IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MWERA & AZANGALALA, JJ.A)

CIVIL APPEAL NO.18 OF 2007

BETWEEN

KENYA TEA DEVELOPMENT AGENCY LIMITED…….…….....…..….APPELLANT

AND

ISMAEL OMBATI OCHIENG …….……..…1ST RESPONDENT

JOHNSON KAMAU……2ND RESPONDENT

GEORGE WACHIRA……..……..…3RD RESPONDENT

JANE IMBWAGA……..……..…..4TH RESPONDENT

ELIUD N. GITHINJI…….…….5TH RESPONDENT

PETER M. KINGE……...…….6TH RESPONDENT

PETER N. NG'ANG'A……...……..…..7TH RESPONDENT

LAWRENCE OYARO…….……..…8TH RESPONDENT

ELIJAH KIRIMI MBWIRA……..9TH RESPONDENT

JOYCE GAKURU…….10TH RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ang'awa, J.), dated 29th November, 2006

in

H.C.C.C. No.948 of 2003)

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JUDGMENT OF THE COURT

The judgment, subject of this appeal, was delivered by the High Court (***Ang'awa, J***) on 29th November, 2006. In her judgment, the learned judge referred to a "constitution reference" as the cause which on 8th February, 2006 the Hon. the Chief Justice directed her to hear. The file could not readily yield a constitutional reference but it has a notice of motion dated 18th March, 2004, headed ***Nairobi Civil Suit No.948 of 2003***. The parties in that motion are ***Ismael Ombati & 133 Others vs Kenya Tea Development Agency Ltd***, as plaintiffs and defendant respectively. That notice of motion or civil suit was filed by the firm of Gitobu Imanyara & Company Advocates. Brought under sections 60, 70, 71, 80, 82, 84 and 107 of the repealed Constitution, the plaintiffs, the respondents in this appeal, sought several orders but those that the court heard and determined were two. The learned judge stated that she was to determine the question relating to the breaches of the respondents' fundamental rights and freedoms and issues:

> ***"(i) An order that Legal Notice No.44 by the Minister for Agriculture made on 22nd March, 1999 styled Kenya Tea Development Authority (Revocation) Order 1999 contravenes and accordingly is inconsistent with and ultra vires section 107 of the Constitution of Kenya to the extent that it purport (sic) to remove the applicants from the public service in breach of that section and or law made pursuant to that section and is accordingly null and void and incapable of being the basis upon which the defendant derives its purported authority including the authority to retire and/or dismiss the plaintiffs from their employment.***
>
> ii. ***An order consequential upon para (i) above that the decision to sent*** (sic) ***[the] plaintiffs on early retirement was a breach of the plaintiffs fundamental right to the protection of law guaranteed under section 70(a) of the Constitution of Kenya."***

Before filing the said notice of motion, the respondents filed a plaint on 11th September, 2003 wherein they pleaded that they were former employees of the appellant who had succeeded their original employer, Kenya Tea Development Authority (KTDA), which ceased to be by virtue of the publication by the Minister of Agriculture of the L.N. No.44 of 1999. By that legal notice, KTDA ceased to exist and in its place the appellant was incorporated, a limited liability company, by the Minister. The appellant took over the assets, liabilities and staff of KTDA then proceeded to shed off the respondents to early retirement in an exercise called "ongoing re-engineering and restructuring process" in the company. This suit appeared to have been left in abeyance in preference to pursue the notice of motion herein but basically on the same material facts, namely, the movement of the respondents from KTDA to the appellant who later got rid of them by early retirement. So they prayed the High Court to find that:

