



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 290 of 2002

CHRISPINUS LAWRENCE WANYAMA APPELLANT

AND

PUBLIC SERVICE COMMISSION OF KENYA.....1ST RESPONDENT

DIRECTORATE OF PERSONNEL MANAGEMENT.....2ND RESPONDENT

(Appeal from a Ruling and Order of the High Court of Kenya at Nairobi (Kuloba, J.) dated 27th July, 2000 In H.C.MISC.CIVIL APPL.NO. 569 OF 1999)

JUDGMENT OF THE COURT

The appellant herein, *Chrispinus Lawrence Wanyama*, was a civil servant attached to the Department of Kenya Police within the Office of the President where he was engaged as a Finger Print Officer. His tribulations were triggered by a letter dated 29th April, 1996 signed by one, J.M. Waweru for the Permanent Secretary in the Office of the President. In that letter the appellant was required to show cause why he should not be retired in the public interest. The appellant must have written back and subsequent to his reaction to the said letter he received yet another letter dated 11th September, 1997 signed by one, J.K. Munyao for the Permanent Secretary Office of the President advising him (*the appellant*) that the Public Service Commission had decided that he be retired in the public interest.

The appellant went through the appeal process as provided by the provisions of the Public Service Regulations but in the end his efforts were rendered futile when he received a letter dated 31st March 1999 signed by one, *Mrs. J.A. Masibo* for the Permanent Secretary, Office of the President. In that letter the appellant was informed as follows:-

“*Mr. Chrispinus Lawrence Wanyama,*

P.O. Box 34175,

NAIROBI.

Dear Sir,

SECOND APPEAL AGAINST RETIREMENT ON THE PUBLIC INTEREST

I am directed to inform you that the Public Service Commission considered but disallowed your Second Appeal against retirement in the Public Interest in view of the fact that there were no new convincing grounds for allowing it and decided that the case be now treated as closed.

You are now required to forward a Government Liability Clearance Certificate to enable us process your final dues.

Yours faithfully,

J.G. MASIBO (MRS)

For: PERMANENT SECRETARY

PROVINCIAL ADMINISTRATION

cc.

The Director,

CID Headquarters,

P.O. Box 30036,

NAIROBI.

After receiving that letter, the appellant decided to file judicial review application pursuant to ***Order LIII Rule 1(2)*** of the Civil Procedure Rules seeking the following reliefs:-

“14. An Order of certiorari to remove to this Honourable Court and quash the decision of the first respondent to retire the applicant from the Public Service.

15. An order of Prohibition to prohibit the second respondent from starting or proceeding with the process effecting the retirement of the applicant.

16. Costs of this application.”

The facts relied upon and the grounds upon which these reliefs were sought were as follows:-

“3. On the 2nd May, 1996 the applicant received a letter dated 29th April, 1996 signed by one J.M. Waweru for the Permanent Secretary in the Office of the President requiring the applicant to show cause why the applicant should not be retired in the Public Interest.

4. The reason given in the said letter for requiring the applicant to show cause why he should not be retired in the Public interest was his alleged conspiracy with one Grace Imali Otieno to falsify a Certificate of Good Conduct for somebody. The said Grace Imali Otieno was also a Civil Servant attached to the department of Kenya Police in Mombasa.

5. At the material time the Public Service Commission Regulations (Regulation 40) under the Service Commission Act Cap.185 and the Civil Service Code of Conduct (No. g.35(2)) mandatorily required that a disciplinary action such as related to the applicant must be initiated and signed by an authorized officer who is the Permanent Secretary, in this case the Permanent Secretary Office of the President.

6. The applicant states that the letter requiring him to show cause why he should not be retired in the Public Interest was not initiated and/or signed by an authorised officer and was therefore a wrongful

exercise of authority. This was in contravention of the law.

7. After making answer to the aforesaid requirement the applicant on the 12th September, 1997 received a letter dated 11th September, 1997 signed by one J.K. Munyao for the Permanent Secretary Office of the President advising the applicant that the Public Service Commission had decided that the applicant be retired in the Public Interest.

8. The applicant states that in accordance with the said Public Service Commission Regulations and the Civil Service Code of conduct the said letter in No. 7 above would have to be signed by the authorised officer i.e. the Permanent Secretary Office of the President, and not by any other person.

9. The applicant states that the said letter in No. 8 above, according to the Public Service Commission Regulations, should have informed the applicant of his right of appeal which it did not, and this was in contravention of the law.

