

NSHUNGUYINKA v. RWANDA SOCIAL SECURITY BOARD (RSSB)

[Rwanda SUPREME COURT – RADA0066/12/CS (Mutashya, P.J., Gatete and Mukamulisa, J.)
July 22, 2014]

Administrative procedure – Admissibility of the claim – Alteration of the claim on the appellate level – Replacement of the institution in the course of the lawsuit – It is not considered as alteration of the claim on the appellate level, when an institution which replaced the one sued on the first instance is summoned on the appellate level.

Administrative law – Civil service – Dismissal – The taking of the oath by the public servant – The dismissal of the employee due to refusal of taking the oath cannot be considered as a dismissal for the employment misconduct to oblige the employer to prior seek the opinion of the public service commission because it is the oath which bestows him the status civil servant – Law N°22/2002 of 09/07/2002 on general statutes for Rwanda public service, article 29.

Administrative law – Freedom of beliefs – No one should rely on the freedom of belief to derogate from the laws and regulations of the state, therefore the appellant should have complied with the directive of taking oath for civil servants – The Constitution of the Republic of Rwanda of 04 June 2003 as amended up to date, article 33.

Facts: Nshunguyinka sued Caisse Sociale du Rwanda (CSR) which became Rwanda Social Security Board (RSSB) in the High Court requesting for the annulment of the dismissal decision taken against him and claiming for related damages. The Court found that although CSR dismissed him without first seeking the opinion of the Public Service Commission, he was dismissed for an appropriate ground because he failed to comply with the directive of taking oath by holding the National Flag while he was a civil servant governed by the general statutes for the public service, thus it confirmed the decision taken against him.

Nshunguyinka appealed to the Supreme Court claiming that he is not pertained to the directive of taking the oath because it was not in place prior to his appointment and moreover he was a contractual staff, therefore he had no obligation to do so. He finds that dismissal contrary to the Constitution because he could not do something contrary to his belief, given that the right to freedom of religion and belief is inviolable. He adds that he should have taken the oath holding the Bible as required by his religion and he was dismissed without first consulting the Public Service Commission.

In the course of the hearing, RSSB raised a preliminary objection for inadmissibility of the claim on the ground that the plaintiff sued Caisse Sociale du Rwanda (CSR) which is no longer in existence because it was replaced by RSSB, thus it argues that in case CSR was sued and on the appeal RSSB was mentioned, then it would be tantamount to alteration of the claim on the appeal level.

In regard to that objection, Nshunguyinka rebuts that CSR was sued on the first instance and the fact that it was replaced by RSSB, implies that it also took over the obligations of CSR, thus there was no change of claim.

RSSB raised another objection arguing that the claim lodged is not an administrative one rather a labour one because it relates to the termination of employment contract. Nshunguyinka argues that the claim filed on the first instance was aimed at the annulment of the administrative decision, and that is how it should be regarded on the appellate level.

RSSB also filed a cross appeal claiming for damages for vexatious litigation on both levels. In his defence, Nshunguyinka argues that those damages should not be awarded because its counsel is a public servant who is paid every month for pleading on its behalf, and it did not incur any additional cost.

Held: 1. It is not considered as alteration of the claim on the appellate level, when an institution which replaced the one sued on the first instance is summoned on the appellate level. Therefore the fact that on the first instance CSR was sued and on the appellate level RSSB which replaced it was summoned is not changing the claim on the appellate level.

2. The decision requested to be annulled was taken as an administrative one with damages thereto. Therefore the administrative court is the one with jurisdiction.

3. The dismissal of the employee due to refusal of taking the oath cannot be considered as a dismissal for the employment misconduct to oblige the employer to prior seek the opinion of the public service commission because it is the oath which bestows him the status civil servant.

4. No one should rely on the freedom of belief to derogate from the laws and regulations of the state, therefore the appellant should have complied with the directive of taking oath for civil servants.

5. Even though the counsel for the respondent forewent other activities for these lawsuits, the appellant had a right to seek redress through all the legally provided remedies at his disposal, thus his appeal was not a vexatious action.

**Appeal lacks merit;
Cross appeal lacks merit;
Court fees to the appellant.**

Statutes and statutory instruments referred to:

The Constitution of the Republic of Rwanda of 04 June 2003 as amended up to date, article 33.

Organic Law N°51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts as amended to date, article 93.

Law N°22/2002 of 09/07/2002 on general statutes for Rwanda public service, article 29.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] This case began in the High Court, whereby Nshunguyinka sued RSSB claiming for the annulment of the dismissal decision taken against him and requesting for the related damages. The Court found his claim without merit on the ground that Nshunguyinka as an employee governed by the general statute for public service had to comply with the directives of taking the oath. Thus the Court held that his non-compliance constituted a ground for his dismissal, therefore it found the decision taken against him fair.

[2] It further found that Nshunguyinka had to comply with the directives of his employer as provided for by article 84 of the general statutes for public service and take the oath holding the National Flag as provided for by article 19 of the Law N°34/2008 of 08/08/2008 on characteristics, description, ceremonial and respect of the National Flag instead of holding the Bible as he desired.

[3] That Court also found that even though RSSB dismissed Nshunguyinka without first seeking the opinion of the Public Service Commission as provided by article 93 of the general statutes for the public service but the commission later verified and found that he was dismissed on appropriate grounds and in compliance with the laws (article 28, 29 and 120 of the General Statute for Public Service).

[4] Nshunguyinka appealed to the Supreme Court, substantially claiming that he was not pertained to the directives of taking oath because it was not in place prior to his appointment and also his employer dismissed him without first consulting with the Public Service Commission.

[5] The hearing was held in public on June 17, 2014, Nshunguyinka assisted by Counsel Nkurunziza François-Xavier, while RSSB, the former CSR represented by Counsel Kamonyo Rugaba Serge.

II. ANALYSIS OF LEGAL ISSUES

The preliminary objection for inadmissibility of the claim on the ground that the Caisse Sociale du Rwanda (CSR) which was sued is no longer in existence.

[6] Kamonyo, the counsel for RSSB raised an objection on the ground that CSR was sued despite the existence of the law which terminated and replaced it with RSSB. He explains that since it was CSR which was sued while on the appeal level it is RSSB which is mentioned, this is tantamount to alteration of the claim in violation of the provisions of article 4 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure.

[7] Nkurunziza, the counsel for Nshunguyinka adduces that the raised objection lacks merit because if CRS which was sued on the first instance, was replaced by RSSB, it implies that it also took over all of its obligations. He goes further to state that there was no alteration of the claim, and if RSSB replaced CSR, then RSSB should be recorded as the defendant.

THE VIEW OF THE COURT

[8] The Court overrules the raised objection on the ground that the defendant on the first instance was CSR which was by then governed by the Law N°60/2008 of 10/09/2008 which was

replaced by RSSB instituted by the Law N°45/2010 of 14/12/2010, that being the case, it is obvious that at the time of lodging the appeal, CSR was recorded as the defendant which was sued on the first instance, therefore if within that period, CSR was replaced by RSSB, the latter is supposed to take over this case. Thus the claim was not altered on the appellate level as alleged by the counsel for RSSB, and it's also understandable that since CSR was summoned on the appellate level, then this case concerns RSSB which replaced it.

Regarding the objection of this case being classified as an administrative case while the gist of action being the termination of an employment contract.

[9] Counsel Kamonyo explains that on the first instance he demonstrated that this was not an administrative claim rather a labour one because it relates to the employment contract, but the Judge did not rule on it.

[10] Counsel Nkurunziza explains that the claim filed on the first instance was aimed at the annulment of the administrative decision, and that is how it should be admitted on the appellate level.

THE VIEW OF THE COURT

[11] The Court overrules the objection raised on the ground that the decision requested to be annulled was taken as an administrative one as provided for by article 93(2°) of the Organic Law N°51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts as amended to date, with damages resulting from its effect attached to it.

Whether the dismissal of Nshunguyinka Eric was unfair.

[12] Nkurunziza, the counsel for Nshunguyinka argues that his client was not governed by the general statutes for public service because he was a contractual staff, thus he was under no obligation to take the oath.

[13] He goes on to explain that Nshunguyinka was dismissed without first seeking the opinion of the Public Service Commission, his dismissal was in violation of human rights because it was premised on his failure to take the oath by holding the National Flag, which according to him violates the Constitution, because he could not carry out something contrary to his beliefs. He further argues that the freedom to religion and it's belief is inviolable right, for those grounds he should not have been dismissed for not taking the oath holding the National Flag because he could have taken the oath holding the Bible as he had wished because that is what his beliefs dictate.

[14] Kamonyo, the counsel for RSSB argues that the appointment letter issued to Nshunguyinka does not indicate that he was a contractual staff. He explains that in the documents submitted to the Court, he demonstrated that there are laws which require the civil servants to take the oath on their appointment. He adds on that there is also the directive of the Minister of Public Service and labour which regulates the procedure of taking the oath and which Nshunguyinka was requested to comply with and he refused, thus he finds that he was justly dismissed.

THE VIEW OF THE COURT

[15] The Court finds that there is a letter N°9.00/2022/RI/umc dated May 27, 2010, which CSR wrote to Nshunguyinka Eric informing him that he has been offered a job as professional officer beginning from June 01,2010, which implies that it is one of the posts occupied by public servant governed by the general statutes for public service and the attached terms of employment which was signed by both parties on June 01,2010, providing in its article 3 for a probation period of 6 month which could only be extended once. The Court finds therefore the allegation that Nshunguyinka was a contractual staff with no ground.

[16] The first paragraph of article one of the Constitution of the Republic of Rwanda of 04/06/2003 as amended up to date provides that Rwanda is a secular state.

[17] Article 29 of the Law N°22/2002 of 09/07/2002 on general statutes for Rwanda public service which was in place at the time of Nshunguyinka's dismissal provided that before taking office, every Government employee takes the oath before the competent authority.

[18] The Court finds that there are also letters N°2119.19.19/19 dated August 16, 2010 and N°035/19.23 dated April 05, 2011, which the Minister of public service and labour wrote to the administrators of all public institutions directing the public servants to take the oath. It also instructed those who did not prior took it for various reasons to do so, and sanctions including dismissal by the competent authority after being given a notice of fifteen days be taken against those who fail to comply.

[19] The Court also finds that there is another letter N°9.00/1661/RI/umc dated April 27, 2011, which CSR wrote to Nshunguyinka demanding for explanations why he did not take the oath and was given 15 days of notice to have performed that ceremony, on May 03,2011 Nshunguyinka replied that he did not refuse to take the oath but he was reluctant to comply, consequently pursuant to the directive of the Minister of public service and labour, CSR issued to him a dismissal letter N°9.00/1721/R.I/umc on May 04, 2011 for his refusal to comply with the ministerial directive.

[20] The Court finds that since Nshunguyinka was dismissed for the refusal to take the oath should not be considered as an employment misconduct for the CSR to first seek the opinion of the Public Service Commission prior to dismissing him, because his oath was the one supposed to bestow to him the status of being governed by the general statutes for public service as provided for by article 19 of the Law N°34/2008 of 08/08/2008 mentioned above. And he cannot use the pretext that he was an existing employee of CSR for him not to comply with the directive of the Minister of public service and labour which provided that even the employees already in service who did not take the oath should do so, and they should be dismissed in case they fail to comply.

[21] The Court also finds that Nshunguyinka cannot hide himself behind the pretext of beliefs to refuse to take the oath holding the National Flag alleging that there was violation of human right since Rwanda is a secular state as demonstrated above, for those reasons he had to take the oath as provided by article 13 of the Law N°34/2008 of 08/08/2008 on characteristics, description, ceremonial and respect of the National Flag which provides that those in the

executive, legislative and judiciary who are provided by the law and others which the law compels take the oath holding the National Flag.

[22] Pursuant to the above motivations, the freedom to belief which is also ingrained by article 33 of the Constitution of Rwanda should not be used as pretext to not comply with the laws and regulations of the state.

Regarding the cross appeal of RSSB

[23] The counsel for RSSB adduces that on the first instance it was only awarded 200,000Frw, but he finds that his client is still being dragged into unnecessary lawsuits, for that it should be awarded 500,000Frw on both instances.

[24] The counsel for Nshunguyinka argues that this ground of cross appeal has no merit, because the counsel for RSSB is a public servant for which he is paid every month, he finds that he did not cost RSSB any additional expenses.

[25] The Court finds that even though the counsel for RSSB forego other activities for these lawsuits, Nshunguyinka who thought that he was prejudiced had a right to seek redress through all the legally provided remedies at his disposal, hence forth he seized the Courts of law after lodging an administrative appeal to the authority which took the decision to dismiss him, therefore his appeal was not a vexatious action, in accordance to that the cross appeal has no merit.

III. THE DECISION OF THE COURT

[26] Holds that the appeal of Nshunguyinka Eric lacks merit;

[27] Holds that the cross appeal of Rwanda Social Security Board also lacks merit;

[28] Orders Nshunguyinka Eric to pay court fees equivalent to 50,300Frw;

[29] Sustains the rulings of the judgment RAD0092/11/HC/KIG