



REPUBLIC OF KENYA
IN THE EMPLOYMENT LABOUR AND RELATIONS COURT
AT MOMBASA
CAUSE 399 OF 2015
(CONSOLIDATED WITH ELRCC NO. 400 OF 2015)

ALFONSO KATHEKA MUNYALI1STCLAIMANT

JEREMIAH NYABERI ICHWARA.....2ND CLAIMANT

VERSUS

THE COUNCIL OF THE KENYA

SCHOOL OF GOVERNMENT1STRESPONDENT

THE DIRECTOR GENERAL OF THE

SCHOOL OF GOVERNMENT2ND RESPONDENT

DR. TOM WANYAM OUNDO.....3RD RESPONDENT

PRISCA MARY OLUOCH.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1) Two main issues arise from this case. Firstly, the court is invited to determine whether an employee who formerly headed an entity which is rendered defunct by a statute must automatically transit as the head of a new entity that is created by the statute to succeed the defunct entity. Secondly, the court must determine whether it is unlawfully and breach of the contract of employment of the head of the former entity, if another person is appointed to head the new entity. In this case the claimants were the heads of defunct Government Training Institutes (GTIs) Mombasa and Matuga respectively which were elevated and converted to Campuses of the Kenya School of Government (KSG) by the Kenya School of Government Act .

BACKGROUND

2) The said Act came into force on 1.7.2012, and by dint of section 3 of the Act established the KSG as a

body Corporate and the successor of the Kenya Institute of administration and the Kenya Development Learning Centre. Under section 4(2) of the Act, the GTIs including Mombasa and Matuga were converted to campuses of the KSG. Section 6 of the Act established the KSG council as the organ to manage the school and with power to employ the Director General and other officers of the school among other functions.

3) Under 21(3) of the Act all the employees of the GTIs became employees of the KSG from the date of commencement of the Act subject to the terms and conditions of service determined by the council of the KSG. However under subsection (4) upon the commencement date, all the employees of GTIs were to be given the option to choose between serving in the KSG and reverting to the public service.

4) As at 1.7.2012, the First claimant was the Director GTI Mombasa being employed by the Public Service Commission (PSC) job groups 'S'. On the other hand, the second claimant was then the Acting Director GTI Matuga being employed as the substantive Deputy Director GTI by the PSC job group 'R'. On 17.4.2013 he was promoted by the PSC to the position of Director GTI Matuga job group 'S'.

5) On 19.9.2013 the council adopted the terms and conditions of service for KSG staff and approved the same for use effective from 1.11.2013. The said terms and conditions of service provided the level of appointment in the school under section, 3.3. indicating the KSG Scale and its corresponding PSC Job Group in the public service.

6) By the letter dated 28.2.2014, KSG asked the claimants to exercise their option, either to continue serving the KSG as per their then current terms and conditions of employment, or revert to the public service. On 11.3.2014, the claimants indicated their option to continue serving the KSG under their then current terms and conditions of employment.

7) On 13.6.2014, the First respondent advertised in the Mass Media, vacancies for positions of campus Director for six campuses including Mombasa and Matuga and invited all interested and qualified persons to apply. The claimants were not pleased with the advertisements and they lodged complaint with the Commission for Administrative justice (CAJ) alleging that the advertisement was irregular and a breach of their terms and conditions of service. Nothing much resulted from the said complaint to CAJ and the recruitment process of the campus Directors continued un interrupted and the 3rd and 4th respondents were on 11.6.2015 appointed Campus Directors under a three year contract.

8) On 11.6.2015, the second respondent notified the claimants that they had been deployed to the academic functions of the school and that they should report to the Director of Academic affairs (DAF) on 18.6.2015 for assignment of duties and responsibilities in accordance with the KSG terms and conditions of service. The claimants were dissatisfied and on 11.6.2015 they filed Judicial Review application in the High Court **HC Civ. Application No. 23 of 2015** and they obtained stay order.

9) On 17.6.2015 they brought this suit and ELRCC 400 of 2015 and obtained injunction to restrain the first and second respondents from removing them from office or installing any other person to their position as Campus Director KSG Mombasa and Matuga respectively. The suits were later consolidated under this file but the Judicial Review application in the High Court was left out.

