



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 138 of 2006

INDUSTRIAL COURT.....APPLICANT

Versus

**KENYA UNION OF DOMESTIC, HOTELS,
HOSPITALS AND ALLIED WORKERS.....RESPONDENT**

**KENYA HOTELS AND ALLIED WORKER
SOUTHERN PALMS BEACH RESORT.....INTERESTED PARTY**

JUDGMENT

The ex parte Applicant, Kenya Union of Domestic Hotels, Hospitals and Allied Workers filed the Notice of Motion dated 23rd February 2007 against the Industrial Court of Kenya, the 1st Respondent, while the Kenya Hotels and Allied Workers Union and Southern Palms Beach Resort were named as the 1st and 2nd Interested Parties. The Applicant seeks the following orders against the said Respondents:-

- 1) That the court do issue an order of certiorari to remove into the High Court and quash the amended award of the Industrial Court issued on 8th February 2005 in Industrial Cause No. 120 of 2005 at the Industrial Court of Kenya;
- 2) That this court do issue an order of prohibition prohibiting the Industrial Court, its agents, employees or servants from implementing and/or enforcing the amended award issued on 8th February 2005 in Industrial Court Cause No. 120/05 and all subsequent directions or orders issued therefrom;
- 3) Such other directions as the court may deem fit for the ends of justice to be met;
- 4) Costs of these proceedings to be provided for.

The Notice of Motion is supported by a statutory statement and a Verifying Affidavit of Festus Mutunga both dated 22nd February 2007. The Applicant also filed skeleton arguments on 15th May 2007. Mr. Mbugua urged the Application on behalf of the Applicant.

Mr. Kirori who appeared on behalf of the Respondent filed no papers in reply and had nothing to say in reply. Mr. Thomas Lubira, the Human Resources Manager of the 2nd Interested Party swore an Affidavit

dated 21st March 2007 and Mr. Ngaira, Counsel for the 2nd Interested Party filed skeleton arguments dated 15th May 2007.

Mr. Wambeyi representing the 1st Interested Party relied on the Affidavit of Jared Akama Onyari dated 12th November 2007 in support of the Notice of Motion.

Festus Mutunga, the Secretary General of the Applicant deponed that he was conversant with the matters herein and that the jurisdiction of the Industrial Court set up pursuant to S. 14 of the Trade Disputes Act, Cap 234, Laws of Kenya is to determine Trade Disputes and matters related thereto. That there was a dispute between the 1st Interested Party and the Respondent over a Recognition Agreement which was referred to the Respondent by the Minister of Labour and Human Resources Development by virtue of S.8 of the Trade Disputes Act. The Respondent issued an award on 16th December 2005 in Industrial Court Cause 120/05 (FM 1). The Ballot exercise was done by the Planning Division and the Applicant who was declared winner was allowed to negotiate and sign a fresh Recognition Agreement (FM 2) which was executed between the Applicant and the Hotel – 1st Interested Party.

On 20th April 2006 the Applicant and the 1st Interested Party executed a Collective Bargaining Agreement (CBA) which was registered by the Industrial Court in RCA 103/06 (exhibited as FM 4). On 13th July 2006 the Respondent issued an award amending the original award issued on 16th December 2005 (FM 5). On 8th February 2006, the Respondent in the absence of all the parties issued ex parte orders which exhibited as FM 6. On 21st February 2007, the Ministry of Labour issued a circular directing that parties conduct another balloting (FM 7) in accordance with the amended order. It is the Applicants contention that the Industrial Court had no jurisdiction to amend the award which had already been issued, that the Respondent breached rules of natural justice by not hearing the parties before the amendment and that the issue of recognition is res judicata having been adjudicated upon.

Mr. Ngaira submitted that the Industrial Court had no jurisdiction to amend the award as none of the parties had moved the court to do so, and the award directly affects the 1st Interested Party as they are the employers of the workers. That the 2nd Interested Party has a CBA with the Applicant and has incurred costs in implementing the same and the amended award will make the Interested Party to incur extra costs and create technicalities as to how to enter into negotiation for another Recognition agreement and a CBA. The 2nd Interested Party therefore supports the Applicant's Notice of Motion.

Mr. Wambeyi Counsel for the 1st Interested Party told the court that he supports the Applicants Notice of Motion in light of the judgment of the Constitutional Court in **1784/04 MECOL LTD V AG, and Others**, where the court struck out S.17(2) of the Trade Disputes Act as being unconstitutional and void. That Section provides that the decision of the Industrial Court is final and cannot be challenged by way of review but that court found that that Section is contrary to the provisions of S.65 of the Constitution which gives the High Court supervisory jurisdiction over criminal, civil courts and tribunals.

All the Interested Parties have agreed that this court has supervisory jurisdiction over the decisions of the Industrial Court in light of the decisions of the Constitutional Court in the **MECOL LTD Case (supra)**. This court therefore has got the jurisdiction to entertain this matter to supervise the decisions of the Industrial Court if it is questioned. The Respondents never filed any replying papers to this Application. Mr. Karori who appeared for the Respondent had nothing to say. This is despite the fact that the Respondent had been indulged by this court and allowed time to file their papers.

It is the Applicant's case that the Industrial Court had resolved a dispute in Industrial Case 120/05 as a result of a recognition agreement that was signed between the Applicant and the 1st and 2nd Interested Parties. The parties then negotiated a CBA which was registered by the Industrial Court in RCA 103/06 and it is agreed that the 2nd Interested Party has implemented the terms of the CBA.

No fresh dispute has been filed with the Minister who could refer the dispute to the Industrial Court nor

have the employees of the 2nd Interested Party complained about the CBA. Earlier on 13th July 2006, the Respondent had issued an award amending the original award that was issued on 16th December 2005. The 2nd Interested Party then sought interpretation of the Respondent's order dated 13th July 2006. By its ruling on 31st August 2006, the Industrial Court declined to give another interpretation of the order terming the request as contemptuous and a gross abuse of the due process of the law.

On 8th February 2007 the Respondent, without being moved by any party made an order directing as follows:-

“with the foregoing resume in mind, we once again direct as follows:-

- (i) That Mr. Benson Okweyo is hereby ordered to proceed with the secret ballot as ordered by the court on 13th July 2006, with or without the participation of the 2nd union;**
- (ii) That the management of the Resort are ordered to avail all their records, eg Register Muster Rolls, etc to Mr. Benson Okwayo to enable him conduct the secret ballot of all unionsable employees (excluding casual and seasonal workers), without any interference whatsoever;**
- (iii) That the exercise should be completed within one (1) month from the date hereof, and the court will make its final decision soon after the receipt of the exercise.....”**

The record of that order clearly indicates that there was no appearance of any of the affected parties. Can the court move *Suo Motto* in such a matter? The court had made earlier orders, and the parties had acted upon them. The secret ballot that is being ordered by that order had already been carried out and results released by the Economic Planning Division on 16th March 2006 (FM 2). A recognition agreement executed on 20th March 2006 and a CBA signed on 20th February 2006 (FM 3). The question is what happens to the CBA that is already registered with the Respondent? The 2nd Interested Party claims to have incurred costs in ensuring that the process was followed so should the process be repeated and who would meet the incurred costs?

In my considered view the Respondent was in breach of a fundamental principle of natural justice that parties to a dispute should be heard. This is not a situation where the court could move '*Suo Motto*'. The court would not sit on appeal or review of its own orders without being moved and purport to amend the order. The court's order could only be amended before being signed. The Respondent clothed itself with powers that it does not have nor has it shown how it was moved. I find that the Respondent acted *ultra vires* its powers and the order of 8th February 2005 is therefore null and void and cannot be acted upon by any of the parties.

The Applicant seeks an order of certiorari to quash the said amended order. Certiorari lies to quash decisions made without or in excess jurisdiction or in breach of rules of natural justice. The order of 8th February 2005 is made *ultra vires* the powers of Industrial Court and in breach of the rules of natural justice and it is hereby ordered quashed by certiorari. See the **KENYA NATIONAL EXAMINATION V REP 266/1996**.

The Industrial Court had ordered that the order be effected within 30 days. Prohibition lies to bar any decision made without or in excess of jurisdiction. The order of the Industrial Court is made in excess or outside the mandate of the Industrial Court and an order of prohibition must issue to prohibit the Respondent from implementing or enforcing the order of 8th February 2005. The Notice of Motion dated 23rd February 2007 is hereby granted. The costs of this Application will be borne by the Respondent.

Dated and delivered this 13th day of March 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Ngaira for 2nd Interested Party holding brief for mr. Mbugua for the Applicants

Daniel: Court Clerk