



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIVIL CASE NO 995 OF 2007

**IN THE MATTER OF AN APPLICATION BY KENYA PORTS AUTHORITY FOR ORDERS
OF CERTIORARI**

AND

IN THE MATTER OF THE TRADE DISPUTES ACT

AND

IN THE MATTER OF THE RETIREMENT BENEFITS ACT 1997

AND

IN THE MATTER OF THE KENYA PORTS AUTHORITY ACT

BETWEEN

KENYA PORTS AUTHORITYAPPLICANT

VERSUS

THE INDUSTRIAL COURT OF KENYA1ST RESPONDENT

KENYA DOCK WORKERS UNION.....1ST INTERESTED PARTY

DOCK WORKERS RETIREES

ASSOCIATION.....2ND INTERESTED PARTY

JUDGEMENT

Pursuant to leave granted by the court on 17th September, 2007, the ex-parte applicant Kenya Ports Authority (KPA) filed a notice of motion dated 19th September, 2007 in which it prays for orders as follows:-

1. That an Order of certiorari do remove into the High Court to quash that part of the award of the Respondent herein dated 5th April, 2007 in Industrial Cause No. 52 of 2002 in which the following orders were made.

(a) That the contributions of the employees who are still in service, for the period under consideration, i.e. January, 1999 to June, 2001, be credited to their accounts under the contributory Pension Scheme and certificates thereof be issued to them.

(b) That the contributions (of both the employee and the authority) for those employees who have since left employment, be paid or refunded to them or their next of kin in accordance with the

contributory Pension Scheme rules and regulations.

- (c) That the Board of Trustees shall strictly enforce the contributory Pension Scheme so formulated and introduced in accordance with the law, especially the Retirement Benefits Act, and the rules and regulations made or prescribed thereunder, and/or contained in the Deed of Trust.
2. THAT costs of this application be provided for

In support of the application the applicant cites the following grounds:-

- (a) The part of the Award dated 5th April, 2007 which is complained of is ultra vires the scope of the statutory powers allocated to the Industrial Court under the Trade Disputes Act.
- (b) The decision is ultra vires as the Industrial Court has no power under the Trade Disputes Act to make orders as to the type of Pension Scheme that the applicant should adopt.
- (c) The decision is unlawful as it usurps the power of the Retirement Benefits Authority to deal with the regulation, supervision and promotion of retirement benefits schemes as provided under the Retirement Benefits Act.
- (d) The part of the Award making the orders complained of is patently irrational. The Respondent, having found that the demand by the Union that the employees' contributions for the period January, 1999 to June, 2001 be refunded to them and that the Authority revert to non-contributory Pension Scheme is absolutely uncalled for and untenable, it was therefore irrational and unreasonable to proceed to order that the contributions be refunded.
- (e) The decision is also unreasonable and impracticable to the extent that the contributions which the Respondent has ordered should be refunded includes pension dues already paid or computed for payment upon retirement.
- (f) The decision is unlawful and contrary to statute. Under Rule 18(3) of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations 2000, the scheme rules shall provide that a member of the scheme shall not be permitted to withdraw from membership whilst he remains an employee of the Sponsor.
- (g) The award is also contrary to section 6(f) of the Employment Act, Cap 226 Laws of Kenya, which provides that an employer may deduct from the wages of his employee any amount which is authorized by any written law for the time being in force. The deductions had been made pursuant to Legal notice No. 82 dated 11th June, 1999, by the Minister for Transport and Communications.
- (h) The delay in delivering the decision is so inordinate as to make its enforcement unfair. The final submissions were made on 5th August, 2003 and the ruling was delivered nearly 4 years later. No explanation has been given for this inordinate and unreasonable delay.
- (i) That in making the said award, the Industrial Court unfairly and unreasonably took into account factors which it ought not to have taken into account and omitted to consider factors which it ought to have considered.
- (j) There is a real danger that unless the Orders sought herein are granted the Respondents through their agents will proceed with the enforcement proceedings of the Award against the applicant on the basis of the defective, illegal, and unreasonable decision.
- (k) Such further grounds as shall be adduced at the hearing hereof.
- (l) This application is meritorious and has been brought without unreasonable delay.
- (m) It is just, fair and equitable that the Orders sought herein be granted to the applicant.

The application is also supported by a statutory statement dated 28th August, 2007, a verifying affidavit sworn by Muthoni Gatere the Corporation Secretary of KPA and documents annexed to the verifying affidavit.

In the application the Industrial Court is the respondent whereas Kenya Dock Workers Union and the Dock Workers Retirees Association are the 1st and 2nd interested parties respectively. Looking at the court file it appears that the respondent did not participate in these proceedings. The 1st interested party opposed the application through a replying affidavit sworn by its General Secretary Mr. Simon K Sang on 16th September, 2010. The 2nd interested party opposed the application through a joint replying affidavit sworn on 19th November, 2010 by Pius Omondi Owuor, Jackson Mulwa Ngali, Ongoro Weda, Jennifer Kitwa and Apollo Okello Ogwambo. The said deponents swore the affidavit on their own behalf and on

behalf of the other members of the 2nd interested party. The members of the 2nd interested party are retirees of the applicant (KPA). Looking at the interested parties' replying affidavits it is clear that they are arguing that the respondent had jurisdiction to make the challenged award and that the challenged award was made within the law.

The parties also filed written submissions and authorities. I have looked at all the papers filed in this case and I have come to the conclusion that there are two broad issues to be addressed in this judgment namely:-

1. Whether this court has jurisdiction to handle this matter; and
2. Whether the Industrial Court (the respondent) exceeded its jurisdiction.

On the issue of the jurisdiction of this court, the interested parties submitted that its jurisdiction to review the respondent's awards was ousted by Section 17(2) of the repealed Trade Disputes Act, Cap 234. Section 17 of the said Act had provided as follows:-

“17(1) The award or decision of the Industrial Court shall be final.

(2) The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise, either at the instance of the Government or otherwise.”

I think the best thing to do is to address all the issues that come with jurisdiction so that my position on the relationship of the respondent to the High Court can come out very clearly.

From the outset it should be clear that this judgement addresses the position that prevailed before the current Constitution was promulgated on 27th August, 2010. A reading of the current Constitution clearly shows the status of the Industrial Court vis-à-vis the High Court. In the repealed Constitution the status of the Industrial Court in relation to the High Court was not very clear. The hazy situation prevailing in the repealed Constitution led to two different interpretations by this Court on the issue of the relationship between this Court and Industrial Court.

One of the two interpretations is found in the decision of Mohammed K Ibrahim (as he then was) in the case of **REPUBLIC V INDUSTRIAL COURT OF KENYA BANKERS ASSOCIATION, NAIROBI H.C. MISC. APPLICATION NO. 1143 OF 2004**. In that case the learned Judge was of the view that the repealed Constitution did not give supervisory jurisdiction to the High Court over the Industrial Court. He also held the view that even if the decisions of the Industrial Court were amenable to review by the High Court Section 17(2) of the Trade Disputes Act had clearly denied the High Court jurisdiction to grant judicial review remedies in respect of awards made by the Industrial Court. On the issue of the Constitution and Industrial Court this is what the learned Judge had to say at pages 24 and 25 of his judgment:-

“Under Section 65 of the Constitution, Parliament is empowered to establish subordinate courts and courts martial. On the grounds, I hold that the Industrial Court is not a court contemplated by Section 65(2) of the Constitution as it was not established by Parliament under Section 65 (1). As such it is not a court amicable to the supervision of the High Court under the said provision.”

The school of thought espoused by Ibrahim, J was supported by J.G. Nyamu, J (as he then was) who had earlier held in the case of **KENYA GUARDS & ALLIED WORKERS UNION VS. SECURITY GUARDS SERVICES & 38 OTHERS, NAIROBI H.C. MISC. APPLICATION NO. 1159 OF 2003** that:-

“Section 17(2) of the Trade Disputes Act which gives finality to the Industrial Court awards reflects a deliberate policy decision by Parliament to achieve finality in the handling of industrial relations. It is the function of Parliament to articulate policy and to legislate in order to give effect to that policy. On the other hand it is the function of the courts to interpret legislation. It has not been suggested that section 17(2) of the Trade Disputes Act is ambiguous or capable of having more

than one meaning. It would be a violation of the constitutional doctrine of separation of powers for this court to usurp the powers of Parliament to make law.

It is also significant to observe that the finality intended by Parliament as stated in the section has served this nation well since the establishment of the Industrial Court many years ago. This court cannot therefore ignore the great public interest that has been achieved by the finality of the Industrial Court awards. Granted that the Industrial Court, like any other court can make mistakes, the mischief of those mistakes is greatly outweighed by the virtue of the finality of the awards. Parliament had addressed the issue of mistake in Section 16 of the Trade Disputes Act where in the event of a mistake an applicant can request the Industrial Court for an interpretation of an award. To my mind there is therefore no loophole for the court to seal and make judge made law in the situation before me.”

The other school of thought was articulated by Visram, J (as he then was). He was of the view that the repealed Constitution did not cloth the Industrial Court with the status of the High Court and that being so the only other cloth available to the Industrial Court was that of subordinate courts. Having grouped the Industrial Court with the subordinate courts, he went ahead to find that the Industrial Court was amenable to the supervisory jurisdiction of the High Court. He brought out this position clearly in the case of **KENYA AIRWAYS LIMITED VS.KENYA AIRLINE PILOTS ASSOCIATION, NAIROBI H.C. MISC. APPLICATION NO. 254 OF 2004** when he stated that:-

“I agree with the applicant’s contention that the Industrial Court is subordinate 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. Further, the Constitution supersedes the Interpretation and General Provisions Act and I would therefore go by the Constitution and hold that the Industrial Court is inferior to the High Court.

In the present case, I am satisfied that there is prima facie evidence to suggest that the Industrial Court did act in excess of its jurisdiction. I am also persuaded that where there is an ouster clause in an Act such as Section 17(2) of the Trade Disputes Act and the inferior court (the Industrial Court) acts in excess of its jurisdiction then the High Court has power to interfere with that decision or award of that inferior court.”

This same position was adopted by this Court (K H Rawal (as she then was), O Mutungi and M Kasango) in **MECOL LIMITED V ATTORNEY GENERAL & 7 OTHERS [2006] eKLR** when they stated that:-

“ It is with a sigh of relief that we note that all learned counsel appearing for the Respondents have conceded that the Industrial Court is a subordinate Court in terms of section 65[1] and section 123[1] of the Constitution and we do express our appreciation to their candid acceptance to the obvious point of law.”

The Court went ahead and gave its opinion on the other issues relating to jurisdiction. Having found that the Industrial Court was a subordinate court the Court went ahead to decide whether the awards of the Industrial Court were by their unique nature not amenable to review by the High Court and this is what the Court said:-

“...we are of the firm view that the makers of the Constitution could not possibly have intended that there would be a branch of the law not amenable to the supervision by way of Judicial Review of the High Court so far as any Subordinate Court is concerned..... We also observe that the nature of litigation before the Industrial Court falls within the ambit of Civil Law remedies touching the issues of employment and trade disputes. Accordingly, the High Court is empowered by the Constitution to grant orders of certiorari, mandamus or prohibition in respect of proceedings and decisions of the Industrial Court like any other subordinate courts.”

On the issue of Section 17(2) of the Trade Disputes Act which appeared to bar the High Court from issuing orders of certiorari and prohibition in respect of awards made by the Industrial Court, the Court found the said section to be inconsistent with the provisions of the sections 65[2] and 84 of the Constitution. They declared the said provision of the Trade Disputes Act to be unconstitutional.

To my understanding the Court of Appeal has not had its say on these issues. I will therefore decide which school of thought I should join and give my reasons for doing so.

Was the Industrial Court an inferior tribunal as per the repealed Constitution? A look at the repealed Constitution shows that the Industrial Court was not mentioned therein. Section 123 of the repealed Constitution stated that:-

“Subordinate court “means a court of law in Kenya other than:-

- (a) the High Court;**
- (b) a court having jurisdiction to hear appeals from the High Court; or**
- (c) a court martial.”**

The fact that the makers of the repealed Constitution did not include the Industrial Court among the subordinate courts can only imply that the Industrial Court came into being after the Constitution had been passed. It is also clear that when it was created the lawmakers did not find it necessary to entrench it in the Constitution. One can say that its jurisdiction was special but that alone did not put it at par with the High Court. This Court when exercising its judicial review powers, exercises special jurisdiction conferred upon it by the Law Reform Act and Order 53 of the Civil Procedure Rules. It will issue orders to curb maladministration by inferior courts like the Industrial Court. I therefore agree with the decision by this Court in the **MECOL LIMITED** case that the makers of the repealed Constitution never intended to make the Industrial Court a special subordinate court not amenable to review by this court. The repealed Constitution gave this Court supervisory power over all subordinate courts and it should be implied that the supervisory power included issuance of judicial review orders in respect to Industrial Court awards.

The next question would be whether the ouster of the jurisdiction of this Court by Section 17(2) of the Trade Disputes Act completely bars the Court from issuing orders of certiorari and prohibition in respect of Industrial Court awards. I will again agree with Visram, J (as he then was), K H Rawal, J (as she then was), O Mutungi, J and M Kasango, J that once the Industrial Court acts outside its jurisdiction, this court has power to redirect it to the correct path by issuing the necessary judicial review orders.

Although, in the case of **REPUBLIC VS. ATTORNEY GENERAL & ANOTHER (2006) eKLR** the Court of Appeal did not make any determination on Section 17(2) of the Trade Disputes Act the Court went ahead and quoted the commentary of de Smith Woolf & Jowell at page 234 of the 5th edition of their book: **Judicial Review of Administrative Action** on the barring of judicial review by statute. I reproduce the said quotation as follows:-

“Even where the right to certiorari had been expressly taken away by statute, the courts relying on one or other of the restrictive rules of interpretation already mentioned, or upon the proposition that Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior court, persistently declined to construe the words of the statute literally. It was held that certiorari would issue, notwithstanding the presence of words taking away the right to apply for it, if the inferior tribunal was improperly constituted (as here some of its members had a disqualifying interest), or if it lacked or exceeded jurisdiction because of the nature of the subject-matter or failure to observe essential preliminaries, or if a conviction or order had been procured by fraud or collusion. Such language would also be ineffective to exclude certiorari or a declaration of invalidity for breach of either rule of natural justice. Legislation purporting to exclude review by other named remedies (e.g. prohibition, injunction) was equally ineffective to prevent the courts from containing inferior tribunals within the limits of their jurisdiction.”

The case which addressed the impact of exclusionary clauses on the jurisdiction of the High Court is the decision of the House of Lords in **ANISMINIC VS. FOREIGN COMPENSATION COMMISSION (1969) 1 All ER 208 HL**. Discussing the House of Lords decision on the impact of exclusionary clauses, **B. L. Jones & K Thompson (Garner's Administrative law, 8th edition, pages 317-318** state that:-

“The issue came before the House of Lords again in *Anisminic Ltd v Foreign Compensation Commission*..... In this case the House decided, unanimously on this point, that a privative clause of this kind could not oust the jurisdiction of the court to declare void a determination of the Commission based on an error of law on a jurisdictional matter. If the decision or determination was *ultra vires* it was really no determination at all and so the court was not acting contrary to the statutory requirement that no ‘determination’ be questioned.....

Accordingly, the decision in *Anisminic* suggests that this type of clause has no effect in excluding judicial review on the basis of *ultra vires*. It would, however, prevent review for mere *intra vires* error of law on the face of the record.”

Considering the views of all the above quoted scholars, I am persuaded that where Parliament inserts a clause in statute like the one it had inserted via Section 17 of the repealed Trade Disputes Act such a clause cannot be construed to have taken away the jurisdiction of this court to quash illegal decisions. If an inferior court or tribunal acts out of the law that created it, then this court has no option but to quash such decisions made outside the law.

The next question would then be whether the respondent's award was *ultra vires* the repealed Trade Disputes Act. The respondent was created **“for the purpose of the settlement of trade disputes and of matters relating thereto”** [Section 14(1)]. In accordance with Section 2 of the Act a trade dispute:-

“means a dispute or difference between employers and employees, or between employees and employees, or between employers and trade unions, or between trade unions and trade unions, connected with the employment or non-employment, or with the terms of employment, or with the conditions of labour, of any person and includes disputes regarding the dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements; and it also includes an apprehended trade dispute”

Retirement benefits are payments payable primarily upon retirement, or upon death, or upon termination of service. Such benefits are therefore connected to employment so that any dispute concerning retirement benefits can as well be termed a trade dispute.

The applicant argued that any dispute to do with retirement benefits ought to be dealt with under the disputes resolution system provided by the Retirement Benefits Act, Cap 197. In furtherance of this line of argument the applicant submitted that the respondent therefore did not have jurisdiction to entertain the matter that was placed before it. On this issue the interested parties replied that since the retirement benefits scheme in issue had not been registered then the Retirement Benefits Act did not offer a solution to the 1st interested party who took Cause No. 52 of 2002 to the respondent.

I find it important for the purpose of this judgement to reproduce sections 22(1) and 23(1) of the Retirement Benefits Act. Section 22(1) states that:-

“No person shall establish a retirement benefits scheme except in accordance with the provisions of this Act and under the authority of a certificate issued under this Act.”

Section 23(1) provides that:-

“A person proposing to establish a retirement benefits scheme or to act as a manager, a custodian or an administrator shall apply to the authority for, and obtain, a certificate of registration before establishing the scheme or commencing the performance of any of the functions of a manager or a custodian.”

I have quoted these two sections so as to demonstrate that a retirement benefits scheme can only fall within the Retirement Benefits Act after registration. It was agreed by the parties before me that by the time the 1st interested party herein went to the respondent the retirement benefits scheme in dispute had not been registered as required by the Retirement Benefits Act. This fact also clearly came out in the award of the respondent. The question would then be where was the 1st interested party expected to have gone to at that particular time? The answer is that the only body the interested party could have approached was the respondent.

In its award the respondent clearly acknowledged the provisions of the Retirement Benefits Act. It is clear from a reading of the award that it was alive to the provisions of the said Act. The respondent was asked to determine whether the employees and the retirees of the applicant should revert to the old non-contributory pension scheme. It answered that question and went ahead to clarify what was happen to the contributions made to the contributory pension scheme prior to the registration of the scheme with the Retirement Benefits Authority.

Looking at that award, one cannot say the respondent exceeded its jurisdiction. It was at one point argued by the applicant that the award lacked clarity. If that be so, then the solution was provided by Section 16(5) of the repealed Trade Disputes Act which provided that:-

“If any question arises as to the interpretation of an award or as to an award being inconsistent with any written law, the Minister or any party to the award may apply to the Industrial Court which made the award for a determination of the question, and the court shall determine the matter after hearing the parties concerned, or without such hearing if the parties consent, and any such determination shall be deemed to be an award made under this Act.

Provided that where the question arises out of any clerical mistake, incidental error or omission the Court may rectify such mistake, error or omission without hearing the parties concerned.”

It is clear from the provisions of Section 17 of the repealed Trade Disputes Act that Parliament intended to give independence to the Industrial Court. In this case this court could have only stepped in if it had been demonstrated by the applicant that the respondent heard a dispute which it had no jurisdiction to hear. As already demonstrated however, it is clear that the respondent acted within its mandate. The end result therefore is that the applicant’s notice of motion is dismissed. The applicant will meet the costs of the interested parties.

Dated and signed at Nairobi this 21st Day of February, 2012.

W. K. KORIR
JUDGE