



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Case 620 of 2004**

**SAMMY MUHIA & OTHERS ..... PLAINTIFFS**

**VERSUS**

**K.P.L. CO., LTD ..... DEFENDANT**

**JUDGMENT**

On 11<sup>th</sup> June, 2004 the three plaintiffs Sammy Muhia, Henry Nganga and Anthony Kinyua moved this court by way of plaint dated 9.6.2004. The Plaintiffs who were by then casual employees of the defendant, Kenya Power & Lighting Company Limited sought the following prayers;

1. (a) A declaration that the practice of giving short term contracts renewable indefinitely is wrongful and contrary to law.
- (b) A declaration that the plaintiffs are entitled to long term contracts of employment similar to those enjoyed by other employees of the defendant on permanent and pensionable terms with effect from their original letters of appointment.
- (c) An order restraining the defendant Company by itself, its directors, officers, servants and any of them or otherwise howsoever, from terminating or otherwise interfering with the Plaintiff's employment Contracts save on terms similar to those under permanent and pensionable terms.
- (d) Damages
- (e) Costs
- (f) Interest on c & d above
- (g) Any such order, writs and or directions considered appropriate for the purpose of enforcing or seeing the enforcement of the fundamental rights breached in relation to the plaintiffs.

Filed along with the plaint was the chamber summons dated the same date. At paragraph 3 of the plaint the three plaintiffs had pleaded that they bring the suit on their own behalf and represent other casual employees of the Defendant, employed on diverse dates beginning 1996 to date. The 1<sup>st</sup> two prayers were for leave of the court to allow the plaintiffs sue on behalf of the other employees and that notice of the institution of the suit be advertised in one of the daily newspapers. The third prayer was for an order

of injunction to restrain the defendants from terminating or interfering with the plaintiff's contracts of employment pending hearing and determination of the suit.

On 14<sup>th</sup> June, 2004 J. Mugo granted prayers 1 and 2 of the chamber summons making this a representative suit. Before the 3<sup>rd</sup> prayer for injunction was heard inter partes, the plaintiffs on 7<sup>th</sup> July, 2004, filed a Notice of Motion under provisions of Section 84 of the Constitution of Kenya and Rules 10(a) and (b) of the Constitution of Kenya (Fundamental Rights and Freedoms of the individual) Practice and Procedure Rules, 2001. The chamber summons came up for hearing before J. Ibrahim who on application consolidated the Notice of Motion dated 7<sup>th</sup> July, 2004 with the chamber summons. They were heard together as per prayer 1 of the Notice of motion. The notice of motion sought the following prayers

2. A declaration that the defendants' practice of giving the plaintiff's short term contracts renewable to uncertain dates has occasioned the breach of the plaintiffs fundamental rights guaranteed by Section 70 & 71 of the Constitution.
3. A declaration that the Plaintiffs' entitlement to contractual terms on permanent and pensionable terms provided in the Employment Act and the laws relating to employment and conditions of employment has been violated and accordingly, the plaintiffs' fundamental rights to the due protection of law guaranteed by section 70 (a) of the Constitution has been breached in relation to the plaintiffs.
4. A declaration that the failure by the defendant to grant the Plaintiffs employment contracts similar to those of employees on permanent and pensionable terms amounts to discriminatory treatment of the Plaintiffs in breach of Section 82 of the Constitution.
5. A declaration that the refusal, failure and/or neglect of the defendant to offer the plaintiff's contracts of employment similar to those by employees on permanent and pensionable terms has resulted in a breach of the plaintiffs' fundamental rights guaranteed under Section 70 (b) and 80 of the Constitution namely the right to belong and or form associations for the furtherance and protection of their interests.
6. A declaration that the keeping of the plaintiffs on short term contracts without attendant benefits available to other employees of the defendant has resulted in the breach of the plaintiff's fundamental rights guaranteed under Section 73 of the Constitution not to be held in servitude.
7. A declaration that the keeping of the plaintiffs on the short term contracts without attendant benefits such as annual leave, leave allowance, maternity leave with respect to the female employees, medical cover, house allowance, contribution to provident fund, the right to join a Union and the Co-operative Society and accident compensation available to other employees of the defendant has resulted in the breach of the plaintiffs' fundamental rights not to be subjected to inhuman or degrading treatment guaranteed under Section 74 of the Constitution.
8. Damages for breach of the aforesaid constitutional rights.
9. Costs.
10. Interest on 7 & 8 above
11. Any such further orders writs and or directions considered appropriate for the purpose of enforcing or securing the enforcement of the fundamental rights breached in relation to the plaintiffs.

