



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Petition 269 of 2009

TELKOM KENYA LIMITED..... APPLICANT/PETITIONER

AND

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

**THE COMMUNICATION WORKERS UNION OF KENYA....2ND
RESPONDENT**

RULING

On 5/5/09, the Petitioner Telkom Kenya Ltd filed the petition of the same date, against the Industrial Court of Kenya and the Communication Workers Union of Kenya (1st & 2nd Respondents). The petition is brought pursuant to section 84 (1) of the Constitution whereby the petitioner alleges contravention of its fundamental rights and freedoms under sections 70 (b) 71, 73, 75, 76, 77 (a) 78, 79 (1), 3 & 65 of the Constitution. The petitioner seeks several declarations and orders including the prohibiting of the hearing of Industrial Court Cause No.151 (N) of 2008 and the quashing of the Rulings and proceedings therein on allegation that the court is violating the petitioner's fundamental rights. Filed contemporaneously with the petition is the chamber summons dated 5/5/09 where the Applicant prays that the court be pleased to grant a conservatory order staying the proceedings including execution of all rulings and orders issued in the Industrial cause No.151 (N) of 2008 involving **COMMUNICATION WORKERS UNION OF KENYA V TELKOM KENYA LTD.**, pending before the Industrial court of Kenya pending the hearing and determination of this petition. The application is premised on grounds found on the face of the application and an affidavit sworn on 5/5/09 by Mary Kita Nalianya, Head of Human Resource Department, Mr. Obura, counsel for the petitioner/Applicant also filed submissions on 25/6/09. 2nd The Respondent filed a replying affidavit sworn by Benson Okwaro the General Secretary of the 2nd Respondent dated 4/6/09 and grounds of opposition on 5/7/09. Mr. Patrick Maina counsel for the Respondent filed submissions on 25/6/05.

Briefly, the facts underlying this dispute are that due to serious mismanagement of resources, loss of revenue and a blotted work force, the Applicant, a state corporation with the help of the International Finance Corporation (a subsidiary of World Bank) decided to undertake a privatisation process which included inter alia, staff rationalization, financial restricting, a staff rationalization program centre, sale of the petitioners shares in private investors etc. By 21/12/07, the staff rationalization alone cost Kshs.10 Billion and involved retrenchment of some 11,873 staff. The remaining members of staff were sensitized on the value of a trimmed organization through workshops, road shows and several members of staff pleaded with the management to allow them retire under the Voluntary Early Retirement Scheme (VER). That was agreed upon and they were to be paid their benefits. By a circular dated 17/10/08, the petitioner

invited those employees willing to retire through the scheme. This was to be undertaken in 3 tranches between December 2008 and April 2009. The petitioner received 739 employees. On 12/11/08, the 2nd Respondent moved to the Industrial court seeking to restrain the petitioner from closing the VER Scheme on 14/11/08 (MKM 3). On that date, the 1st Respondent issued an ex parte order without giving notice to the petitioner (copy of that MKM 4). It is the contention of the petitioner that the 2nd Respondent had not sought any interim or temporary injunction and the effect of the order was that a mandatory injunction was issued barring employees who wanted to retire under the VER Scheme voluntarily from doing so even without hearing the petitioner. The petitioner contends that the letter of 17/10/08 was an invitation to treat and the offer was made by the respective employees who applied for early retirement and therefore the order of 12/11/08 restrained the petitioner from closing an offer which the petitioner never made. The petitioner opposed the said application by filing an affidavit 'MKM 5' and the application proceeded inter partes on 31/11/08. The Ruling was delivered on 5/12/08 which granted a mandatory injunction which was to be effective till the employees pay package was determined and that it was made without jurisdiction. Since the order did not bar the petitioner from accepting VER offers by those interested in VER, the Petitioner continued to accept VER offers from employees. That after the order of injunction there was confusion at the petitioners offices due to interference by the 1st Respondent and members resigned from the membership of the 2nd Respondent. On 30/4/09 the Petitioner withdrew its application dated 27/3/09 from the Industrial Court by a letter (MKM 9) and the Petitioner released the last tranche of retirees on 24/4/09. On 27/4/09, the 2nd Respondent moved under certificate of urgency seeking a stay of the implementation of retrenchment under or the VER of 597 employees by the Petitioner pending hearing of the application and also sought that the court grant contempt orders against the petitioner for disregarding orders of 5/12/08 and 30/3/09 on implementation of the VER and that the letter and actions by the Petitioners be annulled (MKM 10). A ruling was given on 28/4/09 granting an order of injunction that the affected employees, members of the Claimant union were to remain in employment of the petitioner till the hearing and final orders of the court and that the application was to be heard inter partes on 5/5/09 (MKM 11). The Petitioner denies having acted inconsistently with the subsisting orders of injunction as the affected (parties) employees had not been disclosed, and the orders amounted to a mandatory injunction issued without hearing the petitioner. That if the orders were referring to those who had taken the VER Scheme, then it was overtaken by events as the employees had left between December 2008 and April 2009 and lastly, there was no prayer by the 2nd Respondent seeking reinstatement of employees. It is the applicant's contention that the order of 28/4/2009 has caused a state of confusion at the petitioner's work place as employees who had retired and had been paid their dues have reported back on duty seeking to be deployed; that the petitioner has been treated unfairly by the Industrial Court contrary to rules of natural justice and in violation of S.77 (9) of the Constitution. That the parties have not been allowed to contract freely contrary to S. 70 (b) and 78 of the Constitution. That the orders of the Industrial Court that employees do remain at work offends S. 71 of the Constitution and that the parties are being held to servitude contrary to Ss 73 and 76 of the Constitution. That the petitioner is unable to plan or implement its financial operations due to the interference. Mr. Obura also submitted that a dispute involving Voluntary Early Retirement must be subjected to procedures under part 8 of the Labour Relations Act section 62 to 72 of the Act where there has to be an attempt at conciliation first. Counsel also added that the 1st Respondent failed to observe section 49 to 50 of the Employment Act, 2007 which deals with reinstatement of employees as one of the remedies available to the 1st Respondent and sets out what should be considered by the labour office. That the order of 27/4/09 ordering reinstatement did not observe due process.

That the Rules to be followed in hearing a dispute as set out in Rule 11 of the Trade Disputes Act was not followed under that rule a Respondent must be accorded a chance to respond to the claim before the 1st Respondent proceeds to hearing. That in this case, the court heard the Applicants ex parte and gave orders. That the regulations cited above violated the petitioner's fundamental rights and fair hearing under S.77 (9) of the Constitution.

It was also counsels submission that at the inter partes hearing conducted by the Court on 5/12/08 the orders made determined the whole suit by ordering the employees to be reinstated irrespective of whether or not they had been paid their dues or not and that that order infringes on the petitioner's right to property under S. 75 of the Constitution and fair hearing. Counsel urged the Court to confirm the orders

that were issued ex parte by this court as the employees will not suffer any prejudice.

Mr. Maina counsel for the 2nd Respondent submitted that the petitioner has not demonstrated that it has an arguable case to warrant the grant of the conservatory orders sought. Mr. Okwaro the General Secretary of the 2nd Respondent deponed that all along the 2nd Respondent had supported the privatization programme by the petitioner. But that on 15/2/08 the petitioner confirmed the closure of its VER programme but that there was an outstanding issue of the pay package which was raised by the employees through their union which touched on tax rebate and severance pay. That the petitioner coerced the employees into accepting what the petitioners offered. An employee Joel Karumba has sworn an affidavit dated 4/6/09 on the alleged coercion (BO 3). That the union responsible for the employees was never consulted on the procedure to be followed. That in their application dated 12/11/08 in I.C.C 151 (N) of 2008, the 2nd Respondent sought interim orders of injunction which were granted by the court and contrary to what the petitioner contends, the letter of 17/10/08 was an offer which contained terms and conditions and the petitioner clearly indicated that it was an offer not an invitation to treat and that the intention of the Applicant was to retire its employees without following due process in accordance with the labour laws. That after an inter partes hearing on 28/11/08, the court issued an order restraining the Applicant from closing its offer on VER and referred the issue of salary back to the council and both parties obeyed the orders and despite threats to appeal, none was filed. That the order of 5/12/08 had the effect of stopping either party from dealing with the issue of VER but the Applicant acted mischievously using threats that resulted in resignations from the union. That the purported withdrawal of the letter of offer of VER vide the application dated 27/3/09 was opposed because the petitioner did not state how many people had been discharged from work and that it was in contempt of the court order by purporting to release 597 employees and allegedly paying them 80% of unspecified dues. That this matter was also due for an inter partes hearing on 5/5/09 and the release of the employees' was done in bad faith because funds were sent to the employees' accounts then the same were frozen. That the Industrial Court made the order of 28/4/09 due to prevailing circumstances and that in any event, the court had jurisdiction to order reinstatement of employees under S 12 (4) of the Labour Institutions Act, 2007. That both parties were heard on 28/11/08, a ruling was reserved for 5/12/08 and no party ever filed an appeal. That contrary to the allegation made by the Applicants it is the Applicants, who through threats and coercion are in breach of the employees constitutional rights under section 71, 75, 78, and 80. That the employees are entitled to all their dues before retirement. It is the 2nd Respondents contention that it is the petitioners who are in contempt of court orders and this court should not grant them any orders as such orders would delay and obstruct the cause of justice. That the Applicant came to court with unclean hands by not observing the labour laws, and due process and should not come under the guise of constitutional violations.

