



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Petition 62 of 2011

MARSHALLS (E.A) LTDPETITIONER

VERSUS

INDUSTRIAL COURT OF KENYA & 29 OTHERSRESPONDENT

JUDGMENT

1. In the petition dated the 8th of April 2011, the petitioner seeks the following orders

(a) A declaration do issue that the entire proceedings in the industrial court of Kenya at Nairobi in Industrial Cause no 265 of 2010 culminating in the award delivered on 3rd March , 2011 be declared a nullity for the violation of the petitioner's rights to equal protection of the law as guaranteed under the constitution of Kenya.

(b) A declaration do issue that the respondents through the proceedings in industrial court of Kenya at Nairobi in industrial cause no 265 of 2010 contravened the rights of the petitioner not to be subjected to unfair trial and discriminatory process guaranteed under the constitution of Kenya.

(c) A declaration do issue that the entire proceedings and award of the industrial court of Kenya at Nairobi in industrial cause no 2165 of 2010 were made in excess of and /or want of jurisdiction.

(d) A declaration do issue that the Award in industrial court of Kenya at Nairobi in industrial cause no 265 of 2010 was made in direct contravention of the provisions of section 11(3) of the Labour institutions At and as such the court did not have jurisdiction.

(e) A declaration do issue that the Award in Industrial court of Kenya at Nairobi in industrial cause no 265 of 2010 was made in direct contravention of the provisions of section 11(3) of the Labour Institutions Act.

(f) Such other or further orders as this court may deem fit.

2. The petition is supported by the affidavit of **Julius Korir** sworn on the same date and a supplementary affidavit sworn by **Kelvin Mogenion** the 19th of March 2012

3. The respondents filed grounds of opposition dated the 19th of December 2011 as follows:

1. **This Court lacks the requisite jurisdiction to interfere with the decision of the Industrial Court.**
2. **The petitioners remedy lies in an appeal against the decision of the industrial court to the court of appeal**
3. **The individuals cannot be respondents to a constitutional petition**
4. **The non-joinder of the attorney general to the petitioner is fatal**
5. **That the petition lacks merit.**

4. A replying affidavit sworn on 11th November 2011 by Justin **Okore Adhochi**, a former shop steward and employee of the petitioner was filed on behalf of the respondents.

The Petitioner's Case

5. The facts of the matter as pleaded by the petitioner are that the 2nd

to the 29th respondents were employees of the petitioner who were declared redundant between May and December 2006. Following negotiations between the petitioner and the workers' union, the Amalgamated Union of Kenya Metal Workers, two agreements dated 25th May 2006 and 21st December 2006 were arrived at on the redundancy benefits that each employee was entitled to.

6. The petitioner states that it then prepared cheques and a breakdown of what each of the employees was entitled to and communicated this fact to the union by its letter dated 18th February 2008. However, while some of the employees collected their cheques, others declined on the basis that the calculations were not in accordance with the terms of the Collective Bargaining Agreement reached with the union.

7. The employees then filed **Industrial Cause No 265 of 2010** against the petitioner claiming arrears calculated on the basis of a new Collective Bargaining Agreement that had come into force after they had left the petitioner's employment. The Industrial Court, after hearing the parties, made an award in favour of the respondents.

8. The petitioner contends that the Industrial Court did not have jurisdiction to hear the matter but that the petitioner nonetheless tendered evidence before it with regard to its position on the dispute with the respondents.

9. The petitioner alleges that it was not accorded an equal opportunity to be heard; that the Industrial Court was biased against it; that the court subjected the petitioner to discriminatory practices contrary to section 27 and 50 of the Constitution; and that it acted in excess of its jurisdiction.

10. The petitioner also contends that the award of the Court was made in direct contravention of the provisions of Section 11(3) of the Labour Institutions Act with regard to the composition of the court.

11. Mr. Mogeni submitted further that the basis of the claim before the Industrial Court was the industrial Relations Act which replaced the Trade Disputes Act. He contended that under the Trade Disputes Act, the Labour Office would carry out investigation of matters that were before the Industrial Court. Under the Labour Relations Act, parties could go directly to the Industrial Court, which meant that claims were now not being investigated as was previously the case. It was therefore incumbent on the Industrial Court to investigate claims and not just rubber stamp the claims. The petitioner contended that the Industrial Court failed to investigate the claim before it, and the proceedings before it were therefore unfair and discriminatory.

12. On the question of this Court's jurisdiction with regard to the Industrial Court, Mr. Mogeni submitted that the High Court had jurisdiction to hear this matter contrary to the respondents' contention as the Industrial Court is subordinate to the High Court.

13. To the contention by the respondents that the petition did not disclose the violations of rights, Mr. Mogeni's response was that the petition and the supporting affidavit had set out which Articles had been violated and how the violations had occurred; that the availability of an alternative remedy was not a bar where there was a violation of rights; that the court should go through the record and ascertain if there was a failure to adhere to the law and to interrogate the figures by the Industrial Court.

The Respondents' Case

14. The position taken by the respondents as presented by Mr. Nyabena is that this petition does not raise any constitutional issues; that neither the petition nor the submissions cite or disclose any violation of the fundamental rights of the petitioner, and that the petitioner had not met its obligation to demonstrate what rights have been violated, and in what manner.

15. According to the respondents, the petitioner was given ample opportunity to present its case before the court. It applied and was granted adjournments five times; it was allowed to file a response and supplementary responses on two occasions. The right to a fair hearing requires that parties be given an opportunity to present their case in open court, which the petitioner was accorded.

16. To the petitioner's allegation that the court did not interrogate the figures presented to it, the respondent submits that the court had before it the claim and how it was arrived at; that for a court to adopt or give its findings in favour of one party does not violate the right to a hearing. The petition was frivolous, an abuse of the court process and intended to deny the respondents the fruits of their judgment and should be dismissed.

17. Ms. Muchiri for the 1st respondent relied on the grounds of opposition filed on behalf of the 1st respondent and supported the submissions by Mr. Nyabena for the 2nd -30th respondents. She argued that if the petitioner was aggrieved by the decision of the Industrial Court, it had a right of appeal. She also urged the court to dismiss the petition.

Determination

18. From the pleadings and submissions before me in this matter, I take the view that two issues arise for determination. The first is whether this court has jurisdiction to hear this matter and to supervise the Industrial Court as it existed at the time the impugned decision was made. The second issue is whether the facts as pleaded disclose any violation of the petitioner's rights under the Constitution.

Jurisdiction

19. The respondents have questioned the jurisdiction of this court to hear this petition. The issue, however, with regard to the Industrial Court as it existed prior to the Industrial Court Act, 2011, has been settled; that the Industrial Court was an inferior tribunal amenable to the supervision of the High Court. In the case of **Kenya Airways Limited-v-Kenya Airlines Pilots Association Nairobi High Court Misc. Appl. No. 254 of 2004** Visram, J (as he then was) observed as follows:

I agree with the applicant's contention that the Industrial Court is subordinate to the High Court as the Constitution, specifically section 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.

20. In the case of **Nairobi Safari Club Registered Trustees -v- Industrial Court of Kenya & Another Misc. Civil Appl. No. 605 of 2009**, Warsame J held that the High Court could inquire into decisions of

the Industrial Court where the decision of the Industrial Court was arrived at in excess of jurisdiction

21. A similar finding with regard to the jurisdiction of the High Court to quash decisions of the Industrial Court if made in violation of the law was made in the case of **Mecol Limited-v-Attorney General & Others High Court Misc. Civil Appl. No. 1784 of 2004**. In **Kenya Ports Authority-v-The Industrial Court & Others High Court Misc. Civil Case No. 995 of 2007**, KorirJ observed that the High Court would have been entitled to step in *‘if it had been demonstrated by the applicant that the respondent heard a dispute which it had no jurisdiction to hear’*.

22. As the decisions above clearly state, however, such inquiry can only be embarked upon if the court had acted in excess of jurisdiction. The High Court has no jurisdiction to embark on an examination of the merits of a decision of the Industrial Court.

Violation of the Constitution

23. Article 27 of the Constitution guarantees to every Kenyan equal protection of the law while Article 50 guarantees the right to a fair hearing to all. The essence of these provisions with respect to proceedings before a court of law is that each party is accorded an opportunity to present its case before the court. What would be at issue with regard to these rights is not the merits of the decision reached by a court or tribunal but the process of arriving at the decision.

