



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 967 OF 2010**

(Before Hon. Lady Justice Hellen S. Wasilwa on 20<sup>th</sup> December, 2018)

**SAMUEL NGOVU & 11 OTHERS.....CLAIMANTS**

**-VERSUS-**

**TANA & ATHI RIVER DEVELOPMENT AUTHORITY...1<sup>ST</sup> RESPONDENT**

**TANATHI WATER SERVICES BOARD.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**INTRODUCTION**

1. The Claimants herein filed a Memorandum of Claim on 25<sup>th</sup> August, 2010 through Nyamu and Nyamu Advocates seeking for the following orders:-

*i) Declaration that the Claimants ought to be declared redundant and paid their respective redundancy dues.*

*ii) In the alternative the Claimants ought to be redeployed back to the 1<sup>st</sup> Respondent.*

*iii) Salary arrears accrued be paid to the Claimants*

*iv) Costs of the Claim.*

**Facts**

2. The Claimants were employees of the 1<sup>st</sup> Respondent, TARDA, at its Kiambere Mwingi Water Supply Project. That sometime in the course of employment, the 2<sup>nd</sup> Respondent was established to operate within Kiambere Mwingi Water Supply whereupon the Claimants services were transferred to the 2<sup>nd</sup> Respondent without clearly defined legal framework.

3. Subsequent to the aforesaid transfer, the 2<sup>nd</sup> Respondent placed the Claimants under its subsidiary service provider namely, Kiambere Mwingi Water and Sanitation Company. Prior to the transfers, the Claimants had strength of their earnings from the employment by the 1<sup>st</sup> Respondents and the 1<sup>st</sup> Respondents had guaranteed to remit monthly installments of the loan advanced.

4. That the Respondents reneged on their responsibility to pay monthly salaries to the Claimants as a consequence of which the salaries fell with arrears, consequently occasioning default in servicing of the loans by the Claimants. The Claimants further aver that the Respondents are in breach of contract of employment and that the actions of the Respondents are illegal for all purposes.

5. The Claimants called three witnesses who gave evidence on behalf of the others. C.W 1 testified on the 20/2/2013 and stated that, he is employed by the 1<sup>st</sup> Respondent at Kiambere station having been employed on 10/7/1989 as Plant Mechanic and confirmed in November 1990. He stated that the 1<sup>st</sup> Respondent was a parastatal under Regional Development Ministry and had not been merged with the Ministry of Water.

6. He stated that in 1989 he was in Masinga where he stayed for 15 years and was transferred to Kibwezi where he served for 2 years and then Mwingi Tarda in Kiambere. This was still under TARDA. His evidence is that in April 2009 TARDA stopped paying his salary. He and other Claimants were then informed that they had been transferred to TANA-ATHI Water Services Board. They had not been sensitized on this and they were only informed of this position after they wrote letters asking why their salaries were not coming through. The letter

came three months after their transfer.

7. He stated that even since the transfer they did not receive salaries from TARDA. He contends that TARDA is not under the Water Act. His contention is that the transfer was not proper but was unprocedural as the two Parastatals are in different Ministries. He stated that the prudent thing would have been to have them seconded to the second Respondent and have their salaries paid by the parent employer and allowances by 2<sup>nd</sup> Respondent.

8. CW1 averred that TARDA never stopped its operations at Kiambere and the only change was the stoppage of their salaries. They complained about what had happened and the 2<sup>nd</sup> Respondent gave them some allowances top ups. He stated that they had obtained loans in Sacco and Banks which had been approved by their employer the 1<sup>st</sup> Respondent. He stated that he had a loan in Co-operative Bank and he explained default to the bank. The loan remains unpaid to date.

9. He contends that the 2<sup>nd</sup> Respondent TANA ATHI wrote to their employer on 20/5/2009 – the Managing Director TARDA. The list of their grievances was attached. The staff had raised their concerns. The letter dated 20<sup>th</sup> May 2009 – exhibit 1 – communicated these concerns.

10. According to the Claimants they did not consider their movement to the 2<sup>nd</sup> Respondent as a transfer but termination. The Claimants aver that they have not received pay slips from the 2<sup>nd</sup> Respondent but only receive pay advices which do not reflect salaries they earned at TARDA. He avers that a cheque which was supposed to be his salary from TARDA bounced and was never paid. (Appendix 4) Payslips show bank loans were deducted but there are no remittances.

11. He stated that they have now been placed under Kiambere Water and Sanitation Company, different from the other two entities. The new entity has a Chief Executive Officer and is under Water Ministry, not Regional. It's contracted under TANA-ATHI. He contends that he has not received any letter of appointment from the new company nor any termination letter from TARDA.

12. The Claimant avers that his salary arrears are from April 2009 to date and are only paid about Kshs.42,000 in allowances.

13. The Claimants state that they now seek to be declared redundant, and be paid redundancy dues. They also seek costs. When cross examined the CW1 stated that they are not aware of the government Policy to transfer water services and that the Water Rules are foreign to them. He stated that the personal numbers they were given by the 1<sup>st</sup> Respondent remain to date.

14. The CW2 and CW3 corroborated the evidence of CW1. CW2 pointed out that at page 14 of their supplementary documents there is the document showing salaries and allowances of Water Boards which salary they have never been paid to date.

15. CW3 indicated that he was informed that his services had been transferred to the 2<sup>nd</sup> Respondent vide a letter dated 18<sup>th</sup> June 2009 under the same terms and conditions of service. In cross examination he stated that he received some payments from the 2<sup>nd</sup> Respondent and there was no difference from what he was being given by the 1<sup>st</sup> Respondent.

16. He further stated that one Dickens Ochieng the 6<sup>th</sup> Claimant herein accepted the transfer and appointment and there is no indication that this was under duress. He further stated that they were terminated by Kiambere –Mwingi water services and water and Sanitation Co in 2011 and they never challenged the termination.

17. The 1<sup>st</sup> Respondent filed their Memorandum of Response on the 21<sup>st</sup> September, 2010 through the firm of Wamalwa and Co Advocates. The 2<sup>nd</sup> Respondent never filed any response in the matter denying the allegations made by the Claimants and consequently, judgment in default was entered against the 2<sup>nd</sup> Respondent.

18. The 1<sup>st</sup> Respondent avers that vide legal Notice NO. 101 OF 2005, the government of Kenya through the ministry of Water and Irrigation transferred the services of the Claimants to the 2<sup>nd</sup> Respondent but followed a defined legal framework as contained in the Water Act. They deny ever breaching the rights of the Claimants. They asked this court to dismiss the Claimants' case accordingly. The respondent called one witness the 1<sup>st</sup> Respondent's MD who reiterated their averments in the pleadings.

19. In cross examination he admitted that Kiambere was a project under the 1<sup>st</sup> Respondent and did not have capacity to employ but was turned into a company. The 1<sup>st</sup> Respondent then transferred the co to the 2<sup>nd</sup> Respondent. The RW1 also stated that they had committed to remit deductions for loans when Claimants were their employees.

20. The parties herein filed their respective submissions. The Claimants submitted that the implied terms under the Water Act, No. 8 of 2002 and the Labour Laws were not adhered to when the Claimants were being transferred to other Water Service Boards. They cited Rule 5(2) of the Water Act No. 8 of 2002 which deals with transfers and states as follows:-

***“(2) During the transitional period, the officers and servants of the Ministry engaged in the provision of water services shall be deemed to be on secondment to the water services boards for a period of three years after which they shall either:-***

***(a) enter into written contracts of employment with those boards under section 54 (3) of the Act; or***

***(b) be re-deployed in the Public Service. “***

21. The Claimants also submit that during cross-examination of DW1, the Managing Director of the 1<sup>st</sup> Respondent, Stephen Githaiga, stated that the 1<sup>st</sup> Respondent was under the Ministry of Regional Development while the 2<sup>nd</sup> Respondent was under the Ministry of Water.

22. He further stated that Kiambere Mwingi Water Service Company was under the Ministry of Regional Development and it was capable of engaging its own employees. He further stated that according to the Water Act No. 8 of 2002, there was a transfer of ownership of Government-owned water services facilities to the water service board. They therefore submitted that under the schedule of ***The plan of transfer:- I.B 2 this ownership transfer encompasses:-***

*a) Fixed assets*

*b) System facilities and plant*

*c) Operational assets, equipment, books and records, and*

*d) Agreed liabilities and accounts receivable in accordance with the transfer agreement.*

23. The Claimants submit further that as per the Water Act No. 8 of 2002, they were to be deemed as to be on secondment.

24. The Claimants cited the case of ***Mary Nyangasi Ratemo & 9 others v Kenya Police Staff Sacco Limited & another [2013] eKLR***, which was cited in the article by *Employment Law: Transfer and Secondment of an employee, Shearn Delamore & Co., vol 7 No. 2.0, June 2008, 1* notes that:-

***“In situations where an employee has been transferred, the original employer who transfers the employee is, in law, no longer regarded as his employer. Instead the company which, the employee has been transferred to it now regarded as his employer. The opposite is however, the case where an employee has been seconded. In such a situation, the company which seconds the employee remains the employer at all material times and not the company to which the employee is seconded. ... The ordinary meaning of secondment as a temporary transfer is on the face of it the connotation that the employee is subject to recall by his employer. So he is not a permanent employee of the other. ... Therefore, so long as the contract is not terminated, a new contract is not made, and the employee continues to be in the employment of the original employer.”***

25. They therefore submit that the 1<sup>st</sup> Respondent ought to have terminated the employment of the Claimants; paid them one month's salary in lieu of notice and the 2<sup>nd</sup> Respondent ought to have deemed the Claimants to be on secondment.

26. The Claimants have also submitted that since the Claimants were deemed to be on secondment, their contract with the 1<sup>st</sup> Respondent who was under the Ministry of Regional Development ought to have been terminated and the Claimants entered into new contracts with the 2<sup>nd</sup> Respondent after two (2) years as per Rule 5(2) of the Water Act, 2002.

27. The Claimants also submitted that when the 2<sup>nd</sup> Respondent was established to operate within Kiambere Mwingi Water Supply, their services were transferred to and the 1<sup>st</sup> Respondent ought to have declared them redundant and as per Section 40 of the Employment Act, 2007 and paid them severance pay at the rate of not less than fifteen (15) days' pay for each completed year of service. They therefore submitted that the 1<sup>st</sup> Respondent ought to have declared them redundant and paid their redundancy dues depending on the years of services of each Claimant.

28. The Respondent submitted that the order previously given by the Court on 14<sup>th</sup> November 2011 entering judgement against the Respondents owed to be reviewed as this order was given notwithstanding that the 1<sup>st</sup> Respondent were on record and had not been given an opportunity to present their case. The Respondents subsequently filed an application for review of this order and this was allowed.

29. The Respondents also submitted that they acted lawfully in transferring the services of the Claimants to the 2<sup>nd</sup> Respondent as per the Water Act and thus terminating their services accordingly.

#### **Issues for determination**

30. I have considered the evidence and submissions of both parties herein. The issues for determination are as follows:-

***1. Whether the Respondents adhered to the implied terms under the Water Act, 2002 when transferring the Claimants to other Water Service Boards.***

***2. Whether the Claimants ought to be declared redundant and paid redundancy dues.***

***3. What remedies the Claimants are entitled in the circumstances.***

31. 1<sup>st</sup> Respondents have admitted that the Claimants were employees of the 1<sup>st</sup> Respondent at its Kiambere Mwingi Water Supply Project as per the Claimants' supporting documents filed on the 3<sup>rd</sup> August, 2011 which are letters of appointments and confirmation of the Claimants. Later when the 2<sup>nd</sup> Respondent was established to operate within Kiambere Water Supply, the Claimants' services were transferred to the 2<sup>nd</sup> Respondent as per the annexed Claimants' supporting documents filed on the 3<sup>rd</sup> August, 2011 which are letters of transfer of services by

the 1<sup>st</sup> Respondent.

32. As per the transfer letters issued to the Claimants, it was as a result of the government policy contained in the Water Act, 2002 that Kiambere Mwingi Water Services Company had been handed over to the 2<sup>nd</sup> Respondent and therefore the services of the Claimants were transferred as well to the 2<sup>nd</sup> Respondent and further the terms and conditions of the contractual agreement between the 1<sup>st</sup> Respondent would still apply at the 2<sup>nd</sup> Respondent.

33. The Water Act (No 8 of 2002) and Water (plan of Transfer Services) Rules have been cited as the legal framework that necessitated the transfer of services of the Claimants to the 2<sup>nd</sup> Respondent. Under the new framework, Water Services Boards were established to be responsible for the provision of efficient and economic provision of water and sanitation.

34. Rule 5(1) of these rules stated as follows:-

***(a) All rights, powers and duties and liabilities relating to the provision of water services, whether arising under any written law or otherwise, which immediately before the transfer date were vested in, imposed on or enforceable against the Director of Water, the government or its corporations shall be transferred to and vested in, imposed on or enforceable by or against the water services boards.***

35. Rule 5(2) of the Water (Plan of Transfer of Water Services) Rules, 2005 on the other hand provides that:-

**“during the transition period, the officers and servants of the Ministry engaged in the provision of water services shall be deemed to be on secondment to the water services boards for a period of three years after which they shall either-**

**a) enter into written contracts of employment with those boards under section 54(3) of the Act; or**

**b) Be re-deployed in the public service”.**

36. Pursuant to the Water Act, 2002 and the rules, the 1<sup>st</sup> Respondent transferred the operations, the assets, liabilities, staff, human resource and capital of the Kiambere Mwingi and Water Sanitation Company to the 2<sup>nd</sup> Respondent in January, 2009. This is acknowledged by both parties herein. Pursuant to rule (2) above, the Claimants were deemed to be on secondment for upto three years from 2009 when the secondment was effected.

37. Secondment has been defined as follows according to the Oxford Dictionary of English, 2017 edition, **“Secondment is the temporary transfer of an official or worker to another position or employment.**

38. In the case of **Mary Nyangasi Ratemo & 9 others v Kenya Police Staff Sacco Limited & another [2013] eKLR** , where it was cited in the article by *Employment Law: Transfer and Secondment of an employee, Shearn Delamore & Co., vol 7 No. 2.0, June 2008, 1* notes that;

***“In situations where an employee has been transferred, the original employer who transfers the employee is, in law, no longer regarded as his employer. Instead the company which, the employee has been transferred to it now regarded as his employer. The opposite is however, the case where an employee has been seconded. In such a situation, the company which seconds the employee remains the employer at all material times and not the company to which the employee is seconded. ... The ordinary meaning of secondment as a temporary transfer is on the face of it the connotation that the employee is subject to recall by his employer. So he is not a permanent employee of the other. ... Therefore, so long as the contract is not terminated, a new contract is not made, and the employee continues to be in the employment of the original employer.”***

39. Since the law envisaged a secondment and not a transfer, when the 1<sup>st</sup> Respondent decided to transfer services of the Claimants to the 2<sup>nd</sup> Respondent, then the prudent think they should have done was to terminate the Claimants' services and pay them off in order for them to start on a new plate. The Respondent were therefore in breach of the express terms of the Water Act and rules made thereunder when they acted as they did.

40. On the second issue the Claimants have sought to be declared redundant and be paid their terminal dues. The Water Act and rules made thereunder were very categorical on the position of the Claimants as seconded employees. The Respondent chose to transfer their services instead. As indicated above, the prudent think would have been to terminate the Claimants and have them sign fresh contracts with the 2<sup>nd</sup> Respondent. The situation that operated in my view was a redundancy situation where the 1<sup>st</sup> Respondent no longer required the services of the Claimants. This the 1<sup>st</sup> Respondent didn't do so the claim for redundancy dues is justified.

41. I therefore find for the Claimants and order that they be paid as if declared redundant by the 1<sup>st</sup> Respondent as follows:- each Claimant be paid an equivalent of 1 months salary as notice and 15 days salary for each year worked. The totals translate as follows;

**1<sup>st</sup> Claimant - Kshs.332,321**

**2<sup>nd</sup> Claimant - Kshs.308,600**

**3<sup>rd</sup> Claimant - Kshs.128,772**

4<sup>th</sup> Claimant - Kshs.155,288  
5<sup>th</sup> Claimant - Kshs.128,772  
6<sup>th</sup> Claimant - Kshs.206,682  
7<sup>th</sup> Claimant - Kshs.158,488  
8<sup>th</sup> Claimant - Kshs. 69,507  
9<sup>th</sup> Claimant - Kshs. 68,382  
10<sup>th</sup> Claimant - Kshs.154,995  
11<sup>th</sup> Claimant - Kshs. 60,784  
12<sup>th</sup> Claimant - Kshs.392,743

42. The 1<sup>st</sup> Respondent will also pay costs of this suit plus interest with effect from the date of this judgement

**Dated and delivered in open Court this 20<sup>th</sup> day of December, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Esami holding brief Nyamu for Claimants – Present

Njeru holding brief Waiga for 1<sup>st</sup> Respondent – Present