REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 1287 of 2005

WILFRED SAMSON MUTUA……...……PLAINTIFF

Versus

KENYA WILDLIFE SERVICE……DEFENDANT

JUDGMENT

This is an application for Judicial Review. By a Notice of Motion dated 16th September 2005, the applicant seeks the following orders:

1. That the court do issue an order of certiorari to quash the decision dated 1st August 2005 of the respondent, giving notice of termination of the applicant's contract appointment dated 11th November 2003.

2. That the Honourable court be pleased to issue an order of prohibition to prohibit the respondent from going ahead to terminate the applicants contract appointment dated 11th November 2003.

3. The respondent to pay costs of the application.

The applicant was granted leave to commence these Judicial Review proceedings on 9th September 2005. The applicant had filed a Chamber Summons dated 30th August 2005 in which he sought leave of the court and accompanying the Chamber Summons was the statutory statement, supporting affidavit sown by Wilfred Benson Mutua, the applicant. The requisite notice to the Registrar had been served on the Registrar on 30th August 2005.

The application was opposed and Alice Muita the respondent Head of Human Resources and Administration swore a replying affidavit. The applicants counsel is Mr. Ogeto whereas the respondents were represented by Muita Advocates.

Briefly the background of this suit is that the applicant entered into a contract of employment with the respondent on 11th November 2003 for a period of 3 years. Effective date was 11th November 2003 and it was to determine on 10th November 2006. He was employed as the Head of Information and Communication Technology Services. Further to the above, the applicant also signed a performance contract with the respondent for the period of 1st July 2005 to 30th June 2006. However on 5th August 2005 the respondent advertised the applicants position in the Daily Newspapers when he was still in that position and the contracts were subsisting. On 10th August 2005, the applicant received a notice of termination of his contract under a letter dated 1st August 2005. The services were to end on 30th September 2005 and the reason for the termination was that the applicant had been irregularly retained

beyond the mandatory retirement age. The applicant therefore contends that the respondents were in breach of rules of natural justice by failing to give the applicant a hearing before notice of termination was served and before the advertisement of the applicants position in the daily newspapers; that the notice of termination is irregular unlawful, illegal and unconstitutional; that the Director's actions amounted to an abuse of the court process and due process of the law; offends public policy and contrary to State Corporations Act and Amendments contained in legal notice 93/04.

The applicant relied on the following authorities:

1. **ABDUL MAJID COCKAR VS DIRECTOR OF PENSIONS NRB HCC MISC APPL 532/1998.**

2. **CHARLES ORUIDA DOLO V KENYA RAILWAYS CORPORATION HCC MISC 208/00**

3. **REPUBLIC V THE STAFF DISCIPLIMARY COMMITTEE MASENO UNIVERSITY & OTHERS KSM HCC MISC APPL 227/03.**

In her affidavit, Alice Muita deposed that indeed the respondent had terminated the applicants contract before the agreed period but that the applicant had been employed after attaining the mandatory retirement age of 55 years contrary to per Civil Service Regulations. According to her, State Corporation employees are Civil Servants and subject to Regulations that govern employment of Civil Servants. The applicant's employment was supposed to have been approved by the respondent's Board of Trustees in consultation with the State Corporations Advisory Committee or the Permanent Secretary Office of President or DPM. It is also her contention that the Board was evaluating and rationalizing the existing contracts of service in terms of its strategic plan. That the applicants contract was terminated in accordance with terms of his letter of employment by giving 2 months notice. According to Muita the performance contract was signed to ensure the departments targets were set even when he was gone. She denied that the advertisement of the applicant's post was malicious or irregular neither is the termination. The applicant appealed against termination (annexture A) but the decision to terminate the contract was upheld. Her contention that since the termination has already taken effect, the same cannot be stopped or reversed and the applicant's redress lies elsewhere.

The respondent also filed skeleton arguments and relied on several authorities, the key ones being:

1. **ASSOCIATED PROVINCIAL PICTURE HOUSES V VEDMESVURU CORPORATION (1948) 1 KB 223**

2. **ERIC MAKOKHA & ANOTHER V LAURENCE SAMCIM CA 20/92**

3. **KENYA NATIONAL EXAMINATION COUNCIL V REPULIC EX PARTE GEOFFREY GATHENJI CA 261/96**

4. **REPUBLIC V JUDICIAL SERVICE COMMISSION EX PARTE PAREMO CA 1025/03**

I have carefully considered the application, the skeleton arguments of both counsel, submissions made in court and authorities cited by both parties. It is useful at this stage to set out verbatim the letter that sparked off these proceedings. It is the letter dated 10th November 2003. It is titled;

"CONTRACT APPOINTMENT

I am pleased to inform you that you have been offered contract appointment for a period of three(3) years with effect from 11th November 2003 to 10th November 2006 in the position of Head of Information and Communication Technology Services grade 3, in Kenya Wildlife Services under the following terms and conditions:

1. You will receive a consolidated all inclusive remuneration package of Kshs.230,000/= per month

and you will not be entitled to any other benefits such as housing, medical pension, gratuity etc.

2. You will report to the Director

3. You will be entitled to thirty (30) days leave per year during the contract period.

4. During the term of your employment, you will be subject to the provisions of such Rules and regulations of Service applicable to your post, as may from time to time be in force.

5. The appointment may be terminated by either party giving two (2) months notice or paying two 2) months salary in lieu of notice.

Please sign to indicate your acceptance of the contract terms and return a copy of the letter to the undersigned at the earliest opportunity.

Signed

A Evans MuKolwe

Director"

The applicant signed the letter on 11th November 2003 accepting the terms and agreed to report on duty the same day.

The letter of termination (WSM 2) dated 1st August 2005 in part reads as follows:

"**IRREGULAR RETENTION IN THE SERVICE BEYOND MANDATORY RETIREMENT AGE.**

On review of the staffing requirements to drive the strategic plan of the KWS, the Board of Trustees has made a decision that the service will not retain employees who have attained mandatory retirement age. In this regard, a review of your records show that the Government Authority was not sought for you to be recruited with the services when you were already past mandatory retirement age.

Since the Board and management are also keen to ensure compliance with prevailing Government policy on this matter, it has been decided that your services as Head of Information & Communication Technology be terminated by giving you two (2) months notice in accordance with the provisions of your contract of employment……."

The broad issues raised by the applicant is whether the contract of employment had statutory underpinning; whether there was necessity to give the applicant a hearing before the issuance of notice of termination and lastly, whether the contract could be terminated before its due date on 10th November 2006.

What is not disputed is that the applicant entered this contract when he was beyond the retirement age of 55 years. It is not denied. The age did not seem to have been an issue in the contract. The respondents have given the reason that the contract could not continue to subsist because the authority of the Board or Permanent Secretary was not sought and had not been obtained even as of the time of the termination. This is surprising because whoever hired the applicant must have been aware of this particular regulations that authority had to be sought and yet went ahead to employ the applicant. It means that from the on set his employment was unlawful as it was contrary to the regulations governing his employment.

The respondent is established by the Wildlife (Conservation and Management) Act Cap 376. Under Section 3D of the Act, a Board of Trustees is established to manage the service.

S 3D (1) of the Act goes on to provide that the Board of Trustees in consultation with the State Corporations Advisory Committee, should establish the terms and conditions of the appointment and enlistment of the members of the service and the secondment of other persons to serve with the service. Under subsection (2) the Board may appoint and employ such members, agents or servants of the service as may be necessary for the discharge of the functions of the service upon the terms and conditions established by the Board and State Corporations Advisory Committee.

Under S 5 of the state Corporation Act Cap 446, the Corporation by the mandate engage and employ its staff on such terms of service as the minister may, in consultation with State Corporations Advisory Committee, approve. The Minister in such a case is the one under whose portfolio the State Corporation falls. In this case it is the Ministry of Wildlife and Conservation. Basically therefore, the employees of KWS are Civil Servants as they fall under the docket of a minister in a ministry. The compulsory retirement age for Civil Servants is 55 years.

The applicant does not deny that he was over 55 years at the time of engagement. Similarly, at the time of entering into the contract the respondent must have been aware of the applicants age upon seeing his documents. The person who engaged the applicant must have hoped that authority would be given to retain the applicant on contract but it was not. It meant that retaining the applicant in employment was unauthorized and therefore unlawful. Would this court intervene in the decision taken by the respondents?

Perhaps I should consider at this stage when the Judicial Review jurisdiction and when it can be invoked. **The SUPREME COURT PRACTICE 1997 VOL 53/1-14/6** states

"The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which one has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law to decide the matter in question"

The above passage clearly demonstrates that it is the process of decision making that will be under attack in Judicial Review – not the decision. If the merits of the decision are questioned, then it is a case for appeal.

The next issue to consider is the scope and efficacy of the two orders of prohibition and certiorari that have been sought in this application.

The Court of Appeal digest 1997 para 9 defines prohibition as follows:

"an order from the High Court directed at an inferior tribunal or body forbidding that tribunal or body from continuing to hear and or adjudicate proceedings in the tribunal or before the body in excess of its jurisdiction or in contravention of the laws of the land…….. it lies, not only for excess of jurisdiction or total absence of it, but also for a departure from the rules of natural justice, but it does not lie to correct the course practice or procedure of an inferior tribunal or body or a wrong decision on the merits of the proceedings"

Prohibition cannot be invoked to quash a decision that has already been made. It can only be granted to prevent a contemplated decision.

On the other hand, an order of certiorari will issue if the decision by the tribunal is made without or in excess of jurisdiction, or where rules of natural justice are breached, or the decision is unreasonable or that irrelevant and extraneous matters have been considered in reaching the decision under attack.

From the statement of facts I do find that the grounds raised by the applicant are that the respondents were in breach of rule of natural justice for denying the applicant a hearing; the notice of termination was

unlawful, unfair and offends public policy.

Did the applicants employment have a statutory underpinning? It was the submission of Mr. Mageto that the applicants contract goes to the root of a constitution by virtue of S 25(1) of the constitution in that the employees of the Government hold office at the pleasure of the president.

The proviso to the above rule is that the above does not apply to persons who enter into contracts of service in writing with the Government of Kenya which he undertakes to serve the Government for a period which does not exceed 3 years. In response Mr. Lutta submitted that the applicants contract was specified, for 3 years. He was a civil servant subject to State Corporations Act. He did not hold office at the pleasure of the president.

I totally agree with Mr. Lutta that the applicant had signed a specific contract and did not hold the office at the pleasure of the president.

I have already set out the contract of employment of the applicant. It provided for the period the contract was to ran and mode of termination – i.e 2 months notice or 2 months salary in lieu of notice. In my view, the contract did not have any specific procedure to be followed before the contract could be terminated. In the case of ERIC MAKOKHA & OTHERS VS LAWRENCE SAGINI & OTHERS CA 20/1994 NRB at page 8-9. the Court of Appeal defined statutory underpinning as:

"The word statutory underpinning is not a term of art. It has no recognized meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning.

To underpin, is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean the employees removal was forbidden by statute unless the record met certain formal laid down requirements. It means, some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible this is the true meaning of what has become the charmed words "statutory underpinning"

The above words mean that a statute makes it mandatory that a certain procedure be observed in some contracts of service before termination. Examples are constitutional offices of judges, Attorney General and some senior cadres in the Civil Service.

In the case of ERIC MAKOKHA from which I have quoted above, university lecturers whose terms of service were based on the University Act and the regulations made there under, claimed the said contracts had statutory underpinnings and could therefore not be determined on the ordinary law applicable to master and servant. The Court of Appeal consisting of 5 judges of appeal held that the lecturers could sue for damages; that the equitable remedies of injunction and specific performance were not available in breach of contract of personal services.

At page 11 of the same judgment the court observed;

"They cannot competently claim to be reinstated unless a statute to which they can point expressly conferred this right on their continued employment"

This case can be distinguished from the case of REPUBLIC V JUDICIAL SERVICE COMMISSION EX PARTE PARENO MISC APPLICATION 1025/03, in which the ex parte applicant was a Resident Magistrate who was dismissed from the service. Judicial Service Regulations applied to the officer as relates to discipline and dismissal procedure. The Attorney General's office conceded that the procedure was not followed. The intention of the Regulations is obvious. It is to give some protection to the magistrate so that it would not be easy to remove or terminate the magistrate's services considering the nature of their work. The magistrate's employment is underpinned by the Regulations such that if

procedure is not followed, the party aggrieved can have recourse to Judicial Review.

In another case of CONSOLATA KIHARA & 241 OTHERS V DIRECTOR KENYA TRYPANOSOMIASIS RESEARCH INSTITUTE 2003 KLR 232, the applicants sought orders of certiorari to quash the decision of the Director of the Department, compulsorily retiring or retrenching them on terms specified in the respondent's decision and prohibition to prohibit the Director from implementing that decision for reasons that the rules of natural justice had been contravened and notice to terminate their services was unreasonable, the court held that in ordinary situations of employer and employee, or master servant, if a master wrongfully dismisses an employee, the employment is effectively terminated and the servant cannot obtain an order of certiorari to quash the decision.

In the instant case, there is no evidence that the applicant's employment had any statutory underpinning. It was an ordinary contract of employment, of employer and employee. The contract was terminated in terms of clause 5 of the contract between the applicant and the respondent. The applicant sought a public law remedy but in fact was pursuing his individual right and the most efficacious remedy would be in damages sought from the ordinary courts.

On a careful consideration of the applicant's application it seems the applicant is attacking the merits of the respondent's decision to dismiss the applicant. The court is however not acting as an appellate court and only concerns itself with the process leading to termination. I have earlier in this judgment considered the scope of Judicial Review.

The applicant also alleged breach of rules of natural justice by the respondent denying the applicant an opportunity to be heard. The applicants position was advertised in the daily newspapers on 5th August 2005 before the decision to terminate his services was communicated to him on 10th August 2005. He had just signed the performance contract on 4th August 2005. It is his contention that the decision to advertise his position before he was heard was malicious and unfair. It is the respondent's contention that the contract between the applicant and respondent was irregular as it had not been authorized by the Board of Trustees the respondent and the State Corporations Advisory Committee or the Permanent Secretary responsible for the Ministry. Somehow, somebody had got the applicant employed without due authorization. It was not the responsibility of the applicant to seek authority for his contract to be regularized but that was the responsibility of the respondent.

I do agree that the respondent acted maliciously by advertising the applicant's post before he was notified of it or being given a hearing. Right to a hearing is a cardinal principal of rules of natural justice. It is apparent that the contract did not have any provisions that the applicant should be heard before termination. In the case of CHARLES ORINDA HCMISC APPLICATION 208 OF 2000, NRB, the applicant had been given a notice of retrenchment but challenged it and a stay was granted on ground that the applicant was not given an opportunity to be heard. In another case of R V EAST BERKSHIRE HEALTH AUTHORITY EX PARTE WALSH (1984) ALL ER 424, the court observed that the right to be heard is so elementary that even if the contract does not provide for it, the court will imply that the right exists.

In the case of CONSOLATA KIHARA, Justice Kuloba considered the case of RIDGE V BALDWIN (1964) AC 40 where it was held that the question in an ordinary case of master and servant does not at all depend on whether the employer has heard the employee in his defence, it depends on whether the facts which emerge at the trial prove breach of contract. In the present case there is no evidence that there was breach of contract as the termination was within the terms of the contract. The applicant would have invoked the same provisions of the contract had he wished to opt out of the employment.

In the case of MUTHUURI V NATIONAL INDUSTRIAL CREDIT BANK HCC (2003) KLR 145, Justice Ringera held that in determining the lawfulness or otherwise of termination of employment whose terms and conditions have been reduced to a contract, the only test was whether the said termination was in accordance with the contract itself.

I find no breach proved by the applicant in the present case save that the respondent may have acted

irresponsibly and maliciously in failing to inform the applicant about termination before advertisement. In addition to the above, the engagement of the applicant having been irregular, even a hearing would not help change or regularise what was irregular. There is no denial that the relevant authority to retain the applicant in employment after 55 years had been sought and obtained by the respondent. The termination was in accordance with the contract and therefore lawful.

The applicants contract was terminated on 1st August 2005. He was given 2 months notice or two months salary in lieu. The two months have already lapsed. The question is whether the court can grant an order of prohibition in the circumstances.

The court earlier considered the scope of that order. It lies to prohibit that which is yet to take place or is taking place. In the CHIEF CONSTABLE CASE, ERIC MAKOKHA CASE, EX PARTE CASE AND OTHERS the courts have held that an order of certiorari or prohibition cannot issue while the dismissal had already taken place. In the KENYA NATIONAL EXAMINATIONS CASE the Court of Appeal held that it was a futile exercise for the applicants to insist on getting cancelled results as the results would not be useful to them.

In ERIC MAKOKHA CASE the Court of Appeal held that they cannot force a remarriage between the parties. In PARENO CASE the court observed that the dismissal had taken effect 6 months earlier. In the instant case the dismissal took effect on 1st November 2005. The same cannot be prohibited or quashed, even if the order of Judicial Review were available. The SUPREME COURT PRACTICE para 53/1 – 14/14 states this of the procedures.

"Even if a case falls into one of the categories where Judicial Review will lie, the court is not bound to grant it; the jurisdiction to make any of the various orders available in Judicial Review proceedings is discretionary. What order or orders the court will make depends upon the circumstances of the particular case."

All the circumstances of this case considered and especially the fact of the irregular retention of the applicant in the service the orders sought cannot be granted. It is contrary to public policy. The application for orders of certiorari and prohibition is hereby refused and dismissed.

Each party bears their own costs.

Dated and delivered this 24th day of March 2006.

R.P.V. WENDO

JUDGE

Read in the presence of:

Mr. Ogeto for applicant

Lutta for respondent

Ojijo Court Clerk