IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MBAROUK, J.A. MWARIJA, J.A. And NDIKA, J.A.)

CIVIL APPEAL NO. 78 OF 2008

1. LUGANO S. KALOMBA
2. JOHN S. KIJANGA
3. JOSEPH V. SAFARI
4. CHRISTOPHER MTINDA
5. MWAYAONA J. SALEHE
6. ASHA WAZIRI
7. JOHN A. MUSHI
8. HAMIS S. LISU
9. KIANGI SEMPOMBE
10. ELINISARIA MSANGI
11. SALOME K. MADEGA
12. JOACHIM D. J. SISYA
13. SALVATORY K. ALUTE
14. MAJALIWA M. KISALA
15. CARTAS A. KAPELE
16. HERZON WAGAYA
17. MARY ALUTE MPANJU
18. GODFREY F. KALUMUNA
19. NGASSANI W. MAGESSA
20. ELTON S. N. MAPESA
21. MWARABU S. MPONDA
22. THEODORY RWEYEMAMU

..... APPELLANTS

VERSUS

1. THE PERMANENT SECRETARY, MINISTRY OF EDUCATION AND VOCATIONAL TRAINING
2. THE ATTORNEY GENERAL

..... RESPONDENTS

(Appeal from the Ruling of the High Court of Tanzania at Dar es Salaam)

(Mihayo, J.)

Dated the 28th day of May, 2007
In
Miscellaneous Civil Cause No. 50 of 2006

JUDGMENT OF THE COURT

24th October, 2017 & 3rd April, 2018

MWARIJA, J.A.:

The appellants were, prior to 1/6/2006, the employees of the National Examinations Council of Tanzania (hereinafter "the NECTA").

On 1/6/2006, acting on the letter dated 18/4/2006 written to him by the Acting (Ag.) Chairperson of the NECTA, expressing her dissatisfaction with the appellants' work performance and upon the powers delegated to him by the Permanent Secretary (Establishment), the 1st respondent transferred the appellants from the NECTA to various schools and teachers' training colleges under the Ministry of Education and Vocational Training. (the Ministry). According to the letter of the Permanent Secretary (Establishment) [the PS (Establishment)], he delegated the powers vested in him by section 8 (3) (f) of the Public Service Act [Cap. 298 R.E. 2002] to the 1st respondent.

The appellants were aggrieved by the 1st respondent's act of transferring them from the NECTA and thus challenged that act by way of judicial review. They filed in the High Court, an application for *certiorari;* Miscellaneous Civil Cause No. 50 of 2006 claiming for the following reliefs against the respondents:-

> *"(i) An order of certiorari to remove into [the High Court] and quash decision of the 1st Respondent dated 1st June 2006 removing the Applicants from their employment with the National Examinations Council of Tanzania and transferring the applicants to various schools and teachers' colleges under the employment of the Ministry of Education and Vocational Training.*

(ii) Costs to be provided for.

(iii) Any other orders or reliefs as [the] Honourable court may deem just and fit."

The application was predicated on S. 2(2) of the Judicature and Application of Laws Act [Cap. 358 R.E. 2002], S. 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap. 310 R.E. 2002] and S. 95 of the Civil Procedure Code [Cap. 33 R.E. 2002]. It was based on the following grounds: -

*(i) The 1st Respondent, not being the employer of the Applicants acted **ultra vires** his powers in removing the Applicants from their employment with the National Examinations Council of Tanzania and by transferring the Applicants to Schools and teachers' colleges under the direct employment of the Ministry of Education and Vocational Training.*

(ii) The 1st Respondent's decision is bad for want of reason.

(iii) There is failure of natural justice since the 1st Respondent has unilaterally decided to interfere with the contracts between the Applicant and the National Examinations Council of Tanzania without hearing the Applicants and the National Examinations Council of Tanzania.

(iv) That the 1st Respondent's decision is unreasonable in the Wednesbury sense."

