# THE REPUBLIC OF UGANDA

# IN THE SUPREME COURT OF UGANDA AT KAMPALA

## CIVIL APPEAL NO. 07 OF 2019

*[CORAM: Mwondha, Tibatemwa-Ekirikubinza, Chibita, Musoke, Madrama JJSC.]*

**UGANDA RAILWAYS CORPORATION :::::::::::::::::::::: APPELLANT**

**AND**

**EKWARU D.O AND 5104 OTHERS :::::::::::::::::: RESPONDENTS**

***[Appeal arising from the judgment of the Court of Appeal in Civil Appeal No.23 of 2007 before the Hon. Mr. Justice Alfonse Owiny Dollo, DCJ, Hon. Mr. Justice Kenneth Kakuru, JA, and Hon. Mr. Justice Stephen Musota, JA delivered at Kampala on the 17th day of April, 2019]***

## JUDGMENT OF CHIBITA, JSC.

### Introduction

This is a second appeal challenging part of the decision of the Court of Appeal in CACA No. 23 of 2007 being the 1st appeal against the decision of the R.O Okumu Wengi, J in HCCS No. 611 of 2004.

### Background

The respondents and those they represent were former employees of the Appellant, Uganda Railways Corporation (URC) who on various dates from the year 1986 to the year 2004, were retired, retrenched or had the services terminated.

Upon their retirement, retrenchment and or termination of service of the various respondents, the appellant calculated their benefits and emoluments in accordance with the Uganda Railways Corporation Staff Rules and the 1970 Pension Regulations as adopted by the URC Board which computation was subsequently used as a threshold for payment of the respondents' entitlements.

The respondents being dissatisfied with the said calculations unsuccessfully demanded that their emoluments be calculated in accordance with the Pensions Act (Cap 286).

On the 8th day of July 2004, the High Court granted four (4) of the said former employees to wit Ekwaru David O, Opolot M, Dramadri and Kitafuna W, leave to sue the appellant on their own and on behalf of 1330 others.

On 19 August 2004, the said representatives then instituted HCCS No. 611 of 2004 on their behalf and on behalf of 1330 others named as plaintiffs for the following orders.

i. A declaration that the plaintiffs for themselves and the 1330 others they represent being former employees of the defendant are entitled to:
   a) Pension in respect of those former employees legally entitled to pension, to be calculated in accordance with the provisions of the Pensions Act and the Regulations made thereunder, as and when amended.
   b) Other terminal benefits particularized in 5 (c) above to be calculated in accordance with the provisions of the law at

the rates prevailing from the date of retirement of the plaintiffs and those they represent.

c) The payment of unpaid balance of their terminal benefits arising out of the underpayment and/or non-payment of the plaintiffs' terminal benefits by the defendant;

ii. An order that the plaintiffs for themselves and those they represent be promptly paid their pension together with the arrears thereon and their other terminal benefits, calculated in accordance with the provisions of the Pensions Act and the regulations made thereunder, as and when amended, with effect from the day after the expiry of the respective notice and or/or period of accumulated leave of each of the plaintiffs and those they represent;

iii. An order that the defendant refunds and/or pays house rent and/or house allowance to the affected plaintiffs and those they represent;

iv. An order that the defendant refunds the money wrongly deducted as taxes from the plaintiff's terminal benefits;

v. An order that the defendant pays bonus allowance to the plaintiffs and those they represent;

vi. General and punitive damages

vii. Interest on the above at the rate of 25% per annum from the date filing till payment in full;

viii. Costs of the suit

The appellant (then defendant) filed a defence wherein it was contended that the respondents (then plaintiffs) were not entitled to the claims prayed for as their emoluments were

rightly calculated and paid in accordance with the Uganda Railways Corporation Act, the Uganda Railways Corporation Staff Rules of 1994 and the Pension Regulations which had been adopted by the Uganda Railways Corporation Board.
It further challenged the application of the Pensions Act to the respondents arguing that they were not public officers in the Public Service of the Government of Uganda as defined by the Public Service Act and Article 175 of the 1995 Constitution.

The trial judge R.O Okumu Wengi, J entered judgment in favour of the respondents and made the following orders:

1. A declaration that the respondents are entitled to pension calculated in accordance with the Pensions Act such that all benefits particularized in paragraph 5 of the plaint together with arrears of pension and allowances fully recalculated to avoid the underpayments outlined in the evidence are due and payable and shall be paid promptly together with terminal benefits.
2. Orders for the refund and payment of house rent, bonus arrears for the Nalukolongo staff, a refund of wrongly deducted taxes and or advances and such other dues and claims payable.
3. General damages of shs. 500,000/= for each of the plaintiffs now respondents.
4. Interest on the sums payable at 17% from the date of filing till payment in full

5. Costs of the suit.

Being dissatisfied with this decision, the appellant appealed the decision in the Court of Appeal based on the following grounds:

1. The learned trial judge erred in law when he failed to establish and hold that the respondent's action /suit was time barred both under the Uganda Railways Corporation Act and the Limitation Act.
2. The learned trial judge erred in law and fact in entering judgment against the appellant in favor of 3771 respondents who were not proper parties to the suit.
3. The trial judge erred in law and fact in holding that the respondents proved their case against the appellant which they substantiated in the exhibits and oral testimony of Ekwaru (PW1).
4. The learned trial judge erred in law and fact in holding that;
   a) The respondents' claims are well founded in the Pension Law and the Constitution of Uganda.
   b) The respondents are entitled to pension calculated in accordance with the Pensions Act.
5. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record thereby reaching erroneous holdings that;
   a) The respondents were underpaid
   b) The respondents are entitled to a refund or payment of house rent, bonus arrears for the Nalukolongo staff, refund of

wrongfully deducted taxes or advances and such other dues claimed and payable.

6. The learned trial judge erred in law and fact in awarding the respondents interest on the sums payable at the rate of 17% p.a from the date of filing the suit till payment in full.

The Court of Appeal allowed the appeal, set aside the orders of the trial judge and instead substituted them with its judgment and orders that:

1. The respondents are entitled to pension calculated under the 1970 pension regulations which were adopted by the Uganda Railways Corporation Board and the Uganda Railways Corporation Rules, 1994.
2. The respondents are not entitled to a refund or payment of house rent, bonus arrears for Nalukolongo staff, refund of taxes or advances and such other dues claimed and payable which were not proved.
3. The appellant shall pay the respondents general damages of 500,000/= (five hundred thousand shillings) each.
4. The respondents are awarded interest on the sums payable at the rate of 17% p.a from the date of filing the suit till payment in full.
5. The appellant shall pay the respondent 2/3 (two thirds) costs of the appeal.

Being dissatisfied with the decision of the Court of Appeal, the appellant filed this appeal based on the following grounds:

1. The learned Justices of the Court of Appeal erred in law and fact in failing to hold that the respondent's suit is barred by the time and further holding that:
   a) Section 53 of the Uganda Railways Corporation Act is discriminatory.
   b) Non-compliance with section 53 of the Uganda Railway Corporation Act does not render a suit filed against the Appellant incompetent.
2. The learned Justices of the Court of Appeal erred in law when they held that a point of law not brought to the attention of the trial court cannot be raised as a ground of appeal on appeal.
3. The learned Justices of the Court of Appeal erred in law and fact when they erroneously relied on the 19th August, 1998 as the date of termination of the respondents' employment and thereby arrived at a wrong finding that the suit was not barred by time.
4. The learned Justices of the Court of Appeal erred in law and fact when they held that failure by the trial court to make an order to add the additional 3771 persons as plaintiffs to the suit was a curable error and did not cause any prejudice to the appellant.
5. The learned Justices of the Court of Appeal erred in law and fact when they held that the respondents' documents were clearly marked and properly tendered in court as exhibits.
6. The learned Justices of the Court of Appeal erred in law and fact in awarding the respondents general damages of shs. 500,000/= each without any legal basis.

7. The learned Justices of the Court of Appeal erred in law and fact in awarding the respondents interest of 17% p.a on the sums payable till payment in full without any basis.
8. The learned Justices of the Court of Appeal erred in law and fact in awarding the respondents two thirds (2/3) costs of the appeal without any basis.
9. The learned Justices of the Court of Appeal erred in law when they failed to award the Appellant costs of the Appeal and the court below.

The appellant thus prayed court to allow the appeal and for costs in this court and in the courts below.

**Cross appeal.**

Also being dissatisfied with the decision of the Court of Appeal the respondents filed a cross appeal based on the following grounds.

1. That the learned Justices of the Court of Appeal erred in law and fact when they held that the Respondents are not entitled to pension calculated under the 1970 Pension Regulations which were adopted by the Uganda Railways Board and the Uganda Railways Corporation Rules, 1994.
2. The learned justices of appeal erred in law and in fact when they failed to hold that the respondents were entitled to:
   i) Prompt payment of pension and pension arrears calculated in accordance with the Pensions Act and the Regulations made thereunder.

ii) Prompt payment of terminal benefits and other benefits particularized in paragraph 5 of the plaint in HCCS No.611of 2004 Ekwaru D.O & others vs. Uganda Railways Corporation and a re-calculation of the said terminal and other benefits to avoid underpayments outlined in the evidence on record.

iii) Refund of house rent, bonus arrears for Nalukolongo staff, refund of wrongfully deducted taxes and advances and such other dues claimed and payable.

