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

Misc Civil Appli 1784 of 2004

IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER

SECTION 84 OF THE CONSTITUTION

BETWEEN

MECOL LIMITED ……..…….....…….……
APPLICANT

VERSUS

THE ATTORNEY GENERAL .....….....….…..…… 1ST
RESPONDENT

KENYA BUILDING, CONSTRUCTION, TIMBER, FURNITURE &

ALLIED INDUSTRIES EMPLOYEES UNION.....2ND
RESPONDENT

COSMAS M MULINGE …….…….....….... 3RD
RESPONDENT

JAMES W. NJOGU …….....…..……...4TH
RESPONDENT

EDWIN NGAO ……..…….....…….... 5TH
RESPONDENT

JOHN K. KANENE …….....….…..……..... 6TH
RESPONDENT

JOSHUA M. WAGURA …….....….…..…..…….7TH
RESPONDENT

THE INDUSTRIAL COURT…….....…..……..…….....8TH
RESPONDENT

JUDGEMENT

The applicant has brought this action by way an originating summons dated 29th December 2004. The same is brought under Sections 3, 60, 65, 75, 77 and 84 of the Constitution and Section 3 of the Judicature Act.

The background to this matter is that the applicants were the employers of the 3rd to the 7th respondents. The services of those Respondents were terminated on 31st May, 1999. By the notices of termination the Respondents were directed by the applicant to proceed on leave so that the leave could run concurrently with the one month termination notice. The 2nd Respondent Trade Union reported to the Ministry of Labour the existence of a trade dispute between the applicant and itself in respect of the aforesaid termination. The Ministry accepted the report of the dispute and proceeded to appoint Mr. P N Macharia to act as an investigator to effect settlement. The said Mr. Macharia did investigate and certain recommendations were made. Those recommendations were not acceptable to the parties and consequently the matter was referred to the Industrial Court. It was filed before the 8th Respondent as Dispute Cause No. 84/04. In that cause the 2nd Respondent submitted a statement of claim for compensation for wrongful dismissal on behalf of 3rd to 4th Respondents. On 30th November 2004 the 8th Respondent delivered its award in the said Industrial Court Cause No. 84 of 2004. It ought to be noted that prior to the award by the 8th Respondent, the 3rd Respondent had accepted and received his terminal dues as calculated by the applicant and that the recipient had confirmed in writing that he had no other claim against the applicant.

The applicant's case as presented by learned counsel Dr Kamau Kuria is that its employees fall under two categories. Firstly those who belong to a trade union and secondly those who do not belong to a trade union. The distinction between the unionized and un-unionised employees is that the latter do not go to the 8th Respondent to have their disputes adjudicated upon, whilst the former categories have their disputes adjudicated by the 8th Respondent. Those employees who belong to a trade union request the applicant to deduct their union in a check-off system. The applicant annexed copies of 2nd Respondent requests for deduction of union dues of their various members. This occurs where there is a recognized agreement and a collective bargaining Agreement. When a difference arises in respect of unionized employees the same is resolved between the trade union and the applicant. During the period of their employment 4th to 7th Respondents did not belong to 2nd Respondent trade union. On 31st May 1999, 3rd to 7th Respondents were issued with notices of termination of employment. The said Respondents contested against the notices of termination of employment. The applicant contends that the employment of 3rd to 7th Respondent was lawfully terminated as per their contract of employment and that their dues were computed but on presentation of the same the said Respondents refused to accept the dues. We put here for clarity that though the 3rd respondent was before the Tribunal re-contesting his claims, he had accepted the dues given to him in full and final settlement.

During the hearing at the Industrial Court, the parties presented written Memorandum and additionally made oral submissions. The applicant in its memorandum and by evidence contended that 4th to 7th Respondents were not members of the 2nd Respondent during their period of employment with the applicant whereas the 3rd Respondent was a member. The applicant is aggrieved by the award made by the 8th Respondent in that there was an acknowledgment in that award that the 3rd Respondent was paid his final dues of KShs.108, 358. 40 and thereby acknowledged that he had no further claim against the applicant. Despite that acknowledgement the 8th Respondent in that same award proceeded to make orders for further payments to all the 3rd to the 7th Respondent. The applicants are aggrieved that that order of payment of all terminal dues to those respondents, which included the 3rd Respondent was made by the 8th Respondent, despite the aforestated acknowledgement in respect of the 3rd Respondent. Further the applicants are aggrieved by failure of the 2nd Respondent to satisfy the burden of proof of the

