REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 3472 OF 1994

GEOFFREY MUGUNA MBURUGU …… PLAINTIFF

VERSUS

ATTORNEY-GENERAL ……..……DEFENDANT

JUDGMENT

This case was commenced by plaint, dated 27th September 1994 and filed the same day. The Plaintiff was a water engineer in the Public Service, and served under the Ministry of Land Reclamation, Regional and Water Development. The Permanent Secretary in that Ministry had, on 10th March 1994 informed the Plaintiff that the Plaintiff had been retired by the Public Service Commission, in the public interest. The Plaintiff challenged this act of retirement as wrongful and a nullity in law.

The Plaintiff averred in the plaint that he was retired without any notice as required under Regulation 40 of the Public Service Commission Regulations, and in the alternative he asserted that this retirement could not, contrary to the Government's representation, have been effected under the said Regulation 40 and was, therefore, a breach of the law right from the beginning. The Plaintiff asserted further that the retirement process had been accompanied with little or no compliance with Regulation 40 aforementioned. He averred that, while the governing law required that he be given a sufficient opportunity to show cause before his services were terminated, he had not been accorded such opportunity. He submitted that the decision of the Public Service Commission was contrary to law in so far as it violated the principle of natural justice as well as the provisions of the applicable law; there was no, or no sufficient, hearing before the Public Service Commission decision was taken. He maintained that the grounds for retirement, as stated in the Permanent Secretary's letter of 7th February, 1992 were contrary to the provisions of the Public Service Commission Regulations and consequently were illegal. He averred that the purported reliance by the Public Service Commission, in terminating his services, on an audit report prepared by M/s Coopers & Lybrand, and with regard to the WAFIM Project of the Ministry of Water Development and the Swedish International Development Agency, had no justification in law and could not serve as a basis for the retirement of him in the public interest. He submitted further that the retirement decision by the Public Service Commission was wrong in law as it did not emerge from a responsible exercise of a statutory discretion; rather it was a coerced decision taken at the behest of the then Permanent Secretary in the Ministry of Water Development, and in the circumstances the decision was *ultra vires* and void.

The Plaintiff's prayer fell under the following heads:

i. a Declaration that the retirement of the Plaintiff from the Public Service was wrongful and a nullity;

ii. payment of salary from 24th February 1993 to the date of judgment, and all other consequential entitlements;

iii. in addition, or in the alternative, damages;

iv. costs on (ii) and (iii);

v. such other relief as the Court may deem fit.

This case came up for hearing on 19th November 2003, on which occasion evidence was taken, followed with counsel's submissions on 28th November 2003. Although the Defendant had been duly served with the Hearing Notice, he was not represented.

The Plaintiff in his evidence stated that he had been recruited into the Civil Service on 1st July 1975, as Inspector of Water Supply trainee. By the time he left the Civil Service, in February, 1993 he was a Water Engineer. For three years from the time he was engaged, he was at the Kenya Water Training Institute as a student, and he graduated with a Diploma, concurrently with a Water Diploma from the Kenya Polytechnic where he had also been enrolled for specialized training. In 1978 the Plaintiff was promoted to the rank of Water Engineer Assistant, at Job Group E, and by the time he was retired he had attained Job Group L. In 1983 he had been awarded a NORAD scholarship

to undertake further studies at the Brighton Polytechnic in the United Kingdom. This course took him four years, and he graduated with the B.Sc. Degree in Civil Engineering. When he returned in 1986, he was promoted to Job Group K and designated Engineer (Water) II. He served for three years before being promoted further to Job Group L, on 6th September 1989 with the approval of the Public Service Commission. Now just three years after this promotion, in February 1993, the Plaintiff has being sent on retirement in the public interest.

In 1989 the Plaintiff, while serving as District Water Engineer in Samburu (where he had been for three years), was recalled to the headquarters in Nairobi, and re-posted to the Water Financial Management Project (WAFIM) a SIDA-Kenya programme on rural domestic water supply. While on the WAFIM project he was posted to Eastern Province as Project Manager and was based in Embu. This posting took place while the Plaintiff was on annual leave, and he was recalled from leave, for the reason that the Permanent Secretary was in need of a competent engineer for the responsibility. The project had been afflicted by a number of problems, and the more specific such problems were in connection with the management of Government resources, and procurement arrangements.

