

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS CAUSE NO.428 OF 2017

RO/8074 MAJOR NOEL DRAGO NUWE RETIRED----- APPLICANT

VERSUS

ATTORNEY GENERAL-----RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The applicant filed an application for enforcement of rights under Article 20, 21,40(2), 43(1) 45 and 50, 126(2)(c) & 139 of the Constitution, Section 33 of the Judicature Act Section 98 of the Civil Procedure Act and Order 52 rule 1,2,& 3 of Civil Procedure Rules seeking the following orders;

1. A declaration that the actions of the respondent in retiring the applicant and failing or refusing to pay him his full retirement benefits, was unfair, unconstitutional and illegal.

2. An order that the respondent pays the applicant:
 - a. Pension and gratuity; to be calculated at consolidated pay.
 - b. Payment in lieu of untaken leave for the 30 years of the applicant's full military service.
 - c. Unpaid housing allowances of the applicant's full military service.
 - d. Unpaid transport allowances.
 - e. Unpaid professional allowances from the date of graduation
 - f. General damages for the stress and inconveniences caused to the applicant as a result of the illegal and unconstitutional acts of the respondent's servants when they failed to pay the applicant his full retirement benefits.

- g. Aggravated damages for the illegal and unconstitutional acts of the respondent's servants.
3. Interest to the applicant at 24% on a-e above from the date of retirement till payment in full.
4. Interest to the applicant at court rate on f-g above from the date of judgment till payment in full.
5. An order awarding costs of this application.

The main grounds upon which this application is premised are set in the affidavit of **RO/8074 Major Noel Drago Nuwe** are that;

1. That the applicant is a retired Senior Officer of the UPDF, an enrolled and practising advocate formerly working with the Uganda Peoples' Defence Forces.
2. The applicant is a celebrated senior army officer who served UPDF in several capacities for thirty years and 118 days.
3. The respondent's servants in UPDF acted illegally and unconstitutionally when they retired the applicant without giving him his full retirement benefits.
4. That the applicant joined the Forces on 1st January 1986 at a time when the then National Resistance Army was still in the bush until it captured power on the 26th January 1986.
5. That the applicant between 2007-2011, while at the same time actively serving in UPDF, he pursued a Bachelor of Laws Degree course at Makerere University leading to a graduation in 2012.
6. That the applicant proceeded to Law Development Centre and graduated on 4th April 2014 and thereafter enrolled as an advocate of the High Court and all courts subordinate thereto.
7. That the applicant was entitled to gratuity of 86,455,320/= for the period of 30 years and monthly pension of 960,615/= computed in accordance with the law ; since he was entitled to a monthly professional allowance of 650,000/= for 14 months totalling to 9,100,000/=.

8. That the applicant was entitled annual leave or payment in lieu for the 30 years served without taking it totalling to 93,000,000/=.
9. That since he joined the army, he never received any housing allowances neither was he provided with housing facilities which accumulated to approximately 288,000,000/=.
10. That on 23rd June 2016 Ministry of defence deposited on the applicant's bank account a sum of 40,841,495/= and he immediately wrote a letter seeking clarification of what that money was meant for and or its breakdown but has not received any reply to date.
11. That as a result of the illegal and unconstitutional acts of the respondent's servants, the applicant has suffered stress and inconveniences for which the respondent should be punished in general and aggravated damages.

The respondent in reply or opposition to this application filed an affidavit by Brigadier George Igumba who is the Chief of Personnel and Administration of Uganda Peoples' Defence Forces.

The respondent denied all what was stated in the affidavit of the applicant and that the applicant was not entitled to housing allowance because the army has discretion to either provide accommodation and he has not produced any evidence to prove that he was not residing in the barracks.

The applicant served the defence forces for 364 months in various appointments and units and he was under the Chief of Personal and Administration Headquarters. In addition he was aware that the applicant held the following appointments in the defence forces-ADC 3 DIV Comdr, OPTO Military Police, ADC Chief of Staff General Headquarters, Officer Commanding under 4DIV and, Commander in Charge under 71 BN and later joined CPA HQ.

That the applicant has never served the Defence forces in a professional capacity or quasi-professional capacity in the field of his qualification consequently he is not entitled to a professional allowance for lawyers/advocates serving in the UPDF in a professional capacity. In addition he never presented the alleged academic documents to his unit for further management or consideration.