membership to the 2nd Respondent trade union, in respect of the 4th to the 7th Respondents. That it is only on the proof of their membership that the 8th Respondent could have jurisdiction over the dispute. In the award the 8th Respondent declined to accept the said contention on the reasoning that whatever is referred to it, is a trade dispute within the meaning of The Trade Dispute Act (Cap 234) (hereinafter called the Act). That the 8th Respondent wrongfully found that the 4th to the 7th Respondents could have paid their union due directly to the 2nd Respondent rather than through the applicant without any evidence before it. The applicant was aggrieved by the failure of the 8th Respondent to find that the termination of the employment of the 3rd to the 7th Respondent was lawful at common Law and under section 16 of the Employment Act (Cap. 236). The applicant argued that the Court of Appeal has found that the termination notices need not give reasons. That the 8th Respondent wrongly found that their said terminations, which did not given reason for termination, was illegal and amounted to unfair labour practice. That it showed want of good faith and was against the principles of natural justice. The applicant submitted that the employee has the same right as employer to terminate employment. The applicant also faulted the award for failing to set out in monetary terms the Respondent's entitlement making that award, what the applicant stated was vague, indefinite and nebulos.

The applicant argued that the lack of a right to challenge the award of the 8th Respondent by virtue of section 17 of the Act deprived it the right to protection by the court under Section 77 (9) of the Constitution. That further the award infringes the applicant right to property under section 75 of the Constitution.

It was contended by the applicant's counsel that the Industrial Court thus assumed jurisdiction where it did not have and gave order and made award without jurisdiction and thus the resultant award is a nullity.

If so, does this court have jurisdiction to look into and review the unlawful award of the Industrial Court when Section 17 of the Act is staring at us?

Dr Kuria submitted that the court does have such jurisdiction. He stressed that the word "*final*" appearing in section 17 does not exclude powers of Judicial Review by this Court.

According to his submission, Judicial Review are of two kinds:

1) Judicial Review provided under Order LIII of Civil Procedure Rules: and

2) Broader Power of Review of the Legislation under the Constitution.

It is with a sigh of relief that we note that all learned counsel appearing for the Respondents have conceded that the Industrial Court is a subordinate Court in terms of section 65 [1] and Section 123 [1] of the Constitution and we do express our appreciation to their candid acceptance to the obvious point of law.

Dr. Kuria in furtherance to his arguments as to the two categories of the Judicial Review by the High Court contended that the first remedy is limited as per our laws (Order LIII of Civil Procedure Rules) to the granting of orders of mandamus, prohibition and certiorari.

The second one is the broader notion of Judicial Review by the court as a guardian of the written Constitution and its spirit and tenets. It is this wider power that the applicant is urging the court to wield and exercise.

In ***Marbury v Madison [1863] crunch [137]*** a famous case for judicial Review, Chief Justice Marshall observed *inter alia* (we shall quote excerpts):

"**Those, then who controvert the principle that the Constitution is to be considered, in court, as paramount law, are reduced to the necessity of maintaining the courts must close their eyes on the Constitution and see only the law. This doctrine ……..would declare that if the Legislature shall do**

what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits".

On further submissions of learned counsel for the applicant it was contended that sections 65 and section 84 of the Constitution have donned the High Court with powers to exercise both kinds of Judicial Review. Section 84 [2] gives unlimited powers to give all kinds of remedies, when the party before it shows that its rights granted under the Constitution are contravened or likely to be contravened.

It was therefore contended that Section 17 of the Act shall be viewed in the context of supremacy of Constitution and powers of the High Court conferred thereunder.

It was reiterated that by usurping the jurisdiction when it did not lie and determining the issues without evidence, the Industrial Court contravened the Rule of Law and fair trial. The result of such contravention was that the applicant's right of property was breached by the issuance of an illegal award. It was stressed that rules of law and evidence are basic components of a fair trial.

Dr. Kuria added that despite the issue of jurisdiction of the Industrial Court being raised, the same was not considered and determined and in its place an ambiguous and uncalculated award was given by the Industrial Court. He relied on the case of ***Ole Nganai vs Arap Bor [1983] KLR 233*** where the Court of Appeal held that a judge has to make a decision or order on every claim and no reasonable decree could be drawn from a nebulous, uncertain and indefinite order resulting in the order being a nullity.

