



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civ Appli 204 of 1993 (UR 87/93)

NYAMODI OCHIENG-NYAMOGO.....1ST APPLICANT

MICHAEL S GACHAMU NJERU.....2ND APPLICANT

AND

KENYA POSTS AND TELECOMMUNICATIONS CORPORATION....RESPONDENT

(Being an application for injunction in an intended appeal from the ruling of the High Court of Kenya at Nairobi (lady Justice Owuor) dated 4th August, 1993

in

HCCC NOS 1736 & 1890 of 1993

RULING OF THE COURT

This is an application under rule 5(2)(b) of the Court of Appeal Rules for a temporary injunction restraining Kenya Posts and Telecommunications Corporation (the Corporation), from retiring or in any way interfering with the employment of Mr Nyamodi Ochieng Nyamogo (the first applicant) and Mr Michael Gachamu Njeru (the second applicant, pending the hearing and final determination of an appeal against the decision of Owuor J dated 4th August, 1993, whereby she dismissed the applicants' application for a temporary injunction.

According to the plaint filed by the first applicant on 13th April 1993, he was employed by the Corporation in 1981 as a Legal Officer on permanent and pensionable terms rising through the ranks to the position of Senior Assistant Manager in April, 1990. Among the perks that went with his appointment was the occupation of house No 136A, Mwingi Road, Kileleshwa, Nairobi, at subsidised rent. Under the terms of his employment, the first applicant could only be compulsorily retired on attaining the age of 55, but this notwithstanding the Corporation by a letter dated 6th April, 1993, delivered to the first applicant on 7th April, 1993 at 5 p.m., informed him that he had been compulsorily retired with immediate effect. The letter, signed by one Issa Abdulfaraj on behalf of the Corporation's Managing Director, was in the following terms:

“Mr N O Nyamogo

RETIREMENT

At its 125th regular meeting held on 6th April, 1993, the Board of Directors of Kenya Posts and Telecommunications Corporation approved your compulsory retirement with immediate effect.

Since you are entitled to a full pension benefit, herewith please find associated pension commutation papers for your urgent necessary action, as appropriate, and subsequent return to General Manager/Human Resource for processing.

Please ascertain the immediate return of all and any Kenya Posts and Telecommunications Corporation's property in your possession and, likewise, the refund of all and any outstanding payments.

Acknowledge receipt of this letter by dated and signature on the associated duplicate copy which should be duly returned."

The first applicant contested his purported retirement on the grounds that he had made no application for retirement; that the decision was taken without giving him a hearing as required by law; and that the decision was ultra vires the provisions of the Kenya Posts and Telecommunications Corporation Act and regulations made thereunder. Among the reliefs he sought were a declaration that the purported retirement was null and void; an injunction restraining the Corporation from retiring him and also from evicting him from the house.

In his plaint, the second applicant stated that he was employed by the Corporation in August, 1976 as Graduate Pupil Engineer on permanent and pensionable terms rising through the ranks to the position of Senior Assistant Manager with effect from 1st December 1992. He enjoyed the same benefits as the first applicant which included house No 13, Post Office Staff Quarters, Dennis Pritt Road, Nairobi. He also received on 8th April, 1993, the letter from Issa Abdulfaraj dated 6th April, 1993, informing him that he had been compulsorily retired from the service of the Corporation. The second applicant sought the same reliefs as the first applicant.

The applications by both applicants for temporary injunctions were consolidated and heard together. The applicants had obtained ex parte orders of injunction against the Corporation and what came before Owuor J was the hearing inter partes. The applications were supported by affidavits sworn by the applicants in which they repeated in greater detail the averments contained in their respective plaints. At the time of their purported retirement, the first applicant was aged 46 and the second applicant was aged 43.

The applications by the applicants were resisted on the grounds contained in an affidavit sworn by Mr Malakwen who is the Corporation Secretary in which he deponed, inter alia, that the retirement of the applicants was in accordance with the regulations of Posta Code D and was aimed at attaining greater efficiency and economy and was in accordance with the provisions of the Kenya Posts and Telecommunications Corporation Act (cap 411).

In a very short ruling in which she did not even allude to the relevant statutory provisions, the Judge dismissed the application holding that damages would be an adequate remedy if the applicants were aggrieved. She also said:

"I have not been persuaded that the appellant is an office holder in the defendant company and that he was only removable by a due and lawful exercise of the power of removal by the defendant. This is a simple case of a contract between an employer and an employee without more ado."

Dr Khaminwa, for the applicants, has submitted before us that the applicants have an arguable appeal with a high prospect of success and in support of this submission he has drawn our attention to the relevant statutory provisions. First, there is section 106(a) of the Kenya Posts and Telecommunications Corporation Act (cap 411) (the Act), which provides as follows:

"106. Subject to this Act the Minister may make regulations generally relating to the conditions of service of employees and without prejudice to the generality of the foregoing may make regulations relating to:

(a) the grant of pensions, gratuities and other retiring allowances to employees and their dependants and the grant of gratuities to the estate or dependants of deceased employees.”

On 31st July, 1985, in exercise of the powers conferred by section 106 of the Act, the Minister for Transport and Communications made the Kenya Posts and Telecommunications Corporation (Pensions) Regulations 1985, (L.N. No 182 of 1985). The relevant regulations here are regulations 4, 5 and 8 which so far as are material state:

“(4) Notwithstanding the provisions of these Regulations, the Minister may, in regulation to a specified class of officers, approve a scheme of retirement providing payment of pensions, gratuities or other allowances, in these Regulations referred to as an “approved special retirement scheme” and that scheme shall have effect as if the provisions thereof were part of these Regulations.

5.(1) Subject to paragraph (2) and (3), no pension, gratuity or other allowance shall be granted under these Regulations to an officer except on his retirement from the public service in one of the following circumstances –

(a) on or after attaining the age of fifty years;

(d) on compulsory retirement for the purpose of facilitating improvement in the organization of the Corporation or the department to which he belongs, by which greater efficiency or economy may be effected.

(g) On retirement in accordance with any approved special retirement scheme.

8.(1) Subject to paragraph (3), an officer may elect to retire on or at any time after attaining the age of fifty years.

(2) The Corporation may, with the agreement of an officer, require him to retire from the service of the Corporation at any time after he attains the age of 50 years but before he attains the age of fifty five years.

(3) The Corporation may require an officer to retire from the service of the Corporation –

(a) at any time after he attains the age of fifty-five years;

(b) in accordance with the terms of any approved special retirement scheme, and an officer so required shall retire accordingly.

On the same day namely 31st July, 1985, the Minister also made the Kenya Posts and Telecommunications Corporation (Approved Special Retirement Scheme) (Pensions) Regulations, 1985, and which were deemed to have come into force on 1st December 1980 (L.N. No 184 of 1985). Regulations 3 and 4 of these Regulations provide as follows:

“3. Subject to the Pensions Regulations, an officer holding a pensionable office in the service of the Corporation and who has been confirmed in that office and whose salary is not below Super Scale 6 in the Corporation’s salary scales may, on his own option and with the approval of the Board, retire, or be required by the Board to retire, from the service of the Corporation –

(a) on or after attaining the age of forty-five years; or

(b) on or after completion of ten years of service in a pensionable office.

4. Where under these Regulations –

(a) an officer wishes to retire, he shall submit his application to the Managing Director who shall

forward it together with his comments to the Board for approval;

(b) an officer is required by the Board to retire, the Managing Director shall notify the officer in writing that his compulsory retirement is under consideration and ask the officer if he wishes to make any representations to the Board; and on receipt of the officer's representations, the Managing Director shall forward these representations to the Board together with his own comments, if any, and where the Board is not satisfied with those representations it shall order the retirement of the officer concerned."

Mr Wetangula, for the Corporation, on the other hand, submitted that the compulsory retirement of the applicants was lawful and was done in accordance with the Act and the regulations made thereunder. He relied on regulations 5(1)(d) and 8(3)(b) of the Kenya Posts and Telecommunications Corporation (Pensions) Regulations, 1985. He submitted that the Corporation was under no duty to inform the applicants in advance of its intention to retire them compulsorily. Mr Wetangula also contended that the applicants are not entitled to an injunction for two reasons. First, because by the time the applicants went to law, the retirement had already taken effect and, secondly, because the applicants have not suffered any financial loss as their retirement carried full pension benefits.

Considering all the material before us, and particularly the statutory provisions which we have reproduced in extenso, we are quite unable to accept Mr Wetangula's submission that the retirement was carried out in accordance with the law. At the time of their purported retirement, the applicants had not attained the age of compulsory retirement. They did not apply to the Corporation to take early retirement. And they were not given an opportunity to make representations before being compulsorily retired either. On the face of it, and viewed in the context of the relevant statutory provisions, the action of the Corporation appears to be in breach of the law and the rules of natural justice. As to the submission that the remedy of injunction is not available to the applicants, the short answer is that the Corporation took the applicants by surprise and they were completely unaware of their impending retirement. The Corporation having moved the goal posts cannot now be heard to complain about the mode of retaliation adopted by the applicants.

The Judge treated the case as a simple one of master and servant. She did not consider the possibility that the applicants were holding public offices with statutory underpinning. We think that this is a case where the interests of justice would be better served by granting relief sought by the applicants than by refusing it. At stake is the livelihood of two middle-aged professionals and their families.

In the result, we allow this application and make the following orders:

(1) The Corporation is hereby restrained either by itself, its servants or agents or otherwise howsoever from retiring Nyamodi Ochieng Nyamogo and Michael Gachamu Njeru from the service of the Corporation or otherwise interfering with their employment until the hearing and final determination of the intended appeal or further order.

(2) The Corporation is likewise restrained from evicting the said Nyamodi Ochieng Nyamogo and Michael Gachamu Njeru from their houses No 136A, Mwingi Road, Kileleshwa, Nairobi and No 13, Post Office Staff Quarters, Dennis Pritt Road, Nairobi), until the hearing and final determination of the intended appeal or further order.

(3) Costs of the application to be in the appeal.

Dated and delivered at Nairobi this 8th day of October, 1993.

JE Gicheru

Judge of Appeal

RO Kwach

Judge of Appeal

MG Muli

Judge of Appeal

I certify that this is a true copy of the original

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Ag Deputy Registrar