3. The learned justices of the Court of Appeal erred in law and fact when they awarded the respondents only 2/3 (two thirds of the costs in the Court of Appeal.

The respondents (cross appellants) prayed court to allow the cross appeal, set aside the decision of the Court of Appeal and substitute the orders of the court of appeal with the following orders.

1. Prompt payment of the pension and pension arrears, by the appellant to the respondents, calculated in accordance with the Pensions Act and regulations made thereunder.
2. Prompt payment of terminal benefits, by the appellant to the respondents, particularized in paragraph 5 of the plaint and re-calculation thereof to avoid underpayment.
3. Orders for the payment of refund or payment of house rent, bonus arrears for Nalukolongo staff, refund of wrongfully deducted taxes or advances and such other dues claimed and payable.

4. Payment of interest to the respondents on the sums in 1, 2 and 3 above at the rate of 17% per annum from the date of filing the suit till payment in full.
5. The appellant pays costs in this Court and in the Courts below.

**Representation.**

At the hearing, the appellant was represented by Mr. Ahimbisibwe Pope whereas the respondents were represented by Mr. Omunyokol George.

Two of the respondents namely Tigawalana Stephen and Biryabarema Daniel were in Court.

Both counsel adopted the written submissions that had earlier on been filed with the Court.

**Submissions.**

**Grounds 6,7,8 and 9**

It was the contention of counsel for the appellant that the court of appeal erred when it ordered the appellant to pay each of the respondents shs. 500,000/= (five hundred thousand only) as general damages, interest of 17% on the sums payable and 2/3 of the costs in the lower courts. This contention was premised on the fact that the Court of Appeal had overturned the decision of the High Court in which it had been held that the appellant had applied the wrong laws in the calculation of the respondent's entitlement. He argued that the Court of Appeal having found that the law applicable to the respondents was the

Uganda Railways Corporation Staff Rules, 1994 and Pension Regulations adopted by the Uganda Railways Corporation Board which the appellant had applied in the computation of the respondents' emoluments, the appellant was not illegally holding any money belonging to the respondents that would warrant a penalty through the award of general damages to the respondents.

It is in the same spirit that the appellant argued against the award of interest of 17% on the sums payable to the respondents and also 2/3 of the costs to the un successful party.

He thus prayed Court to correct this error as maintaining it would go against the very decision of the Court of Appeal which found that the respondents' emoluments could not be calculated in accordance with the Pensions Act.

In response to this ground, counsel for the respondent supported the decision of the Court of Appeal and submitted that the learned justices of Appeal were justified in not interfering with the awards of 500,000/= to each of the respondents, 17% p.a on the sums payable the sums due from the time of filing of the suit till payment in full and the award of 2/3 of the costs arguing that the circumstances of the case did not warrant for the interference with the same.

**Grounds 1,2 and 3**

Counsel for the appellant submitted that the Court of Appeal erred when it found that section 52 of the Uganda Railways

Corporation Act which set the limitation period within which a suit can be brought against Uganda Railways Corporation was discriminatory. He further submitted that the finding by the Court of Appeal that the limitation Act that sets the period within which to bring a suit against URC at six years was applicable to the respondents was made in error.

He argued that section 52 of the Uganda Railways Corporation Act could not be said to be discriminatory when it set the same time limit within which individuals, organizations, corporations and Government or any other person seeking to challenge an act or omission done by the Uganda Railways Corporation in execution of, or intended execution of its mandate at 12 months from the time of the alleged act or omission.

On the issue of limitation, counsel contended that the Court of Appeal erroneously held that a point of law not raised at trial cannot be raised on appeal. He contended further that the authorities that were relied on by the Court of Appeal to support this finding to wit; **Bogere Moses & Anor vs. Uganda,** SCCA No. 39 of 2016, **Twinomugisha Alex alias Twine Patrick Kwezi & John Sanyu Katuramu vs. Uganda**, SCCA No. 35 of 2002 were quite distinguishable from the instant facts as the parties in those cases were raising points of law with a mixture of facts. He submitted that a mere examination of the pleadings in the instant case in paragraph 5(b) reveals that the process of retirement, retrenchment and termination started in 1986

which is approximately 18 years before the suit was filed which would in itself indicate that the suit was time barred.
It was, therefore, counsel's prayer that the Court finds that all suits in respect of all respondents who were retired, retrenched or had their services terminated 12 months before the 19th day of August 2004 when the suit was filed was time barred.

In the alternative, counsel contended that should the Court be inclined to find that the limitation period applicable to the respondents' suits was 6 years prescribed in section 3 of the limitation Act, then all respondents' who were retrenched, retired and terminated earlier than 6 years before 19th August, 2004 should have their suits thrown out for being time barred.
On the application of section 3 of the Limitation Act by the Court of Appeal, counsel for the appellant's argument was that it was erroneous for the justices of Appeal to pick the date of 19th August, 1998 and apply it to all respondents as the date of retirement, retrenchment and termination yet the evidence on record shows that the respondents were retired, terminated and retrenched on different dates.
In response to this ground, counsel for the respondent supported the decision of the Court of Appeal that the respondents' suit was not barred by time. He submitted that the Justices of Appeal rightly found that section 52 of the Uganda Railways Corporation Act was discriminatory and that noncompliance with the said provision did not render the suit incompetent. He further submitted that the Justices of Appeal

rightly relied on the case **Kabandize and 20 others vs. KCCA**, CACA No. 28 of 2011, which outlawed provisions that gave local government, and government preferential treatment regarding time limits within which to do certain things.

In response to ground 1, specifically, counsel for the respondents argued submitted that it would be erroneous for the Court of Appeal to criticize the High Court for having not dealt with the question of time limit when the appellant had failed to raise it during trial.

In regard to the ground that the Court of Appeal erred in law and in fact when it relied on the date of 19th August 1998 as the date of termination of the respondents' employment, it was submitted for the respondents that this ground was inconsequential as the position of the Respondents has consistently been that for as long as their pension and terminal benefits remain unpaid, there has been continuous breach and, therefore, the Respondents' cause of action continues every single day of non-payment of their pension and pension arrears.

**Ground 4.**

The appellant's complaint against the Court of Appeal in this ground is that the learned justices of Appeal erred in law and in fact when they held that failure by the trial court to make an order to add the additional persons as plaintiffs to the suit was a curable error and did not cause any prejudice to the appellant.

Counsel for the appellant's argument was that the representative order that was granted to the four respondents permitted them to file a suit on their own behalf and on behalf of 1330 (One thousand three hundred thirty) others. He submitted that the addition of 3771 other plaintiffs during the trial without a new representative order under order 1 rule 8 of the Civil Procedure Rules was irregular and occasioned a miscarriage of justice to the appellant.

On the issue of the supplementary record that was filed by the respondents in this court on 8th July, 2020, counsel for the appellant submitted that other than the respondents' Notice of cross appeal, the rest of the documents contained in the supplementary notice of appeal were documents that did not form the record in the Court of Appeal. He contended that when the matter of additional documents came up in the Court of Appeal, the said documents were rejected as the respondents had not followed the prescribed procedure for admission of additional evidence. He prayed Court to disallow the admission of the said supplementary record.

He thus prayed Court to allow the appeal, set aside the decision of the Court of Appeal in part to wit; the award of general damages, interest of 17% on all sums payable and costs of 2/3 to the respondents, find that the suit was time barred, and make an order for costs in favour of the appellant.

In response to this ground, counsel for the respondent contended that the Court of Appeal was right to hold that the

failure by the trial court to make an order to add the additional 3771 persons as plaintiffs to the suit was a curable error that did not occasion any prejudice or injustice to the appellant. He further contended that the appellant is estopped from challenging the addition of the 3771 respondents since at trial counsel raised no objection to the addition. He argued that the 3771 respondents' names were already listed in Exhibit P.1which was an attachment to the pleadings and therefore failure to add them was inconsequential.

Counsel for the respondents prayed Court to find that the appeal lacks merit and should be dismissed with costs.

**Consideration.**

The power of this Court as the 2nd appellate Court is contained in Rule 30 (1) of the Rules of the Court. It provides as follows:

**"Power to reappraise evidence**

**Where the Court of Appeal has reversed, affirmed or varied a decision of the High Court acting in its original jurisdiction, the court may decide matters of law or mixed law and fact, but shall not have discretion to take additional evidence"**

This position has been expounded upon in several cases that include in the case of **Uganda Breweries Limited vs. Uganda Railways Corporation**, SCCA No. 6 of 2001, **Lutalo Moses (Admn. of the Estate of the Late Lutalo Phoebe vs. Ojede Abdallah Bin Cona (Admn. of the Deceased Cona Bin Gulu Estates**, SCCA No. 15 of 2019 and **China Road and Bridge**

**Corporation vs. Welt Machinen Engineering Limited & China Road and Bridge Corporation vs. Welt Machinen Engineering Limited and Attorney General,** SCCA No. 13 &14 of 2019. In the latter case, the Court stated as follows.

**"The threshold prescribed in law for the interference by the 2nd appellate court with the findings of the 1st appellate Court, is that the 1st appellate court has to be shown to have erred in law and fact."**

I will use this as a guide in the determination of this appeal.