> ***"(a) Their transition to the Kenya Development Authority Limited (sic) was a nullity in that the Legal Notice converting the applicants employment from the Kenya Tea Development Authority contravenes and accordingly is inconsistent with and in breach of section 107 of the Constitution and to that extent, the said Legal Notice is null and void within section 3 of the Constitution.***
>
> b. ***The right of the applicants fundamental right to life which incorporates the right to livelihood for the period up to the ripe retirement age and/or subject to terms and conditions applicable to civil servants on permanent and pensionable terms of service was breached by their "early retirement".***
>
> c. ***The payments given or offered to the plaintiffs purportedly as compensation for "early retirement" were not in accordance with the terms and conditions applicable to civil servants on permanent and pensionable terms of service, nor were they fair and/or reasonable, nor were they in accordance with the Public Service Rules.***
>
> d. ***Kenya Tea Development Agency Limited denied the applicants their right to the protection of their interests by their union by sending them on special pre-retirement leaves and later giving them payments which had been worked out unilaterally and arbitrary (sic) without due process and without the involvement of their union and accordingly the applicant's right to collective bargaining guaranteed under section 80 of the Constitution was contravened.***

e. ***The decision by the Kenya Tea Development Agency Limited to pick out the plaintiffs for early retirement was arbitrary and discriminatory.***

f. ***The decision by the Kenya Tea Development Agency Limited to prematurely retire the plaintiffs from their employment was a deprivation of their accrued proprietary right."***

The orders sought, predicated on the grounds just reproduced, were expounded on in the supporting affidavit sworn by the 1st respondent herein, I***smael Ombati Ochieng*** on his own behalf and on behalf of his co-respondents. To this affidavit, the 1st respondent appended his own letter of early retirement dated 10th December, 2004 from the appellant agency's managing director. Similar letters were sent to other co-respondents. The letter stated that the appellant had decided to reduce its staff levels in the ongoing re-engineering and restructuring process with effect from 10th December, 2001. The appellant had approved the policy for the "retrenchment compensation package", which included salary earned to the last day of service; pay in lieu of three months notice; severance pay of two months for every completed year of service; a "golden" handshake of Sh.150,000/= and some few other benefits. The early retirees were told to proceed on leave as from the date of the letters, while their benefits were worked out for eventual payment. It can be assumed that for each retiree, the benefits would differ from the other according to one's job seniority, length of service or salary point.

It is not denied that the respondents were paid their respective dues and they left. Then they brought the suit referred to above in 2003 – two years later. Excusing the mix-up of the reference to the respondents either as plaintiffs or applicants and also disregarding the level of grammar as reproduced above, it is our understanding that the claim by the respondents, in the main, was that as employees of KTDA, taken over by the appellant, they were Civil Servants or Public Servants who could only be retired by the Public Service Commission in accordance with section 107 of the repealed Constitution, and also in accordance with the ***Service Commissions Act*** and ***Rules*** thereunder. Also appended to the 1st respondent's affidavit was a copy of the 1999 – 2000 **Collective Bargaining Agreement** between the appellant and Kenya Plantation & Agricultural Workers Union. Another appendix was a copy of a document titled CONFIDENTIAL. PROPOSED PRIVATIZATION AND OWNERSHIP OF KENYA TEA DEVELOPMENT AUTHORITY (KTDA). The relevant part of this document was the part ***Mr. Kounah*** learned counsel for the respondents referred us to, which read:

> ***"Under the current incorporation KTDA is "de jure" owned by the Government and "de facto" by all the small holder tea farmers…."***

Since we will revert to this extraction later, suffice it to say here that counsel's position was that the respondents were indeed Government of Kenya employees, or civil servants as they referred themselves to in the notice of motion, and so they could not be retired by the appellant but as provided for under section 107 of the Constitution. The appellant filed a replying affidavit and a further replying affidavit to the motion, exhibiting *inter alia,* the respondents' letters of appointment. The appellant relied on this affidavit to oppose the motion in the High Court.

In her judgment, the learned judge reviewed L. N. No.44, which the Minister issued under section 192(4) of the Agriculture Act as having, in essence, dissolved KTDA and in its place incorporated the appellant limited liability company. That part 6 of the L.N. directed that the new entity could take over the rights, liabilities and obligations of KTDA while under part 8 thereof, that entity was empowered to take over the staff of KTA on the same terms and conditions thereby making their employment continuous. The judge then noted that:

> ***"14. The advocate for the defendant/respondent conceded from the bar that all the staff were continuously employed by the defendant being the new limited company…"***

The respondents, however, challenged that transmission on terms as per the retrenchment letters above, which the learned judge termed "dismissal", which was unlawful and in breach of the repealed Constitution. After setting out the arguments from both sides, the judge understood the effect of the L. N.

No.44 to have dissolved KTDA, ordered the incorporation of the appellant to take over the assets, liabilities and employees of KTDAS. After initial doubts whether or not the appellant was soon thereafter incorporated, the learned judge, however, noted that it was indeed active because it signed the Collective Bargaining Agreement referred to above, together with the Union on 31st

January, 2001. At this point the judge stated that:

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

We should admit that we did not quickly understand what the learned judge meant by the foregoing position because Kenya Tea Development Authority was the predecessor of the appellant. So it existed until the appellant took over its place and it is the appellant, not KTDA which signed the collective agreement. But all that notwithstanding, the learned judge asked the question whether the Minister had power to declare the staff of the dissolved authority to be the staff of a limited liability company which had not yet been formed. The judge then delved into the process of incorporating a limited liability company and, without saying whether any side produced evidence or there was no evidence at all that the appellant was ever incorporated as at the time of the effect of the legal notice, concluded that all the actions of the Minister:

> ***"…meant that the Minister took upon himself powers conferred upon the Public Service Commission under section***
>
> ***107 of the Constitution,"***

which section we shall revert to presently. The judge arrived at the above position because she held the view that:

> ***"36. … It is only the said Commission who may determine the role of the employee once an authority has been dissolved."***

And further:

> ***"38. I find that an authority such as the one dissolved/revoked by the Minister was a creature of the Kenya Government. It was fully owned by the government and responsibilities of the staff laid (sic) with the government. The regulation even provided that if any disciplinary action were to be taken upon the staff that was criminal in nature, the staff would be treated in the similar manner as were civil servants. <u>The employee of a parastatal and or authority are</u> <u>public offices</u> (sic) but their employment derives directly from the parastatal or authority. <u>The main stream central</u> <u>government hire and discipline the staff known as civil servants</u>. <u>They too are public officers</u>."*** (underlining supplied.)

Then to concretise the position taken by the respondents, the judge added that:

> ***"42. All along the applicants understood that they were public officers employed till the age of 55 years."***
>
> In allowing the application or reference the court held:

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

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

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

(iv) The powers to declare the staff no longer public offices (sic) ***to private company laid elsewhere. There was nothing to show that the Minister was given powers delegated by the law or public service commission to deal with staff."***

In our understanding, the judge's decision was that the respondents even as they were employees of a parastastal, were public servants/officers whose movement between KTDA and the appellant as well as their retrenchment, only lay with the Public Service Commission, therefore and acting otherwise, breached the respondents fundamental rights. The foregoing is our best endeavour to bring out the basis of the present appeal.

The appeal was premised on nine grounds, namely, that the High Court determined a constitutional application filed in a civil suit; the High Court erred in holding that the respondents were public servants to whom ***section 107 of the Constitution*** applied even as the respondents had not presented evidence to prove that they were public servants appointed by the Public Service Commission and to contradict the evidence adduced by the appellant that the respondents were appointed by an entity other than the Public Service Commission; the High Court did not appreciate the meaning and definition of a public officer in terms of ***section 2 of the Public Service Act*** together with ***sections 2 and 5(1) of the Interpretation and General Provisions Act***; the learned judge failed to appreciate that under ***section 94(2) of the Agriculture Act*** the Minister had powers to transfer KTDA employees to the appellant; and finally that the learned judge came to a conclusion contrary to the evidence and submissions presented.

Called upon to argue the appeal, ***Mr. Thiga***, learned counsel, relied on the submissions filed on behalf of his client on 3rd March, 2015 while ***Mr. Kounah,*** holding brief for ***Mr. G. Imanyara*** for the respondents, presented no written submissions but orally made remarks on the confidential proposal to privatise KTDA as alluded to earlier, which to him, stated that the respondents were employees of then Government of Kenya.

While combining grounds 2, 3, 4, 5 and 6 of the memorandum and arguing the rest separately, ***Mr. Thiga's*** position was that the learned judge was in error to find that an employee of a parastatal or authority was a public servant even if his/her employment derived from the parastatal or authority. In this regard, section 2 of the Interpretations and General provisions Act was reproduced with the definition:

"public officer" means a person in the service holding office under the Government of Kenya whether that office is permanent , temporary, paid or unpaid."

Counsel also relied on section 2 of the Service Commissions Act (Cap 185) (since repealed) which defined a public officer as:

"a paid officer as a civil servant of the Government, not being the office of a member of commission, or part-time office, or an office the emoluments of which are payable at an hourly or daily rate."

Mr. Thiga continued that the State Corporations Act provided in section 5(3) that:

"A state corporation may engage and employ such staff, including the chief executive, on such terms and conditions of service as the Minister may, in consultation with the Committee, approve."

On that basis, ***Mr. Thiga*** told us that there was a clear distinction between a holder of a public office also

called a public servant, and an employee of a corporation. His argument was that the respondents were corporation employees and not public servants whose terms and conditions fell upon the Public Service Commission to determine in order to be governed by section 107 of the repealed Constitution. Accordingly the Minister under ***section 5 of the State Corporations Act,*** did not infringe on any legal provisions in respect of his actions regarding the employees of KTDA when they became the staff of the appellant by virtue of ***Legal Notice No.44 of 1999***.

That such authorities or entities were not synonymous with the Government of Kenya. And more, that the appellant adduced evidence that the respondents were employed by KTDA as per their letters of appointment presented (pages 139-159 of the record). We heard further that the learned judge did not properly appreciate the import of ***section 192(4) of the Agriculture Act*** under which the Minister acted. This provision of law, ***Mr. Thiga*** argued, gave power to the Minister to wind up affairs of an authority and direct transfer of its employees as was deemed fit and necessary. So the High Court fell in error to fault the Minister in issuing L. N. No.14 whose effect included transferring KTDA staff to the appellant. It was added that there was no evidence to support the judge's finding that the Government at any time paid salaries of the respondents during the period in question. There was also the issue of the High Court determining the notice of motion, also called a constitutional reference application, when the suit in which it was filed remained pending.

And finally, that the High Court judgment was contrary to the evidence adduced.

In determining this appeal, we proceed as if we are conducting a retrial as stated in ***Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123***.

> ***"An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistence with the evidence generally."***

To that end, we have perused the record to acquaint ourselves well with the pleadings, affidavit evidence, the submissions and the findings of the High Court in the light of the circumstances of the case and the law applicable. All those have preceded our decision now to follow.

At the outset, we note that the notice of motion which cited the breaches of fundamental rights of the respondents was set out in H.C.C .C. N o.946/2003. It was not filed as a constitutional reference application and neither was it a constitutional petition brought as such under the Practice Rules dubbed the "***Chunga***" Rules, then in operation. All was a study in convoluted pleadings. But be that as it may, we would rather focus on the substance and not the form or procedure of the pleadings presented, to determine what the outcome amounted to. Here the outcome was that the provisions of section 107 of the repealed Constitution was not applied, thereby occasioning breaches of the respondents' rights regarding their employment. Much as the respondents' pleadings and submissions pointed to early retirement or retrenchment, the learned judge called the termination of their services as a dismissal.

All in all, our view is that the issue to resolve on this appeal is whether the High Court was right to hold that the respondents were government servants governed by section 107 of the repealed Constitution or they were employees of a State Corporation governed by the legal regime specific to parastatals. In the event we find that the respondents were not public or government employees, then we need not determine whether or not they were fairly or reasonably compensated at the time of the end of their services.

Section 107 said to have been contravened by the Minister and where he was found to have usurped the powers of the Public Service Commission reads as follows in the pertinent parts:

> ***"107.(1) Subject to this Constitution, the power to appoint persons to hold or act in offices of the public service and on the service of local authorities (including the powers to confirm appointments) the power to exercise disciplinary control over person holding or acting in those offices and the power to remove those persons from office shall rest in the Public Service***

Commission;

Provided that the Commission may, with approval of the President and subject to such conditions as it thinks fit, by directions in writing, delegate any of its powers under this section to any one or more of its members or to any officer in the public service or in the case of appointments to the service of local authorities, particular local authorities.

2. ***Subject to this section and section 106(12) provision may be made by or under an Act of Parliament for presenting the manner of the exercise of the functions of the Public Service Commission under this section and for any matters incidental or supplementary to the exercise of those functions.***

3. ***… (4) ….”***

Pursuant to subsection (2), Parliament passed the Services Commissions Act, referred to in the appellant's submissions, whose provisions set out many incidental and supplementary matters regarding the conduct, discipline, promotions etc of public servants. As we have already seen above, the definition of a public officer over whom the Public Service Commission has power by virtue of section 107, such a person is in the service of the Government of Kenya, namely the mainstream central government service or with the local authorities.

The appellant adduced evidence before the High Court that the respondents were appointed by KTDA and we find for instance that on 11th January, 1987 the 1st respondent was offered a job of senior accounts clerk with that authority/parastatal. Other respondents were shown to have been similarly appointed at various times to various posts by KTDA. The various letters told the appointee/respondents their salary scales, allowances payable, periods of probation, leave entitlements and such other terms as were applicable. So all in all the respondents took up their respective posts, and it was clearly stated:

“…with Kenya Tea Development Authority.”

These employment posts were offered and accepted as provided for by section 5(3) above – a state corporation to engage and employ staff on such terms and conditions of service as the Minister may in consultation with the Committee approve. While so engaged, the Minister in exercise of the powers conferred upon him by virtue of section 192(4) of the Agriculture Act issued a gazette notice L. N. No.44 of 1990 winding up the affairs of KTDA and in its stead, ordering the incorporation of the appellant to take over liabilities, assets and staff of the former KTDA. By that notice KTDA ceased to exist. The appellant came into its place. It was not shown that it did not and then it proceeded in its re-engineering exercise, to reduce staff by retrenching the respondents from among the staff it had taken over. To do so, it offered the terms referred to in the letters of retrenchment and the respondents went their way until two years later when they instituted the suit HCCC No.948/03. At no time did the respondents become public servants and there was no evidence before the learned judge that at some point they were paid salaries by

Government of Kenya. As per the L.N. 44 the respondents maintained continuous employment from KTDA to the appellant. They were never at any time public or civil servants in the main stream central government whereby section 107 of the repealed Constitution could or did apply to them.

In sum, our finding is that the learned trial judge fell in error when she found and declared that the respondents were at some point public servants to whom section 107 applied and therefore the Minister usurped the Public

Service Commission powers when by L. N. No.44 he dissolved KTDA and directed that the appellant takes over the respondents as its own employees.

The respondents were never employees of the Public Service Commission; they remained parastatal staff all the time from employment to the time they were transferred to the appellant who later retrenched, paid and told them to leave.

Thus the High Court ought to have dismissed the respondents' application.

Having found as we have done, we have no other decision to make other than to allow this appeal, set aside the High Court judgment under review and order that the costs here and in the High Court be borne by the respondents.

Dated and delivered at Nairobi this 12th day of June, 2015.

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/jkc