REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 309 of 2009

REPUBLIC.....APPLICANT

VERSUS

INDUSTRIAL COURT OF KENYA.....1ST RESPONDENT

KENYA LOCAL GOVERNMENT WORKERS UNION.....2ND RESPONDENT

EX PARTE MUNICIPAL COUNCIL OF THIKA

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 8th June 2009 filed the same day, the *ex parte* applicant herein, **Municipal Council of Thika**, seeks the following orders:

1. An order of *certiorari* do issue to remove into the High Court and quash the award/ruling/order of the Industrial Court (Cor Corm Stewart Madzayo, JIC) dated 13th May 2009 delivered/issued in Industrial Court of Kenya Cause Number 115 of 2006.

2. An Order of prohibition do issue to prohibit or bar, restrain and/or prevent the Industrial Court of Kenya and the Kenya Local Government Workers Union from enforcing, realising and/or executing and/or taking any execution proceedings against the applicant herein, Municipal Council of Thika, in respect of the impugned award/decision in Industrial Court Cause Number 115 of 2006 between the Kenya Local Government Workers Union and the Municipal Council of Thika.

3. The costs of this application be provided for.

***EX PARTE* APPLICANT'S CASE**

2. The said Motion is supported by Statutory Statement filed 26th May 2009 and Verifying Affidavit sworn the same day by **Johnson Kariuki**, the Town Clerk to the *ex parte* applicant herein.

3. According to the *ex parte* applicant, by a resolution of the applicant made on 29th August 2000, the applicant terminated the services of 33 of its employees for amongst other reasons, gross indiscipline and misconduct for participating in an illegal strike. On 4th September 2000, the said employees filed Thika Chief Magistrate's Court Civil Suit No. 864 of 2000 seeking, inter alia, reinstatement and were granted temporary injunction whose effect was to restrain the applicant from implementing the said resolution. Aggrieved by this decision the applicant appeal in Nairobi High Court Civil Appeal No. 668 of 2000 –

Municipal Council of Thika vs. The Kenya Local Government Workers Union (Thika Branch). The applicant's application for stay was however, disallowed and after some hiccups time was extended to the applicant to file its appeal out of time paving way for the filing of Civil Appeal No. 81 of 2003. Pursuant thereto a stay of the orders of the High Court was granted with the effect according to the applicant that the 33 employees dismissed remained dismissed until the hearing and determination of the appeal. However, during the pendency of the said appeal the said 33 employees with other 57 employees lodged a claim in the industrial court Cause No. 115 of 2006 through their union Kenya Local Government Workers Union. When the applicant raised a preliminary point the respondent exhibited a Notice of Discontinuation of the Thika suit which notice according to the applicant had not been served on the applicant and there was no order formally withdrawing the same. The Industrial Court, it is deposed overruled the applicant's objection challenging its jurisdiction based on the pendency of the appeal and on the issue of *sub judice*.

4. According to the applicant the Industrial Court's decision was made in excess of jurisdiction and/or in express violation of section 14(9)(c) of the ***Trade Disputes Act*** as the same offended the *subjudice* principle and it was an abuse of the court process to proceed with the matter. It is deposed that as the 33 dismissed employees are also the subject of the pending appeal, the Industrial Court made an error in deciding to proceed with the said Cause thus raising possibility of conflicting decisions. Being aggrieved with the said decision the applicant instituted judicial review proceedings but the same were dismissed. Back to the hearing of the matter before the Industrial Court, the matter was heard and the dismissed employees reinstated.

5. It is the applicant's position that the said decision was erroneous, null and void and had no basis in law since it was made in contravention of the provisions of the ***Trade Disputes Act***, was made without jurisdiction, was unreasonable and went against the applicant's legitimate expectations. If allowed to stand, it is deposed the said decision would cripple the operations of the applicant.

RESPONDENTS' CASE

6. In opposition to the application the respondents filed the following grounds of opposition:

1. That the Industrial Court acted within its mandate given to it by the Constitution and the *Trade Dispute Act* now repealed.

2. Section 18 of *The Trade Dispute Act* under which the matter was dealt with provides that decisions of the Industrial Court are final.

3. There is no provision in the *Trade Disputes Act* for appeal against the decision of the Industrial Court. This matter was handled under the *Trade Disputes Act* and not under the *Labour Institutions Act*.

4. Cap 2 stipulates how matters that were brought under repealed law should be handled before the new law takes effect.

5. The application should be dismissed as it has no merit.

***EX PARTE* APPLICANT'S SUBMISSIONS**

7. On behalf of the *ex parte* applicant, it was submitted that although section 17 of the ***Trade Disputes Act*** provided that the decision of the Industrial Court was final, based on the authority of **Re Kenya Planters Co-operative Union Nairobi High Court Civil Case No. 933 of 2005**; **Republic vs. Industrial Court of Kenya *ex parte* Kenya Planters Co-operative Union Nairobi High Court Misc. No. 933 of 2005** and **Mecol Limited vs. Attorney General Nairobi High Court Miscellaneous Number 1784 of 2004**, the present application is competently before the court as the applicant herein seeks to vindicate legal injury occasioned to it by the Industrial Court of Kenya's irrationality, illegality and/or abuse of power.

8. It is submitted that under section 14(9) of the ***Trade Disputes Act***, Cap 234 and section 6 of the Civil Procedure Rules (sic), the Industrial Court lacked jurisdiction to hear the said case in view of the fat that there is in existence a pending Nairobi Court of Appeal Civil Appeal No. 81 of 2003 between the parties herein and which appeal's issues are directly and substantially in issue in the Industrial Cause rendering it in the circumstances *subjudice*. In support of this position the applicant relies on **Ismail S. Mboya and Others vs. Mohammed Haji Issa and Others Kisumu HCCC No. 106 of 2003**.

9. According to the applicant a system of law requires considerable degree of certainty and uniformity and the Industrial Court literally conferred upon itself jurisdiction to hear the said industrial cause by going beyond its mandate by insisting on proceeding with a cause where the subject matter in issue and the parties are also subject of pending litigation in the highest court in the land. By allowing the trial to proceed, it is submitted that the Industrial Court acted ultra vires its powers as conferred under section 14 of the ***Trade Disputes Act*** and violated the said statutory provisions in the said Act an act which amounted to an abrogation of the judicial provisions of *subjudice*. It further acted ultra vires by ignoring the limitations set out in section 14(9)(c) of the said Act which states that the Industrial Court shall not deal with disputes in the process of being settled, investigated or otherwise determined by means of any other proceedings.

10. According to the applicant by ordering reinstatement of the said employees the said Court went beyond its mandate by proceeding with a matter which was the subject of an appeal hence its decision was unreasonable.

11. Since the Industrial Court was guided by the ***Employment Act*** under which the remedy of reinstatement was not available, it is submitted that the award is not inconformity with its jurisdiction. The said decision is also alleged to be prejudicial to the applicant and since the applicant has no other alternative remedy the application ought to be allowed.

1ST RESPONDENT'S SUBMISSIONS

12. On behalf of the 1st Respondent, it was submitted that the Industrial Court has special jurisdiction under the ***Labour Relations Act*** No. 2 of 2007 to hear and determine any issues arising out of employer and employee relationships. Section 12 of the said Act, it is submitted gives the said Court exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim, complaint or infringement of any of the provisions of the labour institutions act or any other legislation touching on the employer employee relations and their organisations. Section 15 of the ***Trade Disputes Act***, it is submitted gives the court powers to reinstate an employee wrongfully dismissed and award compensation. This is also the position in section 15 of the ***Labour Institutions Act 2007***. Therefore it is submitted that the Industrial Court in giving the award acted within its mandate given to it by the Constitution and the ***Trade Disputes Act*** and the trade dispute was properly referred to the said Court under section 8 of the ***Trade Disputes Act***.

13. On the issue of *subjudice*, it is submitted that the applicant did not raise the issue at the stage of the proceedings and since the matter which gave rise to the appeal had been withdrawn the said appeal could not survive. In the 1st respondent's view, the issue of *sub judice* cannot stand since there was no other mater concerning the same parties in another court.

14. It is submitted that since the applicant is not disputing the jurisdiction of the court to hear the matter of this nature but the reliefs awarded, the best remedy for the applicant ought to have been by way of an appeal under section 27 of the ***Labour Institutions Act*** since judicial review is not an appeal but a review of the manner in which the decision is made based on the decisions in **R vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR** and **Chief Constable or Northern Wales Police vs. Evan [1983] 3 All ER** hence the application is an abuse of the process and ought not to be entertained.

2ND RESPONDENT'S SUBMISSIONS

15. On behalf of the respondent it was submitted that the Industrial Court had jurisdiction under section

14 of the ***Trade Disputes Act*** to hear and determine the dispute as forwarded to it by the Minister for Labour and Human Resource Development. In any case, it is submitted that under section 17(2) of the repealed ***Trade Disputes Act***, the orders of the Industrial Court are final and not subject to any review, variation, setting aside, appeal and/or otherwise .

16. Since the said Court was no served with any order staying its proceedings, its orders were well founded in law and practice since it had the requisite jurisdiction. According to the 2nd respondent, this application is an afterthought since the orders already took effect and this Court in any case has no power to look into the merits of the decision of the Industrial Court unless such a decision is given outside the jurisdiction of the Court which is not the case herein. In support of this submission, reliance is sought in **Kenya Airways Ltd vs. Kenya Pilots Ass. Misc. App. No. 254 of 2001** as well Misc. App. No. 286 of 2007 – **Thika Municipality and the Industrial Court**.

17. It is therefore submitted that the application as filed does not lie in law, is misconceived and an abuse of the court process based on **Kenya Bankers Association and Bifu High Court Misc. Case No. 1143 of 2004**.

18. According to the 2nd respondent, the said court's award was not inconsistent with any other statute neither did it contravene section 16(4) of the ***Trade Disputes Act***. In this respondent's view, the court neither took into account irrelevant matters nor extraneous ones and the award was not unreasonable hence the application lacks merit and is an abuse of the court process and ought to be dismissed forthwith with costs.

DETERMINATIONS

19. After considering the foregoing this is the view I form of the matter.

20. However, before going into the merits of the matter, the first issue for determination is whether this Court has the jurisdiction to review a decision made by the Industrial Court as it then existed before the promulgation of the Constitution of Kenya 2010. The said court was established under section 14 the ***Trade Disputes Act***. Under the said section, the court was established by an order of the president and was not one of the superior courts under the former Constitution. The status of that court was the subject of **Kenya Airways Limited vs. Kenya Airline Pilots Association Nairobi HCMA No. 254 of 2001 [2001] KLR 520,** in which **Visram, J** (as he then was) held that the Industrial Court is a subordinate court to the High Court as the constitution, specifically sections 60 and 65(2) when read together with section 123(1) strongly suggests that the High Court is empowered to play a supervisory role over the Industrial Court and that in determining whether the High Court has power to correct an error on the face of the record by way of certiorari notwithstanding the ouster clause, a distinction is to be drawn between an error of law which affects the jurisdiction and one which does not. The learned Judge further held that where an Act contains a finality clause that Act cannot prevent the High Court from acting where the inferior tribunal has acted without jurisdiction.

1. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect. Many modern statutes contain provisions, which attempt to remove decisions of tribunals or Ministers from review by the courts by making these decisions 'final' or 'conclusive'. The remedy by *certiorari* is never taken away by statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal" but does not mean without recourse to *certiorari.* It makes the decision final on the facts but not final on the law. Notwithstanding that the decision is by statute made "final" *certiorari* can still issue for excess of jurisdiction or for an error of law on the face of the records…… And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of

the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise……. A statute setting up a tribunal may of course, in clear and precise words, debar any inquiry that may be necessary to decide whether the tribunal has acted within its authority or jurisdiction and such a provision would operate to debar contentions that the tribunal while acting within its jurisdiction has to come to wrong or erroneous conclusions. There would, however, even in such a case, be no difficulty in pursuing and adducing evidence in support of an allegation, for instance, that the members of the tribunal had never been appointed to act as such members or that those who had been appointed had by some irregular conduct disqualified themselves for membership of the tribunal. Further, it seems, there would be no difficulty in raising any matter that goes to the right or power of the tribunal to exercise the function of the power vested upon it. What an ouster clause does is to forbid any questioning of the correctness or the validity of a decision or determination, which it was within the area of jurisdiction of the tribunal to make. If the tribunal while acting within its jurisdiction makes an error, which it reveals on the face of its recorded determination, then the Court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a Court of law. If a particular issue is left to the tribunal to decide, then even where it is shown that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters, which are left to the tribunal for its decision such errors, will be errors within jurisdiction. If issues of law as well as facts are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called up in question in any court of law. If, therefore a tribunal while within its area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or as is often expressed, on the face of the record) then the superior Court could correct that error unless it was forbidden to do so and it would be so forbidden if the determination was 'not to be called in question in any court of law'. If so forbidden it could not then even hear the argument which suggested that error of law has been made. It could however, still consider whether the determination was within 'the area of the inferior jurisdiction'."

22. Accordingly, I hold that this Court has the jurisdiction to exercise its supervisory jurisdiction over the decisions of the Industrial Court as then constituted notwithstanding the finality clause in the repealed ***Trade Disputes Act***.

23. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

1. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision

of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

2. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.
3. Similarly in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**, the Court expressed itself as follows:

"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…....…Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced…….It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles…..So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts."

27. It is contended on behalf of the applicant that since there was an appeal pending before the Court of Appeal, the Industrial Court was barred from proceeding with the new matter that was before it. Section 14(9)(c) of the ***Trade Disputes Act*** provided that the Court shall not take cognizance of any trade dispute or deal with any matter connected therewith while such dispute or matter is in the process of being settled, investigated or otherwise determined by means of any other proceedings under the provisions of this Act or of any written law. The applicant further relies on section 6 of the ***Civil Procedure Act*** which provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

28. It is, however important to note that the ***Civil Procedure Act*** is expressed in the preamble to be "*An Act of Parliament to make provision for procedure in civil c*ourts". In **Opiyo & Others Vs. Attorney General [2005] 2 KLR 502 Aluoch, Ibrahim & Mugo, JJ** held:

"Whereas the High Court's supervisory powers under section 65(2) extends to Industrial Court, the Industrial Court is a special Court established by the President under section 14 of the Trade Disputes Act and not by Parliament as envisaged under section 65(1) of the Constitution. Its jurisdiction as vested in the judge under the said Act is best considered to be quasi-judicial and not falling under either civil or criminal jurisdiction. However, in light of section 77(9) of the Constitution and considering that the High Court's jurisdiction in this matter derives mainly from section 84(2) and not merely from section 65(2), Parliament could not have intended that the discretion of the Industrial Court judge be not protected under section 82(9). This protection is the very reason that parliament went further to protect the awards of that court from interference by enacting section 17 of the Trade Disputes Act."

29. It is therefore clear that in exercising its jurisdiction under the repealed ***Trade Disputes Act***, the Industrial Court was neither exercising civil nor criminal jurisdiction and its exercise of jurisdiction was protected under section 17 of the Act and was free from interference. Here a distinction must be made between exercise of discretion which was protected and acting outside its jurisdiction or breach of the rules of natural justice which is subject to the supervisory jurisdiction of the High Court. Therefore not being a civil jurisdiction section 6 of the ***Civil Procedure Act*** did not, in my view, apply to its proceedings.

30. With respect to section 14(9)(c), that provision applied where there was a trade dispute or any matter connected therewith which was in the process of being settled, investigated or otherwise determined by means of any other proceedings under the provisions of the Act or of any written law that were pending. That the matter before the Court of Appeal would be a matter in the process of being determined by means of proceedings under the provisions of a written law is not in dispute. However, it is my view that the matter must not be any matter but must be a matter substantially in issue in the two courts. In this case it is alleged that the issues in dispute were similar. However, it is clear that the parties were not exactly the same since the parties before the Court of Appeal were fewer than the ones before the Industrial Court. Therefore whereas it is arguable that the 33 people whose cases were before the Court of Appeal would be bound by that decision, the other parties who were not parties in the Court of Appeal would obviously not be bound by the decision of the Court of Appeal since a Court cannot by its decision bind non-parties to its decision. See **John Gitata Mwangi and 3 Others vs. Jonathan Njuguna Mwangi And 4 Others Civil Appeal No. 213 of 1997.**

31. If the *ex parte* applicant was of the view that the proceedings before the Industrial Court should have been stayed it should have applied for the stay thereof either before the trial Court itself or before the Court of Appeal. Apart from that it is contended by the respondents that the original case that gave rise to the appeal was withdrawn. Although the said withdrawal is contested, without the record of the said matter before me, It is not possible for me to make a finding whether or not the same was withdrawn since the actual withdrawal of a suit is a matter of fact to be established from the records.

32. Apart from the foregoing, the issue of jurisdiction based on the pendency of the appeal in the Court of Appeal was taken up in **Municipal Council of Thika vs. The Industrial Court of Kenya Nairobi High Court Miscellaneous Civil Case No. 268 of 2007** were duly considered by **Wendoh, J** who found that the applicant was challenging the merits of the decision of the Industrial Court's and declined to grant the orders sought. Most of the issues raised herein were live issues then and were dealt with by the learned Judge. To find otherwise would amount to sitting on appeal against the said decision. Although the applicant is of the view that the issue is not res judicata, **Wendoh, J** after considering the determination by the Industrial Court with respect to the pendency of the Appeal and withdrawal notice concluded that it matters not whether the decision of the Industrial Court was right or wrong because the court is allowed to err and an appeal can lie from such decision. Similarly, this not being an appeal against the decision of the Industrial Court, the Court cannot make a finding whose effect would be to revisit the determination made by the Industrial Court which this court in the earlier judicial review

proceedings had declined to revisit.

33. The only issue that was not before the learned Judge was the award which the applicant contends was outside the jurisdiction of the Court. However, as was held by **Mwendwa, CJ and Madan, J** in**Re Motor Trade and Allied Industries Employers Association Nairobi HCMC No. 116 Of 1969 [1970] EA 435**:

"In a dispute referred to it the Industrial Court is empowered to decide terms and conditions of employment which include – they must include – the power to make provision in the event of frustration just as the parties themselves could provide for such an eventuality. The Industrial Court is substituted for the parties to settle the terms and conditions of employment for them. The court also considers it simple logic that like the parties themselves the Industrial Court should be able to make provision to meet circumstances arising from frustration as to do so would not be inconsistent with any written law. In effect an award operates like a provision agreed between the parties."

34. It is not in dispute that even in ordinary civil courts there is nothing to stop a court from ordering a reinstatement if the same is done by consent. Therefore if an award has contractual effect, I do not accede to the applicant's argument that the industrial court had no jurisdiction to order reinstatement. In my view, it must have been a recognition of this unique nature of an award that section 15 of the ***Trade Disputes Act*** recognised an order of reinstatement as a remedy under the Act as opposed to a remedy under the ***Employment Act***. This view is strengthened by the decision of **Platt, JA** in **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194** that a reinstatement made under the ***Trade Disputes Act*** is a "private law" remedy which creates a new cause of action created by a statute and that this is a new cause of action however, and statutory remedies that go with it, are not enforceable by ordinary action, nor indeed by judicial review; they are only available to an employee on a successful application to an industrial tribunal.

ORDER

35. In the result the Notice of Motion dated 8th June 2009 is unmerited and the same is dismissed with costs to the Respondents.

Dated at Nairobi this day 26th of April 2013

G V ODUNGA
JUDGE

Delivered in the presence of Mr Nyaribo for Kahonge for the applicant and Mr Mbuvi for the 2nd respondent