



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 255 OF 2011**

**MARY NYANGASI RATEMO AND 9 OTHERS ..... CLAIMANTS**

**VERSUS**

**KENYA POLICE STAFF SACCO LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**UTUMISHI INVESTMENT LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

The claim herein was filed on 25<sup>th</sup> February 2011 by 9 claimants [John Waruta, Stephen Siakani, Eliud Mumataya, Chrisantus Makokha, Christine Naliaka, Mary Nyangasi, Anne Muthini, Elly Ominde, Priscah Sang, and Christopher Okola] for unlawful and or constructive dismissal and failure to pay terminal dues by the 1<sup>st</sup> respondent Kenya Police Staff Sacco Limited. The 1<sup>st</sup> respondent filed their defence dated 9<sup>th</sup> March 2011 who admitted that they had employed the claimants but in 1995 there was a slip of the respondent and the claimants became the employees of Utumishi Investment Limited who should be held liable for the claim. On 28<sup>th</sup> June 2011, the 1<sup>st</sup> respondent applied for leave to join Utumishi Investment Limited as a co-respondent, which leave was granted and they became the 2<sup>nd</sup> respondents herein.

**Claimant's Case**

In the claim, the claimants state that on divers dates in 1993 they were employed by the 1<sup>st</sup> respondent, a company registered for police related professional. The claimants are civilian staffs who were deployed in various departments and offices of the 1<sup>st</sup> respondent until 15<sup>th</sup> July 2010 when they were terminated. That as support staff of the respondent, they continued to serve until in 2010 when they noticed that some of their employer correspondences bore the names of the 2<sup>nd</sup> respondent, a company they were strangers to as they were employees of the 1<sup>st</sup> respondent for over 10 years and had not been terminated. They thus lodged a letter of complaint with the respondents on 26<sup>th</sup> February 2010 seeking to establish their employment status as the two respondents were distinct legal persons.

The claimants were served with a letter dated 26<sup>th</sup> March 2010 by the 2<sup>nd</sup> respondent, a show cause for disciplinary action for alleged contumacious disrespect in writing a letter to the 1<sup>st</sup> respondent and following this the 2<sup>nd</sup> respondent on 15<sup>th</sup> July 2010 terminated the claimants' secondment to them by the 1<sup>st</sup> respondents and sought to send them back to their employer the 1<sup>st</sup> respondent, on the basis that they were employees of the 1<sup>st</sup> respondent and were only on secondment to the 2<sup>nd</sup> respondent. This act created confusion to the claimants as since their employment they were working on the same premises and wondered how the termination of their secondment could affect their employment. They were ordered to leave their work stations hence there was no more work for them and this was tantamount to

constructive dismissal. That Keenge and Co Advocates wrote to the claimants on behalf of the 1<sup>st</sup> respondent indicating that there was never an agreement between the respondents to have the claimants on secondment to the 2<sup>nd</sup> respondent and therefore the claimants were employees of the 2<sup>nd</sup> respondents.

That the claimants were at all material times issued with letters of appointments; they had salary increments and for all intents and purposes were of permanent employment terms. That the claimants were terminated or declared redundant and were entitled to;

- a. *Notice pay;*
- b. *Payment for days worked but not paid for;*
- c. *Service pay of 15 days for every year of service completed;*
- d. *Unlawful deductions made and not remitted;*
- e. *Certificate of service;*
- f. *Pro-rata leave for the period worked;*
- g. *Any other statutory entitlements;*
- h. *House allowance of kshs.8, 500.00 per month;*
- i. *Travel/transport allowance Kshs.2, 000.00 per month; and*
- j. *Medical allowances kshs.1, 875.00 per month.*

That the acts of the respondents amounted to constructive dismissal and hence are unlawful termination under the law and natural justice<sup>4</sup> as well as ILO Convention 158 and also infringed the claimants' fundamental rights as under Article 20, 21, 25, 41, and 232 of the Constitution as read together with section 12 and 15 of the Labour Institutions Act. The claimants are seeking for a declaration that they were constructively dismissed and this was unlawful, seeking re-engagement in work comparable to that in which they were employed prior to dismissal or other reasonably suitable work together with wages and no loss of benefits in arrears. They also seek reinstatement or in the alternative, seek notice pay and compensation for loss of employment. They also seek salary increments from 1<sup>st</sup> January 2004 to 1<sup>st</sup> October 2010, and all outstaying claims unpaid together with costs.

In response the 1<sup>st</sup> respondents stated that the claimants were employed by them prior to 1995 when they split to create the 2<sup>nd</sup> respondent as an independent entity from the 1<sup>st</sup> respondent. In the split the ownership of Utumishi House where the claimants were employed passed to the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent only remained as a tenant of the 2<sup>nd</sup> respondent in this building. That the claimants were employed as civilian support staff whose main duties were to carry out day to day maintenance of the building and after the split the claimants continued working as support staff within Utumishi House, the property of the 2<sup>nd</sup> respondent and their salaries were paid by the 2<sup>nd</sup> respondents and by this conduct, the claimants had revoked their employment with the 1<sup>st</sup> respondent and effectively became employees of the 2<sup>nd</sup> respondent. That under the law, an important factor to consider on who an employee is the fact of payment of a salary by an employer to an employee, which the 2<sup>nd</sup> respondent did with the claimants and thus the 1<sup>st</sup> respondent ceased being their employer from 1995.

That the claimants were terminated by the 2<sup>nd</sup> respondents under the guise of termination of secondment whereas there was no secondment agreement between the respondents with regard to the claimants and in the claim, the 2<sup>nd</sup> respondent is liable. That the claimants were ordered to leave their work stations and hence constructive dismissal does not indicate who directed them to do so and the 1<sup>st</sup> respondent is not liable as they could not issue such an order as they were tenants. The 1<sup>st</sup> respondent also contests the claim that the claimants only noticed that there was communication bearing the 2<sup>nd</sup> respondent names as being misleading as they were aware their status changed from 1995 when all their pay slips bear the name of 2<sup>nd</sup> respondent.

The 1<sup>st</sup> respondent contended that there was no employer/employee relationship between them and the claimants or working on secondment from them to the 2<sup>nd</sup> respondent. That the claim should be dismissed.

The 2<sup>nd</sup> respondents was enjoined in the suit through third party notice for indemnity on the grounds that the 1<sup>st</sup> respondent ceased to be an employer in 1995 after the split where the 2<sup>nd</sup> respondents came into being and thus took over the claimants services and became the paying employer and that after the split, the ownership of Utumishi House where the claimants were employed passed over to the 2<sup>nd</sup> respondent where the 1<sup>st</sup> respondents was only a tenant. Other grounds were that after the split, the claimant continued working as staff of the 2<sup>nd</sup> respondent where they received their salaries and that the termination herein complained of by the claimants was occasioned by the 2<sup>nd</sup> respondent who should therefore take responsibility.

In evidence only four (4) of the claimants gave their evidence. Six (6) claimants have been employed by either of the 2<sup>nd</sup> respondents and did not pursue their claims. The remaining claimants, Mary Nyagasi Ratemo, Priscah Jepkoech Sang, Eliud Simiyu Mumataya, and Stephen Waswa Saikani gave their sworn evidence in confirmation of their claims.

Mary Ratemo testified that she was employed by the 1<sup>st</sup> respondent in 1993 together with the other claimants as support staff for cleaning. She was issued with her letter of appointment similar to that issued to all the other claimants. She was however terminated on 30<sup>th</sup> September 2010. That on 26<sup>th</sup> February 2010 the claimants wrote a letter to the respondents seeking to know their status as employees as they felt there was confusion since they had letters of appointment from the 1<sup>st</sup> respondent yet their pay slips indicated it was from the 2<sup>nd</sup> respondent. Also the 1<sup>st</sup> respondent employed new people and they were not considered and thus sued the 1<sup>st</sup> respondent. That she was not aware of any changes as between the respondents and at all times she believed to be an employee of the 1<sup>st</sup> respondent.

They thus wrote to the chair of the 1<sup>st</sup> respondent but they never replied but the 2<sup>nd</sup> respondents wrote to the claimants indicating that their secondment to them had been terminated with effect from 1<sup>st</sup> October 2010 and were to either apply for the new jobs with 2<sup>nd</sup> respondents or go back to the 1<sup>st</sup> respondents for re-deployment elsewhere. On 1<sup>st</sup> October 2010, they reported to work but they were not allocated work. When they asked the management of the 1<sup>st</sup> respondent they were told that they had no claim against the 1<sup>st</sup> respondent. They were not paid their dues and in November the witness stopped reporting to work as she was never allocated any work upon reporting to duty. She was thus effectively terminated by the 1<sup>st</sup> respondent without notice or due process.

She is now seeking reinstatement, she is 55 years old and she is unable to get alternative work after working for the 1<sup>st</sup> respondent for over 17 years.

In cross-examination the witness confirmed that she commenced work with 1<sup>st</sup> respondent in 1993 and received salary from them and in 2004 she got a certificate of long service after 10 years. She could not remember when the 2<sup>nd</sup> respondent started paying her salary though she was deployed to clear the house now owned by the 2<sup>nd</sup> respondent. That the claimants wrote to the respondent seeking clarification as to their status but received a show cause letter from the 2<sup>nd</sup> respondent and that their secondment to them had been terminated. They were never taken through any disciplinary process and when they reported to work in October 2010, they were not allocated any duties.

That there were 10 claimants but 6 have since been employed by the 2<sup>nd</sup> respondent but she cannot tell how they went back. She also confirmed that all her statutory dues were remitted to NSSF and NHIF, her claim is for reinstatement and compensation for lost years. No notice was given or service pay for years worked. Her claim is against the 1<sup>st</sup> respondent.

On cross-examination by the 2<sup>nd</sup> respondent, the witness confirmed that she was employed by the 1<sup>st</sup> respondent together with all the other claimants but only 4 are pursuing the claim as the 6 others have resumed their jobs with the 2<sup>nd</sup> respondent. She has no claim against the 2<sup>nd</sup> respondent.

In July 2010 they got a letter from the 2<sup>nd</sup> respondent that their secondment to them by the 1<sup>st</sup> respondent had been terminated and were invited to re-apply to 2<sup>nd</sup> respondent if they needed to continue working with them as a new employer. She did not apply as she was still an employee of the 1<sup>st</sup> respondent who she has lodged her claim against.

The second witness was Priscah Sang, also employed in 1993 by the 1<sup>st</sup> respondents and served for 17 years until 30<sup>th</sup> September when she was terminated. That in February 2010, the claimants noticed that the 2<sup>nd</sup> respondent was employing new people who were issued with letters of appointment yet the claimants did not have similar letter and thus wrote seeking clarification. They were accused of indiscipline but no hearing was conducted and in July 2010, the 2<sup>nd</sup> respondent wrote to them that their secondment with them from the 1<sup>st</sup> respondent had been terminated.

Every month she received her pay but did not know who was giving the money. The pay slips had the 2<sup>nd</sup> respondent logo but her work numbers with the 1<sup>st</sup> respondent were noted. That the 1<sup>st</sup> respondent verbally terminated her, she reported to work the whole of October but no work was allocated. She had no case of indiscipline. Her claim is for leave allowance due in 2010 and 6 leave days that were not taken. She is also seeking to be reinstated back to her job.

In cross-examination by the 1<sup>st</sup> respondent, the witness confirmed that in February 2010, she wrote to the respondents seeking clarification as to her employer status which ended with the 2<sup>nd</sup> respondent terminating her secondment with them. That upon termination she was not given notices, 6 leave days for 2009 and the leave for 2010 was due and were not paid, there were no salary increments like other staff and that she should be reinstated or compensated.

In cross-examination by the 2<sup>nd</sup> respondent, the witness confirmed that once she was employed by the 1<sup>st</sup> respondent, she agreed to be allocated work anywhere and was thus secondment to work at the 2<sup>nd</sup> respondent premises and was paid until 30<sup>th</sup> September 2010 when the 2<sup>nd</sup> respondent asked her to go back to her employer as her salary had now been stopped. The 1<sup>st</sup> respondent however could not take the witness as they said there was no work and that she should go home. She was not given notice.

When the 2<sup>nd</sup> respondent asked her to re-apply for a job with them, she did not as she knew she had a job with the 1<sup>st</sup> respondent and had not been terminated.

The third witness Stephen Siakani stated that in 1993 he was employed by the 1<sup>st</sup> respondent for maintenance in their premises at Utumishi House on a monthly salary of kshs.26, 985.00 per month and for 17 years he served until 30<sup>th</sup> September 2010 when he was told by the 2<sup>nd</sup> respondent to go back to his employer as his secondment to them had been terminated.

That his salary would be increased annually but this stopped in 2005. In February 2010 together with the other claimants he wrote to the respondents about salary increase and clarification of employer and the reply they got was the termination of secondment to 2<sup>nd</sup> respondent. They reported to work in October 2010 but the 2<sup>nd</sup> respondent told them to return to the 1<sup>st</sup> respondent who in turn told them there was no work for them.

That the 1<sup>st</sup> respondents were to allocate them work anywhere just like they had done with the 2<sup>nd</sup> respondent. That when there were changes, the claimants were never consulted or informed of these changes as between the respondents. He is seeking reinstatement and payment of his dues.

On cross-examination by the 1<sup>st</sup> respondent, the witness stated that he was a cleaner and maintenance person at Utumishi House which belong to members of the 1<sup>st</sup> respondent but cannot tell who paid his salary as in the pay slip the paying organisation was the 2<sup>nd</sup> respondent but his work details and numbers were those of the 1<sup>st</sup> respondent. They thus needed clarification as to who their employer was. They were

issued with show cause letter and proceeded to give their defence but there was no hearing, only a termination by the 2<sup>nd</sup> respondent but not from the 1<sup>st</sup> respondent.

That he did not know when the respondent changed management or who posted salaries to his account as his pay slips were issued by the 1<sup>st</sup> respondent and then changed to 2<sup>nd</sup> respondent but cannot tell from which month. He was not aware of any agreements between the respondent about his employment. He never applied for work with the 2<sup>nd</sup> respondent as he knew he was an employee of the 1<sup>st</sup> respondent.

In cross-examination by the 2<sup>nd</sup> respondent, the witness stated that he was working for the 2<sup>nd</sup> respondent on deployment by the 1<sup>st</sup> respondent as they were together but later management changed but he was never an employee of the 2<sup>nd</sup> respondent. From his letter of employment, he had agreed to work anywhere. His claim is against the 1<sup>st</sup> respondent.

The fourth witness was Eliud Mumataya who was on similar work terms as the other claimant and a window cleaner with the 1<sup>st</sup> respondent who was deployed at the 2<sup>nd</sup> respondent. That in 2002 some employees of the 1<sup>st</sup> respondent got a salary increment but he did not get it even though he was their employee. That as the employees attached to the 2<sup>nd</sup> respondent, they decided to ask why their terms had not been improved and thus wrote their letter of February 2010. The 2<sup>nd</sup> respondents replied indicating their secondment was terminated and given 3 months to report back to their employer the 1<sup>st</sup> respondent.

He claims for reinstatement or compensation for the termination.

In cross-examination by the 1<sup>st</sup> respondent, the witness confirmed that his salary was paid by the 1<sup>st</sup> respondent since 1993 until termination of his secondment to 2<sup>nd</sup> respondent. On his pay slip the organisation was indicated as 2<sup>nd</sup> respondent but the other details were those of the 1<sup>st</sup> respondent.

As claimants they had asked for a meeting with the 1<sup>st</sup> respondent to address the issue of non-increase of their salaries and this prompted the 2<sup>nd</sup> respondents to issue show cause letter and the termination of their secondment with them. They were terminated verbally by the 1<sup>st</sup> respondent despite reporting to work in October 2010. That he only realised he had been on secondment in 2010 when the 2<sup>nd</sup> respondent wrote indicating that he had been terminated. His letter of appointment allowed the 1<sup>st</sup> respondents to place or deploy him anywhere for work.

The issue the claimants had were that in 2002, the 1<sup>st</sup> respondent did pay increase without considering them, another one was done in 2004 without their consideration and for 6 years they waited for this to be addressed only to be terminated. He was asked to apply for a job at the 2<sup>nd</sup> respondent but never did as he had another job.

On cross-examination by the 1<sup>st</sup> respondent, the witness confirmed that he only learnt that he was on secondment at 2<sup>nd</sup> respondent from their letter to the 1<sup>st</sup> respondent in July 2010. His salary was paid with both respondents indicated on the pay slip. His claim is against the 1<sup>st</sup> respondents who were his employers.

## **Defence case**

The 1<sup>st</sup> respondent in evidence called Mr. Julius Musembi Mutembo (Mutembo) the Human Resource Manager and the 2<sup>nd</sup> respondent called Mr. Joseph Koech one of the Directors.

Mutembo stated that he joined the 1<sup>st</sup> respondent in December 2008 with duties to oversee staff of the 1<sup>st</sup> respondent who is engaged in savings and credit as a society of police officers. The 1<sup>st</sup> respondent was registered in 1962 and in 1972, the 2<sup>nd</sup> respondent was registered as an investment company and bought

Utumishi House as their investment in 1991 and the 1<sup>st</sup> respondent became a tenant therein but the directors of both entities remained the same. In 1993, the 1<sup>st</sup> respondent employed the claimants to clean this building.

In 1995 members of the 1<sup>st</sup> respondent who had bought the building complained that others who had not participated in the purchase of the House [Utumishi House] were benefiting and there was need for a separation. Hence management was split with each of the respondent getting new directors. The staff hired by the 1<sup>st</sup> respondent to clean the building went to the 2<sup>nd</sup> respondent as the 1<sup>st</sup> respondent had become a tenant. Their management came under the 2<sup>nd</sup> respondent who supervised and paid them salaries.

Mutembo further stated that the claimants were not notified of these changes due to the manner of changes. Since 1995 to 2005, the 1<sup>st</sup> respondent continued to manage the pay roll for the 2<sup>nd</sup> respondent but in July 2005 they were handed over to the 2<sup>nd</sup> respondent. That the 1<sup>st</sup> respondents terms were temporary. Initially the 1<sup>st</sup> respondent was paying salaries until July 2005 when this was taken over by the 2<sup>nd</sup> respondent and the pay slip indicated that the employer was the 2<sup>nd</sup> respondent from July 2005.

There was no secondment, the claimants were deployed on employment and not on secondment and thus the 2<sup>nd</sup> respondent failed to formalise their relationship with the claimants hence this claim.

In February 2010, the 1<sup>st</sup> respondent got a letter from the claimants seeking clarification on the confusion they felt as they had no letters and that since 2005 there was a salary review and was not considered. That this letter was sent to the 1<sup>st</sup> respondent was wrong as it should have been sent to the 2<sup>nd</sup> respondent, who failed to respond but told the claimants to write to the 1<sup>st</sup> respondent management.

The witness further stated that the 1<sup>st</sup> respondent did not terminate the claimants and by virtue of the separation between them and the 2<sup>nd</sup> respondents, they ceased being their employees. Some claimants were taken by the 2<sup>nd</sup> respondent and the others returned to the 1<sup>st</sup> respondent. They were all given a chance to be employed [reinstated] and 6 of the claimants applied and the 4 in court did not and thus some have jobs but the claimants in court do not have a job. They were given a chance by the 2<sup>nd</sup> respondent to go back but those who did not seek re-employment were left out. They were thus effectively terminated by the 2<sup>nd</sup> respondent and it was of no consequence to the 1<sup>st</sup> respondent as the communication sent to the 1<sup>st</sup> respondent regarding the claimants was simply for information sharing purposes.

That there was no formal agreement on secondment between the respondents or an agreement to share workers as the two respondents were interwoven. The 1<sup>st</sup> respondent was the biggest shareholder of the 2<sup>nd</sup> respondent, there was only one staff, the Manager and no support staff and hence the 1<sup>st</sup> respondent employed the claimants but where there was a separation, the management of the 2<sup>nd</sup> respondent and the support staff all went to the 2<sup>nd</sup> respondent. The 1<sup>st</sup> respondents only paid the claimants their salaries due to the relationship between the two respondents and due to the share interest they had therein, they continued this practice until 2005 when these functions were fully taken over by the 2<sup>nd</sup> respondent.

The 1<sup>st</sup> respondent is aware that the 2<sup>nd</sup> respondent has denied that they never employed the claimants but the fact that there was no letter of employment does not mean that they were not their employees. An employer gives instructions and directions, which the 2<sup>nd</sup> respondent did, the 1<sup>st</sup> respondents only paid salaries as they had a share interest in the 2<sup>nd</sup> respondent investment. These payments were made on behalf of the 2<sup>nd</sup> respondent.

In cross-examination the witness stated that in 2005 when the two respondents separated their management, the 2<sup>nd</sup> respondent took over the claimants by managing them and the 1<sup>st</sup> respondents only

did the payrolls for them. When the 1<sup>st</sup> respondents did a salary review for its staff, the claimants were not part to this as they were not their employees any more. For the 1<sup>st</sup> respondents did have done 3 years reviews of salaries for all their staff but not for the claimants as they were the employees of the 2<sup>nd</sup> respondent.

That the claimants were never officially terminated by the 1<sup>st</sup> respondent but after 2005, the 1<sup>st</sup> respondent had no control over them. That the claimants were never notified of the separation. They were cleaners as per their letters of appointment and when the 2<sup>nd</sup> respondent took over management of the investment House, it went without saying that they moved with the second respondent. The claimants continued to do the same duties of cleaning of the building and the 1<sup>st</sup> respondent became the tenant of the 2<sup>nd</sup> respondent.

Mutembo also confirmed that he is aware that the law requires that employees be notified of their changed status but he is aware that the claimants as cleaners, they were aware the 2<sup>nd</sup> respondents took over their employment and they had been moved with the separation. The witness also admitted that the claimants were not involved with the separation negotiations as between eh respondents, no communication were done, verbally or in writing.

The respondents operated the same pension scheme due to the nature of their relationship. Benefits have not been paid since there was a transfer and nothing was lost.

The witness also confirmed to the court his understanding of 'separation', 'transfer', 'reemployment' and 'secondment'. Separation being where one body become two. The new owners of the building wanted to have separate entities. Transfer being that initially the claimants worked for the 1<sup>st</sup> respondent but with change of ownership of the building, staff management went with it. A transfer however involves official communication from one party to the other. Re-employment means that upon termination, one is requested to be employed against for a second time. Secondment is where party 'A' has an interest and sends party 'B' to protect that interest. That in this case the claimants were not on strict transfer. The incident was the separation. The duty however was on the 1<sup>st</sup> respondents to officially inform affected staff that they had been moved. The 2<sup>nd</sup> respondents were also supposed to issue new letter. There was a dual responsibility on their part. Neither party take responsibility to do their part in this case.

## **Second Respondent's Case**

Mr. Joseph Koech for the 2<sup>nd</sup> respondents on the other part stated that he is one of the Directors of the 2<sup>nd</sup> respondent since 2003 and currently, the honorary secretary to the Board. That in 1991 he was one of the shareholders, they held an Annual General Meeting (AGM) of the 1<sup>st</sup> respondents and the co-operators to buy a house as their membership were getting bigger. The directors identified Matungulu House on Nyerere Road and by a resolution at the AGM, it was agreed by all shareholders that members should make a contribution amounting to Kshs.105 million to buy this house which was done in 6 months in a check-off system.

Before the purchase, the directors of the 1<sup>st</sup> respondents went to Cooperative Bank and got the purchase money at Kshs.105 million for which the co-operators, then as members of the 1<sup>st</sup> respondent, were to each give Kshs.16, 800.00. The 1<sup>st</sup> respondent was the promoter of the 2<sup>nd</sup> respondent and there was no dispute as to the new investment.

At this point, the Minister for Agriculture, being responsible for the respondents activities, gave directions that the activities of the 1<sup>st</sup> respondent and those of the 2<sup>nd</sup> respondent, in law did not allow joint activities and the two should remain as separate as per the law. Following this ministerial directive, the 1<sup>st</sup> respondent as the promoter or the 1<sup>st</sup> respondent had to ensure a separation.

The claimants were in 1993 employed as cleaners by the 1<sup>st</sup> respondent. In their letters of appointment,

they were to be posted in any department to undertake their duties as directed by their employer. At the time of termination, the claimants were doing the same duties of cleaning the premises. There were directors elected to manage the 2<sup>nd</sup> respondent and then changed Matungulu House to Utumishi House by taking the management of the house. The Police Commissioner directed the respondents to separate the management of each entity by having separate directors responsible for the management of each but there still remains a strong relationship between the two as members of the 1<sup>st</sup> respondent are also members in 2<sup>nd</sup> respondent.

The claimants were therefore seconded to work at the 2<sup>nd</sup> respondent when the building housing the two was purchased which meant that they were to work for the 2<sup>nd</sup> respondents as a special responsibility. When the two entities separated, they reallocated their budgets to cater for staff on secondment. The apportionment was that some clerical duties were given to the 2<sup>nd</sup> respondent together with the posting of the claimants to work at the 2<sup>nd</sup> respondent premises, termed as secondment.

On 26<sup>th</sup> March 2010 the witness wrote the letter after a complaint was made to the 1<sup>st</sup> respondent where the claimants wanted to know their fate as there was no review of salaries like other staff. He did the show cause letter on the basis that when the claimants were seconded to the 2<sup>nd</sup> respondent, there was no communication from the 1<sup>st</sup> respondent indicating that the 2<sup>nd</sup> respondents should hire them and from the letter the claimants wrote, they knew they were under the management of the 2<sup>nd</sup> respondent and when they directed their complaint to the chair of the 1<sup>st</sup> respondent, this was wrong. After the respondents separated, the claimants came under the management of the 2<sup>nd</sup> respondent and what the 2<sup>nd</sup> respondent realised should have been done is to end the secondment and have the 1<sup>st</sup> respondent re-deploy the claimants or they apply for employment with the 2<sup>nd</sup> respondent. Those keen to work for the 2<sup>nd</sup> respondent applied and were taken.

The witness admitted that the pay slips for the claimants were issued by the 1<sup>st</sup> respondent and used the 2<sup>nd</sup> respondent logo as the two entities were related through the secondment and once there was separation, it was the duty of the 1<sup>st</sup> respondent to give formal communication on what was to happen with their employees seconded to the 2<sup>nd</sup> respondent, which they never received. The 1<sup>st</sup> respondent remained the principal employer.

On cross-examination, the witness confirmed that as the director of the 2<sup>nd</sup> respondent he was aware that the claimants were deployed to work with them and the salaries were paid on apportionment to take care of officers seconded to them. In the agreement between the respondents, the 2<sup>nd</sup> respondent took over the payment of the claimants salaries but they did not become the 2<sup>nd</sup> respondents' employees and the claimant was never notified of these changes. There were no increments as the pay slips were done by the 1<sup>st</sup> respondent.

In 1995, some functions were moved to the 2<sup>nd</sup> respondent, salaries were apportioned, and the financial director distributed to salaries. This contribution came from rent collections and other investments. The witness also confirmed that it was his responsibility to manage the claimants but when they wrote to the 1<sup>st</sup> respondents regarding a need for clarification, this had no basis and it made officers of the 2<sup>nd</sup> respondent agitated and if they had not done this, this matter would not be in court. The issues could have been resolved amicably. They investigated as police officers and confirmed the signatures to belong to the claimants. That the board of the 2<sup>nd</sup> respondent did not call the claimants to address their issues. The issuance of the show cause letter was due to the disrespectful conduct of the claimants to the board which was also an act of insubordination. They knew they had a manager in charge of them and should have followed protocol. They were given a chance to apply for employment with the 2<sup>nd</sup> respondent but only 6 did.

The termination of secondment had an invitation to all claimants to apply for a job with 2<sup>nd</sup> respondent.

After the split, there was apportionment of responsibilities between three (3) entities the 1<sup>st</sup> respondent as the Sacco, Ruaraka Housing limited and 2<sup>nd</sup> respondent, the investment – all being investments by the 1<sup>st</sup> respondent, were allocated responsibilities to pay wages – one a society and the other limited liability companies. The 1<sup>st</sup> respondent society was to undertake transitional measures and formally communicate on the apportionment and other responsibilities. In the meantime, the 2<sup>nd</sup> respondents only took over the payment of salaries. The apportionment was with relation to the two new investments of the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent and Ruaraka Housing Limited, where the 2<sup>nd</sup> respondent paid workers seconded to them as well as Ruaraka paid those seconded to them. The 2<sup>nd</sup> respondent's income was from rent collections, which was used to pay the claimants. The 2<sup>nd</sup> respondent did not have a finance officer and so used the 1<sup>st</sup> respondent officers to effect salary payments to the claimants.

At the close of the hearing, the claimants' advocate applied to the CPMU conduct investigations as to the salary increments to advise the Court on this issue forming part of the claim as none of the respondents had effectively addressed this matter in their defence or through the witnesses that were called. The Court allowed all the parties to submit all employment records in their possession to guide the court to this effect. Toward this the 1<sup>st</sup> respondent was allowed to recall their witness Mutembo to highlight on the documents submitted after the close of hearing.

Mutembo stated that the claimant's salaries were paid by the 2<sup>nd</sup> respondent as their employer. That the committee that addressed the issue of separation between the respondents made recommendations on which employees were to be affected and all the claimants were on the list of staff moved to the 2<sup>nd</sup> respondent. The claimants are noted as permanent staff of the 2<sup>nd</sup> respondent.

When the 2<sup>nd</sup> respondents had income, they used it to pay their staff which included the claimants. The 1<sup>st</sup> respondents only did the pay slips and handed them over to the 2<sup>nd</sup> respondent until October 2010. Due to the interest the 1<sup>st</sup> respondent had in the investment of 2<sup>nd</sup> respondent, they needed representation and therefore paid for their staff salaries and when the Ministry did an audit of the Society Sacco [1<sup>st</sup> respondent] it was noted that the claimants were on deployment. It was noted that this was not a good practice to second staff to the 2<sup>nd</sup> respondent, yet the 2<sup>nd</sup> respondents was not paying for the service.

That in 2008 when the committee met, they noted that some staff were on secondment and others were off-loaded and thereof not the staff of the 1<sup>st</sup> respondent. To 'off-load' meant that they were staff of 2<sup>nd</sup> respondent and so not staff of the 1<sup>st</sup> respondent. There were 3 employees who resigned from the 2<sup>nd</sup> respondent and were employed by the 1<sup>st</sup> respondent. Mary Kamau, Christopher Kathuka and Josephine Kemboi, requested the 1<sup>st</sup> respondent to employ her and thus left the 2<sup>nd</sup> respondents and moved.

That this case would have been well resolved had the claimants written to the management of the 2<sup>nd</sup> respondent to formalise their employment. The 1<sup>st</sup> respondents wrote to them to regularise but responded by indicating that they had terminated the secondment and should take back their employees.

Before 2005, the directors of both respondents were the same but through a ministerial directive, they were told to create a separation. That he wrote tot eh respondents on the need to rationalise the staff but this was between the respondent and the claimants were never notified. There was no secondment agreement noting that the 1<sup>st</sup> respondent has a 25% stake in the 2<sup>nd</sup> respondent but this is a different dispute not linked to this claim.

**In assessing this case several questions are herein addressed;**

**What was the relationship as between the respondents?**

**Whether the claimants were the employees of the 1<sup>st</sup> or 2<sup>nd</sup> respondents**

**What is secondment/deployment/transfer and what are the rights of an employee so placed?**

**Whether the claimants were constructively terminated or declared redundant and if so was this unfair?**

Under the section 10 (1) and (5) of the Employment Act, where there is a written contract as between an employer and an employee;

*... [It] shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment*

—  
2. ...

3. ...

4. ...

**(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing. [Emphasis mine].**

These are mandatory provisions. Where there is a change on the status of an employee with regard to a written contract of work or a letter of appointment, the duty rests with the employer to ensure that they make a written communication to the affected employee with regard to the change or changes.

Section 10 read together with section 13, require an employer to make a written statement indicating all the changes effected with respect to any employee. This written communication should be done as soon as possible and the section stipulates it to be within one month. Looking at the case of the claimants, since 1995 when the alleged changes took place and they were placed on the alleged transfer or secondment, which applied, they were never informed about these changes. Even looking at the law applicable as of 1995, the repealed Employment Act, Cap 226, a good labour practice dictated that the employer then, the 1<sup>st</sup> respondent should have made changes to the letters of appointment issued to the claimants, as this was the document that dictated the terms as between the parties to the employment relationship that commenced in 1993.

Even after the coming into force of the Employment Act 2007, the 1<sup>st</sup> respondent had another chance to regularise the employment of the claimants, but they sat back and waited for things to unfold. This is not a fair labour practice in the meaning of Article 41 of the Constitution. This is equally an unfair treatment of the claimants herein as under section 45 of the Employment Act.

The 1<sup>st</sup> respondent in their submissions heavily relied on the English case of ***Dr. C. Fitton versus City of Edinburg Council, No. UKE ATS/0010/07/MT*** however, this case can be clearly distinguished from the case of the claimants in that, the Appellant in the cited case cleared did not intend to return to work with the employer who had seconded her with another employer, whereas the claimants herein considered themselves the employees of the 1<sup>st</sup> respondents at all material times, they continued to undertake duties as they did when they were employed in 1993 until 2010 when they were advised by the 2<sup>nd</sup> respondent that their secondment with them had been terminated with effect from 30<sup>th</sup> September 2010. Clearly, the claimants herein took themselves as the employees of the 1<sup>st</sup> respondent and thus the basis of this claim.

Further to the above distinction, whereas there is a law in the UK that govern the transfer, secondment and outsourcing of employees from one entity to the other, in Kenya, this law does not exist and when considering all facts and claim, the Constitution and the applicable labour laws are imperative. In this case, the core constitutional principle is that every employee should be fairly treated as under Article 41 of the Constitution and their rights ensured as under the Employment act.

The 2<sup>nd</sup> respondents insisted in evidence and in their submissions that the claimants were on secondment with them from the 1<sup>st</sup> respondent and thus terminated this by giving 3 months notice. On the other hand the 1<sup>st</sup> respondent through their evidence and submission asserted that the claimants were transferred to the 2<sup>nd</sup> respondent after the separation. To this the 1<sup>st</sup> respondent cited 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 secondes 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.*

In making these observations, the author above noted the judgments in ***Bank Simpanan Nasional Finance Bhd & Another versus Omar Hashim [2002] 1 ILR 272, Award No. 1013 of 2005***. Also considered in this analysis was the judgement in ***Complex Services Asia Pacific Region, Miri versus Grame Ashley Powern [1987] 2 ILR, 34***.

Therefore, the right to transfer an employee from one duty station to the other remains the prerogative of the employer. This becomes an implied right of the employer as the entity in need of the employee services and due to work demands. Such an employee can be moved, relocated, placed or transferred as required by the employer. A court cannot interfere with this implied right unless an employee shows that this is done with disregard to fair labour practices. This is not the case here. Even where there is a transfer, the employer who initiates such a transfer must inform the affected employee and continue undertaking the terms of the contract as between them and the employee until a termination of such a relationship or the new employer where the employee has been transferred, agrees to take up this employee as their own and they entered into a new contractual relationship.

Even in the case of deployment, the same involves the transfer of an employee from one department to another within the same organisation or a transfer between organisations, be it private, public or voluntary. Such deployment can be for a specific period or for a specific role. The organisation seconding the employee retains remuneration of the employee including the benefits due. Secondments are done for the purposes of employee development, for strategic reasons, for transitional measures or for reasons found useful and reasonable by the employer as to advance their interests and therefore, management has the responsibility to ensure that the employee is not placed at a disadvantage of losing their employment or such benefits as accrue by such deployment. The ultimate duty on an employer is to have an employee whose employment contract is still running to continue being engaged at work and where there is no more work, apply the law and end the contract after ensuring due process. To assume that the employer where the employee has been transferred, deployed or seconded has taken over this employee is a misapplication of the very principle of having a contractual relationship between an employer and an employee.

In this case, the claimants had a contract running as between them and the 1<sup>st</sup> respondent; it spelt out their terms of employment and had a termination clause. To treat this contract otherwise and indicate that the claimants had been transferred to a new employer and therefore have no claim against the 1<sup>st</sup> respondent is a misapplication of the law that protects contractual employment. If the 1<sup>st</sup> respondent had any claim against the 2<sup>nd</sup> respondent, that can be addressed in a separate claim. If the 1<sup>st</sup> respondent had transferred, deployed or seconded their employees to the 2<sup>nd</sup> respondent, and the 2<sup>nd</sup> respondent continued to enjoy this resource and made profits, the duty was upon the 1<sup>st</sup> respondent to seek compensation thereon or withdraw their employee and place them accordingly.

Once the separation of the 1<sup>st</sup> and 2<sup>nd</sup> respondent took place, the 2<sup>nd</sup> respondent became a third party

while the 1<sup>st</sup> respondent retained the claimant's contract. Where there was a separation of functions, this should have been pursued to the separation of all available resources, human capital inclusive. This was not done and the 1<sup>st</sup> respondent, the employer must take responsibility.

It amounts to an unfair labour practice where an employer, knowing the circumstances of their employee fails to address and offer guidance. The failure to communicate the separation of the respondents by the 1<sup>st</sup> respondent to their employees resulted in uncertainty to the claimants. It took many years to have this addressed, from 1995 to 2010 when without notice or any reasons, the claimants found themselves without work. The 1<sup>st</sup> respondent failed to address the concerns of their employees. Even after getting the letter dated 26<sup>th</sup> February 2010, the 1<sup>st</sup> respondent opted to ignore it under the mistaken belief that the claimants were not their employees and that the 2<sup>nd</sup> respondent should take responsibility. This is an unfair labour practice.

On the other hand, the 2<sup>nd</sup> respondent witness, being aware that they have enjoyed the claimants labour over a long period of time, being aware that they were enjoyed herein under third party proceedings, failed to address the matter amicably and threw their hands up to let the court arbitrate. This is not what a beneficiary or a service ought to do. There was need for Due process on secondment and termination of the secondment. These are employees, human beings to be precise, and not chattels to be tossed from one employer to the next. As dictated by Article 41 of the Constitution, fair labour practices entails each party to an employment relationship to treat the other with dignity, respect and in a reasonable manner. If this were not so, then there would be no labour harmony and employees would be just like any product in the market place to be use or discarded at will. This is not what the Constitution envisaged by ensuring that employees be treated fairly as a fundamental rights in the context of the Bill of Rights.

The witness Mr. Koech stated;

*The claimants were seconded to work at Utumishi [the 2<sup>nd</sup> respondent] when the building housing the two was purchased which meant that they were to work for Utumishi as a special responsibility. When the two entities separated, they reallocated their budgets to cater for staff on secondment. The apportionment was that some clerical duties were given to Utumishi together with the posting of the claimants to work at the building. ... I had the responsibility to manage the claimants but when they wrote to the Sacco Chair the 1st respondent] asking for clarification, this was wrong. It made us at Utumishi agitated. If they had not done this, this matter would not be in court. The issues could have been resolved amicably. We investigated the matter as police officers and confirmed the signatures to belong to the claimants. The issuance of the show cause letter was due to the disrespectful conduct of the claimants to the board which was also an act of insubordination. They knew they had a manager in charge of them and should have followed protocol. They were given a chance to apply for employment with the 2<sup>nd</sup> respondent but only 6 did.*

The 2<sup>nd</sup> respondent as the beneficiary of the claimants labour, having the history of the case, opted to take their action they did of terminating what they considered as a secondment and refused to address the case simply because they found the claimants disrespectful. I differ with assessment of the claimant's circumstances and the superior role taken by the 2<sup>nd</sup> respondent to issue show cause letter in a case that should have been well resolved and the 2<sup>nd</sup> respondent had the upper hand here to resolve the same but failed to do so. Have this matter been taken up positively by the 2<sup>nd</sup> respondent, the claimants would have been saved the expense of bringing this matter to court.

In this case, I find the 1<sup>st</sup> respondent was the employer of the claimants from 1993 to 2010 September when they were terminated. Upon this finding, on 1<sup>st</sup> October 2010 when the claimants were to receive instructions as to their duty stations, the 1<sup>st</sup> respondent failed to do so. They continued to report to work but were forced to stop as this reporting was not productive. They were not allocated any work. They were effectively thus terminated without notice and for no apparent reason. Where an employee is forced to be out of work for no act of their own yet they are ready and willing to continue offering their services,

this is constructive dismissal. There are four claimants who appeared in court to confirm the effect the constructive termination had on them and I find, Stephen Siakani, Eliud Mumataya, Mary Nyangasi, and Priscah Sang, were constructively terminated by the 1<sup>st</sup> respondent from their employment.

A case of redundancy occurs where there is no more work. An employer is therefore forced to close down operations or reduce their workforce due to reduced work, restructuring or changes in production or business. This did not stand out as a case of redundancy. The 1<sup>st</sup> respondent acknowledged that they placed or transferred the claimants to work at the 2<sup>nd</sup> respondent premises as they needed to protect their interests there and they were the promoters of the 2<sup>nd</sup> respondent. The claimants remained and undertook their work at their duty stations until they were terminated. I will therefore not award as regards a case of redundancy.

Was the termination fair or unfair? Under Section 43 of the Employment Act the employer is required to prove the reasons for termination failing which the termination is unfair Under Section 45 of the Act. The reason for termination in the present case is alleged to have been transfer of the claimants to the 2<sup>nd</sup> respondent after the two entities; the respondent had a separation in 1995. The court has found that the 1<sup>st</sup> respondent by the reason of transfer or other cited reasons of secondment of deployment did not terminate their employment and other obligations to the claimants. Thus, the termination was unfair under the cited provisions of the Employment Act, 2007.

### **Remedies**

There was no notice given to the claimants before termination. The finding that this was constructive dismissal also confirms lack of notification to the termination. The claimants have prayed for one month salary in lieu of notice. The claimants were entitled to the notice before termination in accordance with Section 35 (1) (c) and the court finds that Stephen Siakani, Eliud Mumataya, Mary Nyangasi, and Priscah Sang, are entitled to one month pay in lieu of notice.

The prayer for re-engagement, reinstatement or allocation of work similar to their positioned before the termination. These are claim which require specific performance by the respondent where the court should make in exceptional cases which clearly demonstrate that this is the only remedy that can justifiably address the situation. Where there are no such exceptional circumstances as to order specific performance the court can order compensation. In this case I will award compensation.

The claim for annual salary increment at the rate of 15% percent though stated in the claim, all the claimants who gave evidence failed to address this aspect. Despite the 1<sup>st</sup> respondent submitting their detailed accounts, the claimants did not establish that there was an increment that they were to be beneficiaries and that other employees within the period were beneficiary. The duty rests on the claimants to outline this claim. This claim is declined.

Leave days are due to all claimants where this was not taken before termination. Only Mary Ratemo stated that she was owed 6 days of leave for 2009 and the claim for the leave days due in 2010. This will be granted to her for the 6 days and for the 10 months worked in 2010 she had for the 21 days as due under section 28 of the Employment Act, 15 ½ leave days. This will be computed at Kshs. 24,225.00.

Service pay is due as under section 35 of the Employment Act. From the pay slips of the claimants, I note there were deductions to NSSF and NHIF and the pension scheme. They are therefore not eligible for service pay in this case.

The claim for house allowance though claimed was not supported by any evidence. From the pay slips of the claimants I note an amount of Kshs.8.500.00 was paid. This then negates the claim for the same and will not be awarded.

The commuter allowance is a benefit due to an employee but this has to be part of the terms of employment outlined in the contract or from the employer policy or other document that outline the

benefits due to an employee. There was no evidence to this effect. I will decline this prayer.

The medical allowance claim though set out in the claim was not supported by any evidence. I take it by the employer paying the statutory dues to NHIF had factored matters relating to medical care and attention. There was also a medical allowance given to the claimants. This will therefore not be granted.

The court having established that there was constructive termination and the evidence that the claimants reported to work in October 2010 and noting that the respondents did not challenge this evidence in any material way, I will award the salary due for October 2010 to all the claimants.

For the unfair termination, all the claimants had served the respondent from 1993 to 2010, a period of over 15 years. They are all advanced in age and have not been able to secure new employment since their termination. Their termination was unfair and it is only fair and just in the circumstances of this case to award them the maximum available compensation in law at 12 months. I will therefore award this much.

**In conclusion therefore, the claim by John Waruta, Chrisantus Makokha, Christine Naliaka, Anne Muthini, Elly Ominde, and Christopher Okola is hereby dismissed and judgement hereby entered for the Stephen Siakani, Eliud Mumataya, Mary Nyangasi Ratemo and Priscah Sang the claimants in the following terms;**

1. **A declaration that the claimants were constructively terminated by the 1<sup>st</sup> respondent which termination was unfair.**
2. **Stephen Siakani,**
  - a. **Compensation for unfair termination at Kshs.302,700.00;**
  - b. **Notice pay at Kshs. 25,225.00;**
  - c. **Pay due for October 2010 at kshs.25,225.00**

**Total amounting to Kshs. 353,150.00.**

3. **Eliud Mumataya,**
  - a. **Compensation for unfair termination at Kshs. 323,820.00;**
  - b. **Salary for October 2010 at Kshs.26,985.00;**
  - c. **Notice pay at Kshs.26,985.00**

**Total Kshs.377, 790.00**

4. **Mary Nyangasi,**
  - a. **Compensation for unfair termination at Kshs.290,700;**
  - b. **Salary for October 2010 at Kshs.24,225.00;**
  - c. **Leave days unpaid and pro rata leave all at Kshs.24,225.00;**
  - d. **Notice pay at Kshs.24, 225.**

**Total kshs.363, 375.00**

5. **Priscah Sang**
  - a. **Compensation for unfair termination at Kshs.290,700.00;**
  - b. **Salary for October 2010 at Kshs. 24,225.00;**
  - c. **Notice pay at Kshs.24,225.00.**

**Total Kshs. 654,075.00**

6. **The 1<sup>st</sup> respondent to issue all the claimants herein with their Certificates of Service within 14 days from today.**
7. **Costs of the suit for the claimants, Stephen Siakani, Eliud Mumataya, Mary Nyangasi Ratemo and Priscah Sang will be met by the 2<sup>nd</sup> respondent herein.**

Delivered in open court this 18<sup>th</sup> day of September 2013.

**M. Mbaru**

**Judge**

In the presence of:

Jacob Kipkirui, Court Clerk

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