



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 268 of 2007

MUNICIPAL COUNCIL OF THIKA.....APPLICANT

Versus

THE INDUSTRIAL COURT OF
KENYA.....RESPONDENT

JUDGEMENT

The Municipal Council of Thika – the ex parte applicant, has moved this court for orders of certiorari to quash the ruling/order of the Industrial Court dated 7th March, 2007 delivered by at Court in IC 115/06 and an order of mandamus to prohibit the Industrial Court from hearing or proceeding in any manner whatsoever with the trial of the Industrial cause 115/06 between **Kenya Local Government Workers Union v. Municipal Council of Thika** until the hearing and determination of CA 81/03. **The Municipal Council of Thika and another v Kenya Local Government Workers Union** (Thika Branch). The application is brought pursuant to Order 53 Rules 3 and 4 of the Civil Procedure Rules and Section 8 and 9 of the Law Reform Act. The grounds upon which the motion is brought are found in the statement of facts dated 16/3/07 and an affidavit sworn by Joseph Meshack Kimani also dated 16/3/07.

The Notice of Motion was opposed and the respondent’s counsel Mr. Omondi submitted on points of law whereas a replying affidavit was filed by Boniface M. Munyao the National General Secretary of the Interested Party, The Local Government Workers Union (Thika Branch). The Applicant was represented by Mr. Kahonge advocate while Ms Guserwa appeared for the Interested Party. The grounds upon which the Motion is based are that the Industrial court lacks jurisdiction to hear Industrial cause No.115/06 due to the pendency of a Court of Appeal case No.81/03 which is substantially between the same parties and relates to the same subject matter; that the Industrial court has acted ultra vires its jurisdiction by hearing the said case and its decision dated 7/3/2007 by Justice Madzayo offends the doctrine of sub judice.

Briefly stated, the facts of this case are that, the applicant is an employer of over 600 employees who render services within the Thika municipality. On 29/8/2000 the applicant terminated services of 33 employees who took part in an illegal strike from 18/8/2000 to 23/8/2000. On 4/9/2000 the 33 employees filed a case, Thika CM. CC 864/2000 in which they sought inter alia reinstatement to work and the court gave restraining orders thus restraining the Council from implementing their decision to dismiss them. The Council was aggrieved and appealed in CA 668/2000 – **Municipal Council of Thika v The Kenya Local Government Workers Union** (Thika Branch). The High Court declined to grant a stay order and dismissed the appeal on 24th January 2001. The applicant filed an application 41/01 in the Court of Appeal seeking extension of time within which to serve notice of appeal and record of appeal. The application was initially rejected by a single Judge and reference was made to a full bench and leave was granted to serve the Notice of appeal out of time and lodge record of appeal. The applicant then lodged

an appeal No.81/03 which is still pending before Court of Appeal. The applicant also moved the Court of Appeal in 72/01 seeking a stay of the High Court's decision which was granted. The status quo is therefore that the 33 employees dismissed on 29th August 2000 stood dismissed until the Court of Appeal hears CA 81/03. But during the pendency of the matter in Court of Appeal, the 33 employees with 57 others lodged a claim at the Industrial court on 14th February 2006 in IC. 115/06 through their Union to which the applicant filed an objection on account of jurisdiction. At the hearing of the objection, the 33 employees tendered a notice of discontinuation of the Thika suit (CMCC 864/00) without serving notice on the applicant. On 27th March 2007, the Industrial court overruled the applicant's objection that the Industrial Court lacked jurisdiction to hear the matter in view of CA 81/03 which was still pending. Counsel submitted that the court's decision to disregard Section 14 (9), (c) of the Trade Disputes Act and the doctrine of sub judice is an error and is based on irrelevant considerations and unreasonable in the circumstances and thus acted without jurisdiction. The application seeks to quash that ruling made by the Industrial court. Counsel further submitted that section 14 (9) (a) and (c) provides that where there is a matter being determined by another process the Industrial court had to take cognizance of it. That though the Industrial court had the jurisdiction to hear Industrial disputes, it exceeded the perimeters set out in the Act. That the Judge should have stopped the proceedings to await the decision of the Court of Appeal in CA 81/03 because of the 33 employees who were in both suits. Counsel urged that this court has supervisory jurisdiction over the Industrial court and relied on the following cases;

1. **KENYA AIRWAYS LTD V KENYA PILOTS ASSOCIATION (2001) KLR 521**
2. **MECOL LIMITED V AG HCCC 1784/04**
3. **REP V INDUSTRIAL COURT HCCC 933/05**
4. **ASSOCIATED PROVINCIAL PICTURE HOUSES, LTD V WEDNESBURY CORPORATION (1947) 2 ALL ER 680**
5. **AMISMIMIC LTD V THE FOREIGN COMPENSATION COMMISSION & ANOR (1969) 1 ALL ER 208**

He also relied on **ANISMINIC CASE**, for the proposition that where a tribunal exceeds jurisdiction, the court can quash the said decision. Counsel also urged that the Industrial Court's decision was "**Wednesbury unreasonable**" because, despite there being an appeal pending before the Court of Appeal, the court went ahead to hear the matter – See **WEDNESBURY CASE** (Supra).

In opposing the Motion Mr. Omondi submitted that the Industrial court had jurisdiction vested in it by virtue of Section 14 of the Trade Disputes Act to hear and determine industrial disputes. That for the Industrial court not to hear a matter allegedly before another court, there must be evidence placed before it to that effect and it was not sufficient for the applicant to allege that some of the parties before the Industrial court were also before the Court of Appeal without proof. That the matter before the court involved 90 persons while that in Thika had 33 people and that by the time the Industrial court was seized of the matter, the one in Thika had been withdrawn and once it was withdrawn there was nothing to appeal against. That the court considered the issue and made a finding that there was no evidence to the effect that some of the parties before it were also before the Court of appeal in CA 81/03. That the court also considered the fact that the applicant failed to disclose that only 33 out of 90 had a case before the Court of Appeal. Mr. Omondi urged that the applicant is actually challenging the merits of the Industrial Court's decision. That had the applicant disclosed to the Court of Appeal that there were other employees apart from the 33 employees, no stay would have been given.

Counsel also submitted that this application is an afterthought because when the parties appeared before the Minister for pre-trial matters under section 8 of the Trade Disputes Act, the Applicant did not raise the issue of sub judice and he prayed for dismissal of the Motion.

The Interested party associated itself with the submissions of the Respondent and only added that by the time the 90 employees presented their case to the Industrial court, the Thika case which had been filed by

33 of them had been withdrawn on 15/3/05 as per notice of withdrawal and that as of 16/12/06 the case of the 33 employees was not in existence.

That the issue of the 33 employees was raised before the Industrial court and the court could not know who was included in the 33 and it made a finding that it had no material before it to determine who of the 90 was before the Court of Appeal in CA 81/03.

Counsel submitted that the Applicant is challenging the merits of the Industrial court's decision which this court has no jurisdiction to deal with. That the authorities cited do not apply because the Industrial Court has not exceeded its mandate and urged this court to dismiss the Notice of Motion.

It is noteworthy that this being a Judicial Review application the court is concerned not with the merits of the Industrial Court's decision but the process by which it arrived at the decision. The issue is whether the court exceeded its jurisdiction and acted unreasonably as alleged?

The Applicant does not dispute the Industrial Court's jurisdiction as conferred by S.14 of the Trade Disputes Act. The issue that the Applicants have with that court's decision is that under S. 14 (9) of the said Act, it is provided that the Industrial Court cannot proceed with any trade dispute where there is another matter touching on the same issues pending before another court as it would be subjudice.

I have read the decision of the Industrial court as to the objection raised by the Applicant. The judge considered all the issues raised. As to the matter being sub judice, the Court noted that if the learned counsel had placed the names of the thirty three employees whose case was pending in the Court of Appeal before the Industrial Court, then the Industrial Court would have exercised its discretion to reduce the number of the dismissed employees to fifty seven instead of considering the case of ninety. The court took the view that what was before the Court of Appeal in 81/03 was a different matter from the one before it. It is my view that the court having dealt with that issue of whether the 33 employees were both before the Court of Appeal and the Industrial Court, at length, the Applicant wants this court to reopen that issue and reconsider the merits of that decision which is not within the purview of Judicial Review and hence outside this Court's jurisdiction.

The Interested Parties on the other hand contend that they had actually withdrawn their case before the Thika Chief Magistrate's Court in 864 of 2000 in terms of the notice of withdrawal dated 15th March 2005. The Industrial Court found that the matter filed in Thika Court was duly withdrawn by the said notice and that was to enable the matter before the Industrial Court to proceed. The matter before the Court of Appeal was an appeal from the orders made from the case filed in the Chief Magistrate's Court Thika. That case having been withdrawn vide notice of 15th March 2005, the appeal would not have any legs to stand on. Once the lower court case was withdrawn the appeal was compromised and there would be no reason for this court to hold that the Industrial Case 115 of 2006 is subjudice. Again the Industrial Court in its decision of 7/3/07 considered that issue substantively and arrived at the conclusion that the notice was not effective because whereas the notice was filed on 15th March 2005 the Civil appeal is dated 8th May 2003. I am not sure what the court meant that it was not effective but that issue was dealt with on merit. The Applicant cannot move this court to have the Industrial Court's decision quashed just because the court did not adopt the Applicant's preliminary objection. There is no evidence of unreasonableness or excess of jurisdiction by the Industrial Court. It matters not whether the decision of the Industrial Court was right or wrong because the court is allowed to err and an appeal can lie from such decision. This court is aware of the decisions cited by the Applicant in the **MECOL CASE; KENYA AIRLINE PILOTS ASSOCIATION (Supra)** which the Courts have held that the High Court has supervisory powers over the Industrial Court. The High Court can only review the decision of the Industrial Court if the actions of the Industrial Court are brought within the purview of Judicial Review on grounds of irrationality, impropriety or illegality. In the instant case, what the Applicant is challenging are the merits of that court's decision and Judicial Review remedies cannot lie. I have already set out above what the purview of Judicial Review is, to review the decision making process not the merits of a decision. It is obvious that from the pleadings and submissions that the applicant is aggrieved by the merits of the Industrial Court's decision and this Court has no jurisdiction to interfere in the exercise of that court's discretion and declines to grant any of the orders sought. The upshot is that the Notice of

Motion is hereby dismissed with the applicant bearing the costs.

Dated and delivered this 26th day of September 2008.

R.P.V. WENDOH

JUDGE

Present:

Mr. Kahonge for the Applicant

Mr. Omondi for the Respondent

Ms Ngiro holding brief for Ms Guserwa for Interested Party.