



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Miscellaneous Application 429 of 2009

**HASNAIN JAGANI 1ST
APPLICANT**

**MOHAMEDRAZA HUSSEIN JAGANI..... 2ND
APPLICANT**

**ALI HUSSEIN JAGANI..... 3RD
APPLICANT**

**RAZCO LIMITED..... 4TH
APPLICANT**

VERSUS

**INDUSTRIAL COURT OF KENYA..... 1ST
RESPONDENT**

**OFFICER COMMANDING KASARANI POLICE DIVISION.....2ND
RESPONDENT**

AND

BAKERY, CONFECTIONERY, FOOD MANUFACTURING

**AND ALLIED WORKERS' UNION (K)..... INTERESTED
PARTY**

RULING

Before me is the Notice of Motion dated 20/7/09 brought under the inherent powers of this court. It was filed by Khaminwa and Khaminwa Advocates on behalf of the Interested Party, (hereinafter referred to as I.P.) Bakery Confectionery, Food Manufacturing and Allied Workers Union (K). It was filed under certificate of urgency and the IP prays that the orders issued herein by this court on 20/7/09 be vacated and costs of the application be provided for. The application is premised on the affidavits of Dr. Khaminwa Advocate and Mr. George Muchai, the General Secretary of the IP, both dated 20/7/09 and grounds found on the face of the application.

The application was opposed and Mohamedraza Hussein Jagani, the Managing Director of the 4th

Respondent, Razco Ltd, swore a replying affidavit. Mr. Obura appeared for the ex parte application. Mr. Onyancha from the AG's office appeared for the Respondents but filed no papers. He informed the court that he adopted the Interested Party's submissions. The background to this matter is that on 17/7/09, the ex parte Applicants Hasnain Jagani, Mohamedraza Hussein Jagani, Ali Hussein Jagani and Razco Ltd moved this court by way of a chamber summons dated 17/7/09 seeking leave of this court to commence Judicial Review proceedings. The prayers that were sought were as follows;

- (2) That the applicants be granted leave to apply for an order of certiorari directed at the Respondent, the Industrial Court of Kenya to remove to the High Court and quash the order of the said court dated and issued on 29/6/09.
- (3) That the applicants be granted leave to apply for an order of certiorari directed at the Respondent, the Industrial Court of Kenya, to remove to the High Court and quash the order of the said court dated 14/7/09.
- (4) That the Applicants be granted leave to apply for an order of certiorari directed at the Respondent, the Industrial Court, to remove to the High Court and quash the order of that court dated 16/7/09.
- (5) That the Applicants be granted leave to apply for an order of certiorari to quash the orders of the Industrial Court arising out of and or incidental to the orders issued by the said court dated and signed on 27/6/09, 14/7/09 and 16/7/09.
- (6) That the Applicants be granted leave to apply for an order of prohibition to prohibit the OCPD and OCS Kasarani police station or any other police officer or law enforcing person from arresting the Applicant on orders of the Industrial Court issued and dated 29/6/09, 14/7/09 and 16/7/09 or any other orders incidental thereto.
- (7) That the leave granted do operate as a stay of the order of the Industrial Court issued on 29/6/09, 14/7/09 and 16/7/09 and further proceedings in Industrial Court cause No. 331 (N) of 2009 and 334 (N) of 2009 till the hearing and determination of this matter.

After hearing the ex parte Applicant on the chamber summons, the court granted leave in terms of prayers 2 to 6 of the chamber summons and the same were to operate as stay in terms of prayer 7 for 60 days. The above orders were issued on 20/7/09 and the application to set aside the said orders was filed on the same date and the Interested Party appeared before this court on 22/7/09. The grounds upon which the Interested Parties seek to set aside the court's orders issued on 20/7/09 are that there was material non disclosure by the ex parte Applicants; that the ex parte Applicants are using this court to avoid complying with or purging orders which are still in force issued by the Industrial

Court in addition to warrants of arrest against them in its effort to assert its authority and that the effect of the ex parte order issued by this court is to cause a conflict between this court and the Industrial court and that it is a gross abuse of the court process.

In his affidavit, George Muchai deponed that on 29/6/09, the application dated 22/6/09 came up for hearing before the Industrial Court in Industrial Court cause No.331 (N) of 2009 and that court granted ex parte orders to the effect that an order of injunction was issued restraining the Respondent from interfering with the 24 grievant the right to report to their work places until the matter was heard inter partes and the Respondent was directed to pay the salaries and other benefits till the matter was heard inter partes. The OCS Kasarani was ordered to oversee the observance of the said court order. That the order was served on the Respondents company (on the 4th ex parte Applicant) on 30/6/09, the secretary went to the company and was denied entry. The matter came up for inter partes hearing but since the order of the court had not been complied with an order of warrant of arrest was issued against the managing director of the 4th Applicant to explain why they could not comply. That the ex parte Applicants counsel tried to raise objection when the matter came up but the judge declined to allow the objection till the orders were complied with. All the directors of the 4th Applicant were included in the warrant. It is the contention of the Interested Parties that the said orders of the Industrial Court issued on

29/6/09 have not been complied with by the ex parte Applicants and they are trying to circumvent those orders. Dr. Khaminwa further submitted that this court has no jurisdiction to hear this matter and cited several decisions namely

(1) SPIN, KNIT DAIRY LTD V THE AG and others HMISC 237/08;

(2) KENYA BANKERS ASSOCIATION V THE INDUSTRIAL COURT HMISC AP 1143/04

(3) KENYA AIRWAYS LTD V KENYA AIRLINE PILOTS ASSOCIATION HMISC 254/07.

Where the courts held that the Industrial Court is a special court and this court has no supervisory jurisdiction over that court. Counsel parties should respect what a judge has ordered as held by J. Madan in **BUTT V RENT RESTRICTION TRIBUNAL (1982) KLR 417**. Counsel also submitted that this court has similar powers as the Industrial Court under the Labour Institutions Act (S. 11 and 12). That both judge of the Industrial Court and this court are appointed by the president (S.13) and under S. 14 (B) an order of the Industrial Court can be enforced by contempt of court proceedings in the Industrial Court and that if any party is dissatisfied with an order of the Industrial Court, they have a right of appeal under S. 27 of the Act. S. 87 (2) of the Employment Act, 2007 gave the Industrial Court the exclusive power to resolve labour disputes: That before the new Acts that came up in 2007, the Trade Disputes Act provided for resolution of Trade Disputes and under that Act the courts had discretion whether or not to supervise the Industrial Court but that has changed with the 2007 labour laws which have endowed the Industrial Court with the same powers as those of the High Court. Counsel also submitted that the Applicants are using this court to avoid complying with the Industrial Court orders and yet the courts have held that court orders have to be obeyed whether a party agrees with them or not as the dignity of the court has to be upheld, counsel relied on the authorities of **ECONET WIRELESS KENYA LTD V MINISTER FOR INFORMATION & COMMUNICATION OF KENYA (2005) MISC 1640/03** in which the case of **GULAB POPATLAL SHAH V RE. CA 39/1990** in which the Court of Appeal said the dignity of the court has to be upheld by obedience of court orders and **HADKINSON V HADKINSON (1952) 2 ALL ER 567** where the court said that an order of the court must be obeyed until the order is discharged. In **KARIUKI V MINISTER FOR GENDER & SPORTS (2004) 1 KLR 588**, the court said that court orders must be obeyed whether one agrees with them or not.

In opposing the application dated 20/7/09, Mohamedraza Jagani who deposed on matters he has been advised upon by the counsel said that when they approached this court ex parte, the court in granting leave and stay observed that there were several issues affecting the jurisdiction of the Industrial Court especially in regard to contempt and whether the court could order arrest of the directors. The deponent also observed that the Interested party had failed to disclose to this court that on 29/6/09 the Industrial Court had issued an order that the 24 employees be reinstated back to work but that on 1/7/09, the Industrial Court issued another order barring the 24 employees from reporting to work. That despite request to the Registrar to issue a certified order of the order of 1/7/09, the said Registrar has failed to issue the said order save for the handwritten order of Mukunya J. That the Interested Party is aware that the Industrial Court has issued two conflicting orders on the same issue and the Applicant cannot therefore be accused of violating either of the orders. It is the contention of the Applicant that the High Court has supervisory jurisdiction over the Industrial Court and the Applicants had the right to seek this courts intervention by way of Judicial Review.

In addition, Mr. Obura submitted that the application by the Interested party is premature as the Notice of Motion had not yet been filed. Counsel relied on the case of **ADAM BROWN & CO. LTD V COMMISSIONER OF LANDS HCC 92/02** where the court held that once the court exercised its discretion and granted leave, the orders can only be challenged at the Notice of Motion stage. Mr. Obura also submitted that all the cases relied upon by the Interested party were decided based on the Trade Disputes Act which has been repealed and are not relevant. Counsel urged that this court is a superior court with supervisory powers over the Industrial Court and the merits of this application can not be considered at this stage. That the issue of jurisdiction is at stake, and whether S.5 of the Judicature Act contempt proceedings was complied with. That the Industrial Court is a tribunal and if any person alleges breach of rules of natural justice they must be heard by this court. He relied on **REP V KAJIADO LAND**

DISPUTES TRIBUNAL H MISC 689/01. That there is an allegation of arbitrary arrest and that issue must be addressed by this court.

On allegation that the ex parte Applicant withheld relevant facts, Mr. Obura submitted that the Interested Party failed to inform the court that there are the conflicting orders of the Industrial Court issued on 29/10/2009 and 1/7/09 and that they had applied to have the latter order set aside.

Having considered all the affidavits, the submissions and the cases cited by both sides of the dispute herein, what is in issue here is whether this court has the jurisdiction to entertain challenges emanating from the Industrial Court or not. Secondly, whether it can deal with the issue of jurisdiction at this stage or should it await the hearing of the motion and lastly whether the ex parte orders issued on 20/7/09 can be vacated.

Mr. Obura, counsel for the exparte applicant urged that the application to set aside was made prematurely and the orders can not issue. The orders of leave were directed at the two Respondents, the I.C. and the Officer Commanding Kasarani police station which are public institutions against whom Judicial Review orders can lie. The court's orders are not directed at the Interested Party which I believe is a private entity comprised of members drawn from the various trades of a similar nature. Under order 53 Rule 6 Civil Procedure Rules, the Interested Parties can only come into the proceedings after the Notice of Motion has been filed and be heard in opposition to the Notice of Motion. That is when they can challenge the orders of this court. It means they can only file such application seeking to set aside the court orders if a Notice of Motion has been filed but not before. As of 20/7/08 when they filed this application and moved the court to set aside the leave and stay orders issued on 20/7/09, they had no capacity to do so. Only the Respondents could have moved the court to set aside its orders. That seems to be the spirit of Order 53 R 6. The Applicants had been allowed 14 days within which to file the Notice of Motion and had not yet filed it. I do agree with the decision of Rimita J. in the case of **ADAMS BROWN & CO. LTD.** (supra).

Under the Labour Institutions Act, 2007 the Industrial Court has been given wide powers unlike under the Trade Disputes Act now repealed. The court's jurisdiction is granted under S12, to exclusively deal with labour disputes. Under S 12(4), the Industrial Court has jurisdiction to grant injunctive relief, prohibitions, declaratory orders, award damages, specific performance and reinstatement of an employee. S12(6) places at par the jurisdiction of the Industrial Court with that of the High Court. S 14 then allows the Industrial Court to enforce its own orders, even by contempt of court proceedings. S 27 allows any party aggrieved by a judgment or order of the Industrial Court to appeal to the Court of Appeal. There is no provision regarding Judicial Review. Unlike the High Court whose jurisdiction stems from the Constitution, the jurisdiction of the Industrial Court still emanates from a statute, the Labour Institutions Act, 2007. Similarly in the old regime, the jurisdiction of the Industrial Court emanated from the Trade Disputes Act, (now repealed). S 60 of the Constitution creates the High Court as a superior court of record with unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law. Under S 65 (2) of the Constitution the High Court has supervisory jurisdiction in civil and criminal proceedings before a subordinate court or court martial and may make such orders and issue such writs as may be appropriate to ensure that justice is done by the courts. The question then is even with the new legislation, i.e. the Employment Act 2007, the Labour Relations Act 2007, and the Labour Institutions Act 2007, is the jurisdiction of the Industrial Court at par with that of the High Court.

No doubt, the Industrial Court is a court with special jurisdiction, to determine labour disputes and related matters. In the cases cited by the Interested Party which were based on the repealed Trade Disputes Act, decisions of the High Court held the view that the Industrial Court's jurisdiction is a special one and the High Court can not exercise supervisory jurisdiction over that court under S65 of the Constitution. What the Interested Party did not tell the court is that there are two divergent views held by the High Court on the jurisdiction of the Industrial Court under the repealed Act. Contrary to the cases relied upon by the Interested party, i.e. **SPIN KNIT CASE, KENYA BANKERS ASSOCIATION and KENYA AIRWAYS Ltd** (supra) some of the decisions of High Court held that the Industrial Court is subordinate to the High Court and the High Court has

supervisory jurisdiction over the Industrial Court. Such were the decisions in *MECOL V AG HMISC. APP. 1784/04 and REP V ex parte KPCU HMISC. APP. 933/05*. The courts held the Industrial Court is subordinate to the High Court. Those two views have never been reconciled by the Court of Appeal or any other court.

The above being the position and the fact that the Industrial Court is still a creature of a statute while the High Court is a creature of the Constitution, the question that still begs is, does the High Court have supervisory jurisdiction on the Industrial Court even as constituted under the Labour Institutions Act, 2007? That has to be determined later at the hearing of the motion

The ex parte Applicant is alleged to be in contempt of court orders for failure to comply with the order issued by Madzayo J, on 29/6/09 directing the Applicants to reinstate 24 employees who had been sacked by the ex parte Applicants. The Industrial Court has powers under S 12 (4) to enforce court orders through contempt of court proceedings. In the instant case, the court was informed that the ex parte Applicants had not complied with the court orders and that court out rightly issued a warrant of arrest. For one to be cited for contempt, there is procedure provided under S.5 of the Judicature Act which powers are derived from those possessed by the High Court in England and the Contempt of Court Act, 1981 of England. Normally, an application for contempt of court will be brought like a Judicial Review application by first seeking leave of the court to commence contempt proceedings. In contempt of court proceedings there is the requirement that the contemnor be personally served with the order with penal consequences before he can be said to be in contempt of court and there has to be proof of personal service before one is cited. In *Re BRAMBLEVALE Ltd 1970* at pg.128, Lord Denning MR said as follows “**A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved _ _ _**” quoted in *DUNCAN MURIGI V KENYA RAILWAYS CORP (2008)* Halbury’s Laws of England Vol. 9 4th Ed. at page 37 states that personal service is necessary in contempt of court proceedings. In the case before the Industrial Court, was due process followed before the issuance of warrant of arrest and were the contempt of court proceedings before the warrant was issued?

The Respondent solicited the help of police to enforce their orders. The proceedings before the Industrial Court were of a civil nature. The question is whether the use of police to effect the court’s orders was proper. Courts have held over and over again that use of police force has no place in civil cases.

The Interested parties failed to disclose to this court that apart from the order of 29/6/08 which the Applicants are alleged to have disobeyed, a contrary order was made by Mukunya J in Industrial Cause 334 (N)/09 on 1/7/09. That order stayed the reinstatement of the employees. For unknown reason the Registrar of the Industrial Court refused to issue a certified copy of that order but the existence of the order of 1/7/09 is not denied. In fact the Interested parties had applied to have it set aside. The question would then be, since the order of 29/6/09 reinstated the employees and the order of 1/7/09 stayed the reinstatement and there were two conflicting orders of the Industrial Court, which order were the Applicants to obey. This boils down to the question whether there were any disobedience of any court order or whether there was any contempt proceedings and whether due process was followed. That issue has to be determined when the substantive Notice of Motion is heard.

The Applicants also alleged that in ordering reinstatement of employees, the Respondents acted without jurisdiction. As observed above, the Industrial Court has jurisdiction to order reinstatement of employees. But the question is whether the elaborate procedure provided under the Labour Relations Act, and Employment Act, 2007 were followed. S 62 to 69 of the Labour Relations Act provides an elaborate dispute resolution process in labour matters e.g. There has to be an attempt at conciliation. Under S. 49 of the Employment Act, specifically S. 49 (4), the labour officer has to take into account several considerations before a reinstatement can be considered for example, wishes of the employee, the circumstances in which the termination took place, the suitability of the reinstatement, etc. The Industrial court gave the order of reinstatement ex parte. The issue to be considered is whether due process was followed and is this a matter to go on appeal or can this court intervene if moved to do so under its supervisory jurisdiction by way of Judicial Review.

Before the court granted leave and the order of stay, it took into account some of the issues considered above and the outstanding issue for determination is whether this court has jurisdiction to determine those issues or the correct forum is the Court of Appeal, under S 27 of the Labour Institutions Act. Judicial Review is concerned not with the merits of the decision but the fairness of the decision making process. An appeal would be concerned with the merits of the decision made. For all the observations set out above, I find that apart from the Interested party's application being premature, it is not merited at this stage and is dismissed. The Interested party should await the filing of the substantive Notice of Motion and all the issues to be determined at once. Costs to be in the cause.

Dated and delivered at Nairobi this 21st day of August 2009.

R.P.V. WENDOH

JUDGE

Delivered in the presence of:-

Mr. Obura for the Ex parte Applicants

Mr. Onyiso for the Respondents

Dr. Khaminwa for Interested party

Muturi – court clerk