



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 212 of 2012

NZOIA SUGAR COMPANY.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

AND

FRANCIS OYATSI.....1<sup>ST</sup> INTERESTED PARTY

CENTRAL ORGANISATION OF TRADE UNIONS (K).....2<sup>ND</sup> INTERESTED PARTY

RULING

1. The Petitioner in this case was the Respondent in *Francis Oyatsi vs Nzoia Sugar Company Ltd, Industrial Court Cause No. 36(N) of 2009* in which the Industrial Court (Hon. Stewart Madzayo J.) delivered an award on 16th November, 2011 in favour of the Claimant (the 1<sup>st</sup> Interested Party herein) who was then the Managing Director of the Petitioner's Company. The Industrial Court found the claimant's contract of employment to have been wrongfully and unfairly terminated and entered an Award in his favour as follows:

1. *“That the termination of the contract of employment of the Claimant, Mr. Francis Lawrence Oyatsi be and is hereby declared wrongful and a nullity.*

2. *The Respondent to pay the Claimant, Mr. Francis Lawrence Oyatsi for the loss of salary and full benefits for the remainder of the Contract period from January 2009 to 23<sup>rd</sup> July, 2010 at Kshs.445,000.00 per month totaling to Kshs.8,351,167.00*

3. *Gratuity in the sum of Kshs.3,403,800.00*

4. *Leave accrued and to be earned up to the end of the contract period, 85 working days in the sum of Kshs.1,891.120.00*

5. *Certificate of Service be issued with immediate effect to the Claimant in terms of the Employment Act, 2007.*

6. *Costs of this suit to be borne by the Respondent.”*

2. By way of a Constitutional Petition dated the 18th of May, 2012, the Petitioner moved this court

seeking *inter alia* the following Orders:

**(a) A permanent order of stay of execution of the award delivered on 16th November 2011 and all consequential orders, warrants in Industrial Court Cause No. 361 of 2009; Francis Oyatsi vs Nzoia Sugar Company Limited.**

**(b) A declaration that all proceedings including the Award and consequential decree, orders, rulings by the Industrial court undertaken without the judge taking oath of office upon the coming into effect of the Constitution of Kenya, 2010 in Cause No. 361 of 2009 are unconstitutional and inconsequential therefore void, illegal, invalid and/or inapplicable.**

**(c) A declaration that Section 32(2) of the Industrial Court Act 2011 is inconsistent with Article 74 of the Constitution and therefore void to the circumstances hereof as against the Petitioner to the extent of the said inconsistency.**

3. The Petitioner's claim is grounded on **Article 74** of the **Constitution** which provides that before assuming a state office or performing any functions of such office, a person shall take and subscribe an oath of or affirmation of office. It contends that Judges of the Industrial Court had not taken such an oath of office pursuant to the provisions of **Article 74** before the impugned order was made and that therefore all orders and awards made in the case are unconstitutional, null and void. It is the Petitioner's further argument that since the Industrial Court is a Superior Court under **Article 165**, the judges of the Court as State Officers within the meaning of **Article 74** ought to have subscribed to the oath or affirmation of office.

4. Mr. Wekesa, advocate for the Petitioner further relied on **Articles 48** and **50** of the **Constitution** and stated that as long as the judges were not sworn in, then they had no capacity to continue to preside over cases in the Industrial Court.

5. He finally contended that the sum of Kshs.13 million was a huge sum and that it must be shown that it was obtained within the law, and that public tax is at stake if the award is allowed to stand.

6. The 1<sup>st</sup> Interested Party, Francis Oyatsi, opposed the Petition and filed a Cross Petition dated the 8<sup>th</sup> June, 2012 in which he sought *inter alia* the following Prayers:

**i. A declaration that it is a violation of Article 159(2) of the Constitution to misuse or abuse the process of Law under the Constitution in order to defeat or undermine the purpose and principles of the Constitution.**

**ii. A declaration that it defeats the purpose or principles of Article 159(2) of the Constitution to seek orders to invalidate or declare null and void the proceedings and consequential order in Industrial Court Case No. 361 of 2009 after losing the case and having appeared before the court and fully participated in the proceedings.**

**iii. A declaration that it is a violation of Article 232 of the Constitution for the 2<sup>nd</sup> Respondent (Saul Simiyu Wasilwa; the Petitioner's Managing Director) as a public officer to practice deceit or abet in the practice of deceptions upon a court of Law or be a party to any action that defeats the purposes and principles of Article 159 of the Constitution.**

**iv. An order that the Petitioner be ordered to pay interest on the award of Kshs 13,646,087.00 in Industrial Court Case No. 361 of 2009 from the date of judgment, the (16<sup>th</sup> November 2011) up to the date of payment in full at prevailing market rates as compensation to the 1st Interested Party for the above violations of the Constitution.**

**v. An order that the Petition be dismissed with costs and the Cross-Petition be allowed with costs.**

7. In response to the Cross Petition, Mr. Saul Simiyu Wasilwa, the Petitioner's Managing Director swore

an affidavit on 31<sup>st</sup> July, 2012 in which he denied the allegations of deceit and fraud and argued that any person, including the Petitioner, has a constitutional right to institute proceedings alleging breach of fundamental rights. He also reiterated that he was not party to the previous proceedings and was suing as the Managing Director of and on behalf of the Petitioner's Company.

8. In a Replying Affidavit filed on the 8<sup>th</sup> June, 2012, the 1<sup>st</sup> Interested Party reiterated that the Petitioner had practiced deceit and fraud in the Industrial Court by encouraging the Court to exercise jurisdiction and even causing it to enter consent orders. He described the Petition as an abuse of the court process, raising the jurisdictional issue two and a half (2 ½) years after the promulgation of the Constitution. It was argued that at all material times, the Petitioner had invited the Industrial Court as then constituted, to exercise jurisdiction in the case; called witnesses; filed submissions and that indeed three consent orders had in fact been recorded by the Industrial Court namely, a consent order on the quantum of costs payable to him in the case, a consent order to stay execution of the decree for thirty (30) days and a consent order to withdraw the application for stay of execution with costs payable to him.

9. Mr. Oyatsi, advocate for the 1<sup>st</sup> Interested also relied on his submissions dated 11th June, 2012, the revised submissions of 26th June, 2012 and Further Submissions dated 13th July 2012 and urged the point that it is the State which was in breach of the Constitution by not swearing in the judges of the Industrial Court and not the decree holder who is an individual with no control over the State.

10. He also submitted that judges of that court who were serving at the material time, lacked the status of the High Court and were not State Officers as defined under the Constitution and were thus not required to take an oath of office under **Article 74** of the **Constitution**.

He further asked the Court to discharge the conservatory orders earlier issued as the Petitioner had no cause of action against him and its case had no merit whatsoever.

### **Issues for Determination**

11. The main issues that require determination in this case appear to be two- viz:

(i) *Firstly, whether judges of the former Industrial Court as constituted under the now repealed **Labour Institutions Act** are State Officers within the meaning of **Article 260** of the **Constitution** to whom the provisions of the Constitution, in particular **Article 74**, apply.*

(ii) *Secondly, the effect of the said judges not taking an oath under the Constitution with regard to the validity of any issued by the then Industrial Court since the promulgation of the Constitution, 2010.*

12. On the first issue, it is Petitioner's contention that **Article 162** of the **Constitution** establishes the Industrial Court as a superior Court and thus the appointment and removal from the office of judge of the Industrial Court must be in accordance with the Constitution.

13. The Petitioner further contended that by dint of **Section 32(2) of the Industrial Court Act** which provides that 'a person who at the commencement of this Act is a *Judge of the Industrial Court shall be deemed to have been appointed under this Act for the remainder of that person's term* the Judges of the former Industrial Court as constituted under the **Labour Institutions Act** are judges of the superior Court. As such, **Section 13** of the **Sixth Schedule** to the **Constitution** and **Article 74** of the **Constitution** apply to them and require them to take an oath of office before continuing to perform their functions under the Constitution, 2010.