The respondent in paragraph 16 admitted that the applicant was entitled to arrears in lieu of annual leave not taken amounting to 31,541,546.76/= which was computed in accordance with rank, salary and number of days in a given year.

At the hearing of this application and in the interest of time court directed the parties to file written submissions which they both filed and I have considered them in this ruling.

The applicant was represented by **Iduuli Ronald** and the respondent was represented by **Adrole Richard** from the Attorney General's Chambers. The applicant's counsel raised the following issues for determination.

ISSUES

- (a) Whether the Applicant is entitled to payment of Professional/qualification allowance.**
- (b) Whether the Applicant is entitled to calculation of his retirement benefits basing on a consolidated pay.**
- (c) Whether the Applicant is entitled to payment of housing/accommodation allowance.**
- (d) Whether the Applicant is entitled to payment in lieu of untaken leave.**
- (e) Whether the Applicant is entitled to General and aggravated damages?**
- (f) Whether there are any other remedies available to the parties?**

Preliminary Consideration

This court notes that the respondent admitted the applicant's claim for payment in lieu of leave untaken to the tune of 31,541,546.71/=. This is set out in paragraph 16 of the affidavit in reply of Brigadier Iguma.

The sum effect of this admission is that issue (d) is resolved in the affirmative.

Whether the Applicant is entitled to payment of Professional/qualification allowance.

The applicant in his submission contended that he holds he is a lawyer by profession holding a Bachelor of Laws degree, a Diploma in Legal Practice and an enrolled advocate. The respondent in the affidavit in reply also confirms that at the time of retirement, the applicant held a Bachelor of laws and a Diploma in Legal Practice and this is seen also in the discharge certificate originated and signed by the respondent which shows his academic qualifications.

Under **Section 92 of The Uganda Peoples' Defence Forces (UPDF) Act, 2015** provides that ***"Where an officer or a militant who has professional or quasi-professional qualifications... his or her service in the Defence Forces shall count towards his or her seniority in the profession...."***

According to the applicant's counsel, professional service is given priority and it is from that spirit that led to the provisions contained under **Regulations 24 and 29 of The UPDF (Conditions of Service)(Officers) Regulations SI 307-2.**

The claim that the applicant never practiced his profession in the forces, if is to be blamed, should be blamed on the respondent who by statute and common law is entitled to provide employment to the applicant through deployment. If he does not deploy a worker at his disposal that cannot be an excuse to enable the respondent avoid her liability.

In addition, the applicant served **"REGULAR" force** and **Section 37(1)(c) of The UPDF Act** provides that ***"...no officer or militant on continuing full time military service shall engage in any civil employment or undertaking which-in the case of officers and militants of a Regular Force, is continuous."***

The respondent's counsel in his submission noted that the Applicant while in UPDF held the following Appointments; ADC 3 DIV Comdr, OPTO Military Police, ADC Chief of Staff General Headquarters, Officer Commanding under 4 DIV and Commander in Charge under 71 BN and later joined CPA HQ.

It is further contended by the Brigadier George Igumba in the Affidavit in reply that the Applicant never served the Defences Forces in a professional or quasi-professional capacity in the field of his qualification and consequently the Applicant is not entitled to a professional allowance.

The Applicant did not at any one time serve and/or practice his profession to earn a professional allowance that is premised against one practicing his profession as set out in Regulation 24 and 29 of the Uganda Peoples Defence Forces (Conditions of Service) (Officers) Regulations S.I 301-2.

Regulation 24 of the Uganda Peoples Defence Forces (Conditions of Service) (Officers) Regulations opines that:

- (1) *When assessing professional qualifications of an officer for promotion, the board shall take into account the following-*
 - (a) *result of professional examination at various stages;*
 - (b) *reports made on the officer on specified courses;*
 - (c) *confidential reports and recommendations made by the officer's commanding officer*
 - (d) *professional experience in the profession; and*
 - (e) *establishment.*
- (2) **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.** Emphasis mine.

The Ninth Schedule to the Regulations sets out prerequisites of who professionals in the army are. It opines that;

To be considered a professional in the army, one has to fulfill 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. Emphasis mine.
- (b) *he must possess a university degree or its equivalent from a recognized institution.*
- (c) *he should be a registered or registerable members of a recognized professional organization; except that a university graduate upon completion of basic military training should go for cadet course within one year of that completion; and*
- (d) he must be a practicing members of that profession. Emphasis mine.

It is therefore the submission of the Respondent that the prerequisite conditions for one to be considered a professional and earn a professional allowance under the regulations, one has to satisfy all the conditions set out in the Ninth Schedule to the Regulations.

In addition to the above, it is the Respondent's submission that for one to be considered a professional under the army, he must join the army in a professional capacity as set out in Regulation 24 (2) of the Uganda Peoples Defence Forces (Conditions of Service)(Officers) Regulations or in the alternative declare that he wants to be employed in the army as a professional to benefit from this provision.

It was also the Respondent's submission that the Applicant does not meet the conditions precedent set out in clause (d) of the Ninth Schedule of the Uganda Peoples Defence Forces (Conditions of Service)(Officers) Regulations which is that he must be a practicing member of that profession.

In resolving this issue court has critically analysed the facts and circumstances surrounding the applicant's case. He joined the defence forces in 1986 and served through the ranks to Major and undertook various courses.

The applicant throughout his life has been a member of Army and acquired the necessary skills in the course of his employment as a member of the UPDF. He indeed pursued his additional qualifications upon recommendation of the Employer otherwise if it was outside their knowledge and authority they should have stated so in the affidavit in reply.

The respondent in the affidavit in reply denied knowledge of the applicant's qualification as a lawyer and further contended that the applicant did not at any one time serve and / or practice his profession to earn a professional allowance.

The respondent's counsel also submitted that the applicant was never qualified since according to them he never attached any practicing certificate of his profession.

This court with the greatest respect does not agree with this submission of counsel since he is aware that a person serving in government like himself does not take out a practicing certificate for purposes of carrying out professional duties as an Advocate or lawyer. A practising certificate is only relevant for purposes of going to court, therefore any lawyer would still offer professional advice in the nature of work.

Secondly, the legal profession does not necessarily require one to have a practicing certificate to offer legal advice and carry on legal work. The professional like the applicant could still apply his legal skills in any nature of work assigned to him in the course of his employment.

The employer is duty bound to offer work commensurate with the qualifications possessed by the employee. It is the duty of the employer to recognize the special qualifications the employee and consider appropriate assignment. A duty to provide work can exist where; an employee has skills which require work to be provided to maintain those skills. This is buttressed by the common law duty of the employer to provide the employee with work.

The applicant having been a serving member of the Defence Forces for over 30 years and obtained the qualifications in issue with the sanction of the superiors and his newly acquired qualifications and skills ought to have been utilized by assignment of professional work as a duly qualified lawyer.

The provisions cited by the respondent's counsel are not applicable to the applicant since he was not a new recruit in the Army. *"One does not become a professional within the army simply by obtaining the qualification. He must apply to join the army as a professional to benefit from the professional allowance"*

The applicant ought to have been considered like other professionals who attained new qualifications while on duty and not the new recruits as the law provides. Alternatively, the applicant could not first resign from the army and thereafter apply to join as a professional in order for him to be considered as a professional.

The applicant ought to have paid the professional allowance as a lawyer qualified to practice law in Uganda with a Bachelor of Laws degree and a Diploma in Legal Practice.

Whether the Applicant is entitled to calculation of his retirement benefits basing on a consolidated pay.

The applicant's counsel submitted that, according to paragraph 2 of his Notice of Motion, the applicant prays for payment of his retirement benefits to be calculated at consolidated pay.

The applicant in paragraph 8 and 9 of his affidavit in rejoinder stated that what he was paid as retirement benefits was calculated basing on his basic salary of 924,741/=, and not at his consolidated salary of 1, 574,741/=(i.e, basic salary + professional allowance).

The applicant contended that it is now settled law that soldiers' retirement benefits are calculated basing on consolidated pay. According to Section 71(3) of the UPDF Act 2005, 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. According to section 1 of the Pensions Act Cap 286, pensionable emoluments include salary and professional allowances. In addition, 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, Judgment on admission was entered against the respondent where the Attorney general admitted that soldiers are entitled to payment of their terminal benefits based on a consolidated pay.

The respondent's counsel submitted that since at the time of retirement, the applicant was not getting professional allowance, and was not deployed in his profession, he is not entitled to calculation of his retirement benefits at consolidated pay.

