

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM SUB DISTRICT REGISTRY)
AT DAR ES SALAAM
CIVIL CASE NO. 123 OF 2020

PENIEL K. YOHANA..... PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

THE PERMANENT SECRETARY, MINISTRY OF FINANCE2ND DEFENDANT

JUDGMENT

Date of last order: 01/03/2023

Date of Judgment: 05/04/2023

E.E. KAKOLAKI, J.

The Plaintiff imaged as Peniel K. Yohana by way of plaint instituted the instant suit against the above-named defendants praying for the judgment and decree on the following orders:

- (a) Payment of pension which the 2nd defendant withheld for the period between 2013, up to the month of April 2019, at the rate of Tsh. 856,600 per three (3) months being pension payable to the plaintiff.
- (b) Specific damages at the tune of Tsh. 7,000,000/=.
- (c) General damages to the tune of Tsh. 30,000,000/=.

- (d) An order for the return of the name of the plaintiff in pensioners' list and payment of pension to him at the rate of Tsh.856,600 payable per each three months.
- (e) Costs
- (f) Any other or further reliefs as the court shall deem fit and just.

The brief facts giving rise to this suit as deciphered from plaint are not complicated to tell. The plaintiff is a retired officer as primary school teacher at Hedaru area, Same District in Kilimanjaro Region, with advanced age of 83 who served the Government until 1993 when he retired. After retirement plaintiff was dully paid his terminal dues plus pension emoluments in lump sum but later on resumed in the pension scheme and continued to receive monthly pension up to the month of January, 2013 when allegedly the 2nd defendant arbitrarily and without notice ceased the payments and removed his name from the pensioners' list while aware of the fact that he was still alive. Following that alleged ill treatment the plaintiff wrote several letters to and personally visited the 2nd defendant's office several time to establish the reason for such cessation of his pension payment for six (6) consecutive years only, to be given verbal promises most of which have never be fulfilled. It is from such alleged uncalled for cessation of payments without notice and

reasons to the plaintiff that subjected him to shock of missing the pension hence starvation distress, humiliation and ailment, thus present suit is preferred claiming for the reliefs alluded to above.

On their side the plaintiffs disputed the plaintiff's claims while deposing that, the damages and reliefs claimed by the plaintiff are meritless and baseless as his pension payment resumed and is paid to date with deductions on monthly basis as set off of the outstanding arrears derived from the excess amount which he received after restoration of his name in the pension payment list in 2004 following his earlier decision of opting for full payment of his pension emoluments in 1994.

Throughout hearing of this case, the plaintiff enjoyed the legal services of Mr. Stanslaus Halawe while on the adversary parties, Mr. Evelius Elius Mwendwa, learned State Attorney legally fended them. Before the start of hearing and after consultation with the parties basing on the pleaded facts in their pleadings, the following issues were framed by the Court for determination of parties' dispute:

1. Whether there were justifiable reasons for ceasing plaintiff's pension.

2. If the first issue is answered in negative, whether the plaintiff suffered damages.
3. To what reliefs are the parties entitled to.

In answering the above issues the plaintiff testified as sole witness (PW1) and relied on two (2) exhibits which are different correspondences by the plaintiff (exh. PE 1) and bank statement (exh. PE2). As for the defendants also paraded one witness in defence, Janepher Josephat Ntangeki (PW1) and relied on seven (7) documentary exhibits. These are two forms/letters filled by the plaintiff (exh. PE1), payment vouchers in respect of Tshs. 614,913.00 to the plaintiff (exh. PE2), Public Notice '*Tangazo*' (exh. PE3), Computer processed data sheet (exh. PE4), a letter dated 18/06/2020 to the plaintiff on the deductions (exh. PE5), payment history of the plaintiff (exh. PE6) and vendor registration form and copy of plaintiff's NMB ATM card (exh. PE7) collectively. At the conclusion of hearing counsel for parties sought leave of the Court which was cordially granted for them to file the final submission, and I am very much appreciative of their time dedicated to assist this Court reach a just decision.

In this judgment I am intending to address each and every issue in seriatim if need be. In the same beats, I am not intending to reproduce the whole

evidence as adduced by the parties as I will be referring the same in the course of this judgment. And in so doing, I shall be guided by the principle governing proof of civil cases that, he who alleges has the duty to prove the allegations, the principle which is promulgated under section 110(1) and (2), and 112, of the Law of Evidence Act, [Cap 6 R.E 2019].

Similarly it is apparent in that civil proceedings, the party seeking to obtain judgment in his favour relying on certain facts also bears the evidential burden of proving their existence and the standard of proof is on a balance of probabilities or preponderance of probabilities. See the case of **Anthoni M. Masanga Vs. Penina (Mama Ngesi and Another** civil Appeal No 118 of 2014 CAT (unreported) and the case of **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 and section 3(2)(b) of the Law of Evidence Act. With that knowledge in mind therefore, this court is set to decide whether the burden of proof has been sufficiently discharged by the plaintiff.

To start with the first issue as to whether defendants were justified in ceasing plaintiff's pension, from the evidence adduced it is not in dispute that, the plaintiff, a teacher by profession retired 1993 and chose to be paid his pension in lump sum before he was removed from pensioners payroll in

1994. And that, he was restored in the pensioners payroll ten (10) years later, after the proclamation was passed by the then President in a view of reinstating all retired pensioners who had received their pension in lump sum basis upon their application as exhibited in exhibits DE1 collectively and DE4. It is also uncontroverted fact as per both parties' evidence that, after being restored the plaintiff was receiving Tsh.285,533.33/= monthly pension up to January 2013 when the 2nd defendant ceased it. What remains in dispute is the reason(s) for cessation of that monthly pension payments which were resumed lately in 2020 six (6) years passed, with deductions in which Mr. Halawe submits were unjustifiably effected for not according the plaintiff with the right to be heard before the same were made.

In his evidence PW1 testified that, after restoration in the pensioners' payroll in 2004 basing on his application, following public announcement to all retirees entitled to be restored, he started receiving monthly pension of Tsh.285,533.33/= basing on the rank of teacher grade 'A' which he had obtained at the time of his retirement, and continued to received it up to January 2013 when the 2nd defendant with malice ceased the same without notice. Relying on letters and his NMB Bank statement with Account No. 40308301055 reflecting cessation of his monthly pension (exhibit PE1

collectively and exh. PE2) PW1 informed the Court of his follow up of the matter at the 2nd defendant's office to establish the reasons for such cessation without success, until when he instituted this case when he started receiving the same with massive deductions. He therefore claimed for Tsh. 856,000/= each quarter of the year counted from the year 2013 when the defendant ceased the payment to the date of judgment plus the damages including Tsh.20,000/= for each trip made from Hedaru to Dar es Salaam for follow ups of his matter and general damages for sustaining health issues out of 2nd defendant's unlawful act such as hypertension, the condition which subjected him to much more medical expenses.

When subjected to cross examination by Mr. Elias PW1 and asked to show evidence of going to the 2nd defendant's office, he said never made physical follow ups of his claim apart from admission of being paid 50,000/= per month since 2020. He however denied to have been paid in excess of what he was entitled to. When asked whether he has tendered any evidence to prove his medical conditions, he said he has tendered none.

In defence, defendants through DW1 informed the Court that after restoration of the plaintiff in the pensioners' payroll, he was mistakenly paid Tsh. 285,449.98 per month in aggregate of six months before the

government changed payment period into three months and later on every month, as instead of payment of Tshs. 20,077/= per month the rate was increased to Tshs. 50,000/= and later on to Tshs. 100,000. According to DW1, the plaintiff continued to receive Tsh. 285,549.98 per month up to march 2013 when the mistake was realized by the office. And that in order to establish existence of the paid person a decision to stop the payment affected erroneously was made in 2013 before the plaintiff surfaced in their office in 2014 when he was restored to the roll and started remitting his monthly pension of Tshs. 50,144.43/= but his NMB account was found to be dormant, thus payment could not be affected. DW1 further told the court that, in the same year 2014 up to June 2015, verification exercise of pensioners was carried out by the Government throughout the country but the plaintiff was amongst the people who failed to respond to the call hence, his pension payment was to be stayed, until when he appeared in 2019 and presented a new account number and officially identified himself thus, reinstated in the payment register/ payroll and continued to be paid his pension up to June 2022 as per bank statement in exhibit DE6. DW1 clarified further that, in 2019 when the plaintiff provided them with the new account number, the calculations were made to cover all the payments which were

affected to him erroneously at the rate of Tsh. 285,549. 98/= up to 2013 and a set off of the erroneously paid amount done, thus leaving the plaintiff indebted of Tsh.4million plus, the amount which he is aware as per exhibit DE5 that, Tsh. 49,889.07 is deducted monthly from his monthly pension of Tsh. 100,125.87 which he was entitled to receive from July 2015. Hence now he is receiving Tshs. 50,000/- per month vide account No. 21210025261 operated by NMB, as exhibited by the vendor form and photocopy of plaintiffs ATM (Exhibit DE 7). It was DW1's conclusion that, the claims by the plaintiff against the defendants have no basis and prayed the court to dismiss the same.

When subjected to cross examination by Mr. Halawe as to why staying the plaintiff's pension was stayed and when did they respond to his complaints, she explained that, they had to stop his payment after discovering the error of excess payment so that he could identify himself for sorting it out and that, the clarification letter for deduction of the plaintiff's monthly pension was made in 2020. She added that, the payment were stayed between 2014 and 2020 as the plaintiff never identified himself for pensioners' verification exercise. In re-examination, DW1 clarified that, where there is suspicious or

wrong payments to the pensioner the procedure is to stop payment, so as to the pensioner to identify to them for resolving the issue.

Now having considered the evidence above narrated, the contending submission by the parties counsel as well as the exhibits relied on by both sides, this Court is convinced that, the defendants were justified to cease the plaintiff's monthly pension and implement the continued deduction of the amount erroneously paid to him. It is so viewed as DW1 in her evidence made herself clear that, at the time of restoration of the plaintiff in the pensioners' payroll basing on the public announcement of the president's proclamation, the plaintiff was supposed to be paid 20,077 as exhibited exhibit DE3 but the plaintiff erroneously received Tshs. 285,449.98 each quarter of the year, from 2009 up to march 2013, the fact which he does not dispute though claiming to be justified by the rank he obtained at the retirement period, which rank he failed to prove. According to DW1 that was also a reason as to why after discovery of payment error they stopped effecting said payment to him as per their procedure. That aside, it is in DW1's evidence that, even after the plaintiff had shown up and restored in the pensioners payroll in 2014, it was noticed that, his account was dormant and further failed to appear for verification exercise of all pensioners in the

year 2014 to 2015, hence impossible for them to pay him his monthly pension, until 2019 when he presented a new account number. The plaintiffs' contention that, he made fruitless follow ups for not being provided with answers of his complaints, does not hold water as his letter exhibit PE1 dated 17/04/2014 speaks voluminously that, he got informed by the 2nd defendant's officers that, he was paid in excess. Further to that he was notified by the 2nd defendant vide the letter exhibit DE5 dated 18/06/2020 that, the pension paid to him in excess will be deducted from his monthly pension, the letter which he never challenged. With such cogent and unchallenged evidence by the defendants the plaintiff's assertion that cessation of his monthly pension was not justifiable I am convinced lacks basis. As alluded to above, the standard of proof in civil case is on balance of probability which means that, the court will believe and take the most probable evidence as it was well illustrated in the case of **Miller Vs. Minister of Pension** (1937) 2All ER 372, when quoted with approval by the Court of Appeal in the case of **Paulina Samson Ndawavya Vs. Theresia Thomass Madaha**, Civil Appeal No 45 of 2017 at Mwanza. (Unreported) where it was observed that:

*"If at the end of the case the evidence turns the scale definitely one way or the other, the tribunal must decide accordingly, but if the evidence is so evenly balanced that the tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. **It must carry a reasonable degree of probability, but not so high as required in a criminal case. If the evidence is such that the tribunal can say - We think it more probable than not the burden is discharged, but, if the probabilities are equal, it is not...**"*(Emphasis supplied)

Further to that, the Court of Appeal in the case **Berelia Karangirangi vs Asteria Nyalwambwa**, Civil Appeal No.237 of 2017 (Unreported) on the principle governing proof of civil case cited with approval the case of **In Re B** [2008] UKHL 35, where Lord Hoffman stated that:

"If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened."

In this case since the plaintiff is not disputing to have received Tshs. 285,449.98/- per month as pension from 2009 up to March 2013 without any justification in which the defendants through DW1 in exhibit DE5 have proved to the Court's satisfaction was not entitled to instead of minimum payment of Tshs. 20,077.00, I hold his assertion that, the said cessation of his monthly pension by the 2nd defendant was unjustifiable is unfounded and devoid of merit as there is no evidence proving the same on the balance of probabilities. The first issue is therefore answered in positive.

Next for consideration is the second issue as to whether plaintiff suffered damages which I think need not detain this court, since it is already held in the first issue that, there were justifiable reasons for cessation of plaintiff's monthly pension payments. Thus, the plaintiff cannot be said to have suffered any damages out of defendants' lawful and justifiable action. Hence the issue is also answered in negative.

Lastly is the third issue as to what relief are the parties entitled to is so obvious, as it is herein above found that, the 1st and 2nd issues have not been proved by the plaintiff to the standard required by the law which is on the balance of probabilities as stated in the case of **Barelia Karangi rangi** (supra). Thus, I find the plaintiff is not entitled to the claimed reliefs.

The above being the position, the resultant consequence is to dismiss the suit in its entirety, which order I do hereby enter.

Given the nature of the case and parties involved, I order each party to bear its own cost.

It is so ordered.

Dated at Dar es Salaam this 05th April, 2023.



E. E. KAKOLAKI

JUDGE

05/04/2023.

The Ruling has been delivered at Dar es Salaam today 05th day of April, 2023 in the presence of Mr. Evelius Mwendwa, State Attorney for the 1st and 2nd defendants and Ms. Asha Livanga, Court clerk and in the absence of the plaintiff,.

Right of Appeal explained.



E. E. KAKOLAKI

JUDGE

05/04/2023.



