

REPUBLIC OF KENYA

THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 1170 OF 1981

MWANGI STEPHEN MURIITHIPLAINTIFF

VERSUS

THE ATTORNEY GENERAL DEFENDANT

RULING

I am asked by this Chamber Summons to give to the Plaintiff what is in effect a temporary declaration of his rights as a pensionable officer in the Special Branch of the police, whom, as he states in his plaint, he has served for some 23 years.

The plaint filed on April 29, 1981 recites that on April 14, 1981 the plaintiff received the letter exhibited to the plaint, whereby, consequent on his appointment as General Manager of the Uplands Bacon Factory, he was purportedly retired from the service as from February 3, under section 25 of the Constitution. It seems from the Affidavit in support of the Summons that the plaintiff does not want this appointment and resists his retirement as a police officer which in any case, Mr Khaminwa who appears for him, argues, should have been through the Commissioner of Police and not, as by the letter of April 27, exhibited to the Affidavit, by the Director of Intelligence. In particular he says that he should not have to hand over all the Government property of which he has hitherto been in possession as specified in the letter of April 27. Mr Khaminwa argues that the effect of compliance with that letter will be that the plaintiff loses all his rights as a police officer, particularly in view of sections 2, 8, and 15 of the Police Act Cap 84 in full. Mr Khaminwa particularly urges that his client should be given a moratorium stay of execution as to the deadline set out in the letter of April 27, which is included as part of MSM I exhibit to the plaintiff's affidavit.

Mr Shields, for the Attorney-General, defendant, as he says, vehemently opposes the application. In the first place he says that the Government has a perfect right to ask for the return of its property which is only given to the plaintiff for the purpose of the performance of his duties. When those duties end, then they have, Mr Shield says, to be delivered up to the Government. Moreover, Mr Shields says, where is the urgency? If the plaintiff is entitled to them he will get his emoluments. The only basis for his action is section 16 of the Government Proceedings Act, Cap 40; before which no right existed in a private individual to sue the Government anyway.

I am bound to say that I think the point taken as a preliminary objection by Mr Shields, namely, that there can be no such thing as a temporary declaration or order declaratory of a person's right is now settled law. Indeed, at one point in his argument Mr Khaminwa conceded that the declaration he sought could, of its nature, be neither temporary nor interim. The matter arose in *Gachathi v Attorney General* H C C C 3981 of 1979, followed in *Owino v Attorney General* H C C C 111 of 1979 and, I am told before Cotran J in H C C C 3365 of 1980, In the former case *Underhill v Ministry of Food* [1950] 1 All ER, which was based on section 21 of the Crown Proceedings Act (1947), in identical terms to our section 16, was followed. There Upjohn LJ, said:

“But, as Romer J, pointed out, an order declaring the rights of the parties must in its nature be a final order after a hearing when the court is in a position to declare what the rights of the parties are, and such an order must necessarily then be “*res judicata* and bind the parties for ever, subject of course, to a right of appeal.”

“Speaking for my part I simply do not understand how there can be such an animal, as I ventured to call it

in argument, as an interim declaratory order which does not finally declare the rights of the parties.”

It was said by Mr Khaminwa that the very statute itself, by section 13A(3), which was added by the Public Authorities Limitation Act 1974, mentions “an order declaratory of the rights of the parties in lieu of a temporary injunction” so how can the State argue there is no such remedy? But this part of the section was further amended by Act 7 of 1975 so as to delete the word “temporary”. In other words the legislature apparently recognized the inappropriateness of a temporary declaration.

In my judgment Mr Shields is absolutely right and there is no such remedy against the Government as a temporary order declaratory of the parties’ rights. That cannot be done and the reasons why it cannot be done are set out in full in Upjohn L J’s judgment above. It is either a declaration or it is not. There can, of its nature, be nothing temporary about it, as, for instance, is the case with an injunction, which, by Statute, is not available against the Government (section 16(1) proviso (1) of Cap 40). Neither do I consider I have any jurisdiction to extend the date in the April 27 letter which, in any case is not sought, in the Chamber Summons. Moreover, how can the letter be declared void if it is to be extended?

In the result the application by Chamber Summons filed on April 29, 1981, which purports to be for a temporary declaratory order that the decision retiring the plaintiff from the Public Service is null and void, and that the requirements in the letter of April 27, are of no legal effect pending the hearing of the case, is dismissed with costs.

Dated and Delivered in Nairobi this 30th day of April 1981.

A.R.W.HANCOX

JUDGE