10) The suit seeks the following reliefs:-

a) Permanent injunction to restrain the Respondents and/or their agents from removing, replacing, dismissing or deploying the claimants from their current positions of Campus Director KSG Mombasa and Matuga respectively, and installing a newly appointed candidate for the position of Campus Director KSG Mombasa and Matuga campuses, and or committing, any breach of contract of employment, or any other act or anything whatsoever against the claimants that is detrimental to them pending the hearing and determination of the application and the entire claim and thereafter.

b) Reinstatement of the claimants to their position as Campus Directors of KSG Mombasa and Matuga campuses respectively with full benefits.

- c) Declaration that the appointment of the new campus directors of KSG Mombasa and Matuga campuses is null and void.
- d) Prohibition stopping any further action aimed at deploying the claimants to any other position at all other than Campus Director as duly appointed.
- e) Costs.
- f) Any other relief that the court may deem fit to grant.

11) The first and second respondents have opposed the suit and the reliefs sought by the claimants. They aver that the claimants' allegation of breach of contract and unfair labour practices are unfounded. They have further averred that they have acted within the provision of section 21(4) of the KSG Act which provides for the transition of employees from the defunct GTI to the KSG.

12) The 3rd and 4th respondents have also opposed the suit on ground that they were lawfully appointed and deployed as the substantive Campus Directors for the Mombasa and Matuga KSG campuses respectively. They aver that the claimants failed to apply for the vacancies when they were advertised and further failed to mount any case to stop the recruitments before they were appointed as substantive Campus Directors. According to them the transfer and deployment of the claimants were lawfully done under section 3.18 of the KSG terms and conditions of service which allowed for the transfer and re-deployment of employees of the KSG.

13) The issues for determination are:-

- a) Whether the claimants were appointed or transited to the KSG in the position of Campus Director Mombasa and Matuga respectively.***
- b) Depending on the answer to (a) above, what was their terms and conditions of employment after 11.3.2014.***
- c) Whether the advertisement of vacancies in the position of Campus Directors and the subsequent appointment and deployment of the 3rd and 4th respondents to Mombasa and Matuga KSG campuses was unlawful, and amounted to unfair termination and/ or breach of the claimants' contract of employment.***
- d) Whether the claimants are entitled to reliefs sought or any part thereof.***

ANALYSIS AND DETERMINATION

Appointment/Transition as Campus Director

14) The claimants have contended in evidence that by dint of sections 21(3) of the KSG Act they transited to KSG employment effective 1.7.2012 when the Act became effective. They further contended that by dint of subsection (4) of the said section, and the letter of option dated 28.2.2014 and acceptance on 11.3.2014 their transition and appointment in the position of Campus Director of the Mombasa and Matuga Campuses was sealed. They further contended that their then current terms and conditions of service which they accepted to serve KSG under on 11.3.2014 are the KSG terms and conditions that took effect on 1.11.2013.

15) The claimants produced letters and other documents by which the KSG and the Permanent Secretary Ministry of State for Public Service (RW2) appreciated and addressed them as Campus Directors of Mombasa and Matuga Campuses respectively. The second claimant specifically produced letter dated 17.4.2013 promoting him to the position of director of Matuga campus, job group 'S' almost a year after coming into force of KSG Act. They further contended that there was no vacancy of Campus Director for Mombasa and Matuga on 13.6.2014 when they advertised vacancies for Campus Directors. They

maintained that they were formally and substantively in office with all academic and professional qualification.

16) The respondents have unanimously denied that the claimants transited from GTI to KSG as Campus Directors. They are unanimous that the claimants only transited to KSG under the terms and conditions of services immediately before 1.7.2012 when the KSG Act came into force. They averred that the said terms included permanent and pensionable employment plus the other benefits in the PSC Job Group 'S' and 'R' respectively. They are further unanimous that the promotion of the second claimant on 17.4.2013 to Director GTI job group 'S' was by the PSC in the Public Service and not by the first respondent in the KSG. The respondents have therefore maintained that the terms and conditions of service referred to in the letter of option by the second respondent dated 28.2.2014, and which were accepted by the claimants, on 11.3.2014 where terms in the position of Director GTI job groups 'S' in the public service.

17) I have carefully considered the pleadings, evidence, submissions and the law. Section 21(3) (4) of the KSG Act provides as follows:-

“(3) All the members of staff of the Kenya institute of administration, government training institutes and the Kenya Development Learning Centers employed at the time of commencement of this Act shall become employees of the school subject to such terms and conditions as the council shall determine.

(4) Despite subsection (3), all the members of staff of the Kenya Institute of Administration, GTIs and the Kenya Development Learning Centre in employment immediately before the commencement of this act shall, upon the commencement of this act be given an option to serve in the school and if not appointed by the commissions be redeployed in the public service.”
(Emphasis added)

18) There is no doubt from the foregoing provision of section 21(3) of the Act that upon coming into effect Act, all the GTIs became defunct and their employees were to transit to the KSG subject to their option to serve the school and the terms and conditions of service as the KSG Council determined. There is further no dispute that any former GTIs employees who did not wish to serve in the school were to revert to PSC for deployment in the Public Service. According to a Report dated October 2012 by the KSG Delinking Committee produced as exhibit herein, a transition period of 24 months was recommended for full operationalization of the KSG to be achieved.

19) The Report stated as follows:-

“5.0 CONCLUSION

Having looked at all the issues pertinent to the transition process the committee concluded that the six institutions are prepared to become the KSOG. In view of the issues that require being addressed for the school to be fully operational the committee recommends for a transition period of 24 months. To avoid disruption in their operations, it is further recommended that the institutions continue to operate as currently structured until the end of the transition period when they will be expected to have harmonized their operations.”

20) In additions to the foregoing recommendation for 24 months transition period, the committee recommended the following action by the KSG Council among other key and urgent matters towards full operationalization of the KSG:-

“(i) ...

(ii) Recruitment and appointment of a Director General, other key staff and issuing all staff of the school with appointment letters to confirm them as employees of the school.

(vi) Development of terms and conditions of service for KSOG staff.”

21) As observed earlier herein above the council adopted the terms and conditions of service for KSG staff and approved the same on 19.9.2013 for use effective from 1.11.2013. The said terms and conditions service provided the levels of appointment in the school under section, 3.3. indicating the KSG Scale and its corresponding PSC Job Group in the public service. Subsequently, the KSG wrote to the claimants among other former GTI employees, the letter dated 28.2.2014 requesting them to exercise their option to continue serve the KSG or be redeployed to the public service.

22) The letter stated as follows:-

“EXERCISE OF OPTION TO SERVE IN THE KENYA SCHOOL OF GOVERNMENT.

The process of transferring staff from the former – (GTI’s) to (KSG) is in progress. This means that the staff shall become employees of the KSG Council.

The Kenya School of Government was established by the KSG Act No. 9 of 2012 which commenced on 1st July 2013. According to section 21(3) of the Act, all the members of staff of the former (GTI’s) Baringo, Embu, Matuga and Mombasa employed at the time of commencement of the Act shall become employees of the school subject to such terms and conditions as the Council may determine. The purpose of this letter is to request you to exercise the option of serving in the school as per your current terms and conditions of employment or revert to the public service. This is in compliance with section 21(3) of the Act. Please indicate your option, then sign and return to the undersigned a copy of this letter by 5.00pm Friday 14 March 2014.

Elijah K. Wachira, Hsc.

AG. DIRECTOR GENERAL.

I..... IDENTIFY Card Number..... (Accept or Do not accept) to serve in the Kenya school of Government under the current terms and conditions of employment

SignatureDate.....

(Emphasis added)

23) In view of the foregoing provisions of the Act and also report by the Delinking Committee, the staff of the GTIs including the claimants transited to the KSG on 1.7.2012 under the terms and conditions of service they enjoyed in the public service in their respective PSC Job groups. They also moved on with their office status because according to the Delinking committee dated October 2012 the KSG campuses were to continue to operate under the structures of the defunct GTIs during the transition period of 24 months which was to end on 30.6.2014.

24) For the forgoing reason I agree with the respondents contention that the claimants only transited to KSG as Director GTI PSC Job Group 'S'. That they only served as the *de facto* Campus Directors of their respective GTIs during the transition period as recommended by the Delinking committee Report of October 2012. The fact that they were occasionally addressed by the Director General and the Permanent Secretary as Campus Directors, I hasten to say find that such reference had neither legal nor contractual basis. It was an error which could not render the claimants *de jure* Campus Directors by the numerous times it was repeated.

25) In addition to the foregoing finding that the claimants never became substantive Campus Directors during the transition period, I further find that even after exercising their option to continue serving the KSG on 11.3. 2014 they never attained the said status. According to the respondent's letter dated

28.2.3014, the claimants were to accept to serve the KSG under the same terms and conditions of service they were enjoying as at date of the said letter. As already determined herein above, the claimants were still serving under their PSC Job Group 'S' despite the erroneous titles of Campus Directors they were branded.

Terms and Conditions for Transition after acceptance

26) The claimants were members of the Delinking Committee and they knew how the KSG was to be operationalized. They knew that the council had to be put in place and the Terms and Conditions of service for the KSG Staff had to be determined by the same Council before the former employees of the defunct GTI including themselves could be invited to exercise their option to serve in the school or revert to the PSC. As correctly put by the RW2, the former permanent secretary Ministry of State in the Public Service and a current Commissioner in the PSC, the Council had to set the terms and condition of service as the basis upon which the employees could accept to continue serving in the school or revert to the PSC.

27) It appears from the letter of option dated 28.2.2014 that, the council determined that the claimants should transit to KSG horizontally in a job scale equal to their PSC job Group S. As stated above section 21 (3) gave the council the mandate to determine the terms and conditions for the former GTIs employees and if they found them unfavourable they had the right to revert to PSC. It is obviously after transiting to the KSG that the PSC job Group was to be converted to KSG Job Scale under section 3.3 of KSG terms and conditions service that became effective was 1.11.2013.

28) The claimants having read the said terms and conditions of service stated in the option letter dated 28.2.2014 they accepted to continue serving the KSG on 11.3.2014. They have not pleaded that they signed the acceptance through mistake, misrepresentation or any other vitiating factors. They therefore accepted to bind themselves to serve KSG under the terms and conditions they moved with from GTIs, which is a position equal to Job Group 'S'.

Unfair Termination and/ or breach of the claimant's contract of employment

29) The Claimants contends that their transition to KSG as Campus Directors was sealed by their acceptance to the letter KSG's of option dated 28.2.2014. According to them, under section 21 of the KSG Act once they exercised their option to serve the school under the terms and condition of Service determined by the KSG Council on 1.11.2013, they became substantive Campus Directors for Mombasa and Matuga KSG campuses respectively. The respondents are however unanimous that the letter by the KSG dated 28.2.2014 was not an offer but a standard letter to all former employees of the defunct GTI's inviting them to confirm their desire to serve in the KSG so that the council could decide whether to appoint them or not. According to the defence witnesses, accepting to serve in the KSG did not result to any binding contract on the council.

30) The Report of the Delinking committee recommended for recruitment and appointment of the Director General, other key staff and issuing of all staff of the school with appointment letters to confirm them as employees of the school. The key officers obviously included the campus Directors because according to the School Organogram in Page 14 of the Delinking Committee's Report, and levels of Appointment in clause 3.3 of the KSG Terms and Condition of Service Manual, the position of Campus Director is ranked second from the top after the Director General. The position was one of the key positions which was proposed for recruitment by delinking committee.

31) The claimants having been members of the committee knew or had reason to know that the positions of Campus Directors were new positions created under the KSG Act and they were not yet filled by substantive Directors appointed by the KSG Council as prescribed by Section 3 of the KSG Terms and Conditions of Service manual.

32) Section 3.4 of the said KSG Terms and Conditions of Service manual provided that Appointment to the posts of KSG2 (Campus Director) is to be made by the council in accordance with the recruitment

procedures. Section 3.6 provides for competitive recruitment whether internally or externally. The decision on whether or not to recruit internally depends on the advice from the HR Manager. In this case the HR Manager never recommended for internal recruitment and as such the recruitment was open to all interested and qualified persons including the claimants. However the claimant never applied and although they protested to the CAJ against the recruitment of new Directors for their respective campuses, the claimants never moved to the court until the process of short listing, interviewing, appointing and deploying the 3rd and 4th respondents to Mombasa and Matuga KSG Campus respectively was completed.

33) It is clear from all the materials presented to me that the process of recruiting the 3rd and 4th respondent was anchored under the KSG Act and the KSG Terms and Conditions of Service Manual. It was therefore done lawfully and fairly and it did not unfairly terminate or in any manner breach the rights of the claimants as employees of the KSG. As observed herein above, the claimants were only *de facto* Directors of Mombasa and Matuga KSG Campuses pending the appointment of the substantive Directors by the Council after the determination of the terms and conditions of service for KSG.

34) For the foregoing reason the claimants were bound to comply with the orders of the employer to hand over the office to the substantive Campus Directors after they were recruited, appointment and deployed by the council of KSG. They were also bound to comply with the letter directing them to report to the Head office for redeployment in the Academic functions. The said redeployment was not proved by the claimants to constitute demotion or loss of benefit because they were to continue in the KSG scale 2 the equivalent of PSC Job Group 'S' according to SRC letter dated 1.4.2016.

35) Although the Rw1 state that the KSG Council had resolved that the claimants will revert to PSC, such decision must be done upon terms and after following due process because it will have the impact of denying the claimants the benefits of the better terms and conditions of service they were entitled to enjoy under the KSG Terms and Conditions of Service. The reason for the foregoing is that according to claimants and the Rw1, the salary for the claimants was higher under the KSG scale and that is why their pay by PSC is topped up by the KSG in line with the SRC guidelines.

RELIEFS

Injunction

36) In view of the finding herein above that the recruitment, appointment and deployment of the 3rd and 4th respondents by the 1st and 2nd respondent was fair and lawful, I dismiss the prayer for permanent injunction to restrain the said substantive Campus Directors (third and fourth respondents) from taking over office from the claimants in Mombasa and Matuga KSG Campuses respectively.

37) I could have, however granted as prayed, permanent injunction against the respondents restraining them from breaching the claimants' contract of employment and from doing anything against the claimants which is detrimental to their rights as employees of the KSG but, unfortunately, there is no competent respondent against whom the injunction would be directed.

38) The reason for the foregoing is that the parties sued lacked capacity of being sued on behalf of the KSG. As observed from the background remarks herein above the school is a body corporate, capable of being sued on its own name. so why did the claimants resort to suing a council which lacks legal capacity or the Director General who is not the allowed to employ campus Directors under the KSG Terms and Conditions of service?

REINSTATEMENT

39) As already held herein above, the claimants were never appointed substantive Campus Directors of the Mombasa and Matuga KSG Campuses. They were only temporary holders of the office through an operation of the law pending recruitment of the Substantive Campus Directors. They never even applied

for the position and as such there is no basis for the prayer for the alleged reinstatement. Consequently, that prayer is dismissed.

DECLARATION

40) For the reasons that the recruitment, appointment and deployment of the 3rd and 4th respondent was fair and lawful, I decline to declare the same null and void.

PROHIBITION

41) The claimants have prayed that the employer be prohibited from deploying them to any other position other than that of Campus Director. No legal or contractual basis have been shown for that prayer. Although the claimants have alleged that they were at the apex position of Campus Director, Rw1 has denied that allegation and clarified that the apex position in the KSG levels of Appointment stipulated in clause 3.3 of the Terms and Condition of service is the Director General KSG 1.

42) I agree with Rw1 that the claimants have not yet reached the apex position in KSG. Although it is true that they were in the apex position as Director GTI, such institutions are now nonexistent, and the claimants have transited to a higher institution with the Director General as the apex position. The claimants are therefore amenable to redeployment to either higher or horizontal position if the variation of the duties are not unreasonable.

43) In this case the variation of duties are not un reasonable. Section 3.18 of the KSG Terms and condition of service, which the claimants aver that they accepted by signing the option letter on 11.3.2014, permits transfer and redeployment of an employee to any campus, or Department and their job re-designated as may be necessary from time to time.

DISPOSITION

44) For the reasons that the recruitment, appointment and deployment of the 3rd and 4th respondent was fair and lawful, and that the suit is incompetent against the first and the second respondents the suit is dismissed with no orders as to costs.

Signed, dated and delivered this 8th day of February 2017.

O.N. MAKAU

JUDGE