



JUDICIAL REVIEW

- Contradictual Relationship. No public law remedy unless the contract is statutorily underpinned and termination specifically protected.
- Court to act where a public official purports to exercise or assume non-existent powers.
- Judicial review to be available where there is infringement of a right but no remedy provided.
- A public official or authority has no heritage of rights - he can only act as empowered. Decisions reviewed.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 1769 OF 2004

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI PROBATION
AND MANDAMUS**

AND

**IN THE MATTER OF SECTIONS 75 OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA AND SECTION 26,27 AND 28 OF THE STATE CORPORATIONS ACT CAP 44 LAWS
OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

**MINISTRY OF PLANNING 1ST
RESPONDENT**

**KENYA INSTITUTE FOR PUBLIC POLICY AND RESEARCH ANALYSIS 2ND
RESPONDENT**

**EX PARTE PROFESSOR MWANGI S
KIMENYI**

JUDGMENT

The amended Notice of Motion is dated 13th January 2005, and amended on 9th December 2005.

The applicant was the Executive Director of the second Respondent, Kenya Institute for Public Policy Research and Analysis hereinafter called "**KIPPRA**". A contract of employment dated 8th February 1999 initiated the relationship. The contract was initially for five years. Prior to the expiry of the first contract the applicant resigned on 1st September 2002 and his resignation was accepted by the Board of Directors on 5th December, 2002. After this a recruitment exercise, was with the approval of the Board done by Deloitte & Touche but no suitable replacement of the applicant was found. A second contract of employment whose validity is an issue, perhaps for another court in private law, was signed between the Chairman of the Board and the applicant and its effective date was given as 1st June 2004. It is contended that the Chairman's contract had expired on 28th January 2004 whereas he purported to sign the second contract in June, 2004.

On 24th August, 2004 the first Respondent instructed the Inspector General Corporations to carry out investigations on **KIPPRA** following a donor's query concerning relocation costs of US dollars 175,200 paid to the Applicant. The report was given to the first Respondent in December 2004. One of the recommendations was that the Applicant be surcharged in the sum of US dollars 175,200 (equivalent to 21 million).

On 16th December, 2004 the first Respondent terminated the Applicant's contract or to use the term used in the letter "**nullified**" the applicant's contract with immediate effect.

As against the two Respondents the Applicant seeks relief as follows:

1. An order of certiorari to remove into court and quash the decision(s) of the Respondents jointly or otherwise made namely
 - (i) dated 24th August 2004 or thereabouts in which the Respondents called or authorized an investigation to be undertaken of the affairs of Kenya Institute of Public Policy Analysis (**KIPPRA**)
 - (ii) the decision in the letter of the Board of Kenya Institute of Public Policy Analysis (hereafter called "**KIPPRA**") alleged to have been made on 3rd December 2004, if any which otherwise and whose further particulars are unknown, and the decision of the first respondent carried out in the letter dated 16th December, 2004 terminating the Applicant's second contract with **KIPPRA**.
2. That by way of Mandamus direct the first respondent to rescind, cancel or revoke and/or nullify the decision(s) complained of hereinafter and further the first respondent be directed to inform the 2nd Respondent or the Board of **KIPPRA** the revocation, cancellation, rescinding and/or nullification of his decision(s) or do consider the applicant back in his position as Executive Director and the 2nd Respondent herein do restore all his contractual benefits including salaries and other monetary or other rewards unless otherwise lawfully terminated.
3. That by way of a prohibition order the first Respondent to refrain from usurping the process of the other established committees and the 2nd Respondent's Board's powers and to act in accordance with the provisions of the State Corporations Act Chapter 4 and the Rules and Regulations confirmed in the Presidential Executive Order dated 15th April 1997, that established (**KIPPRA**) the laws of Kenya and the cardinal Rules of natural justice as concern amongst other issues and grounds the applicant's right to be heard before any adverse decision is taken against him.
4. That the costs of this application be provided for
5. All such other orders as the Honourable Court would deem just and equitable to grant in the

circumstances.....

In my analysis of the evidence, arguments presented including what I consider to be the relevant law, I find the following as the turning points in the case.

- (1) The existence of a contract of employment with a mutually invocable termination clause
- (2) Does the dispute have a sufficient public law element
- (3) The authority or lack of authority by the first Respondent to cause investigations to be made or to terminate the contract of employment. In other words was the first Respondent authorized under the State Corporation Act or by a Board Resolution to terminate the contract or whether the power to terminate was delegated to him by the Board under Regulation 6 of the Executive order.

