REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

MISC APPLICATION 636 OF 2007

JAMES FINLAY KENYA LTD…….....
……..APPLICANT

Versus

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

KENYA PLANTATION & AGRICULTURE WORKERS UNION (KPAWU)

SUED ON BEHALF OF WALTER MISAO ODERO……...…...……INTERESTED PARTY

RULING

James Finlay Kenya Ltd. filed a petition dated 14th October 2007. It is brought pursuant to Sections 84 (1), 65 (2) 77 (9), 80 (1) and 82 (1) of the Constitution. Accompanying the Petition is a Chamber Summons of the same date seeking conservatory orders of stay of the orders of the Industrial Court of Kenya, the Respondent herein. The prayers sought are as follows:-

1) That the court do issue a stay of the implementation of the award rendered by the Respondent in Industrial Cause No. 114/06 between Kenya Plantation & Agricultural Workers Union v Finlay Flowers, pending the hearing and determination of the Application;

2) That the court do issue an order of stay of the implementation of the award rendered by the Respondent in Industrial Cause 114 of 2006 between the Kenya Plantation and Agricultural Workers Union v Finlay Flowers pending the hearing and determination of the petition;

3) Costs of the Application be awarded to the Applicant.

The Chamber Summons is premised on grounds found on the face of the Application and a supporting Affidavit sworn by Titus Kipkoech Korir, the Applicants Director of Corporate Affairs.

A brief background of this case is that on 31st October 2006, a dispute relating to a claim for wrongful termination of an employee of Finlay Flowers, Mr. Walter Misao Odero (the grievant) was referred to the Industrial Court where the grievant was represented by the Union and the Applicant was represented by Federation of Kenya Employers (FKE). The issue before the Industrial Court was whether the grievant was justly terminated by the Applicant. The matter was fixed for hearing on 29th May 2007. On 29th

May 2007, FKE faxed to the Applicant a court order to the effect that the Applicant's technical manager should appear before the Industrial Court on 30th May 2007 at 12.00 noon. That the said Technical Manager Mr. Elijah Getiro had traveled to China on 28th May 2007 on official company business and could not have complied with the court order. Mr. Daniel Kirui, the Applicant's Human Resources Manager attended court on 30th May 2007 to inform the court of the position. He produced before the court the Technical Manager travel documents indicating that he would be back on 22and June 2007 and applied for adjournment but the court declined to grant the Applicants Application for adjournment yet the said Technical Manager was the company's key witness. The court delivered its award on 31st May 2007 in accordance with S. 15 (1) (i) of the Trade Disputes Act and ordered the unconditional reinstatement of the Grievant to his job for wrongful dismissal. That the court's award was based inter alia on the failure of the Applicants Technical Manager to appear before the court to give evidence on the dispute and the award was ordered to take effect within 10 days when the grievant would report back to work unconditionally. It is the Applicants contention that the court refused to adjourn the case to allow time for the material witness to appear was unfair, unjustified and an infringement on the Applicant's rights to a fair hearing enshrined under S. 77 (9) of the constitution. The Applicant further contends that S. 17 (1) & (2) of the Trade Disputes Act do not allow for appeal or review of the court's order and thus infringes on Section 77 (a) & 65 (2) of the Constitution. It is also the Applicants case that S. 15 (1) (i) of the Trade Disputes Act is unconstitutional as it contravenes the Applicants freedom of assembly and association enshrined in S. 80 (1) & 82 (2) of the Constitution in that it seeks to enforce a contract of service even where the relationship between employer and employee is broken down.

Mrs Opiyo counsel for the Applicant submitted that the Applicant has demonstrated that they have an arguable case. Counsel relied on the following authorities:-

1. GENERAL PLASTICS LID LTD V INDUSTRIAL PROPERTY TRIBUNAL HC PET 348/06 in which the circumstances were similar to this case where the court declined to allow the Applicant chance to call a witness and stay of the court's decision was granted.

2. MECOL LTD. V AG & OTHERS HC MISC. 1784/04 where a similar issue arose and the court upheld the argument that S. 17 (2) of the Trade Disputes Act was unconstitutional.

Counsel also considered the cases cited by the Respondent – ie. M**AYERS & ANOR V AKIRA RANCH (1972) EA 347** in which the court held that the legislature can limit the relief or deprive a person of relief without infringing on the unlimited jurisdiction of the court but Counsel for Applicant submitted the same is irrelevant because Parliament cannot provide a relief that contravenes the constitutional provisions. Mrs. Opiyo also urged that the case of **OPIYO & OTHERS V AG & INDUSTRIAL COURT (2005) KLR** which considered whether S.15 and 17 were contrary to S.80 and 82 of the Constitution is not relevant because it did not deal with S. 65 (2) of the Constitution.

Counsel also relied on the case of **ERIC MAKOKHA V LAWRENCE SAGINI CA 20/1994** where the court declined to order a reinstatement of a dismissed employee unlike what the Industrial Court has done.

