REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

MISC. APPLI. 274 OF 2009

BANKING, INSURANCE AND FINANCE UNION (K)….APPLICANT/PETITIONER

VERSUS

THE INDUSTRIAL COURT OF KENYA.....RESPONDENT

THE COMMUNICATION WORKERS

UNION OF KENYA……...……1ST INTERESTED PARTY

ALEXIUS SAPARH……...……..……2ND INTERESTED PARTY

KENYA BANKERS ASSOCIATION…….....……..……3RD INTERESTED PARTY

RULING

On 7th May 2009, the firm of Wandabwa & Co Advocates filed this petition on behalf of Banking Insurance And Finance Union. The Petition is expressed to be brought under S. 84 (1) of the Constitution. The Petitioner alleges contravention of its rights under Ss. 70 (a) (b) (c), 75 (1) (2) 77 (9), 80 (1), 82 (2) of the Constitution by the Respondent, Industrial Court of Kenya and the 1st and 3rd Interested Parties, Kenya Union of Commercial Food and Allied Workers Union, Alexius Saparii, and Kenya Bankers Association. The following orders are sought;-

(a) A declaration order do issue that the petitioner's right to equal protection of the law has been violated;

(b) A declaration to issue that the Directions given on 17th March 2009 violated the petitioner's right under S. 77 (9) of the Constitution;

(c) A declaration that the Petitioner's exclusion application in Industrial Cause 121(N) of 2008 be heard and determined before any other application so lodged in the said cause;

(d) Such other or further reliefs that this court may deem just to grant.

Filed simultaneously with the Petition and what is for consideration before me is a Chamber Summons of the same date in which the Petitioner/Applicant seeks the following orders-

(1) All further proceedings and procedures in Industrial Court Case No. 121(N) of 2008 be stayed

pending the hearing and determination of this application;

(2) Directions be given as to an early hearing date in respect of prayer 4 below;

(3) All further proceedings and procedures in Industrial Cause case No. 121(N) of 2008 be stayed pending the hearing and determination of the petition filed herein.

The 1st three prayers are spent. What is for consideration is prayer 4.

The Chamber Summons is supported by an affidavit sworn by David Kinyua Mbagia the Chairman of the Applicant. The Application was opposed by the Interested Parties whereas the Respondents chose not to make any submissions. The 1st Interested Party was represented by Nyabena Advocate and he filed a replying affidavit on 27th May 2009 and filed in court on the same date. The 2nd Interested Party was represented by Mr. Maina who relied on grounds of opposition filed in court on 27th May 2009. The 3rd Interested Party was represented by Mr. Namasake who also filed grounds of opposition on the same date.

To understand the facts of this case, it is important to review briefly, the background that led to the present state of events. It is the Petitioner's case that they were registered in 1986 and after participating in meetings of the Trade Unions and the Labour Industry, it was agreed that the Applicant's area of operation was to recruit members from Banking, Insurance and Finance Institutions and it was registered as such. The 1st Interested Party (KUCFAW) was aggrieved by the said registration and moved the High Court to quash it on the basis that it was interfering with its grounds of operation but the court declined to quash that decision.

The 1st Interested Party moved the Court of Appeal but the Court of Appeal likewise declined to deregister the Petitioner. A recognition dispute arose between the Petitioner and 1st Interested Party but the Industrial Court upheld the ruling of the courts that the Petitioner was the Union to represent the Banking, Insurance and Finance Industry. There have been several disputes between the Petitioner and 1st Interested Party over the same issue in several disputes which were resolved as above. However, the 1st Interested Party has gone ahead and sought to recruit members in the sector covered by the Petitioner which prompted the Petitioner to file Industrial Cause No. 121(N) of 2008 in which the Petitioner seeks a permanent injunction to restrain the 1st Interested Party from operating in the Petitioners sphere . During the pendency of Cause No. 121(N) of 2008, the 1st Interested Party filed a dispute with the Minister for Labour seeking to have the 3rd Interested Party to recognize the 1st Interested Party as the Union to represent members of the Banking Sector under the Labour Relations Act but that the Minister rejected it. The 1st Interested Party filed an appeal to the Industrial Court No. 10 (N) of 2009 but that court struck it out on the basis that the issues raised therein were similar to those raised in 121 (N) of 2008 and should be heard in one cause to save on the court's time.

On 15th January 2009, the Industrial Court ordered the 1st Interested Party to file a counterclaim in 121(N) of 2008 to raise issues which had been raised in 10(N) of 2009. It is the Petitioner's contention that by then, the Applicant had not been served with the pleadings in 10(N) of 2009. The Petitioner was directed to file a reply to the counterclaim within 7 days upon service. Upon service of the counterclaim, the Petitioner filed an application to have it struck out for various reasons set out in the application dated 29th January 2009 and filed in court on the same date (See page 627 of Chamber Summons).

That the counterclaim was meant to litigate the appeal that had been dismissed by the Minister; That the counterclaim was filed outside the time allowed. Without hearing the Petitioner on their application to strike out the counterclaim, the court directed the whole suit and counterclaim to be heard on 19th March 2009. That in so doing, the Applicant's defence was ignored and the Applicant cannot file a defence in the matter since it was ordered to proceed to full hearing. The Applicants contend that the rules of natural justice have been flouted and it has been denied a fair hearing that is contemplated under S.77 (9) of the Constitution. That under S 27 of the Labour Institutions Act, the court had not yet made any decision that was appealable. That this court has jurisdiction to intervene under its supervisory jurisdiction under S 60

and 65 of the Constitution. Reliance was made on the case of (1) **OPIYO & 52 OTHERS V AG (2005) 2 KLR** where the court held that even if the High Court had no supervisory jurisdiction over the Industrial Court, it has jurisdiction to adjudicate over matters arising under S 84 of the Constitution touching on S.77 (9) of the Constitution.

(2) **WILSON & OTHERS V UK** where the court held that though under S 84 the Constitution, refers to rights of an individual the Constitution, S 123 defines a person as an individual or a body of persons corporate or unincorporated and that the Applicant is properly before the court.

In opposing the Chamber Summons application, Mr. Nyabena urged that the application is incompetent, frivolious and vexatious. He contended that since the Applicant alleges breach of his rights under Ss 70-83 of the Constitution, he should have raised those issues before the Industrial Court under S. 84(3) of the Constitution and that that court would determine that issue or refer it to this court.

Counsel also urged that before the Industrial court the Applicant was represented by Pheroze Nowrojee and now is represented by Mr. Wandabwa yet there is no notice of change filed.

Counsel argued that for one to come under Sections 70-83 of the Constitution, they had to plead specifically and demonstrate that they have a prima facie case. That the Applicant has not demonstrated that there was any violation. It is also the 1st Interested Party's contention that the Applicant has not come to court with clean hands because the decision of the Industrial Court to hear the matter was made on 15th January 2009 and the Petitioner did not challenge that decision till 10 days to the hearing of the case and that was done in bad faith to try and obstruct and delay the hearing. It was also submitted that under S. 27 of the Labour Institutions Act, an appeal against the decision of the Industrial Court lies to the Court of Appeal. That all issues raised herein are within the jurisdiction of the Industrial court.

Mr. Maina, Counsel for the 2nd Interested Party urged the court to dismiss the Petitioner's application for reasons that orders made by the Industrial Court on 15th January 2009 and 17th March 2009 were within its jurisdiction. That the pending interlocutory applications were 3 and were all to be heard within the main suit. That the Petitioner has waited till 8 days to the hearing to move this court and therefore acted in bad faith. That in the Industrial Court deciding to hear the main suit, it was exercise of discretion and that the court acted judiciously. That the Applicant is guilty of laches and intends to delay the hearing of the main suit and will not suffer any prejudice if the suit before the Industrial Court proceeds to full hearing. That no prima facie case is disclosed and the matter before the Industrial Court should proceed to hearing.

Mr. Namasake for the 3rd Interested Party opposed the application and submitted that the Petitioner's case is based on the fact that they are the only Union to represent employees in the Banking Industry which raises issues under S.80 of the Constitution and S 4 of the Labour Relations Act ie freedom of Association. That in Industrial Cause No. 10(N)/09 which was struck out to be heard in Industrial Cause No. 121 (N) of 2008, the Interested Party raised issues of representation of members of the Banking Sector. That S 12 (5) of the Labour Institutions Act gives the Respondent power to give Directions that are likely to promote the intentions and objects of the Act and therefore the Respondent had discretion to direct that the counterclaim be heard in the main suit. That the Banking Sector is keen in having a quick solution to this issue as the pendency of this suit is prejudicing good industrial relations. That the 3rd Interested Party is interested in which Union it deals with as it is a neutral party. Counsel also urged that Industrial Relations Charter does not have an Appendix showing the demarcations of trade Unions which should operate in the country.

I have carefully considered all submissions by Counsel on the Chamber Summons dated 5th May 2009 and the replies filed therein. With regard to the 1st Interested Party's submission that Mr. Wandabwa has not filed a notice of change in this matter, I find that submission to be misplaced because this is a totally new matter separate from the matter in the Industrial Court, where Mr. Nowrojee appears for the Applicant. Notice of change would only be necessary if Mr. Wandabwa had come on record in the same matter ie. Industrial Court No. 121 (N) of 2008. That objection is rejected.

At this stage, all that the Applicant only needs to demonstrate that they have a prima facie case with high chances of success at the main hearing and that if an interim order is not granted, the Applicant will suffer irreparable damage or loss. The principles applicable to conservatory orders are like those applicable to grant of interlocutory injunctions. See (**GIELLA V CASSMAN BROWN 1973 EA)**

In Constitutional applications such as this one, the courts have held that an applicant moving the court should plead within particularity and precision so that the Respondent knows the case it has to face and so that one can know whether or not the Applicant has a cause of action. In this case, the Applicant cites several provisions under the Bill of Rights but at this stage, the key Section is S 77 (9) – as the Applicant contends that if the matter at the Industrial Court proceeds as directed by the judge, the right to be heard will be compromised and hence they will not be given a fair hearing as envisaged under S.77 (9) of the Constitution. I would have no doubt that the pleadings regarding that prayer are clear in light of the cases of **ANARITA KARIMI NJERU V REP 1979 KLR 154** and **CYPRIAN KUBAI V STANLEY KANYONGA MWENDA NRB HMISC 612/02** which support the above view.

No doubt the Industrial Court is a specialized court established under S.11 of the Labour Institutions Act, No. 12 of 2007 and its purposes and objects are set out thereunder as the furtherance, securing and maintenance of good Industrial or labour relations and employment conditions in Kenya. That court is given a wide discretion under S 12(5) to make any order it deems necessary in the promotion of the purposes and objects of the Act. In the exercise of these powers, that court has to act judiciously.

S 27 of the Labour Institutions Act allows for appeal against the decisions of the Industrial Court. It was the Interested Party's contention that the Applicant should have appealed against the decision of the Industrial Court if at all it was aggrieved by that decision. The question here is whether the court had made a decision that was appealable at that stage. In my view, no decision had been made on the merits that could be appealed against. All that the court did was exercise of its discretion in giving directions on how the matters before that court would proceed and the Applicant was dissatisfied in the manner the discretion was exercised and hence this application.

Mr. Nyabena contended that this whole petition is incompetent because the rules made pursuant to S 84 (6) of the Constitution provide that when a constitutional issue arises during proceedings in a surbodinate court, that issue should be considered before that court and if that court finds that the issues raised are not frivolous, the subordinate court will frame the issues and refer them to the High Court but if it finds them to be frivolous, it will reject the informal application. This is provided for under Rules 24, 25 and 26 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and procedure Rules, 2006. I find that these are substantive issues that will be considered at the main hearing of the petition because the two issues that arise here are whether the Industrial Court is a subordinate court envisaged in Rules 24, 25 and 26 of the Rules referred to above or is it a tribunal? Can the Industrial Court frame questions for determination by the High Court under Chapter V of the Constitution?

Secondly, there is the question which has arisen severally, as to whether the Industrial Court is a subordinate court envisaged under S 60 of the Constitution. There are divergent views on this issue which have not been resolved. Whereas one court has held the Industrial Court is not subordinate to the High Court, the other holds the view that it is a subordinate court, and therefore subject to the supervisory jurisdiction of this court. In this petition, the challenge is under Chapter V, of the Constitution (Bill of Rights) and only the High Court has jurisdiction to entertain (S.84(1)) such challenge.

Even if the High Court has supervisory jurisdiction over the Industrial Court, it will not interfere with the exercise of its discretion unless the said discretion is exercised unjudiciously. Coming back to the facts of this case, there is no doubt that the court struck out Industrial Cause No. 10(N) of 2009 which raised issues related to Industrial Cause 121 N of 2008 in which the issue is, which union should represent workers in the Banking and Finance Industry. The Court also observed that hearing of the two matters together will save on the court's time.

The Petitioner/Applicant avers that they had not been served with the pleadings in Industrial Cause

10(N)/2009. The Applicant in Industrial Cause 10(N) of 2009 was allowed to file a counterclaim in Industrial Cause 121 (N) of 2008. The said counterclaim was filed outside the time allowed by the court. The Applicant had filed an application seeking to strike out the counterclaim for reasons given in that particular application, but the court declined to hear that application or any other and directed the suit to proceed to hearing.

My understanding is that a counterclaim is a cross-demand, a countersuit or counteraction (See **BLACKI'S LAW DICTIONARY 8TH ED)** or a suit filed within another suit opposing the original claim. The Applicant has a right to file a defence to the counterclaim. A fair hearing would entail every party being given a chance to file their pleadings and adequately articulate their case and that has to be done within a reasonable time. With the directions given by the Industrial Court, the Applicants cannot defend the counterclaim as their application remains unprosecuted and there is no defence on record. The question then is, if the Industrial Court proceeds as it has directed, at what stage will the Petitioners put in their defence to the counterclaim? And if they cannot file their counterclaim or prosecute their application seeking to strike out the counterclaim, will they have been accorded a fair hearing? Will the Petitioner have been given a chance to answer or controvert the claim raised in the counterclaim? Those are arguable issues that will have to be resolved at the hearing of the petition.

It was the Interested Parties' contention that the Applicant is guilty of laches and that the application is brought in bad faith. The Industrial Court made the order directing that the entire claim filed by the Petitioner be heard on 19th May 2009. That order was made on 17th March 2009. It was not until the 7th May 2009 that the Applicant filed this petition. The Petitioner has not really explained the delay of about 1½ months, but contends that the delay is not inordinate. The court will at the hearing of the petition determine whether the delay was in-ordinate as to deny the Petitioner a chance to be heard on the main petition which alleges breach of fundamental rights.

An application of this nature is not about the merits of the Petitioner's suit before the Industrial Court but the conduct of that cause before the Industrial Court. With the above questions in mind, I find that the Applicant has demonstrated that they have a prima facie case with a high probability of success. This court is alive to the sentiments of the other parties that delay in the determination of this matter will cause further strain to Industrial relations. Though Mr. Namasake claims to be a neutral party, by filing grounds of opposition, it is evident that he has taken sides but that will be resolved later at the hearing of the petition. The upshot is that I will grant prayer 4 of the Chamber Summons, that all proceedings and processes in the Industrial Case No. 121(N) of 2008 be and are hereby stayed pending hearing and determination of this petition. Once directions are given herein, the matter should be fast trucked. Costs will abide the petition.

Dated and delivered this 26th day of June 2009.

R.P.V. WENDOH

JUDGE

Present

Ms Kaberia for the Respondent

Lenzi: Court Clerk