



**Njaggah v Board of Directors of Water Services Regulatory Authority & 2 others
(Civil Appeal E108 of 2024) [2025] KECA 1258 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1258 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E108 OF 2024
PO KIAGE, WK KORIR & JM NGUGI, JJA
JULY 11, 2025**

BETWEEN

PETER NJAGGAH APPELLANT

AND

**BOARD OF DIRECTORS OF WATER SERVICES REGULATORY
AUTHORITY 1ST RESPONDENT**

**CHIEF EXECUTIVE OFFICER OF WATER SERVICES REGULATORY
AUTHORITY 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

*(An appeal against the judgment of the Employment and Labour Relations Court
at Nairobi (Ongaya, J.) dated 25th May 2023 in ELRC Petition No. E217 of 2022)*

JUDGMENT

1. In a judgment dated 25th May 2023, Ongaya, J. of the Employment and Labour Relations Court (“ELRC”) dismissed the appellant’s petition dated 15th December 2022. The appellant is dissatisfied with the said judgment as a whole and has preferred seven grounds of appeal as follows:
 - “i. The learned Judge erred in law and misdirected himself by finding that the Appellant’s Employment contractual terms superseded statutory provisions.
 - ii. The learned Judge erred in law and fact by finding that there is no established reason to vitiate the binding effect of the Appellant’s Employment Contract dated 4th November, 2020.
 - ii. The learned Judge erred in law and misdirected himself by finding that, despite the Appellant being a Person with Disability and registered as such, the



mandatory retirement age still remained 60 years as per his term of contract and not pursuant to the statutory provisions under Persons with Disability [Act No. 14 of 2003](#) which provides that persons with disability retirement age is 65 years.

- iii. The learned Judge erred in law and in fact by finding that even where the Appellant is a person with disability, he is still obliged to conclude a fixed term of contract with the 1st Respondent in public service.
 - iv. The learned Judge erred in law by finding that the Appellant as at due retirement date had not satisfied the preconditions for a public officer to qualify for mandatory retirement at the age of 65 years, being a person with disability.
 - v. The learned Judge erred in law and in fact by finding that the Appellant's rights and freedoms had not been contravened.
 - vi. The learned Judge erred by not considering all the evidence tendered before him by the Petitioner.”
2. In the petition, the appellant averred that vide a contract dated 4th November 2020, he was employed by the 1st respondent as the Director of Standards, Licensing, Advocacy and Public Education for a period of five years. According to the employment contract, he was to retire upon the expiry of the contract or on 29th December 2022, upon attaining the age of 60 years, whichever was the earlier. The appellant averred that as a person living with disability, he was, however, supposed to retire at the age of 65 years on 29th December 2027 in accordance with Government Circular Ref. No. MSPS/HRM/2/2/2/Vol. II (21) and Regulation 70(1)(b) of the Public Service Commission Regulations, 2020. The appellant, therefore, contended that despite his employment contract indicating that he would retire at the age of 60 years, he had a legitimate expectation that he would retire at the age of 65 years.
 3. It was further the appellant's case that despite the legitimate expectation that he would retire on 29th December 2027, he received a letter dated 15th February 2022 from the 1st and 2nd respondents informing him that he was to retire on 28th December 2022. The appellant averred that on 28th November 2022, he held a face-to-face meeting with the Corporate Services Committee of the 1st respondent in a bid to have his contract reviewed on account of his disability, as supported by the medical report dated 21st July 2022 from Aga Khan University Hospital. The appellant averred that his case was further supported by an assessment form from Thika Level 5 Hospital confirming his physical incapacity as verified by the Director of Medical Services, Kiambu County, followed by his letter dated 9th December 2022 forwarding his registration details being registration No. NCPWD/P/582319 with the National Council for Persons with Disabilities. According to the appellant, despite the information, the 1st and 2nd respondents did not budge.
 4. The appellant, therefore, averred that since his contract had not been reviewed, the 1st and 2nd respondents had acted whimsically in disregard of the law and due process, thereby occasioning him to retire 5 years earlier than the age provided for in law. He averred that the 1st and 2nd respondents' actions violated section 80(1)(a) of the [Public Service Commission Act](#), Regulation 70(1)(b) of the Public Service Commission Regulations, 2020, section 3 of the [Employment Act](#), and Article 41 of the [Constitution](#). He particularized the constitutional and statutory breaches as: unlawful, illegal, arbitrary, and premature termination of his contract of employment; violation of his right to fair labour practices; violation of his right to fair hearing; and violation of the right to fair administrative action. Consequently, the appellant sought an order nullifying the 1st and 2nd respondents' letter dated 15th



