

THE REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA
(SC) CIVIL APPEAL NO. 27/92 (1193) (FROM HCCS NO 643/89)

CORAM: MANYINDO, DCJ, ODER, JSC & PLATT, JSC

WYCLIFF KIGGUNDUAPPELLANT

VS

ATTORNEYGENERAL.....RESPONDENT

Administrative law - public service - interdiction - whether this may be indefinite.

Public service - retirement in public Interest - whether Public Service Commission acted ultra vires in advising the president to retire the plaintiff in public interest

Civil procedure - rejecting plaint - whether the trial judge misdirected himself to reject the plaint on the ground that the action therein contained was not maintainable in law.

Pleadings - cause of action - the submission that the plaintiff's action was not maintainable at law - whether this was a ground to reject the plaint.

Constitutional law - president's prerogative - whether the Presidents prerogative to retire a public servant in public interest was unfettered.

The appellant's plaint was rejected on the ground that it did not disclose a cause of action because it purported to found liability on an action of the president of the Republic of Uganda who dismissed the plaintiff, a public servant in public interest. The trial Judge agreed with the defence State Attorney that no action was maintainable against the Government since the president's prerogative to dismiss any public servant in public interest was unfettered. The trial Judge rejected the plaint, hence this appeal on the ground that the trial judge erred in law in rejecting the plaint holding that the plaint was bad as it did not disclose a cause of action, inter alia.

Rejecting the plaint under 0.7 r 1 1 (a) CPR must be primarily and only the result of constructing the plaint as it stands and no other extraneous matter must be

considered, The plaintiff must be found defective such that if fails to disclose a cause of action. In the instant case the argument that the action was not maintainable at law was a preliminary point of law and not a result of a defect in the plaintiff. Therefore the preliminary point of law should have been set down for hearing and the plaintiff's suit should have been dismissed if the court found that his action was not maintainable but his plaintiff should not have been rejected. The trial Judge misdirected himself when he rejected the plaintiff's plaintiff.

Regulation No. 36 of the Public Service Regulations provides that a Public Servant may be interdicted if proceedings for his dismissal are about to be taken or if criminal proceedings are being instituted against him. The gap between either of these proceedings and his interdiction must be reasonably short. Therefore the plaintiff had a maintainable cause of action for a declaration and or damages for having been on interdiction for more than 2 years. The trial judge misdirected himself in rejecting the plaintiff's plaintiff.

Again Regulation no. 36 of the Public service Regulations provides that a public servant may be interdicted if proceedings for his dismissal are about to be taken or Criminal proceedings are being instituted against him. The plaintiff was interdicted upon the commencement of police inquiries against his conduct and not upon the determination of the authorities to institute actual proceedings for dismissal or prosecution. Therefore, his interdiction was commenced on an illegal basis. The plaintiff has a maintainable action for a declaration and or for damages upon the unlawful interdiction. The trial Judge misdirected himself in rejecting the plaintiff's plaintiff.

The trial Judge misdirected himself when he held that the plaintiff's cause of action was not maintainable at law due to the Presidential prerogative under Art 104 of the Constitution to dismiss the plaintiff in public interest because the plaintiff's action did not seek to impeach the Presidential prerogative but the conduct of the Public Service Commission which had acted outside the law in interdicting him and advising the president to dismiss him in Public interest.

JUDGMENT OF COURT

The Attorney General of Uganda was sued by Wycliffe Kiggundu Kato, the general effect of the suit being, that the Plaintiff Mr. Kato had been wrongly interdicted, and later had been wrongly retired from the Public Service in the public interest. At the beginning of the trial, the Attorney General applied for the plaint to be rejected. The learned Judge agreed with this preliminary objection, and rejected the plaint under Order 7 rule 1 1 (a) of the Civil Procedure Rules because the plaint did not disclose a cause of action. The plaintiff being aggrieved by this decision, appealed to this court.