In opposing the application reliance was made on the Replying Affidavit sworn by Issa Wafula on 13th July 2007 and skeleton arguments dated 23rd April 2007. Isaa deponed that he is the Assistant National Organising Secretary of the Interested Party and that the order of reinstatement of the employee issued by the Industrial Court accords with S.15 of the Trade Disputes Act, that the Applicants were accorded ample opportunity to call all their witnesses save for one who had conveniently left the court's jurisdiction and that there is no breach of S.77 (9) of the Constitution. That the Applicant had not indicated that the Technical Manager would be their material witness prior to 30th May 2007 as required by Industrial Court Practice Rule No. 14. That the Applicant's representative and Interested Party appeared before J. Madzayo before 5th December 2006 when the hearing dates were fixed and the Applicants were aware of the said dates which required attendance of the Technical Manager. That having been given an opportunity to present their case, there was no good reason to seek an adjournment to avail a witness who had known all along that he would be needed in court on 30th May 2007. That the

courts refusal to adjourn did not amount to infringement of the right to a fair hearing because the court has a right to regulate its procedures especially in terms of S.20 of the Trade Disputes Act. He denied that S. 15 & 17 of the Trade Disputes Act are unconstitutional as they are derived from S.82 (9) of the Legislation and cannot contravene S. 65 (2) of the Constitution. That the Industrial Court award should not be stayed as the grievant is likely to suffer as he awaits the outcome of the case. Ms Guserwa, Counsel for the Interested Party distinguished this case with the **GENERAL PLASTIC CASE** where the Applicant was denied an opportunity to call evidence unlike this case where an opportunity was given to the Applicant.

The **MECOL CASE (supra)** was also distinguished for reasons that the Industrial Court was found to have exceeded its powers by making an award in favour of employees who were not members of a union. Counsel urged the court to rely on the **KENYA GUARDS & ALLIED WORKERS UNION SECURITY GUARDS SERVICES & 38 OTHERS MISC APPLICATION 1159/03** where Justice Nyamu held that the Industrial Court exercised special jurisdiction and that the court's awards were not subject to the Constitutional jurisdiction or Judicial Review.

At this stage the Applicants only seek conservatory orders. For conservatory orders to issue, the principles for grant of injunctions would apply. So that the court needs to consider whether the Applicants have demonstrated that they have a prima facie case with good chances of success or that the Applicants will suffer irreparably if the orders sought is not granted. Lastly, if the court is in doubt, then it should decide the matter on a balance of convenience.

The Applicant's complaint is that their rights to a fair trial envisaged under S. 77 (9) of the Constitution have been infringed by the refusal of court to adjourn the matter to call their witness. It is not in dispute that the court has the power to direct on how witnesses should be called and when. In refusing an Application or any other, it should act judiciously. Whereas the Applicant contend that they were given a very short notice by the court to avail the witness the Interested Party depones that the Applicants had over 6 months notice to call the witness. I believe the question of whether or not the notice was adequate depends on each individual case. some of the rights to a fair trial include –

- The right to equality before the law
- The right to call witnesses
- The right to be tried by a competent, independent and impartial tribunal established by law.
- Right to cross examine witness
- Right to equality, of Arms adverse and proceedings.

I do find that the Applicants have indeed raised a triable issue as to whether they had adequate notice to call their witness which the court should enquire into.

The Applicants have also raised the issue of S.17 (2) of the Trade Disputes Act being unconstitutional for denying a party the right of appeal and declaring the decision of the Industrial Court to be final. The same issue was considered by Justice Nyamu in **KENYA GUARDS & ALLIED WORKERS UNION (supra)** where he held that the Industrial Court had a special jurisdiction and it was not subject to the supervisory role of constitution and S. 17 was therefore not unconstitutional. Contrary to the finding of Justice Nyamu, a Constitutional Bench of Rawal, Mutungi and Kasango JJJ in the **MECOL CASE (supra)** found S.17 (2) of the Trade Disputes Act to be unconstitutional and they declared it null and void for contravening S. 65 (2) and 84 (2 of the Constitution. I do find that to be a triable issue which the court needs to enquire into.

The Applicant has also questioned the constitutionality of S. 15 of the Trade Disputes Act which provides for reinstatement of an employee if found to have been wrongfully dismissed. That section is said to contravene S. 82 of the Constitution. Usually the courts will not order parties who do not

wish to work together to do so. (**ERIC MAKOKHA CASE)**. This is because of the mutuality of contracts of employment. That is another triable issue that should be enquired into at the hearing of the petition.

From the foregoing I am satisfied that the Applicant has demonstrated that they have established a prima facie case that should go to full hearing.

Will the applicant suffer irreparable loss if the order of stay is not granted? The grievant was ordered to be reinstated. If the grievant goes back before the matter is heard and determined that would cause strain in the working relationship of the parties and taking into account the decision of the court in **MECOL CASE,** in my view that would be better that the matter be heard and determined first before the grievant goes back to work.

In my considered view this is a case where an order of stay should issue to await the final determination of the petition. I therefore grant the orders as prayed in terms of prayer 2 and 3 of the Chamber summons dated 14th June 2007. Costs to be in the cause.

Dated and delivered this 14th day of December 2007.

R.P.V. WENDOH

JUDGE

Read in the presence of:

Ms Waki holding brief for Kinyaye for Applicant

Mrs. Waigi Kamau holding brief for Mr. Bosire for Respondent

Mrs. Guserwa for the Interested Party.