



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 746 OF 2004

STANLEY KAMANGA NG'ANG'A.....PLAINTIFF/APPLICANT

VERSUS

THE KENYA NATIONAL LIBRARY

SERVICES BOARD..... DEFENDANT/RESPONDENT

RULING

I. SEEKING TO INHIBIT DEPRIVATION OF PUBLIC OFFICE AND BENEFITS,

PENDING DETERMINATION OF EMPLOYMENT DISPUTE: THE

PLAINTIFF'S PRAYERS

Against the background of the plaintiff's suit by plaint dated 5th July, 2004 he filed on even date an application for interim relief. This was by Chamber Summons brought under Order XXXIX, rules 1, 2, 4 and 9 of the Civil Procedure Rules.

The application carries prayers which may be set out in summary as follows:

- (i) that, a temporary injunction do issue restraining the defendant by itself or otherwise, from transferring, retiring, or dismissing the plaintiff from his employment, terminating or interfering with his employment pending the hearing and determination of the suit;**
- (ii) that, the defendant be restrained from withdrawing any of the benefits attached to the plaintiff's employment – in particular his salary, house and other allowances, chauffeur-driven car, guard and gardener, house and mobile phones – until the suit is heard and determined;**
- (iii) that, the defendant be restrained from filling the post of Director/Chief Executive Officer pending the hearing and determination of the suit.**

The grounds forming the premise of the prayers to inhibit the Kenya National Library Service Board in taking new employment decisions, pending the resolution of the plaintiff's grievances, may be set out as follows:

- (a) the defendant has already put out an advertisement seeking to fill the post held by the plaintiff, yet the plaintiff's contract of employment has not been terminated, altered or varied;**

(b) the defendant intends to withdraw the plaintiff's entitlements under his contract of employment;

(c) the Head of Public Service has already purported, by his letter of 27th January, 2004 to transfer the plaintiff from his employment as chief officer of the defendant, and the transfer decision has already been followed up by a letter dated 5th February, 2004 from the Permanent Secretary for Gender, Culture and Social Services purporting to transfer the plaintiff to the Ministry of Trade;

(d) the purported transfer of the plaintiff from his current employment is a demotion, and amounts to a disciplinary action which has not been carried out in accordance with the law;

(e) the purported transfer of the plaintiff from his current employment is being conducted without giving him a hearing;

(f) the plaintiff does not accept the purported transfer from his current employment, and he has challenged that decision in a pending action, *Miscellaneous High Court Application No. 612 of 2004*;

(g) the defendant's decision to replace the plaintiff in his employment is in breach of the plaintiff's contract of employment;

(h) the plaintiff stands to suffer irreparable loss and harm to his livelihood, career and reputation if he ceases to hold his position in the employ of the defendant.

The plaintiff has made depositions as evidence to support his application. He avers that the defendant had advertised a vacancy, in the office of Director, in the Kenya Times of 8th March 1989 and invited applications for the same. He depones that he had taken up his appointment with the defendant through a competitive selection process which ended with his letter of appointment, as Director, dated 4th August, 1989. In addition to the said letter, the deponent avers:

“My said appointment was approved by the Minister of Culture and Social Services as required by the Kenya National Library Services Board Act (Cap. 225).”

The post carried certain benefits and was pensionable under the defendant's superannuation scheme. It was stipulated that the appointment may be terminated by three months' notice on either side, or three months in lieu of notice. The plaintiff accepted the appointment by signing the contract and he took up the appointment in August, 1989. He thereafter, by his own assessment, “rendered services diligently, dutifully and with zeal and ...made tremendous contribution to the growth and development of the Kenya National Library Services...”

The plaintiff depones that he was surprised at a general Government circular letter dated 27th January, 2004 emanating from the Permanent Secretary, Head of Public Service and Secretary to the Cabinet. This circular letter was making widespread management – staff changes in the Public Service; and one of those affected was the plaintiff, the entry against his name (serial No. 13) reading thus:

“From the Ministry of Gender, Sports, Culture and Social Services (Kenya National Library Services) to the Ministry of Trade and Industry (KIPO) as Chief Documentalist/Information Officer.”

This directive was followed up with a more specific letter from the Permanent Secretary in the Ministry under which the plaintiff worked, in her letter of 5th February, 2004. This letter, addressed to the plaintiff, reads in part as follows:

“This is to inform you that the Permanent Secretary/Secretary to the Cabinet and Head of the Public Service in his letter Ref. No. OP. 6/11A Vol. XVII dated 27th January, 2004 has posted

you to the Ministry of Trade and Industry (KIPO) as Chief Documentalist/Information Officer.

“You should therefore make arrangements to report to your new station on 23rd January, 2004 for deployment.

“Please make the necessary arrangement to hand over to Mr. S.M. Maitha, Deputy Director.

“May I take this opportunity to thank you very much for the services you have rendered to this Ministry.”

The deponent disagrees with the Permanent Secretary’s supposition that she could transfer the plaintiff as she attempted to do by her letter of 5th February, 2005. He perceives that letter as “arbitrary, whimsical and without basis or justification.” In his own words:

“I am an employee of Kenya National Library Service and as such, not available for [being transferred] or liable to be transferred by the Permanent Secretary Office of the President and/or the Permanent Secretary Ministry of Gender, Culture and Social Services.”

The plaintiff avers that he is not an employee of the Public Service Commission as established under the Constitution, and his transfer to the position of Chief Documentalist/Information officer in the Ministry of Trade and Industry, “in essence...amounts to a fresh appointment to a *job for which I never applied...*” He avers that the defendant has never dismissed him from his job, and that the defendant has no power to sanction or authorise his transfer to another employment. He depones that his transfer is a demotion, or “an expression of lack of confidence in my performance as Director of the Kenya National Library Service without assigning any reason...” He depones that the transfer “tends to reduce my stature in the eyes of local and international professional colleagues and in the eyes of the public at large.”

The plaintiff avers that he had, by letter dated 20th February, 2004 applied for and had been granted *annual leave* which was to run till 7th June, 2004 – and this request had been approved by the parent Ministry of the Government.

The deponent deposes that on 9th February, 2004 he had written to the Permanent Secretary Ministry of Gender, Sports, Culture and Social Services seeking “clarification and further guidance” on the purported transfer. He wrote a letter similarly seeking clarification from the defendant, on 20th February, 2004. In neither case did he receive a response. He deposes that on 8th June, 2004 the defendant advertised a vacancy in the post of Director of the Kenya National Library Services, in the *Daily Nation*, and that this was contrary to the terms of his own contract. The plaintiff depones that the *defendant* has not at any time material to the suit, terminated his appointment as provided in his contract of employment or at all.

The plaintiff avers that on or about 22nd June, 2004 he had established that the defendant intended to withdraw all the benefits due to him under his employment contract.

He believes such intention on the part of the defendant to be actuated by ill-will or malice; and he annexes a large amount of documentation showing such personal interests, in high offices of government, as may have created the momentum for his removal from the Kenya National Library Service. He avers that he will suffer much loss and harm in his reputation and standing as a professional librarian, if his transfer from the defendant’s employ is effected. The intended transfer, the plaintiff further deposes, will also lead to the withdrawal of all the benefits attached to his present contractual position, and to his detriment.

II. THE DEFENDANT’S RESPONSE

In a replying affidavit dated and filed on 10th August, 2004 **Mrs. Deborah A. Nyabundi** who is the acting Director of the Kenya National Library Service, depones that the circular letter from the Head of Public Service dated 27th January, 2004 had transferred several officers “to various offices within the Government and one such officer was the applicant...” The deponent expresses her awareness that the

applicant was challenging the transfer through a *judicial review* application, namely *Miscellaneous High Court Application No. 612 of 2004* which was pending before the Court. She expresses her belief that the instances of ill-will cited by the applicant as the basis of the plaintiff's transfer, did not in any way annul the transfer which had been *effected by the Head of Public Service* on 27th January, 2004. On 5th February, 2004 the defendant had already released the applicant's personnel file to the Ministry of Trade, where he was expected to report at the expiry of his leave. The deponent averred that the defendant had acted diligently to effect the direction of the Government carried in the said letter of 27th January, 2004 from the Head of Public Service. She annexes a clarifying letter from the Permanent Secretary/Director of Personnel Management dated 8th April, 2004 and addressed to the Secretary/Chief Executive of the Kenya National Library Service. The letter thus reads in part:

"I wish to offer the following clarifications ...that the transfer/redeployment has been done by the Government, being the overall authority on employment/deployment of Chief Executives, Chairman and members of various Boards, Councils and Committees. It is not therefore in the powers of your Board to discuss or challenge the move. Mr. Ng'ang'a is also required to take up his new assignment immediately and raise any issues with the Permanent Secretary in charge."

To indicate the defendant's formal stand regarding the transfer of the plaintiff to the Ministry of Trade, the deponent exhibits the *Minutes of the 94th KNLS Full Board Meeting held on Thursday, 8th April, 2004 at the KNLS Headquarters*. Extracts from these Minutes may be set out here:

"Report of the Sub-Committee [of] the Full Board on the posting of Mr. S.K. Ng'ang'a (former Director and Chief Executive Officer) to the Ministry of Trade and Industry

"The Human Resource Management and Development Committee had received the above report. The Committee had deliberated on the report and had recommended the following to the Full Board for adoption and/or approval.

1. The Committee observed that information on the government changes and redeployment of its officers was relayed to the Board by the Minister in his address to the Special Full Board meeting on 27th February, 2004...

2. Mr. Ng'ang'a was employed by the Board on 25th July, 1989 under its conditions of service. Mr. Ng'ang'a served the Board satisfactorily for nearly ... 15... years and during his tenure the Board realised all-round expansion. The Board had no problem with Mr. Ng'ang'a's performance as Director and Chief Executive Officer.

3. The changes affecting Mr. Ng'ang'a and his re-deployment were made by the Government and indeed the Committee noted that his new employer had requested for information on Mr. Ng'ang'a's terms of service including his remunerations vide letter Ref. No. MTTT I/31/03/(277) dated 19th March, 2004. The Committee recommends that the Board provide the information accordingly. 4. The Committee further observed that although the Board had the responsibility to hire and fire its employees according to the KNLS Board Act, the decision to redeploy Mr. Ng'ang'a did not originate from the Board.

5. The Committee also noted that Mr. Maitha had already taken his terminal leave but was recalled to take over from Mr. Ng'ang'a...

This was noted and approved by the Special Full Board held on 27th February, 2004. The Committee therefore recommended that Mr. Maitha be paid his terminal leave days and remunerations in accordance with the Board's Staff regulations.

6. The Committee also...recommended that a special request be made with the parent Ministry for Mr. Maitha to be retained on contract for a period of one year.

“MIN. 8/2004: DELIBERATIONS OF THE BOARD

“The Full Board was informed that the Ministry for Gender, Sports, Culture and Social Services had written to the Directorate of Personnel Management for guidance on the issues raised by *Mr. Ng’ang’a* about his transfer to the Ministry of Trade and Industry...

“(i) The Full Board after digesting the letter from the Directorate of Personnel noted that *it had not [contravened] its mandate...*

(ii) The Full Board...noted that the Board had discussed and covered themselves in matters pertaining to law...

(iii) The Full Board was not discussing the Government’s decision, but only Mr. S.K. Ng’ang’a’s point of exit to the Ministry of Trade and Industry.

(iv) The Full Board also noted that *Mr. S.K. Ng’ang’a* ceases to give service to the Board on 7th June, 2004 when his leave ends. The Board has therefore not challenged the transfer.”

