IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KOOME JJA

CIVIL APPEAL NO. 238 OF 2015

KENYA EDUCATION STAFF INSTITUTE.....APPELLANT

AND

KENYA UNION OF POST-PRIMARY TEACHERS

(KUPPET).....1ST RESPONDENT

MINISTER FOR EDUCATION..... 2ND RESPONDENT

MINISTER OF STATE FOR PUBLIC SERVICE.... 3RD RESPONDENT

(Appeal from the Award of the Industrial Court of Kenya at Nairobi (Rika, Lukwe & D.K. Siele, JJ) Dated 1st April, 2011

in

Industrial Cause No. 224 (N) of 2008)

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JUDGMENT OF NAMBUYE JA

The appeal arises from the Award of the Industrial Court of Kenya at Nairobi (as it was then known, now the Employment and Labour Relations Court (ELRC) **Hon. Mr. Justice James Rika**, **Jacob Lokwe** and **D.K. Siele,** dated 1st April, 2011.

The background to the appeal is that, the 1st respondent filed a memorandum of claim against the appellant, 2nd and 3rd respondents respectively on behalf of **Jane Murunga** and **Christopher Nyakiti** (the grievants) dated 15th December, 2008 and filed on 22nd December, 2008 verified by an affidavit of **Jane Murunga** deposed on 15th December, 2008, and filed simultaneously with the claim. It was subsequently supported by a further supporting affidavit deposed by the same **Jane Murunga** on 16th July, 2009 and filed the same date.

It was averred *inter alia* that, the grievants were trained graduate teachers employed and deployed by the Teachers Service Commission (TSC) at High Ridge Teachers Training College (H.T.T.C) as senior Lecturers. In 2006, the H.T.T.C. was taken over by the appellant described in the statement of claim as a Semi-Autonomous Government Agency (SAGA), created in 1988 under the Education Act Cap 211 of the Laws of Kenya, through legal notice number 565 of 1998, issued on 13th December, 1988 by the then Minister for Education **Hon. Aloo Aringo** to perform functions as enumerated in the said legal Notice.

It was placed under the management of a council comprising permanent Secretaries (PS's) of the 2nd and 3rd respondents, Directorate of Personnel Management (DPM), Chief Inspector of schools and the Secretary to T.S.C among many others also as prescribed for in the above legal notice. Prior to the merger with H.T.T.C, the appellant carried out its operations at Kenyatta University. A relocation committee was set up headed by **Prof. Godia** the then Education Secretary to over sight the transition of both the infrastructure and services of staff formerly deployed to H.T.T.C to the appellant.

In April 2006, the appellant carried advertisements in the public media for Job opportunities within its establishment. The grievants were successfully interviewed on the 17th July, 2006 by the appellant's council for those job opportunities and subsequently deployed within the appellants' establishment having been taken on as Senior lecturers and variously assigned responsibilities in departments within the

appellant's establishment and started discharging those functions immediately. An inter-ministerial committee convened by the PS, 3rd respondent for the same transitional purpose advised that the grievants be absorbed fully into the appellant's establishment, pursuant to which advise, **Jane Murunga** was assigned the department of media and ICT, while **Mr. Christopher Nyakiti** was assigned duties in the department of research.

In March, 2007, T.S.C issued the grievants with GP33, intending to stop paying their salaries effective April, 2007. Both the appellant's Director **Dr. Wanjiru Kariuki** and **Prof. Karega Mutai**, the then PS to the 2nd respondent separately wrote to T.S.C asking T.S.C. to retain the grievants in its payroll for another three months within which time it was expected they would have been fully absorbed into the appellant's establishment. T.S.C. obliged and paid the grievants' salaries up to June, 2008, by which time, the appellant had not finalized the process of absorbing the grievants into its establishment.

On 19th August, 2008, the appellant's Director acting on directions from the PS 2nd respondent wrote a letter releasing the grievants back to T.S.C citing reorganization exercise then ongoing at the appellants' with advise that they apply for future job opportunities within the appellant whenever any were advertised. On 20th November, 2008, the appellant notified the grievants to vacate its residential houses hither to occupied by them as employees of the appellant by 31st December, 2008, pay rent arrears and other utilities; failing which they would be forcefully evicted. Before the expiry of the notice to vacate the premises of the appellant**,** on 10th December, 2008, the appellant instructed Auctioneers to seize the grievants' goods and sell them to recover rent, prompting the litigation resulting in this appeal. In it, the grievants sought orders to direct the appellant to issue the grievants with a statement of initial particulars, the 2nd respondent to operationalize the absorption of the grievants into the public service within 14 days from the issuance of the order; the appellants' Director to desist from undue interference with the grievants; any other reliefs deemed fit to make for ends of justice to be met to both parties; that the grievants are entitled to a salary and other income; the appellant having advertised and interviewed the greivants for jobs within its establishment should be directed to honour their part of the bargain and pay due salaries to the grievants as set out in the advertisement. The appellant to reinstate the grievants to the jobs they occupied before 1st September, 2008.

The grievants 'claim was opposed by a memorandum of defence filed by the 2nd and 3rd respondents dated 8th August, 2009, in which the 2nd and 3rd respondents denied any administrative laxity, lack of will, malice and mischief in the delay in absorbing the grievants into the public service; and instead, asserted that the grievants remained employees of the TSC throughout, in whose payroll they received their pay; that they were rightly released to the TSC when the process to absorb them into the appellant's establishment failed to materialize. They should not therefore have defied T.S.C's directive to redeploy them elsewhere in its institutions.

