REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISC CIVIL APPLI 1037 OF 2007

IN THE MATTER OF AN APPLCIATION BY KARURI TOWN COUNCIL FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE TRADE DISPUTES ACT CAP. 234 EMPLOYMENT ACT CAP 226 AND THE LOCAL GOVERNMENT ACT CAP. 265, LAWS OF KENYA

AND

IN THE MATTER OF AN AWARD BY THE INDUSTRIAL COURT, NAIROBI IN RESPECT OF CAUSE NO. 80 OF 2006 KENYA LOCAL GOVERNMENT WORKERS UNION – VS- KARURI TOWN COUNCIL

BETWEEN

REPUBLIC…….……. APPLICANT

AND

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

KENYA LOCAL GOVERNMENT WORKERS UNION……. 2ND RESPONDENT

EX PARTE KARURI TOWN COUNCIL

R U L I N G

This is a Notice of Motion dated 5th October, 2007 filed by M/s Gachoka & Company advocates for the ex-parte applicant **KARURI TOWN COUNCIL**. The application was brought under Order 53 rule 3(1) of the Civil Procedure Rules, and Section 8 and 9 of the Law Reform Act **(Cap. 26 *Laws of Kenya).*** The orders sought are as follows-

1. ***THAT an order of certiorari be issued to quash the entire proceedings, record and award of the***

Industrial court in cause No. 80 of 2006.

2. ***THAT an order of prohibition be issued to restrain the Respondent from publishing in the Kenya Gazette, under section 16 of the Trade Disputes Act, the award made on 8th June, 2007.***

3. ***THAT costs of this application be borne by the respondents.***

The application is grounded on the ***STATEMENT OF FACTS*** dated 19th September, 2007 filed with the Chamber Summons for leave as well as the ***VERIFYING AFFIDAVIT*** sworn on 18/9/2007 by David Macharia the Town Clerk of the ex-parte applicant, also filed with the Chamber Summons for leave.

The grounds of the application are, inter alia, that the Industrial court failed to consider the provisions of section 15 of the Trade Disputes Act ***(Cap. 234***) when it ordered reinstatement of dismissed employees and payment of their full salaries, and all other benefits, allowances, privileges and continuity of service from 7th June, 2001; that the Industrial Court exceeded its powers; that the Industrial court relied on a collective bargaining agreement that according to section 11 of the Trade Disputes Act, only became effective in 2002 but the dispute or cause of action arose in 2001 long before the said agreement became effective, that the Industrial Court erred in failing to consider the provisions of the Employment Act (**Cap. 226)** especially section 17 on summary dismissal; and that the award is defective, illegal and unlawful and not in accordance with the dictates of the law, public policy and morality and does not consider prevailing circumstances of the council.

The applicant's counsel filed written submissions or skeleton arguments on 4th May, 2009. The written arguments are brief. However, there is reliance on Acts of Parliament such as the Civil Procedure Act ***(Cap. 21 Laws of Kenya),*** the Employment Act (Cap. 226 Laws of Kenya) and Miscellaneous Application NO. 1784 of 2004 ***Mecol Ltd. –vs- Attorney-General and 7 Others***, a decision made on 15th February, 2006 by a three judge bench.

The 1st respondent, the **INDUSTRIAL COURT OF KENYA** was represented by the Attorney-General. They do not appear to have filed any response to the application, except that they associate themselves with the arguments of the 2nd respondent.

The 2nd respondents on their part, through their counsel, Ms. Guserwa & Company advocates filed a replying affidavit sworn on 26/11/07 by Boniface Munyao as Secretary General of Kenya Local Government Workers Union.

It is deposed in the said replying affidavit, inter alia, that the orders of certiorari and prohibition sought are not available in view of the provisions of section 17(2) of the Trade Disputes Act **(Cap. 234);** that this court therefore has no jurisdiction to stop or stay proceedings in the Industrial Court. It is further deposed that under section 14 of the Trade Disputes Act the Industrial Court has the necessary mandate to hear and determine such disputes, and therefore the case being challenged was conducted and determined within the law. It is also deposed that the award took effect upon completion of 20 days from delivery and that the applicants are late in filing this case and in contempt of court and should not be given a chance to be heard. It is deposed further that the dismissal of 38 employees was in breach of the return to work formular signed at the District Labour offices and that the Industrial Court Award cannot be said to be impracticable by reason of an adamant employer. It is deposed also that the ex-parte applicant refused, ignored or failed to comply with directives of the Ministry of Local Government Vide a letter of 11th February 2004 to reinstate the 38 employees. It is deposed that the ex-parte applicants are using the court ***(in these proceedings)*** to delay and to deny the aggrieved parties fair play and justice.

The 2nd respondents also filed written submissions on 18th May, 2007.

