REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL SUIT NO. 678 OF 2008

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF THE AWARD OF THE INDUSTRIAL COURT IN CAUSE NO.120 OF 2007 DELIVERED ON 9TH SEPTEMBER, 2008

REPUBLIC .....APPLICANT

VERSUS

THE INDUSTRIAL COURT.....RESPONDENT

AND

KENYA BUILDING, CONSTRUCTION TIMBER FURNITURE & ALLIED

INDUSTRIES EMPLOYEE'S UNION.....INTERESTED PARTY

EX-PARTE

MORRIS & COMPANY (2004) LTD.....APPLICANT

JUDGEMENT

By way of a notice of motion dated 6th May, 2009 brought under Order LIII Rule 3 of the Civil Procedure Rules Morris & Company (2004) Ltd (the ex-parte applicant) prays for orders as follows:-

1. THAT the Honourable court be pleased to grant an order of certiorari to bring into the High Court and quash the Award issued by the Respondent on 9th September, 2008 in Cause No. 120 of 2007.

2. THAT the Honourable Court be pleased to grant an order of prohibition restraining the Interested Party from enforcing and/or commencing execution proceedings in respect of the Award issued by the 1st Respondent on 9th September, 2008 in Cause No. 120 of 2007.

3. THAT the costs of and incidental to this application be provided for.

4. Such further relief as this Honourable Court may deem just and expedient to grant.

The application is supported by a statement dated 31st October, 2008, a verifying affidavit sworn by Diamond H Lalji on 3rd November, 2008 plus exhibits annexed to the verifying affidavit. All the documents in support of the application were filed at the time the applicant came to court to seek leave to commence these judicial review proceedings. In the application the Industrial Court is named as the respondent and the Kenya Building, Construction, Timber, Furniture and Allied Industries Employees' Union is the interested party.

The grounds in support of the application are:-

(a) On 9th September 2008, the Respondent issued an Award that was prima facie erroneous, null and void ab initio by reason of being ultra vires the applicable law.

(b) The said Award is inconsistent with statute.

(c) The conduct of the Respondent in making the Award was in the circumstances, unreasonable within the Wednesbury's principle of unreasonableness

(d) The Award made by the Respondent had no basis in law whatsoever. In addition the Respondent completely disregarded the provisions of Section 14(5) (1) and 16 of the Employment Act, Cap 226, now repealed.

(e) The Award made by the Respondent elevated subsidiary legislation, being Legal Notice No. 94 of 2004, above the statutory provisions.

(f) That the Respondent's action aforesaid went against the principle of law that where subsidiary legislation is inconsistent with statute, the statutory provisions must prevail.

(g) In issuing the Award on 9th September, 2008, the Respondent failed to uphold the rule of law, resulting in breach of the applicant's legitimate expectation.

(h) The Respondent acted in excess of its jurisdiction.

(i) The Respondent failed to take into account relevant factors and instead took into account extraneous matters and as a result, arrived at a decision that was plainly wrong.

(j) The Award contravenes the provisions of Section 16(4) of the Trade Disputes Act (Cap 234), now repealed.

The respondent opposed the application through grounds of opposition dated 31st September, 2010 which state as follows:-

1. The High Court lacks the jurisdiction to review the decision of the Respondent delivered on 9th September 2008 in view of the provisions of Section 27(1) of the Labour Institutions Act No. 12 of 2007 which was effective as at 9th September, 2008 and which provides for appeals to the Court of Appeal against any final judgment, award or order of the Industrial Court.

2. The judicial review application herein is premature in view of the provisions of section 26 of the Labour Institutions Act No. 12 of 2007 which confers the Respondent with the power to review its orders, awards or judgements.

3. The judicial review application lacks merit as the Respondent's award delivered on 9th September, 2008 is not illegal and ultra vires as the Respondent acted within the powers given to it by the Trade Disputes Act (repealed) and by the Labour Institutions Act No. 12 of 2007, which was

the law applicable when the award was delivered.

4. The award delivered by the Respondent is not contrary to Sections 14(5) (1) and 16 of the Employment Act Cap 226 as the contracts of service contemplated as terminable by either party at the close of any day without notice are those <u>contracts not to perform a specific work without reference to the time</u> the work is to be performed. The contracts of service between the applicant and the grievants, the subject of the dispute before the Respondent were regulated by the Regulation of Wages (Building and Construction Industry) Order, 2004 which <u>provides categories of employees to perform specific work (Regulation 21) and hours of work (Regulations 5 and 6).</u>

5. The Respondent was in view of ground 4 above right in finding the provisions of Legal Notice No. 94 of 2004 as applicable to the grievants and awarding the grievants compensation in accordance with Regulation 19(1) of Legal Notice No. 94 of 2004.

6. The Respondent's award is legally reasonable and not inconsistent with the Employment Act as the Respondent made a finding of fact that the grievants lost their employment unlawfully as a result of the lock out imposed by the applicant.

7. The application is premature, misconceived and an abuse of the court process.

The interested party opposed the application by way of a replying affidavit sworn on 2nd July, 2009 by its Secretary General Mr. Francis K Murage. Looking at the said affidavit it is clear that the interested party opposed the application on the following grounds.

1. THAT the respondent acted procedurally, lawfully and within its jurisdiction;

2. THAT this court is barred by Section 17(2) of the Trade Disputes Act (now repealed) from exercising its review jurisdiction in respect of decisions made by the respondent;

3. THAT the only avenue opened to the applicant for challenging the respondent's decision is by way of an appeal to the Court of Appeal as provided by Section 27 of the Labour Institutions Act, and

4. THAT Legal Notice No. 94/2004 was not inconsistent with Section 16(4) of the repealed Trade Disputes Act or any other law as alleged by the respondents.

