



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (Milimani Law Courts)

Misc Appli 71 of 2006

**SAMSON VINCENT D’SOUZA.....
APPLICANT**

Versus

THE BOARD KENYA TOURISM DEV. CORPORATION

THE HON. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

Before me is a Preliminary Objection dated 28th February 2006 and filed in court on 1st March 2006 by the Respondents.

The points of law raised in the said Preliminary Objection are as follows:

1. The applicant is not a member of the Kenya Tourist Development Corporation (KTDC) and as such, Section 6(1) of the KTDC Act Cap 382, Rule 2 of the Schedule do not apply.
2. The applicant is not a holder of a public office and therefore the orders of Judicial Review cannot apply.
3. The applicants employment is governed by Rule 17 of the Schedule of the KTDC Act.
4. The application is incompetent and can not lie.

The Preliminary Objection was argued by Ms. Kirimi counsel for the Respondents. Mr. Kitulu who appeared for the applicant opposed the Preliminary Objection.

Briefly, the background of this case is as follows:

On 10th November 2003, the applicant was appointed the Deputy Managing Director of the 1st Respondent vide a letter written by the Permanent Secretary, Ministry of Tourism and Information. The said appointment was confirmed on 4th December 2003 by the Managing Director and was on permanent and pensionable terms.

During his work he discovered some irregularities in the way the affairs were conducted relating to finances as a result of which investigations commenced. From then, the Managing Director tried to have his appointment revoked. He has also been threatened through anonymous calls and emails and in July 2005 the Managing Director was sent on compulsory leave. In January 2006 The Kenya Anti Corruption

Authority started investigations on the 1st Respondent in which he co-operated with the officers but on 3rd February 2006 without any notice or lawful cause the Chairman of the 1st Respondent Board of Directors terminated his appointment. He had not been notified of their intention nor was he given an opportunity to defend himself. That is why on 9th February 2006 he moved this court by a Chamber Summons dated the same day for leave to bring an application for Judicial Review seeking leave to apply for an order of certiorari to remove into this court and quash the decision of the Board KTDC on 3rd February 2006 terminating his appointment as Deputy Managing Director of 1st Respondent. The substantive Notice of motion was filed on 15th February 2006.

In response to the above application, the Respondents filed a notice of Preliminary Objection which is the subject of consideration in this ruling.

Ms Kirimi in support of the Preliminary Objection argued that the applicant is not a holder of a public office and the Respondents in terminating the applicant's contract of employment were not performing a public duty because the office of the Deputy Managing Director which the applicant was employed in, is not created by the KTDC Act. Section 5 of the KTDC Act sets out the membership of the corporation a chairman appointed by the Minister the Permanent Secretaries of relevant ministries and others with knowledge in tourism matters. The Managing Director is appointed by the Minister under Section 6 of the KTDC Act.

It was further submitted that Rule 2 of the Schedule to the Act provides for terms of the members of the corporation and Managing Director of which the applicant was not one. It was the counsels submission that Judicial Review orders are a special jurisdiction to supervise the public functions of a public body and it was the duty of the applicant to show that he was performing functions for the benefit of the public. Ms Kirimi further argued that the applicant's contract of employment falls under Rule 17 of the Schedule which gives the corporation power to employ officers, servants or agents as is necessary to discharge the corporation's functions. Counsel further contends that the contract of service which was annexed to the Notice of Motion provides for termination of the contract, under Clause 16 and there was no provision that he was entitled to be heard. It is therefore a pure employment issue governed by the law of contract and the orders sought would amount to the court giving orders of specific performance which are not available in Judicial Review. In support of the applicant's submissions these are some of the authorities relied upon:

1. Republic Vs. Secretary of State ex parte Benwell (1985) QBD 554
2. Republic Vs. Berkshire Health Authority ex parte Walsh (1985) QBB 152
3. Republic Vs. BBC ex parte Lavelle (1983) 1 ALL ER 241
4. Vidyodaya University of Ceylon & Others Vs. Silva (1964) 3 ALL ER 365.
5. Kadamas Vs. Municipality Kisumu 1955 1 KLR
6. Central Bank of Kenya Vs. Nkabu (2002) EA 34.

The general purport of these authorities is that unless there is a special entitlement by statute that allows the applicant to move the court for Judicial Review in the contract of employment, the applicant's remedy lies in ordinary civil proceedings or under the Employment Act.

