



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 948 of 2003

ISMAEL OMBATI OCHIENG & 9 OTHERS.....PLAINTIFF

VERSUS

KENYA TEA DEVELOPMENT AUTHORITY.....RESPONDENTS

JUDGMENT

I: PROCEDURE

1. On 8th February 2006, the Hon. The Chief Justice nominated me to hear this constitution reference which involves master/servant relationship. The suit that was originally filed by the servants on 11 September 2003 sought a declaration from the High Court of Kenya that:-

“The decision to cause their (staff) early retirement was unlawful and breached section 74,80 and 82 of the Constitution of Kenya.”

That the court order the defendant.”

“M/s Kenya Tea Development Agency Limited.” to pay all their dues and entitlement and or be reinstated in their jobs by the defendant”.

2. The defendants entered appearance and filed defence inter alia, that they were unable to fully plead to the plaint as the names of 124 employees were not disclosed. Full particulars were required. This was true. The plaintiff disclosed only ten names of the employees and stated that the plaintiff Ishmael Ombati – represents the 133 other defendants and himself in this suit. The defendants filed a notice of motion dated 26 January 2004 seeking the striking out of the suit for non-compliance of Order 1 rule 12 (1) and (2) Civil Procedure Rules, namely that the plaintiff did not seek written authority from the other plaintiffs to file the suit on their behalf including the nine named in the plaint.

3. When the plaintiffs realized this, instead of withdrawing this suit and filing a fresh suit and, if time barred, seek leave of the court to file suit out of time, the plaintiff filed a constitution reference under section 84 of the Constitution. The grounds of objection filed by the plaintiff on 18 March 2004 stated that there was no time limit to filing the appropriate authority to sue on behalf of the other purported plaintiffs. Nonetheless, by filing a constitution reference after a plaint has been filed, under the “Chuga rules”, it automatically stayed all proceedings before the High Court and removed the suit to the “Constitution and Judicial review bench.” It is there that this reference was referred to me for hearing and determination.

4. Since the “chungu rules” the “Gicheru rules” were enacted that removes the requirement of stay of proceedings. Under the “Chungu rules” which this reference is being heard, the issue of the courts jurisdiction cannot be raised in hearing this matter on grounds that the proceeding are stayed based on the fundamental rights of the plaintiffs. My task is to hear and determine two distinct matters and to interpret the same. These two points are:

II: Constitution Reference

5. That this court determines the question relating to the breaches of the plaintiffs/applicants fundamental rights and freedoms and further seek.

“(I) An order that legal notice No.44 by the Minister for Agriculture made on 22 March 1999, styled the Kenya Tea Development Authority (revocation) order 1999, contravenes and accordingly is inconsistent with and ultra vires, section 107 of the Constitution of Kenya to the extent that it purport to remove the applicants from the public service in breach of that section and or law made pursuant to that section and is accordingly null and void and incapable of being the basis upon which the defendant derives its purported authority including the authority to retire and/or dismiss the plaintiffs from their employment.

“(II) An order consequential upon para (i) above that the decision to send [the] plaintiffs on ‘early retirement’ was a breach of the plaintiffs fundamental right to the protection of law guaranteed under section 70(a) of the Constitution of Kenya.”

III: Background

6. The Kenya Tea Development Authority was a government parastatal established under section 191 of the Agriculture by Legal Notice 42/1964. This was soon after Kenya became a Republic. Other orders made by the Minister were:-

LN 59/1964

LN 180/1964

LN 181/1964

LN 226/1965

LN 159/1966

And LN 167/1994.

7. The above legal notices was revoked by the then Minister for Agriculture, Livestock Development and Marketing by Legal notice 109/1967. This legal notice established an authority for promoting and fostering the development of tea in the areas specified in the schedule of act. It established a board that included representatives of the licensed tea growers, the Permanent Secretary Treasury; the Permanent Secretary of the Ministry responsible for agriculture; Director of Agriculture; chair, Tea Board of Kenya and the Managing Director cum secretary to the board (section 6 LN 109/97).

8. Powers of the authority include to prepare and carry out schemes for the development of tea purchasing, cultivating seeds, inspection of growing tea, advance loans, operate factories, impose levies with the approval of the Minister concerned.