24. The petitioner alleges at paragraph 15 of the petition that

‘it was unconstitutional for the Court to assume the Respondents terminal dues following some unknown principles and without letting the petitioner know the method used to arrive at such sums and as such the court failed to accord the petitioner equal protection and equal treatment according to the constitution of Kenya.’

25. From the foregoing and from the submissions before me by Mr. Mogeni, it is clear that the petitioner is aggrieved by the decision of the Court, not by the process used in arriving at the decision. The petitioner was unhappy with the fact that the court accepted the computation by the respondents of their terminal dues without, in the opinion of the petitioner, interrogating the figures that were presented to it by the respondents.

26. In my view, there is nothing in the conduct of the matter before the court that amounts to a violation of the petitioner’s right to a hearing or any other right in the Constitution. I have read the proceedings before the Industrial Court which are annexed to the supplementary affidavit sworn by **Kelvin Mogeni** on the 19th of March 2012. The record of proceedings is as follows:

i) The matter was first before the court on the 7th of April 2010 when Mr. Nyabena for the claimants appeared and was directed to serve the respondents.

ii) The parties next appeared before the court on the 7th June 2010 (which is erroneously indicated as 7th June 2011) when both Mr. Mogeni and Mr. Nyabena were present. Mr. Mogeni was granted an adjournment to enable him get instructions and consult the counsel for the claimants.

iii) The matter was adjourned to the 16th of July 2010 when Mr. Mogeni sought an adjournment as he was unwell, which was granted. The matter was then fixed for hearing on the 22nd of July 2010 but on this date Mr. Mogeni sought leave to file supplementary submissions, which was granted and the matter adjourned to the 10th of August 2010.

iv) The matter could not proceed on that day as the court was not properly constituted due to the absence of a member but it was finally heard on the 14th of September 2010 when both Mr. Nyabena and Mr. Mogeni submitted before the court on behalf of their respective clients.

v) Further hearing was scheduled for the 24th of September 2010 when neither party appeared, and on the 26th of October 2010 the matter was mentioned in the presence of Mr. Nyabena and a Mr. Muchoki holding brief for Mr. Mogeni and directions with regard to the filing of authorities given.

vi) The award of the court was read in open court on the 2nd of March 2011.

27. It is clear, as the respondents submit, that the petitioner was accorded more than ample opportunity to present its case, both in terms of filing its pleadings and submissions, and in presenting its case before the court through its Counsel. The requirement that a party is accorded a fair hearing, whether under the provisions of the former constitution or under Article 50 of the Constitution of Kenya 2010, are that a party is accorded a fair hearing before an impartial tribunal, and an opportunity to present its case. This was, in my view, scrupulously done by the Industrial Court in Industrial Cause No. 265 of 2010, and I find no merit in the allegation that there was partiality in favour of the respondents or discrimination against the petitioner.

28. I have also read the award of the court dated the 3rd of March 2011. In that award, the court has, quite properly in my view, addressed itself to the facts, the law, and the authorities cited by Mr. Mogeni, and after due consideration, rejected the petitioner's position as presented by Mr. Mogeni. As noted above, however, this court is only entitled to enquire into whether or not the Industrial Court has acted in excess of jurisdiction or outside the law, and cannot inquire into the merits of its decision.

29. In the affidavit sworn in support of the petition and in submissions by Counsel, the petitioner alleges that it had raised the issue of the Industrial Court's jurisdiction to hear the claim by the respondents and that the court had declined to rule on the matter. However, nowhere in the proceedings availed to the court by the petitioner is the issue of the court's jurisdiction raised.

30. The petitioner also alleges that the award of the court was made in contravention of the provisions of Section 11(3) of the Labour Institutions Act. The section provides that '**The Industrial Court shall be constituted by a judge sitting with two members of the Industrial Court.**' From the proceedings and the award exhibited in the petitioner's pleadings, I do not find any merit in this contention either. The record indicates that the Judge sat with two members, a Mr. Kilonzo and Mr. Wafula, and that on one day, the 10th of August 2010, the court adjourned the sitting as it was not properly constituted due to the absence of one member.

31. The upshot of the above findings is that this petition has no merit and is therefore dismissed with costs to the respondents.

Dated Delivered and Signed at Nairobi this 25th day of July 2012

**MUMBI NGUGI
JUDGE**