It is contended that the ex-parte applicant and the 2nd respondent have a valid recognition agreement and on that account both entered into several Collective Bargaining Agreements relating to unionsable

employees. It is contended that the Industrial Court had jurisdiction under section 14 of the Trade Disputes Act ***(now repealed)*** to entertain and determine cause No. 8 of 2006 and that the orders issued in that cause were lawful. It is further contended that under section 17(2) of the Act, the Industrial Court's orders or awards are final and not subject to review, variation, setting aside or appeal. It was also contended that the Industrial Court had not been served with an order staying proceedings. It was lastly, contended that the industrial Court award took effect 20 days after its delivery, so this application is rather belated. In any case, this court has no power to look into the merits of the decision of the Industrial Court unless the decision is made outside jurisdiction. The cases of ***Kenya Airways Ltd. -Vs- Kenya Airlines Pilots Association – Miscellaneous Application No. 254 of 2001;*** and the case of ***Municipal Council of Thika -Vs- The Industrial Court – Nairobi Miscellaneous 268 of 2007*** were relied upon.

On the hearing date, Mr. Kamuyu for the ex-parte applicants, Mr. Menge for the 1st respondent, and Ms. Guserwa for the 2nd respondent adopted the contents of document filed.

Having considered the application, documents filed and authorities cited I am of the view that the first issue is whether the Industrial Court as set up under the Trade Disputes Act (repealed) is a subordinate court.

It has been argued by the applicants that the Industrial Court is a subordinate Court. The respondents on the other hand argue that it is not a subordinate court.

The High Court in several decisions has held that the Industrial Court as set up under the Trade Disputes Act is a subordinate court. In the case **KENYA AIRWAYS LTD –VS- KENYA AIRLINE PILOTS ASSOCIATION** – Nairobi Miscellaneous Application NO. 254 of 2001 ***(Nyamu and Wendoh JJ)*** stated-

"***After considering the above provisions, subsection 60, 123 of the Constitution and submissions of all counsel we come to the conclusion that the Industrial Court is a subordinate court to the High Court."***

The above was a decision made on 26th September, 2008. In the earlier case of **MECOL LIMITED – VS- ATTORNEY GENERAL & 70 OTHERS,** a decision made in 2006 Rawal, Mutungi and Kasango JJ. Stated-

"***With this definition and what has been stated herein we are of the view that the industrial court is a court subordinate to the High Court"***

The above holdings by the High Court are hinged on section 60, 65 and 123 of the Constitution. Section 60 of the Constitution establishes the High Court with unlimited original jurisdiction in civil and criminal matters. Section 65(1) provides that Parliament may establish courts subordinate to the High Court. Section 123 of the Constitution defines a subordinate court as under-

"***Subordinate Court means a court of law in Kenya other than***-

(a) The High Court.

(b) A court having jurisdiction to hear appeals from the High court; or

(c) A court martial."

It therefore, in my view, follows that any court which is lawfully established by Parliament and which does not fit into the three categories (a), (b) and (c) above, is a subordinate court.

The second issue is whether the Industrial Court is subject to the supervision of the High Court. Courts have differed on this. This issue of varying opinions arises from the interpretation of section 17 of the Trade Disputes Act, which provides-

"**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 prohibition, injunction, certiorari or otherwise, either at the instance of Government or otherwise."

Such varying opinions are clearly expressed in the case of **KENYA AIRWAYS –VS- KENYA AIRLINE PILOTS ASSOCIATION** (supra), in which Nyamu and Wendoh JJ stated-

"***Secondly, we are of the view that the Industrial Court is a specialized court set up under the Trade Disputes Act to deal with trade disputes and related matters and may have been amenable to judicial review but because of the clear legislative ouster of judicial review by virtue of Section 17 of the Trade Disputes Act which limitation is envisaged by Section 65(1) of the Constitution, this court cannot interfere with that court's award."***

On the other hand, in ***MECOL LTD -VS- ATTORNEY GENERAL & OTHERS*** (*supra)* Rawal, Mutungi and Kasango JJ. stated-

"***As regards the provisions of Section 17(2) of the Act, we are of the view that the said section, in prohibiting the granting of remedies such as certiorari, mandamus or prohibition, violates section 84 of the Constitution. Section 84 of the Constitution provides that the High court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of securing the enforcement of sections 77 to 83 of the Constitution – see*** *NJUGUNA –VS- REPUBLIC [2004] I KLR 520*. ***The restrictions on entertaining judicial review orders stipulated in section 17 of the Act clearly runs contrary to the Constitutional provisions of section 84. Section 17(2) of the Act cannot stand being inconsistent with the Constitution."***

My own view is that, in view of the provisions of section 84 of the Constitution, under which the High Court has wide powers to grant orders, issue writs and give directions, an Act of Parliament cannot take away the Constitutional powers of the High Court, which flows from the provisions of the Constitution. I find and hold that this court has jurisdiction to entertain and determine judicial review proceedings from orders of the Industrial Court.

The third issue is whether this court should grant the orders sought. At the risk of repetition, it is pertinent here to highlight the orders sought. They are-

1. ***THAT an order of certiorari be issued to quash the entire proceedings, record and award of the Industrial Court in Cause No. 80 of 2006.***

2. ***THAT an order of prohibition be issued to restrain the Respondent from publishing in the Kenya Gazette, under Section 16 of the Trade Disputes Act, t*****he award made on 8th June, 2007.**

3. ***THAT costs of this application be borne by the Respondents.***

It is clear from the above prayers that the substantive prayers sought are judicial review orders of certiorari and prohibition.

It is trite that a party who has come to court to seek judicial review remedies has the burden of establishing the grounds for grant of such orders. The grounds on which judicial review may be granted are where the applicant has established grounds such as illegality, irrationality, bias, unreasonableness, failure to observe the principles of natural justice and want or excess of jurisdiction, and taking into account irrelevant matters. This list is not exhaustive.

The exparte applicants have come to this court to challenge the decision of the Industrial Court in reinstating sacked employees and granting the said employees their benefits. The main grounds appear to be an alleged failure to comply with the provisions of section 15(i) of the Trade Disputes Act, which in

my view is a ground on illegality. Secondly there is a ground of failure to comply with principles of natural justice by not allowing parties to prove, through evidence, the pecuniary loss before arriving at its decision, and failure to observe section 17 of the Employment Act ***(Cap. 226)*** on dismissal of employees. Another ground is that the Industrial Court relied upon the wrong Collective Bargaining Agreement to arrive at its conclusions.

In my view, the issue of relying on a wrong Collective Bargaining Agreement and not considering the provisions of section 17 of the Employment Act, go to the merits of the decision rather than the process. It is trite that judicial review is concerned with the process of arriving at a decision rather than the merits of a decision. Under the judicial review jurisdiction, I am not concerned with the correctness of the decision. I will therefore dismiss these grounds.

Did the 1st respondent fail to observe the principles of natural justice? The applicant contends that parties were not allowed to tender evidence. I have perused the submissions and ruling of the Industrial Court, as annexed to the application. I find nothing that can convince me that the 1st respondent did not observe the principles of natural justice. Both the Secretary-General of the union, and Mr. Ambenge for the Town Council filed submissions in the Industrial Court and were given an opportunity to be heard.

On illegality as regard to failure to comply with section 15(i) of the Trade Disputes Act, it is worthy to note that in the award, the Industrial Court specifically relied on the provisions of section 15(1) (i) of the Trade Disputes Act to make the final orders of the award. I presume that the applicants' argument is that the decision was an illegality under the said section because the Industrial Court under the said section acted outside its jurisdiction in making the final award, and therefore the decision was a nullity and has to be quashed.

The said section provides-

"**15(1)** ***In any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the court may order that employer to reinstate that employee in his former employment, and the court may in addition to or instead of making an order for reinstatement, award compensation to the employee:***

Provided that such compensation shall not exceed-

(i) In a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as a result of the wrongful dismissal.

(ii) In any other case, twelve months monetary wages."

The Industrial court made an award and decided as follows-

(a) In exercise of the powers conferred on this court by section 15(1) of the Trade Disputes Act, we order that the grievants be unconditionally reinstated to their jobs or posts from the date of their summary dismissal i.e. 7th June, 2001 without loss of their full salaries and all other benefits, allowances, privileges and continuity of service with effect from the said date.

(b) The grievants shall report to the Respondent's Town Clerk for deployment to their respective departments of the Respondent within 20 days from the date of this award.

(c) The grievants who have reached the mandatory retirement age of 55 years be paid their normal retirement benefits from the time they attained their retirement age.

(d) The terminal dues of deceased grievants be paid to the administrators of their estates upon presentation of proof of appointment by the courts.

In my view, according to the law, the Industrial Court had the jurisdiction to make the orders that it

made. Whether they are correct or not goes to the merits and is not in the purview of judicial review proceedings, which deals with the process rather than the merits. The orders of the Industrial Court are not illegal.

The applicant claims that parties were not allowed to tender evidence before the decisions were made. Therefore there was failure to comply with the principles of natural justice. They however do not indicate what evidence would be necessary to make the court arrive at the decision it arrived at. All the parties are agreed that the Industrial Court can choose to take evidence or rely on reports. In my view, all the records and particulars of the grievants are with the applicant as employer. They are the ones who know the salaries benefits and retirement entitlement of each of the grievants. In short I find no merits in the argument that principles of natural justice were not adhered to, or that the pecuniary loss cannot be determined from the decision of the Industrial Court.

For all the above reasons, I find no merits in the application and dismiss the same. The applicant will pay the costs of the other parties.

Dated and delivered at Nairobi this 12th day of October, 2009.

GEORGE DULU

JUDGE

In the presence of-

Ms. Kamuyu holding brief for Mr. Gachoka for applicant

Mr. Kariuki holding brief for Ms. Guserwa for 2nd respondent

David Court clerk