

5

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 050 OF 2009

ASIIMWE JOHN APPELLANT

VERSUS

10

ATTORNEY GENERAL..... RESPONDENT

CORAM: Hon. Mr. Justice Alfonse C. Owiny Dollo, DCJ

Hon Mr. Justice Kenneth Kakuru, JA

Hon. Mr. Justice Remmy Kasule , Ag. JA

15

JUDGMENT OF THE COURT

The appellant appeals against the decision of the High Court, which dismissed his applications for judicial review namely, High Court Miscellaneous Application No. 157 of 2006 and Miscellaneous Application No. 43 of 2007.

20

Brief background

The appellant was appointed an Assistant District Executive Secretary in Bushenyi District effective 2nd January, 1995 and he was confirmed into the Permanent and Pensionable service as Assistant Chief Administrative Officer Bushenyi District on 26th June, 1997.

25

On 1st May, 1998, he was promoted to Senior Administrative Officer and on 1st April, 2005 he was appointed by the District Service Commission Bundibugyo on transfer as Chief Administrative Officer.

30

5

On 30th September, 2005, the **Constitution (Amendment) Act, 2005** came into force and among other amendments **Article 188** was amended transferring the power to appoint, discipline and remove Chief Administrative Officers from the District Service Commission to Public Service Commission.

10

Following that amendment, the Public Service Commission directed the appellant and others to apply for appointment as Chief Administrative Officer and conducted interviews purportedly to appoint the appellant and others as Chief Administrative Officers in what Public Service termed ***“to regularize and validate the appointments of Chief Administrative Officers”***.

15

On 4th October, 2006, the Permanent Secretary Ministry of Local Governments transferred the appellant from Bundibugyo District to Kanungu District as acting Chief Administrative Officer.

20

He now appeals against the said decision on the following grounds:-

25

1. *That the Learned Judge erred in law and in fact in holding that in order for the requirements of Article 188 of The Constitution as amended to be met, it was necessary for the appellant and others to undergo an interview conducted by the Public Service Commission.*

30

2. *That the Learned Judge erred in law and in fact in holding that there is no evidence that the appellant was demoted.*

3. *That the Learned Judge erred in law and in fact in holding that the appellant was not wrongfully retired or dismissed.*

5 4. *That the Learned Judge wrongly refused to grant the appellant the prerogative writs of certiorari and prohibition and other remedies sought in the circumstances.*

At the hearing of this appeal Mr. Ndibarema Mwebaze learned Principal State
10 Attorney appeared for the respondent while learned Counsel Mr. Kwemara Kafuzi appeared for the appellant.

Both Counsel sought and were granted leave to adopt their written conferencing notes and written submissions. This appeal therefore has been determined only on the basis of the parties' respective conferencing notes and written submissions
15 on record.

The Appellant's case

It was submitted for the appellant on issue 1 that, it was not necessary for the appellant to be subjected to an interview by the Public Service Commission following the 30th September 2005 Constitutional Amendment Act, which
20 amended Article 188 of the Constitution. He contended that prior to the amendment, he was holding a substantive permanent and pensionable office as Chief Administrative Officer, and as such his appointment was not affected by the Constitutional Amendment.

Further, that although he sat for interview for the same post, on 23rd May 2006,
25 the purpose of the interview was to regularize his appointment and not otherwise.

There was no requirement under the Constitutional Amendment Act of 2005 that required the Public Service Commission to interview and re-appoint public

5 servants who were already serving in various capacities. Accordingly Counsel submitted there was nothing to regularize or validate in respect of the appellant's appointment.

In conclusion Counsel submitted that the interviews held outside the law had no legal consequence on his previous appointment as Chief Administrative Officer, and thus faulted the learned trial Judge's decision in this regard. He asked Court to uphold this ground of appeal.

In respect of ground 2, Counsel submitted that, following the interview he sat before the Public Service Commission on 23rd May 2006, the appellant was on 4th October 2006 transferred from Bundibugyo District where he was serving as Chief Administrative Officer to Kanungu District as Acting Chief Administrative Officer, which he contends was a demotion. He contended that, having held the post of substantive Chief Administrative Officer, for Bundibugyo from 1st April 2005, transferring him to Kanungu District as Acting Chief Administrative Officer was a demotion. He submitted that, the learned trial Judge erred when he failed to find so. He asked Court to uphold this ground.

Finally on ground 4, Counsel submitted that the appellant had been wrongly and unlawfully retired from public service by the Public Service Commission following the interview held on 23rd May 2006, which the Public Service Commission contended the appellant had failed.

25 He argued that, the said interview was superfluous and uncalled for as there was no legal basis for it. It could not, therefore have constituted a basis for his retirement.

5 He asked Court to uphold this ground too, and to grant him the remedies sought.

The Respondent's Case

On ground 1, it was submitted for the respondent in reply that:

The purpose and effect of the Constitutional Amendment Act of 2005, which introduced the New Article 188 was to remove the power to appoint, confirm, discipline and remove Chief Administrative Officers and the Deputies from District Service Commission to Public Service Commission. Following this amendment all affected officers were required to finalize and regularize their appointments before the Public Service Commission.

The Public Service Commission required all affected officers to reapply for their posts and following which interviews were held.

Those found suitable were retained and those who were found unsuitable were retired.

Counsel submitted that the appellant submitted himself to the interview, was interviewed, found unsustainable and retired. He asked Court to uphold the decision of the trial Judge on this issue.

Further, Counsel argued that, the appellant did not challenge that Constitutional interpretation placed by the respondent on the New Constitutional requirement and as such he could not challenge that interpretation in judicial proceedings. Lastly, that having submitted himself to the process by applying for the post of the Chief Administrative Officer and sitting for the interviews, the appellant was estopped from challenging the validity of the very place.

- 5 He also submitted that the appellant was not demoted as he was transferred to Kanungu as Acting Chief Administrative Officer, he had already sat for interview at Public Service commission for the post of Chief Administrative officer, and was awaiting results. He was therefore no longer a substantive Chief Administrative officer.
- 10 He prayed Court to dismiss the appeal.

Resolution of issues

We have listened to both sides and read carefully the Court record.

We are alive to the duty of this Court to reappraise the evidence and come to our own inferences on all issues of law and fact. See: Rule 30 of the Rules of this
15 Court and *Fr. Narcensio Begumisa & others vs Eric Tibebaaga, Supreme Court Civil Appeal No. 17 of 2002*. We shall endeavor to do so.

On 30th September 2015 *Article 188* of the Constitution was amended to read as follows:-

20 *(1) There shall be a Chief Administrative Officer and Deputy Chief Administrative Officer for every district.*

*(2) Notwithstanding articles 176(2) and (3) and 200 of this Constitution, the Public Service Commission shall appoint persons to hold or act in the office of Chief Administrative Officer and Deputy Chief Administrative Officer, including the confirmation of their appointments and the exercise
25 of disciplinary control over such persons and their removal from office.*

5 *(3) Parliament shall by law establish the qualifications and functions of a
Chief Administrative Officer and Deputy Chief Administrative Officer.”*

The effect of this amendment was to transfer the power to appoint, confirm,
discipline and remove Chief Administrative Officers and the deputies and such
other local government officers from the District Service Commission to Public
10 Service Commission.

Following this amendment the respondent as the Government legal advisor
interpreted this amendment to mean and require that all sitting officers affected
by the amendment regularize their appointments by applying for the same jobs
they already held before the Public Service Commission.

15 The appellant being one of such affected officers duly obliged. On 7th February
2006 he applied for the post of Chief Administrative Officer before Public Service
Commission and on 23rd May, 2006 he sat for the interview. Before the results of
the interview were announced he was on 4th October 2006 transferred from
Bundibugyo District where he was a substantive Chief Administrative Officer
20 before the 2005 amendment of the Constitution to Kanungu District. The letter of
transfer indicated, that he was to hold the post of Acting Chief Administrative
Officer. The letter of transfer clearly indicated that the appointment and transfer
to Kanungu as Acting Chief Administrative Officer was “until the results of your
interview for the post of Chief Administrative Officer are finalized”.

25 On 10th November 2006, the appellant was by letter retired from Public Service
having apparently failed the interview.

5 We accept the submissions of Counsel for the respondent that, the appellant could have moved the Constitutional Court for the interpretation of Article 188 of the Constitution challenging the interpretation placed on it by the learned Attorney. However, it was still open to him to challenge his dismissal by way of judicial review proceedings.

10 The purpose and effect of the amended Article 188 of the Constitution was to place affected officers under the control and supervision of the Public Service Commission.

It appears clearly to us that, the amendment of the Constitution that introduced Article 188 had no retrospective effect on the appointments of public officers who
15 were already in office, their appointments clearly remained valid.

The effect of the amendment was to place those serving public officers previously appointed by District Service Commissions under ambit of the Public Service Commission. Their appointments remained valid, having been appointed legally under the law that was in place prior the Constitutional amendment. Their offices
20 were not revoked and their appointments were in no way invalidated by the constitutional amendment.

We find that the advice of the Attorney General referred to earlier was not based on any law, and had no legal basis. It had no legal effect on the appellant's appointment as it was erroneous.

25 The decision by the Public Service Commission requiring the appellant to attend interviews for a post he already held under permanent and pensionable terms was unconstitutional and we find so. Therefore the results that followed the interviews by the Public Service Commission were of no legal effect the whole process having been illegal and unconstitutional.

5 We find that the appellant's substantive appointment as Chief Administrative Officer remained valid.

We find merit in the appeal and we allow it.

We find that the appellant was entitled to the reliefs and remedies sought at the High Court which were as follows:-

10 *1. The order of certiorari calling into the High Court and for quashing of the decisions of the Permanent Secretary Ministry of Local Government contained in the letters, namely*

15 *(i) Ref LG/P/10010 dated 4th October 2006 addressed to the Applicant communicating to him that he had been deployed as Ag. Chief Administrative Officer.*

20 *(ii) Reg. LG/P/10010 dated 10th November 2006 addressed to the Applicant communicating to him that he had been retired from the public service.*

2- The decision of the Public Service Commission retiring the Applicant from the Public Service of Uganda.

25 *3- The order of prohibition prohibiting vacation of office.*

4- General damages.

5- Costs of and incidental the application.

5 We find that the appellant was unfairly treated and his employment was wrongly terminated. The record indicates that when he was appointed Chief Administrative Officer on 4th April 2005 he was 41 years old. He is now about 55 years old and the retirement age for public servants is 60. Since our finding is that the appellant's appointment as Chief Administrative Officer in 2005 has never been revoked, we deem it appropriate to order his reinstatement as Chief Administrative Officer.

A person wrongly dismissed is entitled to compensation for the financial loss he/she suffered subject to qualification that it is his duty to do what he can to mitigate loss, and this includes finding another job or engaging in another profitable trade or vocation. The amount of compensation is not necessarily the sum of emoluments which the employee would have received, it may be more or less but that sum forms the basis of the determination of award. See: *East Africa Airways vs Knight 1975 EA 165 Bank of Uganda vs Fred Masabi and Others Supreme Court Civil Appeal No.3 of 1998* and *David Iyamulemye vs Attorney General, Court of Appeal Civil Appeal No. 8 of 2016* per. Byamugisha JA.

The appellant's salary on 4th April 2005 was 1,534,543 per month. He was retired on 10th November 2006.

He has been out of work for slightly over 12 years. He would have been earning shs. 18,414, 516/= per annum. In 12 years he would have earned shs.220,974,192/=.

We consider that being relatively young and educated person he ought to have found profitable employment or vocation to mitigate the loss of his employment. We would award him about 50 percent of the above, shs. 110,000,000/= for loss of income. In addition we would award him shs. 15,000,000/= as general damages for wrongful dismissal.

5 The appellant is entitled to costs at this Court and the Court below.

In the result this appeal succeeds, on all grounds and we make the following orders.

1) *The Judgment of the High Court is hereby set aside and substituted with this Judgment*

10 2) *The order of certiorari calling into the High Court and for quashing of the decisions of the Permanent Secretary Ministry of Local Government contained in the letters, namely*

15 (i) *Ref LG/P/10010 dated 4th October 2006 addressed to the Applicant communicating to him that he had been deployed as Ag. Chief Administrative Officer.*

(ii) *Reg. LG/P/10010 dated 10th November 2006 addressed to the Applicant communicating to him that he had been retired from the public service.*

20 3) *The decision of the Public Service Commission retiring the Applicant from the Public Service of Uganda.*

4) *The appellant is awarded general damages of shs. 135,000,000/=.*

25 5) *The respondent is hereby ordered to reinstate the appellant in office as Chief Administrative Officer with immediate effect.*

6) *The respondent is ordered to pay costs at this Court and the Court below.*

5


7) *The amount set out in paragraph 4 shall attract interest at 15 percent per annum from the date of this Judgment until payment in full.*

Justice Remmy Kasule agreed with this decision but was unable to sign the Judgment, as at the time the final draft was ready he had retired.

10

Dated at Kampala this^{28th} day of^{May,}.....2019.

15



Alfonse C. Owiny Dollo
DEPUTY CHIEF JUSTICE

20



Kenneth Kakuru
JUSTICE OF APPEAL

25

.....

Remmy Kasule
Ag. JUSTICE OF APPEAL

①

28/5/19

Csl. Bwiruka for
Appellant.

A-G (Abs)

Clerk. Melissa

Csl. Bwiruka

Matter is for Judge
The A-G was notified
about this date of judgment
but you are not here
I pray we proceed

ex parte

Ch- Judge read & delivered
in Chambers. for
28/5/19