



**REPUBLIC OF KENYA**

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

**Petition 269 of 2009**

**TELKOM KENYA LIMITED.....APPLICANT/  
PETITIONER**

**AND**

**THE INDUSTRIAL COURT OF KENYA.....1<sup>ST</sup>  
RESPONDENT**

**THE COMMUNICATION WORKERS UNION OF KENYA.....2<sup>ND</sup>  
RESPONDENT**

**JUDGMENT**

1. In the petition dated 5<sup>th</sup> May 2009 which is supported by the affidavit of **Mary Rita Naliaka** sworn on the same date, the petitioner seeks, among others, the following orders:

(a) Prohibition order do issue against the 1<sup>st</sup> Respondent prohibiting it from proceeding with or entertaining the prosecution or trial in any manner in Industrial Court Cause no 151 (N) of 2008 **COMMUNICATION WORKERS UNION of KENYA versus TELKOM KENYA** or taking cognizance of any other proceedings instituted by the 2<sup>nd</sup> Respondents on the subject matter of employees who have left employment of the Petitioner under the Voluntary Early Retirement Scheme as per the invitation circular letter issued by the petitioner on 17<sup>th</sup> October 2008.

(b) A declaration do issue against the 1<sup>st</sup> Respondent to the effect that continuation of the trial conduct of any proceedings in Industrial Court Cause No. 151(N) **COMMUNICATION WORKERS UNION OF KENYA AND TELKOM KENYA LIMITED** amounts to a violation of the Petitioner's right to a fair hearing under section 77(9) of the Constitution.

(c) A declaration do issue to the effect that continuation of the trial and conduct of any proceedings in Industrial Court Cause No. 151 (N) of 2008 – **COMMUNICATION WORKERS UNION AND ENYA AND TELKOM KENYA LIMITED** amounts to a violation of the Petitioners right to freedom of conscience under section 78 of the Constitution.

(d) A declaration do issue to the effect that Ruling dated 12<sup>th</sup> November 2008; 5<sup>th</sup> December 2008 and 28<sup>th</sup> April 2009 issued by the 1<sup>st</sup> respondent in Industrial Court Cause No 151 (N) – **COMMUNICATION WORKERS UNION OF KENYA AND TELKOM KENYA LIMITED** violated the Petitioners constitutional rights to a fair trial under section 77(9) of the constitution.

(e) A declaration do issue to the effect that the rulings dated 12<sup>th</sup> November 2008; 5<sup>th</sup> December 2008

and 28<sup>th</sup> April 2009 issued by the 1<sup>st</sup> Respondent in Industrial Court Cause No. 151 (N) of 2008 – **COMMUNICATION WORKERS UNION OF KENYA AND TELKOM KENYA LIMITED** violated the Petitioner’s fundamental constitutional right to protection of life under section 71(1) of the constitution.

(f) A declaration do issue to the effect that the Rulings dated 12<sup>th</sup> November 2008, 5<sup>th</sup> December 2008 and 28<sup>th</sup> April 2009 issued by the 1<sup>st</sup> Respondent in Industrial Court Cause No. 151 (N) of 2008 – **COMMUNICATION WORKERS UNION OF KENYA AND TELKOM KENYA LIMITED** violated the Petitioners fundamental constitutional right to protection against servitude under section 73 of the constitution.

(g) A declaration do issue to the effect that the Rulings dated 12<sup>th</sup> November 2008; 5<sup>th</sup> December 2008 and 25<sup>th</sup> April 2009 issued by the 1<sup>st</sup> Respondent in Industrial Court Cause No 151 (N) of 2008 – **COMMUNICATION WORKERS UNION OF KENYA AND TELKOM KENYA LIMITED** violated the Petitioner’s fundamental constitutional right from deprivation of property under section 75 of the Constitution.

(h) A declaration do issue to the effect that the Ruling dated 28<sup>th</sup> April 2009 issued by the 1<sup>st</sup> Respondent in Industrial Court Cause No 151 (N) of 2008 – **COMMUNICATION WORKERS UNION OF KENYA and TELKOM KENYA LIMITED** – violated the petitioner’s fundamental constitutional rights against entry into the Petitioner’s premises under section 76 of the Constitution.

(I) A declaration do issue to the effect that the rulings dated 12<sup>TH</sup> November 2008; 5<sup>th</sup> December 2008 and 28<sup>th</sup> April 2009, issued by the 1<sup>st</sup> Respondent in Industrial Court Cause No. 151 (N) of 2008 – **COMMUNICATION WORKERS UNION OF KENYA AND TELKOM KENYA LIMITED** – violated the petitioner’s fundamental constitutional right to freedom of expression under section 79 of the Constitution.