14. Consequently that, since the judges of the Industrial Court as constituted under the **Labour Institutions Act** (which continued to be in force under the Constitution 2010), did not take an oath of office, it is the Petitioner's assertion that the award given in **Industrial Court Cause No. 361 Of 2009, Francis Oyatsi vs. Nzoia Sugar Company Ltd** is invalid as it takes away the legitimate expectation of the Petitioner to the right to a hearing before a duly appointed Judge of the Industrial Court; infringes on his rights to access justice and fair hearing and is contrary to the Constitution of Kenya and therefore null

and void.

15. The Petitioner relies on a letter to the Attorney General written by the Permanent Secretary in the Ministry of Labour dated the 29<sup>th</sup> of September 2010. This letter allegedly contains an admission by the Permanent Secretary that the judges of the former Industrial Court did not take an oath of office. He also relies on a letter in reply from the Attorney General's office dated the 30<sup>th</sup> of September 2011 which informs the Permanent Secretary that the swearing in of the judges of the former Industrial Court should be conducted by the President and that the Registrar of that court should assist in the swearing-in ceremony.

16. The 1st Interested Party in a Cross-Petition dated the 8<sup>th</sup> June 2012 asserts that the Petition is contrary to the purpose and principles enunciated in **Article 159 (2)** of the Constitution in that the Petitioner at all times encouraged the former Industrial Court in the exercise of its jurisdiction or judicial powers by calling witnesses, filing written submissions, and making oral submissions, all of which were done after the promulgation of the Constitution. It is my understanding that the Cross-Petitioner's argument is that since the Petitioner by doing all the above submitted to the jurisdiction and the exercise of judicial authority by the court, he cannot now be heard to question the same.

### **The Law**

17. **Section 31** of the **Sixth Schedule** to the **Constitution** provides as follows;

***“31. (1) Unless this Schedule provides otherwise, a person who immediately before the effective date, held or was acting in an office established by the former Constitution shall on the effective date continue to hold or act in that office under this Constitution for the unexpired period, if any, of the term of the person.***

***(2) Subject to subsection (7) and section 24, a person who immediately before the effective date held or was acting in a public office established by law, so far as is consistent with this Constitution, shall continue to hold or act in that office as if appointed to that position under this Constitution.”***

18. **Section 13** of the **Sixth Schedule** to the **Constitution** provides as follows;

***On the effective date, the President and any State officer or other person who had, before the effective date, taken and subscribed an oath or affirmation of office under the former Constitution, or who is required to take and subscribe an oath or affirmation of office under this Constitution, shall take and subscribe the appropriate oath or affirmation under this Constitution.***

19. **Section 22** of the **Sixth Schedule** to the **Constitution** provides as follows:

***“22. All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same Court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.***

20. **Article 74** of the **Constitution** provides:

***Before assuming a state office, acting in a State office or performing any functions of a state office, a person shall take and subscribe the oath of affirmation of office, in the manner and form prescribed by the Third Schedule or under an Act of Parliament.***

21. **Section 260** of the **Constitution** defines a state officer as:

***‘A person holding a State Office.’***

The definition of ‘**State Office**’ is stated to include judges and magistrates.

**Article 162(3)** gives Parliament the power to determine the jurisdiction and functions of the Courts contemplated in clause (2) thereof, i.e. the Court on employment and labour relations and the Court on the environment, use and occupation of, and title to land.

22. **Section 33** of the Industrial Court Act provides as follows:

**“33. All proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that court until the Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary.”**

23. It is clear from the provisions of **Section 22** of the **Sixth Schedule** to the Constitution and **Section 33** of the **Industrial Court Act** that the Industrial Court as previously constituted was to continue exercising its powers until the establishment of the new Court, which action was completed after the appointment of the new judges to the Court (they are yet to be formally sworn in as at the date of this judgment).

24. The intention of the drafters is in my understanding very clear, that there be established an employment and Labour Relations Court under **Article 162(2)** of the **Constitution** which is a superior court and over which the High Court cannot exercise supervisory jurisdiction (**Article 166(6)**). It could not have been their intention that there be a gap between the former Industrial Court and the establishment of the court under **Article 162 (2)**. Indeed, the law, just like nature, abhors a vacuum. It is for this reason that the provisions of **Sections 32** and **33** of the **Act** were enacted.

25. The former Industrial Court as established under the **Labour Institutions Act** was subordinate to the High Court and **Section 65** of the former Constitution provided that, *“Parliament may establish courts subordinate to the High Court and courts martial, and a court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.”* Indeed, this court has in a number of cases held that the former Industrial Court was not a superior court but rather a subordinate court over which the High Court could exercise supervisory jurisdiction. (See **Brookside Dairy Limited v Attorney General and the Industrial Court Nairobi Petition No. 33 of 2011 (Unreported)**, **Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011**). (unreported)

26. Previously, the High Court kept issuing conflicting decisions on the above matter and **Article 162 (2)** sought to remedy that situation. The Court established under **Article 162 (2)** was intended to be independent of the High Court and it is for that reason that it was given the status of the High Court. Indeed the *Final Report of the Committee of Experts on Constitutional Review* at page 123 affirms that giving Parliament power to establish the Industrial Court with the status of the High Court was aimed at addressing the competing jurisdictional issues that have historically existed between the High Court and the Industrial Court.

27. From a casual reading of **Sections 32** and **33** aforesaid together, it is clear that the judges of the former Industrial Court were not intended to be judges of the Court under **Article 162 (2)** Court, despite the contrary interpretation that is proffered by the Petitioner as regards **Section 31 (2)** of the **Sixth Schedule**. This Section cannot also be taken to make judges of the former Court state officers under the **Constitution** to whom the provisions of **Article 74** apply. Indeed I am aware that the Attorney General has given an opinion to that effect, a matter in the public domain.

28. **Section 31 (2)** of the **Sixth Schedule** in my view applies to those offices which were saved by the Transitional Clauses to the Constitution and whose functions continue to be provided for in the Constitution 2010. It does not apply to offices whose functions are intended to be transitional, as it is with the former Industrial Court. The case would have been totally different if for instance the provision had read *‘...shall be considered to have been appointed under the Constitution’*. This would have served to properly subject them to pre-appointment processes such as vetting and oath-taking. The fact that

they did not go through vetting and other processes required under the Constitution for judges and other state officers is quite telling in itself.

29. Moreover, the former court was retained with the intention of concluding the matters pending before it before the constitution of the Court under **Article 162 (2)**. Section 22 of the Sixth Schedule as read with **Section 33** of the Act also gave the Chief Justice or the Chief Registrar of the Judiciary the power to give directions concerning the proceedings before the former Industrial Court, including the filing of new matters. This has not been done, thus buttressing the argument that the judges and members of that court were only intended to continue to serve in an interim capacity while awaiting the setting up of the Court contemplated by **Article 162(2)**.

30. The employment and labour relations court contemplated by **Article 162(2)** was established by the enactment of the **Industrial Court Act (Act No. 20 of 2011)**. Judges to that court were appointed on 12<sup>th</sup> July 2012 as evidenced by **Gazette Notice No. 9797** dated 19<sup>th</sup> July 2012.

31. The history of the Industrial Court in Kenya can be traced back to the enactment of the now repealed **Trade Disputes Act (Chapter 234 of the Laws of Kenya)**. Under the Act, the Industrial Court had jurisdiction to deal with trade disputes. The Court was presided over by a Judge appointed by the President under the Act. The Act also made provision for appointment of additional judges. Under **Section 17** of the Act, the award of the court was final and the award, decision or proceedings of the Industrial Court could not be questioned or reviewed, restrained or removed by orders of prohibition injunction and certiorari or otherwise at the instance of the government or any other person. Subsequent legislation such as the **Employment Act, 2007, Labour Relations Act, 2007** and the **Labour Institutions Act, 2007** extended the jurisdiction of the Industrial Court to deal with a wider range of employment and labour disputes.

33. I reiterate for clarity's sake that a distinction has to be made between the former Industrial Court with its history set out above and the Court established under **Article 162 (2)**. Indeed the same reasoning was applied by Musinga J. in ***John Kimanathi Maingi v. Andrew Ligale & Others (Petition No. 72 of 2010)*** when the eligibility to hold office of the Commissioners of the Interim Independent Boundaries Review Commission (IIBRC) was called to question in light of the provisions of **Section 27 (1) (c)** of the **Sixth Schedule**. Their eligibility to continue in office was called to question because of the provisions of Chapter Seven of the Constitution which appeared to bar them from being members of the Commission. The learned judge was equivocal that:

***“A distinction must be drawn between the appointment of a member of the Independent Electoral Boundaries Commission and eligibility of the members of the IIBRC to continue serving until the expiry of their tenure.”***

He added:

***‘The Constitution must be interpreted in a manner that promotes its purposes and contributes to good governance.’***

34. In the same manner, a distinction must be made between the eligibility of the members of the former Industrial Court to continue serving until the expiry of their tenure (read the establishment of the Court under **Article 162 (2)**) and the appointment of judges to the latter Court.

35. In my view, therefore, the former Industrial Court was an inferior tribunal and was not intended to be transformed into a superior court within the meaning of **Article 165** of the **Constitution**. **Article 74** therefore did not also impose a constitutional obligation on them to take an oath of office as any oath taken by the judges and members of that court in the past was taken not under the former Constitution but rather under an Act subordinate to the Constitution. If they were properly in office at the enactment of the Act, **Section 13** of the Sixth Schedule cannot be taken to require the taking of an oath or affirmation under the Constitution.

36. Having found that the judges and members of the former Industrial Court were not required to take an oath of office under the Constitution, I would find that they were properly in office before the establishment of the Court **Article 162 (2)**. They are however, as stated above, not holders of state offices within the meaning of **Article 260** of the **Constitution** and the award given by a properly established tribunal is valid and it is therefore my finding that the award given in Industrial Court Cause No. 361 Of 2009 Francis Oyatsi vs. Nzoia Sugar Company Ltd is valid and enforceable for the reasons given above.

37. Having answered the twin questions that I set out to address, the only issue left to determine is whether the prayers in the Cross-Petition should be granted. Prayers (i), (ii) and (iii) that are set out elsewhere above can only be addressed in the following terms;

38. The Petitioner indeed participated fully in proceedings before the former Industrial Court after the Promulgation of the Constitution and indeed obtained favourable orders after the Award was entered. However, I see no reason to delve into whether that conduct amounted to deceit, or an abuse of Court process because the issues raised in the Petition before me were neither frivolous nor pedestrian and although I have ruled against the Petitioner, the grey areas surrounding the status of the former Industrial Court after 27th August 2010 needed to be addressed conclusively and I hope that I have managed to do so in this judgment thanks to the Petitioner excising its rights to be heard on any issue under the Constitution 2012.

39. Regarding prayer (iv) of the Cross-Petition, no reason has been advanced as to why an award of the Court should attract interest at prevailing market rates and I see no lawful basis that the same should be in the nature of compensation to the 1st Interested Party. I will therefore dismiss all the Prayers in the Cross-Petition.

40. The final Orders to be made in this matter are therefore are that;

(i) ***The Petition dated 18th September 2012 is dismissed.***

(ii) ***The Cross-Petition dated 8th June 2012 is dismissed.***

(iii) ***The Petitioner for reasons that it is the one that instituted the present proceedings, shall pay the costs of the dismissed Petition.***

41. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 12TH DAY OF OCTOBER, 2012**

**ISAAC LENAOLA  
JUDGE**

**In the presence of:**

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Coram: Irene – Court clerk

*Mr. Chege hold brief for Mr. Wekesa for Petitioner*

*Mr. Wanandwa hold brief for Mr. Oyatsi for 2nd Respondent*

*No Appearance for 2nd Interested Party*

*Mrs. Oduol for 2nd Respondent*

**Order**

*Ruling duly delivered.*

**ISAAC LENAOLA  
JUDGE  
12/10/2012**