



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION 405 OF 2009

FAIRMONT THE NORFOLK
HOTEL.....PETITIONER

V E R S U S

THE INDUSTRIAL COURT OF
KENYA.....RESPONDENT

JUDGMENT

Introduction

1. This petition arises out of proceedings of the Industrial Court in a dispute pertaining to recognition of a workers’ union. The petitioner was aggrieved by the award of the respondent dated 22nd June, 2009 in Industrial Cause No. 48 of 2007, Kenya Hotels and Allied Workers Union –v- Norfolk Hotel. The petition has been brought against the Industrial Court. The Kenya Hotels and Allied Workers Union in whose favour the award was made has not been joined as a party to the proceedings.

2. In its petition dated 3rd July, 2009, the petitioner seeks orders:-

(i) This Honourable Court be pleased to declare that the Respondents’ award directing the Petitioner to sign a Recognition Agreement with KHAWU violates the Petitioner’s freedom of Association under section 80 of the Constitution.

(ii) This Honourable court be pleased to declare that it has supervisory powers over all subordinate courts including the Respondent under Section 65(2) of the Constitution.

(iii) This Honourable court be pleased to declare that in so far Section 27 of the Labour Institutions Act which provides that any party to any proceedings before the Industrial Court may appeal to the Court of Appeal against any final judgment, award or order of the Industrial Court, it purports to deny the Petitioner a Constitutional right to redress to the High court and is inconsistent with Sections 64(1) and 65(2) of the Constitution and therefore unconstitutional.

(v) This Honourable Court be pleased to declare that the High Court has supervisory powers over all subordinate courts including the Respondent under Section 65(2) of the Constitution and that in so far as Sections 17 of the repealed Trade Disputes Act was inconsistent with Section 65(2) of the Constitution it was unconstitutional.

(iv) This Honourable Court be pleased to issue an order restraining the Respondent and the Interested Party from enforcing the award dated 22nd June, 2009 in Industrial Cause No. 48 of 2007, Kenya Hotels and Allied Workers Union –v- Norfolk Hotel.

(v) This Honourable Court be pleased to issue an order setting aside the award dated 22nd June, 2009 in Industrial Cause No. 48 of 2007, Kenya Hotels and Allied Workers Union –v- Norfolk Hotel.

(vi) Costs of this Petition.

(vii) Such other orders as this Honourable Court shall deem just.

The petition is supported by the affidavit of Ali Kadhey, the petitioner's Group Director of Human Resources sworn on 3rd July, 2009.

3. The petition is opposed on the following grounds of opposition dated 30th September 2010 and filed by the Attorney General:

1. The Respondent herein is not a legal entity capable of being sued.
2. The Respondent is a court as defined under Section 87 of the former Constitution.
3. That a Court of law has the implied Constitutional Right to make a wrong or correct decision which decision may be appealed from as provided under the law.
4. That the Respondent is not the proper party to be sued when provisions of any statutes are being challenged on the grounds of unconstitutionality.
5. The jurisdiction of the High Court to supervise subordinate Courts is not at issue.
6. The non-joinder of the Attorney General in the present petition where certain provisions of the Labour Institutions Act are being challenged renders the entire petition defective.

4. The petitioner filed written submissions dated 3rd March 2010 while the respondent filed written submissions dated 28th June 2011. The parties highlighted their submissions before this court on the 2nd of November 2011.

The Petitioner's Case

5. The petitioner's case as presented by Mr. Muthui is that the petitioner is dissatisfied with the award of the respondent made in Cause No. 48 of 2007 in which the respondent ordered the petitioner to sign a recognition agreement with a union called Kenya Hotels and Allied Workers Union (KHAWU) within 30 days of the signing of the award. As a member of the Kenya Association of Hotel Keepers and Caterers (KAHC), the petitioner has an existing recognition agreement with another union, Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers Union (KUDHEIHA). That Recognition Agreement and a collective bargaining agreement with KUDHEIHA had been registered by the respondent in this case. If the impugned award is to be recognised, there will be two Collective Bargaining Agreements and recognition agreements.

6. The petitioner argues that the results of implementation of the award would be a violation of the petitioner's rights under section 80 of the old Constitution and Article 36 of the Constitution. As a member of an existing association it will be deprived of the right to freely associate as the respondent's award takes this right away.

7. The petitioner argued that in view of the fact that the respondent had not filed a replying affidavit, the facts of the matter as presented by the petitioner were not controverted. The respondent had raised technical issues, the main one being that the Attorney-General has not been made a party to the suit, but no law had been cited to support the argument that there was a requirement that the A-G must be joined as a party.

8. It was submitted further that numerous court decisions had been made against the respondent in the past, and there is nothing unique about this decision. What the respondent was raising were the technicalities that Article 159(2) (c) addresses. If there is no dispute that the impugned award has violated the petitioner's rights, the respondent cannot hide behind a technicality. With or without the A-G, the court can set aside any decision that goes against the Constitution. The issue of the Attorney-General not being made a party cannot defeat a case on the infringement of the Constitution.

9. The petitioner cites various cases in response to the respondent's contention that joinder of the A-G is mandatory in which this court has been called upon to exercise its supervisory powers over the respondent. He refers to the cases of **Kenya Airways Limited-v-Kenya Airline Pilots Association High Court Misc. Appl. No 254 of 2001; Mecol Limited-v- The Attorney General and Others Misc. App. No. 1784 of 2004** and submits that if judicial review proceedings under the supervisory powers of the High Court can be brought against the respondent, the respondent cannot be heard to argue that proceedings for enforcement of constitutional rights arising from its proceedings or decisions cannot be brought against it.

10. Mr. Muthui asked the court to note that the A-G was representing the respondent, so if there was anything to be said by the A-G as a party, the liberty to make that representation is still available.

11. The petitioner submitted further that one of the provisions challenged in this petition is section 27 of the Labour Institutions Act. The section denies parties access to the High Court by purporting to provide that a party dissatisfied with a decision of the respondent should appeal to the Court of Appeal. It was the petitioner's contention that this provision goes against the Constitution by purporting to expand the jurisdiction of the appellate court without an amendment of the Constitution as section 64 of the Old Constitution provides that the Court of Appeal would hear appeals from the High Court. It argues that to the extent that Section 27 purports to deny the petitioner a constitutional right for redress to the High Court, and purports to confer jurisdiction on the Court of Appeal to hear appeals from the respondent, it is inconsistent with Sections 64 (1) and 65(2) of the old constitution and should be declared unconstitutional. The petitioner was of the view that the court does not require the Attorney-General in order to make a decision on the constitutionality of the Labour Institutions Act. Such a decision can be made in any proceedings before the court.

12. Mr. Muthui submitted further with regard to the respondent's submissions that the A-G must be joined as a party where the provisions of the Constitution are being challenged that the petitioner was not challenging any section or Article of the Constitution. Rather, the petitioner was challenging the provision of an Act of Parliament, namely Section 27 of the Labour Institution Act, as a secondary issue. Where there is an allegation that someone's rights have been infringed, there is no law that requires that a petition challenging that right has to be brought against the Attorney-General.

13. The position taken by the petitioner was that the petition must be brought against the person infringing the right. A constitutional reference challenging an act that infringes a party's constitutional right can only be brought against the party guilty of such infringement. In the instant case, there is no act of the Attorney-General that is being complained of.

14. With regard to the respondent's submission that the petitioner has a right of appeal, it was the petitioner's submission that an appeal was not the only remedy available in law to the petitioner. If the act complained of infringes the constitutional right of a party, the Bill of Rights grants the party the right to come before the court to complain. The petitioner also submitted that what was before the court was a question of fact, not of interpretation.

The Respondent's Case

15. Mr. Bitta presented the case for the respondent. He relied on the Grounds of Opposition dated 30th September, 2010 and written submissions dated 28th June 2011.

16. The argument by the respondent is that it is trite law that where a provision of the Constitution is

being challenged, the Attorney-General must be a respondent. There is no jurisdiction anywhere where this is not the case.

17. He argued that the respondent is a court as defined under Section 65 of the old Constitution with the mandate to adjudicate on industrial disputes. That mandate entitled them to make right or wrong decisions, and the petitioner has a right to seek redress on appeal to a higher court. He drew a parallel between this instance and a magistrate's court and submitted that if a magistrate's court makes a wrong decision, that does not allow a party to file a constitutional reference to quash the decision because the law allows a party to appeal. The petitioner has a right of appeal against decisions of the respondent. It had conceded to the jurisdiction of the Industrial Court before determination of the matters. If the court were to make a determination that Section 27 of the Labour Institutions Act is unconstitutional, the Industrial Court has no means of enforcing that decision.

18. Mr. Bitta argued that the presence of the A-G in these proceedings is limited to representing the respondent. He is not a party to the proceedings.

19. With regard to the issue of there being no challenge by the respondent to the averment in the petitioner's affidavit, Mr. Bitta submitted that the Industrial Court is a court of record. There is no dispute as to what transpired before that court, and the issue as to whether the decision infringed on the petitioner's rights is an issue of interpretation, not of facts, and the petitioner had liberty to interpret the award in any way it wished but the respondent was not required to rebut anything. He concluded that the respondent opposed the petition and reiterated that failure to join the A-G was fatal.

Issues for Determination

20. From the pleadings and submissions by the parties before me, I am of the view that three issues have been raised for determination in this petition. The first relates to the competence of the petition before the court which has been challenged by the respondent on the basis that the non-joinder of the Attorney General renders the petition fatally defective. The second, which the petitioner refers to in its submissions as a secondary issue, relates to the provisions of Article 27 of the Labour Institutions Act which the petitioner argues is unconstitutional. The third and in my view the main issue raised by this petition is whether the impugned award of the respondent violates the petitioner's constitutional rights.

Non-Joinder of the Attorney-General

21. The respondent has challenged this petition on the grounds that the respondent is a court and is not a legal entity capable of being sued. It also argues that the failure to join the A-G as a party renders the petition fatally defective. This is because the government is the guarantor of fundamental rights and in an action premised on breach of fundamental rights the proper party to be sued is the A-G. The petitioner's position is that judicial review proceedings have been brought against the respondent so there is no reason why proceedings for enforcement of constitutional rights cannot be brought against it. That the Attorney-General is representing the respondent and that the issue of joinder is a technicality and should not defeat a case for enforcement of the Constitution.

22. In the case of **Daniel Migichi Njoroge -v- The Land Disputes Tribunal Githunguri Division and 2 Others Constitutional Application No. 680 of 2007** Wendoh J, considered the issue of failure to join the Attorney General in a case challenging the decision of the Land Disputes Tribunal in which one of the parties in the dispute had been joined as a respondent and observed as follows:

'the Respondent Ruth Wambui is irregularly enjoined to this originating summons as a Respondent because this being a constitutional application, it can only be brought against the state which guarantees the private rights of individuals. The 3rd Respondent could only have been enjoined as an interested Party.'

23. It would seem to me that the proper position with regard to petitions for the enforcement of fundamental rights and freedoms is that the Attorney General must be made a party to the proceedings.

As the court noted in the case cited above, the guarantor of fundamental rights and freedoms is the state, and it is on the state that the primary obligation is imposed at Article 21 of the constitution to **‘observe, respect, protect promote and fulfil’** fundamental rights and freedoms. Further, the Attorney General is the principal legal advisor of the state, and in that capacity, the constitution imposes on him, at Article 156(6), the obligation to **‘promote protect and uphold the rule of law and defend the public interest.’**

24. In addition, and at a practical level, the enforcement of orders of the court arising out of constitutional matters brought against organs of state such as the respondent in this case of necessity requires the participation of the A-G. I therefore find and hold that the petition is defective for failure to join the A-G as a party.

25. It is also noteworthy that the petitioner has not joined the claimant in Industrial Cause No. 48 of 2007, the Kenya Hotels and Allied Workers Union, which would be adversely affected by the decision in this case and against whom an order is sought, and should have been afforded an opportunity to participate in it.