In their recommendations, the Full Board agreed to pay *Mr. Ng’ang’a’s* benefits. The Board “observed that *Mr. Ng’ang’a’s* services with KNLS ended on 29th January, 2004 when he received his posting.” The Board “noted with concern that Mr. S.K. Ng’ang’a had not handed over to *Mr. Maitha.*”

In her affidavit *Mrs. Nyabundi* averred that since the plaintiff had been duly notified of his transfer to the Ministry of Trade and Industry, the defendant could not reasonably have been expected to formally terminate the plaintiff’s services, *as it was clear to him from the beginning that he was proceeding on leave prior to reporting to that Ministry.*

The deponent avers that the defendant had not been in breach of the employment contract with the plaintiff, but had merely implemented a directive from the Permanent Secretary and Head of Public Service; and hence any grievance the plaintiff may have should only be dealt with in High Court Miscellaneous Application No. 612 of 2004 (judicial review). She avers that the applicant has omitted to state in his affidavit that the underlying understanding as he proceeded on leave was that he would be reporting not to the Kenya National Library Service, but to the Ministry of Trade and Industry. She depones too that the defendant had omitted to state in his affidavit that by the time he filed suit, on 8th July, 2004 he had not performed any duties as Director of the Kenya National Library Service since going on leave in January, 2004, and his transfer to the Ministry of Trade and Industry had been effected while he was on leave. The deponent averred that the defendant had paid salary and benefits to the plaintiff up to and including 7th June, 2004 when his transfer became effective. She further deponed that the losses complained of by the applicant can easily be quantified and compensated pecuniarily. She averred that it was the intention of the defendant to recruit a suitably qualified person to fill the post of director, in conformity with the Kenya National Library Service Board Act (Cap. 225).

The defendant also filed, on 29th July, 2004 a set of grounds of opposition. It was contended that the applicant was seeking orders which the Court had no jurisdiction to grant; that the orders sought would, if granted, compromise the application of the Kenya National Library Service Board Act (Cap. 225) and the State Corporations Act (Cap. 446); that the applicant had not shown a prima facie case with a probability of success, or that damages would not be an adequate remedy; and that the application is frivolous and an abuse of the process of the Court.

III. SUBMISSIONS FOR THE PLAINTIFF/APPLICANT

Learned counsel, *Mr. Wachira*, submitted that the plaintiff had been *employed by the defendant* and nobody else – his letter of employment being dated 4th August, 1989, bearing the terms of service, and proclaiming that “The Board of Directors, Kenya National Library Service is pleased to offer you appointment to the post of Director with effect from 25th July, 1989.” He submitted that as the defendant was the plaintiff’s employer, the letter from the Head of Public Service and making Central Government

postings, dated 27th January, 2004 had no bearing on the *contractual obligations* attached to the employment relationship between the defendant and the plaintiff. Yet, counsel submitted, it was precisely on the basis of that irrelevant letter that the defendants had now purported to terminate the plaintiff's employment. Learned counsel contended that the defendant was a *body corporate* and it was strictly within that juristic identity that it had engaged the plaintiff as its Director; and besides, the plaintiff had earlier relinquished his employment with the Government in order to take up his position as Director.

Mr. Wachira stated from the depositions that the defendant had not terminated the plaintiff's employment, but it had terminated his *remuneration and benefits*. Termination of employment, counsel submitted, would have had to be effected *under the terms of the contract*; and so the plaintiff was praying that the Court should restrain the defendant's interference with the plaintiff's *access to his office*. This was a remarkable contention, in respect of which the Court will make a finding: *whether an employee deliberately denied access to his office by the employer, ought as a matter of law to be reinstated so that he continues to serve the employer who has been barring him*. Counsel submitted that so long as the plaintiff's employment is not terminated in accordance with the contract, the defendant was acting unlawfully in terminating his salary and benefits, and in not allowing him into his office for the purpose of carrying out his duties. There was no basis, counsel submitted, for denying the plaintiff his compensation and benefits.

Mr. Wachira submitted that the plaintiff had a *prima facie* case with a probability of success. He urged, from the depositions, that the plaintiff was a diabetic and required constant medication, and in these circumstances he stood to suffer irreparable loss. The plaintiff, besides, had commitments, such as mortgage repayment over his matrimonial home, and educational-fee commitments for his children.

Learned counsel submitted that only the defendant could lawfully terminate or vary the plaintiff's terms of employment, given its corporate status. For this proposition he cited in support this Court's decision in **Dr. Joseph arap Ng'ok v. Attorney-General & Investment Promotion Centre**, Civil Suit No. 565 of 2004. Reliance was placed on the passage cited in that decision, coming from **Attorney-General v. Kenya Commercial Bank Ltd** HCCC No. 329 of 2001, in which Ringera, J. had remarked:

"...to accept the submissions of the Attorney-General to the contrary would be tantamount to judicial amendment of the clear words of section 3(1) of the Irrigation Act which provide that the Irrigation Board shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, and doing all things necessary for the proper performance of its duties and the discharge of its functions under the Act. Such a naked usurpation of the legislative function does not appeal to me. I think it is a temptation to be firmly resisted."

In the **Kenya Commercial Bank case**, as in the **Joseph arap Ng'ok case**, the question was whether the Attorney-General — the Government's legal advisor — was the proper counsel for an incorporated state corporation; and in both it was held that he was not. How does this relate to the plaintiff's instant application? Counsel could have canvassed this point more effectively. I don't think those two cases and the present one are about precisely the same thing. In the instant matter the question is whether the applicant, in view of the nature of his employment, was well and truly alienated from the governmental *scheme of employment*, so that his employment was now wholly dependent on (i) the Kenya National Library Service Board; and (ii) his contract of employment with that Board. Was it within the *contemplation of the law and of regular practice*, that the head of the entire public service and/or the head of his "parent Ministry" could take decisions impinging on his contract with the defendant?"

Mr. Wachira submitted that with regard to the plaintiff's gravamen, the defendant could not hide behind the central Government — as it was entirely responsible for all employment questions affecting the plaintiff. Against that background, it was argued, so long as the *defendant* had not yet taken the decision to replace the plaintiff as Director, his position remained open; and he was eager and willing to take up that position. Counsel invoked the proceedings in a contempt application brought by Notice of Motion dated 4th August, 2004 which had been decided on 11th February, 2005. Counsel remarked, in relation to the earlier application: "They said they were not in contempt; for they had not filled the [Director's]

position. Now they have to formally terminate the plaintiff's employment unless he retires". The significance of this contention goes back to the questions I posed earlier: *is the defendant and the defendant alone the person with legal authority to take decisions on the plaintiff's employment situation? And always by way of the specified contractual provisions? Or can the defendant take such decisions in a manner other than that specified in the letter of appointment?*

IV SUBMISSIONS FOR THE DEFENDANT/RESPONDENT

Learned counsel, *Mr. Koech*, submitted that the instant suit has been brought against the *wrong party* – because the transfer of the plaintiff from the employ of the defendant had been effected by the *Government*; and hence the suit should have been against the Attorney- General. It was contended that the defendant had done nothing in respect of which it should be restrained. It was argued that the design of the instant application is to urge that the defendant should defy the directives of the central Government - and that such is not a prayer that can be granted by a Court of equity. It was urged that interlocutory injunctive relief could not lie against the defendant who had done no wrong. For this principle the case, *Elite Studios Ltd and 9 Others v. Metro Plaza Ltd and Another*, Civil Case No. 203 of 2002 was cited. The relevant passages in the ruling of *Ringera, J* (as he then was) may be cited:

“An injunction is an equitable remedy which is in the discretion of the Court. It can only issue in favour of a party who can show that his legal and/or equitable rights have been or are in danger of violation by the unlawful acts or omissions of another party. In considering whether or not to grant interlocutory relief, the Court must be guided by the principles laid down in *Giella v. Cassman Brown & Co. Ltd. [1973] E.A. 358...*”

Mr. Koech submitted that what is complained of by the plaintiff as an unlawful act, had not been committed by a party to these proceedings — and therefore there was no basis for granting an interlocutory injunction. The point being made here, I believe, is that if there is something wrongful or unlawful, and which is the basis of the complaint, then its author is the Government — who is not a party.

Learned counsel submitted that so long as the direction by the Head of the Public Service, dated 27th January, 2004 remained in force and was not countermanded, the defendant was duty-bound to comply with it; and any challenge to it could only be through *judicial review*. It was urged that the plaintiff's application should have sought a mandatory injunction to compel the defendant to re-employ the plaintiff, instead of seeking a temporary injunction to restrain the defendant from withholding salary and other benefits. Such benefits, it was urged are attached to the position of Director, and they cannot be given in the present circumstances. Since the applicant had already been transferred, he should not, counsel urged, be seeking a salary.

Clearly, the defendant's position is that the transfer of the plaintiff to the Ministry of Trade and Industry was good in law, in every respect; the plaintiff had been lawfully transferred; he was no longer in the defendant's employ; the defendant no longer owed any contractual obligations to him. This raises a point of law which must be disposed of as a basis for concluding the instant matter: *what is the relative force of the contract of employment, on the one hand, and the authority of the Government acting through the Head of the Public Service, on the other hand, to deal with the incidents of the employment obligations?*

Learned counsel contested the claim that the defendant could be restrained from filling the post of Director – because it is a statutory position under s.6 of the Kenya National Library Service Board Act (Cap.225) and could not be made subject to any private contractual arrangements.

Mr. Koech doubted that any irreparable loss would come to the plaintiff if his prayers were not granted. He submitted that the plaintiff's convenience in dealing with his personal matters was not a matter contractual between the plaintiff and the defendant. Counsel urged that personal responsibilities were not contractual issues and bore no relationship to the defendant.

Learned counsel submitted that the plaintiff had been subjected to only a transfer and not a termination; and that the applicant was duty-bound to mitigate his hardship by taking up the position in the Ministry of

Trade and Industry.

Mr. Koech contested the plaintiff's canvassing of positive elements in his work experience, as a basis for the prayer for temporary injunction: "the applicant is in effect saying that he is the one required for the Director's office to function." Since the letter from the Office of the President had stated that the transfer decision was not to be challenged, counsel submitted, it was not right to ask the defendant to defy the direction.

Learned counsel attempted to distinguish the *Joseph arap Ng'ok case*: "The parties to that suit included the Attorney General; but here only the Board was sued."

Mr. Koech urged that if the plaintiff were found to have been damnified, then damages would be an adequate remedy, as in the plaint and the application, the affidavits bring out in specific, monetary terms the salary and the benefits such as would be of interest to the plaintiff. In the words of counsel, "this demonstrates that if the Board is found to have been wrong in complying with the Government directive, then damages will be easily assessed and paid."

V. FURTHER ANALYSIS — AND DETERMINATION

The defendant is established under the Kenya National Library Service Board Act (Cap. 225). It is a body corporate and is endowed with specified attributes of corporate personality (s.3); for instance it has perpetual succession and a common seal; it may sue and be sued; it is capable of holding, purchasing and otherwise acquiring, and disposing of any property movable or immovable for the purposes of , or in the course of, the carrying out of its functions. Although these are also the hallmarks of any corporate body, for instance a private limited company, or a limited co-operative society, the similarity ends there. The statutory corporation is set up essentially to perform public functions in respect of which, in broad terms, government has social responsibility. Thus, in the case of the Kenya National Library Service Board Act, the constitution and proceedings of the Board is provided for in a schedule which may be amended by the Minister (s.3). By s. 6 of the Act it is provided:

"(2) The appointment of the Director and his terms and conditions of service shall be subject to the approval of the Minister."

The Minister has further approval functions in the operations of the Board, including in matters of investment, accounts and audit, and the making of regulations.

So in the legislative design, the Kenya National Library Service though a juristic person, has public character and serves public cause under the *superintendency of a Minister of the Government*.

The main questions for determination in the instant matter are already clear, and may here be summarised as follows:

- (i) Is the employment of the chief executive officer of the Kenya National Library Service a pure matter of private contract in respect of which the Minister or the chief officer of the Government is a total stranger?
- (ii) Considering the statutory functions of the Kenya National Library Service, is it tenable in law that the exercise of its authority to initiate the employment of management staff, can be stayed by claims sounding purely in private law contract?
- (iii) If it is assumed that the Minister or the Government could transfer or retire a senior management employee of the Kenya National Library Service, would the defendant have the legal duty or capacity to countermand such action on the part of the Minister or the Government?
- (iv) Is the defendant, on the facts of this case, under a binding duty to ensure that the plaintiff

is reinstated as Director, and continually availed the benefits of that office, or is there an option?

(v) If a decision was taken to end the plaintiff's employment with the defendant, who took that decision? On the basis of what law? And who committed a wrong?

(vi) Is this a fit case for injunctive relief?

(vii) Is this a matter that is only fit for the judicial review jurisdiction?

Pure private contract, or contract of a public character?

A realistic view of contracts by a corporate body established to perform public functions would, I think, be that *such contracts must keep a balance between the legitimate interests of members of the public, on the one hand, and the exclusive private interests of an individual, on the other.* The public interests in the transactions engaged in by the Kenya National Library Service are clear from the statutorily-defined functions (s.4): promoting, establishing, equipping, managing, maintaining and developing libraries in Kenya; planning and co-ordinating library, documentation and related services in Kenya; advising the Government, local authorities and other public bodies on all matters relating to library, documentation and related services; providing facilities for the study of , and for training in the principles, procedures and techniques of librarianship and such other related subjects as the Board may from time to time decide; advising the Government on Library education and training needs for library, documentation and related services; sponsoring, arranging or providing facilities for conferences and seminars for discussion of matters in connection with library and related services; carrying out and encouraging research in the development of library and related services; participating and assisting in campaigns for the eradication of illiteracy; stimulating public interest in books and promoting reading for knowledge, information and enjoyment; acquiring books produced in Kenya and outside Kenya and such other materials and sources of knowledge necessary for a comprehensive national library; publishing the national bibliography of Kenya and providing bibliographical and references service.

A statutory body of such a highly specialised, intellectual – resourcing orientation, I believe, cannot operate like a private entity the services of which are directly profit-oriented, and which services are wholly claimed by named individuals in return for valuable consideration. Oversight of the overwhelming public interest in the remit of the Kenya National Library Service, must vest largely in the established management team at the first level of and the *national Government at the second level.* I therefore find and hold that the employment of the chief executive officer of the Kenya National Library Service is *not a pure matter of private contract, in the performance of which the Government is a stranger.*

It must be a contract in which the Government's oversight has an important bearing.

Can private contract nullify the claims of public interest?

From that position it must follow that the public management tasks of the Kenya National Library Service cannot be nullified, or held in abeyance by purely private contractual interests. I thus would not agree with the submissions of counsel for the plaintiff, that the plaintiff's claims provide a legal basis for holding the hand of the defendant in ensuring that the office of Director is duly filled.

Does the KNLS have the duty or the capacity to keep away the Government?

Since the Kenya National Library Service has a public-interest mandate, and on that account the Government's oversight is required, the defendant cannot be under any duty, nor would it (as a body established by Parliament) have a capacity to exclude the Government's role.

Is the defendant under a legal duty to ensure reinstatement of the plaintiff?

From the findings set out above, it is clear that the defendant is placed under no duty to ensure the

reinstatement of the plaintiff as Director. Besides, the defendant has already taken its decision which it cannot now renounce: at its 94th Full Board Meeting, of 8th April, 2004 it was accepted that “*Mr. Ng’ang’a’s services with KNLS ended on 29th January, 2004 when he received his posting.*” The defendant has taken the position, as averred in the replying affidavit, that the plaintiff had been “duly notified of his transfer.” The defendant has proceeded to compute the plaintiff’s final dues and to pay these to him. Is there any meaning to be attached to these actions, but that the defendant is now set to initiate the employment of a new Director? I don’t think so.

If a decision was taken to end the plaintiff’s employment at KNLS, who took that decision?

The defendant takes the position that the decision was taken not by it, but by the Government. This, I think, is only partially true. For the defendant by computing the plaintiff’s dues and paying over to him, *has acquiesced* in the Government decision and has taken the binding position which it cannot undo, and which effectively *vacates the office of Director*. The decision would be well supported by the legal principles which I have already set out: *the defendant has public functions which can only be duly performed when arrangements are made for the re-filling of the Director’s office*. Was any wrong committed? Much evidence has been produced by the plaintiff, tending to show lack of justification in the decision to shift the plaintiff from the KNLS to a different public body. It has to be appreciated, however, that because a public body such as the Kenya National Library Service is an important service to so many users, the reality of a running organization is the common expectation of all; and hence the private claims of an individual beneficiary in such circumstances, such as the plaintiff, must be kept separate from the dictates of *institutional functionality*. Hence those in the same position as the plaintiff herein, must resort to remedies which do not hamper the continued delivery of public services by the institution.

Is this a fit case for injunctive relief?

Counsel for the plaintiff repeatedly urged that if the defendant intended to end the plaintiff’s employment it should have given *three months* notice, or paid three months’ salary in lieu. That is so easily done, as to raise doubts about the bona fides of a claim of injunctive relief.

For it suggests that the essence of the claim is pecuniary: and therefore an award of damages would suffice.

Counsel for the defendant has urged that the plaintiff has no valid case for interlocutory relief, for he could have mitigated his losses by taking up the posting given him by the Government. It is clear from the Minutes of the defendant’s Full Board Meeting of 8th April, 2004 that the Ministry of Trade and Industry, to which the plaintiff had been posted, had no intention of lessening his emoluments, and that a letter had been written from that Ministry seeking details of salary and benefits which the plaintiff had been enjoying under the defendant’s employ. For sure, of course, the plaintiff would have been less satisfied at the Ministry of Trade and Industry, given his quite considerable professional investment made under the aegis of the Kenya National Library Service; but it remains the case that the Government’s posting arrangement was not going to leave him in any way grossly disadvantaged. Such are, in my view, not the circumstances in which interlocutory injunctive relief can be given.

Is this a matter for the judicial review jurisdiction?

It was the defendant’s case that judicial review would have been the appropriate recourse for the plaintiff. As already noted, the Government through the Minister has an important role in the general functioning of the Kenya National Library Service Board; he is required by statute to give approval for the appointment of Director; he approves leave taken by the Director; he performs several other functions in relation to the Kenya National Library Service. Would this dictate that the only recourse open to the plaintiff is judicial review? Although this question is not directly relevant in the instant application, it may be noted that judicial review seeks to ensure good administration, in accordance with the law, but it is not designed for the specific purpose of answering to contractual grievances. So if the plaintiff’s claim is a personal one based on contract, judicial review as such may not be the answer.

Against this background of evidence, submissions and analysis, I must decide on the plaintiff's Chamber Summons of 5th July, 2004 as follows:

(1) The prayer that a temporary injunction do issue restraining the defendant from transferring, retiring or dismissing the plaintiff from his employment, terminating or interfering with his employment pending the hearing and determination of the suit, is refused.

(2) The prayer that the defendant be restrained from withdrawing any of the benefits attached to the plaintiff's employment until the suit is heard and determined, is refused.

(3) The prayer that the defendant be restrained from filling the post of Director/Chief Executive Officer pending the hearing and determination of the suit, is refused.

(4) The plaintiff/applicant shall bear the defendant/respondent's costs in this application, in any event.

Orders accordingly.

DATED and DELIVERED at Nairobi this 26th day of September, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Wachira, instructed by M/s. Waithaka Wachira & Co. Advocates

For the Defendant/Respondent: Mr. Koech, instructed by M/s. Kipkenda, Lilan & Co. Advocates.