REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 43 OF 2008

IN THE MATTER OF SECTION 84(1)

AND

IN THE MATTER OF THE ALLEGED (AND OF THE LIKELIHOOD) OF CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND FREEDOMS UNDER SECTIONS 71, 73, 74, 75, 77, 80 AND 82 OF THE CONSTITUTION

BETWEEN

MIRAGE FASHION GARMENTS (EPZ) LIMITED.....1ST PETITIONER

GLOBAL APPARELS (EPZ) IMITED.....2ND PETITIONER

ROLEX GARMENTS (EPZ) LIMITED.....3RD PETITIONER

PROTEX KENYA (EPZ) LIMITED.....4TH PETITIONER

ALTEX (EPZ) LIMITED.....5TH PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INDUSTRIAL COURT.....2ND RESPONDENT

TAILORS AND TEXTILES WORKERS UNION.....3RD RESPONDET

JUDGMENT

This petition was filed by five petitioners. The Respondents are three. Before the petitioner was heard, counsel for the petitioners informed the court that the 1st and 3rd petitioners were already wound up. Therefore they were not proceeding with their case. Counsel also informed the court that the issues relating to the 1st and 3rd petitioners had been settled. This has left the petitions by the 2nd, 4th and 5th petitioners' case for hearing and determination.

The petition was filed on 8th February 2008. The prayers in the petition are as follows:-

1. A declaration do issue that section 17 (2) of the Trade Disputes Act Cap.234 of the Laws of Kenya contravenes the petitioners' right under sections 71 (1), 73, (1), 74 (1), 75 (1), 77 (9), 80, 82 and 84 of the Constitution (repealed) on the protection of the law by denying the petitioners the right of access to the High Court to seek redress for breach of the petitioner's fundamental rights and further to seek judicial review and or nullification of an illegal award issued by the second respondent.

2. A declaration do issue that the petitioners' right to life under section 71 of the Constitution (repealed) has been and or is likely to be contravened by the award by the 2nd respondent in cause No.106 of 2006 as the execution of the award will result in the insolvency of the petitioners.

3. A declaration do issue that the petitioners' right under section 75 of the Constitution (repealed) is likely to and or has been contravened by the award in Cause 106 of 2006 in that the award seeks to deprive the petitioners of their capital which forms the basis of their property under circumstances not justified in the law.

4. A declaration do issue that the award in Industrial Court Cause No. 106 of 2006 would subject the petitioners to servitude and thereby violate their rights under section 73 (1) of the Constitution (repealed).

5. A declaration do issue that the award in Cause \|No. 106 of 2006 violates and or is likely to violate the petitioners' right against inhuman treatment as guaranteed by section 74 of the Constitution (repealed) in that the award imposes an obligation upon the petitioners to implement an award which is beyond their ability in a manner not constitutionally justified.

6. A declaration do issue that the petitioners' rights to a fair trial under section 77 (9) of the Constitution(repealed) has been or is likely to be contravened by the award of the 2nd respondent in Cause 106 of 2006 in that the award has been delivered –

(a) contrary to established factual considerations presented to the 2nd respondent;

(b) in excess of jurisdiction of the 2nd respondent

(c) in disregard of evidence and the law.

(d) with abundant malice, capriciousness and in bad faith.

(e) against the rules of natural justice

7. A declaration do issue that to the extent that the illegal and unjust award orders the petitioners not to employ its employees if it cannot pay the wages and house allowance awarded by the 2nd Respondent the award contravenes section 80 of the Constitution (repealed) which guarantees the petitioners' right to associate and contract with persons of their choice under the law.

8. A declaration that the purported award made in favour of the 3rd respondent by the 2nd respondent in Cause No. 106 of 2006 offends the rule in Ole Nganai –vs- R Bor (1983) KLR 233 and is null and void for being a decision/ judgment which is uncertain, nebulous and indefinite as to what is decided and what it awards the parties before it and hence a calumniation of unfair trial contrary to section 77 (9) of the Constitution (repealed).

9. A declaration that the petitioners' right under section 82 of the Constitution (repealed) not to be subjected to arbitrary, capricious and unreasonable exercise of power by any authority including the 2nd respondent has been contravened by the respondents through the operation of an unconstitutional Industrial Court.

10. A declaration that the 2nd respondent having established that the petitioners had incurred financial loses and hence incapable of accommodating any wage and house allowance increase the 2nd respondent had no judicial or any Constitutional right to award a 25% wage increase and a 12% increase in house allowance.

11. A declaration that the 2nd respondent misconstrued the import of the Wages Guidelines and the application of section 14 (10) of the Trade Disputes Act.

12. A declaration that if the interpretation of the 2nd respondent of section 14 (10) of the Trade Disputes Act is the correct judicial interpretation of what was enacted by Parliament the said section violated sections 71, 73, 74, 75, 77, 80 and 82 of the Constitution (repealed) and to that extent by operation of section 3 of the Constitution (repealed) the rights of the petitioners prevailed and the award is rendered null and void.

13. A declaration that the petitioners are entitled to an order setting aside the purported award in Cause No. 106 of 2006 dated 16th November 2007.

14. An order to bring to the High Court the purported 2nd respondent's award made on 16th November 2007 and to quash the same.

15. An order declaring Gazette Notice No.12302 of 14th December 2007 null and void.

16. An order quashing Gazette Notice No.12302 of 14th December 2007.

17. An order directed to the 2nd respondent, the 3rd respondent and the Ministry of Labour through the 1st respondent restraining them from executing the award in Cause No. 106 of 2006 dated 16th November 2006.

18. An order that the 1st, 2nd and 3rd respondents pay the costs of this petition jointly and severally.

The petition was filed with a supporting affidavit sworn by Yudhvir Singh as General Manager of the 1st petitioner on 5th February 2008. (Though the 1st petitioner has ceased to be a litigant in the case, this affidavit was sworn on behalf of the other petitioners, and there has not been any objection to it being used in the petition).

It was deponed, inter alia, that the petitioners were engaged in manufacture of garments on orders for export to the United State of America. That they were Export Processing Zone (EPZ) manufactures and members of the Federation of Kenya Employers (FKE). That they had negotiated a Collective Bargaining Agreement (CBA) with the 3rd respondent fixing terms and conditions of service for their employees. That an attempt to negotiate a CBA effective 1st October 2005 to 30th September 2007

reached a deadlock and a dispute was filed for adjudication. That the trade dispute was registered by the 2nd respondent as Cause No.106 of 2006 Tailors and Textiles Workers Union Vs EPZ Apparel Manufactures and Exporters Group of FKE. That the petitioners and the 3rd respondent submitted written memoranda to the Industrial Court (2nd respondent) and also made oral submissions to the court through their representatives. That the 2nd respondent was to rely on the advice of an Economist from the Ministry of Labour one Benson Okwayo who was to advise on the petitioners financial abilities and advise on the implications of the guidelines issued vis a vis the disputed items.

That the wages guidelines were issued by the Minister for Finance in 1973 and that the most recent issue was in November 2005. That in the course of proceedings, the expert (Economist) prepared a report which was produced in court and he was cross-examined by the parties representatives. It was confirmed in the report that the 1st petitioner had made loses from the year 2003 – 2006, and that the financial position of the petitioners was as confirmed by the Economist who testified as a witness, and that the petitioners could not afford to pay the aggregate of 25% increase for employees payments as awarded. That the award itself is inconclusive as it did not finally determine the dispute between the parties and ordered that the figures payable be determined by the "**head of the economic planning division**" it was deponed also that the head of economic planning division was not mandated in law to settle trade disputes except with the mutual consent of the parties. That the parties to the dispute had not yet met and agreed on the amount payable. That the vague orders arising from the inconclusive award had been gazetted in Gazette Notice 12302 of 14th December 2007. That on 23rd January 2008 the 3rd respondent proceeded to demand payment of wage arrears as per the award from the petitioners within fourteen days failure to which they would take legal and industrial action. That the 2nd respondent's actions in a awarding the increase of wages and house allowances and the gazettement of the award and threat of industrial action violated the fundamental constitutional rights of the petitioners.

Following the filing of the petition, an application for conservatory orders was made. Conservatory orders were granted by the court.

The petitioners through their counsel Obura Mbeche and Company Advocates filed written submissions on 2nd September, 2009. Mr. Obura their learned counsel also highlighted the submissions in court. It was contended that the 5th petitioner Altex (EPZ) Ltd had withdrawn from the case. It was contended that the petitioners were relying on affidavits sworn on behalf of 1st petitioner, 2nd petitioner, 3rd petitioner and 4th petitioner, all sworn on 5th February 2008.

Counsel contended that all the petitioners were members of a group called EPZ Apparels Manufacturers and Exporters Group of FKE. It was contended that the said EPZ group from time to time negotiated Collective Bargaining Agreements with the 3rd respondent. An attempt to negotiate a Collective Bargaining Agreement (CBA) effective 1st October, 2005 and ending on 30th September, 2007 reached a deadlock and the dispute was referred to the 2nd respondent for adjudication as Industrial Court case Number 106 of 2006.

Parties filed written memorandum to the Industrial Court (2nd respondent) which formed the basis of submissions at the trial. Among the issues in dispute was an issue on general wage increase. At that time, the Trade Disputes Act (Cap 234 of the Laws of Kenya) now repealed was applicable. Section 14 (10) of the Act required the 2nd respondent to be guided by guidelines or any other directives on wage and salary levels as well as other terms and conditions of employment that might be issued from time to time by the Minister for Finance.

It was submitted that pursuant of the above section of the law, the 2nd respondent instructed the Economic

Planning Division of the Ministry of Labour and Human Resource Development to provide an expert opinion on the issues in dispute, especially the general wage increase.

That report was dated 28th June, 2007 and was filed by the 2nd respondent. It made a number of observations and found that the demand by the claimants would result in an additional wage bill of Ksh.46.4 million to the 1st petitioner, Ksh. 53.4 million as regards the 2nd petitioner, Ksh.56.1 million with regard to the 3rd petitioner, and Ksh.51 million with regard to the 4th petitioner. The report showed also that all the four petitioners had incurred losses for the period 2003 – 2006, with the 1st petitioner and 3rd petitioner incurring losses all the years, while the 2nd petitioner incurred losses except for 2006 and the 4th petitioner incurred a loss in 2005. Counsel argued that the expert report recommended that unionisable employees were entitled for a wage increase of 25%. The said awards resulted in an additional liability to the 1st petitioner in the sum of Ksh.15,210,230; 2nd Petitioner 18,397,548/-; 3rd petitioner 17,520,057/-; and 4th petitioner 16,719,612/- However, since the petitioners were making losses from 2003, the Industrial Court (2nd respondent) should not have awarded a wage increase of 25% backdated to 1st October, 2005.

It was counsel's contention that the 2nd respondent misdirected itself in stating that an argument that an employer is unable to meet such demands due to poor financial performance or any other reason had no merits, as an employer had other options.

Counsel argued that the 25% salary increase to all unionisable staff was not ascertained as it was not known or determined who those unionisable employees were. Instead of so ascertaining the amount the learned Judge made an illegal order directing the 3rd respondent to make calculations and deliver them within 30 days and directed that the Head of Economic Planning Division or a representative appointed by him, would make the calculations and that the calculations once served would be part and parcel of the award and become payable within 6 months.

It was argued that this was an error in law. It was wrong to let the 3rd respondent determine the calculations and that if there were objections some unknown representatives of the Economic Planning Division would determine the amount. That decision, according to counsel, meant that the petitioners had been denied a say in determination of the final liability to be imposed on them.

It was contended that the award was unconstitutional. It contravened the provisions of section 77 (9) of the Constitution in that the petitioners were not accorded a fair trial. It violated the provisions of section 71 of the Constitution which guaranteed the right to life. It violated the provisions of Section 73 of the Constitution which guaranteed the right against being subjected to servitude. It contravened the provisions of Section 75 of the Constitution as the award deprived the petitioners their Constitutional rights including the right to contract with their employees. It contravened the provisions of section 80 of the Constitution in that it denied the petitioners freedom to associate with persons of their choice. It also contravened Section 82 of the Constitution which protected persons against arbitratory, capricious and unreasonable exercise of power.

It was contended that the petitioners as corporations were entitled to the enjoyment of fundamental rights and that they fell within the definition "**person"** under section 123 of the Constitution. Reliance on this definition of "**person**" was made on the case of **Shah Vershi Devshi & Co. Ltd. versus The Transport Licensing Board [1991] EA 289** where a bench of two Judges stated that a person within the meaning of Chapter V of the Constitution which protected fundamental rights and freedoms included a company.

On the specific alleged violations or contravention of provisions of the Constitution, counsel argued that this petition was brought under rule 13 of the **Constitution of Kenya** (**Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual**) **High Court Practice and Procedure Rules 2006**. Neither of the respondents had filed replying affidavits to controvert the affidavits filed by the petitioners as would have been expected of them. It was contended that in the proceedings before the Industrial Court, the provisions of Section 77 (9) of the Constitution on fair trial were violated. The respondents did not dispute the fact that at the time the Industrial Court held its proceedings, all the petitioners were incurring operational losses and that the said factual situation was brought to the attention of the 2nd respondent. The 2nd respondent however, in spite of being aware of the inability of the petitioners to pay additional wage increases, went ahead and awarded 25% wage rise. Therefore, the proceedings and the award by the 2nd respondent amounted to an unfair trial by a tribunal established under the law and, therefore, should be quashed.

It was contended that it was not true that the petitioner's did not want to pay already contracted salary. Nor do they not want to avoid observing statutory minimum wages set under the law. The issue was that, contrary to the norms of a fair trial, the 2nd respondent imposed additional liabilities on the petitioners knowing very well that the petitioners were not able to meet the obligations imposed. Worse still, the 2nd respondent did not clearly define the extent of the obligation and instead threw the matter to one party in the dispute, that is the 3rd respondent, to determine the actual amount due and to convince the petitioners to pay and failure to which the matter be determined by an unnamed person appointed by the Head of the Economic Planning Division of the Ministry of Labour.

It was argued that the provisions of the Trade Disputes Act did not authorize the 2nd respondent to delegate its powers and duties to the Head of Economic Planning Division or any representative of that division. It was contended that the Judge of the 2nd respondent, having been appointed by the President, could not delegate his powers unless the instrument of such delegation was signed by the President himself or the Minister in charge, pursuant to the provisions of section 37 of the Interpretation and General Provisions Act (Cap 2). In any case, such delegations must be pursuant to section 38 of the Act for it to acquire the force of law. It was contended that the purported delegation by the 2nd respondent herein, was null and void as it was done contrary to the legal maxim that delegated power cannot be re-delegated.

It was contended further that the 2nd respondent could not delegate its powers to the 3rd respondent. It was wrong for the 3rd respondent to assume the role of a judicial authority. That attempt was void *ab initio* because it was not what was envisaged under the provisions of section 77 (9) of the Constitution.

Reliance was placed on the case of **Ole Nganai versus Arap Bor [1983] KLR 233** where the Court of Appeal held that a judge ought to make a decision or order on every claim. Where the judge failed to make a conclusive decision, the order of the judge would be nebulous, uncertain and indefinite and no reasonable decree could be drawn from it.

It was argued that though the 2nd respondent found that the guidelines from the Ministry were mandatory and binding, they should not have been the basis of awarding 25% wage increase irrespective of the petitioners inability to pay. The court must not award a wage increase irrespective of the ability of an employer to pay. It was argued also that the guidelines were only mandatory should the Industrial Court (2nd respondent) be convinced that there was need to order a wage increase. The need to increase wages would be determined by the ability of the employer to pay. That is why, the Minister for Finance in the same guidelines stated that there was need to sustain and scale up economic performance and that in determining wages, productivity increases and the ability of the economy and employers should be taken into account in order to sustain increased labour costs. It was contended that in the same guidelines the

Minister had indicated that Collective Bargaining Agreements and revision of wages should be in line with productivity increases. It was argued that the 2nd respondent should not have disregarded the petitioners' inability to pay the increased wages. That disregard amounted to a mistrial within the provisions of Section 77 (9) of the Constitution. It was argued that if there was a conflict between the provisions of the Constitution and Section 14(10) of the Trade Disputes Act, then in accordance with the provisions of Section 3 of the Constitution, section 14(10) of the Act would be null and void and Section 77(9) of the Constitution would prevail.

Counsel relied on the case of **Anisminic Ltd Versus the Foreign Compensation Commission & Another [1969] 1 ALLEAR 208** wherein Lord Reid listed circumstances under which a superior court may interfere with a decision of a tribunal and declare it a nullity. Counsel argued that those circumstances were inter alia, where the tribunal had: -

(a) Failed to do something in the course of the enquiry which is of such a nature that makes its decision a nullity.

(b) Given a decision in bad faith.

(c) Made a decision it had no power to make.

(d) Failed to comply with the rules of natural justice.

(e) Out of perfect good faith has misconstrued the provisions giving it power to act in that it failed to deal with the question remitted to it and decided some questions not remitted to it.

(f) Refused to take into account something which it was required to take into account.

(g) Based its decision on some matter which under the provisions setting it up it had no right to take into account.

It was contended that Parliament had never directed a Judge of the Industrial Court (2nd respondent) to delegate his powers. Nor did Parliament give the 2nd respondent power to give wage or allowance increases where the employer was unable to pay.

Reliance was also placed on the case of **Mecol Ltd Versus Attorney General and Others – HCCC Misc. Civil Application No. 1784 of 2004** where the court found that the rights under Section 77 (9) of the Constitution had been infringed by an award of the Industrial Court as that court ordered the applicant to pay final dues to employees who had already collected the final dues and acknowledged full and final payment of their dues.

Also it was argued that the court had in the **Mecol case** found that the Industrial Court acted without jurisdiction by entertaining a suit by a trade union on behalf of persons who were not members of that union. Reliance was also placed of the case of **R Versus Kajiado Lands Disputes Tribunal and Senior Resident Magistrate Kajiado exparte Lilian Muranja – High Misc. Application No. 689 of 2001** where the court held that if a tribunal lacks jurisdiction in entertaining a matter or issuing an award, an award made in those circumstances was a nullity and anything out of a nullity is also a nullity.

On the alleged contravention of the petitioners' right to life contrary to Section 71 of the Constitution, Counsel argued that the petitioners were all corporate entities registered under the Companies Act. Companies like living persons enjoy a life of their own and were entitled to enjoyment of

Constitutional fundamental rights as enshrined in the Constitution. Reliance was placed on the definition of person under section 123 of the Constitution which included a company. It was emphasized that section 71 of the Constitution, which also applied to companies, provided that no person should be deprived of his life intentionally except in execution of a sentence of a court arising from a criminal conviction.

Reliance was placed on the affidavit sworn on behalf of the 1st, 2nd, 3rd, and 4th petitioners. It was contended that the petitioners were not able to honour the award in Industrial Court Cause No.106 of 2006 and that, if they were compelled to do so, they would suffer irreparable damage and would be forced to wind up. Such winding up was envisaged under section 219 (e) of the Companies Act (Cap.486), which provided that one of the reasons why a company may be wound up was from an order of the High Court declaring that the company was unable to pay its debts. Therefore the effects of the award delivered herein by the 2nd respondent in Cause No.106 of 2006 was to deny the petitioners their Constitutional fundamental right to life. This court should therefore quash the awards of the 2nd respondent which was published in the Kenya Gazette Notice No.12302 of 14th December 2007.

On alleged violation of the right to property contrary to section 75 of the Constitution, counsel relied on the **Mecol Case (supra).** Counsel contended that, where there was an order from the Industrial Court (2nd respondent) for an employer to pay an undefined amount as compensation to employees, that order was a violation of an employers property rights violating section 75 of the Constitution. Counsel argued that the fact that the 2nd respondent identified 25% as the amount of award, did not change the position because the award was left upon the 3rd respondent to calculate the amount due to the unionisable employees. Counsel contended that the award went even further to state that if the petitioners disputed the 3rd respondent's calculation, then an unnamed person to be appointed by the Head of the Economic Planning Division of the Ministry would make the calculation and whose decision would be final. In effect therefore, the 2nd respondent imposed a liability on the petitioners to pay an amount of money which was unspecified and could still be subject to dispute.

It was also contended that even if one assumed that the award was definable, since it was made without jurisdiction it was a nullity An attempt to execute an illegal award would amount to a violation of the petitioner proprietary rights contrary to section 75 of the Constitution.

On the allegation of violation of the rights against servitude contrary to section 73 of the Constitution, counsel contended that the 2nd respondent having acknowledged that the petitioners were financially incapable of increasing wages for their unionisable employees by 25%, it could not compel them to effect wage increases with that inability. That action amounted to subjecting them to servitude. Reliance was placed on the case **of Sammy Muhia and two Others -vs- Kenya Power and Co. Ltd (2) 2004 e KLR** wherein Justice Ibrahim held that a decision or order compelling an employer to retain employees personal services and provide them with work and duties and pay them salaries and allowances and allow them entry into the premises and access to information and documents would amount to servitude. The petitioners herein, therefore, contended that to compel them pay additional wages without legal basis and contrary to guidelines issued by the Minister for Finance under section 14 (10) of the Trade Dispute Act in a situation where the petitioners were not solvent, amounted to bondage contrary to section 73 of the Constitution, and hence an act of servitude.

Reliance was also placed on the case of **Republic –vs- Kadhi – ex parte Nasreen [1973] EA 153** wherein the High Court stated that compelling a citizen to do something where there was no legal basis could amount to bondage or servitude.
On the alleged violation of rights against inhuman treatment and the right to associate contrary to section 80 (1) of the Constitution, counsel argued that to expect the petitioners to pay what they could not afford was inhuman. To suggest that the petitioners declare their employees redundant or be wound up

altogether was equally a violation of the petitioners' right to contract with their employees. Reliance was placed on a publication entitled **American Jurisprudence 2nd Edition Vol.16 para. 373** wherein the learned author stated that though the term freedom of contract did not appear in the (American) Constitution it was a liberty nonetheless which fell within the protection of the due process clause of the 14th and 15th amendments of the Constitution of the United States.

Reliance was placed on the case of **Shah –vs- Attorney General (2) [1970] EA 523** wherein the Ugandan Constitutional Court held that property under section 8 (2) (c) of the Constitution of Uganda included a contract and any legislative enactment purporting to take away a citizen's right under contract was void to that extent. Counsel contended that courts should not merely equate freedom of association with the right to form and join trade unions. Section 80 of the Constitution was broader than that. Counsel emphasized that employers should be allowed to engage employees at a cost they can afford.

Counsel submitted that contracts of employment should be built on consensual arrangements between employers and workers. Reliance was placed on the case of **Lymoki and Others –vs- Attorney General [2005] 2 EA 127** (Uganda) as well as the case of **Privy Council in Collymore –vs- Attorney General [1970] AC 532** in which the court observed that freedom of association meant no more than freedom to enter into consensual arrangements.

In response to the replies by the 1st and 2nd respondents counsel contended that the grounds of objection were misplaced. Counsel argued that the allegation that the application was scandalous, frivolous, vexatious, misconceived and an abuse of the court process was not maintainable. No evidence was adduced by the respondents to support their allegation.

On the allegation that the petitioners' application was made to undermine the principle of the rule of law, counsel contended that no evidence was tendered to support that allegation. In fact the 2nd respondent failed to observe the principles of natural justice and violated the rule of law.
On the allegation that the application was wrongly premised on the assumption that the 2nd respondent's decision was made in excess of jurisdiction, counsel argued that the failure of the 2nd respondent to observe the rules of natural justice was itself an act devoid of jurisdiction. This was equally true of the failure of the 2nd respondent to observe the guidelines as well as its attempt to delegate and distribute authority to persons not recognized in law for that purpose.

On the contention by the respondents that the petition did not disclose a cause of action, counsel argued that the fact that the High Court granted conservatory orders pending the prosecution of the petition was itself testimony to the fact that the petitioners had an arguable case.

On the contention by the respondents that the petition contravened the Trade Disputes Act (now repealed), counsel contended that this petition was brought under Constitutional provisions, and the Trade Disputes Act was subordinate to the Constitution.

On the contention by the respondents that the petition is contrary to public interest and policy, it was contended that the petition was for the public good as it intended to inculcate the virtues of the rule of law in the administration of justice by the Industrial Court (2nd respondent).

In reply to the response by the 3rd respondent, counsel argued that the said 3rd respondent confirmed that the petitioners had been incurring operational losses and by analogy they could not pay increased wage rates. It was contended that the 2nd respondent was bound to observe the mandatory wage guidelines. The said guidelines did not provide that even where an employer was unable to meet increased wage rates, the 2nd respondent was obliged to award wage increases.

Counsel contended that it was the duty of the 2nd respondent to determine specific sums payable to employees in the form of wage increases. However, in the present case the 2nd respondent delegated the

assignment of determining the actual amounts payable and went ahead to state that where there was a dispute on the figures then an unnamed third party would determine that part of the award.

It was emphasized by the counsel that the petitioners were not making any profit but continued to observe the legal requirements of paying employees their contracted salaries to date. In the view of counsel, the increase in salaries would render the petitioners insolvent.

Counsel contended that there was no law imposing an obligation on employers to award wage increases to employees. There was only a law which imposed an obligation on employers to collectively bargain with their employees once certain conditions were met. On failing to agree in the negotiation, the law required that parties go to arbitration before the2nd respondent. However the 2nd respondent in the present situation did not observe neutrality and impartiality in the matter hence the filing of the present petition.

Lastly, counsel contended that a demand by employees for improved terms and conditions of service was not a constitutional right but merely an opportunity to bargain for better conditions of remuneration which could only be granted subject to the ability of the employer to afford the costs involved.

The petition was opposed. The 1st and 2nd respondent through the Attorney General filed grounds of opposition on 4th November, 2009. The grounds are brief and we will reproduce them hereunder. They are as follows –

(a) This court lacks jurisdiction to hear and determine this petition by virtue of section 77 (2) of the repealed Trade Disputes Act.

(b) The petitioners have not been deprived of the right of protection under the law.

(c) The petitioners are not being deprived of their property.

(d) No torture has been subjected to the petitioners.

(e) The petitioners are not being subjected to servitude.

(f) ***The petitioners' lives are not being terminated***.

Mr. Onyiso learned State Counsel, in submissions in court, relied on the grounds of objection filed on 4th November, 2009. Counsel conceded that the award of the 2nd respondent was indeterminate. He, therefore, argued that there was nothing to challenge in this court. There was nothing that was disclosed by the petitioners that had raised Constitutional issues for decision. Counsel contended that it would be prudent to await a definite decision from the Ministries concerned before any decision could be challenged. It would only be at that point that one would be able to argue whether there was contravention of Constitutional rights.

Counsel argued that as this dispute was on a matter between employer and employees it was a private matter. It could not be determined through a Constitutional petition. There was no torture proved. In any case, the term torture could not apply to a company. This was also true on the issue of servitude and slavery. In counsel's view, companies could not be subjected to servitude. The fact that a company was not able to pay its employees only meant that it could not honour its obligations. That was not the same as a violation of its right to life or to exist. A company could be resuscitated. Counsel argued that it was preferable that a company be wound up rather than deny an employee of his rights.

Counsel for the 3rd respondent Ms. Guserwa filed a response and highlighted the same in court. The 3rd respondent relied on their response dated 23rd March 2008 as well as written submission filed on 12th October 2009.

In their response dated 23rd March 2008, they contended that the award could not be said to be vague, indefinite or nebulous when in fact it took into account the fact that there already existed a Collective Bargaining Agreement between the parties which had set out the applicable terms for review. The respondent, therefore, did not have any need to work out actual figures. It was contended that the 2nd respondent did not delegate its duties to a third party but merely used the services of a third party in analyzing the financial capability of the petitioners. It was argued that the employees had been suffering from poor remuneration and were heavily exploited. It was also the position of the 3rd respondent that the petitioners would not exist without the services of their employees, and that there was no possible breach of the provisions of section 71 of the Constitution. It was also the position of the 3rd respondent that the petitioners could not hide behind their inability to pay without seeking to be declared insolvent. Currently, since they were existing companies, they were subject to their legal obligations towards their workers. The 3rd respondent also contended that all the parties were granted a fair and impartial hearing of their case by the 2nd respondent. There was therefore no violation of the provisions of sections 71, 73, 74, 75, 77, 80 and 84 of the Constitution as alleged by the petitioners.

In the submissions the 3rd respondent gave a background to the dispute. Their learned counsel Ms Guserwa contended that the 3rd respondent lawfully represented its members in the proceedings before the 2nd respondent. The 2nd respondent exercised its powers as set out under section 14 of the Trade Disputes Act (now repealed) and took into the account the dispute lodged before it. The 2nd respondent had jurisdiction to hear and determine the dispute as forwarded to it by the Minister. Based on the material placed before it as well as relevant documents and submissions by the parties, the 2nd respondent lawfully and procedurally ruled in favour of the employees by issuing the award in their favour. The said award enhanced several monetary benefits of the said employees. In accordance with the provisions of the Trade Disputes Act the award was final. Section 17 (2) of the Trade Disputes Act (Cap 234) provided that the decision of the Industrial Court, was (2nd respondent) not subject to any review, variation, setting aside appeal or otherwise.

