



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
CAUSE NO. 1174 OF 2013

TOM OTIENO ODONGO.....CLAIMANT

VERSUS

- 1. CABINET SECRETARY MINISTRY OF LABOUR SOCIAL SECURITY AND SERVICES.....1ST RESPONDENT**
- 2. THE NATIONAL SOCIAL SECURITY FUND THE BOARD OF TRUSTEES.....2ND RESPONDENT**

RULING

1. When the matter came up before me on 1st August 2013, Mr. Ochieng Oduol appeared for the Claimant/Applicant in the Application dated 27th July 2013. Mr. Tom Macharia appeared for the 1st Respondent while Mr. Ahmednasir Abdilahi appeared for the 2nd Respondent. Immediately he got on to his feet, Counsel for the 2nd Respondent intimated that he would be ready to proceed with a preliminary objection. Mr. Ochieng for the Claimant sought to have notice of the preliminary objection which he held had not been served. On perusal of the pleadings it was apparent that the 2nd Respondent had given notice of the Preliminary objection in the Grounds of Objection filed on 31st July 2013 as ground (iii). I thus allowed the said preliminary objection to be raised.
2. Mr. Ahmednasir urged as follows:- the fact that the termination was pursuant to a clause in the contract there cannot be any conceivable cause of action if a party exercises a right in the contract. The Claimant’s employment was terminated by the 1st Respondent in a letter of 22nd July 2013. It was terminated under Clause 20(i) of the Contract. The 1st Respondent did not use any executive power but cited a specific clause of contract. In para 2 of the letter terminating the contract, the 1st Respondent states there will be 3 month’s pay in lieu of notice. The contract provided for that. Paragraph 20 was the exit clause of the elaborate paged letter. Clause 20(i) has no ambiguity. It is a three line clause. There is clarity. It gives the party power to give three month’s notice or pay in lieu. That is precisely what 1st Respondent did in letter of 22nd July 2013. Clause 20(ii) has another way of terminating the employment. Clause 20(i) provides Minister may terminate and in 20(ii) the Board of Trustees may terminate for failure to meet performance objectives. It is important to appreciate who the parties to the contract were. Hon. Munyes was the Minister, he is the first party and the second party is the Claimant. The acceptance part is at page 5. It stipulates

that he accepts each and every term and condition. He has been exercising his functions in acceptance of the conditions. The Claimant has not raised any issue with any of the other 19 clauses of the contract. Where does Minister derive powers to draw contract of CEO for the 2nd Respondent? It is not executive powers he exercises, it is not fuzzy or hazy powers but he exercises statutory power pursuant to statute. It is express provision, it is not from general law of contract. It is a power derived from statute, that is Section 33 of the National Social Security Fund Act cap 258 of the Laws of Kenya. Emphasis on **who shall hold such office as may be specified in the instrument of his appointment**. There is an instrument of office, that is the employment contract of 7th February 2013. That contract having statutory foundation pursuant to Section 33 of cap 258 the parties cannot go beyond the instrument of appointment and section 33. There is no leeway, there can be no innovation or craft to allow Court or the party to outside the bound of Section 33 of cap 258 or the contract of employment. He humbly submitted that he was right on this. Section 33 ousts any other provision of labour law that negates the provisions of Section 33. Parliament in its wisdom refined and confined the contract under Section 33 of cap 258. We have the Managing Trustee of the NSSF fund, the fund has its own statute. The only law that can apply is the Constitution but the only labour law that can apply is Section 33 and the instrument that is refined and provided for under Section 33. If regard is had to paragraph 5 of the Claim it is clear how unmeritorious or misplaced the claim is. It is a very weak substratum. There is no provision in the law that says the 2nd Respondent must recommend. Section 33 and the instrument of appointment are very clear. As regards the claim that the 1st Respondent has not assigned a reason for termination, under Clause 20 there is no provision for a detailed letter giving the litany of grievances that leads to the termination. Section 5(c) states that the 1st Respondent has no power to terminate. That is not true. It is trite law that where the express terms of a contract are clear in a contract at arms-length, there is no room to imply a term. If there was need to imply the term, parties would have inserted it as an express provision. This case and other cases raise a fundamental issue on good governance and good management of public institutions. Government which is the custodian should be allowed to correct when executives err. This suit where a party seeks to be reinstated so that he can continue is against public policy and against the elementary rules of contract. It would have a negative effect on management of parastatal bodies if allowed. In conclusion, he submitted that we should not lose sight of the basic principles of the law of contract. We have a contract between the parties negotiated and executed and acted upon for the last one year. One of the parties one year down the road exercises one specific provision of the contract according to statute and according to the contract. How can the other party complain and base his claim on nebulous provisions which do not apply? The contract does not say if he is relieved of his duties he can get general damages. All the common law or even statutory reinstatement are expressly ousted by Section 33 of cap 258. He urged the Court to uphold the preliminary objection and strike out the suit as it has no basis in law and once claim is struck out costs should be awarded to the 2nd Respondent for the suit which should not have been filed at all.

3. Mr. Macharia for the 1st Respondent associated himself with the submissions of his senior Mr. Ahmednasir. He submitted that facts are not in dispute. The Claimant's contract of service has been terminated. The letter of employment that is the basis of Claim is dated 7th February 2013. It is not disputed that the Claimant's contract was terminated under Clause 20(i) of that letter. It is not in dispute that the 1st Respondent communicated the termination by letter of 22nd July 2013. The issues before the Court are purely issues of law. He drew the Court to a few areas.
 1. General principles of contract
 2. Principles of law as applied to contract
 3. Issues of public interest and public policy on the contract

He referred to Section 2 of NSSF Act, interpretation clause on the definition of the words "managing trustee".

- 1) That term 'managing trustee' is a creature of statute
- 2) anybody acting in capacity of managing trustee.

As we speak, there is a managing trustee acting as such and there is no vacancy in that position. It is not disputed that NSSF is the sole body mandated to handle pension dues for millions of Kenyans. It is a body whose public role or whose place and interest in public policy plays a central role in lives of Kenyans. He referred to the case of **Bender v. St John Mildmay [1938] AC 1** on the passage on public policy. He urged the Court to find favour with this passage. The House of Lords uses words that state it is a sacred duty to uphold contracts. The Claimant before Court is a man of full age and understanding and was given and was holding the position. He has not suggested that he was forced or it was under fraud or misrepresentation. He was fully lucid when he signed. The Court has a sacred duty to uphold and enforce the contract. The contract voluntarily signed by the 1st Respondent and the Claimant. Clause 20(i) is not for the employer alone. If he had elected to terminate contract as is his Constitutional right he should have either given 3 month's notice or paid 3 month's salary. There is no way the 2nd Respondent would have come to Court and ask the Court 'he has given notice, order him back'. There is freedom of contracting. It is reinforced by the case of **National Bank of Kenya Ltd. v. Pipeplastic Samkolit (K) Ltd & Anor. Civil Appeal No. 95 of 1999** which held that parties are bound by the terms of their contract. Yet in another case of **John Njoroge Michuki v. Shell Limited Civil Appeal No. 227 of 1999** the Court of Appeal emphasizes it – “and should not overrule any clear intent of the parties”. These two parties before Court clearly understood the business and clearly expressed their intention. By notice of 3 months or tender of pay in lieu they could terminate the contract. In 2008, the Court of Appeal in case of **Walter Musi Anyange v. Hilton International Limited & Anor. Civil Appeal No. 269 of 2003** arising out of contract after passage of 2007 labour law, the Court of Appeal states “there can be no damages as the relationship is contractual”. The authority of the Court of Appeal is binding on this Court. The 1st Respondent has raised the issue of public policy. The Claimant seeks re-instatement to duty. Reinstatement to duty is dealt with by Section 49 & 50 of the Employment Act. Under subsection 4 Section 49(4) provides 13 matters a Court has to consider before making the order. Among those are the practicability of the orders of reinstatement. Reinstatement is to be recommended and not ordered. Even that recommendation is to be done in line with the 13 issues. There should be no order for specific performance in a contract of service except in very exceptional circumstances. It will do grave damage to the public interest and policy given the issues raised in the Affidavits of the Respondents to reinstate a party and in a body as sensitive as the 2nd Respondent. The 2nd Respondent is a public body, the statute says so. The Court of Appeal has dealt with reinstatement. The case of **Dalmas Ogoye v KNTC [1996] eKLR** – the only claim for wrongful dismissal is damages as an order for damages suffices. The decision was followed by High Court in case of **Rev. Samuel Omagwa v. Peter Ndungu & others [2006] eKLR** a decision of Justice Ojwang (as he then was). The Orders sought are not available to the Claimant before the Court and are not available at interlocutory level. The 2nd Respondent has referred to Section 33 of the NSSF Act, that provision has to be read hand in hand with Section 51 of the Interpretation and General Provisions Act. The person making appointment has power to suspend or terminate. He referred to the case of **East African Cables v. Public Procurement Complaints, Review and Appeals Board & Another, Civil Application No. 109 of 2007** and the principle of utilitarianism. The 1st Respondent does not concede something was done wrongly. Even when there is wrongdoing, the principles are set out in the case. The doctrine of utilitarianism was upheld in the case of **KPLC v. NGM Company Ltd & Anor Civil Application No. 74 of 2010**. Employment contract is another contract. Weighing the issues and the cases, it will do damage and injustice to hamstring the operations of the 1st Respondent since the Claimant has contracted willingly. He ended his submissions by referring to the case of **Dr. Ann Kinyua v. Nyayo Tea Zones** on the Claimant's list of authorities and submitted that the Applicant had failed to demonstrate she was entitled to more than the damages. The Claimant has sought damages in the alternative based on the submissions the Order should be as has emerged.

4. Mr. Oduol on behalf of the Claimant stated that this was not a preliminary objection as by law defined. A Preliminary objection is now well defined in the case of Mukisa Biscuit. It is a point of law either limitation or jurisdiction argued on the basis or premise that the facts pleaded by opposing party are accepted. It cannot be a preliminary objection if what is sought is the exercise of the Court's discretion. With respect to his learned friends, Mr. Oduol submitted that to engage the Court to determine *in limine* the factual position, policy disguised as preliminary objection can only be described in soft terms as abuse of law. The Court was being asked to determine the statutory foundation of contract, interpretation of Clause 20(i), powers of Minister, sanctity of

contract, absence of coercion or fraud, the principle of reinstatement and exceptional circumstances surrounding such reinstatement. Public interest and policy consideration. With respect, those are not issues to deal with in a preliminary objection in terms of Mukisa Biscuit. He urged the Court to hold that what has been sought to argue is not a preliminary objection or a pure point of law but a pre-emptive strike at the entire Claim before the Court. Where one seeks a claim to be terminated *in limine* a formal application should be filed. The Court has heard of 'no cause of action'. That can only be done by way of an application. On that ground alone the Respondent's seek to short-circuit the Claim before Court the objections should be dismissed. He then descended into why the objection cannot even be sustained as a preliminary objection. The Constitution binds all including the 2nd Respondent and the 1st Respondent. The start is Article 2. The Constitution is supreme law of the land. Article 3, Article 10 on national values is binding on all state officers and authorities which enact, interpret the law. There is a new paradigm which is that in each and every of their decision the state officers are bound by the Constitution. More importantly, the rule of law, equity and human dignity, good governance, integrity, accountability. And there is Article 41 which deals with fair labour practices. In construing the statutes referred to, these are constitutional fundamentals. They cannot be ignored by the Respondents nor can they invite the Court to summarily act in breach of these constitutional phenomena. The Court has been told there is a letter of termination. The Claimant has exhibited the letter which is dated 22nd July 2013. The Claimant has raised the issue whether the Cabinet Secretary had the jurisdiction and the power and whether if he had such power, was it exercised in accordance with national values, written law as these issues cannot be dealt with summarily. The Court is asked to construe parts of statute which are not in conformity with Constitution. Section 7 of the Sixth Schedule of the Constitution provides that all laws are to be construed in conformity with Constitution. Does Minister have the jurisdiction to wake up one day to terminate a contract of employment without reason or due process? That is fundamental. Contrary to what has been submitted, the Minister not only breached the law and threw the Constitution out of the window. The contract dated 7th February 2013 has a fixed term tenable and renewable at the discretion of the Board. It does not say tenable and renewable by Minister. The Board is a statutory body. There is no letter showing the Board in whom power is deposited, there is a purported ratification resolution. The contract is tenable at discretion of Board. Tenable means to be maintained and administered by the Board. There is no power for Minister to administer the contract. The Board could also only act having complied with due process. Nowhere is the case of the Minister has it been shown there was due process. Provision 2 states the Claimant will report to Chairman. It puts it beyond doubt that the power to administer the contract lay with the Board not Minister. What emerges *ex facie* is that the termination of a contract is unlawful, without jurisdiction and without due process. By their own admission they say they had no reason to do so. Those were yesteryears and not after 2010 Constitution. The exit clauses provide that it can be terminated by either party. The other party is the Board of Trustees. To read the other party to be the Minister makes nonsense of the contract. Reporting is to Board, the Managing Trustee was answerable to Chairman and the Board. Remuneration and allowances, salary, transport etc is paid by the Board. Limited to the role of appointment even under cap. 2 there is express provision which divests Minister of the power to administer the contract. The only party which invokes the exit clause is not the Minister but the Board. The Minister does not sign the letter in his personal capacity but an agent resulting into a contract. The contract is between the Managing Trustee and the 2nd Respondent. The Minister only becomes a third party. That is the only logical interpretation of Clause 20(i). Letter of termination refers to Clause 20(i). The Minister does not have the power or jurisdiction. They were obliged to comply with a requirement under Labour laws of 2007. Any attempt to amend or vary is null and void. The argument that Section 33(1) ousts other statutory provisions is with respect misplaced and ignoring mandatory provisions of the Act. He referred to Section 34 and 35(4) of the Employment Act. One has a right to dispute the lawfulness. A Court cannot be invited to lock out someone and elevate the statutory provision. Once again, even if it was the Board acting in concert it would still be subject to legal safeguards like due process. The issues cannot be dealt with as preliminary objection. Article 236 of the Constitution provides for due process and no statutory provision can oust this legal provision. The 1st Respondent swore to uphold the Constitution and the law. Section 7(1) of the Sixth Schedule requires all laws must be read in consonance with adaptations as provided for under Constitution. The Statute must bend and give

way to the Constitution. All the principles have been subject of courts' decision. We cite **Cause 1616 of 2012-Aviation Workers Union v. Kenya Airways and Minister for Transport and Another**. We pray the court upholds the same principles. He also referred to the case of **Juliet W. Ngugi v. TAC Co. Ltd [2012] eKLR**. Notwithstanding what the Minister thinks, the requirements of natural justice is a part and we submit this claim is properly before the court and the court has the jurisdiction to entertain the claim as filed because every employer has to protect the right of employees to fair labour practices. This court has jurisdiction by virtue of Section 12 (1) of the Industrial Court Act and under Section 12(3) to grant an order of interim preservation. That express jurisdiction and power cannot be taken away by a party in a preliminary objection. It is within reason, it is within the statutory and constitutional mandate of this court to issue an order of preservation as we have demonstrated. The minister had no power and the minister had no authority under the contract and there is need to preserve the Claimants rights in the matter. If there is no preservation, the substratum of this claim would be negated. The court has heard a very very queer argument that yes, the first respondent has taken this action and appointed another person to act and they said the court should note there is a holder of the office. He stated that it is a strange argument and not queer. The court can grant orders if it so wishes. The *status quo* to obtain is that which was before. The preliminary objection does not lie and it is misconceived. The authorities cited were before the new Constitution. There is a new dispensation and the claim before court is properly before court and thus should be allowed. Article 23(3) (c) allows the grant of interlocutory orders and Article 19 (3)(b) the fundamental rights are not limited to those in the bill of rights.

5. In a reprise, Mr. Ahmednasir stated there is a lot of mention of the Constitution and he did not know why it was vogue to cite the Constitution even in the most mundane issues. When Article 19 (3) (b) and 23 (3) (c) are cited, it is important to conceptualise. The Bill of Rights is what these parts refer. Whether he will go to his office as managing trustee or not, is not a fundamental right. It is a simple contract. It would be grotesque to elevate it. He said this is not a Preliminary Objection, it is an abuse of the process, content, fraud absence of fraud and all the issues. The Preliminary Objection is purely on a point of law. We are conceding the facts as pleaded, the claim will fail on a point of law. We have conceded all facts as adduced by the claimant. The point of law is that the parties relationship being governed by contract, pursuant to Section 33 of CAP 258 the exercise of power by the Minister disentitles the claimant of the right to come to court. If the matter goes to trial, what will he say, that he wants to go back to work? We have stated the law, the pleadings lie on the law. Mr. Oduol made no reference to Section 33. He took us through the law exhaustively and the Constitution but he did not have a reply to Section 33. We agree that the Constitution is supreme but the sections cited are not relevant at all. On the issue of the letter of termination, contrary to assertions that the Minister has no jurisdiction or power, Section 33 shows he has power and jurisdiction. The managing trustee can only hold office in terms as may be contained in instruments of appointment dated 7th February 2013. Reading the letter and Section 33 together, the Minister has power to appoint and the Managing Trustee holds office according to the terms. The instrument provides the terms it holds under Section 20 (i). When the law is clear, how can the claimant submit there is no power or jurisdiction? Section 7 of the Sixth Schedule was cited. It validates and supports the Minister. All laws in force continue in force with adaptations and modifications. Section 33 does not contradict the Constitution. Section 33 is still in force. The third point was on the contract. He referred to Para 1. He said it was a 3 year contract on fixed term. Clause 20 stated parties can leave. The Minister is the appointing authority. The Minister is a party to the contract, he is the one who signed the contract. There is nowhere the board signed on behalf of the Minister. On exit clause, an interesting submission is made. He has adopted a unilateralist interpretation of the document. The record shows who are the parties and the provisions of the contract and the Labour Act override Section 33. It is trite law that where a Section addresses the specific issue of employment, it ousts the general provisions of the law. Section 33 is the only one applicable. In cases where there is no contract, the court can construe. If there is a written contract, the court can only adjudicate on the provision. He submitted that the Claimant has no cause of action, there are no damages, he has no other claim. In light of the adherence to Clause 20 of the contract, there is nothing left. His dues have been paid and there is nothing more.

6. Mr. Macharia in his reply stated that Mr. Oduol attempted to lead the Court along the wrong garden path. An attempt was made to persuade the Court that the court is part and parcel and an Article of the Constitution. The court was told Article 2, 10, 236 and 41 have been violated. Due process it has been said was not followed, those submissions are what Justice Ringera used to call an unruly horse. He submitted the case of **Fender v. Milday**. The danger of allowing the unruly horse to run. The primary document to interpret the contract is not the Constitution. The Constitution provides the broad framework. The Constitution delegates the nitty gritty to Statute such as Section 33 CAP 258 and the Employment Act. The contract has provisions which are specific on body guards and club membership. If this is Constitutional then Mr. Macharia would demand his. The contract of employment is negotiated between two parties. It cannot be that the Constitution is violated if the contract is applied. We have not been told which sections have been violated. Article 232 has broader principles and the 1st Respondent has the mandate to administer the contract. If you do it according to the Section, you do not violate due process. Section 33 of the NSSF Act is clear beyond peradventure. Due process is to be contained in a document. This is an obligation on both parties. If the Claimant wanted to terminate he would look into process. It was adverted to that the Respondents were holding the Court to ransom. The Court is not hamstrung. The 2 cases of East African Cables and Kenya Power are on the point of an individual who argues he should be reinstated.
7. On that note, the submissions came to an end and I reserved my Ruling and set the Ruling date for 12th August 2013 at 9.30 a.m. The Claimant sought interim orders which was opposed and in an *ex tempore* Ruling I stated that the Respondents would have a herculean task to fill the position of Managing Trustee substantively as that required a set number of steps. I requested that no efforts be made to this end pending my Ruling. I am grateful to counsel for their erudite submissions and citations of law and judicial precedent. I have considered all the facets raised, the law cited and the decisions filed. I now proceed to render the decision I have arrived at.
8. The 2nd Respondent's preliminary objection was premised on Section 33 of the National Social Security Fund Act, chapter 258 of the Laws of Kenya. From the thrust of arguments advanced by Mr. Ahmednasir counsel for the said Respondent, there cannot be any conceivable cause of action if a party exercises a right in the contract and that contract having statutory foundation pursuant to Section 33 of cap 258, the parties cannot go beyond the instrument of appointment and section 33. He stated there is no leeway, there can be no innovation or craft to allow Court or the party to go outside the bound of Section 33 of cap 258 or the contract of employment. He urged the Court to hold that the termination of the contract was not amenable to Court action as the statutory underpinning of the contract ousted the application of other labour laws to this specie of contract. He submitted that read together, the instrument of appointment and the provisions of the applicable law cap 258. He thus was of the firm view that Section 33 ousts any other provision of labour law that negates the provisions of Section 33. Parliament in its wisdom refined and confined the contract under Section 33 of cap 258. Mr. Macharia for the 1st Respondent supported the objection raised. He stated that General principles of contract, the Principles of law as applied to contract and issues of public interest and public policy on the contract were the paramount areas of consideration. He stated that NSSF is the sole body mandated to handle pension dues for millions of Kenyans. It is a body whose public role or whose place and interest in public policy plays a central role in lives of Kenyans. He referred to the case of **Bender v. St John-Mildmay [1938] AC 49** where the House of Lords stated that it is a sacred duty to uphold contracts. He submitted that there is freedom of contracting and this is reinforced by the case of **National Bank of Kenya Ltd. v. Pipeplastic Samkolit (K) Ltd & Anor. Civil Appeal No. 95 of 1999** which held that parties are bound by the terms of their contract and in the case of **John Njoroge Michuki v. Shell Limited Civil Appeal No. 227 of 1999** the Court of Appeal emphasised it - "and should not overrule any clear intent of the parties". He stated that the Claimant and the Respondents clearly expressed their intention and by notice of 3 months or tender of pay in lieu they could terminate the contract. He cited another case being the Court of Appeal decision in **Walter Musi Anyange v. Hilton International Limited & Anor. Civil Appeal No. 269 of 2003** where the Court of Appeal held "there can be no damages as the relationship is contractual".

9. He submitted that the Orders sought are not available to the Claimant and additionally that these orders are not available at interlocutory level. He stated the provisions of Section 33 of the NSSF Act, have to be read hand in hand with Section 51 of the Interpretation and General Provisions Act. The person making the appointment has power to suspend or terminate. He referred the Court to the cases of **East African Cables v. Public Procurement Complaints, Review and Appeals Board & Another, Civil Application No. 109 of 2007** and **KPLC v. NGM Company Ltd & Anor Civil Application No. 74 of 2010** on the principle of utilitarianism. He said weighing the issues and the cases cited, it will do damage and injustice to hamstringing the operations of the 1st Respondent since the Claimant has contracted willingly.
10. Mr. Ochieng Oduol cited the case of Mukisa Biscuits (*infra*) in opposition to the objection taken stating that what Mr. Ahmednasir raised was not a preliminary objection as held by the East African Court of Appeal. He stated the Court was being asked to determine *in limine* the statutory foundation of contract, interpretation of Clause 20(i), powers of Minister, sanctity of contract, absence of coercion or fraud, the principle of reinstatement and exceptional circumstances surrounding such reinstatement, public interest and policy consideration. This was in his view an abuse of the process. He urged the Court to find that what has been sought to argue is not a preliminary objection or a pure point of law but a pre-emptive strike at the entire Claim before me. He continued to state that the Claimant has raised the issue whether the Cabinet Secretary had the jurisdiction and the power and whether if he had such power, was it exercised in accordance with national values, written law as these issues cannot be dealt with summarily. The Court, he held, has been asked to construe parts of statute which are not in conformity with Constitution. Section 7 of the Sixth Schedule of the Constitution provides that all laws are to be construed in conformity with Constitution. Does Minister have the jurisdiction to wake up one day to terminate a contract of employment without reason or due process? That was to Mr. Oduol fundamental. He stated that contrary to what has been submitted, the Minister not only breached the law but also threw the Constitution out of the window. There is no power for Minister to administer the contract. The Board could also only act having complied with due process and nowhere in the case of the Minister has it been shown there was due process. By dint of provision 2 in the contract, the Claimant was required to report to the Chairman and this, it was argued puts it beyond doubt that the power to administer the contract lay with the Board not Minister. He submitted that what emerges *ex facie* is that the termination of the Claimant's contract was unlawful, without jurisdiction and without due process. He referred the Court to Section 34 and 35(4) of the Employment Act for the position that one has a right to dispute the lawfulness of termination. He called in aid Article 236 of the Constitution which provides for due process and submitted no statutory provision can oust this legal provision. Section 7(1) of the Sixth Schedule requires all laws must be read in consonance with adaptations as provided for under Constitution. The Statute must bend and give way to the Constitution. All the principles have been subject of courts' decision and he cited **Cause 1616 of 2012-Aviation Workers Union v. Kenya Airways and Minister for Transport and Another** and the case of **Juliet W. Ngugi v. TAC Company Ltd [2012] eKLR**. He thus urged the Court to dismiss the objection raised.
11. I have considered the rival submissions and the authorities cited by parties. I will not delve into each and every one of them but will highlight a few where they are in sharp focus. In order to fit the bill of a Preliminary Objection, the principles set out in the oft cited case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696** must be met. In that case, it was decided in that a preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. A preliminary objection per Law J.A. was stated to be thus:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Charles Newbold P. stated in the same judgment:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

12. In the case before me, the 2nd Respondent has not asked me to exercise my discretion. He has urged the Court to dismiss the entire Claim on the basis that the statutory provisions do not permit the Claimant to seek the orders in the Claim. Based on the decision of **Mukisa Biscuit** above, the objection taken fits within the purview of preliminary objection. I agree with Law JA that ‘So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.’ I am not being asked to ascertain if the termination took place, I am not being asked if the Claimant was an employee of the 2nd Respondent. What I am asked to do is determine whether by virtue of section 33 of the NSSF Act and the instrument of appointment there can be any legitimate claim before the Court.

13. Section 33 of the NSSF Act cap 258 Laws of Kenya provides as follows:-

33. (1) For the purpose of this Act, the Minister shall, on the recommendation of the Board of Trustees, appoint a managing trustee who shall hold office on such terms and conditions of service as may be specified in the instrument of his appointment.

(2) The managing trustee shall be the chief executive of the Fund and responsible to the Board of Trustees for its management.

(3) The Board of Trustees shall have power to appoint on such terms and conditions of service as they may determine, such other officers, inspectors and servants of the Fund as may be necessary for the efficient administration of the Fund; and the Board of Trustees shall exercise disciplinary control over such officers, inspectors and servants.

(4) The Board of Trustees may, with the approval of the Minister and subject to such conditions as the Board of Trustees may think fit, by directions in writing, delegate any of their powers under subsection (3) to any one or more of the Trustees or to the managing trustee or other officer of the Fund.

The provisions of the statute are very clear. The NSSF Act has to be read with Section 7 of the Sixth Schedule in mind. Upon the passage of the Constitution, many statutes were (and some still are) out of sync with the Constitution which rephrased positions and redesigned the peoples collective social contract. The term Minister is now Cabinet Secretary and reading the above Section with the necessary modification and adaptation, the Cabinet Secretary shall, on the recommendation of the Board of Trustees, appoint a managing trustee who shall hold office on such terms and conditions of service as may be specified in the instrument of his appointment. Later in the Section, the Board of Trustees has its powers set out as follows:-

The Board of Trustees shall have power to appoint on such terms and conditions of service as they may determine, such other officers, inspectors and servants of the Fund as may be necessary for the efficient administration of the Fund; and the Board of Trustees shall exercise disciplinary control over such officers, inspectors and servants.

I have placed emphasis on the last portion to bring out the difference between the powers of the Cabinet Secretary and the powers of the Board.

14. The Cabinet Secretary, on 22nd July 2013 wrote a letter to the Managing Trustee of the NSSF

terminating his appointment. (These are the 1st Respondent, the Claimant and the 2nd Respondent respectively). The Claimant had been appointed vide Gazette Notice No. 17406 of Vol. CXIV – No. 117 of 23rd November 2012. The gravamen of the Notice reads as follows:-

In exercise of powers conferred by paragraph 1 (d), (iii), (iv) and (v) of the first schedule of the National Social Security Fund Act, the Minister for Labour Appoints TOM OTIENO ODONGO to be a member of the Board and Managing Trustee of the National Security Fund for a period of three (3) years with effect from 28th November 2012.

By the same Gazette Notice, the Minister revoked the appointment of Alex Odero Kazongo.

It was signed by J. K. Munyes the Minister for Labour. The appointment was confirmed by the letter dated 7th February 2013 which was issued a good two months after the appointment. The letter of 7th February 2013 set out in detail the terms and conditions of service of the Claimant and is thus for all intents and purposes the instrument of his appointment as per the provisions of cap 258. It sets out various clauses one of which is headed Exit Clause. Clause 20 provides as follows:-

- i. This contract may be terminated by either party giving a three month's prior notice, or on payment of an equivalent of three (3) month's pensionable pay in lieu of such notice.
- ii. The Board of Trustees may terminate this contract, for among other reasons, failure to meet the agreed performance objectives.

15. When Section 33 of cap 258 is read in totality, the 1st Respondent does not play any role in the appointment of any other officers, inspectors and servants of the 2nd Respondent but plays a critical role in the appointment of the Managing Trustee. Ordinarily, words should be given their natural and ordinary meaning. The contract creating an employment relationship between the Claimant and the 2nd Respondent signed by the 1st Respondent the Minister for Labour was a special contract. It had statutory underpinning. It was a contract to which a majority of labour law provisions would not apply by the nature of the contract itself. Reading the 20 Clauses in detail reveals the contract to be a species to which Sections of the Employment Act 2007 would not apply.

16. The contract which comes close to the description given to the contract for the Managing Trustee is a crown employment contract in the United Kingdom. Historically, one of the privileges of the Crown was immunity from suit. The King could not be impleaded before his own Court and therefore in the eyes of the law the King could do no wrong. The King's servant (civil servant) could never sue him in contract (or otherwise) and therefore, in practice and theory, the Crown servant was regarded as having no contract. He was employed only during the pleasure of the Crown, and could never sue for wrongful dismissal when the good pleasure of the Crown turned to displeasure. **Chitty on Contracts Vol. II Specific Contracts Twenty-Ninth Edition** at para 39-031 headed **Crown Employment** holds that even when the relationship between a Crown employee and the Crown can be regarded as contractual, the relationship may nevertheless be regarded as terminable at the pleasure of the Crown, so that no claim for wrongful dismissal will lie against the Crown. The regard of the relationship of crown employment as contractual was held by **Chitty on Contracts** in the above-cited passage to have found currency in decisions such as **R. v. Lord Chancellor's Department Ex parte Nangle [1992] 1 All ER 897**.

17. As adverted to earlier, when the provisions of the NSSF Act are considered, only the 1st Respondent could supervise the contract. The roles played by the Minister and the Board of Trustees are clearly spelt out in Section 33 of NSSF Act. In this case, the 1st Respondent asserts he terminated the contract in terms of Clause 20(i) of the instrument of appointment pursuant to Section 33 of the NSSF Act. I do not doubt for one moment that there is a provision in the contract which permits the termination of the contract under the terms of the Contract. That is Clause 20 which is reproduced in its entirety above.

18. The principle of utilitarianism espoused in the decisions of **East African Cables v. Public Procurement Complaints, Review and Appeals Board & Another, Civil Application No. 109 of 2007** and **KPLC v. NGM Company Ltd & Anor Civil Application No. 74 of 2010** though relevant are in the realm of the challenge to the Orders of reinstatement or injunction which is yet to be urged before the Court. In the premises the authorities are not on point.

19. The attempt by Mr. Oduol to elevate the contest to the Constitutional platform is misplaced. The contract, though special and expressly provided for under statute, cannot lead to the series of rights under Articles 19 and 23. I agree with Mr. Ahmednasir that each contest between parties should not be elevated to the Constitutional platform as to do so would open the Constitution to the service of insidious proclivities. A contract of service except where clear breaches of the Constitution are demonstrable should remain in the arena of employment law.

20. The power to strike out pleadings is a power which the Courts must use with circumspection. In the case of **Eunice Wambugu Gachogu v. Hon. Charles Nyamai T/A My Hotels La Palms Cause No. 1214 of 2012** (unreported) at page 2 of the decision I held as follows:-

At the onset, the Court wishes to settle the dispute as to whether the Civil Procedure Act and the Civil Procedure Rules apply to this Court. Whereas it is desirable that recourse be, where possible, to the Industrial Court (Procedure) Rules 2010, this Court is of the firm view that the Civil Procedure Rules 2010 can be relied on. Only the non-applicability of the strict rules of evidence under the Evidence Act are expressly mentioned in the Industrial Court (Procedure) Rules 2010. The Rules and the Industrial Court Act 2011 do not expressly bar the application of the Civil Procedure Rules and neither would I bar the use of the rules where there is lacuna in the Rules of this Court. The Applicant was well founded in reliance on the Civil Procedure Rules 2010.

21. Under the Civil Procedure Rules 2010, there is procedure for striking out pleadings which are either an abuse of the process or it discloses no cause of action. See Order 2 Rule 15(1) (a) and (d). This was not the course adopted and Mr. Oduol rightly pointed out that an attack of this nature is akin to a pre-emptive strike. A formal application setting out the grounds upon which the suit should be struck out would have been apt in this case.

22. In support of the objection, Mr. Macharia cited the authority of the English case **Fender v. St. John-Mildmay**. The case established a legal principle which is applicable even today. Though it related to a promise to marry between an adulterer and his mistress, the House of Lords and the Judicial Committee of His Majesty's Privy Council held that it is the sacred duty of Courts to uphold contracts. I agree entirely. Contracts are the intention of parties and the Court is bound to uphold those intentions when disputes arise.

23. I however do not ascribe to the submissions that the contract is not amenable to the pursuit of remedies under the law. Even in the United Kingdom, the law has progressed where the Crown employees are permitted recourse to reliefs under the employment laws. In the contract before me, the Claimant has the right to seek recourse in Courts if he feels there was a breach. The Courts cannot shut him out as the contract is not one which is so elevated as to fall in the category of a contract at the pleasure of the state or crown. The termination of the contract is a question of mixed law and fact. It will require a hearing on merits to determine whether the termination was merited or not. There must be an inquiry into the reason why the termination took place in order to ascertain whether it was genuinely warranted or not. I am persuaded by the reasoning of my brother Justice Rika in **Aviation Workers Union v. Kenya Airways and Minister for Transport and Another** and the case of **Juliet W. Ngugi v. TAC Company Ltd** which I decided last year. The Court is entitled to enquire into the circumstances of the termination of the contract and should not determine those facts *in limine* as urged by Mr. Ahmednasir. True, there may be no craft, no innovation to allow Court or the party to go outside the bounds of statute and the contract. The statutory underpinning of the contract means that the room for play in this case is so limited.

24. In the premises, I dismiss the objection raised by the 2nd Respondent and supported by the 1st Respondent.

It is so ordered.

Dated and delivered at Nairobi this 12th day of **August** 2013

Hon. Mr. Justice Nzioki wa Makau

Judge