THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram *:(Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha, Tibatemwa-Ekirikubinza JJ.S.C)*

CIVIL APPEAL NO.07 OF 2017

BETWEEN

KAGUMYA PEREGINO ..... APPELLANT

AND

ATTORNEY GENERAL ..... RESPONDENT

(Appeal from the Judgment of the Court of Appeal of Uganda (Remmy Kasule, Kenneth Kakuru and Egonda-Ntende, JJA) at Kampala, dated21st May 2017 Civil Appeal No. 47 of 2012).

JUDGMENT OF ELDAD MWANGUSYA, JSC

Background:

The appellant, Kagumya Peregino was appointed a Magistrate Grade II with effect from the 23nd August 1979. On 26th May 1993 the office of the District Executive Secretary, Masaka District informed the Chief Magistrate, Masaka that following a report of the Public Service Review and Re-organisation Commission, two of his officers, namely, Baguma Nyakana Fred a Magistrate Grade II and the appellant also a Magistrate Grade II

had been retrenched from the Public Service. Three others who had reached the mandatory retirement age had retired. They were to attend a meeting on 31.05.1993 where they were to be briefed about their retrenchment and be paid their severance cheques. On 27.05.1993 the Chief Magistrate Masaka communicated the information to the appellant, who, on 31.05.1993 received his severance package and left the Judicial Service. Nothing was heard of the matter until the year 2006 when the circumstances under which the appellant had been retrenched were raised and he requested for reinstatement. On 26.02.2007 the Ag. Registrar communicated to the appellant informing him as follows:-

"Arbitrary Termination of Service

The Hon the Chief Justice has considered your request for reinstatement in the service and upon perusing all the correspondence that led to your retrenchment from the service, His Lordship directs that you pursue the matter with the Ministry of Public Service, through the Judicial Service Commission.

It is the considered view of the Judiciary that you were properly retrenched from the service on account of your unbecoming conduct that included frequent absenteeism, drunkenness and fighting staff."

In a rather strange twist of events the Ag. Chief Registrar, on July 24, 2007 informed the appellant that he had been retrospectively confirmed in his appointment as Magistrate Grade II and admitted to the Pensionable Establishment of the Public Service.

The Permanent Secretary Ministry of Public Service sought clarification from Chief Registrar on this confirmation after the appellant's retrenchment. In response the Chief Registrar wrote to the Secretary to the Judicial Service commission requesting that the confirmation of the appellant in the public service be rescinded on account that it was erroneous. In a meeting held at the Judicial Service Commission on 30th October, 2007 the appellant's confirmation was rescinded on the ground that it had been found that the submission for his confirmation had been fraudulently prepared. Again nothing was heard of the matter till the appellant filed this suit.

In his suit dated 15th January 2010 the appellant sued the respondent for (a) a declaration that his retrenchment from Public Service was nullity, (b) an order quashing the illegal retrenchment (c) an order reinstating him in the service (d) payment of salary arrears, (e) general damages, (f) interest on (d) and (e) and costs of the suit.

The respondent denied the appellant's allegations contending that the Chief Registrar had erroneously made a submission to the Judicial Service Commission and it was on that basis that the appellant was confirmed by the Commission in 2007. However the Chief Registrar realised the said error to which a submission was made to the Commission recommending rescission of the Minute confirming the appellant. The defendant/respondent further contended that at all material times, the Judicial Service Commission was acting on the erroneous submission of the Chief Registrar and did not reverse

the appellant's retrenchment as alleged. Accordingly, the defendant sought to raise a preliminary point of law that the suit seeking to quash the plaintiff's retrenchment is time barred and prayed that it should be dismissed with costs.

The agreed issues were:-

(1)Whether the plaintiff's cause of action is time barred.

(2)If not, whether the plaintiff's was lawfully retrenched.

(3)If not, whether the plaintiff was entitled to the reliefs sought.

After consideration of the relevant law relating to Limitation of Actions the trial Judge made the following finding.

"What is clear from the plaint and submissions is that the plaintiffs' main contention is that the authority that communicated his termination from office i.e. Masaka District Executive Secretary's letter dated 26/5/1993 did not have such powers because judicial officers were and still are employees of the central and not local Government.