The grievants' claim was also opposed by a replying and further replying affidavit deposed by **Dr. Wanjiru kariuki**, the then appellant's Director, and **Prof. Karega Mutai** the then PS**,** (2nd respondent). In summary, both deposed separately that the grievants were not employees of the appellant but of the T.S.C, on whose payroll they remained throughout. They conceded the grievants were successfully interviewed in July, 2006 for job placements within the appellant's establishment, and were infact allocated duties to perform in the appellant's establishment, and which they performed, but contended that this was merely on secondment as they still remained in the payroll of the T.S.C. throughout; that in terms of **sections 7(2)** and **7(4)** of legal notice **No. 565 of 1988,** the appellant had no mandate to absorb the grievants directly as employees as that mandate lay with the Public Service Commission (PSC), a role not concretized by the P.S.C, hence the necessity for the appellant to heed the directive from the PS, (2nd respondent) to release them back to T.S.C.

The claim was canvased by way of written submissions, orally highlighted by learned counsel for the respective parties. The trial court analyzed the record and identified issues for determination.

On the legal status of the appellant, the trial court made findings that the appellant was created by legal Notice **No. 565 of 1988** as a Semi-Autonomous General Agency (SAGA) and placed under the management of a council, variously composed as already highlighted above.

On the role of the PSC, in the employment of staff for the appellant, the trial court made findings that no evidence was placed before **it** with regard to Rules or Regulations donating power to the PSC's sanctioning of employment of staff for the appellant before such employees are absorbed into the appellant's establishment.

On the appellant's status as an employer, the trial court made findings that **section 7(2)** and (**4)** of legal **Notice No. 565 of 1988** is what vested in the appellant the power both to employ and receive staff on secondment; that it was pursuant to the power donated under the above provisions that the appellant advertised for job opportunities within its establishment, and in respect of which the grievants applied for and were successfully interviewed for and taken on, assigned and performed duties within the appellant's establishment as its employees, and which in the trial court's view, severed the employer/employees relationship with T.S.C their former employer;

It was further, the trial court's opinion that the greivants were not recruited by the appellant through the PSC as no evidence was placed before court to demonstrate that the recruitment committee then headed by **Prof. Godia**, the then P.S Ministry of Education reserved any role to be played by the PSC in the said recruitment. Neither was any evidence adduced to show that the PSC was ever consulted by the recruiting committee either before or after the completion of the recruitment exercise with regard to the said exercise. Further that the 2nd and 3rd respondents also never pleaded in their memorandum of defence filed in opposition to the grievants' claim that the appellant's recruitment of the grievants had to receive the PSC's sanctioning before being effected/actioned.

On account of the above reasoning, the trial court found no basis in both **Dr. Wanjiru Kariuki's** and **Prof. Karega Mutai's** assertions that the grievants' absorption into the appellant's establishment after their successful interviews with the appellant had to receive the sanction of the PSC.

The trial court considered the definition of an employer as provided for in the Act which includes any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman **or** manager **or**

agent of such person, public body, firm, corporation or company; and applying the above definition to the rival positions before it on this issue, concluded that the appellant through its council met the threshold for the definition of an employer as set out above; that it had the capacity to employ; that it directly employed the two grievants. It was therefore erroneous for the appellant to argue that the grievants could only be employed with the sanction of the PSC. That is why the appellant after the successful interviews engaged the grievants, suffered them to work in very important positions within the appellant, while the appellant exercised control over their working hours and working conditions, a role that in law could only be played by an employer.

On what amounted to the TSC's continued payment of salaries to the grievants after their successful interviews for job placement with the appellant, the trial court made findings that there was evidence that TSC continued to pay grievants' salaries at least upto June 2008, but in the trial court's view, and especially bearing in mind the undisputed facts alluded to above, held that payment of salaries alone could not lead to a conclusion that TSC was at that particular point in time, or in subsequent months the grievants' employer. In the trial courts view, this was an arrangement of convenience, a stop-gap step, confirmed by the content of letters from **Prof. Karega Mutai** and the appellant's Director requesting T.S.C to continue paying the grievants' salaries as they processed the grievants' absorption into the appellant's establishment. In the trial court's view, an employee of TSC could not have acted as the in-charge of the appellant or be in its governing council and procurement Committee. TSC could not also have issued form GP33 to the grievants intending to stop payment of salaries to them.

Turning to other factors tending to demonstrate existence of an employer/employee relationship between the appellant and the grievants, the trial court identified the conduct of the grievants' themselves holding themselves out as employees of the appellant when they discharged duties assigned to them by the appellant upon their successful interviews and recruitment into the appellant's service. Second, the appellant's conduct towards the greivants whom it held out as its then employees when it assigned them duties which they discharged within its establishment. Third, T.S.C as a member of the appellant's council was not only aware of the appellant's advertisement calling on the grievants to apply for job positions within the appellant's establishment, but was also party to the decision making process that recruited and employed the grievants into the appellant's establishment through its participation in the appellant's governing council. That is why, in the trial court's view T.S.C issued grievants with the GP33 forms stopping payments of their salaries effective April, 2008. Fourth, after the successful interviews with the appellant, TSC deployed the grievants to its institutions which deployment the grievants declined citing having secured employment with the appellant**s**, and in respect of which TSC took no disciplinary proceedings against the grievants. On that account, the trial court concluded that all the above factors were additional sufficient basis for the trial court to conclude that the grievants' employment with TSC had terminated.

On the conduct of the 2nd and 3rd respondents, the trial court made findings that both **Prof. Karega Mutai** and the appellant's Director had variously written to T.S.C explaining the position of the grievants and pleaded for time within which to regularize their absorption into the appellant's establishment as employees. It was therefore erroneous for the PS of the 2nd respondent to address the Director of the appellant on 14th August, 2008 requesting them to release the grievants back to T.S.C, while also erroneously referring to them as employees of the TSC; that it was pursuant to the PS's erroneous request that the appellant's Director issued the grievants with the release letters on 19th August, 2008, purporting to release the grievants back to T.S.C as their employer; that reason for the release action was based on the reorganization of staffing levels at the appellants' contrary to the reason advanced earlier on that, the PSC had declined to sanction the grievants' employment and subsequent absorption into the appellants' establishment.

The trial court rejected the appellant's assertion that the grievants had merely been seconded to the appellant because, there was no documentary proof for such a proposition. Second, that if this was purely a case of secondment, there would have been no need for the grievants to apply for job opportunities within the appellant's establishment and successfully attended interviews for those job opportunities.

On the assertion that the grievants' prayers were ambiguous or *otiose*, the trial court ruled that it had found nothing on the record to persuade the trial court to find that the claimant's prayers were ambiguous or *otiose* as they were in simple and clear language. On that account, the trial court found that the grievants' claim was well grounded both on the facts and in law, and was therefore well merited and on that account granted orders that: the release of the grievants by the appellant to TSC on 19th August, 2008 amounted to an unfair termination of the grievants' employment with the appellant; the appellant to immediately reinstate the grievants to their jobs; the grievants to be paid by the appellant all the arrears of salary and accrued benefits within 30 days of the reading of the Award, at the rate applicable to their positions in the appellant's establishment from June 2008 todate; the appellant to immediately issue the grievants with written letters of appointment; the grievants to continue in occupation of their appellant's residential premises on such terms as are currently applicable to the senior staff of the appellant; the appellant to pay each grievant 12 months' gross salary in compensation within 30 days of the delivery of the Award, for unfair termination, at the rate applicable to the appellant's senior lecturers in August, 2008. Further, the appellant to pay the grievants within the same period as above, the cumulative difference of salaries if any, between the rate applicable to the appellant's senior lecturers from September 2006 and the rate actually paid by TSC to the grievants from this date to June 2008 when TSC stopped salary payments; and lastly that parties to bear their own costs.

The appellant was aggrieved and filed this appeal raising seven grounds of appeal. It is the appellant's complaints that the learned Judge erred in law:

1. In holding that;

(a) The grievants were employees of the Appellant; and

(b) That they were unfairly dismissed by the appellant whereas they were employees of the Teachers Service Commission (TSC).

2. In failing to consider that the grievants had admitted that they were under the control of the Techers Service Commission (TSC).

3. By ordering re-instatement of grievants who had never been employed by the appellant.

4. In failing to consider and give effect to the express provisions of section 49 of the Employment Act, 2007 Laws of Kenya before making an order for the reinstatement of the grievants.

5. In ordering payment of salary arrears by the appellant to the grievants who were at all material times employees of Teachers Service Commission.

6. in concurrently awarding the grievants' damages and ordering their reinstatement with the appellant.

7. In holding that the grievants who were not employees of the appellant should continue in occupation of the appellant's residential premises.

The appeal was canvased by way of written submissions orally highlighted by learned counsel for the respective parties. Learned counsel **Mr. Geofrey Imende** appeared for the appellant, while learned counsel **Beatrice Akuno** & **Emmanuel Soita,** appeared for the 2nd and 3rd respondents. There was no representation for **Mr. Gikundi Miriti,** indicated to have been served on 21st October, 2016, for the hearing of the appeal, while **Mr. Nyandieka** was indicated as having been present during the case management proceedings in the course of which a mutual hearing date was taken. The Court being satisfied that the above mentioned learned counsel had due notice of the date for the hearing of the appeal allowed learned counsel for the appellant, 2nd and 3rd respondents to prosecute the appeal.

On the relationship between the grievants and the TSC, the appellant submitted that the grievants were employed by TSC, issued with contracts of employment, but subsequently seconded to the appellant with an intention of eventually absorbing them into the appellant's establishment, but that intention was never concretized for the PSCS's failure to sanction the intended absorption, leaving the appellant with no option but to heed the PS's (2nd respondents') directive to release the grievants back to TSC for redeployment, and which action T.S.C took but was defied by the greivants resulting in their dismissal from T.S.C.

On the nature of the reliefs granted by the trial court on the grievants' claim, against the appellant, the trial court was faulted for ordering the appellant to reinstate the grievants into its employment, issue them with employment letters, and pay twelve (12) months' salary compensation as damages for alleged unfair termination all of which in the appellant's view, were not sustainable because: first, the grievants were never employees of the appellant but merely seconded to it. Second, an order of reinstatement which presupposes existence of an employer/employee relationship could only suffice where there was demonstration that the grievants were the appellant's employees which was not the case in this appeal. Third, the trial court failed to properly appreciate that if there was any merit in its finding that there was unfair termination of the grievants' employment with the appellant which the appellant asserted there was none, then the trial court could only have awarded either a reinstatement or compensation and not both. The trial court's double compensation was therefore in contravention of section **49** of the Act. Fourth, the award arrived at by the trial court was also in total disregard of the grievants' own pleadings and prayers as sought for in their statement of claim and was therefore not sustainable.

On the duty of the Court as a first appellate Court, the case of **Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** was cited as basis for inviting this Court to re-analyze, and re-evaluate the record a fresh, reverse the impugned decision and substitute it with an order allowing the appeal and dismissing the grievants' claims against the appellant in its entirety.