February 2022; an order prohibiting his retirement on 28th December 2022; an order of mandamus compelling the 1st and 2nd respondents to continue his employment; and an order of declaration that his retirement date was 29th December 2027. He also prayed for the costs of the petition.

5. The petition was opposed by the 1st and 2nd respondents through a replying affidavit sworn on 8th February 2023 by Dr. Julius Itunga, the Acting Chief Executive Officer of the 1st respondent. He averred that he was the acting officer in the office of the 2nd respondent. According to the deponent, the appellant's employment contract was for five years or upon attaining the mandatory retirement age of 60 years, whichever occurred first. He averred that based on the appellant's date of birth, he was to attain the mandatory retirement age of 60 years on 29th December 2022. Consequently, a retirement notice was issued to the appellant on 5th February 2022, and the appellant proceeded on terminal leave on 28th November 2022, with his last working day being 28th December 2022. Dr. Itunga stated that the appellant's request for extension of contract was made on 12th October 2022, nearly eight months after the retirement notice was issued. According to Dr. Itunga, the request did not cite disability as a reason for the extension; instead, it focused on operational matters such as new leadership, staff induction, and CEO recruitment. He averred that the court could not rewrite the contract and that its terms bound the parties. It was the 1st and 2nd respondents' case that the actions taken, including the issuance of the retirement notice, were in accordance with the appellant's employment contract and the Public Service Commission Regulations.
6. Regarding the issue of disability, it was averred that the appellant did not disclose any disability at the time of his recruitment in 2020 or at any other point prior to the issuance of the retirement notice. According to Dr. Itunga, the issue only arose during a meeting with Corporate Affairs Committee on 28th November 2022, when the appellant was already on terminal leave. Further, that the 1st and 2nd respondents became aware of the appellant's status as a person with disability (PWD) on 9th December 2022, which was also the date the appellant had obtained his registration as a PWD. The appellant's averment that he had presented a medical report and an assessment form before 9th December 2022 was denied.
7. Ultimately, the 1st and 2nd respondents averred that the appellant's claim of disability was raised opportunistically at the end of his employment to circumvent the clear terms of his contract and the mandatory retirement age. It was consequently asserted that the appellant failed to meet the necessary legal requirements for extension of the retirement age based on disability and the petition should be dismissed with costs.
8. The petition was heard by way of written submissions and in the impugned judgment, the learned Judge made the following findings:

“To answer the 1st issue for determination, the Court returns that the parties have mutually agreed that they signed the contract of service being the letter of appointment dated November 4, 2020...The parties were in contract of service whose tenure was properly governed by clause 6 thereof.

To answer the 2nd issue, the Court returns that while the petitioner was registered as a person with disability on 09.12.2022, clause 6 referred to mandatory retirement age of 60 years. The petitioner received the retirement and does not deny that he wrote the letter dated 12.10.2022 requesting for extension of service beyond the age of 60 years. By that letter it is clear that as urged for the 1st and 2nd respondents, the petitioner understood the scope and import of clause 6 and that by agreement the contract would lapse upon his attaining the mandatory retirement age of 60 years.



To answer the 3rd issue, the Court returns that even where a person is with disability, nothing stops such a person from concluding a fixed term contract with an employer in public service. The Court considers that where such contract is concluded like in the instant case, the clear contractual terms must be binding and it cannot be that the court reads into the clear terms and impose a tenure of retirement at 65 years of age for an employee with a disability...

To answer the 5th issue the Court returns that the petitioner has not established a basis for the award of the reliefs as prayed for. In particular, and as submitted for the 1st and 2nd respondents, the petitioner has failed to show the alleged contravention of rights and freedoms as was alleged...

In conclusion judgment is hereby entered for the 1st and 2nd respondents against the petitioner for dismissal of the petition with orders each party to bear own costs of the petition.”

9. When this appeal came up for hearing on 26th March 2025, learned counsel Mr. Omore appeared for the appellant, while his counterpart Mr. Wachira appeared for the 1st and 2nd respondents. The 3rd respondent did not take part in the appeal despite having been duly notified of the hearing date by the Court. Mr. Omore and Mr. Wachira, having filed their respective written submissions, sought to rely on them, accompanied by brief oral highlights.
10. Relying on the submissions dated 19th March 2024 and supplementary submissions dated 10th May 2024, Mr. Omore asserted that the appellant was a person with disability and was duly registered as such under the *Persons with Disabilities Act*, 2003 and the Persons with Disabilities (Registration) Regulations, 2009, holding registration number No. NCPWD/P/582319. Counsel submitted that pursuant to the said registration, the appellant had obtained a Kenya Revenue Authority (KRA) tax exemption certificate. Counsel therefore argued that the appellant complied with section 35(1) of the *Persons with Disabilities Act* and was eligible to retire at 65 years.
11. Mr. Omore submitted that the trial court misinterpreted and misapplied the law by finding that the appellant had not satisfied the preconditions for a public officer with disability to retire at 65 years. According to counsel, such a conclusion was arrived at without cumulatively considering the evidence on record. Counsel also faulted the learned Judge for finding that the appellant’s contractual terms superseded statutory provisions. Relying on Clause 24 of the appellant’s employment contract, counsel asserted that the contract was subject to the labour laws and the Water Services Regulatory Authority Human Resource Policy Manual, including any amendments from time to time. Counsel therefore argued that the contract, read together with the *Persons with Disabilities Act*, Persons with Disabilities (Registration) Regulations, 2009 and Government Circular No. MSPS/HRM/ 2/2/VOL II (21), would lead to the conclusion that the appellant was to retire at 65 years upon registration as a person living with disability. To bolster this argument, counsel referred to *Gabriel Mutava & 2 Others vs. Managing Director Kenya Ports Authority & Another* [2016] eKLR for the holding that an employment contract governs the employment relationship except where the terms are contrary to the law or have been superseded by a statute. Counsel therefore maintained that the provisions of these legal instruments superseded any contractual terms that stipulated the appellant’s age of retirement as 60 years.
12. Mr. Omore submitted that the 1st and 2nd respondents were obligated to amend the retirement age of the appellant to 65 years so as to comply with statute. In urging that the appeal be allowed,



- counsel contended that the Court should interpret Article 20 of the Constitution in a manner that acknowledges the appellant's rights.
13. Addressing alleged impropriety of the appeal, counsel submitted that the appeal is proper as the failure to annex the decree did not render the appeal incompetent. In this regard, counsel relied on *Mukenya Nduda vs. Crater Automobiles Ltd* [2015] eKLR and submitted that procedural error attributable to counsel should not be visited upon the client.
 14. Opposing the appeal, Mr. Wachira through the submissions dated 7th May 2024 argued that the appeal and the supplementary record of appeal were incompetent for non-compliance with rule 89 (1) (h) of the Court of Appeal Rules, 2022, which requires that the decree forms part of the record. Counsel submitted that failure to attach the decree goes to the root of the appeal, and not being a procedural shortcoming renders the appeal defective. To buttress this submission, counsel relied on *Municipal Council of Kitale vs. Nathan Fedha* [1983] KECA 70 (KLR) as cited in *Paul Kurenyi Leshuel vs. Ephantus Kariithi Mwangi & Electoral & Boundaries Commission* [2015] KEHC 5124 (KLR) to elaborate on the essence of a decree in an appeal and *Tharaka Nithi County Government & Another vs. Gaichu & 129 Others* [2022] KECA 585 (KLR) to emphasize the importance of compliance with court rules. Counsel also relied on *Bwana Mohamed Bwana vs. Silvano Buko Bonaya & 2 Others* [2018] KEHC 597 (KLR), where the High Court declared an incomplete record of appeal incompetent and defective. Mr. Wachira additionally submitted that the appellant did not seek the leave of the Court to file a supplementary record of appeal to include the crucial certified decree. Based on these points, the 1st and 2nd respondents submitted that the appeal should be dismissed with costs.
 15. Turning to the substance of the appeal, Mr. Wachira argued that the employment relationship between the parties was governed by a mutually agreed fixed-term contract. Counsel reviewed the evidence on record and asserted that the appellant did not plead or prove that the contract was invalid due to coercion, fraud, undue influence, or any other vitiating factor. According to counsel, the appellant understood the scope and import of Clause 6, which meant that his contract would lapse upon his attaining 60 years. While conceding that section 80(2) of the Public Service Commission Act permits the appointment of public officers who have attained the mandatory retirement age to serve on fixed-term contracts, counsel argued that allowing the appellant an extension to 65 years would fundamentally alter the fixed-term nature of the contract and prejudice his clients.
 16. Counsel further submitted that the appellant did not deserve to retire at 65 years because he never met the stipulation in regulation 70(2)(b) of Public Service Commission Regulations, 2020 that a public officer could only be considered for retirement as a person with disability if the officer was registered in the public body's human resource data base as a person with disability for at least three years before the date of retirement. Counsel further submitted that although the proviso to Regulation 70(2)(b) allows the Public Service Commission to consider cases where disability occurs less than three years before retirement, the appellant's "hurried registration" prevented the Commission from exercising its right to verify the disability status through a second medical assessment, as permitted by Regulation 70(3). Counsel relied on *Kinyua Felix vs. Ministry of Education & 2 Others* [2021] KEELRC 2069 (KLR) in support of the proposition that a belated disability claim will not succeed where the petitioner had not applied for registration earlier or disclosed disability at recruitment.
 17. Still urging that the appellant did not comply with the procedural requirements, Mr. Wachira stated that the appellant's KRA tax exemption certificate was processed post the retirement date.
 18. Counsel also referred to *Mahamud vs. Mohamad & 3 Others* [2018] KESC 71 (KLR) in support of the principle that parties cannot use additional evidence to create a new case or to cover up omissions or weaknesses in their original arguments. According to counsel the additional evidence presented by the



appellant, such as the Income Tax Exemption Certificate and pay slips, obtained after the retirement date, and should not alter the ELRC Court's decision.

19. In conclusion, the 1st and 2nd respondents submitted that the trial court did not err in its findings and correctly declined to rewrite the appellant's fixed-term employment contract or amend his retirement age to 65 years, given the contractual terms and the appellant's non-compliance with the established regulations for disability-based retirement extensions.
20. This being a first appeal, we are reminded of our role as was restated in *Abok James Odera T/A A. J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR), which is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
21. Before delving into the substance of the appeal, we will first address two preliminary issues raised by the 1st and 2nd respondents. The first issue is in regard to the jurisdiction of the Court to entertain the appeal. According to these respondents, the instant appeal is incompetent because the appellant did not annex the decree to the record of appeal and that the decree subsequently filed through a supplementary record was filed without the leave of the Court. The appellant's reply is that the issue does not go to the substance of the appeal and should be ignored. Our disposal of this issue is that the same has been raised too late in the day and without compliance with the rules of the Court. Rule 86 of the Court of Appeal Rules, 2022 specifically provides for the filing of an application within a specified timeline for the striking out of a notice of appeal or an appeal for incompetency. No such application was filed by the 1st and 2nd respondents. As such the request to strike out the appeal through submissions and outside the time provided by the rules must fail.
22. The second preliminary issue raised by the 1st and 2nd respondents is in respect of the production of additional evidence by the appellant. On this, we find that the issue is not available for our consideration in light of the fact that the Court (*Warsame, Mumbi Ngugi & Nyamweya, JJ.A.*) on 30th January 2024 granted leave to the appellant to adduce additional evidence through a supplementary record of appeal. We, therefore, decline to entertain the 1st and 2nd respondents' arguments on this issue.
23. Turning to the substance of the appeal, there is no contention that the appellant was engaged by the 1st respondent, which contract was according to Clause 6 to "be for a period of five (5) years or upon attaining the mandatory retirement age of sixty
60. years whichever is earlier." Although the appellant stated at paragraph 13 of his petition that he was under "close medical supervision since the year 2016", it is apparent that at the time of his engagement, the appellant was not a person with disability. The bone of contention revolves around the appellant's acquisition of disability status on 9th December 2022 before he was due to retire at the age of 60 years on 29th December 2022. We therefore find that the key issue for determination in this appeal is whether the appellant's request to retire at the age of 65 years was properly rejected by the 1st respondent.
24. The preamble to the Persons with Disability Act, 2003 (now repealed by the [Persons with Disabilities Act, 2025](#)) provided as follows:

"An Act of Parliament to provide for the rights and rehabilitation of persons with disabilities, to achieve equalization of opportunities for persons with disabilities; to establish the National Council for Persons with Disabilities; and for connected purposes."
25. Though enacted prior to the promulgation of the 2010 Constitution, the rights and privileges of persons with disabilities found in Part III of the Act align with the rights of persons with disabilities as guaranteed under Article 54 of the [Constitution](#). The [Persons with Disabilities Act](#) did not regulate



when a person can register as a person with disability because disability can be congenital or incurred during a person's lifetime.

26. It is the aspect of disability during employment that, in our view, led to the enactment of Regulation 70(1), (2), (3), and (4) of the Public Service Commission Regulations, 2020. The Regulation provides as follows:

“70.

- (1) Subject to the *Constitution*, section 80 of the Act, any other relevant written law or a specific government policy, the mandatory retirement age in the public service shall be -
 - a. sixty years;
 - b. sixty-five years for persons with disability; and
 - c. such age as may be determined by the Commission for lecturers and research scientists serving in public universities, research institutions or equivalent institutions as determined by Commission in consultation with such universities, research institutions or equivalent institutions.
2. A public officer shall be considered for retirement as a person with disability if the officer -
 - a. has a disability of a permanent nature that can be perceived by significant sectors of the community and the disability has a substantial impact on the ability of the officer to carry out ordinary day to day activities;
 - b. has been registered in the public body's human resource database as a person with disability for at least three years before the date of retirement:

Provided that the Commission may consider cases of disability that occur less than three years before the date of retirement; and
 - c. is registered by the National Council for Persons with Disabilities and has a tax exemption certificate from the Kenya Revenue Authority as a person with disability:

Provided that registration by the Council or possession of a tax exemption certificate shall not be considered as automatic evidence of disability.
3. Where there is doubt as to the disability of a public officer, the Commission shall seek a second medical assessment from a



panel consisting of a representative of the Commission and three eminent doctors appointed by the Director-General of Health and the second medical assessment shall supersede any other assessment.

4. A person shall not be retained in the public service on account of disability beyond the mandatory retirement age without the approval of the Commission.” (Emphasis applied)
27. Regulation 70(7)(b) of the Public Service Commission Regulations defines disability as follows:

“Disability” means a permanent physical or other impairment or condition that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day to day activities.”
28. The *Persons with Disabilities Act*, 2003 at section 2 defined disability thus:

“Disability” means a physical, sensory, mental or other impairment, including any visual, hearing, learning or physical incapability, which impacts adversely on social, economic or environmental participation.”
29. the *Constitution* in Article 260 defines disability as follows:

“Disability” includes any physical, sensory, mental, psychological or other impairment, condition or illness that has, or is perceived by significant sectors of the community to have, a substantial or long-term effect on an individual’s ability to carry out ordinary day-to-day activities;”
30. In our view, considering the definitions above, to successfully benefit as a person with disability, a person must not only register as a PWD but also establish a substantial or long-term effect on his or her ability to carry out ordinary day-to-day activities. This is the essence of Regulation 70(2)(a) & (c) and (3) of the Public Service Commission Regulations. Additionally, it is imperative to appreciate that Regulation 70(2)(a), (b) & (c) should be read conjunctively and not disjunctively. In so doing, it is evident that a person who has been registered as a PWD for 3 years before his or her retirement would qualify for extension of the retirement age to 65 years. Whatever the case, Regulation 70(4) reveals that for one to benefit from the extension of the retirement age from 60 to 65 years the approval of the Public Service Commission must be obtained. The authority to extend the retirement age, therefore, lies with the Public Service Commission and not with the public body that has employed the officer.
31. The appellant’s disability status having been confirmed on 9th December 2022, hardly twenty days to his retirement age, it was incumbent that approval be sought from the Public Service Commission before the extension of the engagement of the appellant beyond the 60-year mandatory retirement age. In this case, the appellant bore the obligation to seek the approval through his employer as he was the one seeking to adopt the extension as part of his contract of employment. He never did so. We however, do not fault him, as the 1st and 2nd respondents appear to do, for acquiring his disability status late in the day. Although the respondents raised pertinent question as to why the appellant never obtained registration earlier, we observe that the *Persons with Disabilities Act*, 2003 did not provide timelines upon which one must acquire a substantial or long-term effect on the individual’s ability to carry out ordinary day-to-day activities. Disability can occur at any time of an individual’s life and such a provision, were it to exist, would itself be irrational.



32. We, however, must point out that it was incumbent upon the appellant to seek registration in good time so that the 1st and 2nd respondents could ask the Public Service Commission for authority to retain the appellant until the expiry of the contract period. Alternatively, the Public Service Commission could have decided, as it was entitled by the regulations, to seek a second opinion on the appellant's disability status.
33. It is not disputed that the Public Service Commission never approved the extension of the appellant's retirement age beyond 60 years as required by Regulation 70(4). The appellant cannot, therefore, fault the 1st and 2nd respondents for retiring him upon attaining the age of 60 years.
34. Additionally, we are alive to the dictum expressed in *Kenya Chemical and Allied Workers' Union vs. Bamburi Cement Limited* [2017] KECA 20 (KLR) that employment is governed by the general law of contract, now contained in various statutes and it must follow that employment is essentially an individual relationship negotiated by the employee and the employer as per their respective needs. Additionally, in *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Limited* [2017] KECA 152 (KLR) the Court pointed out that:
- “ 38. We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd* [2002]2 EA 503. The primary task of the court is to construe the contract and any terms implied in it. See *Megarry, J. in the case of Coco vs A. N. Clark (Engineers) Ltd.* - [1969] RPC 41.”
35. Applying the above principle to the facts of this case, it is clear that the parties entered into an employment contract whose terms were agreed upon and expressly accepted by the appellant. Under Clause 6 of the contract, the appellant would retire either upon the lapse of the 5 years of the contract or upon attaining the retirement age of 60 years. The latter, in our view, was put in place as a measure for aligning the contract with the Public Service Commission guidelines and the statute. That being the case, the appellant, absent compliance with the Public Service Commission Regulations, cannot therefore demand a retirement age of 65 years. Even if we were to find that he was entitled to enjoy the benefit extended to PWDs, his contract would still be subject to a 5-year term agreed in the contract and not the 65 years he prayed for in his petition. In saying so, we put emphasis on the fact that at the time of entering the contract the appellant knew that he was either to retire upon the lapse of 5 years or upon attaining the retirement age of 60 years. Had he complied with the regulations, then his contract could only have been extended to the full term of 5 years. However, as we have already found, the appellant did not satisfy the threshold set in Regulation 70(4) as read with the proviso to Regulation 70(2)(b) of the Public Service Commission Regulations and was therefore not qualified to retire at 65 years under the law.
36. The appellant also contended that he had legitimate expectation that with the new changes in law, his retirement age ought to have been changed to 29th December 2027. Before addressing the issue of legitimate expectation, we must point out to the appellant that there was no change in the law as he is trying to suggest. By the time he signed the employment contract on 5th November 2020, Circular MSPS/HRM/2/2/2/VOL.II (21) had long been issued on 29th May 2012 whereas the Public Service Commission Regulations, 2020 are dated 14th January 2020. The law he relied on in support of his petition was therefore in place at the time he signed the contract.



37. Coming back to the issue of legitimate expectation, this Court in *Tunoi & Another vs. Judicial Service Commission & Another* [2016] KECA 530 (KLR) identified the ingredients of the principle of legitimate expectation as follows:

“The decision of the Supreme Court that we have just cited stresses that legitimate expectation involves a representation that must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. Other important aspects of the doctrine is that the law does not protect every expectation save only those which are legitimate (*South African Veterinary Council v. Szymanski* 2003 ZASCA 11); clear statutory words override any contrary expectation however founded (*R. v. DPP ex parte Kebilene* [199] 4 All ER 801 and *Republic v. Nairobi City County & Another, ex parte Wainaina Kigathi Mungai*, HC. JR. Misc. C. No 356 of 2013; the representation must be one which the decision-maker can competently and lawfully make without which the reliance cannot be legitimate (*Hauptfleisch v. Caledon Divisional Council* [1963] (4) SA 53); legitimate expectation does not arise when it is made ultra vires the decision-maker’s powers (*Rowland v. Environment Agency* (2003) EWCA Civ. 1885; and a public authority which has made a representation which it has no power to make is not precluded from asserting the correct position which is within its power to make (*Republic v. Kenya Revenue Authority, ex parte Aberdare Freight Services Ltd* [2004] 2 KLR 530).”

38. We have already expressed ourselves on the interpretation of Regulation 70 of the Public Service Commission Regulations, 2020 and its applicability to the facts of this case. In this case, the appellant cannot allege legitimate expectation on the backdrop of clear regulatory provisions that required compliance before he could be entitled to retire at 65 years. In our view, legitimate expectation could only hold had the Public Service Commission given its concurrence. Further, and as correctly submitted by Mr. Wachira, the appellant’s tax exemption certificate which was acquired after retirement contravened Regulation 70(2)(c), which in our view required that the same be obtained prior to retirement. Although the appellant exhibited payslips showing that the 1st respondent complied with the tax exemption certificate, we note that those payslips were for the period that the appellant had been retained in employment pursuant to a court order. The payslips do not change the fact that the tax exemption certificate was issued after the retirement date. Therefore, this ground of appeal likewise fails.

39. Based on the foregoing, we find no merit in this appeal. The learned Judge cannot be faulted for finding that the appellant had not established the claim of violation of his constitutional rights. The reliefs sought could not issue because the conditions that were to be met before the appellant’s request for the extension of his retirement age could be considered had not been met. Consequently, the appeal is dismissed in its entirety.

40. As for the costs of the appeal, we note that the appellant is indeed duly registered as a person with disability and has since left gainful employment with the 1st respondent. In the circumstances, we find that the appropriate order on costs is to order each party to bear own costs of the appeal. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

W. KORIR



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JUDGE OF APPEAL
JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

