



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL CAUSE NO. 749 OF 2007

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCELLANEOUS CIVIL CAUSE NO. 749 OF 2007

REPUBLIC.....APPLICANT

- VERSUS -

PUBLIC SERVICE COMMISSION OF KENYA.....RESPONDENT

BENJAMIN P. KUBO GAYLORD AVEDIPARTIES

EX PARTE:

MICHAEL ODONGO JOBITA

J U D G E M E N T

Michael Odongo Jobita filed the Notice of Motion dated 24.9.2007 seeking an order of mandamus to issue against the Public Service Commission of Kenya, Benjamin Kubo and Gaylord Avedi, to compel them to give to the Applicant a copy of the evidence (including documents tendered in evidence) of the disciplinary proceedings held in respect of him, resulting in his retirement under the 40-year rule, from the Public Service as communicated to him by the letter dated 2.5.1995 from the Solicitor General. The Notice of Motion was supported by a statutory statement and a verifying affidavit dated 27.6.2007 and a supplementary affidavit dated 24.7.2007.

The Applicant was a public officer having been employed in 1975. He was retired under the 40-year rule and he wrote to the Public Service Commission (MOJ P1) to ask them for evidence which was before it that supported the decision to retire him. The letter was written to the then Solicitor General, but there was no response (PMOI82). He also wrote to the Director Personnel Management who initiated the Government's intention to retire the Applicant under the 40-year rule (MOJ P3) but there was no response. The Applicant is convinced that the Public Service Commission and Government had no hand in his retirement but that a clique from the ranks made it up. In other words, the Applicant's contention is that he was hounded out of his office by other officers for no good reason. He exhibited the letters written

to him (MOJ 4), sending him on compulsory leave on 2.2.1993 and a further letter of 16.6.1994 in which the Applicant was responding to a letter dated 9.6.1994 on the issue of retirement on attainment of 40 years of age which he was challenging (MOJ 8). The Applicant also exhibited a letter dated 8.10.1992 in which the Attorney General appointed him to the United Kingdom Assistance to Legal Sector which the applicant believes, caused his early retirement due to vested interests.

The Respondent, though given ample time to respond, did not file any reply till the hearing date when counsel came in late after the Applicant had submitted. Mr. Menge, counsel appearing on behalf of the Respondent urged that the application contravenes Section 7 of the Service Commissions Act Cap 185 Laws of Kenya and the nature of the discrimination or bias alleged has not been disclosed.

That the issue before the court relates to employment and the Applicant is trying to hide behind Judicial Review to seek orders in which he should have sought in an ordinary civil case. Counsel also contended that the Notice of Motion contravenes Regulation 22 of the Public Service Regulations 2005.

Before I consider the merits of this application, I wish to point out that the instant Notice of Motion offends Order 53 Rule 1 (2) CPR which requires that the statutory statement should only contain the names and description of the Applicant, the reliefs sought and the grounds upon which it is sought while the evidence or facts should be contained in the verifying affidavit. The rule reads as follows:-

“(2) An application for such leave as aforesaid shall be made ex parte to a Judge in chambers, and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The Judge may in granting leave, impose such terms as to costs as to giving security it thinks fit.”

Under Rule 4 (1) it is the statement filed with the chamber summons seeking leave and the verifying affidavits filed with the chamber summons that are served with the Notice of Motion and are what should be relied upon to support the motion.

In **COMMISSIONER GENERAL, KRA – VS – SILVANO ONEMA OWAKI CA 45/2000**, the court of appeal did confirm the position that the statement should only contain the name and description of the Applicant, the relief sought and grounds on which it is sought while it is the verifying affidavit to contain the facts.

The Court of Appeal said:-

“We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of Rule 1 (2) of Order LIII . . .”

The Applicant seems to have placed all the facts in support of his application in the statement. The verifying and supplementary affidavits do not set out the facts that led to the Applicant’s retirement at all. All that the Applicant has

done is to exhibit documents supporting his case without the facts. That deals a fatal blow to his application because it is unsupported by facts or evidence.

The Applicant wants the Public Service Commission compelled to release a copy of the evidence and documents of the disciplinary proceedings in relation to him resulting in his retirement. An order of mandamus issues to compel a public body to perform its statutory duty if it has neglected or refused to do so. In this respect, the Applicant has not pointed to any statutory provision imposing a duty on the Respondent to release evidence or documents used in the disciplinary case to the Applicant. To the contrary, Section 7 and 9 which have been referred to by the Respondent's counsel seem to bar the release of communication of the Commission in legal proceedings without the consent of the President. Section 7 reads as follows:-

“7. No person shall in any legal proceedings be permitted or compelled to produce or disclose any communication, written or oral, which has taken place between a Commission, or any member or officer thereof, and the Government, or the President, or a Minister, or any officer of the Government, or between any member or officer of a Commission and its chairman, or between any members or officers of a Commission, in exercise of, or in connection with the exercise of, the functions of a Commission, unless the President consents in writing to such production or disclosure.”

Section 9 of Cap 185 also bars the disclosure of information without the consent of the President. Section 9 reads as follows:-

“9. (1) Without prejudice to any other law, no member or officer of a Commission nor any other person shall without the consent in writing of the President publish or disclose to any unauthorized person or otherwise than in the course of duty the contents or any part of the contents of any document, communication or information whatsoever which has come to his knowledge in the course of his duties under this Act or under any regulation made thereunder; and any person who knowingly acts in contravention of this section shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding one year, or to both such fine and such imprisonment:-

Provided that this subsection shall not apply in relation to the interchange of information between Commissions.

(2) Without prejudice to any other law, if any person having possession of any information which to his knowledge has been published or disclosed in contravention of subsection (1) of this section publishes or communicates to any other person, otherwise than for the purpose of any prosecution under this Act or in the course of his duty, any such information, he shall be guilty of an offence and liable to a fine not exceeding two thousand shillings or to imprisonment for a term not exceeding one year, or to both such fine and such imprisonment.?

The Applicant has not demonstrated that the evidence or documents he wants released to him fall outside the category of the communication or information envisaged under Sections 7 and 9 of Cap 185 Laws of Kenya.

It was also Mr. Menge's submissions that the application offends Regulation 22 of the Public Service Commission Regulations 2005. By that Regulation, with the consent of the President, the disciplinary powers vested in the commission are delegated to authorized officers, under Regulation 22 (b) which is in respect of officers in Job Group 'L'. If the officer has qualified for pension or gratuity, the officer is dealt with in accordance with Regulation (35 (b). That Regulation provides that the authorized officer, in a case of dismissal, shall forward to the Commission the record of the disciplinary proceedings together with his comments and it is upto the commissioner to decide what punishment to inflict or whether the person should be retired in public interest. It is not disclosed in what job group the Applicant was and it is not possible to tell whether or not the above Regulations apply to him. It was the duty of the Applicant to furnish to the court all the necessary information to support his case. Besides, I note that these Regulations were promulgated after the Applicant had already been removed from the civil service and would therefore not be applicable.

For the aforesaid reasons, apart from the application being incompetent, it also lacks merit and the Applicant has not met the threshold to warrant issuance of an order of mandamus. The application is therefore dismissed with each party bearing its own costs.

DATED AND DELIVERED AT NAIROBI THIS

28TH DAY OF SEPTEMBER 2010

R.P.V. WENDOH

JUDGE

Present:

Applicant in person

Muturi – court clerk