This issue arose in 1993 when the plaintiff got communication of his termination. He cannot now claim that he is just realised the mistake after the alleged intervention of the Secretary to the Judiciary, Public Service Commission and other officers interviewed later in 2007. It should not take the intervention of other officers for the plaintiff to act on a mistake that was allegedly detrimental to him. What the plaintiff has stated about Section 6(I)(c) of the Civil Procedure and Limitation (Miscellaneous Provisions)

Act, is true, but how he applies it is the problem. The alleged mistake manifested right from the beginning not in 2009 as he wants Court to believe. I find that the reasons for exemption from the Limitation are not justified.

It beats logic that a retrenched officer whose retrenchment package had been duly processed and granted would later be confirmed! In the circumstances I find that the plaintiff was retrenched in May 1993. There is no sufficient evidence on record to support the plaintiff's claim of mistake in the circumstances. It is on this basis that I find that Counsel for the respondent rightly raised a preliminary point of law that the act is barred as time began to run in 1993, 18 years ago, and as such the suit should not be entertained.

Further, and, with due respect, learned Counsel for the plaintiff seems to have gone on a fishing expedition. What he calls ordinary contracts under Common law is enshrined in statutes for instance the Employment Act, 2006 and the Contracts Act, 2010. It is not clear what he means when he says that Civil Procedure and Limitation (Miscellaneous Provisions Act is limited to Common Law Contracts. To Court, the law of Limitation applies to the plaintiffs contract of service, and the Court finds the suit barred by statute.

The preliminary objection is upheld and the suit is hereby dismissed with costs to the defendant."

The appellant appealed against the judgment of High Court to the Court of Appeal. He set out two grounds of appeal:-

(1)That the learned Judge erred in law and fact to hold that the appellant's suit was statute barred by limitation.

(2)That the learned trial Judge erred in law and fact to have held that a Public Service Contract is the same as a Common Law Contract.

Both grounds of appeal were dismissed by the Court of Appeal. The appellant raises similar grounds as those raised at the Court of Appeal. The grounds are stated as follows:-

(1)That the learned Justices of Appeal erred in law and fact when they held that the appellant's suit was statute barred.

(2)That the learned Justices of Appeal erred in Law when they held that there is no distinction between Common Law contract and Public Service Contract.

He prayed this Court to reverse the judgment of the Court of Appeal, order that the suit be heard on its merits in the High Court and grant the costs of the trial Court, Court of Appeal and Supreme Court to the appellant.

At the hearing of this appeal the appellant was represented by Mr. Ladislas Kiiza Rwakafuzi while the respondent was represented by Ms Charity Nabasa, State Attorney.

Both Counsel had filed written submission which they adopted at the hearing.

Counsel for the appellant argued both grounds together. First of all he submitted, like he did at the Court of Appeal that the plaintiff having pleaded in paragraph 4(e) that the right to sue

accrued in 2009 on the discovery that the plaintiffs retrenchment was null and void, the pleading was a triable issue requiring the plaintiff to lead evidence thereon. He stated that this was because the plaintiff claims to have discovered that in fact his retrenchment was not sanctioned by the President or the Judicial Service Commission. He argued that the written statement of defence promised to put the plaintiff to strict proof thereof and Court should have allowed him to lead evidence to show that it was in 2009 when he discovered that his purported retrenchment was null and void. He added that moreover, the defendant in his written statement of defence had brought two contentions that should have been subjected to a trial so that evidence is adduced on them instead of dismissing the case on a preliminary point of law.

Counsel further submitted that Section 3(2) of the Civil Procedure and Limitation (Miscellaneous Provisions) Act did not apply to a Public contract such as a Judiciary Service contract. He faulted the Court of Appeal for failing to find that there was distinction between a Public Service Contract and a Common Law Contract.

Counsel contended that the allegation that the appellant was illegally retrenched involved elements of Public Law sufficient to attract Public Law remedies such as Certiorari, Prohibition, declaration, etc. According to Counsel while an ordinary employer is free to act in breach of his contracts of employment and the employee will require certain private Law rights and remedies in damages of wrongful dismissal, compensation for unfair dismissal, etc. a Public employer where the employment is

underpinned by statute is entitled to Public Law remedies and accordingly a Public Service Contract can only be terminated according to the Statute setting it up. Counsel asserted that removal from Judicial Service was wholly provided for by Art 91 of the Constitution, the Judicial Service Act and regulations but there was no provision for retrenchment by a local Administration.

Counsel referred to Section 9(1) and (2) of the Employment Act which provides that all employment contracts shall be in conformity with the Act. He said that Section 6 of the Employment Act excluded Section 9 from the application of the Employment Act to a Public Officer or any other person employed by government in Civil Capacity and accordingly Section 2 of the Government Proceedings Act Section 3(2) of the Civil Procedure Act Limitation (Miscellaneous Provisions) Act does not apply to Public Service Contracts.