The grounds upon which the notice of motion was premised are on follows:-

**(a) That on diverse dates between 1991 to 1998 the plaintiffs were employed on "temporary contracts" of three months all with conditions that they were not entitled to any other benefits normally applicable to the regular employees of the defendant;**

**(b) Between the dates of employment upto the time of the institution of these proceedings, the plaintiffs have had the temporary contracts periodically renewed for periods of 1 to 6 months without any benefits normally applicable to other employees of the defendant e.g annual leave, leave allowance and statutory benefits according to the Employment Act Cap 226, Regulation of Wages and Conditions of Employment Act Cap 229 and the Trade Dispute Act Cap 254 etc.**

**(c) I further, the plaintiffs aver that upon entering into the initial contracts of employment with the defendant, the defendant was under Constitutional obligation not to breach the plaintiffs' fundamental rights and freedoms and in particular these provided for under sections 70 (a) 70 (b), 71, 74, 80 and 82 of the Constitution.**

**(d) In flagrant breach of the provisions of the Constitution, the Defendant without any reasonable, probable, and lawful basis was continued to employ the plaintiff's as casuals and has refused, failed or neglected to confirm the plaintiffs in their employment and persists in granting the plaintiffs short term contracts of employment so as to avoid compliance with the statutory provisions of laws set out in paragraph (b) above and has occasioned breach of fundamental rights set out in paragraph (c) above in relation to the plaintiffs.**

**(e) The Defendants' neglect, refusal and failure to give**

Plaintiffs contracts of employment similar to its other employees has occasioned breach of the plaintiffs' fundamental rights set out above and the plaintiffs seek redress and damages for breach of the said fundamental rights under section 84 of the Constitution.

After hearing the application on 14<sup>th</sup> July, 2004 the Judge reserved the ruling for a duly considered ruling to be delivered on 30<sup>th</sup> October, 2004. Meanwhile he granted the applicants a temporary injunction in terms of prayers 4 of the chamber summons to last till 30<sup>th</sup> October, 2004. As of 14.10.2004 some of the applicants' short term contracts were expiring on 16.10.2004 and the court saw the need to preserve the substratum of the suit by granting the order of injunction. On 12.11.2004 after a considered ruling, the court discharged the interim order of injunction which the court had granted and which had barred the defendants from terminating the plaintiffs' contracts of employment.

The hearing of this case commenced on 16<sup>th</sup> February, 2006 with the testimony of the 1<sup>st</sup> plaintiff, **SAMMY MUHIA** who confirmed that the suit was filed by the 3 plaintiffs and 188 other employees of the defendant. His evidence was that all the plaintiffs were employed on short term contracts. He was employed on 5.4.1997 on a temporary appointment of three months as per the letter dated same date. (SMI annexure to affidavit to the notice of motion dated 10.6.2004). He was employed as an entry clerk. As of 11.6.2004 when the suit was filed the plaintiff was still on temporary contract, which had been renewed severally, and the salary had been increased from time to time. He said that after the order of injunction was vacated by the court on 12<sup>th</sup> November, 2004 their contracts were all terminated. The other plaintiffs were also employed on temporary contracts, which were renewed over and over again. Their letters of engagement were also annexed to the affidavit dated 10.6.2004. The plaintiffs organized themselves into a group called Stima Temporary Staff Welfare Group and they instructed counsel to file this suit. P.W.1 was The Chairman of the said group. Only employees who joined the welfare group had their contracts terminated but others on temporary contracts remained working. His complaint is that the casual employees had no rights to join the Union, no annual leave, no medical cover, no house allowance, or other benefits enjoyed by permanent staff and other benefits like contribution to the staff provident fund, Right to join Stima Sacco, Loans (see para.5 of the plaint). He said that the denial of the above rights amounted to breach of their fundamental rights under sections 70 - 83 of the constitution as pleaded in the notice of motion. That is why they moved to court seeking declaratory orders, damages and costs. P.W.1's evidence is that the short-term contracts were contrary to the law and they were seeking to be employed on permanent terms. He was denied rights to life because if any thing happened to him, when at work, he was left to God's mercy. His rights to protection of the law was breached because his employment used to be only 3 months and could be terminated at any time. His right to expression had been breached in that he could not join a Union. He was exposed to degrading and inhuman treatment as

he did hard labour, but no electricity power or proper sanitation at home, or shelter unlike the permanent employees. His prayer was that he be employed again as he has worked the defendant for a longtime. He agreed that he could not force the defendant to hire him nor would the defendant force him to work for them.

Mr. Imanyara, counsel for the plaintiffs made lengthy and elaborate submissions basing his case on the plaint, Notice of Motion, evidence and affidavit of Sammy Muhia filed with the notice of motion and dated 10.6.1004. His submission was that all the plaintiffs were employed on temporary contracts of 3 months or more and the contracts were renewed periodically and some had been so employed for 10 over years. The common features of contracts were;

1. They were temporary appointments
2. The employees would not be entitled to any of the benefits normally enjoyed by permanent employees of the company which are set out in paragraph 5 of the plaint, which include annual leave, leave allowance, maternity leave for female employees, medical cover for employees and their families, house allowance, contribution to staff provident fund, Right to join Stima Credit Savings and Co-operative Society, Loans, Accident compensation and right to a staff number and all rights attendant to a staff member. Counsel submitted that by virtue of their employment, there was a statutory obligation and the defendant had to comply with the law and uphold the plaintiff's fundamental rights which did not mean that the defendants be forced to employ plaintiffs but that once the defendant employed the plaintiffs, the defendant had to comply with the law relating to employment and comply with the employment Act which consolidates all law relating to employment. Counsel made reference to the following sections;

**§ 5(2), of the Employment Act, which provides for when wages shall be due in particular contracts;**

**§ Section 7(i) provides that every employee is entitled to leave of not less than 21 days with full pay.**

**§ Section 7 (2); provides for maternity leave for women employees**

**§ Section 8; Every employee is entitled to at least one day rest in 7 days**

**§ Section 9; Every employee is supposed to be provided with reasonable housing or pay employees a sum as rent**

**§ Section 10; Every employer should provide and supply wholesome water for use by employees at place of work.**

**§ Section 11; every employer to provide food where food is agreed upon.**

**§ Section 12; the employers shall provide proper medicines during illness.**

Counsel's submission is that the above benefits are meant to apply to all employees and yet the defendant specifically excluded the plaintiffs from their enjoyment.

Mr. Imanyara further submits that it has not been denied that the plaintiffs are entitled to the above rights under Employment Act. Since their contracts have been terminated, they will not seek reinstatement but declarations that the contracts were in breach of plaintiffs' rights under section 84 of the Constitution and therefore unconstitutional and will seek declarations to that effect, that they are entitled to long term contracts from the date of 1<sup>st</sup> appointment and dues be calculated till the date they were discharged from the service. Counsel's contention was that the treating of one class of employees differently is contrary to law, discriminatory and degrading.

Mr. Imanyara's further submission is that though the plaintiff's are treated and referred to as casual

employees, they are actually employed on temporary contracts. Section 2 of the Employment Act provides that casual employees are paid on a daily basis which the plaintiffs were not.

Mr. Sigilai Kirui, the Human Resource Manager of the defendant filed a replying affidavit in opposition to the notice of motion in which he contends that the suit is filed to bring political pressure on the defendant; that the pool of casual employees is retained from time to time depending on seasonal demand for labour and that it will not be economically feasible to have all employees on permanent basis and that each casual employee has a separate contract of service renewable depending on the defendants labour needs. He further deponed that when vacancies are available in the pool of permanent employees, they do consider the casual employees on merit.

Mr. Imanyara denies that the fact that the plaintiff wrote a letter to the President and Mr. Koigi Wa Wamwere to intervene in their plight does amount to political pressure.

As regards the issue of whether or not the defendant would be financially viable if all employees were to be treated equally, the defendants have not availed any evidence to that effect and that they cannot ignore the provisions of the Employment Act with such an excuse. Counsel asked the court to consider the fact that the defendant is a government parastatal though described as a Limited Liability Company.

Mr. Imanyara relied on the following authorities.