All the parties filed written submissions and provided authorities in support of their submissions. I have carefully considered the submissions and authorities presented by the parties. Having reproduced the positions taken by the parties, it not necessary to state the arguments put forward by the advocates since this will be repetitive.

In my view there are two broad but intertwined issues to be addressed in this judgment namely:-

(a) Whether this court has jurisdiction to entertain the applicant's application; and

(b) Whether judicial review should come to the aid of the applicant.

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 varying interpretations by the judges of the High Court as to the relationship between the High Court and Industrial Court. In the submissions made in this case I have been confronted with these different conclusions and findings.

One view 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 was of 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 is 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 is led by Visram, J (as he then was). In this school you will find R.P.V Wendoh, J **(MUNICIPAL COUNCIL OF THIKA VS. INDUSTRIAL COURT OF KENYA NAIROBI HIGH COURT CIVIL CASE NO. 268 OF 2007)** and Anyara Emukule, J.

These judges were 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, this school of thought went ahead to find that the Industrial Court was amenable to the supervisory jurisdiction of the High Court. The position of this group was clearly brought out by Alnashir Visram, J (as he then was) 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."

To my understanding the Court of Appeal has not had its take on these issues. As a newly appointed High Court Judge I have now reached a T-junction in as far as these issues are concerned. I can decide to turn right and taken the route taken by Ibrahim, J and Nyamu, J (as they then were) or turn left and take the route taken by Visram, J (as he then was), Wendoh, J and Anyara Emukule, J. Whichever route I take, I must give my reasons.

Was the Industrial Court an inferior tribunal as envisaged by 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 was an afterthought and when it was created the lawmakers did not find it necessary to give it constitutional status by introducing the necessary amendments. One could 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. It cannot stand aside and say that the Industrial Court exercised special jurisdiction in that it handled employer-employee disputes and therefore its decisions could not be reviewed. In my view the Industrial Court was before 27th August, 2010 an inferior tribunal amenable to the supervision of the High Court. I will therefore take the road taken by Justice Alnasir Visram and other like-minded judges.

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) 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 her 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."

Considering the views of these scholars, I am persuaded that even where Parliament has inserted a clause in statute taking away the right to certiorari, this court can still step in to correct acts performed in excess of jurisdiction. I am therefore of the view that Section 17(2) of the Trade Disputes Act cannot be construed to have taken away the powers of this court to check the excesses of the Industrial Court. If the applicant before me convinces me that the respondent did indeed exceed its jurisdiction, then I have no option but to issue the necessary judicial review orders.

The respondent and the interested party submitted that since Section 27 of the Labour Institutions Act provides for appeal to the Court of Appeal from the awards of the Industrial Court, then the applicant ought to have filed an appeal in the Court of Appeal. The provision of Section 27 of the said Act is interesting in that the repealed Constitution provided that the Court of Appeal could only hear appeals from the High Court. The Court of Appeal confirmed this position in **PETER N'GANG'A MUIRURI VS. CREDIT BANK LIMITED & 2 OTHERS (2008) eKLR** when it stated that:-

"**Section 64 of the Constitution establishes the Court of Appeal with such ".....jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law." On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other court other than the High Court."**

How then did Parliament expect an appeal to the Court of Appeal from an award of the Industrial Court? I do not want to speculate on the reaction of the Court of Appeal to such an appeal. In my view Section 27 of the Labour Institutions Act was clearly contrary to the provisions of the repealed Constitution. In my view, it never provides any avenue for appeal to a person aggrieved by an award of the Industrial Court and that is reason enough for this court to open its doors to the applicant herein.

At this point, I am therefore saying that the applicant is properly before this court. The next main issue is whether the respondent acted in excess of its jurisdiction in making the award in Cause No. 120 of 2007. The applicant argues that the respondent elevated subsidiary legislation (Legal Notice No. 94/2004) to the status of statute (the repealed Employment Act Cap 226) and acted on the subsidiary legislation yet the subsidiary legislation was inconsistent with statute. The applicant submits that the Legal Notice in question was inconsistent with sections 14(5)(1) and 16 of the Employment Act. The respondent and the interested party submitted that the award made by the respondent was consistent with the law and the respondent cannot be said to have acted ultra vires.

It is important to note at the outset that this court acting within its judicial review jurisdiction is only concerned with the process under which the respondent reached its decision and not the merits of the decision. Once this court finds that the decision was reached in compliance with the law, it has nothing else to do but to reject the application of the applicant.

Mr. Munyu for the applicant specifically argued that the respondent failed to take notice of the fact that there were two strikes. He also argued that the Legal Notice provided for certain benefits which could only be awarded to permanent employees and in this way the Legal Notice was inconsistent with the provisions of the repealed Employment Act.

I have carefully gone through the award of the respondent and find that the respondent clearly addressed all the issues raised. There is nothing to show that the provisions of the Legal Notice were inconsistent with the repealed Employment Act. In my view, what the applicant is trying to do is to ask this court to engage its appellate gear in respect of the award of the respondent. That cannot be allowed to happen for the applicant has submitted its prayers through the judicial review channel and its prayers can only be answered through the same channel. This court has no authority to question the award of the respondent considering that it has been decided on merits and inside the law. If this court were to do so, it would end up acting outside its judicial review mandate. I therefore decline to grant the orders sought and

dismiss the applicant’s notice of motion with costs to the respondent and the interested party.

Dated and signed at Nairobi this 14th day of February, 2012.

W. K. KORIR
JUDGE