He urged Court to find that the appellant's claim was not statute barred and prayed Court to allow the appeal with costs.

The respondent argued the two grounds separately.

On ground one Counsel for the respondent submitted that the Court of Appeal correctly held that the facts set out on the face of the plaint including the attachments supported the proposition that the cause of action arose in 1993. Counsel stated that it was evident that there was nothing new discovered in 2009 that was not known in 1993. Counsel submitted that the respondent denies the appellant's claim that he had never been terminated, stating that on the contrary paragraph 4(b) of the appellant's

plaint points to the fact of termination on 27th May 1993 and that is when the cause of act occurred. The respondent contends that the appellant's claim is founded on contract and cannot be brought against Government three years from the date of termination of services. Counsel argued that the appellant's action which was brought after eighteen years was clearly out of time and did not fall under the exemptions provided under Order 7 Rule 6 of the CPR.

On the second ground of appeal Counsel submitted that the Court of Appeal properly found that there was no distinction between common law contracts, private law contracts and public law contracts. He added that the Court of Appeal also properly held that in the context of the Civil Procedure and Limitation (Miscellaneous Provisions) Act words ought to be given their ordinary meaning and the words "actions founded on contract" are all inclusive.

I have studied the proceedings at both the High Court and the Court of Appeal. I have carefully studied the written submissions filed by both counsel and I am mindful of the duty of this Court as a second appellate Court to only interfere with the concurrent findings of the two Courts below where there has been a failure to evaluate evidence by the Court of Appeal and where the concurrent findings are not supported by evidence.

As I understand this appeal, there is a contention as to whether Civil Procedure and Limitation (Miscellaneous Provisions) Act is applicable to the applicant who contests his retrenchment on the ground that it was null and void ab initio. The argument is that

on the discovery that his retrenchment was illegal he was entitled to bring his action to correct the anomaly.

The findings of both Courts were that the appellant was retrenched on 31.05.1993. The retrenchment was communicated to him by the Chief Magistrate, Masaka Magisterial Area where he was stationed at the time of his retrenchment.

According to the letter of the Chief Magistrate the retrenchees were briefed on the 31.05.1993 before they received their severance cheques. The appellant tried to manipulate his reinstatement and confirmation in service fourteen years after he had vacated office but the minute of the Judicial Service Commission clearly endorses the retrenchment and rightly rescinds the purported confirmation. So for anybody to claim that from 1993 to the year 2007 the appellant had not discovered an illegality giving rise to his cause of action is only being disingenious. There is no reason to interfere with the finding of the two Courts below that the termination of the appellants' employment took place on 31.05.1993 and that is when the cause of action arose.

As to whether the Limitation (Miscellaneous Provisions) Act is applicable, Counsel for the appellant tries to draw a distinction between Public Service Contracts and Common Law Contracts contending that the illegal retrenchment of the appellant involved elements of Public Law sufficient to attract Public Law remedies such as Certiorari, Prohibition, declaration, etc.

The Court of Appeal resolved ground two of the appeal which is similar to ground two of the memorandum of appeal before this Court as follows:-

"I have considered the submissions of Mr Rwakafuzi that the Civil Procedure and Limitation (Miscellaneous Provisions) Act does not apply to public contracts. We do not find any support for this position on a reading of this Act. In our view no distinction is made between Common Law Contracts or Private Law Contracts and Public Contracts with regard to the application of this law. Words in a statute ought to be given the ordinary meaning unless they do not make sense in the context they have been used. The Act refers simply to actions founded on Contract. No distinction is made in the nature of the contracts. It is all inclusive. We do not find any merit in ground 2 of this appeal."

I agree with the above conclusion. In addition I do not agree with Mr. Rwakafuzi that because the 'illegal' retrenchment of the appellant involved elements of Public Law sufficient to attract Public Law remedies such as Certiorari, Prohibition, Declaration, etc. it is excluded from the application of the Act. According to Rule 5 of the Judicature (Judicial Review) Rules, 2009 those remedies are themselves amenable to limitation because any application for Judicial Review shall be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the

application shall be made. In other words even if the public law remedies were tenable they are also subject to limitation.

The termination of the appellants' contract was on 31.05.1993. He received his retrenchment package and vacated his judicial functions. He then turns up eighteen years later and seeks reinstatement to his job among things. I am sure the Limitation Miscellaneous Provisions) Act was meant to prevent such actions which also amount to an abuse of Court process.

In the result I find no merit in both grounds of appeal which are dismissed with costs here and in the Courts below.

Dated at Kampala this 21st Day of December 2018

Mwangusya Eldad
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

(*CORAM:* Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha, Tibatemwa-Ekirikubinza; JJSC.)

CIVIL APPEAL NO. 07 OF 2017

BETWEEN

KAGUMYA PEREGINO::APPELLANT

AND

ATTORNEY GENERAL::RESPONDENT

(Appeal arising from the judgment of the Court of Appeal at Kampala (Kasule, Kakuru and Egonda-Ntende, JJA), in Civil Appeal No. 47 of 2012 dated 21st May, 2017)

JUDGMENT OF M.S.ARACH-AMOKO, JSC

I have had the benefit of reading in draft the Judgment of my learned brother, Hon. Justice. Mwangusya Eldad, JSC, and I fully agree with his decision that this appeal has no merit and should fail for the reasons he has given in his Judgment.

As the majority of the members on the Coram agree, this appeal is dismissed with costs here and in the Courts below.

Dated at Kampala this 21st day of December 2018

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M.S. ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: ARACH-AMOKO; MWANGUSYA; OPIO-AWERI; MWONDHA; TIBATEMWA-EKIRIKUBINZA, JJSC.]

CIVIL APPEAL NO. 07 OF 2017

BETWEEN

KAGUMYA PEREGINO ::::::::::::::::::::::::::::::::::::] APPELLANT

AND

ATTORNEY GENERAL::::::::::::::::::::::::::::::::::::] RESPONDENT

[Appeal from the judgment of the Court of Appeal before (Kasule,Kakuru and Egonda-Ntende, JJA) at Kampala in Civil Appeal No.47 of 2012 dated 21st May, 2017.]

JUDGMENT OF TIBATEMWA-EKIRIKUBINZA, JSC.

I have had the benefit of reading in draft the Judgment of my learned brother, Justice Eldad Mwangusya, JSC and I agree with his analysis and conclusion as well as the Orders he has proposed.

Dated at Kampala this 21st day of December 2018.

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JUSTICE PROF. LILLIAN TIBATEMWA-EKIRIKUBINZA
JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

Coram *:(Arach-Amoko, Mwangusya, Opio-Aweri, Mwondha, Tibatemwa-Ekirikubinza JJ.S.C)*

CIVIL APPEAL NO.07 OF 2017

BETWEEN

KAGUMYA PEREGINO ..... APPELLANT

AND

ATTORNEY GENERAL ..... RESPONDENT

(Appeal from the Judgment of the Court of Appeal of Uganda (Remmy Kasule, Kenneth Kakuru and Egonda-Ntende, JJA) at Kampala, dated 21st May 2017 Civil Appeal No. 17 of 2012).

JUDGMENT OF MWONDHA, JSC

I have had the benefit of reading in draft the judgment of my learned brother Mwangusya Eldad, JSC. I agree with his analysis, and conclusion that appeal has no merit.

I agree also with the proposed order that the appeal would be dismissed with costs in this Court and the Courts below.

Dated at Kampala this ...21st..... day of ..December.....2018

Mwondha

JUSTICE OF THE SUPREME COURT

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT KAMPALA

Coram: Arach-Amoko, Mwangusya, Opio-Aweri, Mugamba, Tibatemwa-Ekirikubinza JJ.S.C.

CIVIL APPEAL NO. 07 OF 2017

BETWEEN

KAGUMYA PEREGINO:::::::: ::::::::::::::::::::::::::::::::::::::APPELLANT

AND

ATTORNEY GENERAL::::::::::::: ::::::::::::::::::::::::::::::::RESPONDENT

(Appeal from the Judgment and Orders of the Court of Appeal at Kampala by Kasule, Kenneth Kakuru and and Egonda-Ntende, JJA, dated 21st May 2017 in Civil Appeal No. 47 of 2012)

JUDGMENT OF OPIO-AWERI, JSC

I have had the benefit of reading in draft the judgment of my learned brother Hon. Justice Mwangusya Eldad, JSC. I agree with him that the appeal has no merit and should be dismissed with costs.

Dated at Kampala this......21st............day of..December..........2018.

OPIO-AWERI

JUSTICE OF THE SUPREME COURT