Mr. Ssempebwa for the plaintiff/appellant set out 7 grounds of appeal but submitted that the burden of the whole appeal could be summarized in grounds 6 and 7 of the memorandum which are as follows:-

6. That the learned trial Judge erred in law and fact in holding that the plaint was not maintainable as it did not disclose a cause of action and that such plaint cannot be cured by amendment.
7. The learned trial Judge erred in law and fact when he decided the merits of the Appellant's case on a preliminary objection that the plaint disclosed no cause of action.

Mr. Nyakairu Senior State counsel for the respondent/defendant drew attention to ground 1, and as some part of the argument related to the terms of that ground of appeal, it is necessary to set it out as follows:-

1. That the learned trial Judge erred in law and fact in holding that a public servant who is interdicted and against whom no criminal charges are brought may be kept under interdiction indefinitely.

It seems to me that ground 1 -5 were all aspects of the general argument under grounds 6 and 7 and perhaps I should refer to them briefly. It is said that the learned Judge was wrong in holding that all the relevant regulations were followed whilst disciplinary action was being taken against the appellant; and that in fact the Public Service Commission acted in breach of the regulations in advising the President to retire the appellant in the public interest. The Judge was also wrong in holding that the President's powers under Article 104 (1) of the Constitution, enables the President to exercise his powers with unfettered discretion, and

therefore no claim for damages and compensation for loss of salary and other benefits can be maintained.

Mr. Ssempebwa pointed out the nature of the appeal in relation to the prayers in the plaint. We agree that in the case of a preliminary objection of this nature, it is important to observe the nature of the plaint, because of Order 7 rule II (a) of the Rules provides the plaint shall be rejected where it does not disclose a cause of action. We consider therefore, that it is primarily a matter of construing the plaint, there being no other pleading, and as the authorities show, the plaint must be construed without access to evidence on affidavit. *{Attorney General of Duchy of Lancaster vs. L. & N. W. Rly [1892] 3 CH 273; Wenlock vs. Moloneys [1965] 2 All E.R. 871; Libyan Arab Bank of Uganda vs. Intrep Co. Ltd: H. C. C. S. 1007 of 1985 unreported per Odoki J}* We are here concerned with the part further and better particulars may be allowed to play because there were none in this case. Assuming then that the averments in the plaint have been proved, it must be asked whether by themselves they disclose a cause of action. As the pleadings show, the plaint was amended by Court order on 16th January, 1991.

In paragraph I of the amended plaint the Plaintiff describes himself as the Ag. Director of Civil Aviation in Uganda up to the 18th August 1988. Paragraph 3 of the amended plaint then continues to allege that the 18th August 1988, the Permanent Secretary of the Ministry of Transport and Communications, a Government servant acting within the scope of his employment, wrote to the Plaintiff interdicting him from duty on the grounds set out in the letter which was attached to the plaint as annexure "A".

The letter of 18th August, 1988 set out three cases of financial impropriety and then stated: - "2. Police investigation may lead to your prosecution in court for the above offenses. In view of this, I am interdicting you from the exercise of your functions, responsibilities and duties as Deputy Director General/ Ag. Director General of Civil Aviation on half pay with effect from 1st August, 1988. This interdiction is to remain in force until your matters are finalised by court or unless/until I am advised otherwise by Police.

The amended plaint continues in paragraph 3 to allege that the Police investigated

the allegations and found them unfounded, and consequently did not charge the appellant with any criminal offence. Nevertheless, the interdiction was allegedly maintained for more than two years. The Permanent Secretary wrote to the appellant on 30th April, 1990, annexure B. I which letter indicates that proceedings to retire the appellant in the public interest were on foot. The last three paragraphs are especially important and are as follows: - “It is on the above grounds that this Ministry found it difficult to present your case to the Public Service Commission for confirmation into your acting appointment of Director General for a number of years.

It has, therefore, been decided that a case be made against you to the Public Service Commission that you be retired with an option that you be allowed to voluntarily retire prematurely from the services of the Government of the Republic of Uganda.

The purpose of writing is to call upon you either to retire voluntarily....’or to show cause upon which you exculpate yourself from the impending action of retirement in the public interest in the latter alternative your presentation should reach me within a week of this letter and in any case not later than Monday 8th May, 1990.”

The Appellant contends in paragraph 3 (c) that this letter put forward allegations of a vague and general nature, which left the appellant to guess for himself what the case against him might have been. (In fairness to the Permanent Secretary the first three paragraphs of his letter of 30th April 1990 did set out a number of complaints and then gave a summary that the appellant could not be made a Director General because of the appellant’s gross incompetence and causing divisions amongst the staff). Nevertheless, the appellant contended that these allegations were unsatisfactory. The appellant avers in paragraph 3 (d) that his interdiction was ultra vires the Public Service Commission Regulations, which he contends, provide that on interdiction a public officer, against whom no criminal or disciplinary proceedings are brought, should be reinstated. The appellant alleges in paragraph 3 (e) that he appealed in vain for the Public Service Commission Regulations to be complied with. Moreover, the appellant contends in paragraph 3(f) that he was entitled to be informed of any charges against him and be given a hearing by the

Commission. As a result the appellant alleges in paragraph 4 that he was unlawfully interdicted and unlawfully retired in the public interest, thereby causing him loss. The appellant/plaintiff prayed for the following reliefs: - “

a) A declaration that;-

- i) the plaintiffs interdiction and being improperly kept on interdiction for more than two (2) years was unlawful and *ultra vires* the Public Service Commission Regulations;
- ii) the retirement in public interest of the plaintiff by the President of Uganda was unlawful in so far as it was based on advice of public Service Commission which did not follow the prescribed procedure.

b) General damages.

c) costs and interest.

It will be seen that the two main issues arising from the amended plaint would primarily include the issues arising from the nature and length of the appellant's interdiction; and secondly the legality or otherwise of the retirement proceedings.

The learned Judge approached the first issue in the following way. He began by expressing the opinion that the length of time of the interdiction was not based on any existing regulations.

“There is nowhere in the Public Service Regulations - where it is indicated what period a civil servant has to be on interdiction”, (sic).

The Judge then quoted regulation 36(1) -

“When a responsible officer considers that the public interest requires that a public officer should cease to exercise the powers and functions of his office, he may interdict the officer from the exercise of those powers and functions, if proceedings for his dismissal are about to be taken or if criminal proceedings are being instituted against him” (underlining by the Court):

The learned Judge then dealt with the contention that the continued interdiction of the plaintiff was *ultra vires* the Regulations which indeed proved that an interdicted public officer against whom no criminal or disciplinary proceedings are brought,

should be reinstated, he accepted, so it seems, that the proceedings through inquiries had been commenced against the appellant. Those proceedings were culminated by the letter of April, 1990. The appellant had been asked to make representations but did not.

With great respect, it is difficult to follow the logic of those findings. We may commence with the learned Judge's finding above which seems to suggest that regulation 36 allows interdiction to be continued indefinitely. Both Counsel before this court agreed that interdiction could only last for a reasonable time. If that were true, then the application to reject the plaint, so far as this part of the case is concerned, must fail. What a reasonable time might be would depend upon the time construction of regulation 36, and whether or not the facts alleged would fit within that construction. Once questions of fact arise, then the issue must surely go to trial.

On the other hand, it would not be open to the respondent to rely on the Judge's possible assumption that interdictions might last indefinitely. Regulation 36 requires two prerequisites -

- a) if proceedings for his dismissal are about to be taken, or
- b) if the criminal proceedings are being instituted against him.

It is clear that Regulation 36 is not intended to be open-ended. Interdiction may be ordered if proceedings are about to be taken in a), or are being instituted in b). Some latitude between the act of interdiction and the institution of the proceedings mentioned may be allowed perhaps; but the gap must inevitably be short. Whether the two years alleged in the amended plaint would fit within the construction of regulation 36 must be a question of mixed law and fact.

There is the suggestion that "proceedings through inquiries had commenced". In this case dismissal proceedings were not contemplated in the letter of 18th august 1988, we are not sure what the learned judge meant by "disciplinary" proceedings. Apparently, the learned Judge thought that the phrase, "criminal proceedings are being instituted" would include police inquiries. It is doubtful' if that is correct. Regulation 36 appears to refer to the determination to institute actual proceedings for dismissal, or a prosecution, and not a vague period for investigation. However

that may be, there can be no doubt that dismissal proceedings are not the same as retirement in the public interest. Regulation 36 does not cover retirement in the public interest. It seems that the learned Judge may have accepted that construction, if he held that the police proceedings culminated in the letter of 30th April, 1990. If that is so what happened after 30th April, 1990. On this aspect of the case then, two questions are left open: was interdiction commenced on a legal basis, and secondly how long did it last?

On the last question of fact, if interdiction continued after 30th April, 1990. did that not give ground for a declaration from that time onwards and possibly a case for damages? On this point the amended plaintiff is not quite clear, what did the appellant mean by more than two years? If interdiction started on 13th April 1988; two years would elapse on 13th April 1990, at least more than 2 years?

We notice that an application to amend the plaintiff was made by summons, supported by affidavit, dated the 20th November, 1990. The purpose was to introduce certain facts; one being that the appellant was retired in the public interest from 18th August, 1990 by the President of Uganda under Article 104 of the C constitution, and on the advice of the Public Service Commission. The amendment was allowed by Soluade, J on 16th January, 1991. The curious fact, however, is that these facts were not imported into the amended plaintiff. Presumably more than two years was intended to run up to 18th August, 1990. We have to take the amended plaintiff as it stands. The 18th August 1990 has not been incorporated. We have to take it that the amended plaintiff covers the period 13th April 1988 to 30th April 1990; unless it is to be further amended.

It is not permissible to rely upon the affidavit. First because the amendments were not carried out and secondly because in principle. We cannot look at affidavit evidence, outside the amended plaintiff, as we have explained above. Even so there are sufficient facts upon which the plaintiff must show a cause of action. In *Auto Garage vs. Motokov (No. 3) [1971] EA 514* it was held that a plaintiff may disclose a cause of action without containing all the facts constituting the cause of action, provided that the violation by the defendant of a right of the plaintiff is shown. In this case, having in mind the pre-requisite of regulation 36. Prima facie “more than two years” interdiction would not be commensurate with criminal proceedings being instituted. “More than two years” may need elucidation beyond 30th April

1990, and may possibly be the subject of further amendment, or curtailment as the case may be. But as the amended plaint stands there is a case for the respondent to answer the relief claimed of a declaration and possibly damages.

Passing on then to the next issue relating to the legality or otherwise of the proceedings, there are two aspects, which require attention. The first concerns the learned Judge's decision couched in the following phrases:-

“These proceedings culminated in the Permanent Secretary writing to the Plaintiff on 30th April 1990 informing him of the nature of charges against him asked the plaintiff to either retire on his own or make presentation within a week giving an explanation on the accusations.

The plaintiff did not make the presentation or any response to the letter.

Considering all the above, I do not see how the plaintiff would have been reinstated when disciplinary proceedings were initiated, and he was informed about them and asked to make a presentation which he did not respond to. The plaintiff's failure to make any representation as requested for, put himself out of the arena of being heard by his own choice. He cannot turn round and say that he was not heard.”

This passage depends to a large extent on the fact that the appellant did not respond and present his case. That fact is not in the pleading. Its origin, according to the argument presented to this court, lies in other proceedings. Unless it was admitted, the learned judge could not rely upon it. Nothing was stated by counsel before the trial court on this point. Consequently the learned Judge must be held to have relied upon an extraneous fact.

The second aspect concerns the powers of the presidency under Article 104 of the Constitution. A good deal of argument in the trial court concerned the effect of the decision in *Opolot vs Attorney General [1969] E.A. 631*. It does not appear to us that decision is relevant to the precise issues on this appeal. Whether or not the appellant can be retired in the public interest at the will of the President, he is asking for declarations of another kind. He alleges that prior to the decision to retire him he was unlawfully interdicted and then unlawful advice was given to the

President. He considers that these unlawful features allow him to claim a declaration and damages. Several considerations arise from this situation.

First of all it is not pleaded how and when the decision to retire the appellant was taken. As we have seen above, facts of this nature were to be added to the plaint when it was amended. The amendments have never been carried out. It is therefore not an apt case for a general constitutional discussion.

Secondly, no constitutional question was raised by the defence and therefore no reply was filed. The defence merely says that whatever was done was lawfully done. What is the position, then, if the appellant accepts his retirement as a fact, but alleges that the steps taken to cause his retirement were unlawful? *Prima facie* a subject has the right to expect procedures to be lawfully carried out and the remedy if a declaration at least is apt to vindicate the subject's rights. Whether or not that is a pyrrhic victory in the end is not in point in this appeal. A distinction must be drawn between an application to reject a plaint and one when a matter of law is set down for argument as a preliminary point. That distinction was very clearly explained in *Nurdin Ali Dewji & Others vs. Meghji & Co. Others* [1953] 20 E.A.C.A. 132. The distinction is that under order 7 Rule II (a) of the Rules an inherent defect in the plaint must be shown, rather than that the suit was not maintainable in law. In the latter case preliminary point should be set down for hearing on a matter of law? (In Tanganyika at that time Order 14 Rule 2 would have been relevant. In Uganda the relevant rule is to be found in order XIII Rule 2 of the Rules). If the State insists that as a matter of law no suit can be brought, the State should not try to have the plaint rejected, under Order 7 Rule 2, but should apply to have the suit dismissed on a preliminary matter of law.

Thirdly, we should deal with *Katikiro of Buganda vs. A.G. of Uganda*. [1958] E.A. 765 to which we were referred. It was held there that Order 7 Rule 2 of the Rules ought to be applied to an action involving a serious investigation of law and questions of general importance. Subject to the decision in *Nurdin Ali Dewji (above)* and the need for the avoidance of loss of time and costs (See *Mckay vs Essex Area Health Authority* [1982] 2 All E.R. 771), we would as a general rule agree. But in this case facts as well as the law must be investigated and a trial is necessary. In that event, we hope that Legal Notice Nol. 2 of 1988 will be considered if that is possible.

This is an appeal against an interlocutory ruling, which involves the trial Judge's discretion to some extent. Order 7 Rule 2 is not read as mandatory, as the respondent submitted in the Court below. (*See Auto Garage vs. Motokov (No. 3) [1971] EA 514*), an amendment can be ordered. But on appeal, the court of appeal may not only interfere where the Judge has gone wrong in principle, but also if it is satisfied that the Judge is wrong in giving no weight or insufficient weight to those considerations which ought to have weighed with him, or that he had been influenced by considerations which ought not to have weighed with him (per Lord Denning in *James vs. Ward [1966] 1 QB 273 at p. 293*). It follows that as the learned Judge unfortunately misconstrued regulation 36, and took into account extraneous considerations, it is clear that the appeal must succeed.

At the hearing of the appeal, we allowed the appeal, set aside the judgment of the High Court, thus reinstating the suit. We ordered that the record be remitted to the High Court for trial by another Judge. We awarded the costs of the appeal; and of the application to reject the plaint, to the appellant/plaintiff. These are the reasons for those orders.

Dated this 8th day of November 1993