It was submitted by counsel that the appointment of the Economist by the 2nd respondent was well founded. The report which stated that the applicants were making loses did abrogate from the petitioners' duty to pay their employees their lawful dues from whichever source as long the petitioners continued to run their business. Counsel contended that as employers the petitioners were not allowed to continue exploiting workers. They were enjoined to respect and observe the wage guidelines. The 2nd respondent, on its part, was empowered to award salary and wage increases as may be appropriate. The wage increase of 25% herein was well founded.

Counsel contended that all parties were aware of the level of existing salary or wages before they went to Industrial Court (2nd respondent) to resolve their disputes. Counsel contended that the issues raised herein could not be said to be Constitutional issues. The rights of employers to exist did not override the rights of employees to remain in employment at salaries or wages that could sustain them. As employers and employees were partners in development and business, none was allowed to exploit the other. No right against servitude were violated by the award. The petitioners should not be allowed to hide under insolvency to avoid paying workers the increases ordered by 2nd respondent.

It was lastly contended that the petition was an afterthought. This court had no power to look into merits of the decision of the 2nd respondent unless such decision was made outside the jurisdiction of the court. Reliance was placed on the case of **Kenya Airways Ltd –vs- Kenya Airline Pilot Association – Misc. Application No.254 of 2001** as well as case of **Thika Municipality –vs- the Industrial Court – HC Misc. 286 0f 2007.**

In response to the submissions of the respondents, Mr. Obura learned counsel for the petitioners, submitted that his clients were not disputing the reports of the Economic Planning Division. Counsel contended that section 14 (10) of the Trade Disputes Act bound the 2nd respondent to rely on the expert report. The 2nd respondent, however ignored the report and therefore violated section 77 of the Constitution. Counsel emphasized that the 2nd respondent was required to make the decision in industrial disputes. However, it failed to make a final decision in the matter. The 2nd respondent did not determine the case. That was an irregularity that required rectification. Counsel contended also that Mr. Onyiso for the 1st and 2nd respondents rightly conceded that the award of the 2nd respondent was indeterminate. Counsel added that a court established under the Constitution could not delegate its power to a non-judicial authority. Counsel submitted that the petitioners were not challenging contractual issues. They were challenging the process adopted by the 2nd respondent.

Counsel contended that since the guidelines issues by the Minister were statutory, non compliance with the same by the 2nd respondent was a violation of section 82 of the Constitution. It amounted to acting capriciously. There was servitude.

Counsel contended that though employees were entitled to fair wages, the ability of an employer to pay was important in determining the fair wage. Fair wage changes were determined by the ability of an employer to pay. Forcing an employer to pay wages which they could not pay was imposing servitude. Counsel emphasized that the spirit of the new Constitution was that the courts should not be bogged down by technicalities.

We have considered the petition, documents filed, the submissions both written and oral and the authorities cited. In our view the issues for determination are as follows -

(1) Whether this court has jurisdiction to entertain proceedings challenging the decision of the Industrial Court (2nd respondent) by reason of provisions of section 17 of the Trade Disputes Act (Cap 234).

(2) Whether there are contraventions of Constitutional fundamental rights disclosed.

(3) Whether the Industrial Court (2nd respondent) delegated its powers and whether that delegation was irregular and created uncertainty.

(4) Whether this court should grant the reliefs sought.

(5) Who bears the costs of these proceedings?

1. **Whether this Court has Jurisdiction to Entertain Proceedings Challenging the Decision of the Industrial Court by Reason of Provisions of Section 17 of the Trade Disputes Act (Cap 234).**

The respondents herein have argued that this court does not have such jurisdiction. They rely on section 17 of the Trade Disputes Act (Cap 234) now repealed which provides as follows –

"17 (1) The award or decision of the Industrial Court shall be final.

(2)The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed, and shall not be restrained or removed by prohibitory injunction, certiorari or otherwise, either at the instance of the government or otherwise."

The petitioners counsel on the other hand argues that the above section does not bar this court from interfering with the decision of the Industrial Court when that decision is an illegality or where the issue arises from the Constitutionality of the matter. He has argued that this is a Constitutional petition.

Therefore, the High Court as the constitutional Court has jurisdiction to entertain this matter.

There are various decisions of the High Court on whether or not the jurisdiction of the High Court has been excluded completely by the provisions of section 17 of the Trade Disputes Act. Section 60 of the Constitution, (now replaced) provides that the High Court has unlimited jurisdiction in criminal and civil cases. The same section also provides that the High Court has such other jurisdiction and powers as may be conferred on it by this Constitution or any other law. Section 65 of the Constitution provides that Parliament may establish courts subordinate to the High Court and Courts martial and courts so established will have such jurisdiction and powers as may be conferred on them by any law. It also provides that the High Court has jurisdiction to supervise civil or criminal proceedings before subordinate courts or court martial and may make such orders and issue such writs and issue such directions as it may consider appropriate for the purpose of ensuring that justice is done by those courts.

Section 17 of the Trade Disputes Act clearly states that the decisions of the Industrial Court are final. It has been held that section 60 of the Constitution does not necessary give the High Court jurisdiction to hear cases in areas of law where Parliament has decided to limit the jurisdiction of the High Court. In the case of **Kenya Airways Limited –vs- Kenya Airline Pilots Association- Nairobi Misc. Civil Application No.254 of 2001** Nyamu J (as he then was) and Wendoh J cited the case of **Mayer and Another –vs- Akira Ranch Ltd 1972 EA 347** in which it was held that: -

"The legislature can limit relief or deprive a person of relief without infringing the unlimited jurisdiction of the High Court".

The judges also relied on the decision in **Narok County Council –vs- Trans Mara County Council 2000 1 EA 161** where the Court of Appeal stated **–**

"Though section 60 of the Constitution gave the High Court unlimited jurisdiction it did not clothe it with jurisdiction to deal with matters that a statute had directed should be done by a Minister as part of the statutory duty. In the instant case the statute clearly provided that in default of agreement between the two counsels the apportionment of assets and liabilities would be undertaken as directed by the Minister."

The court in the **Kenya Airways** case went on to state that, in view of the provisions of section 17 (2) of the Trade Disputes Act, the High Court would not interfere with the decision of the Industrial Court by way of review. The court felt that the Industrial Court was exercising specialized jurisdiction as envisaged by section 65 (1) of the Constitution.

Yet in a later case of **Municipal Council of Thika –vs- Industrial Court of Kenya Nairobi High Court Case No.268 of 2007** the High Court citing the **Kenya Airways –vs- Kenya Airline Pilots Association** case (above) came to the conclusion that the High Court would still interfere with the decision of the Industrial Court in its supervisory capacity, if the actions or the Industrial Court were brought within the

purview of Judicial Review on grounds of irrationality, impropriety or illegality. It was the view of Wendoh J that the High Court would not interfere with the decision of the Industrial Court only when one was challenging the merits of the Industrial Court's decision.

Having considered the conflicting positions of decisions in the High Court and considering that Judicial Review is a special jurisdiction and that, by any standards, the Industrial Court under the repealed Constitution was not elevated to the level of the High Court, the logical interpretation could only be that the Industrial Court was an inferior tribunal to the High Court. The Constitution did not appear to give Parliament or any government organ power to set up a court that was of equal status to the High Court with regard to Judicial Review or Constitutional matters. As was said by De Smith, Woolf and Jowell in their book JUDICIAL REVIEW OF ADMINISTRATIVE ACTIONS 5th Edition para.522 –

"even where the rights to certiorari had been expressly taken away by statue, the courts relying on one or other of the restrictive rules of interpretation already mentioned or upon the preposition that Parliament would not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior court …… held that certiorari would issue, not withstanding the presence of the words taking away the right to apply for it, if the inferior tribunal was improperly constituted ……. or if it lacked or exceeded jurisdiction because of the nature or the subject matter or failure to observe essential preliminaries ……."

In our view the Industrial Court (2nd respondent) as it then was, was inferior an inferior tribunal to the High Court. It did not itself have judicial review or Constitutional powers. It appears that Parliament was trying to make the decision of an inferior tribunal neither subject to appeal nor review. That is not consonant with the principles of fair justice. It is not consonant with the meaning and spirit of the Constitution (now repealed) which provides for fair hearing. It is our finding that the High Court has supervisory in Judicial Review over the Industrial Court under the provisions of the replaced Constitution.

These proceedings were also brought by way of petition. Again it is the High Court which has original jurisdiction in dealing with Constitutional petitions on alleged violation of fundamental rights under section 60 and 84 of the Constitution. In that regard the Industrial Court cannot be said to be immune to the jurisdiction of the High Court by virtue of section 17 (2) of the Trade Disputes Act which is an inferior legislation.

We therefore, hold that this court has jurisdiction to deal with complaints the decisions of the Industrial Court (2nd respondent) under its judicial review and constitutional jurisdiction

2. **Whether there are Contraventions of Constitutional Fundamental Rights Disclosed.**

Counsel for the petitioners has argued that there were several violations of the fundamental rights of his clients arising from the decision of the Industrial Court. He has argued that this court should so find as the definition of a person under section 123 of the Constitution includes a company.
Indeed, section 123 (1) of the Constitution provides as follows –
"123 (1) In this Constitution, unless the context otherwise requires - "person" includes a body of persons corporate or an unincorporated".

Counsel contended that several provisions of the Constitution have been violated with respect to his clients. These are listed in the petition as section 71, 73, 74, 75, 77, 80 and 82 of the Constitution.

In our view, for anybody to come to court claiming a violation of fundamental rights, such a person has to bring himself or herself within the meaning and definition of the specific contravention. There is no general contravention. It is therefore incumbent upon a petitioner to bring himself within the parameters of a particular section of the Constitution for the purpose of demonstrating his case, in order to succeed in his pursuit of redress as a consequence of the alleged violation of the fundamental rights and freedoms. The petitioners have cited many sections of the Constitution.

Section 71 of the Constitution provides that everyone has a right to life. Such life may be taken away only in the execution of a lawful sentence following a conviction for a criminal offence. A company cannot be sentenced to death. In our view also, a company cannot be arrested or detained. A company cannot die. Consequently, we do not see how section 71 of a Constitution would have been violated by the Industrial Court (2nd respondent) with the regard to the petitioners who were companies. We find that no facts have been provided to establish that the petitioners' right to life has been threatened or will be taken away.

We now turn to section 73 of the Constitution which deals with slavery. The 2nd respondent's award imposes a wages increase that the petitioners claim they will not be able to honour. The petitioners' counsel has cited the case **of Sammy Muhia & 2 others Versus Kenya Power & Lighting co. Ltd [2004] eKLR** in which Ibrahim J, as he then was, stated that forcing an employee on an employer would amount to servitude. Counsel also relies on the case of **Republic Vs Kadhi Kisumu – Ex Parte Nazreen [1973] EA153** in which the court held that an order compelling a citizen to do something not backed by law amounted to subjecting a person to bondage and servitude.

We find that in both the above cases the complaint was about forcing a relationship between persons. In the present case, the 2nd respondent has not purported to force the petitioners to have any relationship with their workers. The 2nd respondent merely tried to improve the terms of an existing contract of service in favour of the employees in accordance with the labour laws of this country. Whether the decision of 2nd respondent is right or wrong, it does not amount slavery or bondage as nobody has been forced to have a labour relationship with another. In our view, the petitioners have not brought themselves within the provisions of section 73 of the Constitution.

We now turn to section 74 of the Constitution. It deals with torture, inhuman or degrading punishment or treatment. In our view, torture of necessity, goes with a living thing. A company which does not have physical life and has no senses or feelings, cannot be tortured. In our view, a company can exist but it cannot live. Inhuman or degrading treatment only applies to living things with feelings. It does not apply to inanimate things like companies. We find and hold that the petitioners have not brought themselves within the definition of section 74 of the Constitution.

Section 75 of the Constitution deals with compulsory acquisition of property or interests in or rights over property. The complaints herein are with regard to increased wages. Nobody has taken the assets of the petitioners or threatened to take those assets. Nobody has taken or threatened to take the rights over property of the petitioners. The complaints herein do not bring the petitioners within the protections provided under section 75 of the Constitution. We find no basis for the allegation that the Constitutional rights of the petitioners under section 75 of the Constitution have been violated.

Section 77 of the Constitution deals with fair hearing in criminal cases within a reasonable time by an independent and impartial court, as well as punishment. Again, the complaints in the petition have nothing to do with criminal charges. They relate to wages payable by employers to employees and their increase or otherwise. The petitioners have therefore not brought themselves within the provisions of section 77 of the Constitution.

Section 80 of the Constitution deals freedom of assembly and association. Again, the petitioners as

companies and employers have not stated what freedom of assembly or association they wanted to exercise, which was curtailed by the decision of the Industrial Court (2nd respondent). We presume that the fact that they have come to court as co-petitioners shows that they have freedom to associate. They have freedom to join the Federation of Kenya Employers or some lawful associations. The complaints herein are merely with regard to an award of what is payable to their employees. That has nothing to do with the petitioners' freedom of association. They have therefore not brought themselves within the definition of violations under section 80 of the Constitution.

Section 82 of the Constitution provides that no law shall make provisions that are discriminatory, and no person shall be treated in a discriminatory manner. This section would cover the Trade Disputes Act if the petitioners were specifically discriminated against. They have not however stated how and to what extent the Act of Parliament has discriminated them. The Trade Disputes Act (Cap. 234) covers situations between all employers and employees. We find and hold that the petitioners have not brought themselves within the provisions of section 82 of the Constitution.

In conclusion, we find that the petitioners have not demonstrated or disclosed any contravention of their fundamental Constitutional rights. This petition discloses no Constitutional issues.

3. **Whether the Industrial Court (2nd respondent) Delegate its Powers and whether that Delegation was Irregular and Created Uncertainty?**

Counsel for the petitioners has argued that the 2nd respondent erred in the ruling by the firstly, imposing a very high percentage of an award of wages and allowances. Secondly, that it allowed third parties to make part of its decisions.

We note that the final paragraph of the award reads as follows –

"In the circumstances, the court awards that the respondent to calculate and pay their unionisable employees their benefit under general wage increment and house allowance which they are entitled due to this award which grants them an increase of 25% for general wage and 12% for house allowed for the period from 1st October 2005 up to 30th September 2007. These payments should be made within six months. The claimant union is to make the calculations and deliver them to the respondent within 30 days and if the latter disputes them, the head of the economic planning division or a representative appointed by him to make the calculations. The calculations once served upon the respondent are to be part and parcel of this award, and the dues to be paid as said within six months."

We have perused the provisions of the Trade Disputes Act (Cap 234). The powers of the 2nd respondent to make an award under section 14, 15, 16 and 17 of the Act are for the Industrial Court (2nd respondent). The 2nd respondent does not appear to have powers to delegate the functions of making the award to third parties. It is only where there are questions of interpretation of the award that the Minister or any party to the award may apply to the 2nd respondent to determine that question.

Under section 16 (6) of the Trade Disputes Act, it is provided as follows –

"16(6) subject to this section, an award shall, as from the date that the award has effect, be an implied term of every contract of employment between the employers and employees to whom it relates so that the rate of wages to be paid and the terms and conditions of employment to be observed under the contract shall be in accordance with the award until it is varied by a subsequent award or by agreement."

From the wording of the last paragraph of the 2nd respondent's award herein contested, the 2nd respondent seems to have completely delegated its powers to define and make a clear award to other parties or persons. There is no law under the Trade Disputes Act that allowed the 2nd respondent to do so. The 2nd respondent in our view, could be assisted in arriving at figures payable and numbers of employees other by parties. However, it cannot delegate that responsibility to other parties, the way it did. That decision by the 2nd respondent to delegate its powers was an error of law and it calls for correction. It does not mean that we hold the whole decision of the 2nd respondent is erroneous. It was a misdirection on a particular item at the conclusion of the award. We think that it can be rectified without affecting the other part of the award. We therefore order that the last paragraph of the award be quashed. The Industrial Court will have to take up the matter and make the final conclusions and a specific award which can be executed

4. **Do we Grant the Reliefs Sought ?**

Prayers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 15 of the petition are not successful. No violation of the Constitution has been proved. We dismiss the same. Prayers 14, and 16 relate to the quashing of the award and we will grant the same in favour of the 2nd and 4th petitioners whose petitions are still alive with regard to the final paragraph which we have highlighted in this judgment. We find that prayer 17 is superfluous and we will not grant the same. Prayer 18 is for costs which we will deal with hereafter.

In the result, therefore, we quash the award of the Industrial Court made on the 16th November 2007 with regard to the final paragraph which starts with the words "**In the circumstances …..**" by way of certiorari, and the same is hereby quashed. We also quash Gazette Notice No. 12302 of 14th December 2007, and the same is hereby quashed. The Attorney General who is the 1st respondent will pay the costs of these proceedings.

We wish to state for the record that references to the Constitution relate to the Constitution which was replaced on 27th August, 2010.

Dated and delivered at Nairobi this 29th day of September, 2011.

……
JEANNE GACHECHE
JUDGE

……
GEORGE DULU
JUDGE

In the presence of

…… for petitioners
……. 1st respondent
……. 2nd respondent
……. 3rd respondent
…… Court clerk