S. 84 (1) of the Constitution allows any person alleging that any of the provisions of sections 70 to 83, has been or is being or is likely to be contravened in relation to him or to a detained person, to apply to this court. In my view it is only the High Court which has the jurisdiction to determine applications under the Bill of Rights, Cap.5 of the Constitution. The Industrial Court or Court of Appeal does not have such original jurisdiction. An appeal from this court lies to the Court of Appeal. The onus is on the Applicant to demonstrate that its rights under the cited provisions have been, are being or are likely to be breached by the Respondents.

An application under S. 84 does not deal with the merits of the issues at hand. In this case, there being allegations of violation of fundamental rights, the court has to inquire whether there has been a violation or a threatened violation of the alleged rights. This court will not therefore be concerned with whether the retrenchment process was proper or not. That is for the Industrial Court. All that this court has to consider is whether in the conduct of the proceedings before the Industrial Court, the Applicant's rights have been or are likely to be contravened as alleged.

This being an interlocutory application in which the Petitioner/Applicant seeks conservatory orders, this court will be guided by the principles espoused in the case of **GIELLA V CASSMAN BROWN LTD 1973 EA 358**. Firstly, the Applicant must demonstrate that it has a prima facie case with a probability of success. Secondly, the Applicant has to demonstrate that it will suffer irreparably unless an order of injunction is granted and that there can not be adequate compensation in damages; Thirdly, if the court is

in doubt, it should decide the matter on a balance of convenience. The application was brought under the Constitution of Kenya (supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006. Rule 20 allows the court to hear and determine an application for conservatory or interim orders and this application is properly before this court.

It is not in doubt that the Applicant had been undertaking a retrenchment programme and this dispute arose when the last tranche of employees were about to be send off. It is the 2nd Respondent who first moved the Industrial court challenging the direction of the petitioner that it should not close the VER programme on 14/11/08. The 2nd Respondent filed the Notice of Motion on 12/11/08 and got ex parte orders barring the petitioner from closing the VER programme pending the hearing of the Notice of Motion inter partes. A perusal of the Notice of Motion filed by the Respondent shows that the 1st Respondent actually made final orders against the petitioner stopping it from closing the VER until the issue of the employees pay package was determined. The 2nd Respondent did not seek any interim orders that the court would have granted at that stage. The prayer in the Notice of Motion read as follows:

- “(i) That the Hon. Court be pleased to certify this application urgent and be heard forthwith.***
- “(ii) That the Hon. Court be pleased to issue an injunction restraining the Respondent’s from closing their offer for Voluntary Early Retirement on 14/11/08 and the injunction to stay in place until the employee’s pay package is determined.***
- “(iii) Costs for this application.***
- “(iv) For any other reliefs the court may deem fit.”***

Clearly there was no prayer for interim injunction.

That being the case, was the Applicant’s right to a fair hearing under S. 77 (9) violated? That should be determined at the hearing of the petition.

After this order was confirmed by the Industrial Court, the Applicants then went ahead with the scheme and retrenched 597 employees who the Applicants allegedly paid off. That action aggrieved the Respondents who again moved the court under the application dated 27/4/09 and the court again granted ex parte orders inter alia, ordering that the employees affected by VER remain in the employment of the Applicant till the final orders were made. The Applicant contends that they had already paid off some of those employees and that the 1st Respondent was thus forcing the petitioner to enter into fresh contracts and that would affect the applicants financially. That the said order has thrown the Applicant to total confusion with retrenched employees streaming back to claim their jobs. S. 12 (4) of the Labour Institutions Act does give the Industrial Court powers to reinstate employees. It provides as follows.

“12 (4) In the discharge of its functions under this Act, the I.C. shall have powers to grant injunctive relief, prohibition, declaratory order, award of damages specific performance or reinstatement of an employee.”

Section 49 of the Employment Act, 2007 provides for the various remedies available to the Industrial Court which includes reinstatement. Section 49 (4) sets out the various considerations to be undertaken before one can be considered for reinstatement. The labour officer has to consider for example, the wishes of the employee, the circumstances in which the termination took place, the practicability of recommending the reinstatement, the employees length of service etc. The order of 28/4/09 was made ex parte and did not take all the above matters into account. The question is, was due process followed in doing so, was the Applicant’s right to fair hearing under S. 77 (9) violated? Again that can only be determined at the full hearing of the petition.

By the very order of reinstatement, 597 employees were ordered to return to work without the Applicants being heard. The question is whether this action would interfere with the Applicants right to protection of its property under S. 75. The Respondents likewise argued that it is the Applicants who are trying to retrench employees contrary to the labour laws and therefore denying them their property under S. 75. It is trite that the rights guaranteed under the Bill of rights are not absolute but are subject to public interest and the rights of others. In this case, where does the scale tilt? That has to be determined at a later stage at the hearing of the petition.

I have seen the application dated 27/4/09. The Respondents did not seek any prayer to reinstate the retrenched employees. However, the court went ahead to grant the orders, without hearing the other side or being moved to grant the order. As noted above, there are several considerations to be taken into account before such order can be made. The court will have to determine whether the court's action violated the Applicants right to a fair trial under S. 77 (9) of the Constitution.

The Respondents contend that if the Applicants were aggrieved they should have appealed. S. 27 of the Labour Institutions Act provides that any party to proceedings before the Industrial court may appeal to the Court of Appeal against any final judgment, award or order of the Industrial court. The Applicant did not appeal but instead came to this court alleging breach of its constitutional rights. I have noted above that it is only the High Court which is clothed with the jurisdiction to determine issues of infractions of fundamental rights and freedoms. In light of all the questions I have raised above, the question of whether the Applicant should have filed an appeal or come to this court will be determined at the hearing of the petition.

From the foregoing, this court is satisfied that there is a prima facie case with a high probability of success disclosed by the Applicant. The Applicant claims to have retrenched 597 employees who were ordered back on their pay roll by the court. There will be an obvious uncertainty and financial constraint on the Applicant and the question is whether the Applicant can be able to meet their obligations. And if the Applicant had indeed paid and released the employees can it continue to pay their dues? It is my view that the Applicants may suffer irreparably and the orders of the Industrial Court may have very far reaching effect on the functions of the Applicant if an interim conservatory order is not granted.

I will accordingly grant the conservatory order as prayed in the chamber summons dated 5/5/09 pending hearing and determination of this petition. Costs will abide the petition.

Before I finish, this being a Constitutional application under the Bill of Rights, it is my view that the Attorney General be enjoined as a party. It is not enough that a state counsel appears for the 1st Respondent.

Due to the urgency of this matter, and the fact that the Industrial Cause 151 (N) of 2008 requires urgent disposal, it is recommended that the case be fast tracked and be send to the Hon. The Chief Justice for appointment of a bench once the parties have filed and exchanged their Submissions and authorities on the petition.

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

R.V.P. WENDOH

JUDGE

Delivered in the presence of:

No appearance for the Petitioner

Mr. Onyiso for the 1st Respondent

Kevin Court clerk