



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, J.J.A)

CIVIL APPEAL NO. 57 OF 2014

BETWEEN

GEOFFREY KIRAGU NJOGU.....APPELLANT

AND

THE PUBLIC SERVICE COMMISSION.....1ST RESPONDENT

PERMANENT SECRETARY PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Keroguya (C.W. Githua, J.) dated 15th August, 2014

in

Judicial Review No. 31 of 2013)

JUDGMENT OF THE COURT

1. An issue in this appeal is whether the powers of the Public Service Commission to make the decision to reinstate a public officer after suspension or interdiction can be delegated. The appellant was the Assistant Chief of Karatina Sub- Location. On 3rd November, 2007 the appellant was arraigned in court and charged in Criminal Case No. 59 of 2007 for corruption. The appellant was interdicted on 14th November, 2007 by the then Provincial Commissioner and was paid half his salary. Thereafter, vide a letter dated 8th January, 2008 the 2nd respondent informed the appellant of the 1st respondent's decision to retire him in public interest with immediate effect. By a letter dated 4th March, 2008 the appellant pleaded with the 2nd respondent to reconsider the said decision and wait for the outcome of the criminal case.

2. Subsequently, the appellant was acquitted of the criminal charges against him on 11th January, 2010. By a letter dated 4th February, 2010 addressed to the District Commissioner, Kirinyaga South, the appellant requested for his reinstatement as an Assistant Chief. On 24th March 2011, the said District Officer invited the appellant to attend training. The District Commissioner vide letters dated 8th July, 2011 and 23rd September, 2011 requested the 2nd respondent to reinstate the appellant and his half salary which had been unpaid from February, 2008. The appellant also wrote another letter dated 13th October, 2010 to the 1st respondent seeking reinstatement. On 19th October, 2012 the 2nd respondent informed the appellant that his appeal for reinstatement had been rejected and his case closed. Subsequently, by a letter dated 7th December, 2012 the District Commissioner, Mwea West wrote to the appellant to clear with his office and return all his uniforms and any other government properties in his possession pursuant to his retirement. Unrelenting the appellant made further several appeals to the 2nd respondent without success.

3. Indefatigable, the appellant initiated judicial review proceedings and pursuant to leave granted by the High Court on 20th November, 2013 he filed a Notice of Motion application seeking inter alia:-

- *An order of certiorari to move to this honourable court to quash the decision of the 2nd respondent through the District*

Commissioner, Mwea West dated 7th December, 2012 requiring the applicant (appellant) to clear with the 2nd respondent due to his retirement from service in public interest.

- *An order of prohibition restraining the 1st and 2nd respondents from using the concluded Criminal Case No. 59 of 2007 against the applicant as a ground for retiring the applicant in public interest.*
- *An order of mandamus compelling the 1st and 2nd respondents to pay the applicant all his outstanding salary dues from the 14th November, 2007 being the interdiction date.*

4. The grounds in support of the application were that the respondents' actions were contrary to the rules of natural justice and the 1st respondent's regulations. According to the appellant, there were never any complaints against him; he was never given an opportunity to show cause why he should not be retired on public interest grounds; he was never given particulars of the complaints against him if any; he was denied his right of a hearing as stipulated in the 1st respondent's regulations; he was never notified of his right to appeal against the decision to retire him within the stipulated time frame. The appellant contends that on account of the aforementioned procedural omissions, the disciplinary actions purportedly taken against him were malicious and premised on irrelevant consideration. The appellant also maintained that even after the purported retirement he continued to carry out his duties as an Assistant Chief.

5. In opposing the application before the High Court, **Ms. Alice Atieno Otwala**, the then Chief Executive Officer of the 1st respondent swore an affidavit. She deposed that the letter dated 7th December, 2012 which the appellant sought to quash merely implemented a decision which had already been made to retire him; that quashing the said letter would not quash the decision to retire the appellant on public interest grounds. It was submitted that the appellant's judicial review application was founded on the merits of the decision to retire him. It was deposed that judicial review is concerned with the decision making process and not the merits of a decision.

6. Alice Atieno Otwala deposed that the appellant was retired in public interest on account of poor performance and failure to eradicate illicit brew and not on the basis of criminal charges he was facing. Under the 1st respondent's Regulations 2005 (Legal Notice 28 of 2005) it is only the 1st respondent that can retire an officer in public interest or reinstate such an officer. It was submitted that the 1st respondent has never reinstated the appellant and therefore the allegations by the appellant that he had resumed duty on verbal instructions of a District Commissioner were illegal.

