



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 614 OF 2015**

**FREDRICK ODHIAMBO WALUKWE.....CLAIMANT/APPLICANT**

**VERSUS**

**CABINET SECRETARY,**

**MINISTRY OF INTERIOR AND CO-ORDINATION**

**OF NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY,**

**MINISTRY OF INTERIOR AND CO-ORDINATION**

**OF NATIONAL GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

1.The applicant in this suit seeks orders inter alia:-

(a) That pending the hearing and determination of this claim, an injunction do issue directed at the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and/or in any way those acting under them, restraining them from retiring the claimant in the public interest and/or terminating him from their employment without following the applicable law and the terms and conditions of his employment.

(b) That pending the hearing and determination of this Application and/or suit restraining orders do issue against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, their agents, servants and anybody claiming through them from harassing, intimidating, threatening, investigating, dismissing, interdicting, discussing, passing a decision and in any other way interfering with the claimant's employment.

(c) That a mandatory order do issue directed at the Respondent, their agents, servants and those working under them for the reinstatement of the claimant to his employment, position with full salary and benefits pending the hearing and determination of the claim inter partes.

2. The application was based on the grounds that:-

(a) The claimant has been a public officer in the employment of the Respondents for over 12 years and serving as a Chief Immigration Officer under “Job Group M” before his interdiction on or about 18<sup>th</sup> December, 2014 on allegations of wrongdoing.

(b) The Respondents have further and before completion of the initial cause of action, now arbitrarily, without notice or furnishing any reasons whatsoever commenced a different cause of action and by their letter dated 6<sup>th</sup> March, 2015, the Respondents have, summarily and in breach of due process, made a decision to retire the claimant purportedly in the public interest.

(c) The latter decision purporting to retire the claimant in the public interest and indeed the initial disciplinary action do not meet the threshold for fair labour practices, fair hearing, fair administrative action, due process and procedural fairness under the constitution, labour laws and the laws applicable to public service employees.

(d) The entire disciplinary action against the claimant is unfounded, based upon misconceived and rash allegations and is actuated by malice, malevolence and ulterior motives.

(e) The alleged retirement of the claimant in the public interest is not responsible and with good foundation as required under the applicable statutes and the Constitution.

3. It was further supported by the affidavit of the applicant Mr. Fredrick Odhiambo Walukwe who deponed on the main:-

(a) That he had invested more than 12 years in the Public Service during which he had served in key security-sensitive and strategic Government installations locally, including, Kisumu Passports Office, Isebania Border Control, Moi International Airport and Mombasa Passports Office earning several promotions and rising through the ranks to the current position of Chief Immigration Officer Job Group “M” in the Ministry of Interior and Co-ordination of National Government, Directorate of Immigration and Registration of Persons.

(b) That he had an unblemished record performing his duties with diligence, integrity and within the law at all material times, on account of which he had earned the aforesaid promotions and further received recognition and express commendations, in particular, a special commendation from the Director of Immigration Services for exemplary service.

(c) That he had never, prior to the disciplinary action the subject matter herein, been summoned before the Respondents disciplinary committee or any other disciplinary committee to answer to any charges of incompetence, ineptitude, misconduct or any form of wrongdoing, neither had he ever been served with any warning or any notice to show cause or called to defend myself against any adverse allegations throughout my entire service.

(d) That inexplicably and without any prior warning or notice, the Respondents by a letter dated 18<sup>th</sup> December, 2014 informed him of their decision to interdict him from public office, purportedly on account of allegations of wrongdoing on his part and on the basis of an allegedly inculpatory preliminary report thereof.

(e) That I without a shadow of doubt, aver that the allegations contained in the said letter of interdiction are hollow, rash unfounded and misconceived and further that the Respondents never involved him in the said investigations or inquired or sought clarifications during the investigations or at all.

(f) That the allegations leveled against him, although unfounded, are grave both in nature and their impact on both his career and reputation and they are of such a kind as would require proper inquest by competent investigative authorities of the state or the Respondents and in the absence of such inquest a decision thereof may not stand the test of substantive and procedural fairness.

(g) That the said Respondent's letter further required his response within 21 days and accordingly, on 7<sup>th</sup> January, 2014, by a letter dated 31<sup>st</sup> December, 2014, he submitted his response to the allegations controverting every allegation contained in the Respondent's letter to the standard and degree of sufficiency required in law.

(h) That accordingly, and in light of his exculpatory representations above, the Respondents discreetly and without notice to myself, vacated and/or abandoned the initial disciplinary proceedings apparently for the reason that the said proceedings could not sustain termination which he has reason to believe was the Respondents desired end result.

(i) That subsequently, about three months after his aforesaid representations, the Respondents by a letter dated 6<sup>th</sup> March, 2015, abstractly and without a prior notice of commencement of a different cause of action or indeed disclosure of the Respondents verdict from the initial proceedings, notified him of their decision to retire him in the public interest.

(j) That the latter's decision purporting to retire him in the public interest is the product of an entirely new cause of action which itself was commenced unprocedurally, discreetly, without notice or any proper notice to himself or a show cause letter and whose basis and/or reasons the Respondents have not disclosed to him or at all against the mandatory provisions of the law.

(k) That he is further advised by his aforesaid advocates, which advice he verily believe to be true that, by subjecting him to the latter parallel disciplinary action on the same charges as those earlier preferred against him in the already spent initial disciplinary action, the Respondents have acted in breach of the constitutional guarantee against double jeopardy.

(l) That, he was also advised by his aforesaid advocates which advice he verily believe to be true that the condition by the Respondents in their letter dated 6<sup>th</sup> March, 2015, limiting and restricting his defence to representations of personal nature alone, has no basis in law or at all and the same cannot withstand the test of due process under labour laws and the constitutional test of legal, valid and fair hearing process.

4. The respondent opposed the application by filing grounds of opposition in which it stated that the orders sought by the applicant were impulsive and or premature in that the claimant was granted 21 days to submit his representation to explain why he should not be retired but instead rushed to Court and that this move by the claimant was against the spirit of article 159(1) (c) of the Constitution.

5. In his submissions in support of the application Mr. Masila for applicant submitted that the respondents by their actions contravened due process and procedure applicable in disciplining a public officer under the Constitution and applicable statutes.

6. According to counsel, the due process of law contemplated by the Constitution constitutes a process adherence to principles of fair trial, fair hearing and rules of natural justice. In this regard Counsel relied on the case of **Dinah Musindarwezo v. African Women's Development and Communication Network**. Mr. Masila submitted that the procedure for disciplining officers in public service is stipulated under 2005 regulations and Disciplinary Manual, 2008 and code of regulations governing the civil service. Further such disciplinary action should be conducted in accordance with article 41, 47 and 236 of the Constitution and values under article 10 and in line with the Employment Act.

7. According to Counsel the 2005 regulations contemplate a rather quasi-judicial procedure for disciplinary action with all attendant formalities including proper framing of charges and calling of witnesses and leading of evidence. Failure by the respondents to grant the applicant an unbiased audience even in the face of the grave accusations leveled against the applicant was manifest of ulterior motives and oppressive exercise of power on the part of the respondents.

8. Counsel further submitted that in the letter purporting to retire the applicant in public interest the respondent represented that the claimant was requested to submit representations of personal nature for

consideration. This invitation to make representations of a personal nature, according to counsel, was a vain attempt to validate a grossly superfluous, arbitrary, unlawful and unconstitutional process. According to Mr. Masila, an employer is under obligation to demonstrate a proper basis, cogent reasons and well founded grounds for terminating a public officer especially when such termination constitutes retirement in public interest.

9. Counsel further submitted that under regulation 33(7) of 2005 even though the investigations, hearing and evidence may be led by an authorized officer, the officer must after such process forward the report to Public Service Commission for a final decision. These regulations vest all final decision in respect of disciplinary proceedings against a public officer under Job Group M in the Public Service Commission and excludes any person or committee. Further, the law vests all decisions of retirement in public interest of all public servants of whatever job group in the Public Service Commission. In this respect counsel submitted the letter and the decision purporting to retire the applicant in public interest had no basis in the Constitution or statute and was accordingly null and void in so far as the decision was made by persons or committee lacking such authority in law.

10. Counsel contended that the latter decision to retire the applicant in public interest was unjustifiably precipitated by suspicion and imputations of wrong doing from the initial disciplinary action which suggested that the applicant may have engaged in certain subversive activities constituting threats to national security though these allegations were never investigated and a report given or a disciplinary hearing conducted.

11. In conclusion, counsel submitted that the applicant had established a good and sufficient cause that the respondent's actions contravened the due process under the constitution and statute hence the applicant's prayers should be granted.

12. The respondent on the other hand submitted that it had justification in ending the claimant's contract since the claimant was engaged in acts of gross misconduct for which the respondent was entitled to take punitive measures including retiring the claimant under the 50 year rule.

13. According to Ms. Chege, the 50 year rule falls under regulation 21(1) of the Public Service Code of regulation, 2006 which stipulated that on attaining the 50 years an officer may elect to retire or may be required to retire any time by the government without assigning any cause. Retirement under 50 year rule was not meant to be a form of disciplinary punishment. It is retirement in the interest of public, or dismissal which are forms of exit from public service with their own specific regulations. According to Counsel, retirement in the interest of public is provided for under regulation 25(2) and 36 of the Public Service Commission Regulations. It is a form of retirement that is resorted to where termination cannot be effected suitably under other regulations. These regulations are in tandem with Employment Act which requires employers to observe certain procedural protections and to attempt substantive justification in all forms of termination.

14. Ms. Chege further submitted that the Ministry of Immigration serves in the domain of national security and the Court should take judicial notice of the outcry over Al Shabaab bombings hence issuance of passports is a very sensitive area and should be approached with extreme care and sobriety. From the letters in evidence, there is clear demonstration that the applicant was given a right to tell his story.

15. This is an interlocutory application for injunction hence the concern of the Court at this stage is to satisfy itself that the applicant has a prima facie case with probability of success and whether damages would not be an adequate remedy if the claim is adjudged successful.

16. The claimant in his memo of claim and the motion before me, contends that the decision to retire him in Public interest and indeed the process leading to that was an unfair labour practice, was done unprocedurally against applicable laws and claimants terms of employment.

17. He further contends that the alleged authorized officer acting on recommendation of the Ministerial Human Resource Advisory Committee had no authority or legal mandate to retire him. These issues as

presented in the claim, the application and the supporting affidavit raise serious questions of law hence a sufficient demonstration that the claimant has a prima facie case with probability of success.

18. The second issue is whether, if successful damages would constitute sufficient remedy. Termination of employment claims are predictably capable of being atoned by an award of compensation as set out in the Employment Act. However, just because damages may be easily assessed does not mean an interlocutory injunction cannot issue against an employer. Employment relationships have become a vital aspect of daily lives of workers. They dedicate most of their time working for the employer leaving very little time of their own. Loss of employment therefore has a significant impact on a workers life, social status and family. It is for this reason that the new Employment Act provides an elaborate framework for separation from employment. These provisions are minimum below which parties cannot contract out. Individual contracts of employment and human resource manuals and policies can make better provisions than the minimum provided in the Act.

19. The applicant has claimed that his retirement in the public interest was unprocedurally decided and that the persons who retired him did not have authority to do so. I have perused the letter of retirement dated 6<sup>th</sup> March, 2015. It called on the claimant to make representations of a personal nature concerning his retirement. He did so and more claiming among others that the retirement was unprocedural and contrary to law. According to him the retirement had something to do with allegations of gross misconduct for which he had earlier been interdicted. He therefore contended that he could not be retired before the outcome of investigations over the allegations for which he was interdicted. These procedural questions raised by the applicant are reasonable and serious and calls for the preservation of the status quo.

20. In that regard the Court issues an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondent from retiring the applicant in public interest pending the hearing and determination of the claim herein.

21. The claimant will however remain on interdiction and that internal investigations and disciplinary mechanisms will continue in accordance with the Public Service Code of Regulations and concluded within 60 days of this order.

22. Either party be at liberty to apply.

23. It is so ordered.

Dated at Nairobi this 5<sup>th</sup> day of February 2016

Abuodha J. N.

Judge

Delivered this 5<sup>th</sup> day of February 2016

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge