REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 160 of 2008

BETWEEN

REPUBLIC.....APPELLANT

AND

PROFESSOR MWANGI S. KIMENYI.....RESPONDENT

PERMAMENT SECRETARY, MINISTRY OF PLANNING..... INTRESTED PARTY

EX-PARTE ….. KENYA INSTITUTE FOR PUBLIC POLICY AND RESEARCH ANALYSIS (KIPPRA)

(Appeal from the judgment and Orders of the High Court of Kenya at Nairobi (Nyamu, J) dated on 25th April 2008)

in

HC Misc. APP. No. 1769 of 2004
****

JUDGEMENT OF THE COURT

1. Professor Mwangi S. Kimenyi (hereinafter referred to as the respondent) was the Executive Director of the Kenya Institute for Public Policy Research and Analysis (hereinafter called "***KIPPRA***).The parent Ministry of KIPPRA at the time relevant to this appeal was the Ministry of Planning. A contract of employment dated 8th February 1999 initiated the relationship between the respondent and KIPPRA. This is the 1st contract of employment. Under this contract, the respondent became an employee of KIPPRA. This first contract was initially for five years. Prior to the expiry of the first contract, the respondent resigned on 1st September 2002 and the resignation was accepted by the KIPPRA Board of Directors on 5th December, 2002. A recruitment exercise was done with the approval of KIPPRA Board but no suitable replacement was found. It was then that the idea of a second contract was mooted. A second contract of employment, whose validity is in issue, was signed between the Chairman of KIPPRA Board and the respondent and its effective date was given as 1st June 2004. An issue that has a bearing on the validity, veracity and relevancy of the second contract is the power and authority of the Board Chairman. This is pertinent as it is contended that the Chairman's contract had expired on 28th January 2004 whereas

he purported to sign the second contract in June, 2004; nonetheless the respondent entered into a new contract as the executive director and assumed office.

2. At the time when the 1st contract of employment was signed, the respondent was based in the United States of America. It was a term in the first contract that the respondent was entitled to relocation costs being costs for relocating himself and family to Kenya. It is not in dispute that the relocation costs relating to the 1st contract of employment was paid.

3. The 2nd contract also provided for payment of relocation costs. According to the pleadings, on 24th August 2004, the Permanent Secretary of the Ministry of Planning instructed the Inspector General of State Corporations to carry out investigations on KIPPRA's financial affairs and statusfollowing a query by the African Capacity Building Foundation (ACBF) who was a donor to KIPPRA concerning relocation costs of US dollars 173,200 paid to the respondent under the 2nd contract of employment and which sum was debited to the donor's account.

4. An audit committee was appointed by the Inspector of State Corporations and a report dated 20th October 2004 was prepared. The terms of reference for the audit committee was to evaluate the recruitment process of Professor Kimenyi; his terms and conditions of service in relation to relocation costs; the process and procedure employed in the payment of relocation costs of US $ 173,200 and any other relevant matter.

5. The audit team made several recommendations *inter alia* that the appointment of Professor Kimenyi (the respondent herein) be nullified with immediate effect. The audit team recommended that Professor Kimenyi be surcharged for the irregular payment of the sum of US dollars 173,200 and other irregular payments identified in the report.

6. On 16th December 2004 the Permanent Secretary of the Ministry wrote a letter ***"nullifying"*** the respondent's 2nd contract of employment as the Executive Director of KIPPRA with immediate effect. Being aggrieved and dissatisfied with the recommendations of the audit committee and the decision of the Permanent Secretary, the respondent approached the High Court for orders of judicial review. The respondent by an amended Notice of Motion dated 9th December 2005 sought orders:

1. THAT this Honourable Court be pleased to issue an order of CERTIORARI to remove into court and quash the decisions (s) of the Respondents jointly or otherwise made namely:

(i) dated 24th August 2004 or thereabouts in which the Respondents called or authorized an investigation to be undertaken of the affairs of Kenya Institute of Public Policy Analysis (KIPPRA).

(ii) the decision in the letter of the Board of Kenya Institute of Public Policy and Research Analysis (hereinafter called KIPPRA) alleged to have been made on 3rd December 2004, if any, which otherwise and whose further particulars are unknown, and the decision of the first respondent carried out in the letter dated 16th December 2004 terminating the Applicant's second contract with KIPPRA.