I wish to deal with ground 2, 1&3 together, 4, 5, 6,7,8 and 9 together in that order.

**Ground 2:**

**The learned Justices of Appeal erred in law when they held that a point of law not brought to the attention of the trial court cannot be raised as a ground of appeal.**

It was counsel for the appellant's argument that the Court of Appeal finding that a point of law not raised at trial cannot be raised on appeal was erroneous. His submission was that although parties are generally by bound by their pleadings, points of law can be raised at any time as long as the point of law can stand alone without the requirement to adduce new evidence. Counsel for the respondents on the other hand argued that this ground could not be maintained by the appellant

submitting that it would be erroneous to criticize the High Court for having erred when the compliant was not brought before it.

The Court of Appeal in dealing with this issue referred to rule 86(1) of the Judicature (Court of Appeal Rules) Directions which required the memorandum of appeal to contain grounds specifying the points which are alleged to have been wrongly decided by the trial Court and held as follows:

**"From the above section, it is clear that the memorandum of appeal should only bear points which are alleged to have been wrongly decided in the lower court. In the Supreme Court case of Bogere Moses and another vs. Uganda, SCCA No. 39 of 2016, the respondent raised a preliminary objection that the Court of Appeal entertained an appeal by the appellants based on sentence, the appellants never raised the issue of their conviction before the Justices of the Court of Appeal. That the justices of the Court of Appeal should not be criticized therefore over what they had no opportunity to handle..."**

The Court further stated that;

**"We therefore find that matters which were not brought to the attention of the Court during trial cannot be raised as grounds of appeal on appeal."**

Whereas it is true that rule 86(1) of the Judicature (Court of Appeal Rules) Directions requires that grounds of appeal

contained in a memorandum of Appeal should specify the points which are alleged to have been wrongfully decided by the lower court, this rule is subject to exception where the new matter being raised points to illegality or fraud.

This position was brought forth in the case **Makula International Ltd vs. His Eminence Cardinal Nsubuga**, SCCA No. 4 of (1981 HCB), and **National Social Security Fund & Anor vs. Alcon International**, SCCA No. 15 of 2009.

**"...the correct position of the law is that while an issue or ground of illegality or fraud not raised in the lower court may be raised on appeal, the parties must be given an opportunity to address court on it before it makes a decision. Even where a judge wishes to consider an issue after the hearing has been concluded, the judge must give the parties the opportunity to address the Court on the issue."** (Emphasis mine)

The new ground of appeal that is subject to this complaint involved a question as to whether the suit was time barred. An allegation of a suit being barred in law cannot be taken lightly because it touches upon court's jurisdiction to entertain the suit. Proceedings undertaken by a court without jurisdiction are a nullity. (See **Attorney General vs. Tinyefuza**, SCCA No. 1 of 1997, **China Road & Bridge Corporation vs. Welt Machinen Engineering Limited, China Road & Bridge Corporation vs. Welt Machinen Engineering Limited and Anor**. (supra).

Indeed, Order 7 rule 11 (d) of the Civil Procedure Rules clearly spells out the consequence of a suit being barred in law. The rule provides as follows:

**"11. Rejection of plaint**

**The plaint shall be rejected in the following cases**

**a) .....**

**b) .....**

**c) .....**

**d) where the suit appears from the statement in the plaint to be barred by any law."**

Once the time period limited under statute expires, the plaintiff's right of action will be extinguished and will become unenforceable against a defendant. It is therefore, imperative upon a court before which a suit has been filed to ensure that it is not barred by time to entertain the suit before it. Usually perusal of the plaint alone should provide sufficient information to assist the Court to determine whether or not a suit is time barred. (See **Iga vs. Makerere University** [1972] EA 65).

Paragragh 5 (b) of the plaint stated as follows:

"**On various dates from the year 1986 to the year 2004 the plaintiffs and those they represent were retired, retrenched or had their services unlawfully terminated by the defendant;"** (Emphasis mine).

This statement prima facie shows that the causes of action for the different respondents arose on different dates and this alone

should point court in the direction of inquiring into whether the respondents' claims are not barred by time.

It is this unique importance of the limitation period that makes it an exception to the general rule set forth in r.86(1) of the Court of Appeal rules that matters not brought to the attention of court during trial cannot be raised as grounds of appeal on appeal.

In my view, the failure by the trial court to inquire into whether the respondents' claims were within or without time albeit not raised was an error on its part.

With due respect to the learned justices of Appeal, the cases relied upon to come in reaching this conclusion were quite distinguishable from the instant facts. For instance, the matter that was being raised in the case of Bogere Moses vs. another vs. Uganda, SCCA No. 39 of 2016, the new ground of appeal pertained to the conviction of the appellants and was not of such magnitude as to render the entire proceedings a nullity.

Ground 2 therefore, succeeds.

**The learned Justices of the Court of Appeal erred in law and fact in failing to hold that the respondents' suit is barred by time and further in holding that:**

**a) Section 52 of the Uganda Railways Corporation Act is discriminatory.**

**b) Noncompliance with Section 52 of the Uganda Railways Corporation Act does not render a suit filed against the Appellant incompetent.**

Section 52 of the Uganda Railways Corporation Act provides that:

"**Where any action or other legal proceeding is commenced against the corporation for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority or in respect of any neglect or default in execution of this Act or any other such duty or authority, the following provision shall have effect;**

**a) .....**

**b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months after the act, neglect or default complained of or in the case of a continuing injury or damage, within six months after its cessation.**"

The section prescribes the limitation period to be 12 months.

The Limitation Act on the other hand prescribes the limitation period to be 6 years from the date on which the cause of action arose.

The Court of Appeal in determining the question of limitation stated as follows:

"***The above section limits the time within which a suit can be brought to 12 months. This court has however pronounced itself on the issue of time limits in cases***

***against government or corporations in <u>Kabandize and 20 others vs. Kampala Capital City Authority Civil Appeal No. 28 of 2011</u>. In that case the court addressed the discrimination between the state and the person as provided for under section 2 of the Civil Procedure and Limitations (Miscellaneous Provisions) Act;***

***While construing Section 2 of the Civil Procedure and Limitations (Miscellaneous Provisions Act) already set out above, the Courts of law must therefore take into account the provisions of Article 274 and 20 of the Constitution of Uganda.***

***Article 20(1) of the Constitution provides as follows; -***

***"All persons are equal before and under the law in all spheres of political, economic, social and culture life and in every other respect and shall enjoy equal protection of the law"***

***This article in our view requires that parties appearing before courts of law must be treated equally and must enjoy equal protection of the law.***

***The reading of Article 20(1) above and Article 274 of the Constitution together would require Section 2 of cap. 72 to be construed with such modifications, adaptions, qualifications and exceptions as is necessary to bring it into conformity with the Constitution."*** (Emphasis mine)

It is on the basis of this decision that the Court of Appeal found as follows:

**"Likewise, section 53 of the Uganda Railways Corporation Act is also discriminatory in as far as it gives preferential treatment to corporations and government regarding the time within which to file a suit. We therefore find that non-compliance with section 53 of the Uganda Railway Corporation Act does not render a suit incompetent. The limitation applicable ought to be 6 years as in any other contract under the Limitation Act.**

With due respect to the learned justices of Appeal, their decision was made in total disregard of the prevailing law which was the decision of this Court which rendered it *per incuriam.* It was an error for the Court of appeal to rely on its own decision in the case of **Kabandize and 20 others vs. Kampala Capital City Authority,** Civil Appeal No. 28 of 2011 to determine the case **Uganda Railways Corporation vs. Ekwaru D.O & 5104 others**, CACA No. 23 of 2007 from which this appeal emanates on 17th August 2019, when the former decision had been appealed against to this Court in the case of **Kampala Capital City Authority vs. Kabandize and 20 others,** SCCA No. 013 of 2014 and this Court delivered its judgment on 2nd November, 2017.

The Court of Appeal was bound to follow this Court's decision under the principle of precedent being that this court is more superior in hierarchy. (See **Attorney General vs. Uganda Law Society**, SC Const. Appeal No. 1 of 2006.)

Had the learned justices of Appeal considered this Court's decision in **KCCA vs. Kabandize and 20 others** (supra) they would not have come to the erroneous conclusion that they did. Whereas the result of the former and the latter case was the same, the two cases were decided on different premises.

This Court in determining **KCCA vs. Kabandize and 20 others,** (supra) had this to say:

***"In my view the emphasis should not be on the failure to serve the Statutory Notice but on the consequences of the failure so long as both parties are able to proceed with the case and Court can resolve the issues which the High Court should have done after going through the hearing. Parliament could not have intended that a plaintiff with a cause of action against a Statutory defendant would be totally denied his right to sue even where the defendant knew the facts and was able to file a defence as it was in this case simply because of the failure to file a statutory notice.***

***In the result I do not find any merit in the appeal and it should be dismissed with costs to the respondents."***

The Court's decision was never based on whether the provision of section 2 of **The Civil Procedure and Limitations (Miscellaneous Provisions Act)** was constitutional or not. In any case the said Article 274 that requires modifications and adaptions and qualifications as necessary to bring acts into conformity with the constitution does not permit completely outlawing a statutory provision and replacing it with a provision

from a different statute as was done by the Court of Appeal. it was an error for the Court of Appeal to declare the whole provision of section 52 of the Uganda Railways Corporation Act and instead replace it with section 3(1) (a) of the Limitation Act.

I will now delve into the determination of the question of **"which statute governs the limitation period in the instant case?"**

It was the appellant's argument that the law applicable to the respondents' claim was section 52 of the Uganda Railways Corporation Act which prescribes a 12-month period whereas the respondents argued for the application of section 3(1) of the Limitation Act which prescribes 6 years.

There is clearly a conflict between the two statutes. Uganda Railways Corporation Act which was enacted in 1992 to cater specifically for all matters of the Corporation and the Limitation Act cap.80 that provides limitation periods for various actions.

This conflict can be resolved through the application of the Latin maxim, "**Generalia Specialibus Non Derogant**".

When interpreted it translates as "**general laws do not prevail over special laws**".

Where two statutes are in apparent conflict on the same subject, the provisions of the general statute must yield to those of the special statute. Basically, provision of the special Act acts as an exception to the provision in the general Act.

From the foregoing, it is clear that the Uganda Railways Corporation Act that specifically provides for a limitation period of 12 months after the act or omission or default on which the cause of action is founded would prevail over section 3(1) of the Limitation Act.

The evidence on record shows that the termination of service, retirement of the last batch of respondents that included one of 4 representatives was effected on 31st May, 2002. The termination of service and retirement letters that were dated 27th May, 2002 spelt out the terminal benefits each respondent was entitled to. The causes of action arose on the various dates on which the respondents received communication from the appellant of their terminal benefits. None of the respondents filed a suit challenging the propriety of the calculation of terminal and retirement benefits within the 12 months prescribed under section 52 of the Uganda Railways Corporation Act. HCCS No. 611 of 2004 was filed on 19th August, 2004 more than a year after the last batch of respondents received communication of their benefits.

Counsel for the respondents' argument that there was continuous breach of contract and that the respondents' cause of action continues every single day of nonpayment of their pension and pension arrears is untenable.

I therefore, find that the lower courts had no jurisdiction to inquire into all the merits of the case because it was time barred.

Therefore, grounds 1&3 must succeed.

The success of grounds 1, & 3 makes grounds 4,5,6,7,8 and 9 moot. This also disposes of the grounds of cross-appeal.

In the result, the appeal is allowed in its entirety. The judgment and orders of the Court of Appeal are set aside and substituted with the judgment and orders of this Court. I would order each party to bear its own costs

Dated at Kampala this.....6th.....day of .....December.....2023

Hon. Mike J Chibita

**JUSTICE OF THE SUPREME COURT.**

# THE REPUBLIC OF UGANDA

# IN THE SUPREME COURT OF UGANDA AT KAMPALA

**CORAM: MWONDHA, TIBATEMWA-EKIRIKUBINZA, CHIBITA, MUSOKE, MADRAMA; JJSC**

## CIVIL APPEAL NO 7 OF 2019

**BETWEEN**

**UGANDA RAILWAYS CORPORATION ..... APPELLANT**

**AND**

**EKWARU D. O. AND 1330 (5104) OTHERS ..... RESPONDENTS**

*(Appeal arising from the judgment of the Court of Appeal at Kampala Civil suit No 23 of 2007 before Owiny- Dollo, DCJ, Kakuru, and Musota JJA delivered on the 17th April, 2019)*

## JUDGMENT OF MWONDHA, JSC

I have had the benefit of reading in draft the judgment of my learned brother Chibita JSC. I concur with his analysis, reasoning and decision that the appeal is allowed and the proposed orders made.

I will add that the decision of the Court of Appeal cannot be sustained for the following reasons:-

(1) The Court determination of this appeal depended entirely on what law was applicable to the facts of the case and the issue of when the cause of action arose.

It is clear from the Record of Appeal and in particular the plaint. Paragraph 5(b) states as follows:- " on various dates from the year 1986 to the year 2004 the plaintiff and those they represent were retrenched, made redundant or had their services unlawfully terminated by the defendant (now appellant).

The plaint clearly states in paragraph 2 as follows:- "The defendant is a Scheduled Corporation established by the Uganda Railways Corporation Act [Cap331] ... In my view for the purposes and intents the Uganda Railways Corporation Act is the law applicable not the Limitation Act S.3(I). The Limitation Act is a general law and its object is provided as, "An Act to provide for the limitations of certain actions and arbitrations and for matter incidental thereto and connect there with."

It is trite law that the general law cannot be applicable when there is a specific law. It is the specific Act and regulations made under it by the Act or Board under which the respondents were recruited. The general Law can only be turned to, if the specific Act is silent which was not the case in this case. The Board adopted the Public Service Regulations but the adoption of the regulations did not turn the employees into Public Servants as envisaged in the Public Service Act.

(2) On the issue of S.52 of Uganda Railways Corporation Act being discriminatory which was not the case, it was not the duty of the Court of Appeal to pronounce itself on such when discrimination was not pleaded in the plaint. The Court of Appeal pronouncement amounted to amending the pleadings.

If S.52 of the Act was unconstitutional, the remedy was in filing a Constitutional Petition to declare the provision unconstitutional by the respondents.

(3) On the point of law on the limitation, the point law raised by the appellants Counsel touched on the foundation of the suit/appeal. It drew the attention of Court to the illegality in as far as jurisdiction is concerned. Definitely the Courts below were not seized with the jurisdiction to hear the suit and the eventual appeal.

It is trite law that proceedings undertaken by a Court without jurisdiction are a nullity/null and void. See **Punjab v. Davinder Singh Bhullar and others 2012 Cr L T Supreme Court of India (decision on 7 December, 2011**) cited with approval in the **SCCA No 18 of 2017 Mohamed Mohamed Hamid v. Roko Construction.** The position laid down is that if a judgment has been pronounced without jurisdiction, the inherent powers (under rule 2(2)) of this Court Rules) can be exercised to recall such an order for reasons that in such an eventuality the order becomes a nullity... In such an eventuality the judgment is manifestly contrary to the audi alteram partem rule of Natural Justice.

(4) On the issue of increased number of respondents from 1330 to 5104, I find the submissions of the learned Counsel for the respondents' baffling. He submitted that the 3771 respondents' names were already listed as Ex P1 which was an attachment to the pleadings and so failure to add them on the 1330 was inconsequential. In the plaint paragraph 3(a) at page 159 of the Record of Appeal stated, "the plaintiffs bring claim on their own behalf and on behalf of 1330 former employees of the defendant's Corporation whose names are listed in the schedule referred to in paragraph 3(b) below.

Paragraph 3(b) below states, "this honourable Court has in **Miscellaneous Application No135 of 2004** permitted the plaintiff to file a representative suit against the defendant on their own behalf and on behalf of the said 1330 former employees. A photocopy of the said respective order to which the said schedule is annexed and marked annexure "A" Emphasis is mine

Paragraph 4 of the Plaint stated:- The plaintiffs claim against the respondent is for a declaration that the plaintiffs for themselves and 1330 others. They represent being former employees of the defendant are entitled to ..."

Counsel for the respondent submitted that the 3771 were already listed on Ex PI which was attached on the pleadings.

There is such a sharp contradiction and inconsistency in learned Counsel's submissions which bring out darkness surrounding the dispute. If the respondents were already there the plaint could not be consistently refereeing to 1330 employees and the 4 employees who filed the application for the representative suit. The additional employees were irregularly added without any amendment.

Or 6 rule 7 of the Civil Procedure rules forbids departure from previous pleadings. It provides:-

**"No pleading shall not being a petition or application except by way of amendment raise any new ground of claim or contain any allegation of fact consistent with the previous pleadings of the party pleading that pleading."** This rule was affirmed in the cases also of **Jamir Properties Ltd versus Dar-es-salaam City Council [1966] EA. 281** and **Struggle Ltd v. Pan African] Insurance Co. Ltd [1990] All 46 at page 47**.

The Court stated, **"the parties in Civil matters are bound by what they say in their pleadings which have the potential for forming the record narrower, the Court also is bound by what the parties have stated in the pleadings as to the facts relied on by them. No party can be allowed to depart from the pleadings."**

It is apparent that other respondents (3771) added as Counsel for the respondent submitted were not added or included in accordance with the law.

There was no way the omission not to amend would be curable without amendment of the plaint. It is clear that Court of Appeal erred in law and fact in their decision.

The Appeal would be allowed and the Cross Appeal dismissed in its entirety with no order as to costs as proposed in the lead judgment of Chibita JSC.

**Decision of the Court**

Since three of the Justices on Coram concurred with my learned brother Chibita JSC judgment, and two Justices partially concurred and partially dissented.

Accordingly by majority decision of 3 Justices concurring, the appeal is dismissed in the terms proposed in the lead judgment of Chibita JSC.

Dated at Kampala this 6th day of December 2023

.....

Mwondha

**JUSTICE OF THE SUPREME COURT**

**THE REPUBLIC OF UGANDA**

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

*[CORAM: MWONDHA; TIBATEMWA-EKIRIKUBINZA; CHIBITA; MUSOKE; MADRAMA; JJ.S.C.]*

**CIVIL APPEAL No. 7 OF 2019**

**BETWEEN**

**UGANDA RAILWAYS CORPORATION :::::::::::::::::::::::::::::::::::::::: APPELLANT**

**AND**

**EKWARU D.O AND 5104 ORS :::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS**

*[Appeal arising from the judgment of the Court of Appeal at Kampala in Civil Appeal No. 23 of 2007 before Hon. Justices: (Alfonse Owiny-Dollo, DCJ; Kenneth Kakuru and Stephen Musota, JJA), dated 17TH April 2019.]*

**JUDGMENT OF TIBATEMWA-EKIRIKUBINZA, JSC.**

I have had the benefit of reading the judgment of my learned brother, Hon. Justice Mike Chibita, JSC and I agree with his analysis and conclusion as well as the orders he has proposed.

Having agreed with my learned brother that the lower courts had no jurisdiction to inquire into the merits of the case because the suit had been instituted out of time, I find it not necessary to deal with any other ground of appeal before this Court.

Dated at Kampala this .....6th..... day of .....December..... 2023.

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**HON. JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA**
**JUSTICE OF THE SUPREME COURT.**

**THE REPUBLIC OF UGANDA**
**IN THE SUPREME COURT OF UGANDA AT KAMPALA**
**CIVIL APPEAL NO. 07 OF 2019**

**UGANDA RAILWAYS CORPORATION::::::::::::::::::::APPELLANT**

**VERSUS**

**EKWARU D.O AND 5104 OTHERS::::::::::::::::::::::::::RESPONDENT**

*(Appeal from the decision of the Court of Appeal (Owiny-Dollo, DCJ; Kakuru and Musota, JJA) in Civil Appeal No. 23 of 2007 dated 17th April, 2019)*

**CORAM: HON. LADY JUSTICE FAITH MWONDHA, JSC**
**HON. LADY JUSTICE PROF. LILLIAN TIBATEMWA – EKIRIKUBINZA, JSC**
**HON. MR. JUSTICE MIKE CHIBITA, JSC**
**HON. LADY JUSTICE ELIZABETH MUSOKE, JSC**
**HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA, JSC**

## JUDGMENT OF ELIZABETH MUSOKE, JSC

I have had the benefit of reading the judgment prepared by my learned brother Chibita, JSC. I gratefully adopt his Lordship's statement of the facts of the case, and shall only make brief reference to them, in so far as it is necessary to explain my conclusions in this matter.

The background to the appeal is that between 1986 and 2004, the appellant Uganda Railways Corporation (URC), a statutory corporation created under Statute No. 13 of 1992, terminated the employment of several of its employees. The majority of these employees were retrenched while some were involuntarily retired.

In 2004, about 1330 of these employees sued the URC in a representative suit seeking several declarations and orders arising from the termination of their employment. The declarations and orders have been set out in Chibita, JSC's judgment. It is also important to note that during the course of the trial, Okumu-Wengi, J, the learned trial Judge permitted more employees to

be added to the representative suit, and thus the judgment of the High Court covered about 5105 former employees.

Upon conclusion of the trial, the learned trial Judge wholly allowed the employees' claim and made several declarations and orders. The appellant appealed to the Court of Appeal which partially allowed its appeal.

The appellant then lodged this further appeal to this Court against the decision of the Court of appeal, on 9 grounds. The respondents also cross-appealed against the said decision on 3 grounds. The grounds of the appeal and those of the cross-appeal have been set out in Chibita, JSC's judgment. I explain my conclusions on the grounds of the appeal and cross appeal below.

**Grounds 2 and 1 of the appeal**

Ground 2 arises against the background that the appellant raised a point of law in the Court of Appeal which it had not raised during the trial in the High Court. The point of law was that the employees' suit in the trial Court was time barred and should not have been entertained. The Court of Appeal dismissed this point of law finding that it had not been raised at trial in the High Court and that points raised for the first time on appeal cannot be entertained. My view is that a point of law may be entertained for the first time on appeal, in the circumstances clearly set out in the judgment of Chibita, JSC. Therefore, for the reasons given by Chibita, JSC, I would reach the same conclusions on ground 2, as he does.

As regards ground 1, the appellant's allegation is that the Court of Appeal erred in holding that the employees' suit was not time barred under Section 52 of the URC Act. It appears that the Court of Appeal took the view that Section 52 applied to the present case but refused to enforce it because it deemed that the provision was unconstitutional for being discriminatory. Further still, the Court of Appeal, on the authority of **Kabandize and Others vs. Kampala Capital City Authority, Civil Appeal No. 28 of 2011 (unreported)**, considered that it had powers to disregard an unconstitutional provision of the law, as it considered Section 52 to be. I

agree with the reasons given by Chibita, JSC in reaching his conclusion that the Court of Appeal wrongly applied its decision in the Kabandize case (supra) since the reasoning therein had been overruled by the decision of this Court on appeal.

Nevertheless, I part company with my learned brother's conclusion that Section 52 of the URC Act is applicable to the present case, and my reasons for doing so are set out below. Section 52 provides as follows:

> **"52. Limitation.**
>
> **Where any action or other legal proceeding is commenced against the corporation for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—**
>
> **(a) the action or legal proceedings shall not be commenced against the corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his or her agent; and**
>
> **(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months after the act, neglect or default complained of or in the case of a continuing injury or damage, within six months after its cessation."**

In my view, Section 52 applies only to actions brought against the URC for the exercise of its primary objects and functions and other additional functions pursuant to any of Sections 3, 4, 5, 32 and 33 of the URC Act. I say so because Section 52 of the URC Act is included under Part IX of the URC Act which sets out the nature of legal actions in respect to which the limitation under that Section was expected to apply. The action in the present case partly related to an employment dispute over computation of terminal benefits and partly to the application of the Pensions Act, and in my view does not fall under the legal actions to which the limitation stipulated under Section 52 of the URC Act applies. For those reasons I would disallow ground 1 of the appeal.

## Ground 4 of the appeal

The appellant alleged, in ground 4, that the Court of Appeal erred in law and fact in holding that failure by the trial Court to make an order to add the additional 3771 persons as plaintiffs to the suit was a curable error and did not cause any prejudice to the appellant. Counsel for the appellant submitted that Order 1 Rule 8 (1) of the Civil Procedure Rules, S.I 71-1 requires that a representative order is made before persons can be represented in a representative suit, and that it was irregular that the additional 3771 persons were added to the representative suit without any order. Order 1 Rule 8 (1) provides that:

> **"8. One person may sue or defend on behalf of all in same interest.**
>
> **(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct."**

Order 1 Rule 8 (1) provides for representative suits. In these suits, often involving numerous persons, the provision allows one or more of those persons to obtain an order to represent the rest of the persons. What happened in the present case was that four of the former employees obtained an order to represent themselves and 1300 other former employees before filing the initial suit. However, during the course of the trial, an additional 3771 employees were added to the representative suit and apparently without following the procedure under Order 1 Rule 8 (1).

The Court of Appeal was alive to the failure to follow Order 1 Rule 8 (1) but held that the failure was an irregularity since addition of the 3771 employees to the representative suit was done without objection from counsel for the appellant. The Court noted as follows:

**"The application to add the 3771 plaintiffs/respondents was made orally in Chambers on 26th April, 2005. Whereas the defendant/appellant did not object to the prayer, court did not pronounce itself and the matter was adjourned. No objection was made at the trial by counsel for the defendant/appellants. The appellant was aware that the 3771 other persons sought to be added were also former employees of Uganda Railways Corporation.**

**Counsel for the appellant was present and did not object to addition of the 3771 former employees of the appellant.**

**...**

**We therefore find that the appellant was not occasioned any injustice by the Court's failure to make an order. The appellant had no objection to the addition of the 3771 plaintiffs. Further, the 3771 plaintiffs' names were already listed in Exhibit P1 which was attached to the pleadings."**

I agree with the above reasons for the Court of Appeal's conclusion that the appellant suffered no miscarriage of justice owing to the procedure adopted in adding the additional employees. After all, the employees were added with the permission of the trial Court and without any objection from the appellant's counsel. Thus, whereas it is true that under Order 1 Rule 8 (1), a representative requires the permission of the Court before filing a representative suit, where the Court gives permission for representation during the trial but without objection from counsel, such permission will be valid since there was no objection. It may be stated that in such circumstances, no miscarriage of justice was occasioned.

I would therefore also disallow ground 4.

## Grounds 3 and 4 of the appeal and Grounds 1 and 2 of the cross appeal

In the original suit, 5104 or so former URC employees sought declarations and orders arising from the termination of their employment. They sought a declaration for payment of pension under the Pensions Act and for orders of payment of bonus arrears, rent refund and other benefits they alleged were owed to them by URC. The Court of Appeal found that they were not entitled

to pension under the Pensions Act, and this conclusion has been challenged under ground 1 of the cross appeal. The Court of Appeal also found that they were not entitled to the benefits claimed and this has been challenged under ground 2 of the cross appeal. I agree with the conclusions and reasons of the Court of Appeal relating to grounds 1 and 2 of the cross appeal. I would therefore disallow those grounds.