Hearing of the application was conducted before the High Court by way of written submissions. Submitting in support of the ground that the 1st respondent acted *ultra vires* his powers in transferring the appellants, the learned counsel for the appellants argued that since by virtue of the provisions of sections 3(2) and 5(2) (d) of the National Examinations Council of Tanzania Act, [Cap. 107 R.E. 2002] (hereinafter "the NECTA Act"), the NECTA is a body corporate having the powers of appointing its employees it is, by virtue of S.48 (1) of the Interpretation of Laws Act [Cap. 1 R.E. 2002], the only authority which has the power to remove or suspend the appointed employees, not the 1st respondent. It was therefore argued that the act of the 1st respondent of transferring the appellants was *ultra vires* because he did not have the power to do so. It was argued further that S.8 (3) (f) of the Public Service Act does not vest power in the PS (Establishment) to transfer an employee from one employer to the other. Citing *inter alia* the cases of **Municipal Board of Mombasa v. Kala** [1955] 22 EACA 319 and **Gulam Hussein v Punja Lila** [1959] EA 735, the learned counsel reiterated the position that an unauthorized assumption of power renders a decision a nullity.

With regard to the ground that the 1st respondent's decision is a nullity, he argued that since the appellants' transfers were a result of the allegations raised by the Ag. Chairperson of the NECTA in her letter dated 18/4/2006, they ought to have been afforded the right of hearing before being transferred. Relying on the cases of **De Souza v. Tanga Town Council** [1961] EA 377 and **Donald Kilala v. Mwanza District Council** [1973] TLR 19, the learned counsel submitted that the 1st respondent's decision was a nullity because the appellants were denied the right to be heard.

The learned counsel argued also that the 1st respondent's decision was based on bias. According to the learned counsel, since the allegations concerning the appellants' unsatisfactory work performance were directed to the 1st respondent, his decision to transfer them without affording them the right of hearing was a clear manifestation that he was prejudiced and that therefore, such decision was based on bias. He cited the case of **Ndegwa v. Nairobi Liquor Licensing Court** [1957] EA 709 to bolster his argument that under the circumstances, the decision was a nullity.

On the ground that the 1st respondent's decision was unreasonable, the learned counsel based the contention on the 1st respondent's failure to consider the following factors:-

1. The fate of the appellants' future pension schemes with the Parastatal Pensions Fund (PPF); whether it would be continued under the Public Service Pensions Fund (PSPF) after the appellants had been transferred to Government employment.
2. The effect of removing the appellants from the NECTA and transfer them to the Ministry without letters of appointment.
3. That the appellants were removed from the NECTA without letters of suspension, dismissal or termination.
4. The uncertainty as to who will pay them their appropriate salaries.
5. The uncertainty as to whether their new positions amounted to demotions or promotions.
6. The uncertainty as to whether the appellants wished to join the Government Service or that they were no longer interested in working with the NECTA.

The respondents opposed the arguments made in support of the application. On the submission that the 1st respondent's decision was *ultra vires*, the learned State Attorney for the respondents argued that the 1st respondent acted on the powers delegated to him by the appropriate authority, the PS (Establishment) who is vested with such powers by S. 8 (3) (f) of the Public Service Act as complemented by Government Circular No. 3 of 31/3/2006 and Regulation 107 of the

Public Service Regulations, 2003 (the Regulations). Relying on the case of **Agro Industries Ltd. v. Attorney General** [1994] TLR 43, the learned State Attorney submitted that the transfers were in effect, done by the PS (Establishment). He submitted further that, being a public corporation, the NECTA is covered by the provisions of S. 8 (3) (f) of the Public Service Act which provides for facilitating labour mobility.

On the ground that in transferring the appellants, the 1st respondent failed to observe the principles of natural justice, the learned Principal State Attorney argued in response that the contention is misconceived because, the appellants were neither dismissed nor terminated. He submitted that the appellants were merely transferred and continued to receive their employment benefits.

With regard to the ground that the decision was unreasonable, it was the learned State Attorney's submission that the allegation was not substantiated. He cited a persuasive decision of the Supreme Court of India in the case of **Lakshmi Narayana v Chief Engineer H.Q Southern Command Pune** [1991] ATC 233 (Bangalore Bench). In that case, the court enunciated the factors which must be considered in determining whether or not a decision is unreasonable. They include a consideration whether any irrelevant material has influenced the

decision or whether in making the decision, some relevant material has been ignored.

According to the learned Principal State Attorney, applying such tests, there is nothing in the 1st respondent's decision which renders it unreasonable. He stressed that, since the appellants were transferred from one employer to the other within the Government Service, the transfers did not affect their terminal benefits and if it did, the problem is one which could effectively be taken care of by the employers to whom the appellants had been transferred.

In its decision, the High Court (Mihayo, J. as he then was), after having considered the provisions of the NECTA Act, particularly S. 3 (2) of that Act which makes the NECTA a semi-autonomous entity and S. 20 which empowers the Minister for Education and Vocational Training to give direction of a general or specific character to NECTA, he was of the view that the NECTA is a public body under the Ministry. He found also that from the definition of the words "public servant" and "public service office" under S. 3 of the Public Service Act, the employees of the NECTA are public servants and for that reason, the appellants fell under S. 8 of the Public Service Act. He then concluded as follows:-

> *"The transfers of the applicants were effected by the Permanent Secretary, Ministry of Education and Vocational*

Training, upon being delegated those powers by the appropriate authority under the Public Service Act. I am certain in my mind that the Permanent Secretary who effected these transfers did not act ultra vires because he had the authority to do so."

He observed further that even if the transfers would have been effected by a person who did not have authority, the decision would not have been amenable to judicial review. He reasoned that, under the circumstances, the transfers would neither be effective nor enforceable. The learned judge was also of the view that, since the transfers did not have the effect of terminating the appellants' employments or affect continuity of their employments, if there were any matters relating to payment of their salaries and the fate of their pensions, the same would have been dealt with by the appellants' relevant employment bodies. The application was, as a result, dismissed.

The appellants were dissatisfied with the decision of the High Court hence this appeal. In their memorandum of appeal, they have raised four grounds; namely:-

"1. The High Court erred in law and in fact in dismissing the application and not holding that the 1st respondent acted ultra vires in removing the Appellants from the

employment with the National Examinations Council of Tanzania.

2. *The High Court erred in law and in fact in holding that the Appellants were public servants.*

3. *That the High Court erred in law and in fact by not holding that the decision to remove the appellants from their respective positions with the National Examinations Council of Tanzania was vitiated by failure of natural justice.*

4. *The decision of the High Court is otherwise faulty and wrong in law."*

At the hearing of the appeal, the appellants were represented by Mr. Melchisedeck Lutema, learned counsel while the respondents were represented by Mr. Killey Mwitasi, learned Senior State Attorney assisted by Ms. Hosana Mgeni, learned State Attorney.

In the course of his reply submission, the learned Senior State Attorney raised a point of law to the effect that the High Court did not have jurisdiction to entertain the application. The gravamen of his argument is that the discord between the parties was a trade dispute. Citing *inter alia*, the case of **Tambueni Abdallah and 89 Others v. National Social Security Fund**, Civil Appeal No. 33 of 2000

(unreported), Mr. Mwitasi submitted that the application ought to have been dismissed for want of jurisdiction by the High Court.

Responding to that point, Mr. Lutema argued that the cause of action did not concern a trade dispute because, the NECTA and the appellants were not involved in any labour dispute. He submitted therefore that, the contention by the learned Senior State Attorney is devoid of merit.

Admittedly, jurisdiction is a legal issue which can be raised and considered at any stage of proceedings. It was for this reason that we entertained that point as raised by the learned Senior State Attorney. Having heard the counsel for the parties however, we think with respect, that we need not be detained much in determining the issue whether or not the High Court had the requisite jurisdiction.

It is not in dispute that the appellants did not have any labour dispute with their employer, the NECTA. They instituted the application against the respondents challenging the 1st respondent's act of transferring them from the NECTA. The case of **Tambueni** (supra) cited by Mr. Mwitasi is, under the circumstances, not applicable. Unlike in the present case, the dispute in that case was between the employees and their employer. The employees claimed that they were wrongly declared redundant. The case was filed in the High Court. On appeal, this Court

found that the matter ought to have been filed in the defunct Industrial Court of Tanzania. In its decision, the Court relied on S. 3 of the repealed Industrial Court Act [Cap. 60 R.E. 2002] (the ICT Act) which, by virtue of the provisions of G.N. No. 1 of 2009, was in force at the time when the said case was filed. In that section, trade dispute was defined as:-

> *"any dispute between an employer and employee in the employment of that employer connected with the employment or non-employment or the terms of employment or with the conditions of labour of any of those employees or such an employee."*

On the basis of the above stated reasons, we agree with Mr. Lutema that the dispute which gave rise to the application was not between the employer and employees within the context of the definition given under S. 3 of the ICT Act. The point raised by the learned Senior State Attorney is therefore hereby overruled.

Having so decided, we now turn to consider the appellants' grounds of appeal. In arguing the appeal, Mr. Lutema dropped the 2nd ground and proceeded to argue the 1st and 3rd grounds. With regard to the 1st ground, the learned counsel argued that the learned High Court judge erred in failing to find that the 1st respondent's act of transferring the appellants from the NECTA to other employers under the Ministry

was *ultra vires*. He insisted that the 1st respondent did not have the power of removing the appellants from the NECTA because under S. 3 (2) of the NECTA Act, the NECTA is a corporate body and thus the only authority having the power of removing its employees. He relied on the provision of S. 48 (1) (a) of the Interpretation of Laws Act [Cap 1 R.E. 2002] which provides that the power conferred upon a person to make appointment includes the powers to remove or suspend the person appointed in the exercise of such power.

Mr. Lutema went on to argue that although the transfers of the appellants were initiated by NECTA through its Ag. Chairperson's letter dated 18/4/2006, the letter did not vest the 1st respondent with authority to remove the appellants. He added that, in effect, the Ag. Chairperson abdicated her duty of exercising her authority to solve the problems which she referred to the 1st respondent. He added that the 1st respondent's act amounted to improper assumption of power, the consequence of which rendered the decision *ultra vires*. As to the letter dated 1/6/2016 in which the PS (Establishment) delegated his powers to the 1st respondent, Mr. Lutema argued that the same was ineffective in law because the powers vested by S. 8 (3) (f) of the Public Service Act are confined to facilitating labour mobility, the function which does not include transfer of employees from one employer to the other. According

to the learned counsel therefore, the 1st respondent did not have such power because the PS (Establishment) could not delegate the powers which he did not have.

In response to the submission made in support of this ground of appeal, Mr. Mwitasi argued that the learned High Court judge correctly found that the 1st respondent's act of transferring the appellants was not *ultra vires*. He submitted that, since by virtue of S. 4 of the Public Service Act, the Chief Secretary is the Head of Public Services, he had the authority of transferring the appellants from the NECTA to other employers within the public service. Relying also on regulation 92 of the Regulations, the learned Senior State Attorney argued that since the powers of the Chief Secretary are in law exercisable by the PS (Establishment), the latter properly delegated such powers to the 1st respondent through the letter dated 1/6/2006. The learned Senior State Attorney submitted further that the power of facilitating labour mobility vested on the PS (Establishment) by S. 8(3) (f) of the Public Service Act includes the power to transfer an employee from one employer to the other within the public service.

The issue which arises for determination in this ground of appeal is whether or not the High Court erred in deciding that the 1st respondent had authority to transfer the appellants from the NECTA to other

employers under the Ministry. As shown above, the 1st respondent acted under the powers delegated to him by the PS (Establishment) who is, vested with authority to exercise the powers of the Chief Secretary. Under s. 8 (1) of the Public Service Act, the Chief Secretary is the head of public service. That provision states as follows:-

> *" 8- (1) Subject to any written law and to the instructions of the President, the administration of the service and the ordering of the terms and conditions of services of public servant is hereby vested in the Chief Secretary."*

Sub-section (2) of that section provides that the PS (Establishment) shall be the principal assistant to the Chief Secretary in relation to the administration of Public service. In that capacity, he is, under S. 8 (3) (f) of the Act, vested with the power of facilitating labour mobility of employees among the employers.

What is at issue is whether in the exercise of such function, the PS (Establishment) has the power of transferring an employee from one employer to the other. S. 8 (3) (f) of the Act provides as follows:-

> *"8-*
>
> *(1) ....*
>
> *(2) ....*

(3) Except where the Chief Secretary directs otherwise, the Permanent Secretary (Establishment) shall –

(a) – (e) ....

(f) facilitate labour mobility of employees among employers."

It is apparent that the provision did not state in clear terms the parameters under which the PS (Establishment) should exercise the function of facilitating labour mobility. It is for this reason, we think, that vide the Public Service (Amendment) Act, No. 18 of 2007, that provision was deleted and substituted for it an elaborated paragraph. After subsequent amendment Acts, including Act No. 2 of 2010, the paragraph read as follows:-

"(f) facilitate labour mobility of employees among employers through transfers where:-

(i) a need arises for; or

(ii) it is in the public interest so to do

and that consultations with the relevant employers are made...."

Although as pointed out above, before amendment, the paragraph was not elaborate, by giving it a purposive interpretation, in our view, the same empowered the PS (Establishment) to transfer an employee

from one employer to the other. According to the **Oxford Advanced Learners' Dictionary**, 7th Ed., the word mobility is defined as:-

> *"the ability to move easily from one place, social class or job to another."*

Since a transfer is one of the essential aspects of facilitating the movement of an employee from one employer to the other, the PS (Establishment) could not discharge the duty imposed on him by S. 8(3) (f) of the Public Service Act without having the power of transferring an employee. For these reasons therefore, we find that the learned High Court judge rightly decided that the 1st respondent's act of transferring the appellants was not *ultra vires*. The 1st respondent properly acted under the powers delegated to him by the PS (Establishment).

With regard to the 3rd and 4th grounds of appeal, Mr. Lutema did, in essence, maintain the arguments which he made before the High Court. He stressed that since the appellants' transfers resulted from the accusations made against them by the Ag. Chairperson of the NECTA, the 1st respondent's act of transferring them before he afforded them the right of hearing amounted to a breach of the principles of natural justice.

In a similar vein, as regards the contention that the 1st respondent's act of transferring the appellants was based on bias, the learned counsel insisted that by acting unilaterally on the allegations contained in the letter of the Ag. Chairperson of the NECTA without hearing the appellants, the 1st respondent was biased and his decision was thus a nullity.

In response, Mr. Mwitasi submitted briefly that, in transferring the appellants, the 1st respondent did neither breach the principles of natural justice nor was he biased in his decision. According to the learned Senior State Attorney, the requirement of affording the appellants the right to be heard did not arise because, the 1st respondent did not conduct disciplinary proceedings against them and their transfers were not meant to be a punishment. They were merely given normal transfers the act which did not affect their employment rights and benefits. Mr. Mwitasi argued therefore that since the 1st respondent exercised the powers of the PS (Establishment) of effecting transfers, the claims that he breached the principles of natural justice or that he was biased in so doing, are unfounded.

Having considered the submissions made by the learned counsel for the appellants and the learned Senior State Attorney, we agree with the learned High Court judge that, since the exercise of transferring the

appellant was not a disciplinary process whereby they should have been entitled to a hearing, the contention that the 1st respondent denied the appellants that right or that his decision was biased are without merit. In the letters of transfer, the 1st respondent stated clearly that the purpose was to strengthen the teaching activities ("*katika kuimarisha shughuli za ufundishaji*"). There is nothing in their letters of transfer which shows that their employment benefits would be affected. Like in the 1st ground of appeal, therefore, we also find the 3rd and 4th grounds of appeal devoid of merit.

On the basis of the foregoing reasons, the appeal is hereby dismissed. Parties shall bear their own costs.

DATED at DAR ES SALAAM this 19th day March, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

A.G. MWARIJA
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL