National Land Commission v Munubi & 4 others (Civil Appeal 248 of 2020) [2022] KECA 391 (KLR) (4 March 2022) (Judgment)

Neutral citation: [2022] KECA 391 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 248 OF 2020

DK MUSINGA, W KARANJA & PO KIAGE, JJA

MARCH 4, 2022

BETWEEN

NATIONAL LAND COMMISSION ..... APPELLANT

AND

SALOME MUNUBI ..... 1ST RESPONDENT

FIBIAN LUKALO ..... 2ND RESPONDENT

FRANCIS MUGO ..... 3RD RESPONDENT

LEONARD OMULLO ..... 4TH RESPONDENT

MUHAMMAD SWAZURI ..... 5TH RESPONDENT

(Being an Appeal from the judgment of the Employment and Labour Relations Court at Nairobi (Maureen Onyango, J.) delivered on 24th May, 2019 and all consequential orders issued by the Employment and Labour Relations Court in Petition No. 8 of 2019)

JUDGMENT

1. The 1st, 2nd, 3rd and 4th respondents were directors of the National Land Commission (NLC), having been seconded to the Commission from the Public Service Commission (PSC). On the other hand, the 5th respondent was the Chairman of the Commission and it is not clear why he was joined in this appeal as a respondent. The 1st to 4th respondents' terms of employment were varied, apparently without their consent, from contractual engagement to permanent and pensionable, then reversed to contractual terms after the NLC commissioners met and resolved that the conversion from contractual to permanent and pensionable was null and void.

2. They were unhappy with the said variation as a result of which they moved to the Employment and Labour Relations Court (ELRC) vide civil suit No. ELRC No. 1643 of 2018 and Petition No. 8 of 2019. In ELRC No. 1643 of 2018 the petitioners sought, inter alia, declarations that: they are and

remain permanent and pensionable employees of the NLC; and that the change of their terms of employment constitutes unfair labour practice, is unlawful and illegal.

3. On the other hand, in Petition No. 8 of 2019, the petitioners, Dr. Salome Munubi, Dr. Fibian Lukalo and Francis Mugo's claim was against Professor Muhammad Swazuri, the Chairman Land Commission (5th respondent). Their reliefs against the respondents were as follows:-

    a. A declaration that the petitioners are and remain permanent and pensionable employees of the National Land Commission

    b. A declaration that change of the petitioners and other directors terms of employment from permanent and pensionable to contract constitutes unfair labour practices, is unlawful, illegal and void ab initio.

    c. A declaration that subjecting the 2nd petitioner to displinary proceedings in a bid to force her to accept the contractual terms of employment is unfair and illegal.

    d. Any other order that this court shall deem fit to grant.

4. The two suits were consolidated and heard together and in a judgment delivered on 24th May, 2019 the court (M. Onyango, J.) while dismissing the petition rendered itself in part as follows;

> " I therefore will order and do hereby order, that the contracts of all the petitioners be renewed according to the resolution of the Commission at its meeting of 8th May 2018, and the subsequent special meeting of the Commission held on 13th December 2018 so that they do not become victims of the infighting among the Commissioners of the NLC."

5. The Commission which is the appellant in this case filed a Notice of appeal challenging some of the findings by the trial court on grounds that the learned Judge erred in law and fact; by awarding and granting orders that the contracts of the respondents be renewed after dismissing Petition No. 8 of 2019 in its entirety; in granting orders that the contracts of all the respondents be renewed which reliefs were not sought by the respondents in their pleadings neither were they contained in the body of the pleadings hence arriving at a wrong decision; in wrongly consolidating the two petitions and ordering that they be heard together even though they raised different issues.

6. The learned Judge is also faulted for not considering and appreciating the provisions of Constitution and the *National Land Commission Act* which provide that the appellants shall recruit its own staff by granting orders for renewal of contracts that had expired, thereby imposing workers on the appellant, which offends the provisions of Article 30 of *the Constitution*.

7. The learned Judge is also faulted for failing to consider the appellant's submission that the first and third respondents were charged in Anti-Corruption Criminal Case No. 33 of 2018 and proceeded to issue orders that the contracts of all the respondents be renewed contrary to the provisions of chapter six of *the Constitution* on integrity of State officers and hence arriving at the wrong decision.

8. The appellants therefore plead with this Court to allow this appeal and set aside the judgement dated 24th May, 2019 in its entirety with costs.

9. On their part the 1st to 4th respondents have filed a cross appeal pursuant to Rule 93 of this Court's Rules, raising the following grounds:-

    i. That the learned Judge erred in law by failing to take into consideration that the acts of the appellant/respondent of converting the terms of the respondents/ appellants from contract to permanent and pensionable and then back to contract violated the respondents/appellants rights under Article 28, 41 and 47 of *the Constitution*.

    ii. That the learned Judge erred in law by failing to take cognizance that the appellant/respondents acts of locking out the respondents/appellants from their offices and stopping their salaries from April 2019 to date when court orders were subsisting amounted to inhumane and degrading treatment of employees and also amounts to constructive dismissal of the respondents / appellant.

    iii. That the learned Judge erred in fact and law by failing to take cognizance of the effect of section 62 and 63 of the *Anti-Corruption and Economic Crimes Act* with regard to the status of the 1st and 3rd respondents who remain suspended on half pay with all the allowances pending the hearing and determination of Milimani Anti-Corruption case no. 33/2018

    iv. That the learned Judge erred in law and in fact when after establishing that the appellant/respondent was wholly to blame for the contradicting terms of engagement to the directors failed to allow the petition and award costs for violations of the respondents /appellants rights and costs of the suit.

    The court was asked to allow the cross appeal; grant an order of declaration that the respondents'/ appellants' rights under Articles 28, 41 and 47 of *the Constitution* were violated; the respondents be awarded accrued salaries and benefits from April 2019 to date with costs of this appeal and the ELRC Petition No. 8 of 2019. In the alternative, the respondents/cross- appellants be awarded damages equivalent to their monthly salary for a period of 5 years being Ksh. 520,000 for 60 months equivalent to Ksh. 31,200,000.

10. Both parties filed written submissions and lists of authorities as directed by the Court. The appeal was canvassed through written submissions with brief oral highlighting by learned counsel. At the plenary hearing of the appeal, learned counsel Mr. Masese appeared for the appellant while Mr. Malenya appeared for the 1st to 4th respondents with Mr. Okubasu appearing for the 5th respondent.

11. In support of the appeal, the appellant urged that by ordering it to renew the respondents' contracts after dismissing the petition, and such relief not having been pleaded, the court fell into error. The Court was urged to hold that parties are bound by their pleadings and being an adversarial system the Judge was precluded from framing and determining those issues.

12. In addition, it is submitted that the Judge' s finding on the renewal of the contracts meant that she had framed an issue and proceeded to make a finding without giving the appellant an opportunity to rebut the evidence. Counsel reiterated that the duty of the court is confined to adjudicating matters pleaded

before it. We were referred *IEBC vs Stephen Mutinda Mule, Civil Appeal no. 219 of 2013*, where the court held:-

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made."

The appellant also called in aid this Court's decision in *Thomas De La Rue K. Ltd vs David Opondo Omutelema, CA No. 65 of 2012*, where the Court cited with approval the decision of *Captain Harry Gandy vs Caspar Air Charters Ltd [1956] 23 EACA, 139 at 140*, where it was held that: "Cases must be decided on the issues on record, and if desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, as in my opinion he was not entitled to take such a step." The Court was urged to find that the issues were not pleaded and the appellant was, therefore, denied opportunity to submit on the same and the impugned orders ought to be set aside.

13. Further, it is submitted that though the 1st and 3rd respondents have a pending case, Anti-Corruption Case No. 33 of 2018, they should be presumed innocent pursuant to section 62 of the Economic Crimes Act and Article 50 of *the Constitution* and they should also benefit from the judgment and orders of the ELRC. The respondents on the other hand submitted that the trial court was right in holding that their contracts should be renewed since it was the Commission's resolution at its meeting on 8th May, 2018 and a special meeting held on 13th December, 2018, which was after a majority of the members of the Commission voted on it as provided by Section 19, and paragraph 4 of the fourth schedule of the NLC Act. The NLC had created a legitimate expectation to the respondents by communicating and issuing offers on permanent and pensionable terms.

14. In regard to consolidation of the suits, this was by consent of the parties on 14th February, 2019 and, therefore, the same cannot be challenged by the appellant. This was done within the court's jurisdiction as provided under Order 11 rule 3(i)(h) as well as section 1A of the *Civil Procedure Act*. The two suits relate to the same questions of fact and law and the pleadings in both raise the same issues. To buttress this argument, the Court was referred to the decision in Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa [2004] eKLR where the court set out theprinciples that guide it in consolidating two or more suits.

15. On the appellant's authority to implement the judgment and decree of 24th May, 2020, it was submitted that during the period February 2009 to November 2019 NLC had no commissioners but the CEO, Kabale Tache, discharged functions of a commissioner. She issued instructions to lawyers to defend her including in the contempt proceedings. During this period the appellant stopped the respondents' salaries and withdrew their medical insurance cover. It is their submission that the Commission being a corporate entity was capable of suing and being sued. Therefore, the orders of the court could be discharged by any officer acting on behalf of NLC, including the acting CEO.

16. In support of the cross appeal, the Court was urged to find that the respondents have been locked out of their offices, their salaries have been stopped and they are being treated inhumanely, yet Article 41 of *the Constitution* guarantees every employee fair labour practices which include fair remuneration and fair working conditions. For this contravention of their constitutional rights, the appellants entreat us to award them damages. In support of the proposition, they cited and placed reliance on the decision of this Court in *Judicial Service Commission vs Daniel Mudanyi Ochenja, [2020] eKLR*, where the Court observed that once a court finds breach of *the Constitution* then it is duty bound to make a determination on the question of damages. We have been urged to adequately compensate them with

a 5 year term salary since they can no-longer work at NLC, noting that the 2nd and 3rd respondents are approaching retirement age. We have also been referred to a persuasive decision in Evans Arthur Mukolwe vs A.G. & Another [2019] eKLR, where the claimant had suffered great loss and damage as a result of mistreatment at the hands of KWS and the parent ministry and he was awarded damages equivalent to the unserved term of fixed contract based on the doctrine of legitimate expectation.

17. The 5th respondent filed his submissions dated 22nd October, 2021. His submission is on one ground, whether it was unlawful or an error on the part of the trial court to grant a relief in respect of renewal of contracts when the same had not been explicitly pleaded. The respondents urged that they had asked the trial court to grant any other relief it deemed fit and therefore it was proper for the court to order the appellant to renew their contracts, which was an issue pleaded and argued. In support of this, we have been referred to the decision in *Housing Finance Company of Kenya v. J. N. Wafubwa [2014] eKLR* where this Court held as follows:

> " Whereas is the case here, the parties have canvassed the issue and left it to the court, the court can pronounce judgment on it though it was not pleaded."

The respondents' issue was in regard to the continuation of their work, their contract was changed to permanent and pensionable and later this position was changed and they were asked to renew their contracts yet their respective secondment from their previous employers had ceased to be because of the communication received from NLC. We have been urged to find that the court was within its power and mandate to grant the orders it made.

18. This being a first appeal, our duty is as set out in Rule 29(1) (a) of the *Court of Appeal Rules* which provides:-

> " 29(1) On any appeal from a decision of a superior court, acting in exercise of its original jurisdiction, the Court shall have power -
>
> a. To reappraise the evidence and to draw inferences of fact;..."

See also the exposition of the same as set out in *Selle vs Associated Motor Boat Company Ltd [1968] E.A. 123*. It is simply that the Court is invitedto consider the evidence, evaluate it and draw its own conclusions. In so doing, the Court must however bear in mind that it neither heard nor saw the witnesses testify and should therefore make due allowance for that. We note that the appellant abandoned grounds 3 to 7 of the memorandum of appeal and submitted on grounds 1 and 2 of the same.

19. Upon considering the record in the light of the oral highlights, submissions set out above and the principles of law relied upon by the respective parties, the issues that arise for determination as raised in the memorandum of appeal and the cross-appeal are:

i. Whether the trial court erred in dismissing the petition;

ii. Whether the trial court erred in granting an order that the contracts of the respondents be renewed;

iii. Whether having the criminal case at the anti-corruption court deterred the respondents from having their contracts renewed;

iv. Whether the respondents' rights under article 28, 41 and 47 of *the Constitution* were violated;

v. Whether the respondents were entitled to their accrued salaries and benefits from April 2019 to date and

v. Whether the respondents were entitled to damages.**

20. The 1st to 4th respondents' averred that the conversion of their employment terms from contact to permanent and pensionable and back to contract was prejudicial to them as after conversion to permanent and pensionable, they proceeded to resign from their former employers where they were serving on permanent and pensionable basis. The appellant, however, maintained that the chairman's (the 5th respondent herein) decision to convert the employees' engagement from contract to permanent and pensionable was not supported by any resolution of the Commission. The 5th respondent had written a memo dated 9th May, 2018 to the Commission's secretary/CEO on conversion of the staff terms from contract to permanent and pensionable. The letter in part reads as follows:

> "In view of the foregoing delineations, the lengthy deliberations on the same by various other stakeholders and having consulted relevant government agencies, this is to instruct you to convert all staff terms from contract to permanent and pensionable terms with effect from 1st june2018 including directors, heads of departments, deputy directors and county coordinators."

It is in reliance of this memo that the 1st to 4th respondents opted to end their secondment from their previous employers where they were on permanent and pensionable basis to the appellant and this was to be effective from the 1st June, 2018. However, this was short-lived.

21. The 5th respondent being the former chairperson to the appellant argued that the conversion of the 1st to 4th respondents' terms of employment was legitimate, however this is not the position held by the appellant. We do agree with the trial Judge that the NLC is governed by *the Constitution*, the NLC Act as well as the Human Resource Manual which provides for the terms of employment. NLC is a Commission established pursuant to Article 67 of *the Constitution*. Section 23 of the NLC Act provides that a public officer who is seconded to the commission shall during the period of secondment be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

22. The 5th respondent had communicated to the 1st to 4th respondents in his capacity as the chairperson to NLC and as provided by the fourth schedule of the NLC Act, the meetings by the Commission shall be presided over by the chairperson and it is in this regard that the 5th respondent argues that the resolution to convert from contract to permanent and pensionable terms was regular. At a special meeting of the Commission held on 8th May, 2018, the following resolutions were made:-

i. All contracts for directors of the commission be renewed for a further term of 5 years, subject to them attaining 60 years of age.

ii. Contracts of employees of the commission from the position of deputy director and below be converted to the permanent and pensionable and be entered into permanent and pensionable scheme that was procured by the commissions.

23. It is very clear from this meeting that there was no resolution by the Commission that the directors scheme be converted to permanent and pensionable. What is clear from this meeting is that all staff from the position of deputy director and below were to be converted to permanent and pensionable.

We do not fault the trial Judge's holding that in directing that the respondents' terms be converted from contractual to permanent and pensionable, the chairman to the Commission acted in excess of his powers and it was contrary to the Commission's resolutions.

24. The trial Judge in her judgment further held that the contracts of the 1st to 4th respondents be renewed according to the resolution of the Commission at its meeting of 8th May, 2018 and the subsequent special meeting of the Commission held on 13th December, 2018. The appellants contend that the court framed an issue not pleaded by the parties and therefore arrived at a wrong decision. The respondents on their part urge that the employment relationship was the dispute at hand and, therefore, it was part of the pleadings and it had been canvassed and the 5th respondent submitted that having pleaded any other relief the Judge was right to grant the order.

25. As discussed above, the reason the 1st to 4th respondents moved to court was the communication received by them from the 5th respondent regarding their employment status. In fact, the 1st and 2nd reliefs sought by the 1st to 4th respondents was on the directors' employment. The appellant cannot plead at this point that it was never an issue in trial yet it was part and parcel of the trial process. Clearly, the issue on the status of the respondents' employment was raised and the appellant even responded to the same and stated that the 5th respondent had not conveyed the message as passed in the resolution of the meeting held.

26. It is axiomatic that parties are bound by their pleadings. However, there are exceptions as was held in the case *Odd Jobs vs Mubea (1970) E A 476*, where the Court held that a court may base its decision on an issue that is not in the pleadings as long as the same arises in the course of the proceedings and the same is fully canvassed by the parties. The issue before the court was the employment of the respondents and the conversion of the employment terms without their consultation. Inevitably therefore, the issue of the renewal of their contracts was a germane one before the trial court. The renewal of the contracts may not have been specifically pleaded, but the issue was inexorably intertwined with the issues before the court. In any event, section 12 of the *Employment and Labour Relations Court Act* mandates the court to grant any other appropriate relief as the Court may deem fit to grant.

27. From the evidence placed before the court, the trial Judge was right to find that the 1st to 4th respondents were entitled to have their contracts renewed as the resolution had expressly stated so. The Judge decided on the issues specifically raised in both ELRC Cause No. 1643 of 2018 and Petition No. 8 of 2019 by the respondents. The learned Judge did not pluck the issue of the renewal of contracts from the air, it was canvassed before the court and all the parties had opportunity to respond to it. Contrary to the submission by the appellant, the learned Judge did not impose employees on the Commission. The court only completed what the commissioners had undertaken to do by ordering that the resolution which had been arrived at by the commissioners be effected. She applied the principle of equity that Equity deems as done that which ought to have been done.