Ground 5 of the appeal is related to the above-highlighted grounds of the cross appeal and raised the question of whether the employees adduced evidence to prove their case. The appellant challenged the Court of Appeal's finding that several of the respondent's documents were properly exhibited and relied on by the trial Court. documents allegedly exhibited in support of the appellant's case. The Court of Appeal stated that:

> **"In the evidence of PW1 Ekwaru David, the listed documents were presented within his testimony from page 206 to 214 of the record. PW1 was examined and cross examined on the same exhibits. An extra 2 documents were also tendered in Court and marked exhibit 112 and 113 and the appellant's counsel did not object to the said documents. We therefore find that the exhibits were clearly marked and properly tendered into Court."**

In my view, the evidence adduced for the employees (the documentary evidence inclusive) could not prove the case against the appellants. Owing to the numerous employees who were part of the representative suit, it was necessary to adduce evidence profiling the diverse circumstances of each employee so as to prove various matters, such as the contents of each employee's respective employment contracts and the terminal benefits payable under those contracts. This evidence was not adduced and therefore the employees' respective cases should not have been allowed.

For the preceding reasons I need not decide grounds 5 and 3 of the appeal.

## Grounds 6, 7, 8 and 9 of the appeal and ground 3 of the cross appeal

These grounds relate to the nature of the remedies granted by the Court of Appeal. The Court of Appeal only partially allowed the appellant's appeal in that Court and granted several remedies in favour of the respondents. In

ground 3 of their cross appeal, the respondents appeal against the Court of Appeal's order on costs. Having earlier found that the respondents' suit in the trial Court ought to have failed, I would allow grounds 6, 7, 8 and 9 of the appeal and set aside the remedies granted to the respondents. Ground 3 of the cross appeal would fail.

For all the above reasons, I would find that the appeal substantially succeeds and make the following orders:

a) The decision of the Court of Appeal is set aside.

b) There is instead substituted an order dismissing the respondents' suit in the High Court.

c) Each party shall bear its own costs since the appellant is a public corporation and the litigation in the present case was necessary to clarify the respondents' rights.

Dated at Kampala this ..... 6th ..... day of..... December .....2023.

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**Elizabeth Musoke**

Justice of the Supreme Court

THE REPUBLIC OF UGANDA,

IN THE SUPREME COURT OF UGANDA AT KAMPALA

(CORAM: MWONDHA, TIBATEMWA - EKIRIKUBINZA, CHIBITA, MUSOKE, MADRAMA JJSC)

CIVIL APPEAL NO 07 OF 2019

UGANDA RAILWAYS CORPORATION} ..... APPELLANT

VERSUS

EKWARU D.O. & 5104 OTHERS} .....RESPONDENT

*(Appeal against from the Judgment of the Court of Appeal in Court of Appeal Civil Appeal No. 23 of 2007 Hon. Mr. Justice Alfonse Owiny - Dollo, DCJ, Hon. Mr. Justice Kenneth Kakuru, JA and Hon. Mr. Justice Stephen Musota, JA at Kampala dated 17th April, 2019)*

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA, JSC

I have read in draft the Judgment of my learned brother Hon Mr. Justice Mike Chibita JSC and I agree with the detailed background that he has given. I do not need to repeat the same here save for discussion of the question of whether the matter before the court is time barred. I would partially allow the appeal with the same order as to costs in that each party shall bear its own costs and my reasons are stated hereunder:

I further accept the conclusion that the question of time bar is a fundamental question that can be raised for the first time in the Court of Appeal even if it was not a ground of appeal based on the decision of the trial judge where it was never raised in terms of the requirements of rule 86 (1) of the Judicature (Court of Appeal Rules) Directions. A fundamental point of law affecting the competence of the court can be raised at any time and overrides questions of pleadings. It has been held that any illegality once brought to the attention of court overrides all questions of pleadings including any admissions made therein in **Makula International vs. His**

Eminence Cardinal Nsubuga and another reported in [1982] HCB 11. In that decision, the Court of Appeal held that it could interfere with a taxing officer's order even where the appeal from the order was incompetent based on the proposition that a court of law cannot sanction what is illegal and an illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. The court cited with approval **Belvoir Finance Co. Ltd vs. Harold and G Cole & Co. Ltd [1969] 2 ALL ER 904** and Judgment of Donaldson J at page 908. Further they approved the doctrine in **Mercantile Credit Co. Ltd v Hamblin [1964] 1 ALL ER 680**. In that action illegality had not been pleaded and the defendant sought to rely on it as a defence. The plaintiff objected to the point being raised on the ground that it was not pleaded and John Stephenson J held that counsel was not acting improperly to draw courts attention to an illegality of the transaction and "on the contrary it was counsel's duty, however embarrassing to prevent the court from enforcing an illegal contract". In the premises the issue of the limitation of actions can be raised.

I further concur with the conclusion of Chibita JSC that the question inter alia is whether section 52 of the Railways Corporation Act, is applicable in the circumstances and bars the action in the High Court for having been filed outside the limitation period. Being a matter that affects workers some of who have recurring claims, I would however not take that route to resolve the appeal because, in the circumstances of this appeal, the question of law before the trial Court ought to have been what formula to apply to calculate retirement or pension benefits for those lawfully entitled to it and this can be dealt with as a pure question of law set for interpretation of the Court. This point of law arises from the pleadings of the parties in the High Court and is a matter that was presented for interpretation to the High Court. The question would not be who is entitled because it was averred that it was the formula for those lawfully entitled. The remedies sought after interpretation were only consequential remedies.

In the High Court, the central issue was whether pension should be calculated in accordance with the Uganda Railways Corporation Staff Rules and the 1970 Staff Regulations adopted by the Uganda Railways Corporation Board. A retired or retrenched worker or those whose employment services had allegedly unlawfully been terminated demanded compensation under the Pensions Act cap 286 laws of Uganda. For that purpose, I will quote the plaint at paragraph 4 (1) (a). For ease of reference and for purposes of my judgment, I would quote it as averred in the plaint as follows:

> "4. The plaintiffs claim against the Defendant it is for: -
>
> (i) a declaration that the plaintiffs for themselves and 1330 others they represent being former employees of the Defendant, are entitled to: -
>
> (a) pension, in respect of *those former employees legally entitled to pension, to be calculated in accordance with the provisions of the Pensions Act and the Regulations made thereunder, as and when amended*; (emphasis added)
>
> (b) *other terminal benefits particularised in paragraph 5 (c) herein below, to be calculated in accordance with the provisions of the law at the rates prevailing from the date of retirement of the plaintiffs and those they represent*; (Emphasis added)
>
> (c) the payment of unpaid balance of the terminal benefits arising out of the underpayment and/or non-payment of the plaintiff's terminal benefits by the Defendant.
>
> (ii) an order that the plaintiffs for themselves and those they represent be promptly paid their pension together with the arrears thereon and their other terminal benefits, calculated in accordance with the provisions of the Pensions Act and the Regulations made thereunder, as and when amended, with effect from the day after expiry of their respective notices and/or periods of accumulated leave of each of the Plaintiffs and those they represent;"

Further facts are averred in paragraph 5 of the plaint has categories of the claims that are material in consideration of the issue of time bar. Paragraph 5 of the plaint provides as follows:

> "the facts constituting the cause of action arose as follows: -

(a) the plaintiffs and those they represent were at all material times employees of the Defendant;

(b) on various dates from the 1986 to the year 2004 the Plaintiffs and those they represent were retired, retrenched or had their services unlawfully terminated by the Defendant;

(c) *in the course of carrying out the said retirement, retrenchment and/or termination, the defendant underpaid the plaintiffs their terminal benefits; refused or failed to pay the plaintiffs some of their terminal benefits, refused to pay the plaintiffs their pension in accordance with the provisions of the Pensions Act and the Regulations made thereunder....*" (emphasis added)

Subsequently, the particulars of underpayment are given in the plaint and specifically the claim of each of the plaintiffs was annexed in documents to the plaint. What should be highlighted is that there are three categories of plaintiffs' claims. There are those who were retired, those who were retrenched and those whose had their services allegedly unlawfully terminated. It is only some of the terminal benefits which allegedly were not paid. It follows that the question of time bar in each of the circumstances may not be handled in the same way.

Firstly, a person who is retired is entitled to pension and the question of what rate the benefits should be calculated depends on what applicable law is in force and should be applied in the calculation of pension. This remains a live question as long as the person remains eligible for pension (remains alive). Secondly the issues of those who are retrenched is that they are entitled to a retrenchment package which is not even in dispute. The question is how the retrenchment package should be calculated, and whether it can be subjected to the issue of time bar? Where there is a question as to which law to apply in the calculation of the pension, what is the cause of action? This delimits the extent of the question of time bar as the issue of calculation is a point of law that can be interpreted for the retrenchment package but can be concluded without reference to any claim. In fact, the question concerns the rate at which a retrenchment package should be paid because the corporation acknowledges that it paid the

relevant packages and the only question is under what law it should be calculated.

The contention of the plaintiff was therefore that they were underpaid. Is the consideration of that question time barred? It is a question of law as to which law should be applied in calculating the package. It is on the basis of advancing a new or different law as the basis for the calculation that the plaintiffs alleged that they were underpaid. On the other hand, the defendant who is now the appellant alleged that the applicable law was the one it had utilised. The defendant who is now the appellant never denied liability for payment under the appropriate law for all categories of claimants whether retired persons, those entitled to notice etc. but only alleged that it had paid in accordance with the applicable law and therefore the plaintiffs were not entitled to any more payment. In other words, they were not underpaid as the appropriate law was applied in the calculation of the particular category of claimants or plaintiffs.

I have considered the averment of the defendant at paragraph 4 of its written statement of defence where it is averred that the defendant without prejudice stated that the plaintiffs were lawfully retired and paid their full accrued salaries, allowances and terminal benefits. The amount was calculated in accordance with the Rules and Regulations of the Corporation applicable to the appointment of the plaintiffs. I do not need to state any more facts averred by the defendant. I have instead considered the agreed facts which were set before the trial judge and the issues.:

As far as the agreed facts are concerned, there are three facts which were agreed to, namely:

a. The plaintiffs are former employees of corporation terminated on various dates.
b. Some of them were paid some benefits and pension.
c. Some other claim they were not paid at all while others claim they were underpaid.

Issues

1. Whether there was non-payment of or underpayment of plaintiffs' terminal benefits by the defendants.
2. Whether the plaintiffs are entitled to the reliefs claimed.

The learned trial judge entered judgment in favour of the plaintiffs and this appears in the lead Judgment of Chibita, JSC as follows:

1. A declaration that the respondents are entitled to pension calculated in accordance with the Pensions Act such that all benefits particularized in paragraph 5 of the plaint together with arrears of pension and allowances fully recalculated to avoid the underpayments outlined in the evidence are due and payable and shall be paid promptly together with terminal benefits.

2. Orders for the refund and payment of house rent, bonus arrears for the Nalukolongo staff, a refund of wrongly deducted taxes and or advances and such other dues and claims payable.

3. General damages of shillings 500,000/= for each of the plaintiffs now respondents.

4. Interest on the sums payable at 17% per annum from the date of filing till payment in full

5. Costs of the suit.

The appellant was aggrieved and appealed to the Court of Appeal on the following grounds:

1. The learned trial judge erred in law when he failed to establish and hold that the respondent's action /suit was time barred both under the Uganda Railways Corporation Act and the Limitation Act.

2. The learned trial judge erred in law and fact in entering judgment against the appellant in favour of 3771 respondents who were not proper parties to the suit.

3. The trial judge erred in law and fact in holding that the respondents proved their case against the appellant which they substantiated in the exhibits and oral testimony of Ekwaru (PW1).

4. The learned trial judge erred in law and fact in holding that;
   a) The respondents' claims are well founded in the Pension Law and the Constitution of Uganda.

   b) The respondents are entitled to pension calculated in accordance with the Pensions Act.

5. The learned trial judge erred in law and fact when he failed to properly evaluate the evidence on record thereby reaching erroneous holdings that;
   a) The respondents were underpaid

   b) The respondents are entitled to a refund or payment of house rent, bonus arrears for the Nalukolongo staff, refund of wrongfully deducted taxes or advances and such other dues claimed and payable.

6. The learned trial judge erred in law and fact in awarding the respondents interest on the sums payable at the rate of 17% per annum from the date of filing the suit till payment in full.

Clearly what was presented to the Court of Appeal for resolution on appeal revolved on the applicable law to carry out calculations. I just need to emphasise that the actual dispute between the parties was on the applicable laws and regulations to be used in the calculation of pension and other terminal benefits for those who were entitled to it under the law in

light of the pleadings before the trial court. The claim did not cover those who are not entitled to pension under the law and this is reflected in the judgment of the Court of Appeal. Firstly, the Court of Appeal set aside the award of the High Court on the ground that the applicable law for calculation was the 1970 Pension Regulations which were adopted by the Uganda Railways Corporation Board and the Uganda Railways Corporation Rules, 1994. Secondly it found that the respondents are not entitled to a refund or payment of house rent, bonus arrears for Nalukolongo staff, refund of taxes or advances and such other dues claimed and payable which were not proved.

In that context, paragraph 4 (1) (a) of the Plaint speaks volumes about the nature of the issue before the High Court. It avers that:

> "(i) a declaration that the plaintiffs for themselves and 1330 others they represent being former employees of the Defendant, are entitled to: -
>
> (a) pension, in respect of those former employees **legally entitled to pension**, to be calculated in accordance with the provisions of the Pensions Act and the Regulations made there under, as and when amended.

**Who are those legally entitled to pension?** Can the calculation under the alleged proper law be time barred? Are they not entitled to pension for the rest of their lives? The answer is, if the regulations provide so, and therefore, any under payment has aspects of both the past and the future and is not time barred. Further the determination of the right regulation to be applied is not time barred for the recurring rights to pension in future.

For a better context, the issue of which law was applicable to calculate benefits was the subject matter of the opinion of the Solicitor General on two separate occasions before the parties finally had it disclosed as an issue before the court for determination and this issue is revealed in the pleadings of the parties before the trial court that I have referred to above. The first letter is dated 31st of January 2005 and is addressed to the **Director Utility Reform Unit, Ministry of Finance, Planning & Economic Development**. The letter in part reads as follows:

RE: UGANDA RAILWAYS CORPORATION WORKERS PENSION STATUS.

I refer to your letter ref: PUSRP 13.06.00 dated 23rd July, 2004 regarding the above subject.

This is to advise as follows:

1) The Pensions Act (Cap. 286) applied to the workers when the East African Railways Corporation was still in existence. It therefore ceased to apply when the Uganda Railways Corporation Decree, 1977 (the precursor of the Uganda Railways Corporation Act, cap 331) was issued.
2) Section 23 (1) and (2) of the Uganda Railways Corporation Act gave the Corporation's board of directors the power to engage employees of the Corporation upon such terms and conditions as it deems fit [including the aspect of pension]. Therefore, in calculating the workers' pensions, the applicable formula shall be that prescribed by the terms and conditions of service that were determined by the Board under this provision. Note that the provision is a mirror image of section 12 of the Decree.
3) The Solicitor General's letter of 2 April 1993 (ref: C 21) is a difference subject altogether. Therefore, the views therein are not relevant in this context.

The second letter is a second opinion of the Solicitor General on the same issue of applicable law to retirement benefits and is dated 30th May 2005 barely four months later. It essentially repeats the same advice. I would however quote the two issues addressed by the Solicitor General and framed by the Solicitor General which were:

1. Whether or not the employees of Uganda Railways Corporation, a successor body of the East African Railways Corporation are acknowledged as public officers under the Pensions Act and therefore entitled to the computation of pension provided therein.

2. Whether or not the legal advice of the then Solicitor General contained in the letter to URA Ref: C.7/2 of 8th September, 1997 is applicable in this matter.

On the first question, the Solicitor General concluded that the Pensions Act cap 286 ceased to apply when the Uganda Railways Corporation Decree, No.

14 of 1977 came into existence establishing a separate Railways Corporation for Uganda under section 12 (1) thereof and the Board of the corporation was given powers to appoint or employ staff on such terms and conditions as it deemed fit for such employees. The law was succeeded by the Uganda Railways Corporation Act cap 331 and section 23 (1, (2) and (3) where the board of directors have similar powers. In addition, the Solicitor General stated that section 46 (1) (a) of the Act empowers the board to make rules relating to the grant of Pensions, Gratuities and other retirement benefits to employees of the Corporation. He concluded that in calculating the workers' pension, the applicable formula shall be that prescribed by the terms and conditions of service determined by the Board under the Uganda Railways Corporation Act.

On the second question, he repeated the advice that the letter of the Solicitor General dated 2 April 1993 concerns a different subject matter altogether and was not relevant. In that letter the issue was whether or not former employees of the East African Posts and Telecommunications Corporation who had been recruited into the Uganda Government Service were entitled terminal benefits (when they were still in service). He advised that the opinion of the office of April 1993 should not be used to misrepresent the legal position pertaining to the pension payable to workers of the Uganda Railways Corp Corporation on this point and at the particular time.

As far as this question is concerned, the High Court allowed the suit on which law was applicable and held that; A declaration issues that the respondents are entitled to pension calculated in accordance with the Pensions Act such that all benefits particularized in paragraph 5 of the plaint together with arrears of pension and allowances are fully recalculated to avoid the underpayments outlined in the evidence which are due and payable and they shall be paid promptly together with terminal benefits. On the other hand, the Court of Appeal, in their detailed judgment found that the applicable law was the 1970 Pension Regulations which were adopted by the Uganda Railways Corporation Board and the Uganda

Railways Corporation Rules, 1994. This rhymes with the opinion of the Solicitor General and meant that the appellant in terms of their WSD stated this formula and had applied the right formula.

In the circumstances, to hold that the suit was time barred would be to say that the suit was incompetent in the first place and the law could not be established as has been done. Yet the issue of pension rights continues and recurs every month.

I further wish to say something about the provisions of law relating to limitation under the Uganda Railways Corporation Act which the Court of Appeal dismissed. In my analysis the issue could be resolved simply as inapplicable to pension claims which are recurring. The Court of Appeal disallowed other claims. In that context we need to examine critically the grounds of appeal in this court which are that:

1. The learned Justices of the Court of Appeal erred in law and fact in failing to hold that the respondent's suit is barred by the time and further holding that:

2. Section 53 of the Uganda Railways Corporation Act is discriminatory.

3. Non-compliance with section 53 of the Uganda Railway Corporation Act does not render a suit filed against the Appellant incompetent.

4. The learned Justices of the Court of Appeal erred in law when they held that a point of law not brought to the attention of the trial court cannot be raised as a ground of appeal on appeal.

5. The learned Justices of the Court of Appeal erred in law and fact when they erroneously relied on the 19th August, 1998 as the date of termination of the respondents' employment and thereby arrived at a wrong finding that the suit was not barred by time.

6. The learned Justices of the Court of Appeal erred in law and fact when they held that failure by the trial court to make an order to add the additional 3771 persons as plaintiffs to the suit was a curable error and did not cause any prejudice to the appellant.

7. The learned Justices of the Court of Appeal erred in law and fact when they held that the respondents' documents were clearly marked and properly tendered in court as exhibits.

8. The learned Justices of the Court of Appeal erred in law and fact in awarding the respondents general damages of shillings 500,000/= each without any legal basis.

9. The learned Justices of the Court of Appeal erred in law and fact in awarding the respondents interest of 17% per annum on the sums payable till payment in full without any basis.

10. The learned Justices of the Court of Appeal erred in law and fact in awarding the respondents two thirds (2/3) costs of the appeal without any basis.

11. The learned Justices of the Court of Appeal erred in law when they failed to award the Appellant costs of the Appeal and the court below.

Grounds 1 – 5 relate to the issue of limitation of the suit. It is safe for purposes of analysis to establish whether the time bar issue was necessary since the appeal of appellant in the Court of Appeal substantially succeeded on the point of law as to what the basis of calculation of pension and other terminal benefits ought to be. It follows that the other questions by which the appellant was aggrieved remained the concerns due to the addition of 3771 new plaintiffs in the course of the trial. This is appealed at ground 6 of the appeal and particularly, the Court of Appeal found that there was an oral application in the course of proceedings on the 26th of April 2005 for the addition of the additional parties and the defendant had no objection to the

application. They found that the defendant was not prejudiced by the addition. The claim of the plaintiffs was not amended and remained the same. Practically, it is the award of general damages to each respondent and interest thereon by the Court of Appeal (COA) that aggrieved the appellant.

The order of the COA is that the plaintiffs who were respondents in that Court were to be paid Pension under the 1970 Pension Regulations which were adopted by the Uganda Railways Corporation Board and the Uganda Railways Corporation Rules 1994. I note that the plaintiffs who were now respondents could not have won on this point because this was the assertion of the appellant in their WSD. It is necessary to demonstrate that this holding of the Court of Appeal favoured the appellant. The Written Statement of Defence of the appellant avers as follows:

> (5). In reply to paragraphs 5 and 6, the Defendant shall aver in the alternative and without prejudice to the above that the plaintiffs did not suffer any loss or damage and are not entitled to the amounts claimed since retirement was determined in accordance with their contracts of employment and the Rules and Staff Regulations of the Corporation applicable to their employment.
>
> (6) In reply to paragraph 7 of the plaint and without prejudice to the denial in paragraph 2, the Defendant shall aver that the Plaintiffs were not wrongfully or unlawfully evicted from the Defendant's Houses, instead a grace period was given them to quit the premises they were occupying.
>
> (7) In reply to paragraph 8 of the Plaint, the Defendant shall reiterate the fact that the Plaintiffs were fully paid their accrued salaries, allowances, terminal and retirement benefits and the calculations of all the payments were based on current formula applicable in Uganda Railways Corporation, Defendant Corporation.
>
> (8) In reply to paragraphs 9 and 10 of the plaint, the Defendant shall aver that the Plaintiffs have no cause of action and did not suffer any loss or damage and are not entitled to any general damages since this was taken care of by the terminal benefits and salaries in lieu of notice.
>
> (9) The defendant shall at the trial rely on various documents including but not limited to staff circulars, Staff Regulations 1994, East African Railways

Corporation Pensions Regulations 1970, Uganda Railways Corporation (URC) Staff Circular No. 5 of 1990 and correspondences to Heads of Department. ..."

In focus is the averment that the plaintiffs were paid under the existing regulations. The Court of Appeal agreed and allowed the appeal and that they held that:

1. The respondents are entitled to Pension calculated under the 1970 Pension Regulations which were adopted by the Uganda Railways Corporation Board and the Uganda Railways Corporation Rules 1994. (I wish to note that the plaintiff averred that their claim was for those lawfully entitled to pension from which arose the issue of whether there was underpayment because of calculation under the existing regulations and not Pensions Act).

2. The respondents were not entitled to (i) refund or payment of house rent (ii) Bonus arrears for Nalukulongo staff, (iii) Refund of taxes or advances, (iv) such other dues claimed and payable which were not proved.

3. The appellant shall pay the respondents general damages of 500,000= (Five hundred thousand shillings.) each.

4. The respondents are awarded interest on the sums payable at the rate of 17% per annum from the date of filing the suit till payment in full.

5. The appellant shall pay the respondents 2/3 (two thirds) costs of this appeal.

The respondents had lost the appeal because order (1) was in favour of the appellant and this was the main basis of their claim that they had been underpaid. The respondents' case was that pension had to be calculated in accordance with the Pensions Act cap 286 and they lost this point absolutely. The appellant won on this point as it averred in its WSD that pensions and benefits were calculated under its regulations as adopted by

the Board. In the premises it is odd that there was an award of general damages in favour of the respondents in the Court of Appeal and I find no basis for the award of general damages to the respondents as the plaintiffs had lost on appeal. The problem in essence is the award of shillings 500,000/- to each plaintiff or respondent for a point they lost and in addition the original plaintiffs had 3771 others added to their number of 1330. This makes 5101 respondents to be paid general damages. Further the Court of Appeal awarded each of them interest on the 500,000 general damages at 17% per annum from the date of filling the suit until payment in full. Yet the Court of Appeal also specifically held that claims were not proved and set aside the judgment of the High Court. The resolution of the Point of law could not have led to an award of general damages. Apart from resolving the interpretation question, there was no other claim proved or allowed by the Court of Appeals. On the issue of the applicable law, the interpretation of the Solicitor General and the Court of Appeal is the correct position. Pension is calculated under the law applicable to the Uganda Railways Corporation and not the Pensions Act and the cross appellants fail on this issue.

Finally, the question is who are those averred in the plaint as lawfully entitled to pension and terminal benefits? The suit revolved on what formula to be used to calculate the benefit of those lawfully entitled as averred in the plaintiff paragraph 4 (1) (a). Those added did not amend this claim.

The claim in the Plaint at paragraph 12 (i) (a), (b) and (c) was not allowed as it was for calculation under the Pensions Act cap 286. Paragraph 12 (ii) was for prompt payment and not applicable as it falls with disallowing of the Pensions Act calculations. Paragraph 12 (iii) – (v) were disallowed by the Court of Appeal. In relation to Paragraph 12 (vi) only general damages were allowed but without any basis. In paragraph 12 (vii) interest was allowed at 17% on general damages as there was no other award. The question of whether calculation was to be in accordance with the Pensions Act or URC Regulations adopted by the Board was a point of law with no quantum of claim and the plaintiffs lost at the Court of Appeal while the Appellant (URC) won.

Costs are not an issue and ought to follow the event and the appellant ought to get the costs.

I do not see the pertinent claim on the basis of which to hold that the suit is barred by the law when the suit was to determine the applicable law to be used to calculate Pension. Lastly section 52 of the URC Act applies to situations where as stated in section 52 "*there was any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or any such duty or authority...*

In this situation the Court ought only to have interpreted the law for those who was lawfully entitled to payment of Pension and Terminal Benefits as expressly pleaded in the plaint.

I would allow the appeal against award of general damages and interests of 17% per annum. I would also allow the appeal against the order as to costs and I would have awarded costs to the appellant but for what I state below.

It would be just for each party to bear its own costs of the appeal because the issue of law is one of public interest.

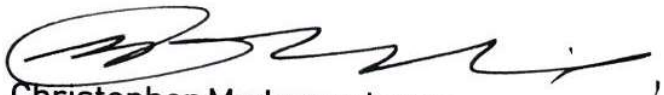
I would not set aside the orders of the Court of Appeal on how pension and benefits for those lawfully entitled to it are to be calculated. This is an interpretation of the law. The appellant ought to know who are lawfully entitled under its regulations to such payments and the trial Court judgment was set aside and the Court of Appeal judgment did not make any award to any person specifically. In any case the Court of Appeal found that the respondents had not proved certain specific claims.

In the premises, those who are lawfully entitled to pension and terminal benefits (if any) are only known to the appellant as an employer and if there are any who were not paid what was lawfully theirs, such payment would be computed by the appellant together with interest for any delay in payment from the filing of the suit till judgment of the Court of Appeal at a

rate of 14% per annum. Further interest would be payable from the date of judgment of the Court of Appeal at 6% per annum till payment in full only on accrued benefits.

In the premises, I would defer from the conclusion of Chibita, JSC by which he allowed the appeal in its entirety having found that the suit was barred by limitation law. In my judgment, the suit remained for interpretation of law to establish under what law terminal benefits are payable to former employees of the appellant who are legally entitled. This covers both past and future lawful claims. In the premises, I would only partially allow the appeal with each party to bear its/his/her own costs of the appeal.

Dated at Kampala the 6th day of December 2023



Christopher Madrama Izama

Justice of the Supreme Court