Put simply was the act of termination ultra vires the relevant Act.

- (4) In the circumstances of this case should the Applicant be left to sue for damages and specific performance as held by the Court of Appeal in the *MUNICIPAL COUNCIL OF MOMBASA v REPUBLIC, C.A. 24 OF 2001* in these words at page 2:

“We are respectfully compelled to point out that the procedure of judicial review has no application whatsoever to disputes arising out of contractual relationships. These relations are all the time governed by the law of contract which offers the remedies of specific performance and damages, general or special for redress of any violation of those contractual obligations. There is never an occasion where a dispute arising out of these obligations may be redressed by means of the special order of mandamus certiorari or prohibition.”

Related to this turning point is the case of *R v EAST BERKSHIRE HEALTH AUTHORITY, ex-parte WALCH (1984) 3 ALL ER 425*. In this case the applicant was employed under a contract of employment. His employment was terminated and the Applicant filed judicial review proceedings seeking a review of the dismissal. It was held:

1. “Whether a dismissal for employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employees position and not on the fact of employment by a public authority perse or the employees seniority or the interests of the public in the functions of the authority. Where the authority was required by statute to contract with its employees on specified terms with a view to the employees acquiring private law rights a breach of that contract was not a matter of public law and did not give rise to any administrative law remedies, it was only if the authority failed or refused to contract on the specified terms that the employee had public law rights to compel the authority to comply with its statutory obligations.

2. I do not think that Lord Reid’s opinion was based on any general proposition that just because the employer was a public body this necessarily involved some public law “element in a contract of employment between it and one of its servants, however senior, and that consequently that the employer was bound to observe the principle of natural justice when dismissing the employee.

3. In order that there should be a remedy sought by Mr Walsh which makes available to him the relief granted by Order 53 it is clear that there must be something more than a mere private contractual right on which the courts supervisory functions can be focused.”

4. Counsel for the 2nd Respondent did cite my own decision in the case of *REPUBLIC v JUDICIAL SERVICE COMMISSION ex-parte STEPHEN PARENO HC MISC CIVIL APPLICATION NO. 1025 OF 2003* (now reported) where I held inter alia:

- (i). **The question is whether application of the cited Regulations to magistrates removes them**

or exempts them from the principle applicable to Employment contracts? In the view of the court since the Regulations allow removal dismissal or retirement in the Public interest the general principle of law applicable to Employment contracts do apply to them (pg 18).

(ii). In practice this (relief) would only be possible when relief is sought promptly and before the parties has parted company. Thus where an officer has left office for some time it would not be desirable to force the parties together again because it would be contrary to the policy of the law and not in the public interest and the principle of master and servant clearly apply (page 19.)

(iii). I hold that in the circumstances of the case the most efficacious remedy would be attained by bringing an ordinary action if the applicant is so advised by his counsel (page 22).

(iv). Where the relevant body or disciplinary body could reasonably have reached the decision the court should not interfere with the decision at all (page 24).

(v). Where for example an officer has been out of employment for sometime the proper remedy if any to pursue is damages and reinstatement or specific performance cannot be available.”

(vi). The Applicant has been separated from his former employer by a six months break. Although the applicant has sought a public law remedy what he is in fact asserting is his individual right and a private law remedy appears the most efficacious in the circumstances (page 27).

At this stage it is helpful for me to reiterate my findings in the *PARENO CASE Misc Civil Application No. 1025 of 2003* and also observe that the findings in the other cases cited above, represent good law in our situations. However, I find that the circumstances of this case are slightly different from the facts of the cases cited in that it is firstly the contention of the applicant that the Permanent Secretary acted ultra vires the parent Act which created the 2nd Respondent and that he purported to act under the general authority of the Act - which Act does not give him the powers to terminate a contract of employment. By so doing he adversely affected the legal rights of the applicant. In addition there was no privity of contract between the Applicant and the first Respondent and that the privity was between the Applicant and the second Respondent. As a result the applicant has no contractual remedy against the 1st Respondent who is the author of the applicant's grievances. It is noteworthy to observe that no Board resolution has been produced terminating the Applicant's employment or authorizing or delegating to the 1st Respondent to terminate. Yet, the Applicant has been away, from his job for several years now, pursuant to the act of the 1st Respondent. The question arises should the Court look the other way and let the 1st Respondent as a public official use his office to purport to execute powers he does not have in law. As regards the 1st Respondent I find a sufficient public law element in his purported assumption of powers, he does not have in law and which exercise had resulted in the applicant's legal rights being adversely affected. I find a sufficient public law nexus between the Applicant and the 1st Respondent but at the same time I find no such public law element between the Applicant and the second Respondent. I find that it is the function of a judicial review court to define the limits of a limited government in order to safeguard constitutionalism, the rule of law and to prevent abuse of power. I have stressed this in my recent decision in the case of *R v MINISTER FOR FINANCE H.C. Misc Civil Application No. 743 of 2006 ex-parte Keroche* industries where I held inter-alia that, public officers have only the power granted to them by law or statute. They cannot act outside the granted power. Where they do so, courts of law should promptly intervene. Thus, the House of Lords in *BENNETT v HORSE FERRY ROAD MAGISTRATE COURT*, made the followings holdings:-