2. THAT by way of MANDAMUS direct that the first respondent to rescind, cancel or revoke and/or nullify the decision(s) complained of herein-above and further the first respondent be directed to inform the 2nd respondent or Board of KIPPRA this revocation, cancellation, rescinding and/or nullification of his decision(s) or do consider the applicant back in his position as Executive Director and the 2nd respondent herein do restore all his contractual benefits, including salaries and other monetary or other rewards unless lawfully terminated.

3. THAT by way of PROHIBITION order the first respondent to refrain from usurping the powers of the other established committees and the 2nd respondent's Board's powers and to act in accordance with the provisions of the State Corporations Act, Chapter 446, the Rules and Regulations contained in the Presidential Executive Orders dated 15th April 1997 (that established KIPPRA), the laws of Kenya

and the cardinal rules of natural justice as concern amongst other issues and grounds, the applicant's right to be heard before any adverse decision is taken against him.

On 25th April 2008, the High Court (Nyamu J as he then was) issued orders in the following terms:

IT IS ORDERED:

1. ***THAT an order of certiorari be and is hereby issued to remove into this court and quash the 1st respondent's decision dated 24th August 2004 in which the 1st respondent called or authorized an investigation to be undertaken of the affairs of Kenya Institute of Public Policy Research Analysis (KIPPAR) and dated dated 16th December 2004 which purported to terminate the Applicant's 2nd contract of employment.***

2. ***THAT an order of mandamus directing the 1st responded to rescind, cancel or revoke and/or nullify, the decision(s) complained of herein above and further the 1st respondent be directed to inform the 2nd respondent of the Board of KIPPRA this revocation, cancellation, rescinding and/or nullification of his decision(s) or do consider the Applicant back in his position as Executive Director and the 2nd respondent do restore all his contractual benefits, including salaries and other monetary or other rewards unless otherwise lawfully terminated be and is hereby dismissed.***

3. ***THAT an order of prohibition prohibiting the 1st respondent to refrain from usurping the powers of the other established committees and the 2nd respondent's Board's powers and to act in accordance with the provisions of the State Corporations Act, Chapter 446, the Rules and Regulations contained in the Presidential Executive Orders dated 15th April 1997 (that established KIPPRA), the laws of Kenya and the cardinal rules of natural justice as concern amongst other issues and grounds, the applicant's right to be heard before any adverse decision is taken against him be and is hereby dismissed.***

7. From the above orders, the trial court issued Certiorari but declined to grant the orders of Mandamus and Prohibition. Aggrieved by the orders issued by the High Court, KIPPRA lodged this appeal urging this court to set aside the orders of certiorari made on 25th April 2008.

8. The appeal was argued by Mr. Fred Ngatia learned counsel for KIPPRA and Mr. Charles N. Kihara and Mr. Kenneth Wilson who appeared for the respondent. Mr. Charles Mutinda appeared for the interested party.

9. Learned Counsel Mr, Ngatia submitted that his argument in appeal is that the respondent's contract of employment had no statutory underpinning that could invoke a public law remedy. It was argued that the relationship between the respondent and KIPPRA was one of employer-employee which was governed by private law. Counsel emphasized that there were no statutory restrictions to the termination of the respondent's contract of employment. He urged us to find that the correct forum to determine any dispute relating to the respondent's contract is a suit in private law. It was argued that the trial judge misdirected himself by stating that the Permanent Secretary terminated the respondent's contract of employment. Counsel submitted that there was a KIPPRA Board of Directors meeting held on 3rd December 2004 and the letter dated 16th December 2004 from the Permanent Secretary of the Ministry merely communicated the Board decision to nullify the respondent's second contract of employment. Learned counsel pointed out that the trial judge correctly concluded that the relationship between the respondent and KIPPRA was in private law. However, the court should have downed its tools and the judge erred to proceed and analyze the procedure relating to how the Board's decision was communicated to the respondent.

10. The respondent's submission through learned counsel Mr. C. N. Kihara emphasized that though the relationship with KIPPRA was that of employer-employee, a public law element had been injected with the consequence that public law remedies became available to protect the contract of employment. The respondent based his submissions on three grounds. First, that KIPPRA is a state corporation and as such it is a public body. Second, the Permanent Secretary to the Ministry of Planning who purported to nullify

and terminate his contract of employment was exercising public power and this introduced a public law element into the contract of employment. Third, the Permanent Secretary by his administrative action was acting utlra vires since he was not a party to the contract.

11. Counsel also made submissions relating to the payment of the sum of US $ 173,200 to the respondent. He urged this court to find that the payment was made by a corporate body following proper procedure. We note the submission on this issue but hasten to state that the legality of the payment of the sum of US $ 173,200 to the respondent was not an issue before the trial court and is not an issue before this court. The legality of this payment is a matter to be canvassed in private law proceedings and not in judicial review proceedings.

12. The respondent further submitted that the High Court judge made a correct finding that the Permanent Secretary did not have powers to terminate the respondent's contract. It was submitted that the tenure of the Chairman of the Board had not expired and even if this were so, the decision of the Board was still valid.

13. Having done the above recapitulation of the facts, grounds of appeal and learned counsel's submissions, we will now consider the law applicable in judicial review matters, apply the same to this appeal and determine whether the learned judge of the High Court properly applied the same and draw our own conclusions. The pertinent issue in this appeal is whether judicial review orders of mandamus, prohibition and certiorari can issue in an employer-employee relationship as based on the facts of this case.

14. **The *SUPREME COURT PRACTICE 1997 VOL 53/1-14/6*** states that "the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which one has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law to decide the matter in question". **(See *REPUBLIC – V- SECRETARY OF STATE FOR EDUCATION AND SCIENCE EX PARTE AVON COUNTY COUNCIL (1991) 1 All ER. 283 285).*** The above passage clearly demonstrates that it is the process of decision making that will be under attack in judicial review – not the decision. If the merits of the decision are questioned, then it is a case for appeal.

15. Judicial review remedies are discretionary and the court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law. In normal circumstances, employment contracts are not the subject of judicial review. In the case of ***R - V- BRITISH BROADCASTING CORPORATION – Ex Parte Lavelle (1983) 1 WLR 1302,*** it was emphasized that judicial review remedies are not available in a situation of employer-employee relationship. It was stated in the Queens Bench Division that:-

"since the disciplinary procedure under which the applicant was dismissed arose out her contract of employment and was purely private and domestic in character, the applicant was not entitled to relief by way of certiorari".

16. In an ordinary contractual relationship of master and servant, if the master terminates the contract, the servant cannot obtain orders of certiorari. If the master rightly ends the contract, there can be no complaint. If the master wrongfully ends the contract, the servant can purse a claim for damages. In ***REPUBLIC – V- JUDICIAL SERVICE COMMISSION Ex parte Stephen Pareno HC Misc. Civ. App No. 1025 of 2003,*** it was correctly stated that where an officer has left office for some time it would not be desirable to force the parties together again because it would be contrary to the policy of the law and not in the public interest and the principle of master and servant clearly apply. The court further stated that "the applicant has been separated from his former employer by a six months break. Although the applicant has sought a public law remedy what he is in fact asserting is his individual right and a private law remedy appears the most efficacious in this circumstances".

17. This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is gross and clear violation of fundamental rights. In the case of ***CHIEF CONSTABLE OF NORTH WALES POLICE – V- EVANS*** ***(1982) I WLR 1155***, Lord Hailsham pronounced himself thus:

"the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court" (See also Commissioner of *LANDS – V- KUNSTE HOTEL LIMITED* ***1995-1998 1E.A. 1 (CAK))***

18. In the case of ***ERIC MAKOKHA & OTHERS – V- LAWRENCE SAGINI & OTHERS*** ***CA No. 20 of 1994 at NRB,*** this court defined statutory underpinning. It was stated:

"the word statutory underpinning is not a term of art. It has no recognized meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may also mean the employees removal was forbidden by statute unless the record met certain formal laid down requirements. It means some employees in public positions may have their employment contract guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible that this is the true meaning of what has become the charmed words "statutory underpinning". The statute makes it mandatory that a certain procedure must be observed in some contracts of employment before termination,. Examples are constitutional office holders such as judges and the Attorney General".

19. The issue for us to consider is to determine if the contract of employment of the respondent herein had statutory underpinning to make judicial review remedies available. The learned judge correctly answered this question. In the judgment, he correctly stated that he found no public law element between KIPPRA and the respondent. The learned judge correctly stated that in the present case, matters of the contract are the preserve of the Board of KIPPRA and the respondent. The judge correctly stated that both parties could invoke the contract for any lawful reliefs inter se.

20. In the case of **Erick Makokha,** this court consisting of five judges declined to issue equitable remedies stating that such remedies were not available in breach of contract of personal services. The appellants were required to proceed for damages. In the present case, the learned judge correctly found that the termination of the contract of employment of the respondent was not being undertaken under any written law. The termination ought to have been done under his contract of employment. From the record, the respondent submitted that he has been out of the position as the executive director of KIPPRA from 16th December 2004 when the letter purporting to terminate his contract was issued. KIPPRA does not dispute that the respondent's contract of employment was terminated. Whether the termination was lawful or not is not an issue before this court. This is a private law matter. There is no statute that confer upon the respondent the right to continue in employment indefinitely. In the instant case, there is no evidence that the respondent's employment had a statutory underpinning as defined in the **Erick Makhokha** case.

21. The orders issued by the learned judge was to quash a decision dated 24th August 2004. Was there a decision made on 24th August 2004 which the learned judge could call and remove to court and quash by an order of Certiorari? We have painstakingly perused the record and we have not been able to find or locate any letter or decision dated 24th August 2004. Counsel for KIPPRA submitted that there was no letter dated 24th August 2004 as referred to in the judgment of the High Court. Counsel for the respondent admitted that indeed, the letter dated 24th August 2004 does not exist. It is our considered view that at the appeal stage, we are bound to evaluate the evidence as is on record. We cannot speculate which letter was meant to be quashed. All pleadings filed by the respondent refer to the letter dated 24th August 2004.

22. The learned judge further called and quashed decisions made on 16th December 2004 which "purported to terminate the applicant's second contract of employment". The respondent sought orders of certiorari to quash the decision in the letter of the Board of KIPPRA alleged to have been made on 3rd December 2004, if any, which otherwise and whose further particulars are unknown, and the decision of the first respondent carried out in the letter dated 16th December, 2004 terminating the Applicant's second contract with *KIPPRA*.

23. The learned judge in issuing the orders of certiorari stated that the decision of 3rd December 2004 (if any) is patently ultra vires the relevant Act in relation to the respondent. Is there a decision made on 3rd December 2004? The judge stated in the judgment that it is noteworthy to observe that no Board resolution made on 3rd December 2004 had been produced terminating the respondent's employment. The object of the order of certiorari is to call and remove into the High Court a decision that has been made. The evidence on record does not show how the judge arrived at the conclusion to remove and call into the High Court a decision which the court had not satisfied itself that it existed. We have perused the record and we have not seen a decision made on 3rd December 2004. The letter dated 16th December 2004 purports to implement a decision made on 3rd December 2004. If the court is not satisfied that a decision was made on 3rd December 2004, it follows that there was no substratum upon which the court could quash the letter dated 16th December 2004. The letter of 16th December 2004 derives its force from the decision of 3rd December 2004.

24. A further issue for determination is whether the order of certiorari could properly be issued on the facts of this case. We have analyzed the judgment of the honourable court in this matter. Bearing in mind that judicial review is not concerned with the merits of the decisions, the learned judge delved to determine the issue of validity of the second contract. He also delved into determining the issue whether the Chairman of the Board of KIPPRA was lawfully in office or not. In the judgment, the honourable judge stated "my finding on the arguments concerning the validity of the second contract is that they are an afterthought". The trial judge found that the second contract is still subsisting but could not grant any judicial review orders. These were not issues pertaining to decision making process and they had nothing to do with the judicial review application that was before the court. In the case of ***MUNICIPAL COUNCIL OF MOMBASA AND REPUBLIC Civil Appeal No. 24 of 2001,*** this court stated that judicial review has no application to disputes arising out of contractual relationship, since these relationships are governed by the law of contract. The issues of validity of the second contract falls within the realm of private law and not judicial review.

25. In the case of ***R v EAST BERKSHIRE HEALTH AUTHORITY, ex-parte WALCH (1984) 3 ALL ER 425***, the applicant was employed under a contract of employment. His employment was terminated and the Applicant filed judicial review proceedings seeking a review of the dismissal. It was held:-

"Whether a dismissal for employment by a public authority was subject to public law remedies depended on whether there were special statutory restrictions on dismissal which underpinned the employees position and not on the fact of employment by a public authority perse or the employees seniority or the interests of the public in the functions of the authority. Where the authority was required by statute to contract with its employees on specified terms with a view to the employees acquiring private law rights a breach of that contract was not a matter of public law and did not give rise to any administrative law remedies, it was only if the authority failed or refused to contract on the specified terms that the employee had public law rights to compel the authority to comply with its statutory obligations"

26. A parallel may be drawn from ***Civil Appeal No.20 of 1994 Erick D. J. Makokha & others versus Lawrence Sagini & others*** in which a question arose whether the breach of contract of personal service of lecturers from a public University could be remedied by equitable remedies of injunction and specific performance. In a unanimous judgment, a five judge bench of this court had this to say:

"In our opinion the well settled rule that a breach of contract of personal service cannot be redressed

by the equitable remedies of injunction and specific performance remains good law. The comparatively few cases in which declarations were made and injunctions were granted to restrain a breach of contract of personal services are exceptions to the general rule of the common law. In our opinion the common law rule that damages are the generally accepted remedy for redressing breaches of contracts of personal service is too firmly established to be overthrown by side wind. While we note the emerging changed attitudes and remedial changes they are bringing about, we cannot help feeling that the common law and the doctrine of equity which Section 3 of the Judicature Act obliges us to apply is the established and well known common law. It is on the faith of this that the transactions are entered into."

27. We concur with the above proposition and find that the breach or threatened breach of the respondent's contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and KIPPRA governed by private law. We find that the respondents contract of employment had no statutory underpinning.

28. The role of the Permanent Secretary of the Ministry of Planning in relation to the contract of employment of the respondent deserves determination. The honourable judge properly found that issues relating to employment between KIPPRA and the respondent are in the realm of private law. We concur with the learned judge that the Permanent Secretary had no role to play in terminating the contract of employment between KIPPRA and the respondent. The grievance of the respondent is founded on the alleged unprocedural termination of his second contract of employment by the Permanent Secretary. If the person who terminated it had no authority to do so, or if the procedure as outlined in the contract was not followed, these are issues of breach of contract to be canvassed in private law proceedings. We hold that legality or otherwise of termination of contracts of employment that have no statutory underpinnings are matters of private law and the remedies available are private law remedies. In the instant case, the learned judge erred in granting a public law remedy in a contract of employment that had no statutory underpinning. The error is fatal when it is taken into account that the court had found that KIPPRA had a litany of grievances against the respondent.

29. The learned judge in his judgment was correct in stating that the court cannot act in vain against a non-existent decision. There was no decision or letter dated 24th August 2004 that could be called and removed into the High Court to be quashed. This being so, the learned judge erred in quashing the alleged decision of 24th August 2004 when the said decision is non-existent. Further, the learned judge erred in issuing orders to quash the letter of 16th December 2004 when the court had not determined that the decision made on 3rd December 2004 was in existence. A court of law should not descend into the realm of speculation. The decision to be quashed must first be ascertained and determined to be in existence. This is the rationale for calling and removing into court a decision to be quashed.We hold that the learned judge erred and it was not appropriate to issue the judicial review orders in this matter. The respondent may well have a grievance. His remedy lies in private law which covers disputes relating to contractual relationships. The High Court erred in granting the orders of judicial review as the respondent did not have public law right and statutory underpinning capable of protection under the supervisory jurisdiction of the Court.

30. For the reasons given above, we allow this appeal and set aside the judgment of the trial judge made on 25th April 2008 granting the orders of certiorari. We further make an order dismissing with costs the respondent's Notice of Motion dated 13th January 2005 as amended on 9th December 2005 filed in the High Court. The respondent shall bear the costs of this appeal.

Dated and delivered at Nairobi this 15TH day of MARCH, 2013

M. WARSAME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR