REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JR. MISCELLANEOUS CIVIL APPLICATION NO. 86 OF 2011
IN THE MATTER OF AN APPLICATION BY KENYA UNION OF POST EDUCATION TEACHERS NAIROBI BRANCH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
AND
IN THE MATTER OF INDUSTRIAL COURT CIVIL SUIT NO. 463 OF 2011
BETWEEN
KENYA UNION OF POST PRIMARY EDUCATION TEACHERS (KUPPET-NAIROBI BRANCH) ……..…..APPLICANT
V E R S U S
THE INDUSTRIAL COURT-NAIROBI……1ST RESPONDENT
BENTER AKINYI OPANDE ……..…..2ND RESPONDENT
AND
REGISTRAR OF TRADE UNIONS.....1ST INTERESTED PARTY
SECRETARY GENERAL – KUPPET.....2ND RESPONDENT

R U L I N G

This court is alive to the provisions of Article 162(2) of the Constitution which are as follows:-

"Parliament shall establish courts with the same status of the High Court to hear and determine disputes relating to:-

(a) Employment and labour relations."

Under Article 165(5) (b) it is provided that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2). It cannot be denied that the "courts" contemplated by Article 162 (2) have not been established by any legislation since the promulgation of the Constitution. Secondly, the fact that the status of such "courts" was being enhanced to that of the High Court means they were previously inferior to the High Court.

Employment and labour relations matters are, before the contemplated courts, being handled by the Industrial Court set up under the Trade Disputes Act (Cap. 234). Until the "courts' contemplated by Article 162 (2) have been established, and by virtue of Article 7(1) of the Transitional and Consequential Provisions of the Constitution, the Industrial Court must continue to exist under the Act and has to continue to be inferior to the High Court. The High Court will consequently continue to have supervisory powers over the Industrial Court **(Kenya Airways Ltd. –Vs- Kenya Pilots Association [2001] KLR 531)**.

The result is that the submission by Mr. Oduor for the 2nd Respondent that this court lacks jurisdiction to supervise the Industrial Court in relation to the labour dispute now before it is without substance or merit.

What was the matter before the Industrial Court? A chamber summons was placed before the court seeking to restrain the Registrar of Trade Unions (who was the 3rd Respondent and is in this application the 1st Interested Party) from registering the change of officers of KUPPET NAIROBI BRANCH (who were the 1st Respondent and are now the Applicant) pending the *Inter parte* hearing of the summons. The Applicants in the summons were members of NAIROBI KUPPET BRANCH. The Secretary General KUPPET (2nd Respondent in the summons) had issued a notice for elections. It was their case that he was the only one constitutionally mandated to call such an election. However, that the secretary of KUPPET NAIROBI BRANCH had gone ahead and issued another notice for elections of the branch on 5th March 2011 at which certain officials had been elected. These are the officials the Applicants did not want the Registrar of Trade Unions to register. It was alleged that the notice for the elections had not been communicated to them and that the elections went against the constitution of the body. The Industrial Court granted an *ex parte* injunction and scheduled the matter for *inter parte* hearing. It is this injunction that forced the Applicant herein to come before this court. It asked for leave to bring these proceedings to apply for an order of certiorari to issue to bring into this court and to quash the decision of the Industrial Court to grant the injunction. Also sought was an order of prohibition to prohibit the Respondents from prosecuting, hearing or commencing any proceedings whatsoever in the Industrial Court in the case pending there or any other on similar grounds. It was asked that the leave granted does operate as stay of the orders of the Industrial Court pending the hearing and determination of this application.

The application went before Justice Musinga on 12th April 2011 who asked that the same be served for it to be heard *inter partes*. In other words, the Judge did not grant leave. Such leave is usually granted *ex parte* and indication made whether or not such leave would operate as a stay. In certain instances, however, a Judge may decline to grant leave until the application has been argued between the parties – **(Dipak Panachand Shah And Another –Vs- The Resident Magistrate Nairobi And Attorney General [2002] IEA 208)**. This is what happened in this case.

The law is that leave should be granted if, on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave **(R. –Vs- Communications Commissioner of Kenya And Others *ex parte* East Africa Televisions Network Ltd, Civil Appeal NAI. 175 of 2000)**. It is also true that in an application for leave to apply for orders of certiorari and prohibition, if the issues raised are weighty, it cannot be concluded by court that a *prima facie* case for the grant of leave has not been shown by the Applicants. This is because the seriousness of the issues have to be investigated and interrogated by the court in the ensuing motion.

The complaint by the Applicant in regard to injunction was that the Industrial Court did not have jurisdiction to grant it. This is because under rule 16(1) of the Industrial Court (Procedure) Rules made under the Labour Institutions Act (Act No. 12 of 2007),

"An interlocutory application shall be by notice of motion and shall be heard in open court".

The Applicant is aggrieved because the application that led to the injunction was by chamber summons. I am aware that this Court cannot make an order to tell the Industrial Court how to conduct its business, but that is as long as it conducts that business reasonably within the confines of the statutory provisions that brought it into existence **(Roshanali Essa Hasham –Vs- Registration of Accountants Board, Civil Appeal No. 43 of 1990 at NBI)**.

The response of the 2nd Respondent to this was that under rule 14 (5) of the same Rules:-

"A party may by notice, object to a pleading stating grounds of objection:-

Provided that no objection may be raised to any pleading on the ground of form".

It further pointed out rule 24(5) which provides that:-

"The court shall conduct the hearing in a manner it considers most suitable to the just handling and

recording of proceedings and shall, if appropriate, avoid legal technicalities and formalities."

Mr. Oduor's submission was that even if there had been a departure from the provided form the Applicant had not shown that it had suffered any prejudice. I agree with him. The Industrial Court is not strictly a court of law. The procedure under its Rules guides its operations. A departure from the Rules that causes no prejudice cannot be condemned. If by the departure the court goes against the tenets of the statute or against the rules of natural justice then that will be subject of review. The Rules are important, but it should always be borne in mind that under Article 159 (2) (d) of the Constitution judicial authority should be administered in such a way that the final goal is to do justice to the parties:

"without undue regard to procedural technicalities."

I do not find that the point the Applicant is urging is serious or arguable.

The other complaint raised was that the chamber application before the Industrial Court was stated to be brought under sections 34 and 35 of the Labour Relations Act, 2007 and all other enabling provisions of the law. It was argued that sections 34 and 35 of the Act do not confer any jurisdiction to the court to grant an injunction. It was further complained that the matter that went to the Industrial Court on which the injunction was granted was headed **"civil suit no. 463 of 2011"** when the court had no jurisdiction to hear civil cases. It was however acknowledged that the application had since been amended to read **"Cause No. 463 of 2011"**. Again, these procedural technicalities, I find, have not taken away the jurisdiction of the Industrial Court to deal with the substance of the matter filed before it.

I do not want to indicate that even as the Applicant is complaining about procedure at the Industrial Court, it did not, for instance, indicate that the present application was brought under the provisions of the Law Reform Act. This is the Act that gives power to the High Court to grant orders of certiorari, prohibition and mandamus. Further, the statement of facts to support the application for leave was not filed. That would make the present application a candidate for striking out.

In conclusion, the application for leave is denied with costs.

DATED AND DELIVERED AT NAIROBI
THIS 31ST DAY OF MAY 2011

A. O. MUCHELULE
J U D G E