IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Apaloo CJ, Gachuhi, Cockar, Omolo & Akiwumi JJ A)

CIVIL APPLICATION NO. NAI 20 OF 1994

BETWEEN

ERIC V.J. MAKOKHA……………………………...……..1ST APPLICANT

CHARLES F.K. NAMCHANJA ………………….....…......2ND APPLICANT

DR. KORWA G. ADAR ……………………...……...…3RD APPLICANT

DR. J.W. OMRI ONYANGO……………………..……... 4TH APPLICANT

CHURCHILL M. KIBISU…………………………….....5TH APPLICANT

AND

LAWRENCE SAGINI …………………...……..………..1ST RESPONDENT

FRANCIS GICHAGA ……………………...…………..2ND RESPONDENT

UNIVERSITY OF NAIROBI ………………..………….3RD RESPONDENT

(Application for a stay of execution in an intended appearom the ruling of the High Court of Kenya at Nairobi (Justice A.B. Shah) dated 28th January, 1994

in

H.C.C.C. NO. 73 OF 1994)

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RULING

The applicants invite us to exercise our discretionary jurisdiction under rule 5(2)(b) of the Court of Appeal Rules to order a stay of execution of an order on a similar application which the High Court declined to grant them in its ruling of the 28th January, 1994. The upshot of the High Court's refusal was that the applicants were in immediate danger of being evicted from a subsidised housing which the University of Nairobi provided them in virtue of their employment by that University as lecturers. The

Court gave them a seven-day respite to enable them repeat that application to this Court.

Hence this application to stay execution under the well known rule 5(2)(b). Such an application is everyday fare in this Court and the principles on which this Court acts if invited to exercise that jurisdiction, is old hat. But the importance attached to this particular application and the depth of

feeling it generated, was such that, in all, no fewer than fifty cases were cited to us. Some of these are of local origin and a good number are from English Courts to which we not infrequently make recourse for help in determining doubtful and novel points of the common law.

We are grateful to both counsel and found ourselves helped by their research and industry and for the interesting and persuasive submissions they made to us. They should forgive us, if we have not found it possible to refer to and deal with a good many of them. We were simply overwhelmed by the sheer weight of their number.

It is elementary that the application of legal principles to any given case depends on the facts. We now relate them. The applicants were lecturers employed by the University of Nairobi under standard terms of service for the academic staff. In addition to their emoluments, the University made available to them housing in various parts of Nairobi rented by itself.

At some imprecise point of time late last year or possibly a year before last, they and some of their colleagues were minded of registering their staff Association as a Trade Union under the Trade Union Act. The Registrar of Trade Union refused to register it for a reason which is immaterial to this application. They were aggrieved and dissatisfied by the refusal and accordingly lodged an appeal to the High Court.

It appears that the University sided with the Registrar as it considered that the applicants association was not unionisable. This seems to have angered the applicants. The Vice-Chancellor deponed in an uncontested affidavit placed before the court below, that three months before the 10th January last the applicants, in breach of their terms of contract, failed to perform their contractual duties. They refused to teach and also refused to report for duty. In addition to withdrawing their services, they incited and instigated other academic staff to join them on strike and obstructed teaching and other administrative processes at the University. The Vice-Chancellor swore that faced with this situation, he suspended the applicants and summoned them to appear before the disciplinary committee of the university council on the 7th January, 1994. Such proceedings might result in the termination of their appointments.

The applicants were apprehensive of this and in order to forestall it, they filed a plaint in the High Court on the 7th January in which they sought a permanent injunction to restrain the defendants from hearing the disciplinary proceedings against themselves and terminating their services. On that very day, they sought and obtained *ex-parte*, an injunction

restraining the respondents from evicting them from their residences. This order was made by the then duty judge Dugdale, J.

It appears that after bringing their plaint, they became aware that the disciplinary proceedings brought against them were concluded and as they feared, their appointments were terminated. So they amended their plaint and sought in addition to other reliefs, a declaration that the purported terminations of their appointments were void and an order of injunction to restrain the University from acting on their purported terminations. They also claimed a temporary injunction restraining the respondents from evicting them from their premises. They amended their chamber summons accordingly.

The *inter-partes* hearing of the summons came before the new duty judge, Shah J on the 12th January, 1994. At that date, the other temporary injunctions they sought against the respondents were spent. They therefore refrained from presenting to the judge any argument on those. The only one they invited him to decide was whether the “defendants can be restrained from evicting” them from their official university residences until the determination of the substantive suit. The record shows that on this, they presented

copious argument to the Court.

The learned judge considering the application in some depth and the length of his ruling showed that he gave the matter a great deal of thought and took an equally great deal of trouble in the preparation of his ruling. He cited and relied on the rule-making case of *Geilla v Cassman Brown* and put to himself three questions namely, first, did the applicants show a *prima facie* case with a probability of success? To answer this question, he examined the University of Nairobi Act and the regulations made under them. About four months before he commenced his deliberation, namely October, 1993, the Court of Appeal had handed down a ruling in which it held that a contract of employment entered into in that case had statutory underpinning and could not be determined on the ordinary law applicable to master and servant. That case is Civil Application No NAI 204 of 1993 entitled *Ochieng Nyamogo and another vs Kenya Posts and Telecommunications*. That ruling has acquired some notoriety and we will refer to it hereafter, as the *Nyamogo* case. This ruling was brought to the learned judge's attention, and predictably enough, he was invited to follow it. It was clearly of great assistance to the applicants because it decided the precise point which Shah J was invited to decide. In that ruling, the Court granted a temporary injunction restraining the corporation from retiring two of its servants and a further order restraining it from evicting them from their official residences until the hearing and final

determination of the suit.

Having read that ruling and considered it alongside the Act and the regulations, the learned judge held that the regulations had no statutory backing and was made by the University under powers conferred on it by the Act for the internal guidance of the University only. The Court held that the contract of employment entered into between the applicants and the respondent was not statutorily underpinned within that concept in the *Nyamogo* case. He held therefore that the applicants failed to present a *prima facie* case with a probability of success.

The answer to the second question; namely, whether the applicants would suffer irreparable loss, if the applications were denied, obviously gave him no trouble. He held that if it was established that the University was in breach of contract in terminating the applicants' contracts, their loss could adequately be met by the payment of damages. In his opinion, the University would be in a position to meet the payment of any such compensation. The negative answer to these two questions entitled the judge to exercise his discretion against the applicants.

Obviously, *ex abundati cautela*, he also considered the third arm of the *Geilla* guidance, namely, where the balance of convenience lay, or put in another way, who had the greater justice. He concluded that it was the University. Before he considered this third arm of the *Geilla* ruling, he returned to the *Nyamogo* ruling. Clearly, it troubled him as this Court had reached a decision diametrically opposite to the one he was minded to reach. In the end, he distinguished it by holding that it was an interlocutory ruling and not a final judgment. But he thought that as that ruling appeared to have finally pronounced on the matter, it was binding on him under our doctrine of *stare decisis*. Although he did not treat that ruling with disrespect, he did not consider that it obliged him to decide this matter otherwise than his own appreciation of the law and facts obliged him to do. And as we said, he found against the applicants and dismissed their plea for a temporary injunction.

The applicants invite us to exercise our original jurisdiction differently and hold that the contract of employment entered into between the University and themselves was statutorily underpinned within the meaning of those words in the *Nyamogo* case. As to the principle on which we should exercise this jurisdiction, they referred to two well-known cases, namely firstly, *Githunguri v Jimba Credit Corporation Ltd* Civil Application No 161 of 1988 decided on the 8th November, 1988 and *J K Industries Ltd v Kenya Commercial Bank* decided in September, 1987 reported in [1982 -

1988] 1 KAR 1088. Both laid down almost identical principles as the basis under which stay of execution pending appeal should be granted, namely, first, the applicant must present an arguable case for the consideration of the Court of Appeal and second, the application must show that if the stay is withheld, it would render the intended appeal nugatory. Both cases were decided on the basis of these principles. In

Githunguri case, the application of that principle led to the grant of the stay sought, in the *J K Industries*, it led to the opposite result, that is, that the application failed.

The divergent conclusions reached in these two cases on the application of the same principles show that, by and large, it is the facts of each particular case that determine the result.

Mr Nowrojee, leading counsel for the applicants referred to these two cases and led us through various sections of the University of Nairobi Act and the statute of the University enacted by the university itself and argued that these were enacted under the delegated power of the university and having derived their authority from statute, guaranteed the employment of the applicants. He submitted, if we got him correctly, that that was the statutory underpinning as conceived in the *Nyamogo* case. He made other submissions which suggest that the terms of service and the removal provisions laid down in those conditions of service permitted the termination of the applicants only for good cause and the *audi alteram partem* Rule of Natural Justice was implicit in these provisions. In sum, it is by this contention that he submitted that the test of the "arguable case" requirement of the two principles laid down in *Githunguri and J K Industries* was met.

The word "statutory underpinning" is not a term of art. It has no recognised legal meaning. If it has, our attention was not drawn to any. Accordingly, under the normal Rules of Interpretation, we should give it its primary meaning. To underpin, is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help.

As a concept, it may also mean, the employee's removal was forbidden by statute unless the removal met certain formal laid down requirements.

In *Mbogo v Kenya Post Office Savings Bank* Shelds J said, he derived a great deal of assistance from the Scottish case of *Mallock v Aberdeen Corporation* especially in the speech of Lord Wilberforce whom he quoted as saying:

"pure master and servant cases which I take to mean

there is no element of public employment or service in support by statute, nothing in the nature of an office or status which is capable of protection.... If any of these elements exist, there is, in my opinion, whatever the terminology used and though in some *inter partes* aspects, the relationship may be essential procedural requirements to be observed and failure to observe them may result in a dismissal being declared null and void."

This speech is, we think, with respect, a trifle long winding, and if we understand it alright, it means, some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible this is the true meaning of what has become the charmed words "statutory underpinning". If this is correct, we can readily conceive of some of such public positions. For instance, under section 61 of the Constitution of Kenya, judges are appointable by the President and removable by him. But he cannot lawfully exercise the power of removal unless for specified misdoings and unless a tribunal appointed specially for the purpose after investigating such conduct, recommends to him such removal. So it can accurately be said that the tenure of judges was protected by the Constitution. The same applies to other constitutional office holders such as the Attorney General, Auditor General and others. Even an ordinary office holder can be protected by statute. For instance, section 23(3) of the University of Nairobi Act mandate the council of the university to keep proper books and records of account of the university as well as its expenditure. The accounts must be audited by the Auditor General and subsection 4 says in telling words:

"The employment of an auditor shall not be terminated by the council without the consent of the Minister in concurrence with the Controller and Auditor-General".

So to that extent the position of an auditor is statutorily underpinned. It is difficult to see in what sense the tenure of lecturers of the University of Nairobi can properly be said to be "statutorily underpinned". The record shows that by section 19 of their terms of service, each category of academic staff can terminate his services with the University by giving notice according to their academic rank: If they should leave their appointments without giving the stipulated notices, they would have been in breach of contract. What remedy can the University have against them for this breach? It is well established that they cannot be forced

to resume their office by the equitable remedy of specific performance. So, the only remedy the University can pursue against them would be a claim for damages for breach of contract. Equitable remedies are said to be mutual. If that is so, if the University itself commits a breach of contract against them, the mutuality rule would dictate that they, for their part, can only seek damages against the University for breach of contract. If the University can properly compel them to return to its service by the equitable remedy of specific performance, then, and then only, can they claim as a remedy against the University the co-ercive equitable remedy of specific performance. To compel performance of a contract of personal service in this way, will turn a contract of service into a status of servitude.

Section 23 of the conditions of service give the University power to remove a lecturer for good cause. This imports a duty of *audi alteram partem*, that is, they must be afforded an opportunity of answering any allegations of any misconduct justifying removal. That is also provided by the manner in which the disciplinary proceedings of alleged errant members of the university are dealt with or should be dealt with. In his affidavit, the Vice Chancellor deponed that proper disciplinary proceedings against them were set on foot and a committee which investigated the charges against them, found them guilty. It was on the strength of the findings that their services were terminated. The applicants, of course, dispute this in their plaint. The difference between their accounts and that of the University is yet to be resolved. If it is resolved in their favour, it is obvious that the only compensation they can lawfully receive, is damages. They cannot competently claim to be re-instated unless a statute to which they can point, expressly conferred this right on them and by that method, underpinned their continued employment. Although they produced a great deal of case and statute law, they did not refer to even one statute which underpinned their tenure for the very sufficient reason that there is none. So the only remedy that they can obtain at law, is the one that is ordinarily awardable for breach of a contract of employment. They cannot properly invoke any equitable remedy to underpin their tenure any more than they can obtain one to compel any breach of their employment. In our opinion, the law generally applicable is stated at page 626 of the 27th Edition of *Snells Principles of Equity* as follows:

"The very first principle of injunction law is that *prima facie*, you do not obtain injunction to restrain actionable wrongs for which damages are a proper remedy".

That is the holding of Owuor, J in the *inter partes* hearing of an application for injunction to restrain the P & T Corporation from retiring

the then applicants in the *Nyamogo* case. The judge expressed herself as follows:

"At this stage it has not been shown to me that damages would not be within the defendant's capacity to pay or would not adequately compensate the plaintiff for the action which the defendant has taken should it turn out to be unlawful. That is a sufficient reason for refusing the injunction".

The learned judge found one other reason which, in her opinion justified the denial of the injunction sought. She expressed it in these words:

"There is an additional reason why the application must fail. The application before me did not seek mandatory but restraining orders.... The event complained was a past one and no application for amendment was made to seek alternative or other reliefs".

This additional reason does not sound extremely weighty but its value will become apparent when we examined the decision and orders made in the *Nyamogo* case which has become the *locus classic* on the

subject of statutory underpinning.

We must now examine the *Nyamogo* case. We must, of course, treat the holdings in that case with great respect. We are not sitting on appeal from that ruling and have no jurisdiction to make any orders on that case. But the holdings in that case and the orders made in it, have raised eye-brows in the profession as to its correctness. The conclusion is also at variance with the view of the law expressed in the court below not only in the *Nyamogo* case itself but in the one expressed in the court below in the present application before us. It also seems, *prima facie*, at odds with the common law position as we know it. We think it in the interest of the profession to say which of these conflicting views is right. That explains the somewhat unusual composition of the Court.

Some muted but not impolite observation was made about the numerical composition of the Court by the applicants' counsel but the breadth and sophistication of the submissions made to us for four whole days, justified the strengthening of the normal bench of three by two more heads. Because of the hierarchial structure of the Court, it is also the practice adopted to review two inconsistent decisions of this Court. But it would be technical and narrow to suggest that as the two consistent rulings of the High Court only differed from one ruling of the Court of Appeal, the practice of constituting 5 judges recommended and adopted in the *Income Tax v*

[1974] EALR 546 and followed as recently as October 1993 in *Trouistik Union International and another v Jane Mbeyu and another* Civil Appeal No 145 of 1990 should not be followed.

But before considering whether the now famous *Nyamogo* decision accords or offends the law or equity, we must relate the facts. We take them from the official record. Both applicants were employed sometime in 1976 and 1981 by the Kenya Posts and Telecommunications Corporation, (which we hereafter refer to as the Corporation). The first applicant is a legal officer and the second an engineer. They rose from the ranks and by April 1993, each rose to the pensionable position of Senior Assistant Manager. Neither had in April 1993 reached the compulsory retiring age of 55. The 1st applicant was 46 and the 2nd applicant was 43 years of age. On the 7th April 1993, each received a letter in identical terms dated the previous day ie 6th April 1993. The letter informed them that the board of the corporation had retired them with immediate effect. They were informed in that letter that they were each entitled to "full pension benefit". They were invited to fill the necessary forms for their pension documents to be processed.

The surprise each applicant felt was understandable. Six days after the notification of their retirements, each brought a plaint in the High Court contesting the validity of their enforced retirement. It was dated 13th April. They each sought:

(a) A declaration that the purported retirement of the plaintiff is null and void;

(b) A declaration that the plaintiff is entitled to remain in the defendant's employment;

(c) An injunction to restrain the defendant, from evicting or attempting to interfere with the plaintiff's occupation of his........corporation residence.

Each brought a contemporaneous chamber summons for orders that the Corporation be restrained from retiring them until they reached the statutory retiring age. The Corporation for its part, objected that they were not liable to be restrained by temporary injunction from retiring the plaintiffs as they had done so already and that if such retirements were held to be illegal, the applicants' proper remedy lay in damages. The plaintiffs obtained routinely, the *ex-parte* orders in terms sought. It was the *inter partes* hearing of that application that we related earlier, failed before the High Court.

As is not unexpected, the plaintiffs repeated this application before this

Court and invoked its equitable jurisdiction under rule 5(2)(b) to obtain the orders sought. They were successful. In a reserved ruling, this Court granted them

1. An interim injunction restraining the Corporation from retiring them until the hearing of the intended appeal; and

2. An order restraining the Corporation from evicting them from their Corporation provided house until the hearing and determination of the appeal.

This Court, in accordance with precedent, has to decide first, whether the applicants presented an arguable case, and second, whether the intended appeals would be nugatory if these interim orders were denied.

In apparent compliance with the first guideline, the Court considered legal arguments presented to it on the various sections of the Pensions Regulations on which the parties relied. The Corporation admitted that it compulsorily retired the applicants as alleged but justified its action as authorised by the Kenya Posts and Telecommunications Corporation (Pensions) Regulations 1985 and in particular regulation 5(1)(d) thereof.

So, as this Court did in both the *Githunguri* and *J K Industries,* it considered whether the legal argument advanced in support of an arguable case, appeared *ex facie*, to have merit. It held in the *Githunguri* case that it had and that in the *J K Industries* case, that it had not.

It follows that in determining whether the applicants had an arguable case meriting the grant of injunction, the Court had to construe the section of the Regulations the Corporation relied upon as giving it statutory power to retire the applicants compulsorily - that is regulation 5(1)(d) which fully read as follows:

“No pension, gratuity, or allowances shall be granted under these Regulations to an officer except on his retirement from the public service

(d) on compulsory retirement for the purpose of facilitating improvement in the organisation of the Corporation or the department to which he belongs by which greater efficiency or economy may be effected.”

The Court itself read this section and reproduced both it and the submissions made on it in its ruling. That submission, as recorded, was

that the applicants retirement was done in accordance with that regulation and that as it was compulsory, the Corporation owed no duty to inform the applicants in advance of its intention to retire them compulsorily. That submission appears to us to be perfectly sound. The Court said it could not accept it and proceeded to hold that as the applicants did not apply to the Corporation to take early retirement, the action of the Corporation violated the requirement of natural justice and “the relevant statutory provisions”. It did not specify which of the Regulations it reproduced at great length in its ruling, the Corporation’s action transgressed and which underpinned the applicant’s employment. But the reason the Court gave for its decision, namely, that the applicants had not applied to take early retirement suggests that it was founding itself on regulation 8(2) of the Regulations which provides that:

“The Corporation may, with the agreement of an officer require him to retire....after attaining the age of 50 years but before he attains the age of 55 years”.

This regulation entitles the applicants, with the consent of the Corporation to obtain early retirement. It had nothing to do with compulsory retirement which, on a plain reading of regulations, the Corporation is entitled to do on its own motion if it considers that the Corporation should be reorganised to enhance efficiency or achieve economy.

The applicants were not accused of any wrong-doing. By necessary implication, the Rules of Natural Justice which would have required that they be notified of their pending retirement were dispensed with by regulation 5(1)(d) which empowers the Corporation to retire the applicants compulsorily, their wishes

notwithstanding. Our reading of the Pensions Regulation shows that two types of compulsory retirement were envisaged. One is on attaining the age of 55, the other on reorganization by the Corporation designed to achieve improvement or to achieve economy in its operation. It is the latter that entitled the Corporation to retire the applicants compulsorily subject to payment to them of pension. Had the Court not omitted to consider and construe that particular regulation on which the Corporation relied, it would have been compelled to reach the conclusion that the Corporation's action was statutorily authorised and that the applicants failed to establish an arguable case within the meaning of the *Githunguri* and *J K Industries* holdings. As the Court omitted to do so, its decision was given *per incuriam* within the true meaning intendment of those words. That view is sufficient to deny the *Nyamogo* holding the authority of a binding precedent.

It must be borne in mind as a proposition of administrative law, that the

power conferred on the Corporation to retire compulsorily some members of its staff in a re-organization or with the object of achieving economy in its operations, is discretionary. If it is exercised *bona fide* for the purpose for which it was conferred, it is not for the Court to substitute its judgment for that of the competent organs of the Corporation. There is no suggestion here that in retiring the applicants, the Corporation exercised that power other than properly. The argument that the exercise of that power was impeachable either because the applicants had not reached the retiring age or that they were not given prior notice of their retirement was wholly misconceived.

There is one other reason on which the order of injunction granted in that case could be questioned. An application for injunction under rule 5(2)(b) is an invocation of the equitable jurisdiction of the court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, Courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it. In this case, the compulsory retirement which the applicants sought to injunct was effected on the 6th April 1993. In *Rosslyn Estates Ltd v Underword* 22 EALR page 196, Briggs, JA, speaking for the Court of Appeal for Eastern Africa holding that a remedy sought could not be effective said:

"This being a suit in equity, the relief which the Court could grant had to be considered on the basis of the facts as they were at the date of judgment, not as they were at the date of the filing of the plaint".

In this case, even at the date of the filing of the plaint on the 13th April 1993, the action which the applicants sought to prevent by an injunction had already taken place. It took place on the 6th April 1993. When in October 1993, the applicants repeated their application for interim injunction to restrain the Corporation from compulsory retiring them and evicting them from their residences, the Court's attention was drawn to how pointless the granting of a temporary injunction would be at that date. The Court itself recorded that counsel for the Corporation submitted that:

".......by the time, the applicants went to law, their retirement had already taken effect".

The Court rejected that submission. The upshot of this was that the

highest Court of the land, on the 8th October, 1993, solemnly granted a temporary order of injunction to restrain an action which took place as long ago as April 6th 1993. It is plain to us that a Court of Equity would regard this order as a pious farce. And this in spite of the fact, that action, that is the compulsory retirement of the applicants, was, in our judgment, made according to law. We are wholly unable to accept either that the employments of the applicants were statutorily underpinned or that on the facts known to the Court a temporary injunction to restrain the doing of an act which took place five months previously can be halted or undone by a temporary injunction issued in October 1993. We therefore find no fault with the learned judge below for feeling himself unable to follow the *Nyamogo* ruling.

We have said enough to reach a conclusion on this application. But counsel for the parties made in great

earnestness, a number of other contentions. We think we owe it to counsel to make a short observation of some of the significant of these.

The learned judge below was not able to hold that the university statutes was subsidiary legislation to support a contention that the applicants' appointments were statutorily underpinned. We were referred at great length to a number of sections of the University of Nairobi Act and various other enacted laws to show that the judge was in error in so holding. Counsel for the respondent urged with no less persuasiveness and by reference to other pieces of legislation that the statutes were not subsidiary legislation within the true legislative intent. The contentions on both sides were extremely subtle. In view of our holding, that even if the statutes were properly regarded as subsidiary legislation, the employment of the applicants was not protected by it, no useful object would be served in embarking on a further examination of that question. It would, we think, be merely academic and we decline to engage in such exercise.

It was also argued for the applicants that in view of the shortness of time that elapsed between the handing down of the *Nyamogo* decision, we would decline to depart from it. For this, we were referred to the decision of the English House of Lords, in the case of *Secretary of State for Social Services, Hudson v Sainz* decided in 1971.

In that case, the House in a split decision of 4 to 3 held that a modified practice it introduced in 1966 in which the House laid down rules as to when it may depart from its previous decision should be used sparingly. Otherwise, its previous decisions should be followed. But we prefer the speech of Viscount Dilhorne that if a previous decision was clearly wrong it

is easier to decide that a recent case should not be followed than one which has stood for a long time. We put the *Nyamogo* ruling in that category.

Furthermore, the House of Lords is a second appellate court from a decision of the High Court of Justice. It can afford the luxury of adopting a policy of keeping an erroneous decision alive for a great many years. But in Kenya, at least as at present, there is only one appellate court ordinarily manned by a bench of 3 judges. Even a five bench Court cannot reverse its decision and substitute what it considered the right one for it. It is only limited to refusing to following it in a subsequent case. In the absence of a second tier appellate court in Kenya, the practice of constituting a bench of 5 judges to have a second look at a doubtful decision of a Court of three is a sensible one and meets a felt judicial need of this country. Certainty of the law in a developing jurisprudence demands that a wrong decision should be quickly identified and at least, pointed out that suffering it to remain a binding judicial precedent for a great length of time.

Our attention was drawn to a number of recent English decisions in which declarations were made as remedies for breaches of contracts of personal service. We were urged to accept that this is the emerging trend of English judicial attitude. These cases are few and their *ratio decidendi* are anything but consistent. We formed the view that this is not the generally shared attitude of English judges. We have noted a few powerful and well-reasoned dissents. In our opinion, the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance remains good law. The comparatively few cases in which declarations were made and injunctions were granted to restrain a breach of contract of personal service are exceptions to the general run of the common law.

In our opinion, the common law rule that damages are the generally accepted remedy for redressing breaches of contracts of personal service is too firmly established to be overthrown by side wind. While we note the emerging changed attitude and the remedial changes they are bringing about, we cannot help feeling that the common law and the doctrines of equity which section 3 of Judicature Act obliges us to apply is the established and well known common law. It is on the faith of this that transactions are entered into.

On the main question debated in this case, we hold that in the event of the applicants being successful in

their suit for wrongful termination of their appointments, their proper legal remedy is damages and not declaration. That being so, the contract of employment having gone, the fringe benefit

of subsidised housing went with it.

Before we conclude this rather long judgment, we think it right to express to counsel on both sides our gratitude and appreciation of the industry they both put into the preparation of the case and for their well-reasoned and powerful submissions. However, in view of what has fallen from our lips, we are driven with more than little regret to the conclusion that the orders prayed for by the applicants cannot be granted.

In view of the conclusion we reached on this application, the applicants will have to give up their official residences to the respondent University. But we do not think it right to order their immediate eviction. We think we should give them time to reflect on the views we expressed in this ruling. It may well be that the applicants may feel it right to review their position towards the University and enter into discussions which will entitle them to resume their university duties and retain their residences. We are inclined to think that on the basis of the legal advice rendered to them, they believed in good faith that they are legally entitled to retain their official residences until the hearing and determination of the substantive suit. They now know the true position. We have no doubt that the legal advice tendered to them by their lawyers, was on the part of the advocates equally well believed by them in their professional view to represent the law. They too must accept that we hold that those views were mistaken.

We propose to give the applicants a reasonable time to consider their position and hopefully resume their teaching portfolios.

We venture to hope, that the University for its part, will prove itself magnanimous in victory and respond favourably to any overtures that the applicants may make that may lead to the resumption of the normal functioning of the university. We believe the overall national interest dictates no other course.

But we realize that we cannot force a re-marriage on unwilling partners. Our order therefore, is that if the applicants fail to enter into arrangement satisfactory to the University on or before the 31st March next, there will be an order for their eviction from their university provided residences on the 1st April next. The applicants will pay the costs of this application. In view of the complexity of the matters canvassed before us, we certify costs for the respondent for two counsel.

Dated and delivered at Nairobi this 1st day of March, 1994.

F.K. APALOO

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CHIEF JUSTICE

J.M. GACHUHI

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JUDGE OF APPEAL

A.M. COCKAR

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR