



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO 254 OF 2001

KENYA AIRWAYS LTD APPLICANT

VERSUS

KENYA AIRLINE PILOTS ASSOCIATION.....RESPONDENT

RULING

This is an application by Kenya Airline Pilots Association (hereinafter “the interested party”) to set aside this Court’s *ex parte* order giving Kenya Airways Ltd (hereinafter “the applicant”) leave to apply for an order of *certiorari* to remove into this Court and quash all the orders contained in a decision delivered by the Industrial Court.

It is necessary, however, to give a brief history of the facts. The Industrial Court made an award allowing the applicant in this case to declare 14 of its flight engineers redundant subject to certain conditions. The interested party then applied in writing to the Industrial Court under section 16(5) of the Trade Disputes Act chapter 234 Laws of Kenya, for interpretation of one of the conditions. The interested party in its application sought to be heard “in respect of interpretation” and intended “to call witnesses in support of its claim” and further sought payment to the flight engineers of cash in lieu of providing a “full and valid check” under clause 40 (d) of the collective bargaining agreement made between the applicant of the one part and the interested party of the other part.

The applicant stated that it submitted to the Industrial Court that the said Court had no jurisdiction to take the evidence of the parties and further had no jurisdiction to award payment (to the flight engineers) of cash in lieu of providing a “full and valid check”. The Industrial Court nevertheless allowed the interested party’s application and ordered the applicant to pay a sum of US\$ 45,000 to each of the flight engineers. The Industrial Court is said to have acted in excess of its jurisdiction. Under section 16(5) of the Trade Disputes Act the Industrial Court was only empowered to interpret the award by hearing the parties but not to alter the award as it did.

The issue here is:

Whether the High Court can interfere with a decision of the Industrial Court by way of judicial review.

With regard to this issue, whether the High Court can interfere with a decision of the Industrial Court, the interested party has referred this Court to the Trade Disputes Act section 17(2) which states that “the award...of the Industrial Court shall not be questioned or reviewed and shall not be restrained or removed by prohibition, injunction, *certiorari*...”

Section 17(2) estoppes the High Court from questioning or reviewing a decision of the Industrial Court in any manner; however, can the High Court interfere with a decision of the Industrial Court where the said Court has acted in excess of its jurisdiction?

The interested party contended that the High Court has no powers to interfere in any way with a decision made by the Industrial Court and referred me to section 65 of the Constitution of Kenya which establishes the other Courts in which the High Court has supervisory powers; that is, subordinate courts and Court Martials. The Industrial Court is not mentioned in section 65.

The applicant, on the other hand, submitted that the High Court does have jurisdiction to quash a decision of the Industrial Court where the Industrial Court has acted in excess of its jurisdiction. The applicant further submitted that under section 8(2) of the Law Reform Act chapter 26 of the Laws of Kenya, the High Court has the same jurisdiction as the High Court in England in *mandamus*, prohibition and *certiorari* proceedings and therefore English authorities are relevant and legitimate. The interested party has submitted that the English laws are not binding on this Court; they are only of a persuasive nature. This is true. However where there are no guiding laws on precedence the Court can consider the English authorities and if persuaded, can rely on them.

The applicant has relied on two English authorities to prove its point. The first is *Anisminic Ltd v The Foreign Compensation Commission and another* [1969] 1 All ER 208 where the House of Lords on a majority of 3 to 2 decided that where an Act contains a finality clause such as section 17(1) and (2) of the Trade Disputes Act that Act cannot prevent the High Court from acting where the inferior tribunal has acted without jurisdiction. Lord Reid stated at p 216:-

“If one party submits to a tribunal that its powers are wider than in fact they are, then the tribunal must deal with that submission. But if they reach a wrong conclusion as to the width of their powers, the Court must be able to correct that...If they base their decision on some matter which they have no right to do... their decision is a nullity”.

The second authority is *South East Asia Fire Bricks Sdn Bhd v Non- Metallic Mineral Products Manufacturing Employees Union and others* [1980] 2 All ER 689 where the Privy Council held that in determining whether the High Court has power to correct an error on the face of the record by way of *certiorari* notwithstanding the ouster clause – in our case section 17(2) of the Trade Disputes Act - a distinction was to be drawn between an error of law which affected jurisdiction and one which did not. I have observed that in this case the Privy Council dismissed the appeal on the grounds that the award of the Industrial Court was within that Court’s jurisdiction therefore the High Court could not quash the award by *certiorari* proceedings. It, therefore, follows that had the Industrial Court in this case acted in excess of its jurisdiction, then the High Court would have had power to grant *certiorari* to quash the award. This now leads us to the next major argument advanced by the interested party as to whether the Industrial Court is at par with the High Court, and if so, whether the High Court has supervisory jurisdiction over the Industrial Court.

The interested party stated that the Industrial Court is presided by a judge who has the same qualifications as a judge of the High Court and therefore the Industrial Court is not subordinate and stands at par with the High Court. Further that the Interpretation and General Provisions Act chapter 2 of the Laws of Kenya defines a subordinate court as a Magistrate’s Court; and from this, the interested party concluded that the Industrial Court is not inferior to the High Court.

The applicant, in opposition to the interested party’s submissions has referred me to section 60 of the Constitution which states that the High Court has unlimited original jurisdiction plus such other jurisdiction conferred by the Constitution or any other law. The applicant further stated that section 123(1) of the Constitution defines a subordinate court as one other than the High Court or Court Martial; all other Courts are subordinate. I agree with the applicant’s contention that 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 suggests that the High Court is empowered to play a supervisory role over the Industrial Court. Further, the Constitution supersedes the Interpretation and General Provisions Act

and I would therefore go by the Constitution and hold that the Industrial Court is inferior to the High Court. In the present case, I am satisfied that there is *prima facie* evidence to suggest that the Industrial Court did act in excess of its jurisdiction. I am also persuaded that where there is an ouster clause in an Act such as section 17(2) of the Trade Disputes Act and the inferior court (the Industrial Court) acts in excess of its jurisdiction then the High Court has the power to interfere with that decision or award of that inferior court.

As the applicant has demonstrated that it has an “arguable case” (see *Samuel Muchiri W Njuguna v Ministry for Agriculture* (CA 144 of 2000), I am satisfied that the *ex parte* order giving the applicant leave to apply for an order of *certiorari* was properly granted.HY

I accordingly dismiss the interested party’s application with costs to the applicant.

Dated and delivered at Nairobi this 7th day of August, 2001

A. R.M. VISRAM

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JUDGE