



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Application 963 of 2006

**IN THE MATTER OF: AN APPLICATION BY MANSUKHLAL SHANTILAL PATEL,
DEBESH SENGUPTA, CALEB M. KAMOTE AND KENSALT LIMITED FOR JUDICIAL
REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT CAP 226, LAWS OF KENYA

AND

IN THE MATTER OF: EMPLOYMENT ACT CAP 234 LAWS OF KENYA

AND

IN THE MATTER OF: THE LABOUR DEPARTMENT OF THE MINISTRY

BETWEEN

KENSALT LIMITED & 3 OTHERS.....APPLICANTS

VERSUS

1. PROVINCIAL LABOUR OFFICER, COAST

2. MINISTRY OF LABOUR AND MANPOWER

DEVELOPMENT.....RESPONDENTS

AND

CLAUDY MWADIME.....INTERESTED PARTY

JUDGMENT

On 11th October 2006, Kensalt Limited, Mansukhlal Shantilal Patel, Debesh Sengupta and Caleb M. Kamote (hereinafter “the applicants”) were granted leave by Njagi J, to bring judicial review proceedings by way of:

(a) an order of Certiorari to remove to this court for purposes of quashing the decision of the Respondent, the Provincial Labour Officer, Coast, his officers and agents contained in the charge sheet dated 2nd August 2006 to charge the applicants, herein in the District Magistrate's Court Mombasa.

(b) an order of prohibition prohibiting the respondent from charging the applicants and/or from continuing with Criminal Case No. 2093 of 2006: **Republic – v – Mansukhlal Shantilal Patel, Debesh Sengupta, Caleb M. Kamote and Kensalt Limited.**

(c) an order of prohibition prohibiting the respondent from acting arbitrarily and from using the provisions of the Employment Act Cap 226, Laws of Kenya in the District Magistrate's Court Mombasa or any other court.

The grant of leave was to operate as stay of the proceedings in Mombasa District Magistrate's court Criminal Case No. 9093 of 2006: **Republic – v – Mansukhlal Shantilal Patel, Debesh Sengupta, Caleb M. Kamote and Kensalt Limited.**

The applicants then lodged their Notice of Motion dated 18th October 2006 on 23rd October 2006 seeking the orders for which leave had been obtained. The main grounds for the application are that the interested party, Claudy Mwadime (hereinafter "the Interested Party") was, upto June 2005, employed by the first applicant, Kensalt, when his services were terminated and he was paid his terminal benefits and contributions to their pension scheme are held by ICEA Limited under the Retirement Benefits Act. After his termination, the Interested Party commenced criminal proceedings before the District Magistrate's Court, Mombasa on the basis that the first applicant had failed to pay him severance pay of Kshs. 224,250/= which proceedings are unlawful, *ultra vires* the Employment act and the Trade Disputes Act, unreasonable, actuated by malice, in breach of the Rules of Natural Justice and an abuse of the court process.

The Notice of Motion is supported by a statutory statement dated 3rd October 2006 and a verifying affidavit sworn on the same date by the fourth applicant. From the statement and the affidavit the following background emerges: The Interested Party was employed by the first applicant on 1st September 1978 as a Grade III Parker. He was unionisable until 6th February 1992 when he was promoted to management and the Collective Bargaining Agreement between his union and the first applicant became inapplicable. He then became a member of the Staff Retirement Scheme of the first applicant which scheme is managed by the Insurance Company of East Africa. On termination of his services, the first applicant paid the Interested Party Kshs. 141,395/= being three months salary in lieu of notice and reasonable compensation and Kshs. 202,713/= being his pension surrender value. Severance pay was not payable, yet the Interested Party claimed the same and when the claim was not met, the Interested Party commenced criminal proceedings before the District Magistrate on 4th October 2006 against the applicants. The applicants appeared before the District Magistrate's Court Mombasa and denied the charge and were granted bail. The applicants therefore contend that the Interested Party had no basis to complain and the respondent is acting *mala fide*, unlawfully, arbitrarily, capriciously, unreasonably and *ultra vires* the provisions of the Employment Act and the Trade Disputes Act. They further contend that the action of the respondent is contrary to the Rules of Natural Justice, is against public policy and amounts to abuse of the process of the court.

When the application came up before me for hearing on 18th September 2008, counsel agreed to file written submissions. The applicants duly filed their written submissions on 13th November 2008. Counsel for the Respondent prayed for time upto 19th February 2009 to file his submissions but come that date, no submissions had been filed on behalf of the respondent. I have therefore not had the benefit of responding submissions from the office of the Attorney General.

I have considered the application, the supporting documents including the statutory statement, the verifying affidavit and the replying affidavit. I have also given due consideration to the ex-parte applicants' written submissions. Having done so, I take the following view of the matter. It is clear from the material availed to the court that the relationship between the first ex-parte applicant and the

Interested Party was purely contractual and at the time the latter's employment was terminated, his terms of employment were governed by terms and conditions, applicable to management of the first applicant. Pursuant to those terms, the Interested Party was paid Ksh. 143,395/= being three (3) months salary in lieu of notice and Ksh. 202,713/= being the surrender value of pension under the pension scheme applicable to the Interested Party. Given that position, the question of severance pay claimed by the Interested Party could not arise and was not payable. That being my view of the matter, the Interested Party had no basis for laying a complaint against the applicant under the Employment Act (Cap 228 of the Laws of Kenya). In any event if the interest of the Interested Party was to recover what he referred to as severance pay of Kshs. 224,250/=-, preferring criminal proceedings against the applicants would not achieve that end since the penalty prescribed under the Employment Act (Section 48) is a fine of Kshs. 1,000/= or imprisonment of upto three (3) months.

If the prosecution of the applicants would not result in the payment of the said severance pay, the presumption for laying the criminal complaint by the Interested Party could only have been for an ulterior motive, namely to coerce the applicants to pay the said claim. The use of the criminal procedure to settle a civil claim is capricious and *mala fide* and should be frowned upon as did the Court of Appeal in **Republic – v – Commissioner of Cooperatives & Another CA No. 39 of 2007** where the court said as follows”

“It is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows any one or confirms a power to exercise such power arbitrarily or in bad faith,”

Further, it has been held that where there is an alternative remedy, the criminal process should not be resorted to. See the case of **Kigorogolo – v – Rueshe [1969] EA 426** in which the following passage appears:-

“When a remedy is elsewhere provided and available to a person to enforce an order in a civil court in his favour, I see no valid reason why he should be permitted to invoke the assistance of the Criminal Law for the purpose of such enforcement.....

.....

If the object of the applicant is to overawe the respondent by brandishing at him the sword of the criminal law and the possibility of punishment thereunder, such an object is unworthy to say the least and cannot be countenanced by this court.”

It is clear to me that the respondent intends to exercise his power to prosecute to aid the Interested Party, recover what purely is a civil claim. The respondent's exercise of the power to prosecute is therefore not only being used unreasonably to achieve the private interest of the Interested Party, but is clearly oppressive and contrary to public policy. The exercise indeed amounts to clear abuse of the process of the court.

In the end, I find and hold that the applicants are entitled to the reliefs sought in paragraphs 1, 2 and 3 of the Notice of Motion dated 18th October 2006 and filed on 23rd October 2006. Orders sought shall issue forthwith as prayed.

The applicants should have the costs of this application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 15TH DAY OF JUNE 2009.

F. AZANGALALA

JUDGE

Read in the presence of Mr. Mabeya for the Applicant and Mr. Onserio for the Respondent.

F. AZANGALALA

JUDGE

15TH JUNE 2009