014 **KALOKOLA KALOLI VS NDUGA,** H.C.M.A NO.98/2005 **FX MUBUUKE VS UEB HIGH COURT MISC. APPLICATION NO. 98 OF 2005** and HCMA NO. 40/ 2007 **JOYCE L. KUSULAKWEGUYA VS. HAIDER SOMANI & ANOTHER** See also M.Ssekaana & S. Ssekaana Civil Procedure and Practice in Uganda 2nd Edn, Law Africa at page 452.

[15] The Applicant's Counsel anchored the application on a mistake and or error apparent on the face of the record and identified the following errors or mistakes.

(i) The entitlement to 3 months' notice.
(ii) Statutory four weeks' pay under Section 66 of the Employment Act.
(iii) Severance pay in the sum of UGX 1,253,333/=.
(iv) Compensation for 33 untaken leave days in the sum of UGX 2,068,000/= and
(v) Withheld savings held by Hand to Hand VLSA Group in the sum of UGX 2,399,000/=.

[16] We understand the Applicant's case to be in respect of the remedies as summarized in paragraph 14 above and propose to consider each of the remedies separately.

The entitlement to 3 month's notice in lieu under Section 58 EA

[17] At page 7 of its ruling, the Industrial Court[6] found that the Applicant's contract was effective from 1st April 2016 to 28th February 2018. The Court also found that the Respondent was terminated on the 17th November 2018. Applying Section 58(3) EA, the Court awarded her 2 weeks' pay. Counsel for the Applicant took the view that the Court should have considered the employment contract executed between the Applicant and the Respondent which provided for 3 months' notice. We agree with Counsel for the Applicant, that having found that the Applicant was unlawfully dismissed, the remedy for notice would be the contractual notice of 3 months as this was the standard in the employment relationship between the Applicant and Respondent. In this regard, we would review the order of the Court and substitute the award of 2 weeks' pay with an award of 3 months' pay computed at UGX 5,640,000/= at a gross monthly pay of UGX 1,880,000/=.

Statutory four weeks' pay under Section 66 of the Employment Act

[18] In declining to grant compensation for unfair termination, the Court held the strong opinion that the remedy of compensation for unfair termination and general damages served the same purpose: to compensate the Claimant for the loss or injury incurred as a result of the termination. The Court

[6] Coram Ruhinda Asaph Ntengye H.J, Panelists A. Namara, M. Matovu and S. Nabirye in LDR 182 of 2017 Nabulya Winne vs Children At Risk Action Network(Crane) and Viva.

considered the statutory limitations on the awards by labour officers under section 78 of the Act. The Court concluded that it did not have a limit on the amount of damages and therefore it was considered double jeopardy for the Respondent if the Court was to order both compensation for unfair termination and damages. On this basis, the Court granted general damages of UGX 4,000,000/=. Precedent on the point is to the effect that;

> *"It will not be a sufficient ground for review that another judge could have taken in a different view of the matter. That the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law cannot be ground for review but could be a proper ground for appeal. Misconstruing a statute or other provision of law cannot be ground for review but could be a proper ground for appeal since in that case the court will have made a conscious decision on the matters in controversy and exercised his discretion in favor of the successful party in respect of a contested issue"*[7]

[19] In our view, the Court was neither mistaken nor is there an error apparent on the face of the record in respect of this award. The Court considered its discretion to award damages against the labour officer's limited statutory power under Section 78 of the Act. Therefore, there could be more than one view and conclusion regarding this award. This is not a self-evident error, and we would not be inclined to review the award regarding compensation for unlawful and unfair termination. We are fortified in this view by the decision in the case of **Muyodi vs. Industrial and Commercial Development Corporation and Anor (2006) 1 EA 243** at **246**[8]. Further, in **Hoima District NGO Forum & 6 Ors vs. Murungi & 5 Ors H.C.M.A No. 13 of 2013,** the Court held that the proper way to correct a Judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record. Misconstruing a statute or other provision of law cannot be a ground for review. Therefore, we are of the persuasion that coupling the award of statutory compensation with general damages is not a subject amenable to review.

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[7] Per Ssekaana J. in H.C.M.A 572/2020 L.LUITINGH v SARACEN UGANDA LTD where the cases of Ojijo Pascal v. Geoffrey Brown M.A 758 of 2017, and Nyamogo & Nyamogo Advocates v. Kago [2001] 2 EA 173 were cited.

[8] It was held that mere error or wrong view or difference in opinion is certainly not a ground for review though it may be for appeal

Severance pay in the sum of UGX 1,253,333/=

[20] In regard to severance pay, the Court applying Section 87 of the Act and the case of **Donna Kamuli v DFCU Bank LDC 002 of 2015**, awarded the Applicant UGX 609,750/=. The Applicant contends that having served the Respondent for 8 months, she would have been entitled to severance pay over the said period and not the sum of UGX 609,750. Computed at a gross pay of UGX 1,880,000 per month, the Applicant would be entitled to UGX 1,253,333/=. We agree with the Applicant's contention. The sum of UGX 609,750 is based on a net pay of UGX 1,219,500/= According to the contract of employment, the Applicants Gross Monthly Salary was UGX 1,880,000/=. The award of UGX 609,750 would be a computational or mathematical error or mistake which is within the ambit of review. In the result, the award of this Court would be reviewed in respect of severance pay and the sum of UGX 1,253,333 substituted for the award of UGX 609,750/=.

Compensation for 33 untaken leave days in the sum of UGX 2,068,000/=

[21] Upon perusing the award of the Court, we established that the Court did not make any award in this regard. Counsel for the Applicant did not point to the mistake or error apparent on the face of the record in this regard. In the submissions, Counsel suggested the Court erred in failing to make this award as evidence had been led. In our decision in the case of **Washington Inima vs. Oilcom Uganda Ltd LDMA 186 of 2021**, [9] we held that the failure to evaluate the evidence would have formed a ground of appeal as opposed to a ground for review. In the award in LDR 182 of 2017, the subject of the present review, there is no reference to any evaluation of evidence regarding leave and a finding or award in that regard. The failure to make an award is a matter more appropriate for appeal and not review. As a result, we decline to review the award of this Court in respect of leave.

Withheld savings held by Hand to Hand VLSA Group in the sum of UGX 2,399,000/=

[22] The Court did not make any award in this regard. Following our finding in paragraph 21 above, we are inclined to the view that this claim would be more appropriately dealt with in an appeal. We would not review the award of this Court in that regard.

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[9] Per Mubiru J in Farm Inputs Care Center Ltd V Klein Karoo Seeds Marketing (Pty) Ltd M.A 0861 Of 2021 *"An application for review... cannot be allowed to be an appeal in disguise."*

[23] In the final analysis, the award of this Court is reviewed to the extent of the medals in respect of computation of 3 months' notice and of severance allowance. Specifically;

(i) The award of UGX 609,750/= for two weeks' notice is reviewed and substituted with an award of 3 months' notice in the sum of **UGX 5,640,000/=;** and

(ii) The award of UGX 609,750/= for severance pay is reviewed and substituted with an award of **UGX 1,253,333/=.** There shall be no order as to costs.

Dated at Kampala this _____ day of March 2023

DELIVERED AND SIGNED BY:
ANTHONY WABWIRE MUSANA, Judge

THE PANELISTS AGREE:

1. **MS. ADRINE NAMARA,**
2. **MS. SUSAN NABIRYE &**
3. **MR. MICHAEL MATOVU.**

Ruling delivered in open Court in the presence of:

Mr. Nuwandinda Jonan Rwambuka for the Applicants.
The Respondents and their Counsel are absent.

Court Clerk: Mr. Samuel Mukiza.