



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1512 OF 2002

ISMAEL OMULA EGALA1ST PLAINTIFF/RESPONDENT

STEPHEN NDONGA AGADE2ND PLAINTIFF/RESPONDENT

BENSON LUBANG'A OGADA..... 3RD PLAINTIFF/RESPONDENT

NATHAN MUINDE KIMATU 4TH PLAINTIFF/RESPONDENT

MANASSEH AGANYA OTEGO..5TH PLAINTIFF/RESPONDENT

MARTIN OTIENO OLUNYA.....6TH PLAINTIFF/RESPONDENT

GEORGE MAKORI ORINA..... 7TH PLAINTIFF/RESPONDENT

VERSUS

THE ATTORNEY GENERAL.... DEFENDANT/APPLICANT

**(Sued under the Governmental Proceedings Act, Cap 40, Laws of Kenya
on behalf of the Public of Service Commission of Kenya and the
Authorized Officer of the Ministry for the time being responsible for
matters relating to the employment of officers of the Kenya Metrological
Department)**

RULING

By an application of the 20th July, 2004 the Attorney General applied for inter alia an order extending the time for filing an appeal against orders of this court given on the 10th June, 2003 and 5th March, 2004.

Miss Mbiyu for the Attorney General abandoned an application for leave to appeal out of time. That is not, therefore a matter I need to go into except in so far as Mr. Mwenesi relied on matters relating to the necessity for leave to appeal being granted in respect of the order of the 16th June, 2003.

The jurisdiction to extend the time for filing an appeal lies under section 7 of the Appellate Jurisdiction Act, which states:-

“ The High Court may extend the time for giving notice of intention to appeal from a Judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired “

It will be noticed that the jurisdiction is in respect of an appeal against a Judgment, which I take to mean the final disposal of the suit.

Miss Mbiyu also relied on section 75 of the Civil Procedure Act and Order XLII. However, the Sections 95 of the Act and O. XLIX only relate to extension of time for doing things under the Act or Rules.

Rule 74 of the Court of Appeal Rules states that every Notice of Appeal shall be lodged within 14 days from the date of the decision.

It appears therefore that this court has only a discretion to extend the time for filing a Notice of Appeal in respect of a Judgment. If an Appellant wishes to appeal against an order then leave to extend the time for appealing it should be sought in the Court of Appeal.

The orders granted by this court on the 16th June, 2003 were pursuant to a Notice of Motion of the 7th May, 2003 and as result Judgment was entered against the Attorney General in accordance with the orders entered on the preliminary decree of the 16th June, 2005 and in the following terms:-

- (i) **THAT** it is hereby declared that by 31st August, 2000 each and every one of the Plaintiff's was a serving officer in the Public Service of Kenya in the Kenya Meteorological Department
- (ii) **THAT** it is hereby declared that the retrenchment or early retirement of the Plaintiffs on or after 30th September, 2000 was unlawfully and wrongful.
- (iii) **THAT** it is hereby declared that in the circumstances of the case, the conduct of the permanent secretary for the time being responsible for the matters relating to the Plaintiffs' service as public officers was fraudulent and a malicious procurement of breach of the Plaintiffs' contracts of service as public officers.
- (iv) **THAT** it is hereby declared that the action of the Directorate of Personnel to employ and deploy 32 (thirty-two) trainee officers in the Kenya Meteorological Department on 1st October, 2000, some of whom took over the duties of the Plaintiffs was inconsistent with the constitutional requirement that the Public Service Commission is responsible for all appointments in the Public Service. To the extent of the consistency the employment and deployment is null and void.
- (v) **THAT** the Plaintiffs are hereby reinstated to their core positions in the Kenya Meteorological Department and therein to service until voluntary retirement or until their services are lawfully and constitutionally terminated.
- (vi) **THAT** the defendant to pay the Plaintiffs costs of this suit.

Mr. Mwenesi for the Respondent raised other objections to the Application. He submitted that on the authorities of the **Pharmacy and Poisons Board versus Sipri Pharmaceuticals Limited & Others C.A No. Nai 103 of 1998, Maina Mugiria (1977) K.L.R 159** which both referred to the English decision of **Hadkinson versus Hadkinson (1952) 2 ALL E.R. 567** where a party is in contempt of an existing Court Order that person should not be heard until the contempt is purged save in circumstances where the court exceptionally agree to hear such an application.

In this case Miss Mbiyu submitted that the court should take into account that the Government could not honour the order to reinstate the Plaintiff back in employment. She relied on paragraph 25 of the Supporting Affidavit sworn on the 15th July, 2004 by Mr. Gerishon K. Ikiara the Permanent Secretary in the Ministry of Transport and Communications. No reason is given why the order could not be complied with but I understood from Mr. Mbiyu that Government has no machinery to reinstate staff, which have been made redundant. To some this may seem a lame excuse however I consider the circumstances are such that I can exercise and do exercise may discretion to allow the Application to be dealt with on its merits particularly as the reason for the intended appeal is to attack the order made to reinstate the

Plaintiffs.

Mr. Mwenesi also submitted that a delay of two years in making the Application was inordinate. The deponent to the Replying Affidavit dealt with the delay which basically amounted to blaming one of the State Counsel for not filing the Notice Appeal in time due to negligence although the Government has expressed its desire to the Attorney General to appeal.

I cannot but agree that the actions of the Government were dilatory and muddled not to say negligent in pursuing its various remedies. However a court has a discretion to waive delay where the substance of the matter requires addressing.

In this case the matters sought to be raised on Appeal are of the greatest importance to government touching as they do on the policy of retrenchment put in place by Government.

In the result I will extend the time for the filling of the Notice of Appeal against the Judgment of this court of the 16th June, 2005 for 30 days from today. So far as the extension of this Notice of Appeal against the decision of Mr. Justice Ojwang is concerned for the reasons given an application of this nature must be made in the Court of Appeal.

I also issue a certificate that the case is fit for appeal, although the issue in the Appeal is a narrow one namely whether in the circumstances Judgment could be given on admission, and the Government had jurisdiction to make the order for reinstatement. In the meantime costs of this applicant to the Respondent.

Dated and delivered at Nairobi this 19th .day of May 2005

P.J. RANSLEY

JUDGE