(j) An order quashing the proceedings in Industrial Court Cause No. 151 (N) of 2008.

(k) A declaration that the employees of the Petitioner who responded to the Petitioner’s circular letter dated 17<sup>th</sup> October 2008 by offering themselves voluntarily to retire and whose retirements were accepted by the petitioner did so on their own volition and the 2<sup>nd</sup> Respondent has no *locus standi* filing an imaginary trade dispute against the Petitioner in the Industrial Court.

(l) A declaration to the effect that the Industrial Court has no jurisdiction to issue interim or temporary injunctions.

(m) A declaration to the effect that save for trade disputes on subject matters specified under section 74 of the Labour Relations Act all trade disputes arising under that Act must first be reported to the Minister for Labour and be subject to the conciliation process.

(n) A declaration that the petitioner was under no obligation to discuss the issue of Voluntary Early Retirement of its employees with the 2<sup>nd</sup> Respondent.

(o) A declaration that proceedings in Industrial Court Cause No. 151(N) of 2008 are null and void *ab initio*.

2. The petitioner filed written submissions dated the 22<sup>nd</sup> of February 2010 while the 2<sup>nd</sup> respondent relied on the grounds of objection and a replying affidavit sworn by Mr. Benson Okwaro, its Secretary General, on the 4<sup>th</sup> of June 2009 as well as written submissions dated the 16<sup>th</sup> June 2009.

## **The Facts**

3. The facts as set out by the petitioner, and whose essential elements are admitted by the respondents, are that the petitioner was a state corporation which was privatised sometimes in 2007. The privatisation was necessitated by mismanagement and loss of resources as well as a bloated workforce and it involved the rationalisation of staff. Following the privatisation, a number of employees were laid off and paid benefits. In 2008, after a sensitisation campaign around the country by the petitioner on the ideals of the new organisation, a number of employees requested to be allowed to retire under a voluntary retirement (VER) scheme. Based on the request from individual employees, the petitioner issued a circular dated 17<sup>th</sup> October 2008 which set out the benefits that would be payable to an employee who opted to retire. The option to retire was required to be exercised before the 14<sup>th</sup> of November 2008. Under the VER, the petitioner had the option to accept the offer to retire, and it accepted the offer of retirement by 739 of the 900 employees who opted to retire.

4. As the process was on-going, the 2<sup>nd</sup> respondent, which is the union then representing the employees, went to court and sought an order that the petitioner be restrained from closing the offer for voluntary early retirement, such order to stay in force till the retirement package was determined. On the 12<sup>th</sup> of November 2008, the 1<sup>st</sup> respondent issued an order restraining the petitioner from closing the voluntary early retirement scheme on the 14<sup>th</sup> of November 2008 or any other day thereafter pending the hearing of the motion interparties.

5. The petitioner filed an affidavit opposing the 2<sup>nd</sup> respondent's application and both parties were heard on the motion and the ruling delivered on the 5<sup>th</sup> of December 2008. In its ruling, the court made orders, inter alia, that '**A temporary injunction is hereby issued restraining the respondent from closing its offer for Voluntary Early Retirement on 14<sup>th</sup> November 2008 or any other day thereafter until the employees' intended retirement pay package is determined.**'

6. Since the order of the court made on the 5<sup>th</sup> of December 2008 did not bar the petitioner from accepting offers for voluntary early retirement from employees, paying them their terminal dues and releasing them from employment, it did so and accepted offers from some 597 employees. It released several employees from its employment at various times in terms of the VER, releasing the last tranche of employees in April, 2009.

7. On 27<sup>th</sup> April, 2009 the 2<sup>nd</sup> Respondent went back to the 1<sup>st</sup> Respondent under certificate of urgency praying for orders, among others, that the court do "**issue a stay order on implementation of retrenchment and/or Voluntary Early Retirement of about 597 employees of Telkom Kenya Limited pending the full hearing and determination of this application.**"

8. The court heard the application ex parte and on the 28<sup>th</sup> of April 2009 it issued orders that

**(a) Parties shall not act in any manner inconsistent with the subsisting orders of injunction.**

**(b) Consequently, the affected employees, members of the Claimant union, shall continue in the employment of the respondent until hearing and issuance of the final orders of claim filed herein.**

**(c) The application dated 27<sup>th</sup> April 2009 be served upon the Respondent to be heard inter-parties on 5<sup>th</sup> May 2009.**

9. Following the issuance of these orders, the petitioner moved to this court alleging violation of its fundamental rights under the Constitution and on the 21<sup>st</sup> of August, 2009, the High Court granted conservatory orders pending the hearing and determination of this petition.

### **The Petitioner's Case**

10. Mr. Obura for the petitioner submitted that the petitioner was invoking the supervisory powers of the court granted under Sections 65 and 84 of the former Constitution and that the court had power to hear the

matter under the provisions of Section 22 of the 6<sup>th</sup> Schedule of the new Constitution. Section 65(2) of the old constitution gave the court judicial review powers while Section 84 gave power to quash acts which violated or may violate fundamental rights of an individual. The petitioner contends that the orders made by the 1<sup>st</sup> respondent constituted violations of its fundamental rights and the orders should be quashed under section 65.

11. According to the petitioner, the 1<sup>st</sup> respondent gave its orders of 12<sup>th</sup> November 2008 in which it restrained the petitioner from closing its voluntary early retirementscheme on the 14<sup>th</sup> of November 2008 without hearing the petitioner; thatthe court extended, on its own motion, the period for the voluntary early retirement from the 14<sup>th</sup> November 2008 to the 27<sup>th</sup> of November 2008; that in giving the order of 5<sup>th</sup> of December 2009, the court gave an injunction that was never sought. Further, the interlocutory injunction was given without affording the petitioner a hearing, and the extension was also done without a hearing. The petitioner therefore argues that the court imposed a contractual obligation on it in violation of section 77 (9) of the former constitution which imposed an obligation on a court to give parties a fair hearing.

12. Further, at the time the court heard the parties on the 27<sup>th</sup>of November 2008, all that the petitioner had done was to file an affidavit in reply. It had not filed a Memorandum of Response, the equivalent of a defence, as it is the court which gives the time for filing the Memorandum of Response.By its ruling of 5<sup>th</sup> December 2008, the 1<sup>st</sup> respondent conclusively determined the rights of the parties at an interlocutory stage. It was not concerned whether there was a prima facie case before giving its order. In addition, by its second order in the ruling of 5<sup>th</sup> December 2008, the 1<sup>st</sup> respondent threw the dispute back to a Committee, thereby disqualifying itself from its role, assuming it had such a role.

13. According to the petitioner, the court made a final determination of the issue in dispute at an interlocutory stage without affording the parties a chance to canvas their respective cases, and it did this even though the petitioner had not filed its Memorandum in Response, yet it would have been expected that the court would issue an injunction pending the hearing of the issues set out in the Supporting Memorandum. Its actions in proceeding the way it did were in violation of its own Rules of Procedure, Rule 11 of which requires that the respondent, in a matter before the court, is given an opportunity to file its memorandum in response to the claim. The claimant in the matter before the 1<sup>st</sup> respondent, the 2<sup>nd</sup> respondent in this matter, had every opportunity to file its claim and other documents before the 1<sup>st</sup> respondent, but a similar opportunity was not given to the petitioner. The whole process therefore amounted to an unfair trial contrary to section 77(9) of the former constitution, and this court has power to quash the proceedings under section 84 of the constitution but also under its supervisory powers under section 65 of the constitution.

14. The petitioner contends that following the decision of the 1<sup>st</sup> respondent of 5<sup>th</sup> December 2008, the employees who were members of the 2<sup>nd</sup> respondent, angered by the interference of the 2<sup>nd</sup> respondent in their voluntary decision to retire, decided to resign from the 2<sup>nd</sup> respondent's membership en masse. The petitioner has annexed in the petition (Annexure MKN 9-1263-1563) letters of resignation or sworn affidavits by various members of the 2<sup>nd</sup> respondent protesting against the 2<sup>nd</sup> respondent's interference with their right to contract with the petitioner for retirement. The import of these letters, according to the petitioner, is that the employees did not require the services of the 2<sup>nd</sup> respondent who was a mere busy body and had no locus before the 1<sup>st</sup> respondent; that the 2<sup>nd</sup> respondent was not acting on behalf of the employees who negotiated the voluntary early retirement scheme; that what the 2<sup>nd</sup> respondent submitted before the Industrial Court and before this court has no basis at all; that there was no evidence before the court that the employees who had voluntarily opted to retire sought the assistance of the 2<sup>nd</sup> respondent, and that the mere fact that a union was negotiating a collective agreement does not preclude individuals from negotiating individual agreements or contracts.