9. Sometime thereafter, the authority embarked on a liberalization and restructuring of the small – holder Tea Sub-sector. The aim was to privatize the authority which had been incorporated under the Agriculture Act Cap.318 Laws of Kenya. As a government of Kenya authority it fell within the state Corporation Act Cap.446 Laws of Kenya. By liberalizing the said authority, its further intention was to place the ownership into the hands of the small-holder tea farmers.

10. The Minister of Agriculture Musalia Mudavadi, acting on the alleged advice of the board, issued gazette notice No.44 under the Agriculture Act Cap.318, section 192 (4) that gave the Minister powers to issue revocation orders and proceeded to so revoke the existence of the Kenya Tea Development Authority and create a new body which is a limited liability company and in fact, the present defendant herein.

11. Section 3(1) The Kenya Tea Development Authority (revocation) order 1999 reads:-

“Kenya Tea Development Authority SHALL incorporate a limited liability company under the provisions of the Companies Act for the purpose of bringing the provisions of this order into operation.

(2) [That] the company shall be the successor of the Kenya Tea Development Authority and, subject to this order, all rights, duties obligations assets liabilities of the Kenya Tea Development Authority existing on the appointed day shall be automatically and fully transferred to the Kenya Tea development Agency Limited and any reference to the Kenya Tea Development authority in any contract or document shall for all purpose be deemed to be reference to the company.”

12. The Minister was in effect dissolving the authority on the powers given to him by the Agriculture Act section 192(4) which he is of course permitted to do but declaring that the authority, which he had accordingly dissolved, must form a limited liability company. Before the said company was actually formed, it implied that at a particular time there may not have been in existence any legal entity. The proposed limited liability company was to accordingly receive, by transfer, all the liabilities of the authority that had been incurred:-

Section 6 (f) of the legal notice states:-

“Whereby the operation of the provisions of this order, any right liability or obligation becomes a right liability or obligation of the company, all other persons shall on and after the appointed day have the same rights, and powers as to taking or defending any legal proceeding or any application to any authority for ascertaining perfecting or enforcing that right liability or obligation as if it had at all times been a right liability or obligation of the company.”

IV: What then happened to the staff?

13. Under section 8 of the revocation order they immediately became the employee of the new proposed limited liability company.

“8 (1) Any person who is employed by the Kenya Tea Development Authority immediately before the appointed day shall on the appointed day become an employee of the company on the same terms and conditions and subject to subsisting notice of termination resignation or variation and such employment with the Kenya Tea Development Authority and the company shall be deemed to be continuous.”

(Emphasis my own)

14. The advocate for the defendant/respondent conceded from the bar that all the staff were continuously employed by the defendant being the new limited company (although, it is unclear whether the defendant was incorporated with articles and memorandum of association duly registered or whether the revocation order actually (which may be denied) created the limited company)

15. According to the original defence filed:-

“The company was doing badly which had eroded into ... its pay roll [and unable to continually] sustain [the workers]”

Therefore the dismissal of the workers.

v) The Disputes

16. Three (3) years later on 10 December 2001, the new company known as the Kenya Tea Development Agency Ltd wrote a letter to the plaintiff Ismael Ombati, purporting to terminate his service. This letter was reference

“Early retirements from the agency

Employment Services (management)

It stated that it would award the 1st plaintiff a three month pay in lieu of notice, a golden hand shake of Ksh.150,000/- and pay of two months salary for every month basic salary, was to be paid. The 1st plaintiff had been in employment for 20 years continuous service.

17. The plaintiff filed suit almost a year later challenging the dismissal stating that it was unlawful and in breach of the constitution of Kenya.

iv) Arguments by the Advocate for the plaintiff

18. The plaintiffs advocates argued that the Minister had no right to create a new body from an “authority to a limited liability company”. The effects of this was to remove the workers from being civil servants to be employees in a private company. The Minister had no powers to do this. The only person who had powers to change the status of the employees was the Public Service Commission Section 107 of the Constitution gives this power to no one else. Further the Public Service Commission Act Cap.185, the employees of the public service include employees of parastatals and therefore the plaintiffs. This is because section 13 of the Public Service , the rules and regulations rule 1(2) apply to them (with the exception of the employees in the Kenya police and the Kenya Prisons Service)

19. The plaintiffs constitution rights had therefore been breached on the right to be heard, the right to be protected from inhumane treatment and of being discriminated upon (section 80,74 and 82 of the constitution refers).