10. The applicant went through the appeal process provided for under the Provisions of the Public Service Regulations and on the 31st March, 1999 received a letter signed by one Mrs. J.G. Masibo for the Permanent Secretary Office of the President informing him that his final appeal had been disallowed by the Public Service Commission.

11. The applicant states that the aforesaid contravention of the law rendered his retirement unlawful and nullify (sic) J.M. Waweru who initiated the applicant's disciplinary action was not the Permanent Secretary Office of the President and was not an authorised officer and he acted in excess of authority.

12. The said Grace Imali Otieno, also a Civil Servant, with whom the applicant allegedly conspired, was not disciplined or retired as the applicant, and the applicant states that he was discriminated against on grounds of his sex, which is a breach of his fundamental right against discrimination and which is in breach of the constitution of Kenya.

13. The appellant (sic) states that the above action against him is in breach of the law and deserves to be quashed by this Honourable Court."

After leave was granted to apply for the reliefs sought, the application was placed before Kuloba, J. on 16th September, 1999 when the appellant was represented by Mr. Okatch. The respondents were not represented and were absent. According to the record, Mr. Okatch was brief in his submissions. This is what is recorded as his submissions:-

"This is an application for orders of certiorari to quash the decision of the Public Service Commission, and prohibition to prohibit director from retiring the applicant from the Public Service.

Support application with annexed statement and affidavit sworn by applicant.

No authorized officer signed letters. There was bias. Only one party was punished. Right of appeal not intimated to applicant."

The learned Judge considered the statement of facts, the affidavit in support of the application and the submissions by Mr. Okatch and came to the conclusion that this was not a proper case for judicial review. Having reached that conclusion the learned Judge proceeded to dismiss the application. In a short ruling delivered on that same day when the application was heard, the learned Judge expressed himself thus:-

"This is an application for judicial review.

But clearly, in the circumstances explained in the statement of facts and in the affidavit in support of the application, this is not a proper case for judicial review.

It is said that the correspondence advising the applicant at various stages, was not signed by an authorised officer, i.e. the permanent secretary. Apart from the bold statement that his action contravened Public Service regulations it has not been shown that the order (sic) regulation 40 an authorized officer must act in person and that no person can sign on behalf of the authorized officer. It has not been shown that he cannot act by someone else on his behalf. Under the interpretation and General Provisions Act an officer may act by himself or by someone on his behalf, unless express provision or necessary implication shows that he cannot do so. The Court has not been shown that the authorised officer must act personally.

Discriminatory action has not been proved. The mere fact that one officer is disciplined and not his co-accused, does not necessarily point to discriminatory behaviour.

The applicant seems to have been conversant with his right of appeal, and, indeed he excused (sic) it. He has not shown that by reason of not having been informed of it by the respondent he suffered prejudice.

For these reasons the application is dismissed. No order as to costs.”

Being aggrieved by the foregoing the appellant chose to approach the superior court again and this time the appellant proceeded by way of review pursuant to order **XLIV rule 1 (a)** of the Civil procedure Rules. The main ground for review was that Legal Notice No. 39 of 1998 which authorized an authorized officer to delegate the duties pertaining to the institution of disciplinary proceedings against an officer which came into force long after the applicant had already been retired in public interest. It was for that reason that the appellant argued that the letter retiring him had not been signed by an appropriate officer.

The application for review was placed before Kuloba, J who considered what was argued before him and the legal notice and came to the conclusion that the application for review lacked merits. He accordingly dismissed the application.

It is that dismissal of the application for review that triggered this appeal. It would appear that when the appellant pondered on the way forward and chose to file an appeal he decided to handle the matter personally, hence filed this appeal in person.

The Memorandum of Appeal filed states:-

“MEMORANDUM OF APPEAL

CHRISPINUS LAWRENCE WANYAMA the above mentioned appellant appeals to the Kenya Court of Appeal against the whole of the above-mentioned decision on the following grounds:-

1. THAT the learned Judge expressed prejudice against the appellant (sic) application and misconduct and misdirected himself by stating: “when one party has got a case or matter decided in his favour by a Court of Justice according to the law and rules of procedure, he is, by law entitled not to be deprived of the fruits of that judicial decision without solid grounds for such deprivation for however, shot a time.” This statement in the opening of the learned Judge’s ruling was an expression of prejudice rather than of caution; hence the learned Judge rushed himself.