15. Mr.Obura referred to the case of **William BarasaObutiti-v- Mumias Sugar Company Limited Civil Appeal No. 198 of 2004** for the proposition that employees of their own volition can agree to

terminate their employment through a voluntary early retirement scheme and the terms of such VER will override previous contracts or Collective bargaining agreement. He submitted that the 1<sup>st</sup> respondent had been referred to this decision but disregarded it even though the Industrial Court is bound by decisions of the Court of Appeal.

16. With regard to the order of the 28<sup>th</sup> of April, 2009, the petitioner submitted that the employees who had opted to retire had collected their terminal benefits and left employment. Some had in fact left the petitioner's employment the previous year. The effect of the ex parte order of 28<sup>th</sup> April 2009 (MKN 14) was to re-instate all those employees who had retired voluntarily under the VER and to require the petitioner to pay them salaries as if they were employees of the petitioner; that this was in violation of section 49(3) as read with section 50 of the Employment Act and the court failed to consider the factors which it is required to consider; that in consequence of the order, the employees who had opted to retire returned to work, causing total confusion for the petitioner; that the security of the petitioner's property was compromised as persons were being forced onto its property with no basis in law.

17. The petitioner contends that by forcing it to accept its former employees, the 1<sup>st</sup> respondent was subjecting both the petitioner and the employees who had opted to retire to servitude contrary to the provisions of section 73 of the former constitution. Mr.Obura relied on the case of **SammyMuhia-v-Kenya Power & Lighting Co. Civil Case No 620 of 2004** for the proposition that if both parties do not wish to be in a certain situation, forcing them together amounts to servitude contrary to Section 73 of the former constitution; that all the proceedings before the 1<sup>st</sup> respondent were conducted in breach of the petitioner's constitutional rights; they were in excess of the 1<sup>st</sup> respondent's jurisdiction; were a sham and null and void.

18. The petitioner also contends that both the orders were made without jurisdiction under section 12 of the Labour institutions Act. Section 74 of the Labour Relations Act requires that where a dispute involves union dues, it must first go for conciliation. Only if it fails at this stage will it go before the court. In the present case, the matter was taken to the Industrial Court by the 2<sup>nd</sup> respondent without first going for conciliation. Under section 74, issues that can be referred to the Industrial Court under certificate of urgency are where the dispute involves recognition agreements, redundancies or issues involving disputes in an essential sector. Issues related to voluntary early retirement are not subject to such referral; it was wrong of the judge therefore to take cognizance of the dispute involving early retirement and the Judge therefore acted in excess of jurisdiction.

19. The petitioner submitted that this was a proper case for the court to quash the decision of the 1<sup>st</sup> respondent and relied on the case of the **Vice Chancellor Jomo Kenyatta University Ex parte Dr. Cecilia Mwathi Misc. Civil Appl. No. 30 of 2007** which sets out the circumstances under which the court can review a decision in judicial review and submitted that the court acted in abuse of discretion and of the duty to act fairly; that it acted irrationally and unreasonably in issuing its orders and in breach of the rules of natural justice and the court should grant the reliefs sought in the petition.

### **The Case for the 1<sup>st</sup> Respondent**

20. The main issue that this court should determine, according to Mr.Nguyo for the 1<sup>st</sup> respondent, is whether it has jurisdiction to quash the order of the Industrial Court in Cause No 151 of 2008. Mr.Nguyo submitted that the 1<sup>st</sup> respondent acted within its jurisdiction in issuing the orders it did. It was created to deal with labour and employment matters, and the law as contained in the Labour Institutions Act, the Employment Act and the Labour Relations Act of 2007 were enacted to govern its operations.

21. Section 12 of the Labour Institutions Act gave the Industrial Court discretion, especially at section 12(4), that was wide enough to allow the court to issue orders of re-instatement. The court therefore acted within its mandate in issuing the orders of 12<sup>th</sup> November 2008.

22. The 1<sup>st</sup> respondent submitted further that the orders sought cannot be granted as against the

Industrial Court as the judges of the court are protected from liability while acting in a judicial capacity; that with regard to the supervisory powers of this court, such powers do not extend to a judge of the Industrial Court and he relied on sections 6 and 7 of Schedule 6 of the current constitution which preserves the rights under the old constitution. This court did not have jurisdiction to supervise the industrial court under the old constitution. The only recourse that the petitioner had was to apply for a review of the orders of the Industrial Court to the same court under the provisions of section 12 of the Labour Institutions Act which creates a mechanism for review of its orders by the court.

23. Mr. Nguyo submitted further that the award of the court, even if given the widest possible interpretation, cannot subject the petitioner to servitude. He urged the court to dismiss the petition as this court lacks jurisdiction to set aside, vary or interfere with the orders of the Industrial Court.

### **The 2<sup>nd</sup> Respondent's Case**

24. The 2<sup>nd</sup> respondent's position was set out in the affidavit sworn by **Benson Okwaro**, the General Secretary of the 2<sup>nd</sup> respondent, on 4<sup>th</sup> June 2009. Mr. Okwaro averred that the rights of the petitioner were subject to the rights of others, including those of its former and current employees. The 2<sup>nd</sup> respondent, he stated, was aware of and supported the privatization process and the staff restructuring so long as it was done within the laid down legal processes and in compliance with the necessary procedural safeguards. It contends that the petitioner's employees were intimidated, coerced and harassed into accepting the VER and annexes affidavits sworn by some employees to this effect.

25. In any event, according to the 2<sup>nd</sup> respondent, there was no violation of the petitioner's constitutional rights, and this court had no jurisdiction to supervise the Industrial Court. Mr. Maina for the 2<sup>nd</sup> respondent submitted that Section 87(f) of the Employment Act read with section 1 and section 12 of the Labour Institutions Act (now repealed) confer jurisdiction on the Industrial Court. Section 12 of the Industrial Court Act 2011 confers original and appellate jurisdiction to bear and determine all disputes referred to it in accordance with Article 162 of the Constitution relating to employment.

26. Mr. Maina submitted that the Industrial Court is not subordinate to the High Court. The High Court has no power to exercise supervisory jurisdiction over the Industrial Court; it cannot hear matters which would amount to review of Industrial Court decisions as this would amount to appeal from the decisions of the Industrial Court.

27. According to Mr. Maina, the jurisdiction of this court is limited to considering whether the petitioner was denied a right to a fair hearing under section 77(9) of the former constitution. He submitted that the Industrial Court Procedure Rules were not in force at the time the Court heard the matter as section 84 of the Labour Relations Act repealed the Trade Unions Act and the Trade Disputes Act, and that the Industrial Court was guided entirely by the Labour Relations Act and the Labour Institutions Act.

28. Mr. Maina argued that the parties were ably represented in court by counsel. The court had before it a main suit, in which there was a Memorandum of Claim, and as a matter of procedure, it was incumbent on a party, once served with a Memorandum of Claim, to file a response. In this case, no response was filed on behalf of the petitioner.

29. The respondents also contend that there was an application before the court and the parties subjected themselves to the court; that the petitioner was given an opportunity to be heard when the application was argued before the court; and that it did not object to the application. There was therefore no violation of the petitioner's right to be heard.

30. With regard to the petitioner's argument that the petitioner had not made an offer but had only made an invitation to treat and that it was the employees who made the offer, the 2<sup>nd</sup> respondent referred to annexure MKN7 annexed to the affidavit in support of the petition and submitted that the so called voluntary early retirement was forced redundancy.

31. The respondent therefore submitted that the filing of this petition was an abuse of the Court process. Mr. Maina referred to the case of **Harrikisoon-v- Attorney General of Trinidad and Tobago (1980) Law Reports of the Commonwealth 265** and **Kenya Bus Services –v-Attorney General Misc. Civil Suit No 413 of 2008** and submitted that a constitutional application should not be used to evade the judicial process.

32. To the petitioner's contention that the 2<sup>nd</sup> respondent had no locus in representing the employees, the 2<sup>nd</sup> respondent submitted that there is a recognition agreement between the petitioner and the 2<sup>nd</sup> respondent on the basis of which the parties were negotiating a pay package.

33. The 2<sup>nd</sup> respondent argued that the employees were being forced to sign the letters accepting the retirement package. Mr. Maina referred to the affidavits of protest sworn by **Joel Karanja Ngata and Others** annexed to the 2<sup>nd</sup> respondents replying affidavit which he submitted related the circumstances under which the employees were coerced and intimidated into signing letters accepting early retirement.

34. In his response to the submissions by the respondents, Mr. Obura submitted that the question whether the High Court has jurisdiction to question the decision of the Industrial Court had already been answered by Justice Wendoh in her ruling on the application for conservatory orders when she held that it was only the High Court which has jurisdiction to deal with breach of fundamental rights. The Court also had jurisdiction under section 65 of the former constitution to supervise the Industrial court and he referred to the decision in **Mecol Ltd –v- A.G. Misc Civil App. 1784 of 2004**. He argued that the issue before the court was the procedure, not the merits of the decision by the Industrial Court.

35. To the argument that the order of the 1<sup>st</sup> respondent did not amount to a reinstatement of the employees without hearing the petitioner, Mr. Obura submitted that the court had ruled that the employees remain in employment till the hearing of the matter. Since the employees had already retired, the order amounted to reinstatement.

36. With regard to the contention that Article 162 of the Constitution established the Industrial Court and that it was not subject to supervision, Mr. Obura submitted that the dispute arose in 2008 – 2009 and that Article 162 does not apply retrospectively.

37. On the contention that the Industrial Court Procedure Rules were repealed when the Trade Disputes Act was repealed, it was the petitioner's submission that while the Act was repealed by section 84 of the Labour Relations Act, Section 24 of the Interpretation and General Provisions Act provides that where an Act of Parliament has been repealed, subsidiary legislation enacted pursuant to that Act remain in force until repealed by subsidiary legislation. The Industrial Court Procedure Rules made under the Trade Disputes Act remained in force till 28<sup>th</sup> May 2010 when the new Industrial Court Procedure Rules came into force under Legal Notice No 78 of 2010, rule 38 of which repealed the 1973 Industrial Court Procedure Rules.

## **Jurisdiction**

38. I will first deal with the jurisdictional issues that arise in this matter. The first relates to the jurisdiction of this court to supervise the 1<sup>st</sup> respondent. The second relates to the exercise of jurisdiction by the 1<sup>st</sup> respondent in dealing with the matter that gave rise to this petition, and specifically whether it acted in excess of jurisdiction as provided under the relevant legislation.

## **Jurisdiction of the High Court**

39. The 2<sup>nd</sup> respondent contends that Article 162 ousts the jurisdiction of the High Court by providing for the establishment of a court to deal with labour and employment matters, that it is not subordinate to the High Court, and that this court therefore has no jurisdiction to entertain the petition before it. That is the correct position, today, with the enactment of the Industrial Court Act, 2011, and the appointment and swearing in of the judges of the Industrial Court under the provisions of the Constitution. However, the

provisions of the Constitution do not have retrospective application, and as correctly argued by Mr.Obura, the matters at issue arose in 2008-2009 before the promulgation of the Constitution in 2010. It therefore has no application to the matters at issue.

40. The next question with regard to jurisdiction pertains to the powers of the High Court to supervise decisions of the Industrial Court. The High Court has held in various decisions that the Industrial Court as it existed in 2008-2009, and indeed right up to the establishment of the Industrial Court as contemplated under Article 162, was a tribunal amenable to the supervision of the High Court. See in this regard the decisions in the cases of **Kenya Airways Limited-v- Kenya Airlines Pilots Association Nairobi High Court Misc. Appl. No. 254 of 2004** where 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. “***

41. This was the position even where, as in the case of the Trade Disputes Act (now repealed), there was a specific legislative provision ousting the jurisdiction of the High Court. As Justice Visram observed in the **Kenya Airways Limited -v- Kenya Airlines Pilots Association** case (supra):

***‘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’.***

42. A similar position was taken in the case of **Mecol Limited-v-Attorney General & Others High Court Misc. Civil Appl. No. 1784 of 2004** and, more recently, in the case of **Kenya Ports Authority-v-The Industrial Court & Others High Court Misc. Civil Case No. 995 of 2007** where Korir J, citing the above authorities,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.”***

43. The High Court, however, in exercising its supervisory jurisdiction, can only inquire into the procedural aspects of the case. It cannot embark on the merits of the decision reached by the Industrial Court, and thus constitute itself into an appellate court and exercise powers that it did not have. See in this regard the decision in **’Nairobi Safari Club Registered Trustees -v- Industrial Court of Kenya &Another Misc. Civil Appl. No. 605 of 2009.**

## **Violation of Constitutional Rights**

44. The petitioner alleges violation of its rights under various provisions of the former constitution: sections 71(1) right to life; 73 (protection against servitude); 75 (protection against deprivation of property); 76 (entry into property); 77(9) (fair hearing); 78 (freedom of conscience); and 79 (freedom of expression). It argues that the acts of the 1<sup>st</sup> respondent which were in excess of its jurisdiction resulted in violations of its constitutional rights under the above provisions. I will consider the question of the 1<sup>st</sup> respondent’s jurisdiction alongside the alleged violation of the fundamental petitioner’s rights.

45. I believe there is no dispute with regard to the jurisdiction of the High Court with to hear and determine questions pertaining to the enforcement and protection of fundamental rights under the former constitution. The High Court is vested with power, under Section 84 of the former constitution, to inquire into the question whether there had been a violation of the petitioner’s fundamental rights by the Industrial Court in conducting its proceedings on the matter.

46. The petitioner argues that it is a 'person' as contemplated under section 123 of the former constitution as the term is defined to include **'a body of persons corporate or unincorporated.'** While this is indeed the case, it must be recognized that certain provisions may only have application to a natural person. Thus, while the petitioner alleges violation of the provisions of Section 71(1) which provides that **'No person shall be deprived of his life intentionally,'** I can find nothing in the matter before me that has any relation to the deprivation of life as contemplated under this section. Similarly, I see no violation in the matters before me of the provisions of Section 75 which provides that **'No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired.'**

47. There is also, to my mind, no application of the provisions of sections 78 and 79 to the matters before me. Section 78(1) provides that **'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion,'** while Section 79 contained the constitutional guarantee to freedom of expression and provided that **'Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference.....'** With the greatest respect to the petitioner, there is nothing in the proceedings before the Industrial Court that comes even close to a violation of the provisions set out above, and one may well ask whether the provisions had application to a corporate entity such as the petitioner.

48. The petitioner has also alleged violation of its rights under sections 73 of the former constitution. Section 73 provides as follows:

**(1) No person shall be held in slavery or servitude.**

**(2) No person shall be required to perform forced labour.**

49. The petitioner has contended that for the 1<sup>st</sup> respondent to re-instate its employees while neither the employees nor the petitioner wished to continue with the employer—employee relationship would amount to holding the petitioner and the employees in servitude.

50. The petitioner also alleges that the orders of the 1<sup>st</sup> respondent would lead to a violation of its rights as provided under section 76 of the former constitution. This section was in the following terms:

**(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.**

**(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—**

**(a)...**

**(b) that is reasonably required for the purpose of promoting the rights or freedoms of other persons;**

51. The petitioner also alleges that the orders of the court violated its rights under section 77(9) of the former constitution. This section provided that

**'A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.'**

52. The petitioner impugns the orders issued on the 12<sup>th</sup> of November and the 5<sup>th</sup> of December 2008 and

argues that the 1<sup>st</sup> respondent acted in excess of its jurisdiction by issuing injunctive orders that it had no jurisdiction to issue; that it issued the orders in violation of the provisions of the law, and thereby infringed the petitioner's rights under the former constitution. With regard to the order of 12<sup>th</sup> of November 2008, the petitioner argues that the court issued a temporary injunction that had not been prayed for, while the order of 5<sup>th</sup> December 2008 was a final order also issued without jurisdiction in light of and in violation of the provisions of the governing legislation.

53. In the application before the court on the 12<sup>th</sup> of November 2009, the 2<sup>nd</sup> respondent had prayed for an order '***That this Honourable Court be pleased to issue an injunction restraining the respondent from closing their offer for voluntary early retirement on 14<sup>th</sup> November 2008 and the injunction stay in place until the retirement package is determined.***' The court issued an order that "***A temporary injunction is hereby issued restraining the respondent from closing their offer for voluntary Early Retirement on 14<sup>th</sup> November 2008, or any day thereafter, until hearing and disposal of the Notice of Motion inter partes.***'

54. According to the petitioner, the 1<sup>st</sup> respondent had no jurisdiction to issue a temporary injunction as the Labour Institutions Act did not give it such power, and that even if it did, the 2<sup>nd</sup> respondent had not prayed for such interim order.

55. I have considered the application by the 2<sup>nd</sup> respondent as set out above. The 2<sup>nd</sup> respondent had not, in that application, prayed for an interim injunction, by issuing the order in the terms that it did without hearing the respondent, the 1<sup>st</sup> respondent was in violation of the petitioner's right to a hearing as it issued an order with far reaching consequences on the petitioner without affording it a chance to be heard. I am not, however, convinced that it had no jurisdiction to issue a temporary injunction. Section 12 of the Labour Institutions Act gives it power to 'grant appropriate relief' which may include a temporary injunction.

56. With regard to the order of the 5<sup>th</sup> of December 2008, the parties had been heard on the 27<sup>th</sup> of November 2008, and to that extent, the 2<sup>nd</sup> respondent is correct when it asserts that there was no violation of the right to a fair hearing as alleged by the petitioner. What then is at issue is whether the 1<sup>st</sup> respondent had the jurisdiction to issue the orders that it did and in the form that it did. Further, whether the petitioner was subjected to an unfair trial by the court proceeding with the matter while the petitioner had not filed anything other than a replying affidavit while the court had the duty, under Rule 11 of the Industrial Court Rules 1973, to direct and give timelines for the filing of the petitioner's claim in the matter that was before it.

57. Rule 11 of the Industrial Court Rules provided that '***Each party to a dispute referred to the court shall, within such period as the court may direct, being not less than seven days after the date of such direction, present to the court a memorandum....***' In the case of a respondent before the court, the memorandum was to contain the respondent's reply to the items raised in the claim by the claimant. These rules, as correctly submitted by the petitioner, were in force as provided under the Interpretation and General Provisions Act, until new rules were enacted under the Labour Relations Act in 2010. The 1<sup>st</sup> respondent therefore had a duty to issue directions for the filing of the requisite memorandum before proceeding with a matter, and its failure to do so subjected the petitioner to an unfair trial.

58. I now turn to consider the order made by the 1<sup>st</sup> respondent on the 28<sup>th</sup> of April 2009 which precipitated the filing of this petition. While the petitioner argues that its circular of the 17<sup>th</sup> of October 2008 amounted to an invitation to treat, and the respondents deem it an offer and indeed, as forced redundancy, which the 1<sup>st</sup> respondent had, in its order of 12<sup>th</sup> November and 5<sup>th</sup> December 2008 restrained the withdrawal of, the facts before the court show that a large number of the petitioner's employees had opted to retire as is evidenced by the letters and affidavits that are annexed in two volumes to the petition. The 2<sup>nd</sup> respondent contends that the employees were coerced into early retirement, but there is limited evidence of this, contained in the 6 affidavits or so annexed to the 2<sup>nd</sup> respondent's

replying affidavit. Whatever the case, however, the order made on the 28<sup>th</sup> of April 2009 that ***‘Consequently, the affected employees, members of the Claimant union, shall continue in the employment of the respondent until hearing and issuance of the final orders of claim filed herein’***would have had the effect, if implemented, of forcing the petitioner to accept back into employment hundreds of employees who had opted to retire and had accepted their retirement packages.

59. This order was issued ex parte, without hearing the petitioner. It was mandatory in nature and would have forced onto the petitioner’s premises persons who no longer had a legal basis for being there. It clearly was, in my view, issued in violation of section 77(9) which guarantees to all a fair trial and would have resulted in violation of Section 76 of the former constitution as set out above. Further, it would have resulted in circumstances similar to those under consideration in **Sammy Muhia and Others –v- Kenya Power & Lighting Company Limited** (supra) which Ibrahim, J (as he then was) considered akin to servitude and bondage for the employer. It would also result in a violation of the rights of those employees who had elected to retire early not to be subjected to servitude. The order was therefore unconstitutional, null and void.

60. The petitioner has prayed for various orders and declarations, but in light of developments with regard to the Industrial Court, I believe that some of the prayers sought have been overtaken by events. I therefore issue declarations with respect to Industrial Court Cause No. 151(N) **Communication Workers Union of Kenya-v-Telkom Kenya Limited** in the following terms:

- i) That the rulings dated 12<sup>th</sup> November 2008, 5<sup>th</sup> December 2008 and 28<sup>th</sup> April 2009 issued by the 1<sup>st</sup> respondent in the Cause violated the petitioner’s constitutional rights to a fair trial under section 77(9) of the former constitution and are therefore null and void.
- ii) That the rulings dated 12<sup>th</sup> November 2008, 5<sup>th</sup> December 2008 and 28<sup>th</sup> April 2009 issued by the 1<sup>st</sup> respondent in the Cause violated the petitioner’s fundamental constitutional right to protection against servitude under section 73 of the former constitution and are therefore null and void.
- iii) That the ruling dated 28<sup>th</sup> April 2009 issued by the 1<sup>st</sup> respondent in the Cause violated the petitioner’s fundamental constitutional rights against entry into its premises under section 76 of the former constitution and are therefore null and void.

61. Should any issue still be outstanding between the parties in Industrial Court Cause No. 151 (N) of 2008, then the same can be addressed appropriately by the Industrial court newly constituted under Article 162 of the Constitution of Kenya 2010.

62. The petitioner shall have the costs of the petition.

63. I am grateful to the parties for their diligence in prosecuting this petition.

**Dated, Delivered and Signed at Nairobi this 25<sup>th</sup> day of July 2012**

**MUMBI NGUGI  
JUDGE**