The case law of:-

Geoffrey Muguna Mburugu V Attorney General

Nairobi Hccc 3472/94 Nairobi

Ojwang J Ag J. (Unreported)

Was referred to whereby the plaintiff was an employee of the Kenya Government. His services was terminated on basis of a report made by donors on a government project. The plaintiff had not been given a chance to be heard and defend himself of the allegations despite writing letters to explain his non-involvement in misappropriation of project funds. The court held that he was unlawfully dismissed and gave declaratory orders that the dismissal was a nullity.

20. The advocates in this constitution reference therefore stated that if the court determines the constitution reference, the whole suit would be determined. He prayed that I declare the dismissal of the plaintiffs a nullity.

VIII Arguments by the defendants

21. The defendant stated that the issue before this court is whether the plaintiffs (only one to ten of them) are “Public Servants?” According to him, the plaintiffs are not Public Servants and are not entitled to the protection sort. The fact that they are referred to as public officers from the bar must first be proved in evidence.

22. Although under section 106 (2) of the constitution of Kenya, the commission shall “not be subjected to the direction or control of any other person or authority” the advocate for the defendant failed to point out that under section 107 (2) of the constitution this exercise may be delegated (implying delegated to the Minister)

23. Further Njuguna Muguna Mburugu v Attorney General (supra)

Involved a civil servant who was employed as a public officer in the Kenyan Government. The plaintiffs herein were employed in a limited liability company and that company had a right, from the agreements of contract to terminate that services of the plaintiffs. He sort that the reference be dismissed.

VIII Interpretation by the court

24. This is a constitution reference where I require to interpret the Legal Notice 44/99 issued by the Minister of Agriculture on 22 March 1999 as to whether it was constitutionally so issued or not?

25. It is not disputed that there existed the Kenya Tea development Authority, a state cooperation created under section 191 (1) of the Agriculture Act by powers given to the Minister, with the said state cooperation being fully owned by the government of Kenya. It is further not disputed that in order to effect liberalization within the tea industry certain legal notices were effected in 1997 which notices were repealed by Legal Notice 44/99 of the Kenya Tea development Authority (revocation order). The powers obtained by the Minister to revoke the existence of an authority under the Agriculture Act is contained under section 192 (4) that reads:-

“The Minister may, by order in the Gazette, amend or revoke an order, and any order of revocation may provide for winding up the affairs of the authority and for distributing, transferring or otherwise disposing of the property and liabilities of the authority and for all such matters as appear to the Minister to be corrected with or incidental to the dissolution of the authority.”

26. The gazette notice 44/99 was accordingly issued on the 22 March 1999 as stated above. In this order, it described the revocation commencing or coming in force on the 1 January 2000. The company meant the Kenya Tea Development Agency Limited a limited liability company that was to be incorporated under the provisions of the Companies Act for “the purpose of bringing the provisions of the order into operation.”

Namely, that though the Kenya Tea Development Authority was technically being dissolved by the LN 44/99 order of the Minister which powers he fully had to so do, the Minister was in effect ordering that a Limited Liability company should be compulsory enacted as per clause 3 of his order. This therefore meant that the rest of the Kenya gazette would quietly take care of the assets and staff. Under Clause 3(2) of the Kenya gazette he further orders that:-

“The company (ie the proposed limited liability company) shall be the successor of the Kenya Tea Development Authority and subject to this order, all rights duties, obligations assets and liabilities of the Kenya Tea development Authority existing on the appointed day shall be automatically and fully transferred to the Kenya Tea Development Agency Limited and any reference to the Kenya Tea Development Authority in any contract or document shall, for all purposes be deemed to be reference to the company.

(Emphasis supplied)

27. I believe the interpretation of this clause is to state that though the Minister is dissolving a parastatal body, known as the Kenya Tea Development Authority, he in effect is ordering there to be a limited liability company to be incorporated under the Companies Act and thereafter the company once incorporated by the name of the “Kenya Tea Development Agency limited.” will then take over all contracts, documents, right duties obligations and assets including liabilities of the parastatal from the parastatal known as the Kenya Tea Development Authority.

28. During the submissions before me, none of the parties ever disclosed to me whether a limited liability company was actually incorporated. It could not have been before the issuance of the Kenya Gazette notice as the Minister has ordered that it be incorporated. It could only mean that it should be incorporated afterwards

29. Parties never took issues of the existence of the limited liability company. They therefore did not disclose to this court who the directors were. There was mention of small scale farmers in early authority (1997) being involved through a board but this was never elaborated. The other indication to show to this court that a limited liability company was active was an agreement entered into by the company together with the trade union known as:-

1999- 2000

Collective Bargaining Agreement

Between

Kenya Tea Development Agency Limited

And

Kenya Plantation and Agriculture Workers Union

That was actually signed on 31 January 2001 by the following parties:-

- i) The Managing Director of the Kenya Tea Development Agency Limited.
- ii) The Kenya Plantation and Agriculture Workers Union.

It was witnessed by

- iii) The Federation of Kenya Employers Senior Executive Officer
- iv) The Chief shop steward.

30. The Minister had no powers to incorporate a limited liability company. He did direct that one be incorporated but as stated above, there is no indication as to whether this actually was done or not. Between January 2000 to January 2001 when the collective agreement was signed the authority known as the Kenya Tea Development Authority did not exist.

31. The clause 8 (1) of the Kenya Gazette touched on the employees. The Minister made the following orders under section 192(4) of the Agriculture Act.

“Any person who is employed by the Kenya Tea development Authority immediately before the appointed day [1 January 2000] shall on the appointed day become an employee of the company on the same terms and conditions of service as his existing terms and conditions and subject to any subsisting notice of termination, resignation or variation and such employment with the Kenya Tea Development Authority and the company shall be deemed to be continuous.

(2)_____

(3) The operation of any of the provisions of this paragraph shall in itself give rise to any claim by any person to benefit under any scheme or fund referred to in sub paragraph (2)”

(Emphasis supplied)

32. The question therefore arises, Does the Minister have powers to declare the employment of the staff of a dissolved authority to be the staff of a limited liability company that had not yet been incorporated?

33. First and foremost, I quite understand the need by the Minister to wish to have a limited liability company. The purpose of forming a company is to ensure “its registration the information about the company has to be complied with and disclosed” A company must have documentation which had to be open for public inspection and scrutiny” “It has therefore been said that “disclosure of information is the best guarantee of fair dealing and the best antidote to mistrust.” (see Company Law, Simon Goulding 2nd edition Cavendish Publishing Ltd page 11; company Law Reform CMND 5391,1973 (para 65).

34. The objective of forming a company . . . inter alia . . . “must be to provide sufficient control on the persons forming and running companies, so that an outsider who deals with the company does not lose out unfairly as a result of fraud or sharp practices or abuse of the companies act” Company law Simon Goulding (supra).

35. Once the company was alleged to have been formed or alternatively the gazette notice issued, the staff of the former authority continued to work as if nothing had changed. The advocate for the defendant of the Limited liability company stated from the bar that the employees were all taken up and absorbed into the defendant company. This meant that the Minister took upon himself powers conferred upon the Public Service Commission under section 107 of the constitution:-

“Subject to this constitution, the power to appoint persons to hold, or act in offices in the public service and in the service of the local authorities (including the power to confirm appointments) the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove these persons from office SHALL VEST IN THE PUBLIC SERVICE COMMISSION

36. The plaintiffs had argued the Minister acted illegally in taking over such powers from the Public Service Commission. It is only the said commission who may determine the role of the employee once an authority has been dissolved.

37. The advocate for the defendant state that all the workers were NOT public officers and thus do not fall under the category of section 107 of the constitution. Indeed the case law referred to me on master/servant above actually involved civil servants in the main central government and therefore such authorities relied on by the plaintiff irrelevant.

38. I find that an authority such as the one dissolved/revoked by the Minister was a creature of the Kenya government. It was fully owned by the government and responsibilities of the staff laid with the government. The regulation even provided that if any disciplinary action were to be taken upon the staff that was criminal in nature, the staff would be treated in the similar manner as were civil servants. The employee of a parastatal and or authority are public offices but their employment derives directly from that parastatal or authority. The main stream central government hire and discipline the staff known as civil servants. They too are public officers. Under the Public Service Commission the following officers are exempted from the dealing with the Public Service Commission:-

- i) The office of judges of the High Court or Court of Appeal**
- ii) The office of the Attorney General**
- iii) The office of Controller Auditor General**
- iv) . . . Permanent secretary to the Directorate of Personnel, the Commissioner of Police**
- v) Ambassadors, High Commissioner or Principal representative of Kenya to other countries.**

- vi) The Judicial Service Commission – and office related therein.
- vii) An office in the Kenya Police force.

39. I hold that the staff of a parastatal and or authority are public officers.

40. If per chance the employees in effect are not in control of the Public Service Commission, which is denied by this court, the procedure under any Employment Act Cap.226 Laws of Kenya is that the employee may have been declared redundant section 16A. This required that the labour officer would be notified and the due pay and benefits be made. Namely, for the dissolving of one company and creating a new company even if the names remain the same but the directors and of management change there must in effect be the severance of all the employees and termination of employment. Their benefits must therefore be paid. Thereafter a new contract would be entered with the required staff on all new terms and conditions of service with the new employer. Their service would not be continuous.

41. The Trade Union appear to understand this as they entered with the defendant (The new Company) into a collective agreement. The new company purported to have entered thereafter into a new agreement with each of the new staff. Once this was done, they alleged (from the bar) that as a limited liability company they had a right to employ and sack the staff from the former authority. The ten staff/applicants were sacked/dismissed after a seminar was given to them explaining “why they had to go?” was held. The reasons the defendant company wished to do so was to relieve the employees due to:-

“re engineering and restructuring process within the company.”

As a result the applicants were offered till 10 January 2002 (having worked less than 12 months) as their last day of service. They were informed that they would:-

- a) Obtain their leave on a pro rata basis
- ii) Pay in lieu of 3 months notice
- iii) Severance pay of 2 months basic salary
- iv) A golden hand shake – Ksh.150,000/- for plaintiff No.1.
- v) and a refund of contribution on their pension scheme”

42. All along the applicants understood that they were public officers to be so employed till the age of 55 years old. They understood that there would be no termination of their employment from the former authority to the new Limited Liability company.

43. The Minister by including section 8 in the LN44/99 of transferring the staff from the authority that he revoked to a propose limited liability company was actually creating a situation found in the Employment Law of UK known as the TRANSFER OF UNDERTAKINGS (Protection of employment) Reg. 1981. This law “creates a situation where it is as if the original contract of employment was agreed with by the new employer. Thus an employees’ period of service will transfer to the new employer. When the trade business or undertaking is transferred to a new employer their continuity is also prescribed by section 218(2) ERA 1966 and the employees length of service moves to the new employers although as pointed in Nokes v Doncaster Collieries (194) AC 1014 HZ this is likely to require the knowledge or consent of the employee.” (Employment Law, Malcolm Sergeant, Peason Education Ltd 2001).

44. Unfortunately none of the advocates addressed me on the point as to whether Kenya has similar laws? From the research undertaken I have not come across a similar legislation in Kenya.

Without the existence of a law the Minister had no powers of transferring staff who are public officers to a limited liability company. That act was an illegality.

45. It can be argued that this is a constitution reference and the applicants are agitating their contractual rights at a wrong forum. They should therefore go back and deal with the contractual issues with the trade unions and their employers.

46. In the case law of:-

Richard Nduati Kariuki V Hon. Leonard Nduati Kariuki, Kariuki Enterprises Ltd

Misc. Application No.7/2006 (OS)

Nyamu, J. (unreported)

Where a constitution reference touching on a succession matter arose between two sons the applicant and the respondent respectively following the demise of their father and the Limited liability company that is a family business company allegations were made that the fundamental rights and freedoms had been violated by the family company and one of the brothers.

The court rightly held that the fundamental rights and freedoms under the constitution is owned by the state to all persons. Namely, that the responsibility of the violation of fundamental rights and freedoms are vested in the state and as such only “vehicle” guarantees are recognized under the constitution. The relationship of the parties were horizontal and should therefore be dealt elsewhere and not in the constitution and judicial review court. The authority describes very well the relationship between the said two fundamental rights to be perused.

47. In this constitution reference section 107 of the constitution together with the legal notice 44/99 required to be interpreted. There is therefore a horizontal obligation by the government of Kenya to the plaintiffs.

48. The Minister had powers to revoke and dissolve the Kenya Tea Development Authority, under section 192(4) of the Agriculture Act Cap. 318 Laws of Kenya. The reasons he did this was to allow for the liberalization and privatization of the tea industry giving it greater transparency.

49. His role should therefore had stopped there save to give directions as to the assets, liabilities and staff who should have been returned to the central government and or dismissed. Thereafter “the new company” would acquire the assets, liabilities and employ the same staff under their terms if they so wished. Instead, the Minister created an environment whereby a limited liability company would take over the assets, liability and all staff even before the said limited liability company was incorporated in 1999/2000. The government continued to pay their salary till 2001 at the signing of the agreement with the union.

50. If the governments intention was to have a limited liability company take over the assets and liabilities there must be an enabling act of Parliament or regulations to do this as is in the case of UK Employment Law (supra above). In absence of this an agreement to the effect that the Limited liability company having its own distinct corporate personality must be entered into. As stated earlier, I do not clearly know who the share holders of the new company are nor what they do. The company must now have been incorporated otherwise the locus of the defendant who has been sued would be questioned.

51. The Minister required to have sorted the issue of the staff first before dissolving the authority. The other alternative he had was to hand over the staff back to the central government for placement elsewhere or retrenchment. Thereafter could a new company employ the staff.

52. I believe that the difficulties faced by the defendants was

Inheriting a large workforce that it may have become unprofitable to gain and keep the staff. That of course negates the main purpose in which the Minister revoked the existence of the authority.

53. The defendant company terminated the plaintiffs employment. This is not retrenchment but actual dismissal. Termination must be by mutual consent where a company wishes to reduce its workload of employees. It has been said that it “takes the form of a financial inducement in excess of any statutory entitlement to make it attractive for employees to resign. “Termination by agreement is to be consistent with a free mutual consent, bringing a contract of employment to an end” Employment Law (supra)

54. The defendant company is in fact the same creature as the authority. They cannot therefore shun away from the responsibility of the staff.

55. I would though state that it was as a consequences of the contravention of the constitution through the orders of the Minister transferring he staff of the former authority that was dissolved to a limited liability company without any legal framework in place. This later resulted into the termination of the terms and conditions of the employment of the staff. The action by the Minister as stated earlier was a consequence of the termination of employment of the applicants who believed their employment was guaranteed up to the age of 55 years old subject to disciplinary act or retrenchment not by the Minister but by the authority and or commission.

56. For ease of reference I accordingly uphold this constitution reference but as relates to Ismael Ombati, the original 1st defendant only. 57. In Summary

57.1 Master/servant

57.2 Constitution reference

57.3. Whether the minister of Agriculture had power to declare a parastatal a limited liability company under LN 44/99?

57.4. Whether the issue of servants was “to continue in a limited liability company as employees of the new company without breach in their terms and conditions of employment?

57.5 Constitution reference filed under “Chunga rules” that LN44/99 is ultra vires null and void under section 107 of the constitution and as a consequences the plaintiff early retirement was in breach of section 70(a) after the constitution.

57.6. Held:

i) That the minister had powers to dissolve the authority under section 192(4) of the Agriculture Act Cap 318.

ii) That the minister exceeded his powers in declaring all staff of the authority (section 8 of LN 44/99) to be the staff of a new limited liability company, not incorporated.

iii) The new company is a creature of the authority created and or intended to retain the same staff.

iv) The powers to declare the staff no longer public offices to private company laid elsewhere. There was therefore nothing to show that the Minister was given powers delegated by the law or Public Service Commission to deal with staff.

v) The constitution reference be and is hereby allowed with costs to the applicant No.1 only.

Dated this 29th day of November 2006 at Nairobi.

M.A. ANG'AWA

JUDGE

Gitobu Imanyara & Co. Advocates for the applicant

Waruhiu K'owade & Nganga Advocates for the defendants