1. **RASHID ODHIAMBO ALLOGOH v. HACO INDUSTRIES C.A.** 110/01 in which the Court of Appeal gave guidelines on how the High Court would approach cases brought under section 84 of the Constitution. The applicants in that case sought similar prayers as in this case. The Court of Appeal observed that once there was allegation of breach of fundamental rights the court had to go a head and investigate whether the allegations were true: If admitted, agreed or proved then the court would consider whether they violated any constitutional rights and grant damages if need arose.
2. **MARETE v. ATTORNEY GENERAL** 1987 KLR 690 where the applicant was suspended from work for 2 ½ years and the court held it was servitude.
3. **DIAV v. BOTSWANA BUILDING SOCIETY** (No. Citation). A case from Botswana, the court held that a non-governmental Organization which has more bargaining powers than its employees had to ensure rights of the employees are upheld.
4. **DOMINIC ARONY AMOLO MISC. APP. NO.494/03** where court held that once a breach of fundamental rights is established, the court can award damages.
5. **RUFUS NJUGUNA v. ATTORNEY GENERAL MISC. APP. NO.1278 of 2004**
6. **LEMPAA VINCENT SUYIANKA 2 OTHERS v. KENYATTA UNIVERSITY HCCC No.118 of 2003**
7. **GEOFFREY MBUGURU v. ATTORNEY GENERAL 3472 of 1994**

Making reference to the Court of Appeal's finding in the **ALLOGOH** case, Mr. Njoroge, counsel for the Respondents admitted that this court has unfettered jurisdiction to hear and determine any person alleging breach of fundamental rights but the applicants must adduce evidence to prove their allegations, and demonstrate that their rights have been infringed and that they are entitled to a remedy.

Mr. Njoroge considered each prayer that has been sought by the applicants in the Notice of Motion in his submissions:

The first is a declaration that rights to life were infringed. Mr. Njoroge contended that Sammy Muhia admitted that his life had been uplifted by the job offered by the defendants.

As regards prayer three where it is alleged that the plaintiff's rights to protection of the law were breached, the counsel submitted that Section 7 of the Employment Act provides for benefits for employees on permanent terms but the plaintiffs were never employed for more than 12 months and were not on permanent terms. The plaintiffs' contracts fell under section 14 of Employment Act which provides for temporary contracts and their terms vary from one agreement to another. He also referred to Section 5 that contemplates short term contracts or contracts for special tasks paid on daily basis and that the plaintiffs have not demonstrated that such contracts are contrary to the law and are therefore unconstitutional.

Prayer 4 of the notice of motion alleged breach of Section 82 of the constitution in that the employment of Plaintiffs on different terms from permanent employees is discriminatory. Mr. Njoronge said that the plaintiffs have to show that treatment of them by the defendant was due to some classification as specified in the constitution, that is discrimination due to race, creed, sex, political opinion, tribe, place of origin or residence or other local connexion. The classification given by the plaintiffs is on account of permanent and temporary employment which does not fall in any of the classes.

In regard to prayer 5, which alleges breach of right to associate, it is counsel's submission that the plaintiffs were never restricted from forming an association and indeed they did go a head and formed the Stima Welfare Group to advocate their rights.

In prayer 6 the plaintiffs seek a declaration that they are held in servitude but Mr. Njoroge submitted that the plaintiffs had renewed their contracts severally and their salaries had been increased upwards as per testimony of Muhia and that there is no evidence to support the allegation of servitude.

In prayer 7, it is pleaded that the plaintiffs were subjected to degrading and inhuman treatment. It was Mr. Njoroge's view that the plaintiffs' salaries were above the minimum wages and that they were not unreasonable. He relied on the decision of **DOMINIC ARONY** where the court described what degrading and inhuman treatment means, that is below reasonable standards of decency. In this case, counsel says that the terms are reasonable.

Counsel further submitted that fundamental rights cannot be enforced as between private parties but has to be between the government and the governed. He said that the defendant is a private company with its own rights and the plaintiff's rights are not absolute and should be balanced as against the defendant's rights. He said that the defendant is not a government department as submitted by Mr. Imanyara but a licensee under Electric Power Act and the declaration cannot therefore be made against the defendant being a private company or person. That the defendants have employed the plaintiffs on terms that they can afford and plaintiffs are trying to transform the contracts into what was never intended by the parties and the plaintiffs want the court to declare the Employment Act unconstitutional.

From a Summary of these submissions by both counsel, there is no denial that the plaintiffs were employed by the defendant on temporary contracts some of which were annexed to the plaintiffs' affidavits to the notice of motion dated 6<sup>th</sup> July 2004. They were for periods ranging for 3 months to 6 months. For ease of reference, I think it is proper to reproduce one of the agreements.

**“Sammy Kibura Muhia I/D No.110085523**

**Thro'**

**Zonal Head Machakos/Makueni/ IPS zone**

**Dear Sir.**

**TEMPORARY EMPLOYMENT CONTRACT.**

**I am pleased to offer you Temporary Employment as a Meter Reader in Distribution and Customer Service Division, Machakos/Makueni/IPS zone with effect from 8<sup>th</sup> October, 2003 to 31<sup>st</sup> December,**

2003.

- (a) **SALARY**: your salary will be at the rate of Kshs.9,386/= per month
- (b) **BENEFITS**: The salary payable to you is consolidated and all-inclusive and you will, therefore, not be entitled to any other benefits normally enjoyed by employees on the permanent workforce.
- (c) **TERMINATION** Unless otherwise advised, your last workday will be 31<sup>st</sup> December, 2003. The Employment however, may be terminated by either party giving the other one day's notice or pay in lieu of notice.
- (d) **ACCEPTANCE**: Please signify your acceptance of the above terms by returning the duplicate of this letter duly signed in the spaces provided.

Yours faithfully

For: THE KENYA POWER AND LIGHTING CO. LTD

ANTONINA MOIRE MRS

AG REGIONAL HUMAN RESOURCES

ADMINISTRATION OFFICER NAIROBI

I have read and understood this employment contract and agree to serve the Company under the terms and conditions stated herein.

Signature \_\_\_\_\_ dated 3<sup>rd</sup> November, 2001”

That was the standard temporary agreement. The common features of the agreement are that it was introduced as temporary in nature, a salary per month would be specified and the period within which the contract would run; the contract excluded the benefits enjoyed by permanent employees and termination would be a day's notice or payment in lieu and some of the employees like Sammy Muhia had signed such contracts for over 10 years. The existence of these contracts between the plaintiffs and defendants is therefore not disputed. The issue for consideration will be whether the contracts contravened the provisions of the Employment Act.

This suit was brought under sections 60, 70 (a) 70 (b) 73, 74, 80, 81 and 84 of the Constitution and Rules 10(a) and (b) of the Constitution of Kenya (Fundamental Rights and Freedoms of the individual), Protection and Procedure Rules, 2001. Counsels were in agreement with the Court of Appeal ruling in the **ALLOGOH CASE** where the Court of Appeal gave guidelines on how a constitutional court determining an application under section 84 of the constitution could proceed.

Section 84 (1) provides;

**“Subject to subsection (6) if a person alleges that any of the provisions of sections 70 to 83 (inclusive) has been or is being or is likely to be contravened in relation to him (or, in the case of person who is detained, if another person alleges a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”**

The Court of appeal in **ALLOGOH CASE** said that it means that the availability of other lawful causes of action is not a bar to a party who alleges contravention of his rights under the constitution

coming to court for redress under that section. It means that even if the plaintiffs have other remedies under the Employment Act as alluded to by the defendants, they still have a right to move this court under section 84 of the constitution.

The Court of Appeal then went ahead to give guidelines to be followed when a constitutional court is confronted with such an application.

But before I do consider the said guidelines, I should point out at this stage that fundamental rights and freedoms of the individual provided for under Cap 5 of the constitution are not absolute. The rights have to be enjoyed without prejudicing the rights and freedoms of others, the society and public interest. This is clearly spelled out in section 70 of the constitution, which reads.

**“Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, the place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following:-**

**(a) Life, liberty, security of the person and the protection of the law**

**(b) Freedom of conscience, of expression and assembly and association and;**

**(c) Protection for the privacy of his home and other property and from deprivation of property without compensation; the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the rights and freedoms of others or public interest.”**

It is obvious from a reading of the above section that the fundamental rights are not absolute and will not be enjoyed if they infringe on the rights of others, the society or public interest. The society's rights, public interest and other's rights are also rights secured under the constitution and also need to be protected. The defendant being a legal person or legal entity too has rights that needs to be protected. I believe the defendant's rights are included in **“rights and freedoms of others”** referred to in section 70 of the constitution. What the court is required to do is to balance the interests of all the parties to the suit and that is what the court will endeavor to do as it considers whether or not the plaintiff's rights were violated by the defendants in relation to the Employment Act.

Bearing the above in mind, I go to consider the guidelines given by the Court of Appeal referred to earlier. At page 9 of the **ALLOGOH'S CASE THE COURT OF APPEAL**. says.

**“What should the Constitutional Court have done? In our respectful views it should first have considered whether or not the allegations made by the appellants were true ... the burden of course would have been on the applicants to show the court that the facts on which they based their claim were true. If the court found that the facts as put forward by the applicants were not true, then that would have been the end of the matter. Even on matters touching on the constitution, the facts on which the contravention is based must be either proved, admitted or agreed.”**

In the present case, the defendants do admit having engaged the plaintiff's on short-term contracts as pleaded. What the defendants do not accept is the contention that the said contracts are in breach of the Employment Act and therefore in breach of the plaintiffs constitutional rights.

So what should the court do in the circumstances? The Court of Appeal went on to state:

**“...But if the court had found that the facts were as stated by the applicants, then the court would have moved to the next stage namely, do the proved or admitted facts constitute or amount to a violation or contravention of the provisions of the constitution? In determining that issue, the court**

**would be entitled to consider the various statutory provisions relied on by the applicants, the law relating to contract of service of employment, whether these contracts can be specifically performed and if so, what effect that would have on the concept of freedom of contract.”**

The prayers sought in the **ALLOGOH** case were similar to those sought by the plaintiffs in this case.

The law that has been relied upon by both parties to the contract is the Employment Act.

One of the queries that linger in my mind is whether the Employment Act provides for different kinds of employment contracts and I have no difficulty in getting an answer. The Act does provide for different contracts as can be deduced from the following provisions.

Section 2, the interpretation section defines who a casual employee is;

**“Means an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”**

After examining the various provisions of the Employment Act relied upon, the question to be answered is whether or not the plaintiffs were casual employees of the defendants. Both the plaintiffs and defendants had referred to the plaintiffs as casual employees.

Section 5 (2) of the Act provides as follows;

**“Subject to subsection (1) the times when wages shall be deemed to be due shall be as follows;**

- (a) In the case of a casual employee at the end of the day;**
- (b) In the case of an employee employed for a period of more than a day but not exceeding one month, at the end of that period.**
- (c) In the case of an employee employed for a period exceeding one month, at the end of each month after thereof.**
- (d) In the case of an employee employed for an indefinite period or on a journey, at the expiration of each month or of such period, whichever date is the earlier and on the completion of the journey respectively.**

**Provided that the provisions of this section shall not affect an order or award of the Industrial Court, or an agreement between an employee and his employer the relevant terms of which are more favourable to the employee than the provisions of the section.”**

The above provision does envisage a situation where different kinds of contracts of service for different durations are created.

**Section 14** of the Act goes on to provide for contracts of service and general provisions relating thereto Section 14 (1) reads:

**“Every contract of service;**

- (a) For a period, or a number of working days which amount in the aggregate to the equivalent of six months or more: or**
- (b) Which provides for the performance of any specified work which could not reasonably be expected to be completed within a period, or a number of working days amounts in the aggregate to the equivalent, of six months, shall be in writing.**

**(2) For the purpose of signifying his consent to a written contract of service an employee may;**

**(a) Sign his name thereon, or**

**(b) Imprint thereon the impression of his thumb or one of his fingers in the presence of a person other than an employee.”**

The provisions of section 14 do contemplate the formation of contracts of service which will vary according to the parties terms under the particular contract.

On the contrary, there is section 7 of the Act, which reads

**(i) Every Employee shall be entitled –**

**(a) After every twelve consecutive months of service with his employers to not less than twenty-one working days of leave with full pay.**

(b) Where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave earning period and not less than one and three quarter day of leave with full pay in respect of each completed months of service in that period, to be taken consecutively.

(2) ...

Section 7 refers to employees who are engaged on contracts of over 12 months and these must be what we call permanent employees with the benefits accruing to permanent employees. The rest of the benefits under section 8, 9, 10, 11, 12 and 13 only apply to the above permanent employees but not to contracts of service under section 14 of the Act. By the very nature of the contracts under section 14, they cannot be entitled to the benefits listed in paragraph 7-13.

From a description of the kinds of service contracts it is my view that the plaintiff's contracts do fall under section 14 of the Act because they are for more than 3 to 6 months, they are written and signed by the Plaintiffs as required by the law. From a consideration of the above provisions, it is my view that this Act provides for casual employment, short term employment and permanent employment with particular benefits accruing to each type of employment. The defendant is a commercial enterprise engaged in service delivery and has the right to choose its staff or employees on contractual terms permissible by law to fulfill the kind of service that the company renders to the public.

Were the short term contracts entered into between the plaintiffs and defendants a violation of the plaintiff's right to life? My answer to that is no. They were not. Infact by an admission by Mr. Muhia who testified, the employment uplifted and enhanced his life because he earned a salary to take home for his personal use. There was no evidence of any right to life being violated.

The contracts were made in accordance with the Employment Act – that is evident after a careful consideration of the various provisions in the Act relating to contracts. The contracts were jealously guarded or guaranteed under the Act.

Were these contracts discriminatory and hence violated section 82 of the constitution? A contract of services under section 14 of the Employment Act is governed by its terms and is in no way discriminatory as against the permanent employees whose terms are governed by inter alia section 7 of the same Act. By analogy, it is not unlike a contract for consultancy services over a period of time in which an employee is taken in because of his expertise and works a long with the other employees of a firm and for all practical purposes other than their contracts of service, they are performing the same duties. They will be entitled to different terms resulting from their terms of service. Besides, the plaintiffs have not demonstrated that the plaintiff's have been discriminated against as per the classification set out in section 82(3) of the constitution. Section 82 (3) reads;

**“In this section the expression “discriminatory” means affording treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or one ascertained privileges or advantages which are not accorded to persons of another such description.”**

In the **MAKUSA CASE** the court cited the case of **BROWN BOARD** (1954) 347 US 483 in which discrimination was alleged on grounds of colour and the class discriminated against was held to be identifiable on grounds of colour. The court went on to say **“we think that discrimination must be in the words of section 70 of the constitution, relate to race tribe, place of origin or residence or other local connection, political opinion, colour, creed or sex.”** Though the list may be longer than this, the plaintiffs do not belong to any particular class of people. They are individual employees who have willfully signed temporary contracts of employments with the defendant. That does not bring them into a class of persons. Besides, as I have earlier pointed out the defendant has its constitutional rights, to hire on permanent or temporary contracts whoever they want provided it is in accordance with the law.

The plaintiffs allege breach of their right to association under section 70(b) of the constitution. By their very nature short term contracts could not avail the formation of associations because the period of employment was very short and uncertain. The right to association provided under Trade disputes Act, I believe would apply to permanent employees. In any event, the plaintiff went a head and formed the Stima Welfare Group to agitate their interests while still in employment. It was in fact registered and since they are no longer employees, it will not serve any purpose.

The plaintiffs contend that the short term contracts held them in servitude and breached their rights under section 73 of the constitution. **Blacks Law Dictionary 8<sup>th</sup> Edition** defines servitude (sevitus) as slavery or bondage. It envisages a situation where the plaintiffs are performing forced labour for some pay or none at all and they are being coerced into it. In the plaintiff’s case, they signed the contracts and some of them continued to renew these contracts over and over again. Salaries were increased upwards depending on the job. Besides their salaries were not below the minimum wages and it has not been so alleged. The short term contracts were agreed upon taking into account the rights of both parties and I do find that the plaintiffs were not held in servitude. The defendants having the upper hand in the bargain notwithstanding, if there was any such inclination to hold them to servitude, they had the right to opt out of the agreements.

Lastly the plaintiffs prayed for a declaration that they were subjected to inhuman and degrading treatment by denial of benefits that should have accrued from the contracts of service. The court in **ARONY’S CASE** considered another case of **HIGGS & MITSHELL v. MINISTER OF NATIONAL SECURITY & OTHERS** (2002) 2 LRC 656 where that court considered what inhuman treatment meant:

**“below reasonable standard of decency having regard to financial and security concerns.”**

It was also defined it to mean falling under the minimum standard of decency.

The plaintiff’s complaint is that benefits were not equal with those of permanent employees but as found earlier, the terms of their employment are different. The plaintiffs’ wages were not below the minimum wages and there is no evidence that the defendant could have paid better than they did. The court does appreciate the fact that the defendant being a company, has better bargaining power but yet it will only pay wages as much as it is able to afford taking into consideration many other things like making of a profit, paying all its workers and being able to sustain itself. The plaintiffs have not demonstrated that they were treated less than other employees were nor can be said the treatment of them was unreasonable and indecent in the circumstances.

It was the defendant’s contention that the prayers sought would not issue against the defendant anyway, as it is a private entity and fundamental rights cannot be enforced against another private person. No

doubt the defendant is a Ltd Liability Company and therefore a legal person with its own rights and freedoms with freedom to freely enter into contracts (see section 123 of the Constitution) Mr. Imanyara submitted that the courts have granted such orders between private companies and individuals.

He cited the **ALLOGOH CASE** Unfortunately though the Court of Appeal ordered that the case be heard de novo, this court has no idea what became of that case, whether it has been finalized or not. What the Court of Appeal said was that once breach of constitutional rights was alleged, a party had to be heard. This is also the decision made in **LAWRENCE K. NDUTU & 156 OTHERS v. KENYA AREWERITES LTD HCC NO.279** of 2003 where the Hon. Chief Justice, Justice Gicheru said that there were allegations of breach of fundamental rights and the parties had to be heard. Unfortunately the court has not an idea as to what the fate of these cases was and whether it was found that the breach of fundamental rights would be founded as between the private parties. In the case of **KBS LTD & ANOTHER v. ATTORNEY GENERAL AND OTHERS 413 of 2005** Justice Nyamu in considering this issue considered the decision in case of **TETTWEMMANG v. ARIONG & OTHERS (1987) LRC Const 517** at page where Maxwell CJ. At page 599 held;

**“Dealing now with the question can a private individual maintain an action for declaration against another private individuals on individual for individual for breach of the fundamental rights provisions of the constitution. The rights and duties of individuals and between individuals are regulated by private law. The constitution on the other hand is an instrument of Government. It contains rules about the Government of the country. It is my view therefore that the duties imposed by the constitution under the fundamental rights provisions are owed by the government of the day to the governed. I am of the opinion that an individual or group of individuals as in this case, cannot, owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a Group of individuals since no duty can be owed by an individual to another or individuals under the fundamental rights provisions of the constitution, no action for a declaration that there has been a breach of duty under the provisions can be or be maintained in the case before me, and I so hold.”**

What the above quotation means is that fundamental rights are available as against the government and the constitution’s function is to define what Constitutes Government and it regulates the relationship between the Government and those governed. The rights of the individual are taken care of under private law.

In the **KBS CASE** Justice Nyamu observed and which observation I am in agreement, that an exception to the above rule is where Companies or Corporate bodies are created under a statute and can be said to be a state agents.

In the present case the K.P. & L. Co., though a Limited Liability Company, is a licensee under the Electric Power Act Cap 314 Laws of Kenya. It is a Government parastatal. It is my view that it would fall under the exception and a declaration of breach of fundamental rights can issue against it. In the circumstances however, the court finds that the plaintiffs did not prove that the defendants breached the provisions of the Employment Act. If the declarations were to issue it would amount to the court rewriting contracts for the parties which would not be contracts. For a contract to exist, the parties must mutually agree to the terms, an offer there should be acceptance and consideration.

As harsh as it may seem, because the defendants being a company, have more bargaining powers as opposed to the plaintiffs, yet if the court were to grant the declarations, it would be rewriting the law of contract and the Employment Act. Unless our law is amended, the contracts entered into by the plaintiffs and defendants are in accordance with the Employment Act and there is nothing unconstitutional about them. The contracts could not have been ordered to run retrospectively as prayed.

In the end I find that the plaintiffs have failed to prove that they are entitled to the declarations sought and this suit is hereby dismissed. The plaintiffs were dismissed from their temporary employment following the filing of this suit. I think it fair to order that each party bears their own costs.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of June 2006**

**R.P.V. WENDOH**

**JUDGE**

**In presence of**

Mr. Marangu for Plaintiffs

**Mr. Thuita for Respondent**

**Ojijo CC**