



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MUSINGA & OUKO, JJA)

CIVIL APPEAL NO. 166 OF 2003

BETWEEN

HENRY OMOLLO OORO APPELLANT

AND

KENYA WILDLIFE SERVICE 1ST RESPONDENT

HOUSING FINANCE CO. OF KENYA 2ND RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at Nairobi (Githinji, J.) dated 20th December, 2001

in

HCCC NO. 1763 OF 1993)

JUDGMENT OF THE COURT

This is an appeal from the judgment and order of the High Court of Kenya at Nairobi (Githinji, J. as he then was), dated 20th December, 2001. Pursuant to an order made on 7th June 2011 by Tunoi, JA (as he then was), Waki and Aganyanya JJ.A, counsel representing the parties in this appeal filed written submissions on 16th and 23rd June 2011, respectively. Following the appointment of Tunoi, J.A to the Supreme Court and the retirement of Aganyanya, JA from the service, in a further order made on 28th August, 2012, Githinji, JA, as the acting President of the Court, ordered that this appeal be heard *de novo* before another bench on priority basis, and the same was subsequently listed for hearing before us.

The appeal, in our view, raises a fairly straight forward question which we shall shortly revert to and the following brief background is necessary in order to understand the genesis of the dispute. The appellant was employed by the Ministry of Tourism and Wildlife (the Ministry) in the Wildlife Conservation and Management Service Department (the Department) on permanent and pensionable terms. His appointment was confirmed through a letter of 12th February, 1976. On 7th July 1987, the appellant was interdicted while working at Mt. Kenya Station. While the appellant was on interdiction, the Wildlife Conservation and Management (Amendment) Act, 1989, was enacted establishing the Kenya Wildlife Service (KWS). The Act came into operation on 15th January, 1990.

On 22nd July, 1991 the appellant received a letter from the Ministry retiring him on the ground of abolition of office. However, on 17th September, 1991, he received another letter from the Ministry rescinding that decision. On 18th April, 1994 the appellant was sent on compulsory retirement. Aggrieved by this decision, the appellant filed a plaint which was subsequently amended twice. In the further amended plaint filed on 16th September 2000, the appellant claimed the following:-

- “a) A declaration that on the construction of Section 15 of the Wildlife Conservation and Management (Amendment) Act, 1989 as read with Legal Notice No. 11 of 1990, the said Act granted plaintiff an appointment as a warden two at a salary scale commencing at Kshs. 7,300/= per month with effect from 15th January, 1992.**
- b. A declaration that plaintiff’s compulsory retirement of 1st August, 1994 is unlawful.**
- c. A declaration that he is entitled to be paid all arrears of salary, house allowance and henceforth the true appropriate salary scale applicable to the defendant’s employees.**
- d. An order for payment of the said sum to the plaintiff by the defendant.**
- e. Further or other relief.**
- f. General damages against first defendant.”**

The resolution of prayers (b) to (f) would depend on the finding on prayer

(a) above.

In its statement of defence, the respondent denied that it recruited the appellant as its employee pursuant to the provisions of **Section 3D** as read with **section 15 (6)** of the Wildlife Conservation and Management (Amendment) Act. Neither did it enter into any contractual relationship of employment with the appellant. KWS further alleged that **Section 15** of the Act merely makes transitional provisions which are incapable of being construed in such a way as to recruit employees for KWS; that at the time KWS was established, the appellant was in fact on interdiction by his employer, the Public Service Commission, hence the question of his recruitment in KWS did not even arise; that it never actually paid the appellant any salary but was, upon a request by the Ministry, only assisting in the preparation of the pay-roll for the civil servants who were yet to be redeployed by the said Ministry following the abolition of the Department in which they were working.

The suit against the 2nd defendant, the Housing Finance Corporation of Kenya, in the High Court was struck out with the consent of the appellant on 26th April, 2001. It was therefore in error that it is joined in this appeal. We shall for that reason proceed to determine the appeal only between the appellant and KWS. In a judgment dated 20th December, 2001 following a full trial the High Court (Githinji, J. as he then was), dismissed the appellant’s suit with costs, holding, *inter alia*, that:-

“As the marginal note to Section 15 shows the provisions of Section 15 (6) of the Act are clear and free from ambiguity. The officers, members and servants mentioned in Section 15 (6) of the Act were deemed as appointed officers of the service for a specified but indefinite duration – that is until they have been recruited into the service or otherwise deployed by the Government. The plaintiff was never recruited into the service by the Board of Trustee of Kenya Wildlife Services. His case was referred to the Government and the Government eventually decided to retire him.”

With that, the learned Judge dismissed the appellant’s claim with costs, thereby provoking this appeal. The appeal raises eleven grounds which the appellant’s counsel, in his written submission has condensed into three.

On our part, as we have said, the single broad question raised in this appeal is whether the appellant was

an employee of KWS by virtue of **section 15 (6)** aforesaid. Both learned Counsel for the appellant Mr. K'Opere and Mr. Lutta for the respondent mutually agreed to rely entirely on their respective written submissions. This being a first appeal, it is our duty to re-evaluate the evidence on record in order to reach our own independent conclusion, bearing in mind the fact that we have not had the opportunity of seeing and hearing the witnesses and must give allowance for that. See **Selle vs. Associated Motor Boat Company** [1968] E.A. 123.

The transitional provisions contained in **Section 15 (6)** stipulates that:-

“(6) The Director and other officers, members and servants of the former Department and of the Wildlife Fund Trustee in office on the day of coming into operation of this Act shall, until they have been recruited into the service or otherwise deployed by the Government, be deemed to be the duly appointed Director, officers, members and servants of the service and shall be subject to the disciplinary provision relating to the service from time to time in force.”

(Emphasis ours)

According to the appellant, all employees of the Ministry in the Department of Wildlife Conservation and Management Services automatically, by operation of this section became duly appointed officers of KWS. KWS, on the other hand has taken the position that the appellant could only have been its employee if it “*recruited*” him under that section.

When legislation is amended or repealed, provisions are often needed to deal with the transition from the old to the new law. As was held by the Supreme Court of India in the case of **Union of India and others vs. Flip Tiago De Gama of Vedem Vasco** 1990 AIR 981, 1989 SCR Supl. (2) 336:

“The purpose of incorporating transitional provisions in any Act or amendment is to clarify as to when and how the operative parts of the enactments are to take effect. The transitional provisions generally are intended to take care of the events during the period of transition.”

The purpose of enacting the Wildlife Conservation and Management (Amendment) Act was *inter alia*, to create the KWS to take over the operations and duties of the former Wildlife Conservation and Management Department. By dint of **Section 15 (2)**, KWS was given authority to take over funds, assets and other property movable and immovable previously held by the Department. **Section 15 (4)** further vested in KWS all rights, powers, assets and liabilities of the Department. Similarly, **Section 15 (6)** saved the employment of former employees of the Department on specific conditions, which we shall shortly consider.

It is not in dispute that the appellant was employed by Wildlife Conservation and Management Department in the Ministry. Although he was interdicted on 7th July, 1987 which interdiction was lifted on 29th August, 1991, the question at the trial was whether upon the lifting of the interdiction he was absorbed in KWS. It was the appellant's case that upon coming into operation, the Act automatically deemed all employees of the Department to have been appointed employees of KWS. In his opinion, this was fortified by the fact that his salary was paid by KWS, he was issued a new personal number by KWS and the letters exchanged between the Ministry and KWS recognized his transfer of service to KWS.

A few months after the interdiction was lifted, the appellant was retired on the ground of reorganization/abolition of office. But by a letter dated 17th September 1991, S.K. Marisin, on behalf of the Permanent Secretary Ministry of Tourism and Wildlife, rescinded that decision and directed the appellant as follows:-

“You have retro-actively been reinstated in the Kenya Wildlife Service.....Accordingly, you are immediately required to report to the Director, Kenya Wildlife Service for further instructions.

By a copy of this letter, the Director of the Kenya Wildlife Service is being informed of the Government decision on your reinstatement and the rescission of your retirement.” (Emphasis

supplied)

In addition to this letter, there was another letter from KWS confirming that the appellant's salary and owner-occupied house allowance arrears would be paid by KWS. It would also appear that the period preceding the appellant's interdiction and reinstatement his personal number was simply 005868. However, the period after his reinstatement it was reflected on his payslips which were hence headed "Kenya Wildlife Service" and other correspondence as 0186 (005868). He also contended that he was appointed Warden II by KWS. The appellant was ultimately retired in 1994 before reaching the retirement age.

Basing his claim on these facts, the appellant argued that having been absorbed in KWS, on the true construction of **section 15**, he was irregularly retired; and that his terminal dues were not paid in accordance with the KWS salary scale.

In his testimony before the learned trial Judge, the appellant repeatedly confirmed that apart from receiving payslips headed KWS he never worked for KWS. That while KWS absorbed some employees of the Department, himself and several others were not lucky as the KWS Director flatly rejected them. In his own words he told the trial court;

"Mr. Waka of KWS refused to deploy me.....I do not know what happened to officers who were accepted by KWS. I do not know if they received letters of appointment. I did not receive a letter of appointment from KWS. I did not work for KWS after it was created because Mr. Leaky refused to deploy me.....Between the date of reinstatement and date of retirement in 1994 I did not work for either the Ministry or KWS. The Ministry issued me with written letter of retirement. I am under retirement by the Ministry."

Section 15 (6) aforesaid being a transitional provision, "*deemed*" the Director, other officers and employees of the former Department to be duly appointed as such until their recruitment into KWS or deployment by the Government.

Under the Act, it is the Board of Trustees that is charged with the management of KWS. It appoints and employs members, agents or servants of the service. It follows that the burden of proof was upon the appellant to demonstrate that he was recruited by KWS. It is on record that he was never issued with a letter of appointment by KWS. The fact of payment of salary on the KWS headed payslip which was in any case on the Ministry's salary scale was not enough to bring the appellant within **section 15 (6)**.

Charles Kariuki Mwangi, the KWS Human Resources Officer who testified on behalf of KWS, explained that pursuant to the provisions of **section 15 (6)** KWS absorbed about 1,000 former employees of the Department by issuing to them letters of appointment and the rest, including the appellant, were referred to the Ministry for deployment.

Pending deployment, by a letter dated 24th June 1991 (an exhibit) the Ministry requested the Director KWS to:-

".....assist the Ministry with the salaries for surplus employees of the defunct Wildlife Conservation and Management Department who have not been taken over by the Kenya Wildlife Service.....for three months starting from July to September, 1991."

The witness confirmed that this arrangement continued beyond the initial three months.

Like the learned trial Judge, we entertain no doubt that the appellant was duty-bound to demonstrate by evidence that he was "*recruited*" by KWS. No such evidence was presented before the trial court. The payment of his salary was retained at the Ministry's scale. He never worked for KWS and did not participate in KWS Defined Contribution (D.C.) pension scheme. The Ministry directly communicated to the appellant all issues relating to his terms of service and ultimately retired him. The Ministry was not joined in the proceedings in the High Court hence no findings could be made on the question of arrears of

salary, house allowance or even on his pension qualification.

The letter rescinding the appellant's earlier retirement was copied to the Director, KWS, merely to inform the latter of the decision to reinstate the appellant back in the service after rescission of that retirement. It did not amount to deployment, as deployment by the Government could not have been to KWS which had its own procedure of recruitment. The explanation on payment of the appellant's salary by KWS was sufficiently explained as an administrative arrangement between the Ministry and KWS. The adoption of personal No. 0186(005868) was clearly in accordance with that arrangement.

We accordingly come to the conclusion that there is no merit in this appeal which we hereby dismiss with costs.

Dated and delivered at Nairobi this 24th day of October 2014.

D.K. MARAGA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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