Section 27 of the Labour Institutions Act

26. The petitioner challenges the provisions of the Labour Institutions Act and submits that it is unconstitutional as it expands the jurisdiction of the Court of Appeal contrary to the provisions of the old constitution which provided that appeals from the Industrial Court would lie in the High Court. The petitioner argues also that the section denies parties access to the High Court by providing that parties dissatisfied with decisions of the respondent should appeal to the Court of Appeal. The petitioner submits that this is a secondary issue, and in my view, it is not an issue that this court need determine in this matter. The petitioner in this case has not come to this court on appeal. It has asked the court to exercise its jurisdiction under the constitution to protect the petitioner’s fundamental rights, and this is a jurisdiction that this court can exercise whether or not the petitioner has another remedy. What this court is called upon to determine is whether or not, on the facts before it, there has been an infringement of the petitioner’s rights under the constitution.

Alleged Violation of Constitutional Rights

27. I now turn to consider whether, had I found in favour of the petitioner on the technical issue with regard to joinder of the A-G, this petition discloses a violation of the petitioner’s rights under either the old or the current Constitution.

28. The petitioner alleges that its constitutional freedom of association guaranteed under Section 80 of the old Constitution and under Article 36 of the current Constitution will be infringed by the enforcement of the respondent’s award made on 22nd June 2009. The petitioner’s argument with regard to infringement of this right is presented at paragraph 4.3 of its written submissions as follows:

‘Under Section 80 of the Constitution and Article 36 of the New Constitution, the petitioner has a constitutional right to associate with other hotels that are members of the KAHC and reap the benefit of that association. One of the benefits of that association is the Recognition Agreement entered into between KAHC and KUDHEIHA.’

29. The petitioner enumerates the effects of the award as being to hinder the petitioner’s enjoyment of the right to associate with other hotels in KAHC; force it to associate with KHAWU against its consent and will and force it to have a separate recognition agreement other than the one entered into between **KAHC and KUDHEIHA.**

30. The petitioner’s argument as set out above indicates that the petitioner views the respondent’s decision of 22nd June 2009 as infringing, not its right to freely associate with other hotels, but what it perceives and describes as **‘the right to reap the benefit of that association,’** one of which benefits it sees as being the **‘Recognition Agreement entered into between KAHC and KUDHEIHA.’**

31. The question that this court needs to deal with in this petition is precisely what right is protected under section 80 of the old constitution and Article 36 of the current Constitution.

Section 80 of the old constitution provides as follows:

‘Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.’

Article 36 provides 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.

32. In the circumstances of this petition, these provisions must be read against the provisions of Article 41 which protects labour relations and provides as follows:

41. (2) Every worker has the right—

(a).....

(b).....

(c).... to form, join or participate in the activities and programmes of a trade union; and

(d)....

(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.

These constitutional provisions give constitutional underpinning to the rights of employees provided for in the Labour Relations Act, 2007 which provides at Section 4 that:

‘Every employee has the right to -

(a) participate in forming a trade union

(b) join a trade union; or

(c) leave a trade union.’

33. In my view, the intention in these constitutional and legislative provisions is to permit employees to collectively participate in unions for the protection of their labour rights. The Constitution also protects the right of employers to have the freedom to join associations of employers, and this right is also reflected in the Labour Relations Act 2007 which provides at section 6 that

‘Every employer has the right to-

(a) participate in forming an employers’ organisation or a federation of employers’ organisation;

and

(b) subject to its constitution, join an employers' Organisation or a federation of employers' organisations.'

Membership of such an employers' organisation must carry with it various benefits which will accrue to a member by virtue of the membership.

34. The question that arises, however, is whether the **'benefits'** that accrue to an employer from membership of an association are constitutionally protected, particularly where protection of such **'benefits'** would directly impinge on the constitutional rights of employees. In the present case, the petitioner seeks the court's protection, not of its right to freely associate with other hotels in **KAHC**, but of the **'benefit'** that has resulted from that membership in the form of a recognition and collective bargaining agreement entered into with a specific trade union.

35. In my view, the protection of the employer's right to association cannot extend to protection of **'benefits'** such as recognition or collective bargaining agreements entered into by the employers' association so as to deny employees the right to belong to trade unions other than the one with which the employers' organisation has entered into an agreement. To hold otherwise would effectively mean that employers' organisations, which almost invariably have greater bargaining power, would dictate to employees which trade union they can or cannot join. This would then have the effect of infringing on employees' constitutional right to **'form, join or participate in the activities and programmes of a trade union.'** It would compel employees to join a particular trade union or remain in one against their will.

36. The right of employees to join a trade union of their choice is an essential element of the enjoyment of their right to work which, though not recognised directly in the Constitution, can nonetheless be implied from the provisions of Article 2(6) of the Constitution which provides that

'Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

37. Article 6(1) of the **International Covenant on Economic, Social and Cultural Rights** provides as follows:

'The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.'

Article 7 provide as follows:

'The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a)

(b) Safe and healthy working conditions;

At Article 8, the Convention imposes an obligation on the States Parties to ensure:

'The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;'

38. In **General Comment No. 18 on Article 6 of the International Covenant on Economic, Social and Cultural Rights adopted on 24 November 2005**, the United Nations Committee on Economic, Social and

Cultural Rights notes with regard to the International Covenant on Economic, Social and Cultural Rights that:

‘The ICESCR proclaims the right to work in a general sense in its article 6 and explicitly develops the individual dimension of the right to work through the recognition in article 7 of the right of everyone to the enjoyment of just and favourable conditions of work, in particular the right to safe working conditions. The collective dimension of the right to work is addressed in article 8, which enunciates the right of everyone to form trade unions and join the trade union of his/her choice as well as the right of trade unions to function freely.

39. In my view, the right that is given prominence and priority in national and international law is the right of workers to join trade unions of their choice, which is an essential element of ***their right to work***. The right to work is, in the words of the Committee on Economic, Social and Cultural Rights ***‘essential for realizing other human rights and forms an inseparable and inherent part of human dignity.’*** (See General Comment No. 18, supra)

40. The protection of the right to work and the other rights with which it is indivisible such as the right to good conditions of work and the right to form and join a trade union which has such major implications for survival and human dignity must take precedence over any right of an employer to enjoy a ‘benefit’ conferred on it by its membership in an employers’ association.

41. In light of the above matters, I find and hold that what the respondent did in its decision of 22nd June 2009 was to recognise and uphold the right of the employees of the respondent to form, join and participate in a trade union of their choice. This decision did not, in my view, infringe on the constitutional right to freedom of association of the petitioner. The petitioner is still at liberty to join any association of hotels that it chooses to. What it cannot do is impose on its employees the trade union they should belong to simply because the employers’ association it is a member of has entered into a recognition agreement with a particular union.

42. The law provides the circumstances in which an employer will recognise and enter into a recognition agreement with a workers’ union and with which it would then negotiate a collective bargaining agreement. Section 54 of the Labour Relations Act 2007 provides that:

(1) An employer, including an employer in the public sector, shall recognise a trade union for purposes of collective bargaining if that trade union represents the simple majority of unionisable employees.

(2) A group of employers, or an employers’

organisation, including an organisation of employers in the public sector, shall recognise a trade union for the purposes of collective bargaining if the trade union represents a simple majority of unionisable employees employed by the group of employers or the employers who are members of the employers’ organisation within a sector.

(3) An employer, a group of employers or an employer’s organisation referred to in subsection (2) and a trade union shall conclude a written recognition agreement recording the terms upon which the employer or employers’ organisation recognises a trade union.

(4)

(5)

(6) If there is a dispute as to the right of a trade union to be recognised for the purposes of collective bargaining in accordance with this section or the cancellation of recognition agreement, the trade union may refer the dispute for conciliation in accordance with the provisions of Part VIII.

(7) If the dispute referred to in subsection (6) is not settled during conciliation, the trade union may refer the matter to the Industrial Court under a certificate of urgency.

43. The law thus provides a mechanism and a forum for determining the issue of representation of employees by a trade union. Where the body mandated by law to determine the issue does so in accordance with the law, there can be no basis for complaint on alleged infringement of constitutional rights.

44. I therefore find no merit in the petition and dismiss the same with costs.

45. I am grateful to the Counsel involved in the matter for their diligence and industry in prosecuting this petition.

Dated and Delivered at Nairobi this 3rd day of February, 2012

Mumbi Ngugi
Judge