The applicant isolated the following issues for the consideration of this court:

(i) Whether Section 17 of the Trade Disputes Act is ultra vires Sections 77 (9) and 84 (1) of the Constitution by purporting to prevent the applicant from challenging the correctness of the award made by the Industrial Court in its Cause No. 84 of 2004;

(ii) What remedies this Honorable court has power to grant, under section 84 (2) of the Constitution, when an applicant is brought before it;

(iii) If Section 17 of the Trade Disputes Act is ultra vires sections 77 (9) and 84 (1) of the Constitution, whether the Industrial court has contravened the applicant's rights under Sections 77 and 84 of the Constitution: and

(iv) what remedies the applicant is entitled to

The prayers that the applicant seeks in the Originating Summons, after withdrawal of some prayers, are as follows: -

1) A declaration that the applicant's right under section 77 (9) of the Constitution to a fair hearing of Industrial Cause No. 84 of 2004, was contravened by the 1st and 8th Respondents in that the 8th respondent acted in excess of its jurisdiction *per incuriam* and mistook the location of the burden of proof on the issue as to whether the 8th respondent had jurisdiction in the matter before it.

2) A declaration that section 17 of the Trade Disputes Act Cap 234 of the Law of Kenya

ravenes the applicants right under section 77 (9) and 84 (1) of the Constitution to the protection of the law by denying the applicant the right of access to the High Court to obtain a judicial review or to appeal against any mistaken or illegal award made by the 8th respondent established by section 14 of the said Act by way of either appeal or judicial review, and is null and void.

3) A declaration that section 17 of the Trade Disputes Act contravenes the applicants right, under section 82 of the Constitution, not to be subjected to arbitrary exercise of power by denying the applicant a review or appeal against mistaken or illegal or manifestly unreasonable award, and is null and void.

4) A declaration that the applicants right to property under Section 75 of the Constitution has been contravened by the 1st respondent through establishment of the 8th respondent whose members do not enjoy security of tenure and who have power to make arbitrary, capricious and unreasonable awards taking away or diminishing property rights which are not reviewable and against which no appeal may lie purportedly to make an industrial cause No. 84 of 2004 an award against the applicant.

5) A declaration that the right to a fair trial under section 77 [9] of the Constitution is contravened whenever the 8th respondent acts in excess of jurisdiction, and gives judgment which is not based on either evidence or law or both.

6) A declaration that the industrial award made on 30th November 2004 is within the meaning of section 16 of the Trade Disputes Act, inconsistent with sections 16 of the Employment Act, Cap 226 of the Laws of Kenya, and is void to the extent of the inconsistency.

7) A declaration that the purported award made in favour of 3rd to 7th respondents by the 8th respondent on 30th November 2004 offends rule in ***Ole Nganai – Ara Bor (1983) KLR, page 233*** and is null and void for being a decision/judgment which is uncertain, nebulous and or indefinite as to what it decides and what it awards the parties before it.

8) A declaration that the 3rd to 7th respondent are entitled to be paid by the applicant kshs 141, 763/40 and not KShs. 571, 100/40 as ordered by the 8th respondent, made up of the of following: -

Name	Entitlement as the Law	Entitlement as per the Industrial Court Award
Cosmas M Mulinge	108,358.40	245,013.40
James W. Njogu	7,745.00	74,674.00
Edwin Ngao	9,000.00	88,857.00
John K Kanene	8,330.00	81,278.00
Joshua M Wagura	8,330.00	81,278.00
Total	141,763.40	571,100.40
Difference		423,337.00

9. A declaration that the applicant is entitled to an order setting aside the said purported award made on 30th November 2004 and replace it with an order that the 3rd to 7th respondents be paid moneys as per paragraph 8 above.

10. An order to bring to the High court the purported 8th respondents award made on 30th November 2004 and to quash the same.

11. An order that the 8th respondent be restrained from publishing in the Kenya Gazette, under section 16 of the Trade Disputes Act, the purported award made in favour of 3rd to 7th respondents on 30th November 2004.

12. An order that the 3rd to 7th respondents be restrained from executing against the applicant the

purported award made by the 8th respondent on 30th November 2004.

13. A declaration that the applicant's right under section 82 of the Constitution not be subjected to arbitrary, capricious and unreasonable exercise of power by any authority including the 8th respondent has been contravened by the respondent through the operation of an unconstitutional industrial court

14. A declaration that the dismissal of the 3rd to 7th respondents was not wrongful as there is no legal requirement for employers to give reasons for the termination of their employee's services.

15. A declaration that having received from the applicants all his terminal dues following the termination of his employment, the 3rd respondent lacked a dispute which he could refer to the 8th respondent through the 2nd respondent and the 8th respondent lacked jurisdiction to receive the same.

16. A declaration that the burden of providing that the 4th to 7th respondents were members of the 2nd respondent and hence that the 8th respondent had jurisdiction to entertain their cause was on 4th to 7th respondent's but they did not discharge it.

17. A declaration that the 8th respondent had no jurisdiction to entertain the claims of the 4th to 7th respondents who did not prove that they were members of the 2nd respondent.

18. A declaration that having accepted the applicant's submission and held that the 3rd respondent had been paid all his terminal dues by the applicant before the matter was referred to it, the 8th respondent lacked jurisdiction to make further orders in his favour.

19. A declaration that the applicant's right under section 77[9] of the Constitution to a fair trial was contravened by the 8th respondent's holding in industrial Court Case No. 84 of 2004, that it will not investigate whether or not trade dispute within the meaning of the Trade Disputes Act exists and that it will always rely on the decision of the Minister or other authority which refers a dispute to it.

20. A declaration that the 8th respondent is obliged to apply the provisions of the Employment Act.

21. A declaration that the industrial award made in Cause NO. 84 of 2004 is null and void.

22. A declaration that the claimant's employment contracts were terminated in accordance with the requirements at the time both of the law and of the Collective Bargaining Agreement in force at the time.

23. A declaration that the 8th respondent illegally assumed jurisdiction over the claim of the 2nd to 7th respondent.

24. A declaration that at the time their services were terminated, James W. Njogu, Edwin Ngao, John K. Kanene and Joshua M. Wagura were not members of the 2nd respondent and consequently the 8th respondent lacked jurisdiction to hear and rule on their claims.

25. A declaration that the 8th respondent violated a basic principle of law in that it did not call for evidence to prove that the claimants were indeed members of the 2nd Respondent trade union.

26. A declaration that the 8th respondent acted wrongly in awarding Cosmas M. Mulinge moneys when there was no *bona fide* dispute regarding the termination of the contract of employment.

27. A declaration that the Trade Disputes Act is *ultra vires* the Constitution in that it purports to establish, contrary to sections 60 and 65 of the Constitution, an industrial court which is neither of the same status as the High court nor subordinate to the High court and whose decisions are not reviewable/appealable by any authority.

28. A permanent injunction restraining the 2nd respondent from publishing within the meaning of section 16 of the Trade Disputes Act, the purported award of 30th November 2004.

29. An order that 3rd to 7th respondents be restrained from executing the purported award made on 30th November 2004.

30. An order that the respondents do pay the costs of this application.

The 1st Respondent who represented the 8th Respondent opposed the application. Reliance was put on the replying affidavit sworn by the 8th Respondent's Registrar. He deponed that section 17 of the Act provided that decisions of the Industrial Court cannot be questioned or reviewed, nor can they be restrained or removed by prohibition, injunction certiorari mandamus or otherwise. He further deponed that the intention of the legislature was to ensure speedy conclusive disposal of trade disputes and to promote industrial relations. Learned counsel Mr. Rotich submitted that section 17 of the Act prohibits any questioning of the Industrial Court award. That this was deliberate intention of the legislature that matters before the Industrial Court would be speedy and conclusive. Counsel for the 1st and 8th Respondents contended that the words appearing in Section 65 [1] of the Constitution to wit "***have such jurisdiction and powers as may be conferred on it by law***", imply that the law can take away power of the High Court conferred by Section 65 [2] of the Constitution.

With due respect to the counsel, we shall only remind ourselves of the words "***Subject to this Constitution"*** appearing immediately before the aforesaid words quoted in Section 65 [1].

We also do not have to go to any where else except to Section 3 of the Constitution which states: -

"**This Constitution is the Constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void**.".

On the matter relating to the membership of the 4th to 7th Respondents with the 2nd Respondent trade union, learned counsel said that it had been dealt with by the Industrial Court and ought not to be revisited by the High Court. Counsel did however concede that if the decisions of the Industrial Court did exceed their power the same could be subject to judicial review.

Learned counsel Mrs. Gursewa for the 2nd to 7th Respondents in response to the applicant's argument that the Industrial Court is a court subordinate to the High Court as provided in section 65 of the Constitution, stated that the Industrial Court was established by the President as seen in Section 14 of the Act. That accordingly the Industrial Court was not caught up by the provisions of section 65 of the Constitution since that section provided for subordinate courts established by Parliament. In that regard she was of the view that, the High Court, although it may have supervisory powers over the Industrial Court, that power does not extend to declaratory orders and therefore the court could not declare section 17 of the Act unconstitutional. In response to the applicant's claim that the Industrial Court award was ambiguous it was contended that the applicant should have sought interpretation of the award as provided in section 16 (4) and (5) of the Act. Learned counsel in her written submissions identified the following issues for the court's consideration: -

1) Whether or not the Honorable High Court has jurisdiction to entertain the instant proceedings in view of the provisions of section 17 of Cap. 224?

2) Whether or not the prayers being sought by the applicant are available to them?

3) Whether the application as filed is premature and misconceived?

Counsel further submitted that the Industrial court's decision was protected by Section 82 (9) of the Constitution and in this regard counsel placed reliance on the case **HCCC NO. 1971 of 2001 (0.S)**

JACOB OPIYO AND OTHERS – ATTORNEY GENERAL AND ANOTHER. The court held in that case:

"**The provisions of section 82 (2) of the Constitution would not affect the award of the Industrial court in view of section 82 (9) of the said Constitution. The same is a constitutional limitation and therefore in accordance with the law**."

We at this juncture shall observe that the applicant in Opiyo's case had complained that their rights under Section 82 of the Constitution were violated. The court in that case did not have any other claims as regards breach of other rights under the constitution. The court also held in the case that the rights of the applicants were not breached. After finding to this effect the above observations were made.

In support of the 2nd issue, the Learned Counsel argued that it is possible for the Legislature to limit the relief to be granted. The Learned counsel relied on the case of **MAYER AND ANOTHER – V – AKIRA RANCH LTD [1972] E.A. 347**. It was held in that case that: -

"**The legislature can limit relief or deprive a person of relief without infringing the unlimited jurisdiction of the High court**."

Counsel therefore concluded that the limitation placed by section 17 of the Act, are lawful.

It must by now be clear that the centre of the argument presented before us is whether or not the provision of section 17 of the Act is ultra vires the provisions of Sections 65, 77 and 84 of the Constitution and whether the Industrial Court is subject to the provisions of section 65 of the Constitution. There are two opposing decisions on this area and perhaps before considering them it is important to have in mind what section 17 of the Act provides:

"**(1) The award or decision of the Industrial Court shall be final.**

(2)The award, decision proceedings of the Industrial court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise, either at the instance of the Government or otherwise."

In **HC MISC NO. 254 OF 2001 KENYA AIRWAYS LIMITED – V – KENYA AIRLINE PILOTS ASSOCIATION** the court stated: -

"… **the Industrial Court is subordinate to the high court as the Constitution, specifically sections 60 and 65 [2] when read together with section 123 [1] strongly suggest that the high court is empowered to play a supervisory role over the industrial court … I would therefore go by the Constitution and hold that the Industrial Court is inferior to the High court**."

The learned Judge in that case proceeded to hold that where subordinate courts such as the Industrial Court act in excess of their jurisdiction then the High court has power to interfere with the decision or award of those courts.

The High Court in **HC MISC APPLICATION NO. 1159 OF 2003 KENYA GUARDS & ALLIED WORKERS – V – SECUIRTY GUARDS SERVICES & OTHERS** in considering the finality of an award of the Industrial Court, as provided by section 17, Cap 234 stated:

"**A close look at section 65 however reveals a different picture concerning the so called supervisory role of the court. Whereas the Industrial court is a subordinate court as defined in section 123 of the constitution it has all the same been given a special jurisdiction by a statute – namely Trade Dispute Act to give final awards in the area of its specialization. The Trade Disputes Act section 14 upon which the court is established is in law in turn based on section 65 [1] of the Constitution which the learned counsel did not cite. Parliament may establish courts subordinate to the High court and court martial, and a court so established shall, subject to this constitution, have**

jurisdiction and powers as may be conferred on it by any law.

Section 17 [2] of the Trade Disputes Act cited above is such a law as contemplated by section 65 [1] of the Constitution. The special jurisdiction conferred on the Industrial court to hear and to finally determine industrial disputes is not in my finding inconsistent with the jurisdiction and powers donated by section 65 [2] of the Constitution."

The court thus observed that section 17 [2] of the Act in taking away the right to judicially review awards of the Industrial court did not limit the high court's jurisdiction to supervise the industrial court as provided in section 65 [2] of the Constitution. He further stated that the supervision of the High court is defined in section 65 [2] of the Constitution. Section 65(2) of the Constitution provides: -

(2)The High Court shall have jurisdiction to supervise any civil or criminal proceedings before subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts."

The learned Judge in that case further stated:

"**Parliament has by a law contemplated by Section 65 [1] (of the Constitution) conferred on the Industrial Court the power to make final awards and has denied the High Court the jurisdiction to review such awards by way of orders of certiorari, mandamus or prohibit. The High court's powers in turn to supervise by way of the grant of orders of certiorari, mandamus, had been specially donated by section 8 of the Law Reform Act Cap 26. In short one Act of Parliament has donated the power to the High Court and the other has taken it away in the case of the special jurisdiction of the Industrial Court … Judicial review is neither civil nor criminal but is a special jurisdiction which is in the case of Kenya created by statute. The High Court's power to supervise extends to Civil and Criminal proceedings**".

The court relying on those observations held that the Industrial Court was not amenable to judicial review.