7. By consent parties agreed to dispose the application before the High Court by written submissions and oral highlights. After considering the application on its merits the High Court (Githua, J.) vide a judgment dated 15th August, 2014 dismissed the appellant's application. It is that decision that has provoked this appeal based on the following grounds: -

- *The learned Judge erred in law and in fact by finding that the appellant was retired by the 'retirement in public interest' letter dated 8th January, 2008 whereas the same gave the appellant 42 days within which to appeal against the decision and he appealed.*
- *The learned Judge erred in law and in fact by relying on two unsigned letters purporting to originate from M.N. Kamincha of the office of the President yet the appellant's employer was/is the Public Service Commission.*
- *The learned Judge erred in law and in fact by relying on the replying affidavit sworn by M/s Alice A. Otwala on 6th February, 2014 relying on a non-existent letter, purportedly addressed to the applicant allegedly dated 21st November, 2007. Sic.*
- *The learned Judge erred in law and in fact by finding that despite pendency of the appellant's appeal to the letter by the 2nd respondent dated 8th January, 2008, the letter of 7th December, 2012 did communicate the decision of the appellant's appeal (though it took 5 years) sic.*
- *The learned Judge erred in law and in fact by finding that there was a decision made by the letter to the applicant dated 8th January, 2008 despite evidence produced showing that the appellant was in office for 5 years awaiting the outcome of his appeal against the said letter.*
- *The learned Judge erred in law and in fact by finding that the appellant was not entitled to his outstanding dues from 14th November, 2007 to date.*

8. At the hearing of the appeal Mr. Orangi appeared for the appellant while Mr. Makori appeared for the respondents. Mr. Orangi submitted that the decision made by the High Court was at variance with the facts on record. He argued that the appellant was answerable to the District Officer, District Commissioner and the Provincial Commissioner in that order. When he was still facing the criminal charges he was invited for training by the District Commissioner and he continued carrying out his duties. According to him, the only complaint against the appellant was the aforementioned criminal charges which were eventually dismissed. Mr. Orangi argued that the issue that fell for consideration was whether the appellant was retired from service by the first letter dated 8th January, 2008 or the second letter dated 7th December, 2012. He submitted that it was the second letter that retired the appellant from office. This is because the appellant continued working after he received the first letter.

9. Mr. Orangi contended that the appellant was entitled to fair administrative action and that the trial court erred by taking into account two unsigned letters. He submitted that the fact that the appellant continued working after he received the first letter raised estoppel against the respondents from contending he was retired on 8th January, 2008; that the appellant had a legitimate expectation that the issue had been resolved when he resumed his duties after he was acquitted. He urged us to allow the appeal.

10. Mr. Makori in opposing the appeal argued that the trial court's decision was based on sound principles of law. He submitted that the appellant was retired from public service by the letter dated 8th January, 2008. The second letter dated 7th December, 2012 was simply asking the appellant to clear with the respondents and return Government property. The first letter and the decision to retire the appellant have never been challenged by the appellant. Mr. Makori submitted that the letter dated 8th January, 2008 gave the appellant 42 days to appeal against

the decision to retire him but the appellant did not file an appeal within time. Consequently, the appellant's right to appeal was extinguished when the aforementioned days lapsed.

Mr. Makori maintained that the appellant's employer was the 1st respondent and verbal instructions from the District Officer could not amount to reinstatement of the appellant. He argued that judicial remedies could not issue to the appellant since he was challenging the merits of the decision to retire him. He urged us to dismiss the appeal.

12. We have considered the record, submissions by counsel and the law. This being a first appeal we bear in mind that we are enjoined to consider all the evidence adduced before the trial court and draw our own independent conclusions. See Lucy Mirigo & 550 others -vs- Minister for Lands & 4 others - Civil Appeal 277 of 2011. We are also cognizant of the fact that judicial review orders are discretionary orders. See Republic -vs- Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPR) - Civil Appeal 160 of 2008 wherein this Court stated that:

“Judicial review remedies are discretionary and the Court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law.”

13. The learned Judge (Githua, J.) in dismissing the appellant's application exercised her discretionary power; we can only interfere with her exercise of the discretionary powers under certain well defined principles. These principles are succinctly spelt out in the case of Mrao Ltd. -vs- First American Bank of Kenya Ltd. & 2 others (2003) KLR 125, where this Court held inter alia :-

“2. The Court of Appeal may only interfere with the exercise of the court's judicial discretion if satisfied:-

- a. **The Judge misdirected himself on law; or**
- b. **That he misapprehended the facts; or**
- c. **That he took into account of considerations of which he should not have taken account; or**
- d. **That he failed to take into account of considerations of which he should have taken account; or**
- e. **That his decision, albeit a discretionary one, was plainly wrong.”**

14. Based on the foregoing we are of the considered view that the issues that fall for determination are whether the circumstances of this case justified the issuance of the prerogative orders as sought by the appellant; whether the trial Judge exercised her discretion properly by dismissing the appellant's application for certiorari, prohibition and mandamus.

15. From the pleadings the appellant sought an order of *certiorari* to quash the 2nd respondent's decision contained in the letter dated 7th December, 2012. An order of *certiorari* quashes a decision already made and will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with. See Kenya National Examinations Council -vs- Republic Exparte Geoffrey Gathenji Njoroge & Others - Civil Appeal No. 266 of 1999. According to the appellant, the letter dated 7th December, 2012 retired him allegedly in public interest contrary to the rules of natural justice and the 1st respondent's regulations. In contrast, the respondents' contention is that the letter dated 7th December, 2012 was merely implementing a decision which had been made earlier vide a letter dated 8th January, 2008 retiring the appellant in public interest.

16. The appellant contends that he was retired in public interest by two letters, the first one dated 8th January, 2008 and the second dated 7th December, 2012; that upon receiving the first letter he resumed duty when he was acquitted of criminal charges and the 2nd respondent purported to retire him again vide the second letter.

17. At this juncture it is imperative that we set out the particulars of the two letters from the 2nd respondent. The first letter is set out herein below: - “8th January, 2008

Mr. Geoffrey Kiragu Njogu

Thro'

The District Commissioner

Kirinyaga District

P.O Box 1

KERUGOYA

Dear Sir,

RE: RETIREMENT IN PUBLIC INTEREST:

I wish to inform you that it is not in the interest of the Government to retain you in service.

Accordingly, the Public Service Commission has conveyed its decision that you be retired from the service in the public interest with immediate effect and you will therefore be paid one month's salary in lieu of notice.

.....

You are required to indicate in the commutation of pension Form which bank account you service gratuity should be paid.

In accordance with the Public Service Commission Regulations 2005 you have the right of appeal against this decision to the Commission through this office within 42 days from the date of this letter.

Yours faithfully

R.W. GICHOHI (MRS)

FOR: PERMANENT SECRETARY /PROVINCIAL

ADMINISTRATION & INTERNAL SECURITY”

18. It is clear from the letter set out above that the appellant was retired in public interest on 8th January, 2008. The appellant did not appeal against the said decision within the stipulated 42 day time frame; instead, the appellant vide a letter dated 4th March, 2008 only requested the 2nd respondent not to retire him and wait for the outcome of the criminal case against him. Upon his acquittal the appellant sought to be reinstated after the lapse of the appeal period; the 2nd respondent vide letter dated 19th October, 2012 informed the appellant that his application for review had been rejected and his case had been closed.

19. The second letter which formed the basis of judicial review application before the High Court that the appellant sought an order of *certiorari* to quash is set out herein below:- “7th December,2012

Mr. Geoffrey N. Karagu

P.O BOX 74

WANG’URU

RE: CLEARANCE AFTER RETIREMENT FROM THE

SERVICE IN PUBLIC INTEREST

We refer to the Permanent Secretary’s letter. ‘Ref: Application for review of a closed case regarding retirement from service in public interest dated 19th October, 2012 which contents you are aware of.

This office wish to close the case as per the above referred letter and inform you that you clear with the office as is required of any civil servant leaving the service. Sic

In this regard, we request you to return all your uniforms together with any other Government properties that may have been in your possession/custody during your tenure as the Assistant Chief Karatina Sub-Location in Thiba Location.

Your earliest compliance will be appreciated.

A. MUNENE

FOR DISTRICT COMMISSIONER

MWEA WEST”

20. Based on the foregoing we find that the letter dated 7th December, 2012 did not contain the decision to retire the appellant but was merely implementing the 1st respondent’s decision to retire the appellant by requesting him to return his uniform and any other Government property in his possession. We observe that a District Commissioner has no power to retire a public officer and a plain reading of the letter dated 7th December, 2012 cannot be construed to be a retirement letter. The letter dated 7th December, 2012 is not from the 1st respondent who was the employer of the appellant; the said letter is signed on behalf of a District Commissioner who was neither the employer of the appellant nor a person exercising powers delegated by the 1st respondent in relation to making the decision to retire a public officer. We concur with

the following findings by the High Court: -

“Looking at the entire letter whollistically (dated 7th December, 2012), I am unable to agree with the applicant’s (appellant’s) position that the letter contained a decision against which an order of certiorari can be properly issued by this court for the following reasons. To start with the letter made reference to the letter dated 19th October, 2012 which was the last communication to the applicant informing him that his appeal against the decision to retire him in public interest had been rejected and that his case had been closed. It required the applicant to comply with the directions given therein to facilitate the closure of his case following the rejection of his appeal against the 1st respondent’s decision.