28. Having reconsidered the evidence placed before the trial court, we come to the irresistible conclusion that the learned Judge cannot be faulted for arriving at the decision now impugned. Accordingly, we dismiss the appeal in its entirety. For the sake of clarity, according to the special meeting of the Commission held on 8th May, 2018 the contracts were supposed to be renewed for a further 5 years, subject to the respondents attaining the statutory retirement age of 60 years. Given that it may not be possible to reinstate the respondents to their former offices, we grant the alternative order that the Commission be at liberty to compute and pay the respondents' salaries for the period of their contracts subject to statutory deductions and any other dues. We further clarify, as held by the learned Judge, that the above order will not interfere with the administrative actions taken by the National Land Commission in respect of the 1st and 3rd respondents pursuant to Anti-Corruption Case No. 33 of 2018.

29. Turning to the ground on whether the 1st to 4th respondents' rights in regard to Article 28, 41 and 47 had been violated, the respondents argued that they had been treated inhumanely by the appellant in total disregard of the court order that their contracts be renewed. Article 28 of *the Constitution* provides that:-

> " Every person has inherent dignity and the right to have that dignity respected and protected."

30. Article 41 of *the Constitution* provides for fair labour practices which include right to a fair remuneration and reasonable working conditions. The respondents contend that their contracts have not been renewed despite having a valid court order. Their offices had been locked and they could not therefore perform their duties. As at the time judgment was delivered, they were yet to be paid their salaries. They were denied medical cover and other benefits accruing to them by virtue of their employment. The 1st to 4th respondents in our view met the threshold established in Anarita Karimi Njeru vs Republic [1979] eKLR, where it was held as follows:

> " We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

The appellant has not provided any evidence that it has renewed the 1st to 4th respondents' contracts in view of the judgment dated 24th May, 2019. We also take cognizance of the fact that the Civil Appeal No 196 of 2020 whereby the appellant's then CEO challenged her conviction for contempt of court was dismissed. We hold that the 2nd and 4th respondents have established and proved that they were treated inhumanely by being denied access to their offices, and being denied other attendant vital benefits in spite of the court order. Their right to fair labour practices has been violated.

31. As far as 1st and 3rd respondents are concerned, as observed by this Court in Civil Appeal No. 196 of 2020, they had been charged with corruption related charges under section 62 of the *Anti-Corruption and Economic Crimes Act* and they had been lawfully placed under suspension and so the order on reinstatement or renewal of their contracts was not applicable to them. The only issue of concern in respect of these two was that the appellant was not paying them 50% of their salaries as required under section 62(1) of the *Anti-Corruption and Economic Crimes Act*, unless of course the provisions of section 62(4) of the Act were applicable to them. We note that at paragraph 24 of their Petition, the 1st and 3rd respondents stated that they had been suspended on half pay and so we cannot understand the reasons their half salaries were not paid. They have nonetheless averred that they could not access their offices because their bail terms proscribed them from doing so, and so the appellant cannot be blamed for complying with the court prescribed restrictions on bail.

32. The respondents urged this Court to grant them damages saying they have suffered great loss and damage. This has been raised on cross-appeal. It is correct to say that the cross- appellants did not claim damages before the trial court, but this would be because the issue of damages had not arisen as at the time they filed the petition. The issue of damages arose after the Ag. CEO of the Commission blatantly refused to comply with the court order directing the reinstatement of the appellants to their offices and to renew their contracts as per the resolution of the Commission which was passed at the special meeting held on 13th December, 2018 and as endorsed by the trial court.

33. Having established that the respondents/cross appellants' constitutional rights were violated as we have held above, it goes without saying that they are entitled to damages. The primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration but an award for damages is not automatic and the court must consider all the peculiar circumstances surrounding each case, hence the issue of proportionality and rationality.

34. In this case, the court ordered renewal of the contracts with the result that the respondents/cross-appellants will be paid their salaries even for the time they were unable to access their offices. A declaration of violation of the respondents' constitutional rights will send the message to the appellant that its employees have rights, which should be respected and failure to do so has dire consequences. We also consider the fact that the person who violated the respondents' rights was punished with a conviction and fine for contempt of court and that should serve as a deterrent to other CEOs who may be inclined to violate the constitutional rights of the commission employees. We are in the circumstances disinclined to award any damages for violation of the respondents' rights.

35. The cross appeal therefore succeeds only in respect of prayer No. 2 to the extent that a declaration is issued that the Cross appellants/respondents' rights under Articles 28, 41 and 47 of *the Constitution* were violated. In view of the outcomes in the appeal and cross-appeal, we order that costs of the appeal and the cross appeal be and are hereby awarded to the respondents/cross appellants, but each party to bear its own costs of the suit before the trial court as ordered by that court. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR