



REPUBLIC OF KENYA

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

Misc. Appli. 237 of 2008

SPIN KNIT DAIRY LIMITED.....APPLICANT

Versus

THE ATTORNEY GENERAL & 3 OTHER.....

RESPONDENT

RULING

On 29th April 2006 the Petitioner Spin Knit Dairy Ltd. filed the petition dated the same day seeking various orders and declarations against the Hon. The Attorney General, the Industrial Court, Bakery, Confectionery, Food Manufacturing and Allied Workers Union (K) and Allan Indeche, (1st & 4th Respondent). The petition is brought pursuant to Section 84 (1) of the Constitution in which the Petitioner alleges violation of their rights under S.80 of the Constitution. The orders sought are as follows:

- 1) A declaration that the 2nd Respondent's award delivered on 1st October 2007, ordering reinstatement of the 4th Respondent to his former position without any loss of benefits, salary and/or service is null and void as it violates the petitioner's rights as secured under S 80 of the Constitution;
- 2) A declaration that all consequential orders arising from the 2nd Respondent's award delivered on 1st October are null and void in so far as they are meant to enforce the said award;
- 3) A declaration that ordering reinstatement when the party alleging wrongful dismissal is already in gainful employment is a violation of the petitioner's right under S. 80 of the Constitution and given in the face of conventional labour practices;
- 4) A declaration that ordering reinstatement when the relationship between the employer and employee is stained is a violation of the petitioner's rights under S.80 of the Constitution especially when the judicial body so ordering had other options under the law;
- 5) A declaration that the Industrial Court award made in cause No 70 of 2007 is null and void;
- 6) A declaration that the Petitioner is entitled to an order; setting aside the said award made on 1st October 2007 and replace it with an order that the 4th Respondent's employment was terminated in accordance with the requirement at the time both of law and of the Collective Bargaining Agreement;
- 7) An order that the Respondent pay costs of this petition.

Filed simultaneously with the petition is the Chamber Summons of the same date seeking conservatory orders that pending the hearing of the Chamber summons and petition the execution of the 2nd Respondents award made on 1st October 2007 in Industrial Cause No.70/07 be stayed.

On 8th May 2008 the 3rd and 4th Respondents filed a notice of preliminary objection dated the same day, and since the preliminary objection was on jurisdiction, it was taken up first. The Preliminary was urged by Mr. Muturi, the Respondents were represented by Mr. Omondi, Counsel for the 1st and 2nd Respondent supported the preliminary objection while Mr. Kagano, Counsel for the Petitioner/Applicant opposed the application.

Briefly the background of this matter is that the petitioner is a limited liability company and has signed a Collective Bargaining Agreement (CBA) with the 3rd Respondent governing their terms and conditions of employment between the workers and the employer. The 4th Respondent was employed by the petitioner on 22nd April 2000 as a shift supervisor till 7th April 2005 when his services were terminated. That in the CBA were included powers of summary dismissal for serious offences (Paragraph 23) while clause 24 of the CBA provided for reinstatement of an employee who was wrongfully dismissed. The 4th Respondent had a warning letter and that on 17th March 2005 the 4th Respondent deserted his place of duty from 3.30 p.m. to 4.30 p.m. and after investigations he was found to have gone to deliver milk which was not his function and that followed his dismissal under clause 23 (a) of the CBA. The 3rd Respondent reported to the Ministry of labour about existence of a labour dispute between the Petitioner and 4th Respondent the matter was investigated and the matter was ultimately referred to the Industrial Court as Cause No. 70/07. The matter was heard and the 2nd Respondent rendered a decision after evaluating the evidence and made an award that the 4th Respondent be reinstated to his position with the petitioner without any loss of benefits, salary and seniority and the award was to be implemented within 30 days of the readings of the award. That despite the fact that the 4th Respondent was said to be gainfully employed elsewhere the court handed that award and the petitioner is aggrieved by it. That is why they filed this petition as the Respondents are keen on executing the award and the 3rd and 4th Respondents have moved the 1st Respondent for contempt of court and the petitioner fears committal to civil jail for disobedience of the court's order.

The 3rd and 4th Respondents raised 7 points in their preliminary objection and they are as follows;

1. The High Court of Kenya has no jurisdiction in Industrial disputes to substitute a finding of the Industrial Court with the Court's own finding which clearly the petitioner seeks to do;
2. The petitioner has not specifically sought to declare Section 12(4) and Section 15 of the Labour Institutions Act 2007 as unconstitutional consequently the petition as drawn is incompetent and for striking out.
3. A judgment pursuant to express provisions of the law, such as S.12 (4) and 15 of the Labour Institutions Act or any other law such as Committal to civil jail for non payment of a civil debt cannot amount to a violation of the individual's fundamental rights and freedoms which the applicant seeks to call upon this court's adjudication.
4. The issues raised by the petitioner can be adequately looked into by the Industrial Court as statutorily empowered to, consequently the High Court lacks jurisdiction to intervene on the issues expressly set out by the petitioner;
5. The petitioner's express admission that it has failed to comply with orders of the Industrial Court as a vindication of the Respondent's contention that the petition herein which seeks to arrest the contempt proceedings is an abuse of the court process and an attempt to derail the due process of the law and the powers vested in the industrial court by parliament;

6. To the extent that a violation of an individual's rights pursuant to the Constitution or reinstatement into employment are matters of law, the petitioner's only recourse is to invoke the powers of S. 17 (1) of the Labour Institutions Act by way of an appeal to the Court of Appeal which the petitioner has failed to do;

7. The petitioner has not exhausted all legal avenues including the Industrial Court's power to review its orders, awards or judgments pursuant to Section 26 of the Labour Institutions Act and consequently the proceedings before the court are incompetent and for striking out.

Mr. Muturi, Counsel for the 3rd and 4th Respondents in addition submitted that the Industrial court in reinstating the 4th Respondent acted within the law and for the decision to be declared unconstitutional, the applicant should seek to declare the provisions of law under which the court acted to be unconstitutional .

2ndly the Counsel submitted that this application has been filed when there is in force law which allows a party aggrieved by the decision of the Industrial Court to move to the Court of Appeal, that is, S. 27(1) of the Labour Institutions Act. 2ndly that under S. 26 of the same Act the Industrial Court can review its own decision. Lastly Counsel submitted that the Applicant seeks to challenge the Industrial Court's discretion to order a reinstatement instead of ordering the payment of damages this court cannot substitute the Industrial Court's decision with its own and that therefore the petition should be struck out.

Mr. Omondi, Counsel for the Respondent associated himself with the 3rd and 4th Respondent's submissions. He urged that this court cannot substitute the decision of the Industrial with its own so long as the court was acting in accordance with provisions of the Trade Disputes Act or the new Act, Labour Institutions Act.

That in any case the Applicants submitted themselves to the jurisdiction of Industrial Court and are estopped from turning against it. That the CBA provides for the manner of dispute resolution which the Parties to the CBA are bound by.

Lastly, Counsel urged that individual rights are owed by the state to the individual and cannot be enforced against another individual. That this dispute is between the petitioner and 4th Respondent and the Industrial is used as a cover up and that this court is being used as an appellate court.

The preliminary objection was opposed and Mr. Kagoni submitted that this court has wide powers under S.84 (1) of the Constitution and its hands cannot be fettered when it comes to violation of individual rights. He relied on the case of **JACOB OPIYO & 250 OTHERS V A.G. (2005) KLR 1971 OF 2001 OS** and that this court should give the Petitioner a chance to canvass their case.

As to the submission that they should have appealed under the new Act, Counsel submitted that in the above cited case the court observed that they cannot be restricted to an appeal. Counsel also relied on the Ugandan case of **KYAMANYWA V UG (2000) 2 EA 426** where a person made a 2nd appeal on the constitutionality of corporal punishment pursuant to the Supreme Court and that court held that it is the Court of Appeal which had the jurisdiction to deal and referred back the matter to that court. That in this matter, the applicant has tried to exhaust the avenues available to them by even asking for an interpretation of the award but the court declined to hear them on grounds that they were raising constitutional issues.

The facts leading to the Industrial Court's decision are not disputed. The first question this court would ask itself is whether the Industrial Court had the jurisdiction to hear and determine the issue of dismissal of the 4th Respondent. The dispute before the Industrial Court was filed under the Trade Disputes Act Cap 234. The decision of that court was rendered on 7th February 2008. Section 14 of Cap 234 establishes the Industrial Court whose mandate was to settle trade Disputes and matters relating there to.

Under S. 15 (1) of the same Act the Industrial Court is given powers to determine disputes relating to discipline and dismissal. It reads:

“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 the 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-

(1) in a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as the result of the wrongful dismissal;

(ii) in any other case, twelve months monetary wages,

(2) without prejudice to any other remedy, any compensation awarded under this section may be recovered summarily as a civil debt.

(3)

(4)

(5)”

In addition to above provision the petitioner has signed a Collective Bargain Agreement (CBA) with the Workers Union to which the 4th Respondent belongs. Clause 24 provides for reinstatement of terminated or dismissed employees. It reads

“where through laid down machinery in the Trade Disputes Act (Cap 234) Laws of Kenya, it is determined that an employee was wrongfully terminated or dismissed from employment, the employee shall be reinstated back to his/her other job without any loss of benefits and or seniority.”

From a reading of the above provisions, the Industrial Court had jurisdiction both under the Trade Disputes Act and the CBA to order for reinstatement as it did. Can the courts action be held to be unconstitutional?

In an application under Chapter 5 of the Constitution, the court is called upon not to consider the merits of an act or decision but to enquire into the conduct of a party like in the instant case, whether the Industrial Court violated the Applicant’s rights under S.80 in any way acting within the law? My answer is No. As submitted by Counsel for Respondents, for the Industrial Court’s decision to be declared unconstitutional, the law under which the decision is made must be declared unconstitutional because there are no allegations against the court that it acted outside its powers under the Act and CBA. Laws are made pursuant to the Constitution and for a law to be said to be unconstitutional that law has to be declared so. In **MECOL LTD V THE AG MISC APPL 1784/2004** the court was invited to find that S. 17 of the Trade Disputes Act was ultra vires the Constitution and that it violated S.84 of the Constitution. Without an invitation of this court to declare the said Section 15 of the Trade Disputes Act unconstitutional, this court finds that the Industrial Court acted within its mandate and there is nothing unconstitutional about its decision in reinstating the 4th Respondent as it was done in accordance to the law.

The petition is alleging breach of his rights under S.80 of the Constitution. The said Section stipulates:-

“80 (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to join or belong to trade unions or other associations for protection of

his interests.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question makes provision.

(a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health;

(b) That is reasonably required for the purpose of protecting the rights of freedoms of other persons;

(c) That imposes restrictions upon public officer, members of a disciplined force, or persons in the service of a local government authority; or

(d)

And except so far as that provision or, as the case may be the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

The petitioner claims that his rights of association have been or are likely to be breached because of reinstatement of the 4th Respondent whom he can no longer associate with as a an employee. However, the protection under S.80 of the Constitution which is the foundation of the fundamental rights provides that the rights and freedoms guaranteed under Chapter V of the Constitution are not absolute but subject to the respect of rights and freedoms of others and for the public interest. It also states that there are limitations to the protection provided under the various Sections 71 to 83. Under S. 80, the limitation to the protection of assembly is provided for under S.80 (2) (b). The Petitioner’s right to associate are subject to respect of the 4th Respondent rights and freedoms under the law. In the case of **GITHUNGURI V REP (1986) KLR 1** the constitutional held:

“Rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community.”

Section 80 has a proviso that the thing done should be reasonably justifiable in a democratic society. In a democratic society, the rule of law must prevail. The court must rule in accordance with the law and that is what the Industrial Court did in reinstating the 4th Respondent. What the Petitioner wants is this court to relook at that decision of the Industrial Court again and either act as a review court or an appellate court which is not the purview of this court. If dissatisfied with Industrial Court’s decision, the petitioner should pursue other avenues of redress provided for in the TDACT. R 2 (4)(a) of the schedule made pursuant to Section 84 of the Labour Relations Act provides that disputes commenced under the Trade Disputes Act will be determined in accordance with the same TDACT now repealed. The Labour Relations Act commenced on 26th October 2007.

Mr. Omondi also raised objection that the joinder of individuals to this application because individual rights are not guaranteed by an individual. It is trite and the courts have over and over held that it is only the Government against whom individual rights can be enforced. The court in **KBS LTD V AG HC 413/05** adopted the decision in **TEITIWNANG ARIONG & OTHERS (1987) LRC CONST 517** in which the court stated,

“Dealing now with the question can private individuals maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the constitution? The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains matters about the Government of the country. It follows therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the Governed. I am of the opinion that an individual or a group of individuals as in this case cannot owe a duty under the

fundamental rights provisions to another individual so as to give rise to an action against the individual and or a group of individuals since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution.”

The same decision was adopted in the cases of **HON. MARTHA KARUA V RADIO AFRICA LTD. T/A KISS FM STATION & ANOTHER** and **RICHARD NDUATI KARIUKI V HON. LEORNARD NDUATI KARIUKI & ANOTHER MISC APPLCIATION 7/06** and many others. In this case, the 3rd Respondent Bakery Confectionary Food Manufacturing & Allied Workers is a private entity which cannot guarantee the rights of individuals. Similarly the 4th Respondent is an individual who cannot guarantee the rights of the Applicant. The 3rd and 4th Respondent are non-suited and the orders sought cannot lie against them. The 2nd Respondent is properly enjoined to these proceedings because the Industrial Court is represented by the Hon. The Attorney General, 1st Respondent.

The Trade dispute under consideration arose before the commencement of the Labour Relations Act 2007 whose

commencement date is 26th December 2007. Only the ruling of the court on the issue of reinstatement was made on 7th February 2008. In terms of S.84 of the Labour Relations Act, No. 14 of 2007 a read with the 5th Schedule R 2 (4), the proceedings should be determined under the Trade Disputes Act. It was therefore improper for Mr. Muturi to invoke and rely on the provisions of the Labour Institution Act for this preliminary objection at paragraph 2, 3, 6 and 7. However, even based on the 1st point alone that this court has no jurisdiction to substitute the decision of the Industrial Court which has been arrived at in accordance with the law, with its own decision, this petition cannot see the light of day.

Further the petitioner has admittedly declined to obey the Industrial Court’s decision and that is why it came to court. The Applicant should have complied and sought these prayers later. This court cannot aid a party who fragrantly disobeys the law.

The upshot of this is that the objection is upheld based on ground I of the preliminary objection and this petition is hereby struck out with costs to the Respondents.

Dated and delivered this 27th day of June 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of:-

Mr. Muturi for 3rd and 4th Respondents

Mr. Kegoni for petitioner

Daniel: Court Clerk