We intend to tackle this point from two fronts. Firstly we are of the view that in interpreting section 65 [2] of the Constitution, we should find out whether judicial review process, falls within the definitions of Civil Law or Criminal Law. William Gildart, ***Introduction to English Law*** 146 (D.C.M. Yardley 9th Edition 1984) defined Civil law as:

"**The difference between civil law… and criminal law turns on the difference between two different objects which the law seeks to pursue – redress or punishment. The object of civil law is the redress of wrong by compelling compensation or restitution: the wrong doer is not punished; he only suffers so much harm as is necessary to make good the wrong he had done. The person who has suffered gets a definite benefit from the law, or at least he avoids a loss. On the other hand, in the case of crimes, the main object of the law is to punish the wrongdoer, to give him and others a strong inducement not to commit the same or similar crimes, to reform him if possible and perhaps to satisfy the public sense that wrongdoing ought to be met with retribution."**

Having in mind the said definition we are of the firm view that the makers of the Constitution could not possibly had intended that there would be a branch of the law not amenable to the supervision by way of Judicial Review of the High Court so far as any Subordinate Court is concerned. We are also of the view that the judicial review application before us is for Constitutional remedies given by the Constitution to all Kenyans and the same cannot be taken away by an Act of Parliament. It is a far reaching and important remedy encompassing all Government authorities and subordinate courts. Accordingly we find that judicial review remedy **under the constitution** is a Civil Law remedy. We also observe that the nature of litigation before the Industrial Court falls within the ambit of Civil Law remedies touching the issues of employment and trade disputes. Accordingly, the High Court is empowered by the Constitution to grant orders of certiorari, mandamus or prohibition in respect of proceedings and decisions of the

Industrial Court like any other subordinate courts. In so finding we are of the view that the constitution should be interpreted broadly and liberally. It cannot be interpreted like any other statute. We are indeed persuaded by the finding in ***Crispus Karanja Njogu – v – Attorney General [Criminal Application No. 39 of 2000]*** where the court stated in respect of interpretation of the Constitution that it should be interpretation: -

"… **broadly or liberally and not in pedantic way, i.e. restrictive way. Constitutional provisions must be read to give value and aspirations of the people**."

We may also borrow the words from an Indian authority to support our observations, namely:

"**The Constitution is a mechanism under which the laws are to be made and not merely an Act which declares what the law is to be (see Kihoto Hollehcan v Zachillhy Air SC 412.)"**

In the same case the Supreme Court of Indian observed that –

"**If the legislature states that the decision or order of the Court or tribunal shall be final and conclusive, the remedies available under the constitution remain unfettered**."

As we stated before, it could not have been the intention of the Constitution to exclude one branch of the law from the supervision of the High Court and consequently from the remedies under the judicial review. We also observe, in passing, that the court in the case of **Kenya Guards** (***supra***) was deciding Judicial Review application under order LIII of the Civil Procedure Act and not under section 84 of the Constitution.

As regards the provisions of Section 17(2) of the Act, we are of the view that the said section, in prohibiting the granting of remedies such as certiorari, mandamus or prohibition, violates section 84 of the Constitution. Section 84 of the Constitution provides that the High Court may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of securing the enforcement of the provision of sections 77 to 83 of the Constitution. See ***W Njuguna – v – Republic [2004] I KLR 520.*** The restrictions on entertaining judicial review orders stipulated in section 17 of the Act clearly runs contrary to the Constitutional provisions of section 84. Section 17(2) of the Act thus cannot stand being inconsistent with the Constitution. It ought to be noted that the Court of Appeal in Civil Application No. **NAI 77 OF 2003 JUDICIAL COMMISISON OF INQUIRY IN THE GOLDENBERG AFFAIRS & 3 OTHERS – AND – JOB KILACH** in considering whether a tribunal of inquiry was subject to judicial review orders stated:

"**it was largely agreed before us that a commission such as the 1st Respondent is a tribunal inferior to the High Court and as such is amenable to judicial review jurisdiction of the High Court and hence to this court on an appeal**."

We also get support from the finding in the case of **HC MISC. CIVIL APPLCIAITON NUMBER 102 OF 2006 REPUBLIC – V – THE JUDICIAL COMMSISON OF INQUIRY INTO GOLDERNBERG AFFAIR AND OTHERS** where the court quoted with approval the case of EX PARTE PRESTON [1985] AC 835 as follows: -

"**I must make it clear in my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of power conferred by law."**

"**Judicial review is available where a decision making authority exceeds its powers commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses it powers**."

There then is the ample support to our finding that section 65 [2] does encompass supervision of

subordinate courts by the High Court which can exercise supervision of subordinate courts and can grant orders of certiorari, mandamus and prohibition. The restriction imposed by Section 17(2) of the Act to those powers of the High Court conferred under section 65 [2] and section 84 of the Constitution cannot stand for that inconsistency.

After observing as aforesaid, what is before us is the applicant's claim that its rights under section 77 (9) of the Constitution have been infringed by the award in Industrial Cause NO. 84 of 2004. The applicant argued that the Industrial Court failed to give it a fair hearing as required by section 77 (9) of the Constitution. That section provides:

"**A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within reasonable time."**

The applicant claims not to have been afforded a fair hearing because firstly the 3rd Respondent had been paid his final dues and also acknowledged that he had no further claims against the applicant. Secondly the applicant contended during the hearing at the Industrial Court that the Industrial Court did not have jurisdiction to entertain the claims by 4th to 7th Respondents because they were not members of the 2nd Respondent Trade Union. The applicant's argument is that their claim ought to have therefore been governed by normal laws of contract and by the Employment Act.

In respect of the 1st grievance the Industrial court in its award stated: -

"… **the court agreed with Miss Mungai that no coercion was used to have Mr. Cosmas Mulinge (the 3rd Respondent) to sign a discharge voucher, acknowledging receipt of the sum of kshs 108, 358. 40 in full and final settlement and that he had no further claims against the company**."

Despite making that finding the Industrial Court proceeded to conclude in its award that the applicant's notice to terminate the 3rd to 7th Respondent's service was bad in law and therefore awarded them damages.

In regard to the applicant's plea that the Industrial Court did not have jurisdiction to entertain the Cause in respect of the 4th to the 7th Respondents because they were not members of a Trade Union the Industrial court had the following to say in its award: -

"**With regards to the lack of jurisdiction of this court to adjudicate on the claims of Messrs Njogu, Ngao, Kanene and Wagura due to the fact that they were not members of the claimant union at the time when their services were terminated, the court disagrees with that point, as it is a pre-industrial stage issue which should have been sorted out at that stage. Once the matter comes to court it becomes a dispute".**

Considering the comments which simply brushed aside the issues of jurisdiction and fact of settlement between an employer and employee, we are of the view that the applicant did not receive fair hearing in respect of both its contentions as regards case of 3rd Respondent and that of 4th to 7th Respondents. In making this bold statement we are very much aware that the Industrial court by virtue of section 21 of the Act is not bound by the rules of evidence. The section provides: -

"**The Industrial Court and a Board of Inquiry shall not be bound by the rules of evidence in Civil and criminal proceedings**."

We note that side by side of that restriction, the same section gives the Industrial Court power to require any person to attend before it, to order a person to give evidence on oath and to order a person to produce relevant documents, amongst others.

Bearing in mind what is stated hereinbefore the Industrial Court cannot be said to have been fair in determining the claim by the 3rd Respondent when on one hand it finds that he had no further claim against the applicant and yet on other hand proceeded to make an award of damages for that same person. Similarly the Industrial Court did not afford the applicant a fair hearing for having failed to investigate the claim of the lack of jurisdiction by making a sweeping statement that it should have been raised at pre-industrial stage. For the Industrial court to be fair to the applicant, it ought to have used the powers it has under section 21 of the Act to seek the production of documents to prove the trade union membership of 4th to 7th Respondents. This we say because the applicant raised an issue of jurisdiction of the Industrial Court and it turned its face away from the most basis question. It ought to have decided the issue as per fundamental rule of law. To support our view, we quote from the case **Macfoy – v – United Africa Co. Ltd [1961] 3 ALL E.R. 1169** as follows: -

"**Jurisdiction is everything. Without it a court has no power to make one step. Where a court has no jurisdiction there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

That is what in all fairness the Industrial Court ought to have done in respect of its jurisdiction, before entertaining the claims of 4th to the 7th Respondents. By usurping the jurisdiction, despite the evidence brought forth, the 2nd respondent violated property rights of the applicant when it made an award asking the applicant to pay undefined amounts as compensation. It also violated the Applicant's rights under section 77 (9) of the Constitution by not offering a fair hearing.

Having made the finding that the applicant's rights under sections 75 and 77 [9] of the Constitution were infringed is this court constrained by the provisions of section 17 of the Act? We respond in the negative. We simply rely on the provisions of Section 65 of the Constitution.-

Section 65(1) provides that the Parliament may establish subordinate court to the High Court. Section 123 of the Constitution defines subordinate court as under:

"**Subordinate court means a court of law in Kenya other than**

(a) the High Court;

(b) a court having jurisdiction to hear appeals from the High court; or

(c) A court-martial."

With this definition and what has been stated herein before we are of the view that the Industrial court is a court subordinate to the High court. It is noteworthy that section 65 [1] provides that such subordinate courts to be established by Parliament shall have their jurisdiction subject "***to this Constitution***". What this provision brings out clearly is that the actions and awards of the Industrial court are always subject to the provisions of the Constitution. Undoubtedly courts are the guardian of the constitution and defender of the rule of law. With that in mind, wherever there is a violation of the Constitution, as we so find here; the court is mandated to address the same.

During the hearing, much was said of the High Court's supervisory power of the subordinate court, which the applicant said extended to supervisory power of the Industrial court. That supervisory power is donated by section 65 [2] of the Constitution. The High court is conferred with supervisory powers over the civil or criminal proceedings of the subordinate courts. We are of the undoubted view, as discussed in this ruling herein before, that as regards judicial review the High court indeed has the supervisory role over subordinate courts which include the Industrial court. To supervise means to "**observe and direct the execution of (a task or activity) or the work**." ***Concise Oxford English Dictionary***.

The applicant's argument that the award of the Industrial court is defeated by its ambiguity does not

advance the applicant's claim of Constitutional violation because there is a provision under section 16 [5] of the Act for a party to get interpretation of an award. We do not intend to say any more on that issue.

The respondents were heard to argue that the Industrial court as per section 14 of the Act was established by the President and not by Parliament and for that reason it does not fall within the ambits of section 65 of the Constitution. We are of the considered view that, the argument aforesaid is '*cutting a thin line*.' Why do we say that? We say so because the Act that gives the President the power to establish the industrial court was enacted by Parliament. That being the case a distinction cannot be made in respect of the establishment of the Industrial Court.

The respondents did also submit that the Industrial court's awards are protected by the provisions of section 82 [9] of the Constitution which states as follows: -

"**Nothing in subsection [2] shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in a court that is vested in a person by or under this Constitution or any other law**."

With respect, this issue is not at all relevant in this cause. The applicant is seeking redress of violation of its rights under Sections 75 and 77 (9) of the Constitution.

We thus reject the Respondents' argument in that respect.

ISSUES

1. The 1st and 3rd issues of the applicant and also the 1st and 3rd issues of the Respondent are related and can be dealt with together. That is, whether section 17 Cap. 234 is ultra vires sections 77 [9] and 84 [1] of the Constitution and whether this court, in view of section 17 Cap. 234, has jurisdiction to entertain the present action.

We respond by observing that the exclusive provisions of the laws should be given most restrictive interpretation. We rely on the passage from the book by Sir Williams Wade and Christopher Forsyth, on ***Administrative Law*** (9th Edition) at page 713, viz:

"**If a statute says that the decision or order of some administrative body, or tribunal I shall be final or shall be final and conclusive" to all intent and purposes, this is here to mean merely that there is no appeal. Judicial Review of legality is unimpaired. Parliament only gives impress of finality to the decisions that they are reached in accordance with the law. This has been the consistent doctrine for three hundred years".**

This is a well established doctrine and we respectfully adopt it. An Industrial Court award would be final if it is reached in accordance with the provisions of the Constitution, Rule of Law and The Trade Disputes Act.

With these observations, we do not hold that Section 17(1) of the Act is ultra vires the constitution as it only restricts the appeal from its awards.

What remedies under section 84 of the Constitution can the court grant the applicant? That issue captures the Respondent's and the applicant's issue No. 2.

As stated herein before, section 84 of the Constitution donates power to the High Court to make such orders, issue such writs and give such directions appropriate to secure enforcement of the provisions of sections 77 to 83 of the Constitution. Having made that finding we do hereby find that section 17 [2] of the Act is unconstitutional. That sub-section is, in our considered opinion, in contravention of the express provisions of Sections 65 [2], 84 [2] of the Constitution and thus we do declare sub-section 17 [2] of the Act, unconstitutional and, thus, void.

As it will be noted, we have found that the Industrial court failed to afford the applicant a fair hearing of the cause, for the reasons we have stated herein before. We therefore find that the applicant is entitled to, which we hereby grant, a declaration that The Industrial Court of Kenya, award, in Cause No. 84 of 2004 is null and void. In making that declaration, we do hereby enter judgment in favour of the applicant in the following terms, as agreed and/or offered by the applicant:

James Njogu - kshs 7, 745.00

Edwin Ngao - Kshs 9,000.00

John K Kanene - Kshs 8, 330.00

Joshua M Wagura - Kshs 8, 330.00

The above sums were offered to the Respondents upon their employment being terminated by the applicant. We make no orders as to costs.

Dated and delivered this 15th day of February 2006.

K. H. RAWAL

JUDGE

O. MUTUNGI

JUDGE

M. KASANGO

JUDGE