In the respondent's supplementary affidavit, the deponent Brigadier George Igumba stated that the respondent was not entitled to calculation of his benefits basing on consolidated pay. Reason being that at the time of his retirement, the applicant was not getting professional allowance to entitle his benefits to be based on consolidated pay.

Since this court has already found that the applicant was entitled to a professional allowance it automatically follows that the computation of his salary should be computed based on his consolidated pay of both his salary and professional allowance.

It is therefore not in dispute that this formulae of calculating retirement benefits based on consolidated pay should be adopted once it is established that the Officer retiring was employed as a professional as provided for under Regulation 24 (2) of the Uganda Peoples Defence Forces (Conditions of Service)(officers) Regulations.

The applicant was entitled to receive terminal benefits/gratuity based on consolidated pay and likewise his pension should be computed based on the same.

Whether the Applicant is entitled to payment of housing/accommodation allowance.

The applicant contended in his affidavit in support of Notice of Motion, that he was entitled to unpaid housing allowances totaling to **288,000,000/=**. The applicant has attached evidence of rent outside the barracks by way of water and electricity bills to prove that he indeed was not residing in the barracks.

The applicant's counsel submitted that Ministry of Defence claims housing allowances in its annual budgets and indeed receives it on behalf of soldiers every financial year from the consolidated fund. This fact has never been denied by UPDF. What UPDF claims is that after receiving the housing allowances, it becomes their discretion to determine what to use this money.

It was further submitted that, accommodation for soldiers is an entitlement provided for by law. According to **Section 96 of the UPDF Act, *accommodation for Officers and militants shall be prescribed by the Defence Forces Counsel.***

According to Regulation 34 ***of the UPDF (Conditions of service) (Officers) Regulations S.I 307-2*** which provides for accommodation for officers ***(4); An officer who has no quarters may receive a housing allowance in respect of accommodation suitable and according to his rank.***

According to part 1 of the Seventh schedule to the above regulations, ***A Major is entitled to a 3 bedroomed house.***

The regulation further goes ahead to state that;

An officer not housed shall be paid an amount calculated according to his rank and profession at the current value. An officer shall be deemed eligible for a house after service in the UPDF for four years.

Considering the above legal provision, housing for officers is a legal entitlement and not discretion of the army leadership. Making it discretion of the army leadership is therefore, unconstitutional, illegal and unfair. The applicant should therefore be paid all unpaid housing allowances from the time when he legally became entitled to it to the time when he retired.

The applicant claimed for 800,000/= monthly. Considering the current housing rates in Makerere areas, 800,000/= per month for a three bedroomed house is a reasonable figure. The applicant should also be paid interest on the said figure.

The respondent in reply contends the applicant is not entitled to housing allowances because the army has discretion to either provide accommodation or not.

The respondent further contended that the applicant was receiving a consolidated salary that included his accommodation allowance in his monthly salary. He further goes ahead in his affidavit to contradict himself that accommodation for officers/ men ceased officially in the year 2000 after the leadership of the defence forces counsel as a way of change in policy suspended indefinitely all matters related to provision of accommodation.

It can be deduced from the evidence on record that the applicant was not staying in the barracks and the argument of the respondent that the applicant has not lead evidence to show that he was not staying in the barracks is not tenable. The applicant contended that he was not staying in the barracks and it was the duty of the respondent to rebut that evidence with proof that indeed he was staying in barracks in order to disentitle him to housing allowance. The applicant was in the Army for over 30 years, it would be very clear whether he was residing in a barracks or not.

The issue of provision of housing in the army is also a question of law, According to **Section 96 of the UPDF Act, *accommodation for Officers and militants shall be prescribed by the Defence Forces Counsel.***

According to Regulation 34 ***of the UPDF (Conditions of service) (Officers) Regulations S.I 307-2*** which provides for accommodation for officers ***(4); An officer who has no quarters may receive a housing allowance in respect of accommodation suitable and according to his rank.***

According to part 1 of the Seventh schedule to the above regulations,

A Major is entitled to a 3 bedroomed house.

The regulation further goes ahead to state that;

An officer not housed shall be paid an amount calculated according to his rank and profession at the current value. An officer shall be deemed eligible for a house after service in the UPDF for four years.

The respondent has not attached any evidence of change of policy or amendment to the law in respect to the suspension of housing allowances. A serving officer ought to be accommodated or given housing allowances in accordance with the UPDF Act.

It is the finding of this court that 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.

Whether the Applicant is entitled to payment in lieu of untaken leave.

The above issue was already resolved as an admission. The applicant is entitled to payment in lieu of untaken leave amounting to Ug. Shs. **31,541,546.71/=**

Whether the Applicant is entitled to General and aggravated damages?

General Damages

The applicant's counsel submitted that, the purpose of general damages has been stated by **Kitumba, JSC**, as she was then in **OPUS V. HARVEST FARM SEEDS LTD Supreme Court Civil Appeal No.02 of 2012**, when she held that ***“General damages are compensatory in nature... They must be in the reasonable contemplation of parties to arise from the breach...”***

It was the applicant's submission that his claims are based on the law hence the damages were in proper contemplation of the respondent. The respondent contemplated that if the laws relating to the claims herein are not complied with, the victims, like the applicant would seek legal redress including general damages. Therefore, this is a proper case for award of general damages.

Relating the above to the instant case, the applicant has proved and demonstrated that as a professional senior officer, he was expectant that at the time of retirement, he would be paid his emoluments as per the law. However, to his surprise, on retirement, he was give peanuts.

It was the contention of the applicant that make any meaningful investment with the little pay as terminal benefits due to wrongful computation of his entitlements. Since he retired from the army at 45 years and used most of his useful life serving his country.

The case of **OMUNYOKOL V. ATTORNEY GENERAL Supreme Court Civil Appeal No. 06 of 2012**, cited by the applicant's counsel does not offer any guidance and extremely distinguishable in both law and facts. It was a case of breach of contract of employment/wrongful termination. In the present case, it was a proper retirement after service.

General damages are such as the law will presume to be direct natural probable consequence of the act complained of. In quantification of damages, the court must bear in mind the fact that the plaintiff must be put in the position he would have been had he not suffered the wrong. The basic measure of damage is restitution. See ***Dr. Denis Lwamafa vs Attorney General HCCS No. 79 of 1983 [1992] 1 KALR 21***

The character of the acts themselves, which produce the damage, the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance and nature of the acts themselves by which the damage is done. See ***Ouma vs Nairobi City Council [1976] KLR 298.***

Since the applicant diligently served the army for over 30 years and retired at the age of 45 years, it was incumbent upon the responsible officer to compute his entitlements properly so that he could make meaningful investment and be able to leave a decent life of a retired Major.

The applicant is awarded 80,000,000/= as general damages for inconvenience that he suffered by the failure to be paid his terminal benefits in accordance to his position as a retiring soldier.

Aggravated Damages

The **general principle on aggravated damages** has been stated by **Katureebe, JSC**, has he was then in **ZAABWE V. ORIENT BANK & ORS**(Supra) where he stated that ***“...with aggravated damages...It is well established that when damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the defendant and this injury suffered by the plaintiff, as, for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature...”***

Therefore, in determining whether the applicant is entitled to aggravated damages, there is need to look at the conduct of the Respondent in this case. Well aware that the applicant was entitled to the claims herein part of which he has

admitted, the respondent went ahead to render the applicant unemployed through retirement without paying him his full benefits.

The applicant contended that the respondent is a public body who is supposed to observe strict compliance with the laws of this country and where he disobeys them with impunity, moreover to the detriment of gallant members of The Defence Forces who protect the sovereignty of this nation, there can be no less that aggravated damages.

This court has not come across any cogent evidence that would justify the award of aggravated damages. There is nothing aggravating in the nature of this case, the applicant retired and identified an error in computation of his terminal benefits and has not received any payment in lieu of leave like all other serving officers.

I decline to award any aggravated damages.

Whether there are any other remedies available to the parties?

- (a) The applicant ought to be paid professional allowance as a lawyer during the time he served while he possessed the qualification.
- (b) The applicant is entitled to receive terminal benefits/gratuity based on consolidated pay and likewise his pension should be computed based on the same principle.
- (c) 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.
- (d) The applicant is entitled to payment in lieu of untaken leave amounting to Ug. Shs. **31,541,546.71/=**
- (e) The applicant is awarded 80,000,000/= as general damages.

(f) The applicant is awarded interest of 15% on (a)(b)(c) and (d) since 2017 and interest of 10% on (e) from the date of ruling until payment in full.

(g) The applicant is awarded costs of the suit.

I so order

SSEKAANA MUSA

JUDGE

5th/ 02/2019