2. The learned Judge further expressed prejudice against the appellant’s application and misdirected himself by stating early in the ruling: If therefore a review is sought by a party the greatest care ought to be exercised by the court in granting the review especially where the ground is the discovery of something new” this statement was borne out of the prejudice rather than caution and this prejudice let to the learned Judge misdirecting himself.

3. The learned judge prejudice (sic) against the appellant’s application in stating that the reason for what the learned Judge described as caution (out which was actually prejudice was that: “It is easy for the party who has lost his case to see the weak part of his case was, and the lengthation (sic) to lay

and procure something which will strengthen that weak portion and put a different complexion upon it must be very strong.” This, again was on expression of prejudice rather than caution, as a result of which the learned Judge misdirected himself.

4. The learned Judge misdirected himself and erred in stating that absence of negligence on the part of the appellant must be strictly proved. This misdirection prejudiced the appellant.

5. The learned Judge erred in findings that the appellant should have necessarily known about or found a circular which has been addressed exclusively to Permanent Secretaries, Solicitor General, Registrar of High Court, the Controller and Auditor General and the Clerk of National Assembly. The learned Judge erred in finding that it was for lack of due diligence that the appellant did not know about this piece of evidence.

6. The learned Judge misdirected himself and erred in stating that the mere fact that the applicant for review could not provide the (new) matter in spite of his best efforts is no ground for allowing review. This misdirection prejudiced the appellant’s case.

7. the learned Judge erred in failing to review his order of 16th September, 1999 in the premises.

8. The decision of the learned Judge is contrary to the law.

IT IS PROPOSED to ask the Court for orders that:-

(a) The Appellant’s appeal be allowed with costs.

(b) The order of the superior court be set aside.

(c) The appellant’s application for order of prohibition and certiorari be granted.

DATED at **NAIROBI** this 7th day of November, 2002.

Chrispinus Lawrence Wanyama

The Appellant.”

When this appeal came up for hearing before us on 12th July, 2007 the appellant appeared in person while Mr. E. Kaka appeared for the respondents.

In his address before us the appellant stated that he relied on his grounds of appeal. He asked us to set aside the order of the superior court and in its place grant the order of prohibition and certiorari. As a parting shot, the appellant informed us that he had not taken his final dues as he chose to pursue the matter in court.

We have endeavoured to give the background to this appeal. The appellant’s tribulations, as already stated elsewhere in this judgment were triggered by a letter which retired him in public interest. His application for judicial review having been dismissed the appellant sought the review of that ruling that dismissed his judicial review application. There is the question of whether the provisions of **Order XLIV** apply to judicial review applications under **Order LIII** but as the appellant was not legally represented before us, we were not and could not expect to be addressed on that issue. The determination of that point must accordingly wait for another occasion. What concerns us now is whether the learned Judge was right in refusing to review his earlier ruling.

The starting point in this matter must be **Order XLIV rule 1** of the Civil Procedure Rules which provides:-

“1. (I) Any person considering himself aggrieved –

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

In his application for review the appellant’s main ground was:-

“That it has since come to the Applicant’s knowledge that the power to delegate the powers of the authorized officer as described by Cap 185 only came to effect by an amendment under Legal Notice No. 99 which was long after the applicant had been dismissed after the letter initiating the dismissal was signed by an unauthorized officer.”

Can it be said that the appellant had discovered new and important matter which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when he filed judicial review proceedings? We do not think so. A subsequent event or even altering the law even with retrospective effect is not a sufficient ground to warrant a review. In concluding his ruling on review application the learned Judge said:-

“There are no facts presented to the Court to show diligence on the part of the applicant to lay his finger on the alleged matter in question and to produce it at the appropriate time. There is no evidence on record to show what might have prevented the applicant from making a timeous discovery of the alleged new matter. The applicant seems to be arguing that a new rule changed the scenario under which the order sought to be reviewed was made; and he seems to be saying that the court reached an erroneous decision on the merits. These are not matters which can be canvassed on an application of a review under the cited rule.”

We are in entire agreement with that conclusion by the learned Judge.

In view of the foregoing, we have no alternative but to bring the appellant’s pursuit for what he considered his legal rights to an unhappy end by asking him to go and collect his final dues since our conclusion in this matter is that the appeal be and is hereby dismissed with no orders as to costs.

Dated and delivered at Nairobi this 28th day of September, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR