



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 33 OF 2011

BROOKSIDE DIARY LIMITED.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

THE INDUSTRIAL COURT OF KENYA.....2ND RESPONDENT

BAKERY, CONFECTIONARY FOOD MANUFACTURING AND

ALLIED WORKERS UNION.....INTERESTED PARTY

JUDGMENT

Introduction

1. This petition arises out of proceedings and a decision before the then Industrial Court in **Industrial Cause No. 124N of 2009- Bakery, Confectionary, Food Manufacturing and Allied Workers Union vs Brookside Dairy Limited** which pitted the current petitioner against the interested party. In the said Cause, the Union, which was the claimant in the Cause, sought orders to compel the respondent, the petitioner in this case, to sign a recognition agreement it had sent to it on 16th January 2009.
2. A rival Union, the **Kenya Union of Commercial, Food and Allied Workers Union (KUCFAWU)**, which also alleged to have recruited members from the employees of the petitioner, sought to be enjoined as an interested party in the Industrial Cause, an application that was rejected by the Industrial Court. **KUCFAWU** then filed in the High Court **Constitutional Reference No. 13 of 2010- Kenya Union of Commercial, Food & Allied Workers Union vs the Attorney General & 3 Others** to challenge the decision of the Industrial Court declining to permit **KUCFAWU'S** participation in Industrial Cause No. 124N of 2009. **KUCFAWU** joined the current petitioner and interested party in its petition as interested parties.
3. On 28th July 2010, the parties in Petition No. 13 of 2010 recorded a consent which, inter alia, provided that Industrial Cause No. 124N be stayed pending the determination of the petition. The Industrial Court, however, according to the petitioner, disregarded this consent when it was brought to its attention on 11th January 2011 and proceeded to hear and determine the matter

before it. It is the decision of the Industrial Court to proceed with Industrial Cause No. 124N and to render a decision thereon compelling the petitioner to sign a recognition agreement with the interested party herein that precipitated this petition.

The Parties

4. The petitioner, Brookside Dairy Limited (hereafter “**Brookside**”) is a dairy company carrying out operations nationally. The Attorney General (AG) is cited as the first respondent in his capacity as the principal legal advisor to the national government of the Republic of Kenya. The Industrial Court is cited as the second respondent in its capacity as the body then responsible for securing and maintenance of labour relations and employment conditions. The interested party is a registered trade union (hereafter referred to as “the Union” operating within the food and dairy industry in Kenya.

The Facts

5. The facts as set out in the petition and affidavit in support are as follows. On 19 January 2009, Brookside received a letter from the Union stating that it had recruited a simple majority of Brookside’s employees as members. On this basis, the Union sought to conclude a Recognition Agreement with Brookside and requested Brookside to process the deduction of union fees from its members. Upon conducting due diligence, however, Brookside found a plethora of errors and inconsistencies, thereby challenging the authenticity of the Union’s claims to have recruited a simple majority of its employees that would require Brookside to execute a Recognition Agreement with it. An exchange of correspondence followed, as well as an attempt at conciliation in respect of which the Minister for Labour had appointed a conciliator upon receipt of a report of a trade dispute between the Union and Brookside. However, before the conciliation process could begin, the Union filed Industrial Cause No. 124N of 2009.
6. In its decision in **Industrial Cause No.124 of 2009**, the Industrial Court found that the Union had indeed recruited a simple majority on the basis of its check forms. In its decision made on 3rd February 2011, the Industrial Court ordered Brookside to conclude the Recognition Agreement and deduct the union fees in 30 days.
7. Dissatisfied with the decision of the Industrial Court, Brookside then filed the present petition in which it claims a violation of its right to a fair and impartial trial as guaranteed under Articles 25 (c) and 50 (1) of the Constitution, the right to fair labour practices, the freedom to contract, and the freedom of association. It has therefore prayed that the Court exercises its constitutional mandate to protect the rights of the petitioner and its employees and to grant the orders sought in the petition.

The Petitioner’s Case

8. The petitioner’s case is contained in its petition dated 3rd March 2011 supported by an affidavit sworn on the same day by Ms. Grace Manugu its Human Resource Manager. Ms. Manugu deposes that the petitioner is engaged in the dairy business and has operations in many parts of the country. It therefore employs a considerable number of persons, which at the time of filing the present petition stood at 2326 unionisable employees and 307 supervision and management level employees. By virtue of its business in the dairy sector, both the Union and KUCFAWU have, in the course of time, attempted to recruit its employees with a view to signing a recognition agreement with it.
9. On or about 19th January 2009, it received a letter from the Union dated 16th January, 2009 by which the Union forwarded a Standard Agreement Relative to Recognition and Negotiating Procedure. The letter purported that the Union had recruited a simple majority of Brookside’s potentially unionisable employees into its membership. It therefore sought to execute a Recognition Agreement as envisaged under the Labour Relations Act. On the same day, it

- received another letter from the Union, dated 15th January, 2009, in which the Union issued a Notice requiring Brookside to effect deduction of union dues from a purported 729 employees said to have joined the Union on 15th January, 2009.
10. Ms. Manugu avers that the petitioner began to scrutinize the list of employees that the Union had forwarded to it and in so doing, noted anomalies which it communicated to the Union by its letter dated 7th February, 2009. The communication was to the effect that the Union had not met the threshold which would require negotiations leading to the signing of a Recognition Agreement.
 11. The petitioner further avers that the Union sent another letter dated 6th February, 2009 in which it claimed that Brookside had systematically victimized employees because of their union activities, a claim which Brookside denied in writing; that the Union sent a further list of 109 additional names purporting that they had joined the Union, which Brookside again scrutinised and found to contain similar anomalies as were in the first list, as well as containing names that were in the earlier list. The petitioner avers further that it exchanged correspondence with the petitioner over a period of time, the Union claiming that it had attained the threshold for the signing of a Recognition Agreement while Brookside stuck to its position that it had not.
 12. Brookside further states that by a letter dated 12th March 2009, the Minister for Labour notified it that his Ministry had received a report of a trade dispute on the refusal to sign a Recognition Agreement with the Union, as well as victimization and wrongful redundancy of 86 employees. The Minister had then appointed a Mr. P.N Macharia to act as the conciliator. It states that while it subjected itself to the conciliation process and attended one meeting with the conciliator and Union representatives on 26th June, 2009, a second meeting did not take place, and it thereafter received a letter from the conciliator reporting that the conciliation process had failed and that he was referring the matter to the Industrial Court for determination.
 13. The petitioner avers further that even before the conciliation process could commence, however, the Union had filed a Memorandum of Claim in the Industrial Court, the said Cause No 124(N) of 2009, on 20th March, 2009. Brookside filed an objection to the Memorandum of claim as well as a detailed replying affidavit reiterating its position as set out above.
 14. The petitioner avers that as at 31st March, 2009, it had 1688 employees, of whom 1448 were unionisable. However, due to a merger of its operations with Spin Knit Dairy Limited and recruitment of additional employees in the course of the year, as at January 2010, its unionisable staff complement had risen to 2127, thereby raising the simple majority to 1064.
 15. Brookside further avers that on 27th January, 2010, the Union filed a Supplementary Memorandum seeking an injunction over the employment of staff from Spin Knit Dairy Ltd on the basis that the said employees were members of the Union in their previous employment. In reply, Brookside filed a Supplementary Memorandum in answer arguing that the Union had not recruited the requisite simple majority of its employees, and that KUCFAWU had also recruited its employees and had indeed obtained orders from the **Court in Industrial Cause No 15 of 2007** seeking to compel Brookside to sign a Recognition Agreement with it.
 16. Brookside further avers that as KUCFAWU had only recruited 22.05% of the petitioner's employees, the Court in **Industrial Cause No 15 of 2007** had made an order that it was at liberty to continue unhindered to recruit more members with the view to attaining a simple majority. Following the filing of Industrial Cause No. 124(N) of 2009 by the Union, KUCFAWU sought to be joined in the proceedings as an interested party, an application which the Industrial Court declined to grant. KUCFAWU then filed Petition No. 13 of 2010, and the consent orders which have been alluded to earlier, staying Cause No. 124(N) of 2009, were issued.
 17. The petitioner claims that it brought to the attention of the Industrial Court seized of Industrial Court Cause No 124 (N) of 2009 the consent orders recorded in the High Court, but the Industrial

Court disregarded the said orders and proceeded with the hearing of the Cause. It is the petitioner's case that it was therefore compelled to participate in the proceedings to avoid the erroneous perception that it did not take the Industrial Court seriously.

18. The petitioner contends that the Industrial Court acted in an un-procedural manner. In its view, the very fact that the matter proceeded may have infringed on the freedom of association of some of its employees as it determined the matter without having resolved how many unionisable employees the petitioner had and how many of those the Union had recruited.
19. The petitioner further avers that the Court had ordered the Labour Officer, Thika, to conduct a head count and verify the figures; that the Labour Officer visited its office without the Union's officers, and during the said meeting demanded a list of its employees; that the petitioner insisted that for an effective verification exercise to be carried out, it was imperative that a physical head count be conducted at all its sites first, and that the count be done in the presence of the Union's representative. It contends that neither the Union nor the Labour Officer availed themselves for the intended head count, and so the verification exercise ordered by the Industrial Court was not done.
20. The petitioner claims that during the hearing of Cause No. 124(N) of 2009, the court declined to allow it to cross-examine the Labour Officer, though the Court admitted his report in which he claimed that the petitioner had not cooperated with respect to the head count. Its case is therefore that the Industrial Court acted in breach of its inalienable constitutional right to a fair trial and to be subjected to fair labour practices, by, among other things, manifestly ignoring evidence that was favourable to the petitioner and conducting the trial before it in a manner that was grossly unfair; ordering the Union to recruit and submit new lists and thereafter have the petitioner deduct dues regardless of whose names appear on the intended lists. It is also aggrieved that the court disregarded what the petitioner terms the Union's questionable entries in the lists relied upon, thereby not only arriving at an unfair finding, but also allowing the Union to benefit from unfair practices, to the petitioner's detriment and that of its employees.
21. The petitioner contends that pursuant to the award of the Industrial Court, it has reviewed all its records and determined that the position it has taken with regard to the number of employees recruited by the Union is correct. It has filed a notice of appeal and called for the proceedings of the Industrial Court. It contends, however, that the Labour Institutions Act which creates the Industrial Court only allows an appeal to the Court of Appeal on matters of law. An appeal will therefore not delve into the factual issues raised in this petition which establish that there is a fundamental breach of its rights.
22. The petitioner further states that the Union has forwarded a draft Recognition Agreement and insisted that the petitioner executes the said agreement, in complete disregard of its right to negotiate and agree on the terms of any contract it enters into. According to the petitioner, the draft agreement contains numerous untenable, unlawful and unconstitutional clauses, among them a provision that the Agreement shall continue in force and shall not be terminated or revoked under any circumstances whatsoever unless Brookside ceases to exist.
23. It is the petitioner's contention that if the proposed Agreement is signed, it shall curtail its fundamental rights and those of its employees, particularly the freedom to contract, and shall place it and its employees in the eternal bondage of the Union. Its contention is that all these breaches and threatened breaches are a direct result of the conduct of the Court in Industrial Cause No 124(N) of 2009 and its award in the Cause delivered on 3rd February, 2011. It submits that this Court has the constitutional mandate to safeguard and enforce the rights of all citizens regardless of their station, and to grant the remedies that it seeks as follows:
 - a. ***A declaration do issue that the Industrial Court in its conduct of Industrial Court Cause No 124 (N) of 2009 breached the petitioner's right to a fair and impartial trial as guaranteed by Articles 25 (c) and 50 (1) of the Constitution of the Republic of Kenya.***

- b. *A declaration that the Industrial Court acted unconstitutionally in proceeding with the hearing and determination of Industrial Court Cause No 124 (N) of 2009, despite being aware of the orders of the constitutional court in Constitutional Petition No 15 of 2010, staying the said hearing pending the hearing and determination of the petition.*
- c. *A declaration that the Industrial Court's findings in Industrial Court Cause No 124 (N) of 2009 breached the petitioner's right to fair labour practices as guaranteed by Article 41 (1) of the Constitution of the Republic of Kenya.*
- d. *A declaration that the directives issued by the Industrial Court in Industrial Court Cause No 124 (N) of 2009, in its award made on 3rd February, 2011 breached the petitioner's fundamental rights of freedom to contract and freedom of association as guaranteed by Article 36 of the Constitution of the Republic of Kenya.*
- e. *A declaration that the rights of the petitioner and its Directors and Officers to property and liberty are threatened by the imminent commencement of contempt proceedings to enforce the award of the Industrial Court made on 3rd February, 2011, in Industrial Court Cause No 124 (N) of 2009, in breach of Article 40 and 25 (a) of the Constitution of the Republic of Kenya.*
- f. *A declaration that the proceedings before the Industrial Court in Industrial Court Cause No 124 (N) of 2009 and the resultant award made on 3rd February, 2011 were made without jurisdiction, are unconstitutional and hence null and void.*
- g. *This honourable Court do issue such orders and gives such directions as it may deem mere and just and appropriate in all the circumstances of this matter.*
- h. *The costs of the petition be awarded to the petitioner.*

The Respondents' Case

24. The respondents filed Grounds of Opposition dated 10th December, 2014 in which they opposed the petition on the grounds that the petition is misplaced, non-eficacious and a gross abuse of the court's process; that a judgment of a court of competent jurisdiction cannot be deemed to be a contravention of any human right or fundamental freedom; and that the actions complained of constitute the legitimate obligations of the 2nd respondent under the relevant statutes. It is also the respondents' contention that the petition does not disclose any violation or threat to the petitioner's fundamental rights or freedoms, and that the petition is an attempt to circumvent the legally established avenues of redress for parties aggrieved by a court's decision.
25. In their submissions dated 10th December 2014, the respondents argue that this is not the proper forum for resolution of the petitioner's grievance. Their contention is that the petitioner has an avenue by way of appeal as provided under section 27(1) of the Labour Institutions Act. They contend that the petitioner cannot, as it is doing, seek to reverse the decision of the Industrial Court by way of a constitutional petition. They have relied on the decision in **Alphonse Mwangemi Munga & Others vs African Safari Club (2008) eKLR** and **Kirinyaga Construction Ltd. vs Oscar D. Beuttah & Another (2014)eKLR** for the proposition that approaching a constitutional court over a purported irregular judgment is an abuse of the Court process. They ask that the petition be dismissed with costs.

The Interested Party's Case

26. The interested party agrees with the position taken by the respondents. It submits, additionally, that under the repealed Constitution, the High Court took the view that the Industrial Court was a subordinate court, while it was not. Further, the 2010 constitution had placed the matter beyond dispute by providing that the Industrial Court has the same status as the High Court. With regard

to the dispute underlying the petition, the interested party's contention is that it is too late in the day to re-open the debate. In its view, this petition has no merit as the High Court has the same jurisdiction as the Industrial Court that heard the matter. Further, since litigation must come to an end, the petition should be dismissed.

Determination

27. We have considered the pleadings and submissions of the parties, as well as the statutes and authorities relied on. In our view, two issues arise for determination. The first is whether this Court has the jurisdiction to hear and determine the issues raised in this petition. Should the answer to this issue be in the affirmative, then the next issue to consider is whether the material before us discloses a violation of any of the constitutional rights of the petitioner as alleged.

Jurisdiction

28. As noted above, the respondents have argued that this is not the appropriate forum for the determination of the issues raised in the petition. It is the submission of the AG that a binding decision of the court cannot be the subject of a petition alleging violation of constitutional rights, and that the petitioner has a remedy under section 27 (1) of the Labour Institutions Act.

29. To the petitioner's contention that an appeal to the Court of Appeal only lies on matters of law, the AG's position is that in the strictest sense, the petitioner is in this petition raising issues of law that can be determined by the Court of Appeal. As noted above, their position on jurisdiction is supported by the interested party.

30. The petitioner submits in response that the actions complained of occurred in the period between 28th July, 2010, when the High Court issued the consent orders in Petition No. 13 of 2010, staying the hearing of the Industrial Court Cause, and 3rd February, 2011 when the Industrial Court issued its orders in the Cause despite the pendency of the orders given by the High Court. It was its submission therefore that during the period in question, the Industrial Court was still subordinate to the High Court as the date of commencement of the Industrial Court Act was 30th August, 2011, after the delivery of the award in question.

31. The petitioner relies on the decision in **Nzoia Sugar Company vs Attorney General [2012] eKLR**, **Kenyatta University vs The Industrial Court of Kenya [2012] eKLR**; and **Mecol Limited vs Attorney General and 7 Others [2006] eKLR** to submit that the Industrial Court was then subordinate to the High Court and this Court is therefore empowered to exercise its supervisory jurisdiction over the conduct of the Industrial Court with regard to the matters complained of in this petition.

32. The importance of a court's jurisdiction with respect to a matter before it has been underscored in several decisions of this Court and Courts superior to it. In **Owners of The Motor Vessel Lillian 'S' vs Caltex Kenya Ltd (1989) KLR 1**, Nyarangi J stated that:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

33. The views of the Court above are echoed in the writings of **John Beecroft Saunders** in **Words and Phrases Legally defined – Volume 3: I – N** where it is stated at page 113 that:

"By jurisdiction is meant the authority which a court has to decide matters that are

litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

34. The Court of Appeal also emphasised the importance of a court establishing its jurisdiction prior to considering the matter before it in **Joseph Njuguna Mwaura and 2 Others vs Republic, Nairobi Criminal Appeal No 5 of 2008** when it stated that:

“It is incumbent upon any court intending to render an opinion or determine a matter to first ascertain the entry point to the doors of justice, and that is jurisdiction. The authority of the court is determined by the existence or the lack of jurisdiction to hear and determine disputes. In essence, jurisdiction is the first hurdle that a court will cross before it embarks on its decision making function.”

35. The respondents and the interested party have made two arguments with respect to the jurisdiction of this Court to hear the present petition. The first is that the relief for the petitioner, if dissatisfied with the decision of the Industrial Court as then constituted, lay in an appeal to the Court of Appeal under section 27(1) of the Labour Institutions Act.

36. This is an argument that can be easily disposed of, in light of the decision of the Court of Appeal in **The Director Kenya Medical Research Institute vs Agnes Muthoni & 35 Others Court of Appeal Civil Appeal No. 15 of 2011**. The Court was in that matter determining a preliminary objection by the respondents to the effect that it had no jurisdiction to entertain appeals from the Industrial Court as established under the Labour Institutions Act. In holding that section 27(1) of the Labour Institutions Act was unconstitutional, the Appeal Court stated as follows:

“...in determining whether we have jurisdiction, we need not look beyond the legal prescriptions enshrining our mandate both legislative and constitutional. We have done so and we are in agreement that section 3 of the Appellate Jurisdiction Act... and section 64 of the retired constitution limit our appellate jurisdiction to appeals emanating from the High Court. Section 3 of the Interpretation and General Provisions Act Cap 2 defines the high court as follows:-

“High Court means the High Court established by the constitution:

By the constitution is meant section 60 of the retired constitution. We are therefore in agreement with the arguments of the preliminary objector that the definition of the High Court whose decisions are appealable to the Court of Appeal does not include the Industrial Court.”

37. It is our finding therefore that in the circumstances of this case, the option of an appeal to the Court of Appeal was not open to the petitioner.

38. The second argument raised with respect to the jurisdiction of this Court was by the interested party, its argument being that the Court could not entertain this matter as the Industrial Court is

not subordinate to the High Court, and has the same status as the High Court.

39. The merit or otherwise of this argument can be fairly easily established by considering the time or period in which the events impugned in this petition took place. This is because a clear distinction has been drawn in law with respect to the jurisdiction of the High Court vis a vis the Industrial Court between the period prior to the promulgation of the new Constitution and the enactment and coming into force of the Industrial Court Act, (Act No. 20 of 2011) in 2012, and the period thereafter.

40. In the period preceding the establishment of the Industrial Court provided for under Article 162(2) of the Constitution, the Industrial Court had been held to be a subordinate court and was therefore subject to the supervisory jurisdiction of the High Court. This question had been the subject of various decisions of the High Court, and was still an issue subsequent to the promulgation of the Constitution with its provisions which elevated the Court under Article 162, to the status of the High Court. In the case of **Samuel G. Momanyi vs Attorney General and Another, Petition No 341 of 2011** while addressing the question of the status of the court immediately after the promulgation of the Constitution, the High Court expressed the following view:

“[31] Further, the Industrial Court as presently constituted is not such a Court as envisaged by Article 162 (2) and I agree with Majanja J. in Brookside Dairy Ltd. vs Attorney General, Petition No.33 of 2011 when he stated as follows:

‘The status of the Industrial Court in relation to the High Court has been somewhat controversial in view of conflicting decisions of the High Court. In the case of Mecal Limited vs. the Attorney General and Others Nairobi HC Misc. Appl. No.1784 of 2004 (unreported) the High Court declared that the Industrial Court was a Subordinate Court for the purposes of the exercise of the supervisory jurisdiction of the High Court under Section 65 of the former Constitution. In Kenya Guards and Allied Workers Union vs. Security Guards Services and 38 Others Nairobi HC Misc. No.1159 of 2003 (unreported) the Court expressed a contrary view on the basis of legislative policy favouring finality of labour disputes. I take the position that the Industrial Court, as a creature of statute, is a court subordinate to the High Court. Parliament did not have the constitutional authority under the former Constitution to create a Court of equivalent status with the High Court.’...

41. The Court thus reaffirmed the position and status of the Industrial Court as existing under the former constitution as a court subordinate to the High Court. Indeed, this issue had been addressed by Majanja J early on in this matter in response to a preliminary objection by the interested party to the jurisdiction of this Court.

42. In his ruling on the said preliminary objection, Majanja J acknowledged that:

“[9] Article 162(2) of the Constitution contemplates the establishment, by the legislature, of a court of the status of the High Court to hear disputes concerning employment and labour relations. Such a court was duly established by legislature by enactment of the Industrial Court Act (Act No. 20 of 2011) whose date of commencement was 30th August 2011.

[10] Though the Act commenced on 30th August 2011, section 33 thereof provides; All proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that court until the Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary.”

43. He, however, concluded as follows with respect to the jurisdiction of the High Court:

[11] Prior to the operationalisation of the Act in accordance with section 33 and the appointment of judges of that Court in accordance with the Constitution, the High Court still has jurisdiction to deal with all matters concerning the enforcement of fundamental rights and freedoms under the Constitution. The High Court cannot divest itself of this jurisdiction.

[12] Further, the matters complained of occurred prior to the establishment of the Industrial Court Act, 2011. As the matters complained of concern the conduct of proceedings of the Industrial Court and whether such infringement is a violation of the petitioner's rights under the Constitution. These are matters which this court, the High Court, has jurisdiction to determine.

44. We agree with the views expressed by Majanja J in his ruling which we have reproduced above. We are of the view that a matter that had been heard and determined by the Industrial Court as it existed prior to the promulgation of the Constitution and the operationalizing of the Industrial Court established under the Industrial Court Act, 2011 was subject to review in respect of violations of constitutional rights, or for procedural improprieties, in accordance with the High Court's powers of judicial review.

45. In the circumstances of this case, we are satisfied that the petition, which was filed in 2011 prior to the coming into force of the Industrial Court Act and related to a decision of the Industrial Court established under the former constitution as a subordinate court, is properly before us and we have jurisdiction to determine such issues as it raises that fall within the supervisory jurisdiction of the High Court. Our view on this matter is reinforced by the provisions of section 22 of the Sixth Schedule to the Constitution which states as follows:

“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.”

46. We therefore turn to consider the second issue that this petition raises.

Whether There was a Violation of the Petitioner's Rights

47. The petitioner is aggrieved by the decision of the Industrial Court made on 3rd February 2011 which it alleges violates its rights to fair and impartial trial as guaranteed under Articles 25 (c) and 50 (1) of the Constitution, the right to fair labour practices guaranteed under Article 41, as well as the freedom to contract and freedom of association.

48. The respondents, having taken the position that this Court has no jurisdiction to entertain this petition, deemed it unnecessary to submit on the question whether there had been a violation of the petitioner's rights, though they submit that there is no evidence of violation of the petitioner's rights, and in any event a decision of a competent court cannot be said to have violated a party's constitutional rights. Their position is that they should not enter into arguments on the process or legality of the decision of the Industrial Court as that would be to enter into an inquiry on the merits, which would be the subject of appeal.

49. In response to this argument, the petitioner relies on the decision in **Basil Criticos vs Attorney General and 8 Others [2012] eKLR** to submit that the Industrial Court was duly informed of the court orders stopping the proceedings before it, and therefore its failure to down its tools deprived it of its authority to hear the matter before it, nullified the proceedings, and thereby rendered the award that it issued null and void.

50. The petitioner has also relied on the decision in **Kenya Airways Limited vs Kenya Airline Pilots Association [2001] eKLR** to submit that the decision reached was made while the court acted without the necessary jurisdiction, thereby rendering the said award *ultra vires*. It submitted

further, in reliance on **Judicial Service Commission vs Speaker of the National Assembly and Another [2013] eKLR**, that in hearing and determining the case before it, the Industrial Court was *functus officio* as it ought to have obeyed the orders of the High Court.

51. It is indeed correct that all persons are required to obey orders issued by the Court. In **Ibrahim Haji Issak vs Kenya Meat Commission and Another, Industrial Court of Kenya at Nairobi, Cause No. 1052 of 2013**, the Industrial Court established pursuant to the provisions of Article 162(2) underscored the importance of obedience to orders issued by the Court in the following words:

“The concept of the rule of law is the modicum of operations in civilized societies. It entails a situation where all action by public office and officers, private citizens and corporations inclusive of government are governed by the law in their operations and everyday life. Anything less than this would bring about chaos, disorder and apathy not desirable in organized systems of governance. It would nurture impunity, a deadly monster to the rule of law and order.”

52. The Court went on to observe as follows with respect to the question of contempt of Court:

“...In the case of Johnson vs Grant, 1923 SC 789 at 790 Lord President Clyde stated that: ‘...The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.’ The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.”

53. In underscoring the importance of court orders, the Court stated as follows:

“A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.”

54. The Court concluded by stating as follows:

“In the case of Kenya Tea Growers Association vs Francis Atwoli and 5 Others [2012] eKLR Lenaola J cited with approval the case of Clarke and Others vs Chadburn and Others [1985] 1 All E.R (PC), 211 in which the court observed that:

‘I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, willful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.’

55. We fully agree with the sentiments of the Court in the above matters. The former Industrial Court, as a subordinate court that was subject to the jurisdiction of the High Court, was bound to heed orders of the High Court. If it did not and proceeded to determine a matter in contempt of an order of the High Court, then, in our view, such proceedings and decision would be a nullity. As was held by the Court of Appeal in **Fatima Ali Mohamed vs. Harbans Singh Soor Civil Appeal No. 129 of 2007 [2008] KLR 271**, disregard of an order of the Court is a matter of sufficient gravity whatever the order may be.
56. It is undisputed that in the present case, the parties to Petition No. 13 of 2010 had entered into a consent order under which they had agreed that Industrial Cause No. 124(N) of 2009 should be stayed pending the determination of the petition.
57. The petitioner alleges that though the attention of the Industrial Court was drawn to this order, it disregarded the order and proceeded to hear and determine the claim before it. However, the petitioner did not deem it necessary to provide the record of proceedings before the Industrial Court which could have helped in determining whether indeed the Court was aware of the consent order, and that it deliberately decided to disregard it.
58. We have perused the judgment of the Court and have not been able to find any allusion to a consent order between the parties, or that there was any application made to the Court not to proceed with the hearing before it as there was a hindrance to the proceedings. Without such evidence, we are unable to ascertain whether indeed the Learned Judge was aware of the consent order, and we cannot therefore make a finding that the Industrial Court acted in breach of the said court order.
59. Further as was held in **Owners and Masters of the Motor Vessel “Joey” vs. Owners and Masters of the Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367**:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

60. In this case, the Petitioner contends that it was compelled to participate in the proceedings to avoid the erroneous perception that it did not take the Industrial Court seriously. There was no allegation that the issue of jurisdiction was raised by the Petitioner before the Court. Based on the decision of **Owners and Masters of the Motor Vessel “Joey”** (supra) having participated in the proceedings without a murmur, it cannot now be heard to lament that the proceedings in which it participated were a nullity.
61. The petitioner further challenges the award of the Industrial Court on the basis that the Court disregarded its evidence and by so doing, denied it the right to a fair and proper opportunity to challenge the allegations of the Union that it merited recognition by the petitioner. It relies on the

decisions in **Mrs. Kalyani Baskar vs Mrs. M. S. Sampooram, Criminal Appeal 1293 of 2006**, and **Zahira Habibullah Sheikh and Another vs State of Gujarat and Others, Criminal Appeal 446-449 of 2004** to submit that by the refusal to consider the petitioner's evidence which was properly on record, the Industrial Court breached the petitioner's right to a fair trial.

62. In asking the Court to make a determination of the question whether the Industrial Court considered or failed to consider its evidence in arriving at its decision, the petitioner is asking the Court to enter into a merit review of the decision of the Industrial Court. We agree with the respondents that the supervisory jurisdiction of the High Court over decisions of the former Industrial Court did not extend to an inquiry into the merits of the decision, which is the function of an appellate court.

63. Since there was no appeal provided for with respect to such decisions, it is evident that the intention of the legislature was that no appeal would lie on the merits of the Court's decisions. As we have indicated elsewhere in this judgment, the attempt to create an appellate process through the provisions of section 27(1) of the Labour Institutions Act in 2007 was held to be unconstitutional. It is not therefore within our mandate to enquire into what evidence the Industrial Court considered, or failed to.

64. In addition, it is trite law that a wrong action or decision of a public body does not necessarily elevate the matter to a constitutional issue in order to warrant a party aggrieved thereby instituting proceedings by way of a constitutional petition. As was held in **Pattni & Another vs. Republic [2001] KLR 264** in which **Harrikisoon vs. Attorney General of Trinidad and Tobago [1980] AC 265** was cited with approval:

“The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the provision if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

65. In the Harikisoon decision, the Court stated that:

“No human right or fundamental freedom recognised in the Constitution is contravened by a judgement or order that is wrong and is liable to be set aside on appeal for an error of fact or substantive law even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. And where there are no higher courts to appeal to, then, no one can say that there was an error. The fundamental human right is not a legal system that is infallible but one that is fair and it is only errors of procedure that are capable of constituting infringement to the rights protection by section 1(a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction. The error must amount to failure to observe one of the fundamental rules of natural justice.”

66. Having said that, however, and for the sake of clarity and completeness, we must state that we have read the judgment of the Industrial Court, and noted that contrary to the petitioner's assertion, it did consider the petitioner's evidence, and noted and drew conclusions from the failure by the petitioner to avail certain information. The Court notes that the petitioner did call a witness, a Ms. Grace Wambui Manugu, who testified on its behalf and was cross-examined on her

evidence. In his consideration of the petitioner's evidence, the Court stated as follows at page 10 of the Award:

“The witness stated that the 2 lists contained names of employees who had been terminated or who died or repeated (Sic). However these statements were only claims which were not substantiated. However the list she relies on as containing the names of total workforce which was produced in evidence and marked as Exhibit No 1, it has 1493 names. According to her evidence there were 250 employees in management. This would leave 1253 unionisable employees. After the court rejects her contention and allegations of other irregularities in the list as unproven it is evident that Appendices 1 and 2 of the memorandum of claim containing 838 recruited employees would translate into the Claimant Union having recruited an overwhelming majority.”

67. With respect to the failure by the petitioner to avail certain information that it deemed necessary for the determination of the matter, the Court observed as follows:

“The court had made an attempt to have the Labour Department establish the number of employees working for the respondent and the number recruited by the Claimant union. This attempt was frustrated by the parties and especially by the respondent who is under legal obligation to maintain employment records. A letter received from the Thika District Labour (sic) dated 15th November 2010 stated that the management did not accord him the cooperation needed to establish the figures required for the exercise. This would have substantiated the allegations by the respondent...”

68. It is therefore not only evident that the petitioner was accorded an opportunity to present its case in the form of its written responses to the interested party's claim, but was also permitted to call oral evidence.

69. The petitioner has also alleged that it was denied an opportunity to cross-examine the Labour Officer during the hearing of Cause No 124 (N) of 2009, but again, there was no evidence to support the allegation, which the petitioner could have provided this court with by placing before the Court the proceedings before the Industrial Court.

70. Finally, the petitioner alleges violation of its right to fair labour practices. It contends that the Industrial Court award required that it signs the Recognition Agreement in question within 30 days. Its contention is that the award was not supported by the relevant facts as the Union had not recruited a simple majority of the unionisable employees to merit recognition. It is its contention therefore that the award breached Article 41 of the Constitution, as well as Article 36 with respect to the freedom of association.

71. It argues, further, that the Industrial Court failed to ensure that the Union complied with section 54 of the Labour Relations Act which requires that an employer recognises a union which has recruited a simple majority of unionisable employees. It has relied in support on the decision in **Kenya Union of Commercial Food and Allied Workers vs Capital Fish Kenya Limited [2013] eKLR** and **Tailors and Textiles Workers Union vs Arax Mills Limited [2014] eKLR**.

72. Article 41 of the Constitution provides that:

1. *Every person has the right to fair labour practices.*
2. *Every worker has the right-*
 - a. *To fair remuneration;*
 - b. *To reasonable working conditions;*

- c. *To form, join or participate in the activities and programmes of a trade union; and*
- d. *To go on strike.*

3. **Every employer has the right-**

- e. *To form and join an employers' organisation; and*
- f. *To participate in the activities and programmes of an employers' organisation.*

4. ***Every trade union and every employers' organisation has the right-***

- a. *To determine its own administration, programmes and activities;*
- b. *To organise; and*
- c. *To form and join a federation.*

5. ***Every trade union, employers' organisation and employer has the right to engage in collective bargaining.***

73. Article 41(3) of the Constitution (which is erroneously numbered (e) and (f) as though it were a continuation of Article 41(2)) contains the rights of an employer under the Constitution. These are the right to form and join employers' organisations, and to participate in the activities and programmes of an employers' organisation. Employees have, in turn, the right to join and participate in the activities of a trade union, and to enjoy better working conditions at the work place.

74. These provisions echo the constitutional guarantees to freedom of association contained in Article 36 as follows:

1. ***Every person has the right to freedom of association, which includes the right to form, join or participate in the activities of an association of any kind.***
2. ***A person shall not be compelled to join an association of any kind.***

75. Taking the above constitutional provisions and considering them against the averments by the petitioner, we are unable to find a violation of its rights under Article 36 or 41(3) by the decision of the Court as alleged. First, the Court did not require the petitioner to join any association against its will. It only required that it enter into a Recognition Agreement with a union which, on the basis of the evidence before it, had recruited a simple majority of the petitioner's unionisable workers. Indeed, as the Court stated at page 10 of its judgment, having recruited 838 out of 1253 of the employees of the respondent, it had recruited an "overwhelming majority" and the petitioner was therefore obliged to enter into a Recognition Agreement with it.

76. Since the petitioner's argument is premised on a finding of the Industrial Court which was arrived at on the basis of the evidence before that Court, it would be to constitute this Court an appellate Court, with the mandate to enter into an inquiry on the merits of the decision of the Industrial Court. This Court is not sitting on appeal on decisions emanating from the former Industrial Court, and we cannot, in any event, sit on appeal with respect to the merits of a case in a petition alleging violation of constitutional rights. In considering the evidence before it, the Industrial Court specifically noted the weaknesses in the case presented before it by the petitioner. In reaching its conclusion on the matter, a conclusion which, in our view, given the evidence before it, is well founded, the Court stated as follows with regard to the evidence adduced before it by Ms. Manugu:

"...She also admitted that the respondent company has a muster (sic) roll containing names of all employees and that this would have been the most authentic document to show the number of employees. Yet this document was not produced.

The witness stated that the 2 lists contained names of employees who had been terminated or who died or repeated. However these statements were only claims which were not substantiated. However the list she relies on as containing the names of total workforce which was produced in evidence and marked as Exhibit No 1. This would leave 1253 unionisable employees. After the Court rejects her contention and allegations of other irregularities in the list as unproven it is evident that Appendices 1 and 2 of the memorandum of claim containing 838 recruited employees would translate into the Claimant Union having recruited an overwhelming majority.”

77.The petitioner has sought various orders and declarations, the effect of which would be to quash the decision of the Industrial Court in Industrial Cause No. 124(N) of 2009. However, in light of our findings and conclusions set out above, we are unable to reach the conclusion that the Industrial Court, either in the proceedings before it or in its decision in the said matter, violated any of the petitioner’s rights. That being the case, we cannot issue any orders in favour of the petitioner, for such orders would depend on a merit review of the decision of the Industrial Court, and would be dependent on our making a finding that the Court erred in finding that the interested party had recruited a simple majority of the petitioner’s workforce.

78.As was held in **Republic vs Kenya National Examinations Council ex parte Gathenji and Others Civil Appeal No. 266 of 1996:**

“...Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

79.**In the circumstances, we find no merit in this petition. It is hereby dismissed, but noting the nature of the dispute, let each party bear its own costs.**

Dated and Signed at Nairobi this 28th day of September 2015

ISAAC LENAOLA MUMBI NGUGI G.V. ODUNGA

JUDGE JUDGE JUDGE

Dated, Delivered and Signed at Nairobi this 28th day of September 2015

G.V. ODUNGA

JUDGE

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