THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

AT KAMPLA

(CIVIL DIVISION)

MISCELLANEOUS CAUSE NO. 80 OF 2009

JOHN MARY KISEMBO============================APPLICANT

VERSUS

KAMPALA CITY COUNCIL==========================RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING:

This application for Judicial Review was brought under Section 36 of the Judicature Act, Cap. 13 and the Judicature (Judicial Review Rules), S.1 2009 No. 11. The applicant seeks the following orders:

(a) **A declaration that the applicant is entitled to be paid pension by the respondent.**

(b) Mandamus directing the Secretary District Service Commission, an organ of the respondent, to rescind the dismissal of the applicant and to substitute therefore (sic) an order of retirement.

(c) Mandamus directing the respondent to include the applicant on the list of pensioners and to pay the applicant the pension due to him including all arrears from the time of the effective date of his retirement.

(d) General damages.

(e) Costs.

At the conferencing the parties agreed that:

1. The applicant was an employee of the respondent.
2. The District Service Commission directed the respondent to dismiss him which was done.

3. The applicant felt aggrieved by that decision and filed **HCCS No.216 of 2002**.
4. The claim was for, **inter alia**, pension.
5. Consent judgment in terms of annexture JMK 5 was filed by the parties in court.
6. All the benefits stated in the consent judgment were paid.

In this application court is to decide:

1. Whether pension was covered by the consent judgment.
2. Whether the procedure adopted by the applicant is proper.
3. Whether the cause is res judicata.
4. Whether the claim is barred by law.

Counsel:

Mr. Sebastian Angeret for the applicant

Mr. Joash Sendege for the respondent.

Issue No. 1: **Whether the pension was covered by the consent judgment.**

From the pleadings, the applicant was the plaintiff in **HCCS No. 216 of 2002.** In that suit one of the claims was payment of pension. The respondent herein was the defendant in that suit. It denied all the claims of the applicant/plaintiff in the said suit. As the suit was pending hearing and determination, the parties struck a compromise. In that compromise, the applicant/plaintiff accepted to receive terminal benefits in accordance with Clause 4 of the Supplement Bargaining Agreement on terminal and Voluntary Retirement Benefits Agreement of 28th June, 2000 between the respondent/defendant and the Uganda Public Employees Union.

The implication, in my view, was that this was in substitution for any other rights the applicant/plaintiff and the respondent/defendant may have had under **HCCS No. 26 of 2002.** Clause 4 of said agreement states as follows:

4. **TERMINAL BENEFITS**

Council employees who have been laid off or have voluntarily retired under this agreement shall be paid terminal benefits as agreed hereunder.

(i) Notice:- Three (03) months Gross pay in lieu of notice.

(ii) Annual leave:- One (01) month's Gross pay in lieu of leave not taken.

(iii) Severance pay:- Two (02) months' current Gross pay obtaining on the pay roll multiplied by the number of years worked to the maximum of twenty (20) years of service.

(iv) Transport:-

(a) Shs.3500= per kilometer from employment station to Employee's home District Headquarters. Then;

(b) A flat rate of shs.200,000= from the employees home District Headquarters to the rural home village (final destination)."

It is instructive to note that the applicant was not a Council employee who had been laid of. He had been dismissed and hence the challenge under **HCCS No. 216 of 2002**. He was also not an employee who had voluntarily retired under that agreement. Nevertheless the parties agreed as they did and the matter ended the way it did. It is obvious from the reading of Clause 4 above that the agreement did not provide for payment of pension. Likewise, the consent judgment made no provision for payment of pension to the applicant/plaintiff. Needless to say, what is in issue herein is payment of pension.

It is submitted by learned counsel for the respondent that a consent judgment is a compromise between the parties to settle the issues in an action; that this compromise supercedes the original claims of the parties; that a consent judgment is also a final, binding judgment in a case in which both parties agree, by stipulation, to a particular outcome.

I agree with the above submission. It represents the law. The position could not have been expressed better than in **Odgers' Pleadings and Practice in Civil Actions (Edited by Giles F. Harwood) Universal Publishing 2000 at page 326** which states:

" **In all cases it should be appreciated that a compromise at trials involves two elements:**

(i) it is a contract whereby new rights or immunities are created between the parties in substitution for and in consideration of the abandonment of, former claims or contentions of either or both of them;

(ii) it will ordinarily be necessary for the court to take some action agreed upon by the parties e.g. to give a judgment, make an order of discontinuance, etc."

Clearly a consent judgment between the parties does present a resolution of dispute as between them. In the instant case it did and a decree was accordingly extracted by the parties in **HCCS No.216 of 2002** and signed by the Deputy Registrar on behalf of Trial Judge on 19th May, 2003. Since pension was one of the claims in that suit and the parties decided that the matter ends as it did by virtue of the consent judgment and Decree extracted therefrom, the applicant abandoned that claim in preference to the terms in the consent judgment.
In all these circumstances I am inclined to the view that though not expressly stated pension was covered by consent judgment.

Issue No.2: **Whether the procedure adopted by the applicant is proper.**

The applicant's grievance relates to alleged non-payment of pension to him. The compromise between the parties in **HCCS NO. 216 of 2002** did not expressly provide for payment of pension. It cannot, therefore, be said that in this action the applicant seeks to enforce the terms of the compromise.
As learned counsel for the respondent has submitted, quite correctly in my view, judicial review presupposes a decision to be examined for possible quashing. By its very nature, the remedy of judicial review involves examination of a case second time by a higher court because the lower court (by whatever name called) or an administrative or public body has in the opinion of the aggrieved person acted wrongly. The applicant has not in the instant case placed before the court material that amounts to a decision of a body that was mandated to determine a dispute which decision court can examine with a view to granting an appropriate relief.   In other words, there is no definite decision of any inferior court, tribunal or other body or person carrying out quasi-judicial functions, engaged in the performance of public acts and/or duties which this court can sustain or quash. In these circumstances, the applicant cannot be said to have adopted a proper procedure.

In the event that my above conclusion is wrong, which I doubt, I would note that the applicant prays for two orders of **Mandamus:** first one, directing the Secretary District Service Commission, an organ of the respondent, to rescind the dismissal of the applicant and substitute therefor an order of retirement, and, second one, mandamus directing the respondent to include the applicant on the list of pensioners and to pay the applicant the pension due to him including all arrears from the time of the effective date of his retirement.

Mandamus is a prerogative order for compelling performance of public duties. From the authorities, before the remedy can be granted, the applicant must show a clear legal right to have the thing sought by it done. It is a discretionary power, like all other prerogative powers, which the courts will exercise only in suitable cases and withhold in others. It cannot be granted as a matter of course. A demand for performance must precede an application for mandamus and the demand must have been unequivocally refused. See: **The District Commissioner, Kiambu Vs R Ex parte Njau [1960] EA 109**.

From the above legal position, mandamus can only issue where the applicant has a legally enforceable right against the party to whom he seeks to have writ issued. In the instant case, whereas he seeks an order of mandamus against the Secretary, District Service Commission, he wants the order issued against the respondent. I think this is superfluous. In any case he wants the Secretary to rescind the dismissal and substitute therefor an order of retirement. No such order of retirement exists anywhere. Likewise there is no order directing the respondent to include applicant on the list of pensioners and to pay the applicant pension dues which the respondent has refused to obey to warrant issuance against them an order of mandamus. It is plain to me that the applicant's pleadings do not demonstrate existence of a clear legally enforceable right against the respondent to whom he seeks to have the writ issued and when that right accrued to him for purposes of the limitation under Rules 5 (1) of the Judicature (Judicial Review) Rules, 2009. Under this rule an application for judicial review must be made promptly and in any event within three (3) months from the date when the grounds in the application arose. In the instant case, the grounds in the application arose either in 2000 when the contract of employment was terminated or 2003 when the consent judgment was entered. He would have to plead disability under the limitation Act or seek extension of time within which to file the application under the Judicature (Judicial Review) Rules, 2009. In all these circumstances, it is plain to me that not only is the procedure adopted by the applicant improper but his cause of action, if any, appears from the pleadings to be barred by law. I would answer the 2nd issue in the negative and the 4th one in the affirmative and I do so.

Issue No. 3: **Whether applicant's cause is res judicata**

Res judicata [Latin: a matter that has been decided] is a principle of law that when a matter has been finally adjudicated upon by a court of competent jurisdiction, it may not be re-opened or challenged by the original parties or their successors in interest. It is also known as

action estoppel. It does not preclude an appeal or a challenge as to the jurisdiction of the court. Its justification is the need for finality in litigation.

Section 7 of the Civil Procedure Act (Cap 71) provides, inter alia, that no court shall try any suit in which a matter directly and substantially was in issue in a former suit between the same parties.

In determining whether or not a suit is barred by res judicata, the test is whether the plaintiff in the second suit is trying to bring in court in another way in form of a new cause of action a transaction which has already been presented before court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If this is answered affirmatively, the plea of res judicata will apply. See: **Semakula Vs Mugala & Others [1979] HCB 90.**

Applying the above principle to the instant suit, the applicant instituted **HCCS No. 216 of 2002** claiming, inter alia, payment of terminal benefits and pension. The respondent denied the applicant's claim. As already explained above, the case did not go for full hearing. A consent judgment was entered by the parties finally disposing of the matter. Seven years later, the applicant has come up with this application in which he seeks, inter alia, a declaration that he is entitled to be paid pension by the respondent.

Learned counsel for the respondent has submitted that the matters herein are the same matters that were presented to court and on which judgment has been pronounced; that the matter is therefore res judicata.

I have accepted this submission. The law is clearly on the respondent's side. In my view the evidence adduced by the applicant in the affidavit in support of the application and the circumstances surrounding the consent judgment do not support the prayers herein. What the applicant is indirectly praying for in the instant application is an order to set aside the consent judgment or else vary its terms.

Setting aside a consent judgment is not a simple task. The reason is not difficult to discern. It is to be found in the rule of Sanctity of contracts. Courts are very reluctant to interfere with agreements or contracts freely entered into by the parties. There are several authorities on this point and if any is required, **Brooke Bond Liebig (T) Ltd Vs Mallya [1975] EA 266** is a good example. The court held in that case that consent judgment may only be set aside for fraud, collusion or for any reason which would enable court to set aside an agreement.

And in **Hirani Vs Kassam (1952) EACA 133** The Court of Appeal for Eastern Africa held:

“**Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action……..and cannot be varied or discharged unless obtained by fraud or collusion, or by agreement contrary to the policy of the court…… or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general, for a reason which would enable the court to set aside an agreement”.**

It is my considered opinion that since consent judgment in HCCS No. 216 of 2002 is enforceable inter partes, until court declares it to be illegal or otherwise unenforceable, the applicant cannot go round it in the manner he has done herein. The consent judgment did not provide for payment of pension. If in the course of time the applicant has realized that all that he wished the consent judgment to include was not included, it was up to him to seek the respondent’s consent to review it or else file a fresh suit for appropriate reliefs. I am inclined to the view that the instant application for judicial review is not and cannot be any such fresh suit. I would also agree with the submission of learned counsel for the respondent that this matter is res judicata.

Finally, learned counsel for the applicant has submitted that the application is grounded on the provision of Article 254 of the Constitution which provides that:

(i) **a public officer shall on retirement receive such pension as is commensurate with his/her rank salary and length of service.**

(ii) **The pension payable to any person shall be exempt from tax and shall be subject to periodic review to take account of changes in the value of money.**

(iii) **The payment of pension shall be prompt and regular and easily accessible.**

I think it is not in dispute that the Constitution provides so. However, this argument is neither derived from the notice of Motion nor from the applicant’s affidavit in support of his application. As the line up of issues for determination shows, it is not even among the issues for determination. The rule has long been established that a party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of pleadings: **Inter freight Forwarders (U) Ltd Vs EADB [1994 – 95) HCB 54.** In my view this argument about the applicant’s claim being

grounded on the provisions of the Constitution is, with due respect to the applicant, intended to re-open **HCCS No. 216 of 2002,** which is not the purpose of judicial review.

In the premises and for the reasons I have endeavoured to give herein above, I have found no valid reasons to allow this application. I would disallow it with costs to the respondent and I so order.

Dated at Kampala this 3rd day of November 2010.

Yorokamu Bamwine
JUDGE