The trial court was also faulted for granting orders that had not been pleaded for by the grievants, namely, that, the grievants be paid all salary arrears from June, 2008 todate, be issued with letters of appointment by the appellant, be paid 12 months' gross salary for unfair termination and continue occupation of the appellant's residential premises.

To Buttress the above submissions, the appellant relied on the case of **Richard Satia Partners & Another versus Samson Sichangi Civil Appeal No. 164 of 1995** for the holding *inter alia* that, special damages must be specifically pleaded, particularized and proved; the case of Ch**arles Sande versus Kenya Cooperative Creameries Civil Appeal No. 154 of 1993 (UR),** for the holding *inter alia* that the only way to raise an issue before a Judge is through a pleading as a Judge has no power in law to decide an issue not raised before them; High Court **civil** case of M**athew Mutua Mutio versus Car & General (K) Ltd,** Civil Case No. 4272 of 1992, in which the position held by the Court of Appeal in the case of **Coast Bus Services Ltd versus Sisco Murunga Danyi & 3 others** Civil Appeal No. 192 of 1992 (UR) was approved for the reiteration of the principle that special damages must be pleaded with as much particularity as circumstances permit **was approved**; the case of **Nairobi City Council versus Thabiti Enterprises Ltd [1995-1998] 2EA 231** for the holding *inter alia* that, it is settled law that pleadings are the only way for raising issues for determination in a Court of law and only then will a party be allowed to prove its case; the case of **Galaxy Paints Co. Ltd versus Falcon Guards Ltd [2001] eKLR**, for the reiteration of the principle that, it is trite law that issues for determination in a suit generally flow from pleadings and that the trial court may only pronounce judgment on the issues arising from pleadings or such issues as the parties may frame for the Court's determination and the case of I**ndependent Electoral and Boundaries commission & another versus Stephen Mutindi Mule** & **3 others [2014] eKLR**, for the holding *inter alia* that, parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce itself on.

As to whether the grievants were employees of the appellant, the appellant faulted the trial court for erroneously finding that grievants were employees of the appellant, when the greivants' themselves had in their memorandum of claim conceded that the process for their absorption into the appellant's establishment and which was subject to sanction by the P.S.C was never sanctioned as such.

The trial court was also faulted on its findings, firstly, that TSC retained the greivants in its payroll as a way of accommodating the appellant, 2nd and 3rd respondents to allow them to finalize the absorption of the greivants into the appellant's establishment; and secondly that T.S.C considered grievants no longer as its employees which findings in the appellant's view had no legal basis, especially when TSC readily redeployed the grievants to its institutions soon after their release back to T.S.C by the appellant's Director without the grievants formally reapplying for those postings. In the appellant's view, the above conduct of both the T.S.C and the grievants was clear demonstration that the contract of employment between the grievants and the T.S.C was never severed during the period the grievants served the appellant after their successful interviews with the appellant.

To buttress the above submissions, the appellant relied on the case of **Dr. C. Fitton versus City of Edinburgh Council Appeal No. VKEATS/0010/07/MT** for the proposition that a contract of employment is established by proven existence of factors showing mutuality of obligations between the contracting parties and control of the employee by the employer, and which tests according to the appellant were never met in this appeal.

On secondment, the appellant faulted the trial court for misdirecting itself on the law on secondment firstly, by failing to appreciate that on secondment, the responsibility of employment of the seconded employee remains with the original employer who still pays the seconded employees' salary subject to a right of recall of such an employee by the sending employer whenever exigencies arise. Second, that allocation of duties to grievants by the appellant was a mere consequence of secondment by TSC pending formal employment by the appellant which was never concertized. Thirdly, that the mere fact that TSC did not issue letters of termination to the grievants upon their refusal to be redeployed to new work stations, upon being instructed to do so by TSC after their successful interviews with the appellant and assumed duties within the appellant's establishment was not in the appellant's view, sufficient basis for the trial court to hold that the grievants had not ben seconded to the appellant.

To buttress submissions on secondment, the appellant cited the case of **Mary Nyangesi Ratemo & 9 others versus Kenya Police Staff Sacco Ltd and another [2013] eKLR**, the case of **Centrica India Offshore PVT Ltd versus C.T. (W.P.C) No. 6807/2012 (Del); Capital Health Solution versus BBC & Another UKEATS/0034/07/MT,** all for the proposition that, in a situation of secondment, the employee seconded, continues to be the employee of the original employer; and that secondment connotes a temporary assignation of an employee from the sending employer to the receiving employer, based on the basis that the assigned employee will return to work directly for the sending employer at the conclusion of the secondment tour.

On unfair termination, the appellant faulted the trial court for the failure to appreciate that, all that the appellant did was to release the grievants back to TSC on the advice of the PS, (2nd respondent) after the PSC failed to sanction their absorption into the appellant's establishment; that no employment between the grievants and the appellant materialized, as no contract of employment was ever executed as between the appellant and the grievants capable of termination either fairly or unfairly. There was also sufficient evidence to demonstrate that TSC considered grievants as its employees, a position informed by T.S.C's conduct of continued payment of their salaries and subsequently re-deploying them to other work stations within its establishment as soon as they were released by the appellant's Director on the advice of the PS, 2nd respondent. It was also the appellant's assertion that the fact that the director of the appellant wrote to TSC pleading for additional time within which to finalize the absorption process, was no sufficient basis for the trial court's finding that the appellant considered grievants as its employees.

The trial court was also faulted for making an assumption that merely because the PS, to the second respondent, TSC and the Director of the appellant sat on the appellant's council was in itself sufficient basis for the trial court holding that they were by virtue of holding those positions conversant with actions each took independently in the discharge of their official functions with regard to the intended absorption of the grievants into the appellant's employment.

On the significance of the disciplinary action taken by TSC against the greivants, the trial court was faulted for erroneously finding that the said disciplinary sanction was part of a well-orchestrated and coordinated scheme to coerce the grievants into re-entering TSC especially when there was no evidence to show that they had ever severed their employment ties with T.S.C.

On the reliefs granted in favour of the grievants for reinstatement, the trial court was faulted for granting this relief notwithstanding, that the grievants were never absorbed into the appellant's establishment as employees of the appellant. Second, for the failure to properly appreciate and apply the prerequites for granting the relief of reinstatement as provided for in **section 49** of the Act and which in the appellant's view, were absent in this instant appeal.

To buttress the above submission, the appellant relied on the case of **Mary Chemweno Kiptui versus Kenya Pipeline Company Ltd [2014] eKLR**, and the case of **Kenya Airways Limited versus Allied Workers Union Kenya and 3 others [2014] eKLR** both for the prerequites that guide the court when granting the remedy for reinstatement, to an aggrieved party.

On the other, additional remedies, the appellant submitted that these did not lie in law firstly, because, the appellant had demonstrated before the trial court and now on appeal that, the grievants were still in the employment of TSC, that is why T.S.C gave them letters of transfer to other stations within the T.S.C's establishment as soon as they were released by the appellant. Second, they went against the spirit of the law as provided for in **section 49** of the Act.

To buttress the above submissions, the appellant cited the case of **Kenya Airways Limited versus Allied Workers Union Kenya & 3 others** (supra), and **Rift Valley Textiles Ltd versus Edward Onyango Ogada [1994] eKLR,** for the submissions that these additional remedies neither lay in law, pleaded for**,** nor proven.

On continued occupation of the appellant's premises by the grievants, it was submitted that since the grievants were not employees of the appellant, and had infact been redeployed by T.S.C, there was no basis for the trial court ordering that they do continue occupying the appellant's premises.

To buttress the above submission, the appellant relied on the case of **Erick V.J. Makokha** & **4 others versus Lawrence Sagini & 2 others [1994] eKLR,** for the holding *inter alia* that, fringe benefits of subsidized housing become extinguished the moment the contract of employment ceases to have effect.

The 2nd and 3rd respondents, while supporting the appeal faulted the trial court for the failure to appreciate that the grievants were initially employed by TSC, issued with employment contracts, and subsequently seconded to the appellant following successful interviews but were never ultimately absorbed into the appellant's establishment for lack of sanctioning by the PSC, which led to the appellant releasing them back to TSC for redeployment; that TSC did redeploy the grievants to its institutions notwithstanding that they defied that redeployment and instead filed the claim giving rise to this appeal. Second, for the failure to pay due regard to the grievants' own admission in their pleading and supportive evidence that they were all along not only under the control of but also drawing salaries from TSC and were therefore never employees of the appellant.

To buttress the above submissions, the 2nd and 3rd respondents relied on the case of **Abok James Odera Associates versus John Patrick Machira T/A Machira & Co. Advocates** (supra), and the case of **Express Connection Limited versus Ezekiel Kiarie Kamande [2016] eKLR,** in support of their submissions that the trial court should not have ignored evidence; that since there was no contract of employment between the appellant and the grievants there was no basis for granting the reliefs granted in their favour by the trial court.

The trial court was also faulted for granting to the grievants' salary arrears for a period of three and a half years in contravention of the provisions in **section 49(1) (c)** of the Employment Act, which only permitted compensation for a maximum of twelve (12) months' salary in the event of any proven unlawful/unfair termination of employment which was not the case in this appeal.

To buttress the above submissions, the 2nd and 3rd respondents cited the case of **United States International University versus Eric Rading Outa [2016] eKLR**, in which the trial court was faulted for granting an award of compensation in excess of twelve (12) months' salary in disregard of the **provision** in **section 49** of the Employment Act which limited such compensation to twelve months; without assigning reasons for the award arrived at; without assessing and giving due regard to the effects such a hefty award would have on an employer and to the economy in general; without due regard to the principles that guide assessment of damages by a courts of law; and lastly, for making an excessive award which did not reflect a proper assessment of what should have been a proper award to be made. Also relied on is the case of **Rift Valley Textiles Limited versus Edward Onyango Ogada [1944] eKLR**, on the principles that guide a court of law on assessment of damages.

Being a first appeal, this Court in **J. S. M. v E. N. B.** ***[2015] eKLR*** aptly put the role **of** a first appellate court as follows: -

> ***"We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."***

I have considered the record in light of the court's mandate as set out above; the submissions of the appellant, the 2nd and 3rd respondents and the principles of law relied upon by the above named respective parties all of whom supported the appeal. Issues that fall for determination are as follows:

> ***(1) Whether the grievants were employees of the appellant.***
>
> ***(2) Whether the grievants' employment was unfairly terminated by the appellant.***
>
> ***(3) Whether the remedies awarded to the grievants by the trial court lie in law.***

In resolving the first issue, the trial court relied on **clause 7** (**2)** and **(4**) of Legal **Notice No. 565 of 1998** which reads as follows:

> ***"7, (1) The council shall appoint, with the approval of the Minister, appoint a Director of KESI.***

(2) The Council shall appoint and develop suitable professional and supporting staff.

(3). The Council shall appoint education officers in charge of education programmes and district and provincial levels as field agents of KESI.

(4) The power of the Council to appoint staff, shall include the power to approve persons seconded to the service of the Council.

(5) The Council may by a resolution passed by not less than two thirds of the members present and voting at a special meeting convened for that purpose, request the termination of the secondment of any person seconded to the service of the Council under sub-paragraph (4).

(6) No final decision to dismiss a person employed by the Council or to terminate his contract, or to request the termination of the secondment of a person seconded to the service of the Council on grounds of misconduct, grave professional default or inefficiency shall be reached until the person has been given the opportunity to appear and answer to the charges against him in person before the Council."

My view on the above provision is that, **sub-Clause 7(2)** donates power to the appellant to appoint and develop suitable professional and supporting staff. The power donated in this sub clause is absolute going by the use of the word "shall." **Clause 7(4)** on the other hand provides explicitly that the power of the appellant's council to appoint staff includes the power to approve persons seconded to the service of the council. Vide **sub-clause 5** and **6**, the appellant enjoys power to terminate the services of both seconded as well as hired employees through sanctioning by its council. All that was expected of the appellant was for the appellant to convene its council to deliberate and pass a resolution terminating the grievants' employment with them if they no longer required their services. There appears to be no provision for a seconded employee to be given a hearing. There is however a mandatory requirement for the council to comply with the prerequisite in sub-clause 6 where there is intention to terminate the services of an employee.

As correctly found by the trial court, no residual power is reserved in the above clauses for the PSC or the DPM to sanction the appellant's councils' employment exercise executed pursuant to the above sub clause, before being actioned or given effect to. I therefore find no basis for faulting the trial court's rejection of the appellant, 2nd and 3rd respondents' reliance on lack of sanctioning of the grievants employment by the PSC or DPM as basis for terminating the grievants employment with them.

Turning to provisions of the Employment Act which were also appraised by the trial court, a contract of service is defined in the Act as: meaning *inter alia*, an agreement, whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time. An employee is defined as a person employed for wages or a salary, while an employer on the other hand is defined as any person, public, body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person**s**, public body, firm corporation or company.

Section 7 of the Act prohibits employment of a person under a contract of service outside the ambit of the provisions of the Act. **Section 8** provides that the Act applies both to oral and written contracts. **Section 9** on the other hand makes provision that a contract for the performance of any task by an employee as assigned by an employer in excess of three continuous months has to be in writing. The responsibility of ensuring existence of a written contract for service in excess of three months is cast upon the employer in terms of section 9(2) of the Act.

In this appeal, the trial court found for the grievants and ruled that they were employees of the appellant, based on the background information and its reasoning based on the said background information as already highlighted above.

As correctly found by the trial court, the appellant does not dispute the above position as demonstrated by the background information alluded to above. Their contention before the trial court and now on appeal has consistently been that, all that existed as between the grievants and them was an intention to create an employer/employee relationship which was never concretized by reason of the PSC's failure to sanction the same. In rejecting the above**,** appellant**s'**, 2nd and 3rd respondents' assertion, the trial court gave reasons already highlighted above. I have considered these in light of the totality of the record as analyzed above and find no error in the conclusions arrived at by the trial court on this issue. My reasons for affirming the trial court's rejection of the above, **appellants, 2nd and 3rd respondents' assertions** are as follows:

(i) Clause 7 (2) and (4) of legal Notice No. 565 of 1988 donating the power to employ in the appellant, made no reservation for the PSC or the DPM to sanction the appellant's exercise of its mandate under the said clause either to employ or sanction secondment of an officer into its establishment.

(ii) No other Rule or Regulations was pointed out either to the trial court or on appeal as mandating the PSC or the DPM to sanction the appellant's exercise of its mandate under the said sub-clauses.

(iii) The plea of secondment was also correctly rejected by the trial court, because, going by case law relied upon by the appellant as highlighted above, secondment would be evidenced by a communication to that effect from the sending employer to the receiving employer. None was exhibited before the trial court nor pointed out to the Court on appeal.

(iv) Reliance on the T.S.C's conduct of continued payment of the grievants salaries after they had been successfully interviewed for job placements within the appellant's establishment, assigned and commenced execution of duties assigned them within the

appellant's establishment was correctly rejected by the trial court as there were clear requests from both the appellant's own Director **Dr. Wanjiru Kariuki** and **Prof. Karega Mutai** and which were never recanted by the above named personalities, requesting T.S.C to continue meeting that obligation to the grievants as the appellant organized itself. **I** find this was sufficient basis for the trial court to find that T.S. C's delay in severing employment ties with the grievants was occasioned by the above mentioned unequivocal requests.

(v) The trial court's finding that the grievants not only held themselves out but also discharged their duties within the appellant's establishment as employees of the appellant was also well founded on the evidence on the record especially when it was not denied by the appellant. Likewise, the appellant held them out as its employees, that is why it assigned them duties to perform within its establishment and also supervised the performance of those duties.

(vi) It was also correct for the trial court to find that if it was correct as asserted by the appellant not only before the trial court, but also on appeal, that the grievants remained employees of the T.S.C. throughout the period they were in the service of the appellant, T.S.C would not have issued the GP33's to them nor shifted datelines for stoppage of payment of salaries to the grievants.

(vii) It was also correctly held by the trial court that the purported rerouting of the grievants to the T.S.C through direct positing's by the T.S.C with penal consequences contrary to the T.S.C acquiescing to an earlier move for similar reasons was well founded as in terms of the provisions of section 9 of the Act, the grievants were employees of the appellant. **I**nterference with their service with the appellant could only have been sustained by the trial court and now on appeal if there had been demonstration that the appellant's council complied with sub-**clause 7(5) & (6) of Legal Notice No. 565 of 1988** when relieving the grievants of their employment with the appellant which was not the case in this appeal.