In response Mr. Kitulu submitted that the Preliminary Objection raised by the Respondents does not meet the requirements of a Preliminary Objection as set out in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD** (1969) EA 969. In that the Preliminary Objection should have raised a pure point of law which has to be argued on the assumption that all the facts provided by the other side are correct and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

He submitted that the issue of whether the applicant was subject of a statutory contract or contract of employment is a matter of fact to be considered by the court and that the Respondents should have filed a replying affidavit so that the matter could be heard inter parties. He urged that it was to be determined by evidence whether the applicant entered KTDC under Section 6 of the KTDC Act or Reg. 17 of the Schedule to the Act. His view is that since the Minister has power to appoint a Managing Director, by inference, he also has power to appoint a Deputy Managing Director and that the applicant was not employed on temporary terms under Section 5 or 5(3) KTDC Act. He urged that Judicial Review remedies are available to anybody against a public officer and in this case KTDC is a corporation and the duties of the Managing Director are public in nature. The applicant being a Deputy to Managing Director, does the job of the Managing Director in his absence and that the power to appoint and revoke appointment of public officers is vested in the Minister in terms of Section 6 of KTDC Act. He urged that since the Act did not provide for delegation, any decision taken by the Board instead of the Minister was ultra vires. He further urged that it is presumed that before termination of a contract, a party will be given a hearing even if it is not expressly provided for in the Contract of Employment and the fact that one has an alternative remedy does not bar them from seeking Judicial Review remedies. Mr. Kitulu's view is that the authorities cited by the Respondent will fetter the court's jurisdiction and that the applicant needs to adduce evidence to establish whether or not the applicants entered into a contract of employment or was appointed to the post.

Before delving into the Respondent's Preliminary Objection I think it prudent to consider whether or not the objection raised by the Respondents amounts to a Preliminary Objection.

In the **MUKISA BISCUIT CASE**, Justice Law of the Court of Appeal had this to say of a Preliminary Objection at (page 700) **"In so far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"**.

At page 701 Sir Charles Newbold said;A **"Preliminary Objection is in the nature of what used to be a demurrer. It is a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasionally confuse the issues. This improper practice should stop"**.

The two tests to be satisfied are:

- (i) It has to be a pure point of law which is argued on the assumption that all facts are correct.
- (ii) It cannot be a Preliminary Objection if the facts have to be ascertained or if what is sought will involve exercise of judicial discretion.

In the present case, there is a contract of employment signed by both parties which is an issue before this court. The question for consideration is whether the contract of employment was properly terminated and the court needs only to look at that contract and the KTDC Act Cap 382 under which the contract was made. The prayer sought is one of certiorari and it is only concerned with the process of the termination of the contract but not the merits of the decision to terminate the contract. This being a Judicial Review application, the facts are already before the court as contained in the affidavits and no oral evidence can be adduced by the applicant. In my view all the facts are correct and there will be no need to ascertain the facts or exercise of judicial discretion when ascertaining whether or not the correct procedure was followed by the Respondents in terminating the applicant's contract of employment. It is a point that can be taken up as a Preliminary Objection.

As per the contract of employment dated 10th November 2003 annexure SVD 2a, the applicant was appointed to the post of Deputy Managing Director of the KTDC Corporation with effect from 4th

December 2003. The terms of the contract were also annexed as SV 2(b). On 3rd February 2006 the applicant received a letter from the Chairman of the Board terminating his services with immediate effect in accordance with the terms and conditions of service. It is this termination of services that he challenges by way of Judicial Review.

It is the contention of the Respondent that the applicant is not appointed or employed under Section 5 or 6 of the KTDC Act. Section 5 (1) of KTDC sets out the membership of the corporation who shall be appointed by the Minister. They are the Chairman, Other Members who include Permanent Secretaries of Ministries related to the KTDC. Under Section 5 (3) the corporation may call up other persons to advise the corporation but they do not become members. The applicant does not fall under that category.

Under Section 6, the minister, with agreement of the corporation shall appoint a managing director who will be the chief executive officer of the corporation. Section 6 (3) further provides that in absence of the managing director, the corporation and minister may appoint a person to act as such. It is the applicant's argument that it should be presumed that once a managing director was appointed he would have a deputy but there was nothing wrong with the Act specifically providing that there would be a deputy to the managing director. It seems the Act intended to totally separate the post of managing director and that of the deputy if there was any. As per the Act there can only be an acting managing director and there is no provision of a deputy managing director.

Rule 2 of the schedule to KTDC Act then goes ahead to provide for removal or vacation of office of the members of the corporation. The applicant has not shown under what provision of law in the KTDC Act, his office (Deputy managing director) is established. The letter of appointment was written by the managing director on behalf of the corporation. Rule 17 of the schedule provides that the corporation may employ officers, servants and agents as is efficient to discharge its functions. The corporation will then determine the terms and conditions. There is no provision relating to how they will be removed.

From a reading of these various provisions of the KTDC Act, it is my finding that the applicant was not a member of the corporation. He was not appointed by the minister under Section 5 of the Act. Similarly his dismissal was not done by the minister. He was brought on board of the KTDC by virtue of Rule 17 of the schedule where the rest of the employees or agents of the corporation are hired and the terms applicable to termination of his employment will be those in the contract of employment.

Counsel for the applicant was of the view that the applicant was appointed under Section 6 of KTDC Act and if revocation was not specifically provided for, one can fall back to Section 50 and 51 of the Interpretation and General Provisions Act (Cap 2 (LOK): Section 50 provides for appointment of a public officer to a board or committee and Section 51 of the same Act provides that the person with power to appoint has also got power to revoke, suspend or dismiss. In the present case, the minister did not appoint the applicant and could not dismiss him. It is the corporation which appointed and likewise did dismiss him in accordance with the terms of the contract.

Having found that the applicant was just one of the staff of the KTDC was the termination of his employment performance of a public duty by the respondent?

Halsbury's Law of England, 4th Ed. Vol I para 6 defines what public bodies are – **“Broadly speaking, a public authority may be described as a person or administrative body entrusted with functions to perform for the benefit of the Public and not for private profit.”** Again at para 9 **“The meaning of a public office, and public officer vary according to the context in which the terms are used. In general, a public officer may be said to be one who discharges a duty in the performance of which the public is interested; a person is more likely to be such an officer if he is paid out of a fund provided by the public, but it does not necessarily follow that the fund must belong to the central Government”**

A reading of the above excerpts would indicate that the respondent may be a public body and similarly the applicant may be a public servant if his duties are those in which the public is interested or he is paid out of a fund provided by the public. The tenure of that office will depend on the terms of the contract of

employment. Some contracts of employment like those of judicial officers may have some statutory safe guards whilst others will not have.

In the case of **R v EAST BERKSHIRE EX PARTE WALSH**, a nurse had been dismissed for misconduct and moved the court for Judicial Review orders to quash the decision and it was held that the applicant was not seeking to enforce a public right but his private contractual right under his contract of employment and therefore, his application was a misuse of the procedure for Judicial Review under Order 53. The court held **“an applicant for Judicial Review had to show that a public law right which he enjoyed had been infringed; that where the terms of employment by a public body were controlled by statute, its employees might have rights both in public and private law to enforce these terms but a distinction had to be made between an infringement of statutory provisions giving rise to public law rights and those that arose solely from a breach of the contract of employment”**

It is upon the applicant to show to this court that he enjoyed a public law right which has been infringed and that his terms of employment are controlled or underpinned by statute.

In **R v BBC ex parte Lavelle**, where an employee of BBC challenged his dismissal, the court held that the court had no jurisdiction to interfere with an employee's dismissal in a purely master and servant situation where there was no protection of the employment beyond that afforded by the common law.

In **VIDYODAYAS CASE** the court held that the remedy of certiorari was not available where a master summarily terminated a servants employment.

In one local case of **KADAMAS** the court held that though the corporate body was sustained by public funds, the duties to its employees were not necessarily of a public nature, and Justice Kuloba restated the fact that Judicial Review remedy is only available where an issue of public law nature is involved. The above cases are only persuasive in nature. But in the case of **ERIC MAKOHA & OTHERS V LAWRENCE SALIMI & OTHERS C.A. 20/1994**, where university lecturers had challenged Their dismissal, the court found that the contracts were not underpinned by statute. The court held **“the word ‘statutory underpinning’ is not a term of court. It has no recognized legal meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin, is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept it may mean, the employee's removal was forbidden by statute unless removal met certain formal laid down requirements. It means some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute are observed. It is possible this is the true meaning of what has become the charmed words “statutory underpinning”**

The judges observed that this term may apply to constitutional officers like judges, whose removal from office for misconduct is specifically provided for in the constitution. The court held that the lecturers could not be reinstated unless a statute to which they could point expressly gave that right and the remedy available was for breach of contract of employment.

Though the orders sought in the above case are not Judicial Review, the court addressed the issue of statutory underpinning which was alluded to in the ex parte **WALSH CASE** that Judicial Review was only available if the applicants employment by a public body was controlled by statute.

I have considered the other cases cited by the respondent the and the spirit is the same. I do agree with the respondent that the applicants employment is not statutorily underpinned in KTDC Act. The applicant wants to enforce a private right, of employer employee relationship. It is not a public right and from the wealth of authority cited, the remedy of Judicial Review cannot be available to the applicant.

In the case of **PAUL MELLY V PERMANENT SECRETARY TREASURY MISC APP 1179/03**, the orders of Judicial Review were granted in a case of employer/employee because the

employment was specifically provided for in the statute.

Having come to the conclusion that the orders of Judicial Review are not available to the applicant because the contract is one of master and servant and it has been properly determined under the contract of employment, I do find that the Preliminary Objection was well taken and merited. The court will have no jurisdiction entertaining the matter at a full hearing. The Preliminary Objection is upheld. The Notice of Motion dated 15th February 2006 is incompetent and cannot lie and is hereby struck out with costs to the respondents.

Dated and delivered this 19th day of May, 2006.

R.P.V. WENDO

JUDGE