While serving on WAFIM, at Embu, a retirement letter was sent to the Plaintiff. In March 1990 he was sent on compulsory leave, pending the compilation and release of an audit report on the project.

The WAFIM Audit Report was conducted by M/s Coopers & Lybrand, who proceeded in their investigations without calling the Plaintiff at any stage to answer any questions. The Report itself was not availed to him. But it was on the basis of the Report that he received a letter requiring him to proceed on compulsory leave.

The Plaintiff complained about the allegations that were being made against him, on the basis of a Report which he had not been allowed to see.

On 28th August 1990 the Permanent Secretary in the Ministry of Water Development, Mr. S.M Mbova, wrote to the Plaintiff who had been sent on compulsory leave. In his letter he relied on the Coopers & Lybrand Report on the WAFIM Project, and stated as follows:

> **"The report has revealed numerous and serious financial mismanagement and other irregularities which were committed during the period of your secondment to the project. As the Project Manager in charge of the finances and other activities of the project, you are responsible for these irregularities and I am, accordingly, contemplating [taking] appropriate disciplinary action against you, including removal from the Service. However, before action is taken in this regard, you are required to submit your representation as to why you should not be held responsible for mismanagement of the project funds as revealed by the Audit Report, and also why disciplinary action should not be taken against you as specified".**
>
> **……..**
>
> **"I require a detailed and satisfactory explanation on each and every one of the above-mentioned irregularities, not later than 12th September 1990, failing which I shall proceed with the disciplinary process without further reference to you. In the meantime you will be placed under interdiction w.e.f. the date of this letter, pending finalization of your case".**

To this seven-page close-print letter, the Plaintiff responded with an eighteen-page one of even greater print density (26th September 1990). He addressed each of the points made in the Permanent Secretary, Mr. Mbova's letter. The following passages in the Plaintiff's letter are particularly pertinent:

> a. "As you will see from my explanations, I am not responsible for any financial irregularity or mismanagement of the project funds. You will also note that, some of the events you have queried me about took place long before I joined the WAFIM project and as such, it would be unfair to ask me to account for their occurrence" (p.1).
>
> b. "I would …… like to point out that, most of the decisions relating to the office complex construction were done prior to my joining the Project by the previous managements" (p.2).
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> c. "I should also like to point out that, apart from the actual awarding of the contract, all other transactions relating to the above three items were handled by the consultants….. since this was part of their contractual responsibility" (p.3).
>
> d. "I am surprised that the Ministry could accept the Auditor's allegation that the revised Plan of Operation for WAFIM was a mere replica of the initial one given that the same Ministry accepted and praised its professional production and its relevance to the Project's objectives ……" (pp.6-7).
>
> e. "As pointed out earlier, the digging of trenches and their blockage was done before I joined the Project. As such I should not be held responsible for the actions. I cannot understand why the Ministry did not take the issue with the previous management even when this matter was raised in Parliament" (p.9).
>
> f. [Regarding the accuracy of some voucher numbers] – "Given that I have not been availed access to the relevant documents, it is very difficult for me to come up with a conclusive explanation on this issue" (p.11).
>
> g. "I should like to point out that there was no regulation that imprest exceeding Kshs.50,000 should be approved by the Procurement Committee" (p.12).
>
> h. "It is interesting to note that this accident is being treated as if it was special or peculiar because there were several other accident

cases even before and during my tenure in the Project" (p.13).

i. "Whereas you have charged me with numerous charges allegedly arising from an Audit Report which you have not allowed me access to, I request to mention that, it would appear as if the Auditors were called purposely for a smear campaign against me. I state this because I find no other reason why the Ministry would deliberately charge me for irregularities and mismanagement in the period before I was appointed to the post of its Project Manager". (p.15).