(viii) Lack of a formal contract of employment between the appellant and the grievants was not *perse* evidence of lack of existence of an employer/employee relationship between them, as the obligation to provide a written contract lay with the appellant as the employer in terms of section 9(2) of the Act. The only appellant's explanation for the failure to provide one and which was rejected by the trial court and which rejection is now affirmed on appeal was that the PSC had not sanctioned the employment exercise. I reiterate my earlier findings that there was no provision either in Clause 7 of legal notice No. 565 of 1988 or any other Rule or Regulation cited an appeal making that requirement mandatory.

(ix) The definition for an employment contract alluded to above includes an implied contract. The fact of the grievants holding themselves out as employees of the appellant by reason of their accepting and diligently performing duties assigned to them by the appellant after their successful employment interviews with the appellant on the one hand; and the appellant likewise holding them out as such, was sufficient basis for implying existence of an employer/employee contract as between the disposing parties.

(x) The reason given for releasing the grievants back to T.S.C was in contradiction **with** the reasons given at the trial court by the appellant, 2nd and 3rd respondents as reason for the failure to concretize the grievants' employment with the appellant. It was therefore rightly rejected by the trial court and

In light of the totality of the reasons given above, I find no basis for disturbing the trial court's finding that the grievants were employees of the appellant, they had been absorbed as such, assigned and diligently discharged duties within the appellant's establishment until they were erroneously released to T.S.C in contravention of the procedure set out in **sub-clause 7(5)** &**6** of legal **Notice No. 565 of 1988** on the procedure the appellant was obligated to employ and follow when relieving any employee of either the status of secondment or employment with his/her employment with them. The appellant was also obligated to follow the prerequites set out in the Act if they had arrived at the conclusion that they no longer needed the grievants' services.

Having answered issue number 1 in the affirmative, this now brings me to determine the second issue. Having ruled above that the employer/employee relationship between the appellant and the grievants was governed by the provisions of both **clause 7** of legal **Notice No. 565 of 1988,** I reiterate what I stated above that if the appellant desired to releave the grievants of their employment with them, they ought to have complied with the procedure laid in **sub-clause 5** thereof; if there was evidence that the grievants were on secondment, and sub **clause 6**, since they were employees which was never complied with. Acting on the directions from the PS, (2nd respondent) was therefore in contravention of the above procedure. Second, as already stated above, it was also contrary to an earlier position taken by the appellant, 2nd and 3rd respondents that it was on account of the P.S.C's failure to sanction the absorption exercise. It was therefore correctly rejected by the trial court; a position I affirm on appeal.

Having concurred with the trial court that the employer/employee relationship was also governed by the Act, the appellant ought to have complied with the provisions of the Act with regard to the procedure the appellant ought to have followed when terminating the grievants employment with them is what is set out in **sections 41, 43** and **45** of the Act. In **Janet Nyandiko versus Kenya Commercial Bank Limited [2017] eKLR,** the Court summarized those procedures *inter alia* as follows: -

"Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice

and equity."

Lack of sanctioning of the recruitment exercise by the PSC given as reason the appellant gave for terminating the grievants' employment with them was rejected by the trial court and affirmed on appeal given as reasons already stated above which **I** fully adopt as operating for the determination of this issue.

The finding above in favour of the grievants that their services with the appellant were unfairly terminated, leads me to the determination of appropriate remedies for redressing that wrong. The remedies awarded by the trial court are as already set out above and which I adopt for purposes of determining this issue. The complaint raised by the appellant against these reliefs is three fold. First, that the remedy of reinstatement did not lie for the reasons advanced. Second, that it was erroneous for the trial court to award reliefs not pleaded for by the grievants in their statement of claim. Thirdly, that allowing salary compensation for twelve (12) months in addition to reinstatement did not only lie in law but also amounted to double compensation which was untenable in law.

Starting with the remedy of reinstatement, I find that the same was pleaded for and therefore lay for consideration by the trial court. It is provided for in **section 49(3) (a)** of the Act. Factors to be considered by a court of law when considering reinstatement as an appropriate remedy for an aggrieved employee are set out in **section 49(4) (a)** to **(m)**. These have also been crystalized by case law. See the case of **Kenya Airways versus Allied Workers Union Kenya & 3 others** (supra), in which it was stated that, the remedy of reinstatement is not an automatic remedy. It is discretionary as each case depends on its own set of circumstances, notwithstanding, that these are not limited to practicability of reinstatement or reengagement of the aggrieved employees and the common law principle that specific performance in a contract of employment should not be ordered except in very exceptional circumstances, which in the appellant's view, were absent in this appeal. Being a discretionary remedy, the trial court was obligated to exercise the discretion to grant the same within the principles that guide the exercise of Judicial discretion when granting a discretionary remedy that is; with reason, and not on whim, caprice or sympathy. See **Githiaka versus Nduriri [2004] 2KLR 67.**

The reason the trial court gave when ordering reinstatement was basically the rejection of the reason advanced by the appellant of lack of sanctioning of the grievants employment with then the PSC, a position I have affirmed for reasons advanced above. **I** have also added further that it was in clear breach of the procedure the appellant was obligated to follow when terminating an employee's employment with them as provided for in **clause 7(5)** & **(6) of LN. No. 565 of 1988**. Second, lack of sanctioning of the grievants' absorption into the appellant's establishment was not the reason advanced for their release back to the T.S.C. which in my view amounted to lack of good faith and good will on the part of the appellant in its dealings with the grievants.

Whenever this Court is called upon to interfere with the exercise of judicial discretion, on appeal, it is guided by the principles enunciated in numerous case law from this Court. In the case of **Coffee Board of Kenya Vs. Thika Coffee Mills Limited & 2 Others [2014] eKLR,** it was stated that the court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and therefore occasioned an injustice.

Applying the above threshold to the reasons the trial court advanced for granting the remedy reinstatement, I find no fault as I have already stated above that the only reason the appellant, 2nd and 3rd respondents gave at the trial and still maintained on appeal for the failure to absorb the grievants into their (appellants) establishment was lack of sanctioning by PSC which they failed to substantiate as already alluded to above, I have also added that failure to comply with the prerequites in **Clause 7(5)** & **(6)** of **LN No. 565 of 1988**. That is why I stated above that the variance in the reasons given in the release letters, and the trial and now on appeal was a clear demonstration of lack of good faith and good will in the appellant's dealings with the grievants.

Tuning to granting reliefs not pleaded for in the grievants' statement of claim, I find that these related to payment of all arrears of salary and accrued benefits within 30 days of the reading of the Award, at the rate applicable to their position in the appellant's establishment from June 2008 todate; the appellant to issue the grievants with written letters of appointment; the grievants to continue in occupation of the appellant's residential premises on such terms as are currently applicable to senior staff of the appellant; the payment of cumulative difference of salaries if any, between the rate applicable to the appellant's senior lecturers from September, 2006 and the rate actually paid by TSC to the grievants from September, 2006 to June 2008, when T.S.C stopped salary payments to the grievants. Lastly, that the appellant to pay each grievant twelve (12) months gross salary in compensation within thirty (30) days of the delivery of the Award for unfair termination at the rate applicable to the appellant's senior lecturers in August, 2008

The position in law with regard to awarding of reliefs not pleaded for is as was aptly stated by the Court in the case law relied upon by the appellant in support of their submissions against the above award which I adopt as stating the correct position in law.

Applying the threshold set by the above adopted case law with regard to allowing reliefs not pleaded for to the appellant's complaint on this issue, it is my finding that with the exception of the award for payment of twelve (12) months' salary compensation for unlawful termination and top up salaries in difference of salaries as paid by T.S.C and the equivalent earned by appellant's staff of the same rank, the rest were remedies attendant to the order for reinstatement because, in law, an employee restored to his former position is entitled to all the benefits attendant to such reinstatement.

Turning to the twelve (12) months' salary compensation, **section 49** of the Employment Act makes provision for a wide range of remedies. The mode of assessment of those remedies was set out by the Court, in **Co-operative Bank of Kenya Ltd V. Banking Insurance &**

Finance Union CA No. 188 of 2014 as follows:

> ***"Our understanding of the Act is that the prescribed remedies…are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies….are not mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."***

Going by the above exposition, the exercise of jurisdiction under **section 49** of the Act is discretionary. I adopt the principle highlighted above guiding the exercise of the court's mandate when determining whether to interfere or otherwise with the exercise of such discretion.

Applying the above threshold to the rival position on this issue, it is my finding that the award of twelve (12) months' salary compensation is not sustainable. First, it was not pleaded for.

Second, I find nothing in the findings of the trial court set out above to demonstrate that the trial court was addressed by the parties on this award so as to infer that parties by their conduct of addressing the trial court on this issue thereby invited the Court to rule on it.

Third, in the manner framed, it could easily pass in law as an alternative remedy. **I**n the case of **National Bank of Kenya versus Anthony Njue John [2019] eKLR** and **National Bank of Kenya versus Samuel Ngure Mutonya [2019] eKLR**, the Court had occasion to pronounce itself on the issue of awarding compensation for unfair /unlawful termination of contract in addition to a relief of reinstatement. The Court approved and applied the threshold set by the Court in **Alex Wainaina T/A John Commercial Agencies versus Jonson Mwangi Wanjihia Civil Appeal No. NAI 297 of 2014 (UR)** as approved in **Olive Mwihaki Mugenda & Another versus Okiya Omutata & 4 others [2016] eKLR,** that there is no jurisdiction to award an alternative remedy in instances where consideration for the main remedy awarded preceded consideration for the award of the alternative remedy. A position I adopt as stating the correct position in law. I therefore find this remedy unsustainable and it is accordingly declined.

As for the top up salaries, I do find this was neither pleaded for nor proved going by the fact that nowhere in the trial court's assessment of the record was it highlighted that, the grievants raised any complaint of being under paid. They accepted salaries as paid for by T.S.C awaiting absorption into the appellants' into establishment. I discount the same on this ground.

The upshot of the above analysis and reasoning is that, the appeal partially succeeds and for avoidance of doubt, the following are the orders granted by the Court on appeal.

1. <u>The orders affirmed are as follows:</u>

(a) That the appellant's termination of the grievants' employment with them was unfair.

(b) That the grievants are entitled to an order for reinstatement into the appellant's employment together with all attendant benefits for an employee reinstated back to his/her employment as affirmed above.

2. The reliefs dis allowed are as follows:

(a) Payment of salary compensation for 12 months.

(b) Payment of the difference in salary if any earned by the grievants as paid by the T.S.C and the equivalent earned by their counterparts then in the appellant's employment at the material time.

3. I affirm the order that each party to bear own costs.

The Judgment is signed under **Rule 32(3)** of the Court of Appeal Rules (CAR), since the Hon. Mr. Justice **P.N. Waki, JA** ceased to hold office of Judge of Appeal upon retirement from service and as Koome JA agrees the above are the orders of the Court.

Dated and Delivered at Nairobi this 7th day of February, 2020.

R.N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KOOME, JA

I have had the opportunity to read in draft the judgment of Nambuye, JA, I do concur with it in its entirety. I have nothing useful to add.

Dated and delivered at Nairobi this 7th day of February, 2020.

M. K. KOOME