I wholly agree with the position taken by the respondent that the letter sought to implement the 1st respondent’s decision to retire the applicant from the public service, a decision which had been made a long time ago specifically on or before 8th January, 2008. The letter merely reminded the applicant of the things he was required to do as a Public Officer who was vacating office after leaving the public service. The letter did not therefore contain a decision which was capable of being removed to this court for purposes of being quashed as prayed.”

21. The appellant’s position was that since he resumed duty after his acquittal the letter dated 8th January, 2008 retiring him in public interest ceased to have effect; the respondents were estopped from alleging the contrary and the appellant had a legitimate expectation that the issues surrounding his retirement had been dealt with. We affirm the decision of the High Court in

James Mugera Igati -v- Public Service Commission of Kenya (2014) eKLR where it is stated that there is nothing in the Public Service Commission Regulations which suggest that disciplinary process is tied to criminal process that may arise from the same facts. There is no provision in the Public Service Commission Regulations which make it necessary for employers to follow police investigations, or findings or indeed criminal court decisions in resolving employment disputes. The Public Service Commission Regulations do not merge disciplinary processes with criminal trials. (see Public Service Commission Regulations 23 and 24).

22. Regulation 25 (2) of the Public Service Commission Regulations 2005 (Legal Notice 28 of 2005) empowered the 1st and 2nd respondent in a disciplinary process to retire the appellant from the public service in public interest. That being the case only the 1st or 2nd respondents could reinstate the appellant and not the District Commissioner. The powers and duties of the 1st respondent to discipline or reinstate an officer cannot and was never delegated to the District Commissioner. The legal effect of an improper or unauthorized exercise of delegation is to render the decision of the delegate invalid. (See **Allingham -v- Minister for Agriculture, Fisheries and Food, [1948] 1 All ER 780; Municipal Board of Mombasa -v- Kala (1955)22 EACA 319; and Karia -v- Dhananin [1969] EA 392**). The 1st and 2nd respondents have no power to divest themselves of their functions and delegate the same to the District Commissioner. The contention that the appellant had resumed duty after he had been retired on the verbal instructions of the District Commissioner has no legal foothold and cannot bind the 1st and 2nd respondents. We find that the alleged resumption of duty by the appellant on the verbal instructions of the District Commissioner was null and void. It is not one of the duties, powers or functions of a District Commissioner to reinstate an officer who has been suspended or interdicted. The appellant has not cited to this Court any express provision legitimizing delegation of the powers of the 1st and 2nd respondents to the District Commissioner. We are convinced that the appellant was aware of this position; after retirement vide letter dated 8th January 2008, he was not on the payroll of the 1st respondent and both the District Commissioner and the appellant requested the 2nd respondent on several occasions to reinstate the appellant as an Assistant Chief.

23. In **Henry Muthee Kathurima -vs- Commissioner of Lands & Another - Civil Appeal No. 8 of 2014** this Court while considering the doctrine of estoppel expressed itself as follows:-

“...Estoppel cannot be used to circumvent Constitutional provisions and estoppel cannot override express statutory procedures; there can be no estoppel against a statute. (See Tarmal Industries Ltd. – vs- Commissioner of Customs & Excise, (1968) E.A. 471; see also Maritime Electric Co. Ltd. -vs-General Dairies Ltd. (1937) 1 All ER 748).

24. This Court further in the **Henry Muthee Kathurima case** made the following observations in respect of the application of the doctrine of legitimate expectation:-

“An illuminating consideration of the concept of “legitimate expectation” is found in the South African case, South African Veterinary Council -vs-Szymanski, 2003(4) S.A. 42 (SCA) at [paragraph 28] the Court held as follows:

“The law does not protect every expectation but only those which are ‘legitimate’”.

.. A relevant excerpt from Republic –vs- Nairobi City County & Another ex parte Wainaina Kigathi Mungai, High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR thus reads [paragraph 33]: “...the legal position is that legitimate expectation cannot override the law.”

25. The law as it stood then as per the **Public Service Regulations 2005** only the 1st and 2nd respondents could reinstate the appellant following his retirement. We have stated that the District Commissioner had no legal authority to reinstate the appellant. The 1st and 2nd respondent’s cannot be estopped by the null and void action of the District Commissioner. No estoppel can legitimize action which is *ultra vires*. The doctrines of legitimate expectation and estoppel are inapplicable in this case. We also take note of **Regulation 25(5) of the Public Service Regulations 2005** provides as follows:-

“Notwithstanding the right of appeal or the right to apply for review conferred on a public officer by this regulation, disciplinary action shall not be deferred or suspended pending the determination of the appeal or the application for review.”

26. We are of the view that the decision to retire the appellant in public interest was contained in the letter dated 8th January, 2008. Quashing of the letter dated 7th December, 2012 would not have had any effect on the 1st respondent’s decision to retire the appellant.

27. The appellant contends that the decision to retire him was made in breach of the principles of natural justice. The letter dated 8th January 2008 informed the appellant of his right to appeal within 42 days against the decision to retire him in public interest. The appellant responded to this letter requesting the 1st respondent to await the outcome of his criminal trial. We find that the appellant was given a chance and opportunity to be heard on appeal; the 42 days was a fair and reasonable period to exercise his right of appeal. A person who opts not to exercise his right of appeal cannot turn around and allege he was never heard.

28. Further from the pleadings of the appellant the High Court could not consider whether the decision to retire the appellant was contrary to the rules of natural justice. We agree with the following findings by the High Court:-

“It is trite that parties are bound by their pleadings and that a party cannot benefit from orders not prayed for in the pleadings. I have noted that the applicant’s (appellant’s) major complaint in this case was that the 1st respondent’s decision to retire him in the public interest was tainted with illegality as it was allegedly made in contravention of the rules of natural justice. However, having chosen not to direct his prayer for the remedy of certiorari to this decision but to another subsequent decision, the applicant removed from this court the basis upon which it would have investigated the legality or otherwise of the 1st respondent’s decision. Perhaps the reason the applicant chose not to seek the quashing of the 1st respondent’s decision was the realization that such a prayer could not have succeeded considering that these proceedings were instituted well after the expiry of the six months period limited by the law for filing of application for certiorari.”

18The appellant also sought an order of prohibition to restrain the 1st and 2nd respondents from using the concluded criminal case as a ground for retiring him on public interest grounds. In Ismael S. Mboya & 2 others -vs- Mohammed Haji Issa & another - Civil Appeal No. 232 of 2004 it was held that :-

“We are minded that an order of prohibition is one issued by the High Court to forbid an inferior tribunal or body from carrying out a quasi-judicial function which that inferior body has no jurisdiction to do or that it cannot do it in excess of its jurisdiction-See Kenya National Examination Council -vs- Republic- Exparte Geoffrey Gathenji Njoroge & 9 others (supra). Prohibition orders look to the future and prohibit what is intended to happen before it is done, but it cannot be issued to affect what has already been done.”

(Emphasis added.)

30. In this case the decision to retire the appellant had already been made on 8th January, 2008 and consequently the order of prohibition could not issue. The High Court correctly held as follows:-

“In this case the decision to retire the applicant (appellant) from the public service was made way back on or before January, 2008 long before the application was filed. Whether the reasons that informed that decision were under performance or the prosecution of the applicant in Criminal Case No. 59 of 2007 is immaterial for purposes of these proceedings. The important point to note is that the decision had already been made before the commencement of these proceedings and clearly, the prayer for an order of prohibition had been overtaken by events by the time the application was filed. Issuing an order of prohibition now in those circumstances would be tantamount to acting in vain.”

31. Lastly, the appellant sought an order of mandamus to compel the 1st and 2nd respondents to pay him all his outstanding dues. In *Halsbury’s Law of England, 4th Edition Volume paragraph 89:-*

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty.

Further at paragraph 90:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

32. It is clear from the letter dated 8th January, 2008 which is set out herein above the 2nd respondent requested the appellant to fill in a commutation of pension form and provide details of the bank account he wished his gratuity to be paid to. We believe that the foregoing was indicative of the 1st and 2nd respondents’ intention to pay the appellant his dues. We concur with the High Court that the appellant did not

adduce any evidence to show that the respondents had refused to pay his dues under the law. We find that the order of mandamus could not issue.

33. Consequently, we see no reason to interfere with the trial court's decision and find that the appeal lacks merit. The appeal is dismissed with no orders as to costs.

Dated and delivered at Nyeri this 20th day of May, 2015.

ALNASHIR VISRAM

JUDGE OF APPEAL

MARTHA KOOME

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR