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

Misc. Appli. 1513 of 2003

UPANA WASANA EPZ LIMITED …..……..APPLICANT

Versus

LABOUR COMMISSIONER…..……..……1ST RESPONDENT

ATTORNEY GENERAL……2ND RESPONDENT

JUDGMENT

Upana Wasana EPZ Ltd filed the Notice of Motion dated 28th November 2003 in which the Applicant seeks the following Judicial Review orders against the Labour Commissioner and the Attorney General;

1) That an order of certiorari do issue to bring into this court the decision of the Labour Commissioner dated 31st October 2003 for purposes of being quashed;

2) That an order of mandamus do issue directed at the Labour Commissioner to compel him to return all the records, books and documents taken from the Applicant;

3) That an order of prohibition do issue to prohibit the Labour Commissioner or any other Officer under him from giving effect to the Decree against the Applicant;

4) Costs of this application be provided for.

The Notice of Motion was supported by the following documents:

(1) The affidavit of Nzioki Wa Makau dated 28th November 2003;

(2) Statement of facts dated 14th November 2003;

(3) A verifying affidavit sworn by Radido Stephens Anderson on 13th November 2003;

(4) Skeleton arguments filed in court on 25th November 2008.

The Applicant was represented by Mr. Makau. The Motion was opposed and Mr. Omondi, Counsel who represented the 1st and 2nd Respondents relied on the replying affidavit of Johnson Kavuludi dated 26th February 2004 and filed in court on 5th March 2004.

The grounds upon which this motion is preferred are found in the statement and they are that there is no valid legal basis which the Respondent can base its decision to compel the Applicant to pay the sums that are alleged to be due; that there is no basis in law to justify the Respondent's credit of giving notice to pay, the notice and law on which the notice is premised is inconsistent and mala fides, that the demand from labour officer is made with an ulterior motive, is capricious, null and void and that the demand is unlawful and illegal.

Briefly stated, the facts of this case are that the Applicant is a Limited liability company licensed by the Export Processing Zone Act to manufacture garments and textiles for export to American Market (R S A 1). It is governed by EPZ Act and Employment Act. That on 13th January 2003 there were many strikes at EPZ though no notice had been issued for the strikes and the workers were not unionisable. That the strikes affected the productivity resulting in heavy losses. That on 17th January 2003 the Labour Commissioner brokered a meeting with a view to resolving the disputes. A return to work formula was agreed upon exhibited as RSA 2. It was agreed inter alia that the employees return to work without victimization or conditions and the parties were to meet again to resolve the outstanding issues which included salary increment, House allowance, Maternity leave etc. That 300 of the employees members refused to return to work and instead reported to the Ministry of Labour that they were dismissed without notice, claimed notice pay, underpayments and maternity leave and prorata leave. There were several meetings held between the Ministry and EPZ officials but issues were not resolved. The Applicants deny all the claims that were being made against then. Meanwhile the Ministry went around EPZ factories for purposes of audit.

That by letter dated 31st October 2003 the Labour Commissioner demanded that the Applicant deposit Kshs.3,913,900/= with the Provincial Labour Officer Nairobi by 18th November 2003 (RSA 3) which were under payments of the workers for the period January to 31st April 2002. The applicants content that allegations of underpayment had no basis because basic wages are regulated by the Government and the contracts with the workers provided daily but not hourly rates (RSA 5) and that therefore the decision by the Labour Commissioner to base the rates on hourly basis is illegal and made in bad faith. That the notice contains names of individuals who have never worked with the Applicant for example, Oliver Muturi No. 672 on the list, RSA 3, included the name of Vitalis Otieno as No. 491 on the schedule, a man demanding maternity leave, and yet that allowance is not payable to men, and the demand was therefore illegal. Lastly, that the Respondents purported to calculate terminal dues paid in lieu of notice using a different formula than that agreed in contracts of employment which provided for Kshs.190 per day (RSA 7). That there would have been no under payments because as per Legal Notice 87 of 29th January 2001 on Regulations of wages and Conditions of Employment Act, the daily rate was Kshs.179/15, which is lower than that actually paid and that the Respondents decision is illegal and unlawful and should be quashed. That the Respondent also refused to return the books and records taken from the Applicant making it difficult for the Applicant to confirm whether or not the sums demanded in the notice are due.

The Respondents opposed the Motion. They relied on the affidavit of Johnstone Kavuludi, the Labour Commissioner. He deponed that following strikes at the Applicant company, the Applicant requested the Labour Inspectors to intercede with a view to settling the labour disputes. That in pursuance to Section 40 (2) of the Employment Act, they called the parties for conciliation meetings. An inspection of the Applicant company had been carried out in March 2003 to ascertain compliance with the law which inspection revealed several anormalies. Those anormalies were made known to the Applicant vide letter of 16th April 2003 (JMK 1). The Labour Commissioner replied to all issues raised by the Applicant during conciliation and set out all the complaints in the letter of 8th April 2003 (JMK 3). That the Applicant admitted to there being anormalies in the company and outstanding dues and agreed to pay as a result of which they signed a memorandum of agreement which was witnessed by Radid for management of the applicant and Mr. Macharia for the Respondent. (DMK 4).

However, the Applicant rejected the agreement and proposals prompting the 1st Respondent to call for the records in order to compile the under payments. The claims for under payments was computed and taken to the Applicant for payment (JMK 6) but the Applicant has not responded. That the list of employees and the claims had been sent to the Applicant for verification but the Applicant declined to

respond. The Respondent denied holding any records of the Applicant but admits that there may be some mistakes in the computation of the workers' dues but they do not go to the substance of the dispute.

In addition Mr. Omondi submitted that the claim the Vitalis Ouma is claiming maternity leave is a glaring error in the Respondents Schedule and one out of the 25. That the applicants having agreed that some monies were owed to employees, should have settled them instead of rushing to the court to seek these orders and stay the notice.

As regards the allegation that the 1st Respondent has refused to return the Applicants' books and records, Counsel submitted that the Respondent has been asking for those records from the Applicant but to no avail and there is no evidence that the Respondents received the said records, and books and that they were acknowledged. Counsel also submitted that the application is premature since the decision sought to be quashed was a demand notice calling on the Applicant to comply with an agreement that had been reached. That there is nothing to compel and the Applicant cannot be prohibited because he was performing a statutory duty.

Mr. Muhia, Counsel for the Interested Party associated himself with submissions by the Respondent and also relied on the affidavit of George Mwiti Mugo, a representative of former employees of the Applicant. He denied that there was any strike at their factory but there were strikes in other factories at EPZ. But that in January 2003, he arrived at work only to find gates closed and they could only be let in if they signed new contracts that contained unfair terms. He and others visited the Labour Officer seeking intervention following several complaints over outstanding dues. There were several meetings between the parties which culminated in a memorandum of agreement signed by both parties but he later learnt that the Applicant had rejected that agreement. Mr. Muhia submitted that there was no breach of rules of natural justice as the Applicant was given an opportunity to be heard during the conciliation meetings. That the failure to disclose to the court the memorandum agreement signed on 19th May 2003 was meant to conceal material facts and that if it had been disclosed to the court at the time leave was sought, the order may not have been granted. That the Applicants have not come to court in good faith and should not benefit from the discretionary orders.

The impugned letter is the one dated 31st October 2003 authored by Mr. Macharia for the Labour Commissioner to the Managing director Upana Wasana EPZ Ltd. The letter referred to previous meetings between the parties and demanded that the sum of Kshs 3,913,900/= being terminal dues of their former employees be deposited with the Provincial Labour Officer Nairobi within three weeks. The letter also asked for employment records for the period, July to December 2002. Does the said letter amount to a decision? In my considered view it is a decision arrived at by the Respondent after hearing complaints from the former employees of the Applicant and the Applicant and thereafter computation of the employees dues. The decision having been made by a public officer, it is subject to Judicial Review.

Was the Labour Commissioner justified in issuing the said notice? There is no doubt that there had been extensive consultations and meetings between the Labour Commissioners Office, the Applicants and the Interested Parties following a dispute over terminal dues and other claims. The correspondences exhibited by all parties are evidence of this. By letter of 16th April 2003 (JMK 1), the 1st Respondent conducted an inspection at the Applicant Company following strikes in the EPZ The inspection was done pursuant to their statutory mandate under S.40 (2) of the employment Act. The letter dated 8th April 2003 from the 1st Respondent to the Applicant, the memorandum of agreement dated 19th May 2003 between the Applicant, Respondent and Interested Parts and others are all evidence of the consultations that had been on going. It is the mandate of the Respondent to intervene in such industrial dispute to ensure industrial peace. Section 40 of the Employment Act now repealed states as follows:

"**40 (1) Whenever an employer or employee neglects or refuses to fulfill a contract of service, or whenever any question, difference or dispute arises as to the rights ro liabilities of either party, or touching any misconduct, neglect or ill-treatment or either party, or any injury to the person or property of either party under any contract, of service, the party feeling aggrieved may make a complaint either to a labour officer or to a magistrate empowered to hold a magistrate's court of**

the 1st or 2nd class.

(2) Subject to Section 77 of the Constitution, whenever a complaint is made under subjection (1) of this Section;

(a) to a labour officer, he shall use his best endeavours by the taking of such lawful steps as may seem to him to be expedient, to effect a settlement between the parties;

(b) ……

(3) If in the opinion of the labour officer, a complaint made to him under this section is, or at any time appears to be incapable of settlement between the parties he shall forthwith refer the complaint to a magistrate and in that case the provision of paragraph (b) of sub paragraph (2) shall apply in addition to the following provision of this section and to subsection (2) of Section 58.

(4) …….

(5) …….

Section 40 thus gives the labour officers power to intervene and promote reconciliation between the disputing parties as the Respondent tried to do between the applicant and Interested Parties herein. S.40 (3) provides that if the attempted settlement fails, then the labour officer should refer the dispute to the magistrate. In the instant case there had been negotiations. In fact a settlement seems to have been arrived at in terms of the memorandum of agreement dated 19th May 2003 (JMK 4) but it seems the Applicant reneged on it and refused to comply. That is when the 1st Respondent came up with the schedules of payments due and demanded payment. In my considered view, since the 1st Respondent brokered the memorandum of agreement, his powers ended there. Once the Applicant refused to perform their part and the parties could no longer agree, the 1st Respondent had no authority under the Act to force the Applicant to pay. The Respondent should have referred the matter to the magistrate who has powers under S. 405 2(b) to adjust or set off against the claim, to assess the value of services, rescind the contract and apportion wages or pass any judgment authorized by the Act. The demand for payment by the Respondent seemed to be going to attract sanctions yet the Act does not authorize the Respondent to exercise such powers as the court has. In my view the demand for payment of dues to the Interested Parties was ultra vires the labour officers' powers under the Employment Act. The Respondent has not invoked any other statutory provisions that gave the Respondent power to act as they purported to do. I have seen S. 23 of the Regulation of Wages and Conditions of Employment Act. It limits the power of the Labour Inspector to require production of Wages Sheets, enter the premises of an employer and inspect, get lists of employees and under S. 23 (2) he may institute proceedings for any offence under the Act. Again this Section limits the powers of the Labour Inspector to inspection and if there be an offence committed it is for the court to deal. Once the Applicant declined to pay wages after negotiations, the matter should have been referred to the court for determination but not the 1st Respondent to try and force the terms on the Applicant. The decision of the labour officer having been outside his powers would fall under the purview of Judicial Review.

Would the orders of Judicial Review lie? The remedies of Judicial Review are discretionary and the court may not grant them even though they are deserved if the court is of the view that they are not the most efficacious in the circumstances. In the instant case, the Applicant did not fulfill their duty of candour to disclose that there was the memorandum of agreement dated 19th May 2003 in which the Applicant agreed to make payments to the employees in respect of maternity leave, prorata leave and underpayments calculated on a daily basis. Some issues like salary in lieu of notice were not yet agreed upon. It is noteworthy that the Applicant never disclosed the existence of the memorandum of agreement to the court at the time they obtained leave to commence these Judicial Review proceedings. The effect of that agreement is that the Applicant had admitted that they owed some monies to the Interested Parties and what was left was the calculations of the sums due. Though the schedule of payment presented by the Respondent had 3 errors that were pointed out by the Applicant, the fact is that the applicant owed

monies to the employees and nothing stopped the Applicant from coming up with their own computation as to what they believed was due to the Interested Parties and the two compare notes instead of the Applicant rushing to court with this application to stop any payments completely to the detriment of the Interested Parties.

In my view the Applicants are the party which have come to court in bad faith by denying the Interested Parties their dues. Besides it was upto the Applicants to make a full and frank disclosure of all material facts whether or not these facts were adverse to their case. Michael Fordham's Book **JUDICIAL REVIEW HANDBOOK 3RD ED** says thus of the duty to disclose: page 352, 21.5 "**CLAIMANT'S DUTY OF CANDOUR-**

A claimant for permission is under an important duty to make full and frank disclosure to the court of all material facts and matters. It is especially important to draw attention to matters which are adverse to the claim in particular

1) any statutory restriction on the availability of Judicial Review;

2) any alternative remedy;

3) any delay/lack of promptness and so need for the extension of time.

In facing upto adverse points, the claimant will have an early opportunity to explain why those points are not fatal and only the case should be permitted to proceed. (ie confess and avoid). The duty of full and frank disclosure harks back to the time when permission for Judicial Review was ex parte. That has changed."

In Kenya leave to commence Judicial Review proceedings is still made ex parte and it is important that all facts and matters are set before the court for the court to assess whether or not to grant the orders ex parte.

Again in **KNFC v ECONET WIRELESS KENYA LTD HMSC APPLICATION 1621/05** the court adopted the decision in **R V METROPOLITAN POLICE FORCE DISCIPLINARY TRIBUNAL ex parte LAWRENCE (1999) HC ADM P. 558,** the High Court in England said;

"**it is essential that parties who seek leave to move for Judicial Review should appreciate that they have a duty to make full disclosure of all potentially material facts to the court ……..**"

In the instant case, the memorandum of agreement between the parties was potentially material to this case because it would go to show that infact the Interested Parties were owed dues by the Applicant as admitted by the Applicant to be due and there may have been no need to grant leave or stay in this matter but the Applicant should have been encouraged to pay up.

Failure to disclose the existence of that agreement amounts to failure in the Applicant's duty of candour top disclose all material facts and the Applicant is not entitled to the exercise of this court's discretion to grant them the prayers sought. I believe this application was brought to delay the payment of the dues to the Interested Parties which is also a demonstration of bad faith on the part of the Applicant. This court will decline to grant the orders sought even though I had found earlier on that the Respondent acted ultra vires their powers. The Notice of Motion dated 28th November 2003 is hereby dismissed with the Applicant bearing the costs.

Dated and delivered this 18th day of July 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Muhia for Interested Parties

Mr. Menge holding brief for Mr. Omondi for Respondent

Representative for Applicants Co.

Daniel: Court Clerk