On 7th February 1992, Permanent Secretary Mbova wrote a letter to the Plaintiff retiring him in the public interest:

"From the records held in your personal file, you have committed the following disciplinary offences……"

Some of the disciplinary offences cited related to the period ***"while you were District Water Engineer, Maralal"; "You were involved in financial mismanagement and other irregularities concerning WAFIM Project….. Your representations contained in your letter dated 26th September 1990 were considered and found unsatisfactory as a number of irregularities concerning WAFIM Project took place during your tenure of office as the Project Manager".***

On 9th March, the Plaintiff wrote to Permanent Secretary Mbova, regarding the letter of retirement which he had just received. In this five-page, densely-packed letter the Plaintiff was still giving explanations of matters which may not have emerged with the greatest clarity from his past correspondence.

The Plaintiff pointed out that, by an earlier letter Ref. No. C/28987/(28) of 20th December 1990, Permanent Secretary Mbova had apparently accepted the Plaintiff's explanations regarding WAFIM; for the Permanent Secretary had not only lifted the Plaintiff's interdiction, but had taken the further step of posting him to the Provincial Water Office, Kisumu to go and serve as the Head of the Planning and Design Section (posting letter Ref. No. MWD/018A/3 Vol. II/(3) of 21st December 1990. Before the Plaintiff could report to Kisumu he received a countermanding letter, Ref. No.C/28987/(31) of January 22, 1991, now instructing him to proceed on leave until advised otherwise. It is during this period of uncertainity that the letter of retirement in the public interest came, claiming that even the very detailed explanations about WAFIM, which he had sent to the Permanent Secretary on 26th September, 1990 had been found wanting and therefore he must be retired in the public interest.

On the plaintiff's complaint about the letter of 7th February 1992 from the Permanent Secretary retiring him in the public interest, the following is minuted to the relevant Government officer by Mr. Mbova himself: "***To study. In my opinion Mr. Mburugu [the Plaintiff] has not defended himself adequately over the issues raised in our letter to him. In this regard, I suggest that we should proceed to recommend him for removal from the Service on the grounds of public interest"*** (initialed by the Permanent Secretary on 11th March 1992).

Thereafter a letter is written to the Plaintiff by a Mr. N.J.W. Mulwa on behalf of the Permanent Secretary (dated 21st April 1992):

"In view of the unsatisfactory reply you have given in response to our letter No.C/28987/35 of 7th February 1992 it has been decided that you should be and are hereby interdicted from duty with effect from 7th February 1992 while proceedings for your retirement from the Service in the public interest are being instituted against you. During the period of your interdiction you will be paid half salary and will not leave your duty station, i.e., Maji House, without prior permission of the Director of Water Development."

On 22nd June 1992, Permanent Secretary Mbova wrote letter Ref No. C/28987/(46) to the Secretary, Public Service Commission attributing a series of disciplinary offences to the Plaintiff. This letter was a reproduction of the one of 28th August 1990, which had demanded representations from the Plaintiff regarding the WAFIM Project. Permanent Secretary Mbova concluded his six-page letter as follows:

"…… it is my strong view that Mr. Mburugu [the Plaintiff] should be relieved of his duties. I am, therefore, strongly recommending that he be retired from the Service on the grounds of Public Interest. In these circumstances therefore, I should be grateful if you could please refer this matter to the Commission for a decision."

On 23rd March 1993 a letter written for the Permanent Secretary, Ministry of Land Reclamation, Regional and Water Development was forwarded to the Plaintiff from the hand of one Mr. N.J.W Mulwa. The letter stated:

"Further to my letter No. C/28987/44 of 21st April 1992, I am now conveying to you the decision of the Public Service Commission contained in its letter No. D/MB/182 of 24th February 1993 that you should be retired from the Government service on grounds of public interest with effect from 24th February 1993. Accordingly the interdiction imposed on you in my letter under reference is hereby lifted and you will be paid salary upto and including 23rd February 1993. The effective date of your retirement will, therefore, be 24th February 1993."

This was the last decision in the employment fate of the Plaintiff. His protestation in a long letter to the Secretary, Public Service Commission, of 19th April 2003, bore no fruit. In this letter he was appealing against the retirement decision. He pointed out as weaknesses in the decision, the following: the contradictory decisions and actions regarding the Plaintiff, emanating from the Permanent Secretary; charges made against the Plaintiff even for things that occurred when he was not in office; the conflicts of interest touching on the Permanent Secretary and influencing his attitude towards the Plaintiff; etc. On 10th March 1994, Mr. Mulwa on behalf of the Permanent Secretary Mbova, wrote to the Plaintiff in these terms.

"With reference to your letter of 19th April 1993, I am to inform you that the Public Service Commission in its letter No. D/MB/182 of 23rd February 1994 has disallowed the Appeal against retirement in the Public Interest, submitted by you, in view of the fact that there were no grounds for allowing it."

The foregoing facts were the basis of submissions by Mr. Imanyara for the Plaintiff. The submissions made were as follows:

1. The retirement of the Plaintiff with effect from 24th February 1993 was a nullity as it did not comply with the Public Service Commission Regulation 40, regarding notice to be furnished to the affected person before retirement can be effected. Regulation 40(1) provides as follows:

> "If an authorized officer, after having considered every report in his possession made with regard to a public officer, is of the opinion that it is desirable in the public interest that the service of such public officer should be terminated on grounds which cannot suitably be dealt with under any other provisions of these Regulations, he shall notify the public officer, in writing, specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the public officer".

Paragraph (2) continues:

> "If, after giving the public officer an opportunity of showing cause why he should not be retired in the public interest, the authorized officer is satisfied that the public officer should be required to retire in the public interest, he shall, in the case of public officers to whom regulations 34 or 36 apply, forward to the Commission the report of the case, the public officer's reply and his own recommendation, and the Commission shall decide whether the public officer should be required to retire in the public interest".

Counsel submitted that it would appear that it is by virtue of the provisions of Section 40 of the Regulations that the Plaintiff had been retired. Yet the letters written by the Permanent Secretary (Mr. Mbova) give a distinct impression that it was the dismissal clause in Section 34 that was being applied against the Plaintiff. Counsel submitted that the application of Section 34, which is concerned with "proceedings for dismissal of officer in Job Group L or above", to the Plaintiff in the correct manner would have required certain safeguards which the Respondents had not availed to the Plaintiff. Section 34 states:

> "(1) Where an authorized officer considers it necessary to institute disciplinary proceedings against a public officer to whom this regulation applies on the ground of misconduct which, if proved, would in his opinion, justify dismissal from the public service, he shall, after such preliminary investigation as he considers necessary, and after consulting the Attorney-General as to the terms of the charge or charges, forward to the public officer a statement of the charge or charges framed against him together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based; and shall invite the public officer to state in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate himself".

The provision further states:

> "2(a) If the public officer does not furnish a reply to a charge or charges forwarded under paragraph (1) within the period specified, or if in the opinion of the authorized officer he fails to exculpate himself, the authorized officer shall forward to the Commission copies of the statement of the charge, or charges, the reply, if any, of the public officer, and the comments of himself and, where applicable, of the head of department thereon, and the Commission shall appoint a committee, which shall consist of not more than three members, to investigate the matter".

The Chairman of such a committee is required to be a Judge, Magistrate or a public officer with legal qualifications. The committee is to ***"inform the public officer that on a specified day the charges made against him will be investigated and that he shall be allowed or, if the committee so determine, shall be required to appear before it to defend himself".***

Counsel submitted that, whereas the termination of the Plaintiff's employment purports to be conducted by virtue of Section 40 of the Public Service Regulations, all the accompanying circumstances, as well as the tenor and effect of the alleged retirement, amount to a dismissal by virtue of Section 34; except that all the safeguards of section 34 were not followed. As a result, what has been achieved by the Permanent Secretary is a square denial of hearing and all fair play to the Plaintiff while he was being, in effect, dismissed from his job. The Plaintiff was accorded no notification before termination of service; no committee was constituted to consider his case at which he could make a case for himself; he was accorded no opportunity to make any representation. The officers who took the retirement decision were the very ones who had all along sought to terminate the Plaintiff's services; quite contrary to the Provision of Section 34(2)(c) which states: *"**The head of the Public Officer's department or the authorized officer concerned shall not be a member of the committee".***

In all these circumstances, Mr. Imanyara submitted that, not only was there a direct violation of existing law in the taking of the retirement decision against the Plaintiff, but there was also a denial of natural justice to a Plaintiff who stood to suffer a major loss in his working life. He noted that, as early as 1990 the Permanent Secretary was conducting investigations on the Plaintiff without at any stage making clear his intentions; and to his accusatory letters, the Plaintiff had endeavoured to the best of his ability to give clarifications and explanations, but these did not appear always to give satisfaction to the Permanent Secretary.

Mr. Imanyara questioned the genuiness of the persistent complaints about the Plaintiff raised by the Permanent Secretary. He had not framed any specific charges to which the Plaintiff could respond. The Permanent Secretary had moreover ascribed blame to the Plaintiff even for wrong things done at the Plaintiff's work station where such things took place well before the Plaintiff was posted to the particular station. The Permanent Secretary used the Coopers and Lybrand Audit Report as a grand occasion for laying blame upon the Plaintiff and he was called upon to make representations on the accusations against himself in that Report; yet the Permanent Secretary did not have even the

basic courtesy to allow the Plaintiff access to this Report. Counsel noted that even in situations in which problems at a work station had occurred over a prolonged period of time and the Plaintiff could be questioned about such occurrence only with reference to a shorter span of time, the Permanent Secretary preferred to attribute the entire blame to the Plaintiff; and the best example here was the WAFIM Project at Embu.

Counsel underlined the apparent capriciousness of the Permanent Secretary in his attribution of blame to the Plaintiff, as a factor that led to an unfair decision to retire the Plaintiff. While the WAFIM Project has been at the centre of official decision-making regarding the Plaintiff, by letter of 20th December 1990 Permanent Secretary Mbova had already meted out punishment against the Plaintiff. The relevant part of the letter runs as follows:

> **"2. As you are no doubt aware, some of the financial management and other irregularities concerning WAFIM Project by various actors took place in your tenure of office as the Project Manager. This Ministry therefore would be failing in its duties if it did not apportion part of the blame on your inability to direct and administer the Project. Although you have now brought it to light that the Project had a lot of shortcomings because of interferences from both within and without the WAFIM Project, it is not understood why you chose not to draw the attention of the Accounting Officer to those problems during which the situation would have been arrested and the Project saved…….. This is considered to be a serious omission on your part.**
>
> **"3. Notwithstanding the above observations, however, this case has now been considered and taking into consideration the fact that you are not wholly to blame for the mismanagement of the WAFIM Project, it has been decided as follows:-**
>
> > **(i) That you should [be] and are hereby severely reprimanded and warned that a repetition of such an offence will render you liable to summary dismissal from the Service with the loss of all your terminal benefits.**
> >
> > **ii. That you will be surcharged for any losses that are established to have been caused by you, directly through carelessness and false accounting.**
> >
> > **iii. *That our interdiction is hereby lifted with immediate effect and that you should arrange to report to the Director of Water Development for further instructions".***

Counsel argued that the WAFIM Project question should not have led to retirement in the public interest, since the Plaintiff had already been adequately punished, as regards this matter, with a severe reprimand. Counsel noted that it was the case that the severe reprimand represented a complete set of penalties in the mind of the Permanent Secretary since he at the same time revoked the Plaintiff's interdiction, and opened doors for him to be re-deployed on other tasks.

Mr. Imanyara saw more capriciousness on the part of Permanent Secretary Mbova, in the fact that the severe reprimand against the Plaintiff was followed by the Plaintiff's posting to Kisumu (21st December 1990), but before this could take place, the Plaintiff was required to show cause why he should not be retired in the public interest. The letter written to the Plaintiff by the Ministry of Water Development, on this occasion (7th February 1992) repeatedly cited as reasons for blame things in respect of which the Plaintiff had long been punished, and thus subjected him to double jeopardy. Mr. Imanyara submitted that the persistent invocation of past incidents, in respect of which the Plaintiff had been punished, to justify the case for retirement in the public interest, suggested that the Permanent Secretary had already made up his mind to terminate the Plaintiff's employment, and thus whatever explanations the Plaintiff would proffer, naturally fell on deaf ears. Hence the Plaintiff was presented with no specific charges to which he had any opportunity to respond; he only experienced with a thud, the culmination of the general accusations in the form of a forced retirement. When, to the general accusations from the Permanent Secretary, the Plaintiff inquired further (his letter of 4th May 1992): ***"I would be very grateful if I could be furnished with the points of my reply that were deemed not satisfactory so that I could give further explanation"***, he got no reply. When he appealed against the decision to retire him, the negative response from the Public Service Commission gave no justification of the position of the Public Service Commission, quite apart from the fact that he had no opportunity to appear or be represented before the Commission. Counsel submitted that the retirement of the Plaintiff in the public interest was conducted unfairly, and the decision appeared tainted with prejudice and malice.

Counsel cited in support of the Plaintiff the case of JOSEPH MULOBI v THE ATTORNEY-GENERAL & ANOTHER, reproduced in Nairobi Law Monthly, No.15, March/April 1989. The facts in that case were much like those in the present case. The Plaintiff, a pensionable public officer employed by the Ministry of Information and Broadcasting, was retired in very similar circumstances. He prayed for a declaration that his transfer, interdiction, suspension, dismissal and retirement were unlawful, and for damages. Some of the passages in the Honourable Mr. Justice Cockar's (as he then was) judgment may be set out here:

> **"….I shall now deal with the question of the procedure that has been followed in the retirement process. This according to Mr. Nowrojee is a crucial issue. He cited two High Court of Kenya cases to support his contention that a strict adherence to the prescribed procedure was mandatory. He said that the High Court consisting of Mr. Justice O'Kubasu and Mrs. Justice Aluoch in H.C. Misc. Appeal No. 282/82 S.C. Oyieng v Permanent Secretary, Ministry of Economic Planning and Development had observed that in cases involving dismissal of a civil servant the laid down procedure must be strictly followed. This strict observance of the procedure was stressed by the learned Judges as being the only safeguard to ensure that an officer had had each charge against him deliberated upon. The learned judges had then observed that if the laid down procedure was not followed then any disciplinary action would be quashed. The procedure of course is as laid down in the Act".**

The Honourable Mr. Justice Cockar said of Regulation 40 of the Public Service Commission as follows:

> "To my mind the requirements of sub-regulation (1) of Regulation 40 demand that the authorized officer approach the matter with

an open mind and behave in a quasi-judicial manner. It is not sufficient for him to decide that a public officer should be retired and then tell him that he intends to recommend his retirement to the Commission and ask the public officer to show cause why he should not be retired. The requirements of sub-regulation (1) are imperative and a strict compliance with them to my mind is mandatory".

Although the Plaintiff's services were purportedly terminated by virtue of Regulation 40 which provides for retirement on grounds of public interest, the circumstances attending the action taken do not take this case out the category of any other kind of dismissal. Strictly speaking, therefore, this case is caught by the provisions of Regulation 34, which requires the establishment of an impartial committee, in a quasi-judicial setting to determine the matter. There is no evidence of the setting up of such a committee at any level during the whole process of the purported retirement of the Plaintiff. Regulation 40, too, requires a quasi-judicial setting for the taking of a decision to retire an officer in the public interest.

Regulation 40(1) was correctly interpreted by the Honourable Mr. Justice Cockar in the Joseph Mulobi case, as requiring a quasi-judicial mode of determining the question.

The ultimate test of the legality or otherwise of the decision to retire the Plaintiff in the public interest is: compliance with the letter of the regulations, as well as the underlying principle of fair hearing and quasi-judicialism.

The action in question fails the test, for the following reasons:

a. The procedures established under Regulation 34, to give a fair hearing to an officer being considered for dismissal (and applying to those in Job Group L such as the plaintiff) were not complied with. No committee was appointed as required, and the Plaintiff had no hearing before any such committee.

b. There was no compliance with the requirements of Regulation 40. In his letter of 28th August 1990 to the Plaintiff, the Permanent Secretary, showed clearly that his mind was made up; he wrote: "As the Project Manager in charge of the finances and other activities of the Project, you are responsible for these irregularities and I am, accordingly, contemplating [taking] appropriate disciplinary action against you, including removal from service".

When the Plaintiff responded in detail, in his letter of 26th September 1990, this was not accorded any attention, and later the Permanent Secretary declared that the responses were unsatisfactory.

c. On 7th February 1992 the Permanent Secretary, in his letter to the Plaintiff asserted that all the employment records showed that the Plaintiff had committed a number of disciplinary offences. There were no specific charges framed; none was considered, let alone with an open mind; none was proved.

d. The Permanent Secretary was capricious, in his decision-making on the retirement of the Plaintiff, because he had written an earlier letter (dated 20th December 1990) to the Plaintiff accepting that all the blame for the management problems at WAFIM could not fall on the Plaintiff, as these problems had begun when the Plaintiff was not the Project Manager; but he later sought to attribute all these problems to the Plaintiff, and on this basis to have the Plaintiff retired. Although the Plaintiff had been reprimanded for what was seen as his part in the WAFIM problems, the Plaintiff was to be additionally punished, with the WAFIM saga as the main justification.

e. The Permanent Secretary clearly appeared high-handed in the manner in which he dealt with the Plaintiff as an employee; because even when the Plaintiff had been cleared and posted to the Kisumu Office, the Permanent Secretary countermanded such posting and subjected the Plaintiff to forced retirement.

f. The Permanent Secretary appeared to be on a personal mission to build a momentum of pressure to have the Plaintiff's services terminated. This is particularly clear from his minuted comments on correspondence, such as the ones dated 11th March 1992: "In my opinion [the Plaintiff] has not defended himself adequately over the issues raised in our letter to him. In this regard, I suggest that we should proceed to recommend him for removal from the Service on the grounds of public interest". This clearly violated the provisions of both Regulation 34 and Regulation 40; there was no proper forum, in a quasi-judicial setting, at which responses of the Plaintiff to specific charges were to be heard. The Permanent Secretary had clearly assumed all power of decision-maker and executioner over the Plaintiff, and the fate of the Plaintiff was entirely in his hands.

Employment in the Public Service both provides a machinery of serving the public interest, and benefits the employee who is compensated by approved methods, for work done. The employee thus acquires an interest that evolves into a legal right, within the terms of employment. It is in the interest both of the public, to whom services are rendered, and the employee, who has a personal relationship with the working arrangements, that the governing law affecting continued productivity in public office, be given fulfillment. This law, which will be in the form of statutory enactments, subsidiary legislation, judicial precedents and administrative practices, constitutes the objective criterion of correct delivery and good service. It is a distortion of the quality of public service, when self-interested individuals take over the process of service, jettison the law to the winds, and impose their subjective inclinations on the delivery process. Yet this is precisely what took place when the Permanent Secretary allowed himself to be entrapped in a crusade to ferret the Plaintiff out of the Civil Service establishment, clearly without regard to the safeguards of the law.

I therefore find in favour of the Plaintiff: I make Orders as follows:

a. I make the Declaration that the retirement of the Plaintiff from the Public Service was wrongful and a nullity.

b. I order that the Plaintiff shall be paid his arrears of salary and other benefits, for the period dating back to 24th February 1993.

The exact amounts will be assessed by the Registrar or Deputy Registrar, taking into account the applicable terms of service.

c. I order that the costs of this suit be borne by the Respondent.

DATED and delivered this 15th day of December 2003.

J.B. OJWANG

Ag. JUDGE

Coram : J.B Ojwang, Ag. J

Court Clerk – Mutea

For the Plaintiff: Mr. G. Imanyara, instructed by Gitobu

Imanyara & Co. Advocates

Attorney-General – unrepresented