



**REPUBLIC OF KENYA**

**INDUSTRIAL COURT OF KENYA**

**CAUSE NO. 1174 OF 2013**

TOM OTIENO ODONGO.....CLAIMANT/APPLICANT

VERSUS

CABINET SECRETARY MINISTRY OF LABOUR

SOCIAL SECURITY & SERVICES..... 1<sup>ST</sup> RESPONDENT

NATIONAL SOCIAL SECURITY SERVICES

BOARD OF TRUSTEES..... 2<sup>ND</sup> RESPONDENT

**RULING**

1. The Application before the Court is the Notice of Motion Application dated 25<sup>th</sup> July 2013. The appearances were: Mr. Oriaro for the Claimant/Applicant, Mr. Macharia for the 1<sup>st</sup> Respondent and Mr. Ahmednassir for the 2<sup>nd</sup> Respondent.
2. Mr. Oriaro urged the Notice of Motion dated 25<sup>th</sup> July 2013 and sought prayer 3. The Application is supported by the affidavit of Tom Odongo and also relied on the Application of 23<sup>rd</sup> September 2013. That Application seeks to give the Courts facts of the steps taken to fill the position the Claimant previously occupied.
3. His submissions were as follows:- that the Court has power to grant the orders sought and stated we all are aware of the common law which relates to personal contract. The Court has to consider the philosophical basis of the Employment laws. The theories on Employment law have changed to human dignity and autonomy. The philosophical basis of the Employment Act is to imply terms on every contract of employment. See Section 41, 43 and 45 of the Employment Act – there are implied terms in any contract of employment. The contract is subject to natural justice and fair procedures per Employment Act. There was no hearing. The Claimant was not asked to respond. There are no reasons why the Managing Trustee was to be dismissed. The only reasons are in affidavit of the Cabinet Secretary, who does not supervise the contract. The issue at hand is how do we tame public officers in the management of public affairs? Who will gauge if you are acting in the public interest? There is an affidavit filed by the Claimant. The affidavit was filed on 12<sup>th</sup> August 2013 pursuant to leave. Refer to paragraph 3. He says he was not cautioned. No evidence has been given of any caution given by Cabinet Secretary. Paragraph 4 of the Affidavit speaks of listing at the Stock Exchange and refers to minutes of the Board discussing diversification. Paragraph 5 speaks of transformation agenda. The issue of listing was discussed by the Board and the Board agreed to Mavoko developments at its 153<sup>rd</sup> meeting. The words the Minister complains

- of are words of George Ngugi not the Managing Trustee. As CEO he has the right to speak on behalf of the institution. The contract did not have a provision that he has to seek concurrence of Cabinet Secretary. On collections by KRA, it is the Claimant who initiated it but before he could sign he was terminated. He was not blocking something of which he was the initiator. Numerous complaints are said to have been made. None of those complaints were annexed. The paragraph 10 is the gist of the matter. The turnover of Managing Trustees has been alarming in the last 5 years. It is a trend to be arrested in this era of competitive recruitment of Managing Trustees. Is it crucial to change heads of parastatals because of change of Government? Is that in public interest? There should be no political interference in public appointments. The law is very clear that the supervisory role is vested in the Board of Trustees per Section 33(2). The Managing Trustee is responsible to the Board. He is not answerable to Cabinet Secretary. Draw analogy to State Corporates Act where President appoints and dismisses. Section 7 of State Corporations Act states President may remove member of State Corporations Act upon consultation with the State Corporations Committee. See Section 7(3) State Corporations Act. The NSSF is a State Corporation. The NSSF Act is silent on *suo motu* removal by Cabinet Secretary, the practice of consultation should be supplemented through interpretation. If the Act is silent then the principles of another Act can be applied. He referred to the First Schedule of NSSF Act paragraph 5. The term is 3 years under statute. Mr. Oriaro relied on the cases of
- a. **Thompson v. Park[1994] KB 408** - The *status quo* to be applied is the one subsisting before the termination. The *status quo* to be maintained is the one before the act. Page 40 of the decision. The principle is that we cannot uphold the legal act. In the case there was trespass. The argument here is that it could be unlawful but it does not matter because he has remedy in damages.
  - b. **Alphonse Maghaga Mwachaya v. Operation 680**. At paragraph 18 and 25 of Justice Radido's decision. At paragraph 38 the Court held that cannot grant re-engagement or re-employment. The judge dismissed the old notion in Ogunda. See paragraph 48. Urge the Court to uphold as Employment Act states it applies to all judgments.
4. Section 3(1) of Employment Act – it does not matter if it is the Minister. Section 3(3) binds the Government and the Minister. Section 3(6) issue of notice cannot vary what the law has said constitutes minimum terms. Natural justice per section 41 is a clear provision- it is not that one dismisses and comes to Court to explain. Explanation should be in language the employee understands. It is admitted they did not inform him of the reasons. Are damages an adequate remedy? He submitted they were not. The maximum the Court can grant is 12 months, the Claimant had only served about 9 months or so. Damages here are not an adequate remedy. One of the remedies is the duration the contract would have served. Damages are not adequate remedy where Court finds there was breach. Refer to case of **Republic v. Judges & Magistrates Vetting Board – [2013] eKLR** at paragraph 24. The Court granted a stay to ensure matter is not made into an academic exercise. The position of Managing Trustee has statutory underpinning. The service does not depend on the graces of the Cabinet Secretary.
  5. The case of **Dr. Ann Kinyua v. Nyayo Tea Zone [2012]eKLR** was also cited. No notice was given, that was demonstrated. Injunctions can be granted. Sufficient circumstances exist for grant of the orders. There is no proof of the complaints. Decision of individuals cannot be elevated to a position of not being questioned by Court. No employee shall be dismissed without due process. These provisions mean something to a court of law. In conclusion he referred to the last paragraph of the book by **Simon Deakin & Gillan Morris**.
  6. The position of Managing Trustee, it was submitted, is an employment in which the employee's interest is better conceived as a right to dignity. The job of Management Trustee is one where the job allows one to rub shoulders with the high and mighty and earn so much. Why should taxpayers shoulder the payment of damages? It would not be an economic use of scarce resources. The record of Claimant has not been challenged and he is ready to serve. The second application seeks that while the Ruling is pending, the position should not be filled. There should be no effort to fill the position. He prayed that for limited period pending Ruling the position should not be

filled.

7. Mr. Macharia responded to both applications. In sequence, he relied on Affidavit of 30<sup>th</sup> July 2013 and filed on 31<sup>st</sup> July 2013, Grounds of Opposition filed on 27<sup>th</sup> September 2013 and an affidavit of Caroline Nyaga of 27<sup>th</sup> September 2013 and also on the bundle and list of authorities filed on 31<sup>st</sup> July 2013, the second list filed on 22<sup>nd</sup> September 2013 and the additional authorities which are unbound. They are germane to issues before Court. He submitted that Mr. Oriaro has spent quite some time on submissions that the 1<sup>st</sup> Respondent cannot purport to know whether Claimant was performing and thus cannot purport to engage in the so called “political interference”. The term has been repeated in submissions and pleadings and the Court has been told on account of this political interference public service appointments are the worst to have. The accusations have no basis and can be termed as sensational accusations calculated to inflame passions and perhaps cloud the determination of this matter. The Court was referred to common law and theories of employment and the existence of a theory that has now changed. Mr. Macharia proposed to begin where we must all begin – the law itself. Section 3 of the NSSF is the section of law that creates the 2<sup>nd</sup> Respondent status – 3(1) – There shall be a fund known as NSSF under the control of Minister. The sovereign will of the people of Kenya saw it fit that the control is vested in Minister. What Minister is doing is a statutory duty under section 3(1). It is wrong for Claimant to say the Minister does not know. He fundamentally has misunderstood the body he serves. He has admitted he does not know he is under the Minister. See Schedule of NSSF Act. The entire Board is appointed by Minister, they serve at pleasure of Minister, in order to resign the letter is addressed to Minister and the Minister approves the meetings of the Respondent. The Minister cannot be intermeddling. Quite apart from Minister’s role in supervision is section 33. We spent quite some time on this in preliminary objection. The Cabinet Secretary is the appointing authority. One cannot approbate and reprobate. The Claimant cannot blow hot and cold saying ‘you cannot interfere with any work’ yet it’s the Minister who gave him the work.
8. The submissions on silence of the Act on termination are misplaced. The answer to the question lies at Section 51(1) of Cap 2. Unless there is a contrary intention stated in statute the appointing authority is to dismiss. Section 33 is quite clear. The Court found that clause 20 without any doubt makes provision for termination. Refer paragraph 18 of the Court Ruling of 12<sup>th</sup> August. The Court made a finding and the question cannot be open. Court found there was a termination clause and Minister could dismiss the Managing Trustee. Paragraph 16 of the Ruling states section 33 is the provision of law that captured the essence of the contract. The Claimant accepted the terms of offer and conditions stipulated in the contract. The Claimant signed a contract accepting what contained an exit clause, he was not under disability, he did not sign by mistake, under coercion etc. He only complains that he was not told what he did wrong. In submissions the contract gave provision for service of notice of 3 months. The clause was that either of the parties could serve notice. There was no difficulty in stating if it was necessary for reasons that those would be given by the party terminating. An estoppel was raised on any party trying to renege on that part of the contract. S.120 of Evidence Act creates a statutory estoppel barring the attempt to renege on a position they have led another party to rely on. The Claimant himself replaced another trustee whose contract was terminated in a similar manner. The Claimant happily accepted the position of Managing Trustee. He cannot now come to complain. It is fair when someone else is terminated. It is unfair when he is terminated. There must be some consistency. It is not entirely honest for him to cry wolf. He was quite happy to take over when someone else’s contract was terminated. The Employment Act contemplates parties shall have procedures for termination of contracts – there can be payment in lieu of notice. Section 36 of the Act states that either of the parties to contract may terminate contract without notice by payment of an amount equivalent to the notice. Payment and payment in lieu thereof are provided for. The Respondent’s position is that the termination was lawful. It was (1) not done flippantly (2) thought was given to provisions of contract (3) the termination was done with full consideration of the Claimant’s feelings. The Claimant was paid his 3 months’ notice. In Affidavit of Caroline Nyaga, the Respondent has exhibited cheque and electronic transfer. The money was paid and received. The Claimant has suppressed that fact. He omitted that fact when he came to Court. He should have been candid and

stated he had been paid his notice before he could come and ask to be reinstated. The Court has not been told why damages would not be an adequate remedy. What Court was told is that there is an element of human dignity in this case because the Claimant wants to continue rubbing shoulders with the high and mighty. His job is not to rub shoulders with the high and mighty. We are all equal before the law and before God. It would be a sad day if we reinstate people to jobs to soothe their egos or to give them an opportunity to rub shoulders with the high and mighty. Every job has an element of human dignity. Every human has human dignity whether employed or not. The question as to whether damages are adequate or not is a principle that comes from the Court of Appeal where the Appellate Court found damages to be an adequate remedy.

9. There is a decision of Justice Ojwang in **John Gaikuni Rucus v. Musion Aviation Ltd.** Justice Ojwang (as he then was) where he found similarly as he had found in case of **Rev. Omagwa** that reinstatement ought to be the last consideration even where it is found there was irregular termination of contract. Refer to case of **Kenneth Kasemo v Kenya Bureau of Standards** regarding the position of appropriate remedy. The Kenya Bureau of Standards is a state corporation. The KNTC in the **Dalmas Ogoye** case is a state corporation. Case of **Kenneth Kasemo** is similar. It has been urged there has been a philosophical change. The change in 2007 came with some changes but provision on reinstatement is not new. It existed under Trade Disputes Act to the now Employment Act. Even then Court of Appeal said that Courts cannot force anyone to work together. Section 49 of Employment Act provides guidance under Section 49(4)(c) and 49(4)(d). The Court can consider re-engagement or reinstatement and Court has to consider that it is not deemed proper to grant specific performance in contracts.
10. In the case of **Karisa v. KBS** the Court held that even if the contract was wrongly terminated the remedy is the damages measured by notice period and termination emoluments agreed upon in the contract. Mr. Macharia also relied on the case of **Renold Kimatu Ngati v. Ukulima [2011]eKLR**. The suit was filed in 2007 when Employment Act in force. The court held damages to be adequate. This is in conformity in the case before court and S.33 of the Act.
11. On issue of grant of interim relief before Court is the case of **Giant Holdings Ltd. V. Kenya Airports Authority [2010]eKLR & CMC Holdings v. Jaguar Land Rover Civil Nai 66 of 2013**. It is common ground that a termination notice was issued, the Contract of service had a termination clause, and an Acting Managing Trustee has been appointed.
12. There is also case of **AG v. LSK & COTU**. The case relates to Work Injury Benefits Act. The AG moved to the Court of Appeal seeking stay. The Court of Appeal said one cannot stay what has already happened. The Court is being asked to: Revoke appointment of current Acting Managing Trustee and reinstate Claimant to his position. The Order sought is an order quashing the termination and an order that termination was unlawful. There is a plethora of authority – the request is for mandatory injunction. In face of authority from Court of Appeal it is unclear that the Claimant will succeed. When Claimant came to Court he sought reinstatement *ex-parte*. That order was not granted. On 1<sup>st</sup> August 2013, Mr. Ochieng Oduol renewed the application for interim measure of relief. The Court declined to reinstate the Claimant but stated the 2<sup>nd</sup> Respondent should not advertise the position pending the Ruling. On the 12<sup>th</sup> August when the Ruling was delivered, immediately Mr. Oriaro renewed application again to stop advertisement. The Order was not renewed and there is no order to stop the advertisement. A process of recruitment of Managing Trustee has commenced. Application as drawn has been overtaken by events. It is a matter caught up by issue estoppel. There is no *prima facie* case set out which can allow what the Claimant seeks. He submitted that requests by one individual should not supercede those of many others. The appointment of the Claimant would bring utter chaos. Board of Trustees has endorsed the changes and he thus urged that the Application be dismissed and the Respondent be allowed to continue discharging duties.
13. Mr. Ahmednasir stated that he would be very brief due to Mr. Macharia's submissions as there will be no pleasure to repeat those submissions. He stated that the decision made is not capable of being stayed. The Claimant should have sought quashing not stay. The Claimant has come to

Court after the contract was brought to a grinding halt. The other issue is the Ruling of the Court made on 12<sup>th</sup> August 2013. The Court answered this question at paragraph 25. The Court held there has to be a hearing to determine the merits or demerits of the dismissal as the ground for interplay was limited. The Claimant had not received the pay as per contract and that was the only issue outstanding as per contract. Looking at Affidavit of Caroline Nyaga and Annexure 3 and 4 are the cheque for 2,940,000/= to the Claimant being the 3 months' notice. The Claimant accepted the cheque drawn on 31<sup>st</sup> July 2013 and having accepted and received the last payment due to him to ask for stay is akin to asking for a new contract. A contract can only be negotiated between 2 parties who are in agreement. He submitted that in a very thoughtful and thorough Ruling the Court analysed what is due for determination.

14. Lastly section 33 of NSSF Act is clear - the terms and conditions of appointment as per instrument. The Instrument gives Minister power to terminate the contract. See clause 20 of the contract. That has occurred, cheque has been paid, Minister exercised his power – contract has statutory underpinning. The Application should be dismissed. It is the third or fourth time and Court has declined. I am most obliged.
15. Mr. Oriaro in his brief reprise responded on issues of law. He referred to the case **Ronald Kimatu Ngati v. Ukulima** a Court of Appeal decision in 2011. The Court in that case held the measure of damages is the notice period. The facts are that the commencement was in 2007 before Act of 2007 was commenced in June 2008. He referred to the decision of Radido J. which gave commencement date. The other case, being **Karisa Karemo v. KBS** is also before 2008. The case of **Giant Holdings v. KAA** is on contract - not employment. The case of **John Gaikumu Ruchiis** is a suit from 2003 and cannot be a guide to Court on Employment Act 2007. There is no decision of the Court of Appeal on the issue. He submitted that the Court should apply the law as Justice Radido did. Section 33 of NSSF Act S.3 of Employment Act is very clear. The Court would imply if notice is given then termination is fair. S.3 states the minimum thus cannot be varied by contract. There is allegation of estoppel. Estoppel cannot stop the law. The contract cannot go contrary to the law. It has not support in section 3(6). Section 36 of the Employment Act cannot be read in isolation. There is only room for termination by payment. It does not remove the provisions of section 41. He submitted that the whole Act must be looked into. He stated in response to the number of requests for the order that the reinstatement cannot be made *ex parte*. The record makes it clear. There was no request and it was only in August the Court held that there be no advertisement. After Ruling he again had made request for interim orders and asked what would happen and Court stated if advertisement was made he could approach the Court. It is the Court's discretion to deliver a Ruling but what is the perception if the Court allows the position to be filled?
16. The Court reserved the Ruling and proceeds to render the decision. The counsel who appeared made submissions and relied on a raft of cases which have all been considered but for purposes of this decision I will only refer to those whose findings come into sharp focus in the case before me.
17. The case of **Thompson v. Park (1944) KB 408** was cited in aid of the submissions of the Claimant. In that case, Mr. Thompson wanted an injunction in his favour to ensure that Mr. Park leaves the school. This was after Mr. Park had forced his way back into the premises which both he and Mr. Thompson had amalgamated as a joint venture at Broughton Hall, [Staffordshire](#). The relationship had broken down and Mr. Thompson had revoked the licence. The case was on which turned on the issue of licence and revocation setting the person in breach in position of a trespasser. Goddard LJ held granted the injunction on account of the behaviour demonstrated by Mr. Park.

He stated and I quote:

*“... the court cannot specifically enforce an agreement for two people to live peaceably under the same roof - yet, of course, if the contract is broken, [B] has got a common law remedy in damages, which, if he is right, might be heavy. [B], however did not seek the*

*intervention of the court, but took the law into his own hands and remedied the grievances under which he felt he was suffering in a manner which seems to me to have been wholly deplorable, all the more so when one considers that he is in charge of small boys at a preparatory school and ought to be inculcating into them a respect for authority and discipline. It appears to me that on his own showing he has been guilty at least of riot, affray, wilful damage, forcible entry and, perhaps, conspiracy...”*

18. The judge reiterated that once the licensee’s licence is withdrawn, he has no right to re-enter on the land. If he does so, he is a trespasser. On that basis the judge granted an injunction to restrain the conduct exhibited above. That is what the authority held. It is not lost on this Court that the authority is not on all fours as this claim. The cases cited by Mr. Macharia are on application of statutory provisions and one related to a commercial contract. While the cases of **Ronald Kimatu Ngati v. Ukulima, Karisa Karemo v. KBS** and **John Gaikumu Ruchiis** were cases relating to the old regime they are a guide on the issue. The commencement of the Employment Act 2007 is as stated by my brother Justice Radido. There is no doubt that the Employment Act 2007 commenced in June 2008.
19. The traditional position at common law was that a contract of employment could be terminated on reasonable notice without giving any reason. In those circumstances, it was obvious that the only remedy for a breach of contract by way of dismissal was for the payment of the amount that would have been earned had appropriate notice been given. However, the legal regime now obtaining after the passage of the Employment Act 2008 is that an employee cannot be dismissed save for good reason. The law has developed in relation to affording employees a certain compliance with the rules of natural justice. Section 41 of the Employment Act makes provisions on the process prior to dismissal. While the Court is yet to determine the cause before me, the Court is invited to hold the dismissal was unfair and halt the recruitment of a replacement.
20. It is not part of the Court’s function at this stage of the litigation to try resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor is it my duty at present to decide difficult questions requiring *viva voce* evidence. These are matters to be dealt with at trial. It cannot be established at this stage whether the allegations made by the Cabinet Secretary are factual or not. It cannot also equally be established whether the statements made by the Claimant regarding his interaction with the Board and the Cabinet Secretary are factual or not. Those are issues for trial.
21. As pertains to filling of the position, there is an Acting Managing Trustee. The position has been filled even if in an interim capacity. The Acting Managing Trustee can be removed. Even if the Board of Trustees proceeds and concludes the exercise of recruitment this Court has the power to order a re-instatement or re-engagement. That would not handicap the Court if it finds that the Claimant is deserving of his job after the hearing to ensue.
22. The authorities cited all indicate that the measure of damages is the notice payable. The Act also provides for compensation up to a maximum of 12 months. The Act also provides that the Court may grant any other relief it may deem fit and just to grant. Applying the *ejusdem generis* rule, the Courts hands are not tied. There are statutory remedies available to a party should the Court find the dismissal was unfair.
23. It would not be in the public interest to halt recruitment since the NSSF requires to be run competently even as the case proceeds before me. It would be contrary to good order to hold a position vacant while litigation proceeds. I am not convinced there are sufficient grounds to halt the exercise. I thus decline to grant the Orders sought in the Notice of Motion Application. It is dismissed with costs.

It is so ordered.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of November 2013**

**Nzioki wa Makau**

**JUDGE**