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

Misc Civ Appli 315 of 2006

KENYA UNION OF COMMERCIAL FOOD

& ALLIED WORKERS UNION…….....…...…...….1ST APPLICANT

AGNES L. OGOLLA……..…….....……..…..2ND APPLICANT

VERSUS

KENYA POST OFFICE SAVINGS BANK LIMITED…….RESPONDENT

R U L I N G

Delay in preparation and delivery of this ruling has been caused by my recent illness, hospitalization and long recuperation. The same is regretted.

The Applicants herein sought by notice of motion dated 5th April, 2006 the following orders:-

"***1. That this honourable court do hereby adopt the award of the Industrial Court of Kenya delivered on 1st September, 2004 in Industrial Cause No. 122 of 2003 as its own orders.***

2. That this honourable court do order the Respondent to pay to the 2nd Applicant the sums of money awarded ….. by Industrial Court ……. immediately."

The application is said to be brought under section 3A of the Civil Procedure Act, Cap. 21 and section 10 (1) to (6) of the Trade Disputes Act, Cap. 234. Before the application could be heard the Respondent filed a notice of preliminary objection dated 28th April, 2006. The following points are taken in that objection:-

"*1. In limine, that the Applicants are non- suited.*

2. In limine further, that the application is premature and pre-emptive as the subject-matter the basis of this application is still pending before the Industrial Court for further interpretation and construction by the said court.

3. The application is bad in law, frivolous and vexatious and indeed an abuse of this honourable court's process.

4. The Award sought to be registered and/or enforced is contrary to the express provisions of the law and cannot be so enforced."

At the hearing of the preliminary objection learned counsel for the Respondent, Mr. Onguto, informed the court that he would not argue the 3rd and 4th points which, in his view, ought to be taken at the hearing of the application. Regarding the 2nd point, Mr. Onguto stated that it was spent in view of the "Interpretation of Award" annexed to the further affidavit filed on 16th May, 2005. That left only the 1st point.

Mr. Onguto submitted as follows. The application is incompetent in that these proceedings could not be commenced by way of notice of motion. Under Order 4, rule 1 of the Civil Procedure Rules (the Rules) an action can only be commenced by way of plaint or as provided for in any other statute or rules (for example petitions, originating summons, etc). In his view, an award of the Industrial Court, which is declaratory in nature, can only be enforced by way of a formal suit, commenced either by plaint or by originating summons. He pointed out that it is not provided in the Trade Disputes Act how an Industrial Court award may be enforced.

It was Mr. Onguto's further submission that in any event the suit cannot stand as the Respondent is described as KENYA POST OFFICE SAVINGS BANK LIMITED, an entity that does not exist. He pointed out that the dispute before the Industrial Court was filed by the 1st Applicant against KENYA POST OFFICE SAVINGS BANK, and **not** against KENYA POST OFFICE SAVINGS BANK LIMITED. Kenya Post Office Savings Bank is a statutory body established under the Kenya Post Office Savings Bank Act, Cap 493B. It is not a limited liability company. He further stated that the aggrieved party before the Industrial Court was the 2nd Applicant, and only she could seek enforcement of the resulting award, which was in her favour; the 1st Applicant had no business coming to court.

Mr. Onguto also submitted that the reliefs sought are not currently warranted because the court cannot adopt the award as it has not taken effect in that it has not been gazetted. He referred to section 16 (2) of the Trade Disputes Act which provides as follows:-

"***234. (1)……..***

(2) An award shall be published in the Gazette, and shall take effect on the date of such publication:

Provided that where an award is expressed to have retrospective effect it shall on the date of its publication in the Gazette have effect as from the date specified in the award."

He sought for the striking out of the application.

Mr. Ogola, learned counsel for the Applicants, responded as follows. The preliminary objection is not a proper preliminary objection within the standard laid out in the case of MUKHISA BISCUIT MANUFACTURING COMPANY LIMITED VS WESTEND DISTRIBUTORS LIMITED [1969] E.A 969, where it was stated by Sir Charles Newbold, P., as follows:-

"…….***A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion……..."***

He did not offer any reasons why the point taken was not a proper preliminary objection. He conceded that indeed the Trade Disputes Act does not provide for the procedure of enforcing an award of the Industrial Court. In his view the Applicants were properly before the court by way of notice of motion and, under section 3A of the Civil Procedure Act, the court can grant the orders sought.

Regarding the Applicants' capacity to come to court he pointed out that the 1st Applicant was the claimant before the Industrial Court while the 2nd Applicant was the aggrieved party. No one else would be more suited to bring the present action.

As to the name of the Respondent, Mr. Ogola submitted that the addition of the word "Limited" to its name is a mere minor typographical error that is excusable. The court should decide matters on substance, not technicalities. Concerning gazettement of the award dated 1st September, 2004, Mr. Ogola submitted that it was indeed gazetted vide Gazette Notice No. 1150 of 18th February, 2005 which is annexed at paragraph 10 of the supporting affidavit. He also referred to section 16 (2) of the Trade Disputes Act. Mr. Ogola therefore submitted that the award was to take effect from 20th August, 2002. In his view the preliminary objection was not properly taken and should be overruled with costs.

Mr. Onguto replied that no application to correct the name of the Respondent had been made. Further, it was his view that the gazetted award is the one dated 23rd November, 2004 and not the one dated 1st September, 2004.

I have considered the submissions of the learned counsels. Apart from the case already referred to, no other authorities were cited. I have to decide the following issues:-

1. ***Is the action herein incompetent by dint of being brought by notice of motion?***

2. ***Are the Applicants non-suited?***

3. ***Is the Respondent non-suited?***

Is the action herein incompetent by dint of being brought by notice of motion? It is common ground that the Trade Disputes Act makes no provision for the procedure to be followed in seeking to enforce an Industrial Court award. How should one then proceed? One must obviously bring some kind of suit to court. What is a suit? Under section 2 of the Civil Procedure Act "suit" means all civil proceedings commenced in any manner prescribed. But Order 4, rule 1 of the Rules makes further provision. It states:-

"***Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."***

With regard to enforcement of Industrial Court awards there is no "other manner" prescribed; as already seen, that is common ground. It is thus clear to me that any person wishing to enforce an Industrial Court award must commence suit by presenting a plaint to court. That is what the Applicants herein should have done. They came by way of notice of motion. That is not a proper vehicle for instituting suit unless it is so prescribed. It is not so prescribed in the case of enforcement of an Industrial Court award. The proceedings herein as presently brought are thus incompetent. I so hold.

Having so held, it is not strictly necessary that I decide on the other issues. But I will say something on them. The Applicants having been the parties aggrieved before the Industrial Court and affected by its award, they are the proper parties to seek its enforcement. They would therefore be properly before the court had they commenced these proceedings by plaint. What about the Respondent? It is common ground that its name is **Kenya Post Office Savings Bank,** not **Kenya Post Office Savings Bank Limited**. It is also common ground that it is a statutory body established under its own statutes and not a limited liability company incorporated under the Companies Act, Cap. 486. But there has not been any allegation that an entity called Kenya Post Office Savings Bank Limited exists which may be confused with Kenya Post Office Savings Bank. I think the addition of the word "Limited" to the name of the Respondent was an excusable error. It has not, and could not have, occasioned to the Respondent any prejudice or embarrassment. It is an error quite easily correctable by a simple amendment, which amendment the court could initiate on its own motion. It cannot be used as a ground for striking out the proceedings.

A lot was said regarding the issue as to when the relevant Industrial Court award was gazetted, and therefore when such award was to take effect. Those are matters of fact that do not lend themselves to decision on a preliminary objection on a point of law. I will say no more.

In the circumstances, having decided that the present proceedings are incompetent for not having been instituted by way of plaint, I will uphold the preliminary objection. The notice of motion dated 5th April, 2006 is hereby struck out with costs to the Respondent. Order accordingly.

DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF DECEMBER, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 15TH DAY OF DECEMBER, 2006.