(i). “If the court is to have the power to interfere with the prosecution in the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

(ii). So also should it be in the field of criminal law and if it comes to the attention of the court

that there has been a serious abuse of power it should in my view, express its disapproval by refusing to act upon it.”

In this decision I would extend the above finding to any field of law where a person's rights have been affected, and where there is evidence of abuse of power. In such situations the court should demonstrate its disapproval by making an appropriate intervention. In the circumstances of the case before me the contract of employment between the Applicant and the 2nd Respondent was done in accordance with the provisions of an Act of Parliament which clearly vests the power to enter into a contract in the Board and not with the Permanent Secretary. The power to fire is equally vested in the Board unless it is properly delegated by a resolution of the Board. The Permanent Secretary's act or decisions were ultra vires the Act and this calls for intervention. The intervention will be in keeping with the principle that a public servant has no other powers save those given to him by statute. The position was well set out in case of **R v SOMERSET (1995) QBD 513** which I had occasion to cite with approval in one or two of my recent decisions. The holding is as follows:-

“But for public bodies the rule is opposite and so if another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed it exists for no other purpose.”

Again on the same page the Court notes!

“But in every instance and no doubt many others whereas a public body asserts claims or defences in court, it does so, if it acts in good faith only to vindicate the better performances of the duties for whose the merit exists. It is in this sense that it has no rights of its own, no axe to grind beyond the public responsibility a responsibility which define its purpose and justifies its existence, under our law that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.”

It is quite evident that the Permanent Secretary, had no power to take the actions he took under any statute in particular the State Corporations Act which only makes him a member of the Board. The acts or decisions he perpetrated or made constitute nullities. There is no greater abuse of power, than a public official purporting to exercise power he or she doesn't have! In my view it would be a mistake to countenance nullities without declaring them so, or do nothing or ask the applicant to simply invoke private law. There cannot be a wrong without a remedy. This Court has to fill the void and give a practical remedy.

For the purpose of determining whether or not to intervene in the acts or decisions of the Permanent Secretary (PS) I have taken into account the broad principles advocated by Prof de Smith 1st Edition page 45 and 46 as follows:-

- 1. “The Courts have tended to adopt broader definitions of judicial for these purposes. Public policy demands that the ends of justice should not be frustrated through devotion to a concept of judicial functions that would exempt many public bodies from effective superintendence by the courts.”**
- 2. “An authority acts in a judicial capacity when after investigation and deliberation it performs an act or makes a decision that is binding and conclusive and imposes obligations upon or affects the rights of individuals.”**
- 3. “Hence almost all non-ministerial functions vested in statutory bodies were treated as judicial for the purpose of review by certiorari and prohibition. To be classified as judicial, an act or decision had to affect the rights of individuals; but the term “rights” was given a broad interpretation. The rights affected might appertain to personal liberty or status, or they might be of proprietary, fiscal or, contractual nature....**

In the Kenyan context where we have both Constitutional Judicial review under section 123(8) of the Constitution and ordinary judicial review pursuant to the Law Reform Act, the exercise of power or abuse of power might not necessarily spring from statute, and therefore I hold the view that the court should adopt a liberal approach to enable it to intervene in the interest of fairness, where the source of power is outside the statute as well. Any other approach would be surrender, to perpetrators of arbitrariness and abuse of power. As Lord Diplock quite rightly predicted, judicial review is likely to grow on a case to case basis and courts cannot just fold their hands and shy away from breaking new ground in order to satisfy the ends of justice in every deserving matter. The courts must stay on top of every unfolding horizon, with a stamp for justice in hand, whether the source of the challenged power is statute or executive power. In every situation the flag of fairness must be hoisted.

FINDINGS

Concerning the validity of the second contract whereas counsel for the Respondents have argued that it was not valid because of the shaky position of the Chairman Prof Gichaga who signed it, a judicial review Court acts only on evidence principally by way of affidavit. Submissions cannot constitute evidence. The Permanent Secretary, Ministry of Planning Mr Nehemiah K. Ngeno by his affidavit sworn on 8th March 2005 at paragraph 17 depones:

“That thereafter the Board renegotiated with the Applicant and offered the Applicant a new contract which was to run w.e.f. 1st June 2004 for a period of five years. Hereto annexed and marked NKN - X is a copy of the said letter of offer.”

This is a clear admission by the Permanent Secretary of the Parent Ministry that there was a valid second contract between the parties. In addition there is clear evidence to the effect that the Board, had by a resolution mandated Prof Gichaga to negotiate the contract. Nowhere in the States Corporation Act or in the exhibited Executive’s Order is the consent of the Permanent secretary required in order to validate a contract entered into by the 1st respondent and **KIPPRA**. My finding on the arguments concerning the validity of the second contract is that they are an afterthought meant to justify the subsequent alleged nullification of the contract by the Permanent Secretary. Taking into account the provisions of the Executive Order, and the applicable or the saved provisions of the State Corporations Act, the Permanent Secretary Mr Nalo had no powers either to nullify or terminate the Executive Director’s contract, and also had no power to order any investigation. The power to hire and fire clearly vested in the Board since it is the Board which negotiated it as per the above quote from the then Permanent Secretary. The power to cause investigation to be carried out, vests in the Advisory Committee under the Act.

Under the Executive Order, the Board of KIPPRA could delegate any of its powers by a resolution. The Respondents have not produced any such Board resolution delegating the power to terminate the contract to the Permanent Secretary. The Permanent Secretary was therefore not entitled to make the two decisions namely to appoint an investigation or to nullify or terminate the contract.

I find that it is the function of this court to examine whether the Permanent secretary was in law entitled to make the decisions he made. It is part of the function of the judicial review jurisdiction to uphold the rule of law and constitutionalism. Public bodies and officials are by Acts of Parliament given limited powers to be exercised strictly in accordance with the Act. They cannot purport to exercise power outside the Act creating their offices or defining their involvement.

Indeed it is important and fitting to occasionally trace the origin of the courts entitlement to review decisions of public bodies, authorities and inferior courts. Legal history clearly shows that the basis of the courts intervention was the ultra vires doctrine. Thus if a body exercising statutory powers went beyond the four corners of the Act, then the court could intervene. When examining the Act of Parliament the court must consider what is the area over which power is given. And where the exercise of power by the authority falls outside the area, that exercise of power would be ultra vires.

In this case the first contract was entered into by the Board and the Applicant and there is no difference concerning the second contract. The principle of mutuality in contracts of employment

contemplates two parties and not a third party - in this case the Permanent secretary who was clearly an intermeddler. The only reason why he purported or attempted to exercise the power is because he is a Board member under the Act, and therefore by perpetrating the two acts he purported to exercise the power pursuant to the Act, hence the need for this Court to intervene as against the actions he took outside the provisions of the Act.

Where, as in this case the power to hire and fire vests in the Board and the power is exercised by an individual, namely the Permanent Secretary, it constitutes an ultra vires act and such an act is a nullity and the Court must so declare. Such misuse of power is called excess of jurisdiction - see the findings of Lord Diplock in *ANISMINIC v FOREIGN COMPENSATION COMMISSION* [1969] 2 WLR 163.

The doctrine of ultra vires is used not only to control the scope of the power being exercised but also to control the way it is used. So where a body uses its power in a manifestly unreasonable manner, acted in bad faith, refused to take relevant factors into account in reaching its decision or based its decision on irrelevant factors, the court would intervene on the ground that the body has in each case abused its power. The reason why the Court has to intervene is because there is a presumption that where Parliament gave a body statutory power to act, it could be implied that Parliament intended it to act in a particular way.

Where as in this case an authority purports to act pursuant to law or in the name of public law, since the Permanent Secretary was not party to the contract, judicial review ought to apply to his decisions. Where an official purports to act pursuant to powers donated by statute certiorari should issue to quash his determination because it had the effect on the ground of determining questions affecting the right of the applicant to continue with his employment. The Permanent Secretary could not invoke the termination clause in the contract because he was not party to it and there was no board resolution delegating the power to him. Similarly it is only the Advisory Committee that had statutory powers to appoint experts to investigate.

It follows therefore the decisions of 24th August 2004, 3rd December 2004 (if any) and 16th of December, 2004 are patently ultra vires the relevant Act in relation to the first Respondent.

As regards the prayers of mandamus against the 1st Respondent I find that the Respondent did not have a legal duty to act the way he did and the mandamus order would be superfluous. It is only in respect of a legal right springing from failure to perform a legal duty that a mandamus would lie.

As regards the prayer for prohibition the same is declined. Matters of the contract are the preserve of the Board and the Applicant. The only role by **KIPPRA** upon which the Court frowns, is its failure to act procedurally, a conduct that borders on procedural impropriety, for failure to involve itself concerning the contract and for allowing an intermeddler to deal with an employment contract. This role does not in the view of the Court, call for any relief especially taking into account **KIPPRA** did present a litany of grievances against the Applicant and in addition both parties could invoke the contract for any lawful reliefs inter se.

The two decisions by the 1st Respondents namely the decision as per the letters dated 24th December, 2004 and 16th December, 2004 are forthwith removed into this court and forthwith quashed.

Contract of Employment

Concerning the contract of employment I am unable to find that it had any statutory underpinnings as between the Applicant and the second Respondent. The fact that **KIPPRA** is a parastatal does not mean that it has no capacity to enter into ordinary contracts of employment with the Executive Director and

with other employees. I find nothing in the Act, either expressed or implied that gives statutory protection to the holder of the Executive Director's office or any other employee. There are no statutory restrictions whatsoever on any termination by the parties to the contract.

As contended by the Respondents Counsel, the contract has a termination clause which can be invoked by either party - see clause 13 of the Contract. It has a mutuality which should not be denied to the contracting parties or catapulted to the public law realm, without any specific statutory underpinnings, protecting the employee's employment or restricting the termination.

Having quashed the decision by the Permanent secretary I find that the second contract is still persisting, but I cannot grant any judicial review order as against the 2nd Respondent because the relationship between the parties is strictly contractual.

Now that the position of the Executive Director has since been occupied by another holder or holders for several years the applicant cannot claim the job back this being an employee/employer relationship, and I find that it is for the respective parties to invoke the contract and take any appropriate decisions in accordance with the terms of the contract.

Even without invoking the judicial review jurisdiction the applicant could still have brought a civil action for declaration in terms of the contract and seek a declaration that the contract was still valid but the availability of alternative relief is not necessarily a bar to a judicial review remedy. In this regard I adopt as valid the para 111 of *HALSBURYS LAWS OF ENGLAND 2nd Edition pg 54*:

"Nature of Remedy"

"These orders are in the nature of immediate remedies: they are means of obtaining a speedy decision as to the jurisdiction of the inferior tribunal; it is herein, open to a party in any proceedings in which the decision of an inferior tribunal is relied on as conclusive against him to contend that it was given without jurisdiction. Furthermore it is possible to bring before the court, by means of an action for a declaration, the question whether any administrative or executive action or decision taken or given in purported pursuance of a power conferred by statute, delegated legislation or other lawful authority, was ultra vires see, *PORT OF AYR COLIERIES LTD v LLOYD GEORGE (1943) 2 ALLER 546* this procedure is not limited to judicial or quasi judicial decisions, but in proper cases where persons would otherwise be without a remedy for injustice the Court has a discretionary power to intervene by way of a declaration and injunction in the decisions of statutory tribunal."

In the applicant's situation, a person or authority without power to terminate a contract between him and the second Respondent acted, and this caused him injustice, that is applicant, and he would be without a remedy against the intruder, namely, the 1st Respondent firstly because there is no privity of contract between the applicant and the first respondent and secondly the first respondent purported to exercise powers he did not have and the exercise was a nullity. The applicant would have no remedy in contract as against the 1st Respondent in the circumstances and for this reason it would be abdication on the part of the court to deny him a remedy where his legal right has been practically been infringed, having been kept out of work by the act of the first Respondent.

I have considered elsewhere in this judgment the nature of the powers the Permanent Secretary purported to exercise in terminating the contract. Surely, he could not have acted, on the basis of the terms of the contract because he was not party to the contract. He could only have acted because under the State Corporation Act, he was Board member. When an official purports to act under a statute he does so in exercise of public power and not in a personal capacity.

Although he did not have the powers to do the things he did, he did all the same purport, to perpetrate visible acts which in turn affected the applicant legal rights - he is out of employment because of the act of the Permanent secretary. It is the responsibility of the Court to examine whether public officials have acted in accordance with the law, since in a democracy, public officials have no heritage of rights outside

the law. It is from this background that I rule that the Permanent Secretary “acts” and decisions are amenable to judicial review because he did not derive the power to act or to make the decisions under the contract of employment in question (something in the realm of private law when invoked) - see the ratio in the case of ***R v NATIONAL JOINT COUNCIL FOR THE CRAFT OF DENTAL TECHNICIANS DISPUTES CTEE ex-parte NEATE 1955 QBd 704***. The other reason why this court must intervene pursuant to its jurisdiction in judicial review is because the acts or decisions of the Permanent Secretary (1st Respondent) constitute in the circumstances, a procedural impropriety and procedural improprieties bring the acts or decisions within the purview of judicial review as well.

I believe the conclusion by the Court to intervene in the way it has or proposes to intervene, has received very persuasive backing from the findings or observations of both Lord Diplock and Lord Roskill in the landmark case of ***COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR CIVIL SERVICE [1985] AC 374***.

Lord Diplock observed:

“As regards procedural impropriety I see no reason why it should not be a ground for judicial review of a decision made under powers of which the ultimate source is the prerogative. Such indeed was one of the grounds that formed the subject matter of judicial review the *Reg v CRIMINAL INJURIES COMPENSATION BOARD ex-parte LAIN*. Indeed, where the decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations “procedural impropriety” will normally provide the only ground on which the decision is open to judicial review. But in any event what procedure will satisfy the public law requirement of procedural propriety depends upon the subject matter of the decision, the executive functions of the decision maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made...”

LORD ROSKILL delivered himself with even greater clarity on the same point as follows:

“If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982 so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not the statute should today deny the citizen of that right of challenge to the manner of its exercise which he would possess were the source of power statutory. In either case the act in question is the act of the executive. The talk of that act as the act of the sovereign savours of the archaism of past centuries!”

In other words whether the Permanent Secretary acted, pursuant to the State Corporation Act, the Executive order or did so, as an executive in the public service, his acts or decisions cannot be immune to the courts judicial review jurisdiction. In the case in question, he neither had with him the Board resolution, nor specific powers under the statute to act the way he did or to make the decisions he made, nor was he a party to the contract. All the same he exercised or purported to exercise executive power and this Court’s jurisdiction is available in each of the described situations.

It is with the above background in view, that the Court forthwith issues appropriate orders as set out at pages 24 and 25 herein as against the first respondent and at the same time, challenge or encourage the applicant and the second Respondent to resort to the contract between them for any relief or remedies, which spring from the contract. Whether or not the second contract was valid, is a matter of private law which the parties can pursue if so advised, but for the specific purpose of invocation or application of public law, I find that there is a clear averment in the affidavit of Mr Ng’eno the Permanent Secretary on its existence and validity. The parties to the contract conducted themselves at all times as if it was properly in existence.

I find that the Mandamus order sought in prayer 2 cannot validly lie both on the facts and the law, in that having found that the relationship between the parties namely Applicant and the second Respondent was contractual and also having quashed its purported termination, there is no public duty to be enforced by way of an order of mandamus. Prayer 2 is therefore dismissed.

Similarly as regards prayer 3 by way of prohibition, the same cannot in my finding lie on the basis of the facts and the law. Prohibition operates to prevent unlawful specific acts intended to be perpetrated. It operates as to the future and cannot apply to unspecified general and speculative acts in the future. The door of the courts will remain open for any specific acts. Any officer who purports to invoke the State Corporation Act will be judged on the basis of specific unlawful acts and a general prohibition order would be improper. Prayer 3 is accordingly dismissed as well.

Orders shall therefore forthwith issue by removing into this court the first respondent's decisions dated 24th August 2004 and 16th December, 2004 which purported to call or authorize an investigation and the latter decision which purports to terminate the applicant's second contract and I accordingly forthwith quash the two decisions. In this connection the second Respondent did not produce any decision or resolution made on 3rd December, 2004 and the Court cannot act in vain against a non-existent decision.

In conclusion, in view of the findings above, it is for the second Respondent and the Applicant whose relationship is purely contractual to invoke it as appropriate. Orders shall forthwith issue.

In the special circumstances of the case I award costs to the Applicant as against the first Respondent only.

DATED and delivered at Nairobi this 25th day of April 2008.

J G NYAMU

JUDGE

Mr Charles Kihara for the Applicant

Mr Ombwayo for 1st Respondent

Mr Fred Ngatia for the 2nd Respondent