



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISCH APPLICATION NO. 1520 OF 1999
IN THE MATTER OF AN APPLICATION FOR ENFORCEMENT OF
FUNDAMENTAL RIGHTS UNDER SECTION 84 OF THE
CONSTITUTION OF KENYA

RASHID ODHIAMBO ALOGGOH AND 245

OTHERS.....APPLICANTS

VERSUS

HACO INDUSTRIES LTD.....RESPONDENT

RULING

These proceedings were commenced by way of Originating Motion dated 9th and filed on 10th November, 1999. There are 246 applicants in all who, going by the material before us, are, or have been in the service of Respondent as “Casual Employees.”

The application which is under section 84(1) and (6) and Sections 73 74 and 80 of the Constitution of Kenya, The Employment Act Cap 226, The Regulation of Wages and Conditions of Employment Act, Cap 229, The Judicature Act Cap.8 Laws of Kenya and all other Enabling Legislation, is supported by affidavits sworn by one Rashid Odhiambo Aloggoh and the grounds set out in the body of the application.

The Defendant opposes the application and there are on record grounds of opposition alongside the affidavit in reply sworn by Mr. Peter Kimani- the Respondent’s Human Resources Manager.

Both learned counsel for the parties herein have made their respective submissions and cited several authorities.

What we consider to be the basis of the orders sought by the Applicants, which we shall address shortly herein below, has been set out in the application as grounds which are:

- (a) The Applicants have served the Respondent for periods of time ranging between two years to seventeen years without the Respondent Company giving them letters of appointment and or paying them decent wages and salaries.
- (b) By retaining the Applicants as Casual Employees, the Respondent has denied the Applicants their right to earn a decent wage and to enjoy the other minimum terms and conditions of employment.
- (c) The refusal/failure by the Respondent to issue the Applicants with letters of appointment has made it impossible for them to join any Trade/Workers Union or to form and register

Trade/Workers union of their choice.

(d) The Respondent has refused/failed to recognise the Applicants' right to join a union of their choice thus denying them the right to enjoy their right of association.

(e) The Respondent has a statutory obligation to recognise the Applicants as month-to-month and/or week-to-week Employees and to accord them all their due rights and privileges under the statutes."

On the basis of the foregoing, the Applicants have sought declaratory orders to the effect that their rights guaranteed under Sections 73, 74 and 80 of the Constitution have been contravened. They have also sought declarations that they are month-to-month and/or week-to-week employees of the Respondent, that the provisions for Caps 226 and 229 Laws of Kenya apply to both parties herein and that the Respondent has been in breach of the said provisions.

The Applicants have also sought a declaration that the Respondent is under an obligation to pay all their overtime wages earned but not paid, wages and salaries earned but not paid, leave days earned but not given and/or paid for. If the said declaration is made, the applicants seek an order that the said dues be paid.

The Respondents case in a nutshell is as follows. The application is misconceived as the facts and circumstances of the case do not meet the requirements of a constitutional application under Section 84 of the Constitution; the application is an abuse of the process of the court as Constitutional Provisions cannot be invoked to vary contracts freely and willingly negotiated and entered into by parties; the application is purely a labour matter sought to be brought under constitutional provisions; the affidavit in support of the application is incurably defective; the prayers sought do not lie in law and are contradictory, and finally, the applicants are seeking specific performance of employment contracts which cannot be granted in law.

It has been conceded on behalf of the Respondent that this court has jurisdiction to hear, consider and scrutinise the application, if the Applicants' rights have been breached under the constitution. With respect we agree. We are aware of the provisions of Section 84(6) of the Constitution of Kenya which provides as follows:

"(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section.."

We have had occasion to read the memorandum of F.K. Apaloo C.J. (as he then was) when asked to comment on the ruling on procedure under Section 84 of the Constitution of Kenya reported in The Nairobi Law Monthly No.51 January 1995.

The learned judge said:

"That section simply confers discretionary power on the Chief Justice to make practice rules if he considered it necessary to facilitate the exercise of this jurisdiction. It is merely permissive, and if there are any known or accepted practice rules by which any contravention can be questioned, his in action in the exercise of this power, does not, in my opinion, make any impact on the right of an aggrieved person to agitate his fundamental rights and freedoms conferred by section 70 through 83 in

court.....jurisdiction conferred on the court by section 84 can competently be invoked by (1) a plaint, (2) Order 53 of the Civil Procedure Rules and (3) Originating Motion depending, of course, on the constitutional relief sought."

And so, even if we were to find that the matters raised by the applicants are labour related, it is not wrong to bring the application under Section 84 of the Constitution.

Be that as it may, the relationship between the Respondent and the Applicants is that of Employer and Employee. It is a contract of service. There exists in our statutes a complete regime of Legislation that establishes, governs and oversees such relationships. There is also an established statutory machinery and Institution to resolve any disputes that may arise between the two parties. Indeed, the learned counsel for the applicants cited some of the statutes in the application before us.

The statutes that we find relevant in relation to the matters raised before us are: The employment Act Cap. 226, The Regulation of Wages and Conditions of Employment Act Cap 229, The Trade Unions Act Cap 233 and the Trade Disputes Act Cap. 234.

In approaching the issues raised by the Applicants herein and the reply offered by the Respondent, we have tried to limit ourselves to matters which do not delve into the merits of those prayers. This is because, if we were to hold that the matters may not be constitutional, the applicants may opt for an alternative remedy; in which case it may be prejudicial to address the merits at this stage.

The Applicants' class of Employment as "Casual Employees" and their contracts of service are recognised in law. These are defined in Section 2 of the Employment Act Cap 226 aforesaid. Like in any contract, there is an offer and acceptance and at any given time two parties are at play. It appears to us that a third party is an unwelcome participant in such an arrangement and, therefore, the court should not enter into an arena of conflict between an Employee and the Employer.

The Applicants may then ask, what will happen if there exist any disputes between them and the Respondent? The answer lies in the cited statutes.

There is nothing in the two affidavits sworn by Mr. Rashid Odhiambo Aloggoh to show that the issuance of letters of appointments to the Applicants is the key to freedom of association or joining a Trade Union. There is also no averment that the Applicants have tried to join the trade Union movements of their choice and that the Respondent has been the stumbling block. Further, no provision of law has been cited by the Applicants or their learned Counsel to show that the law prohibits them from joining Trade Unions. On the contrary, our reading of section 29 of the Trade Unions Act Cap 233 convinces us that the Applicants herein are eligible Members of any Trade Union that directly concerns their industry or occupations.

Mr. Aloggoh's affidavit is also wanting in one crucial aspect. He has allegedly worked for the Respondent for about 5 years. There are Applicants who have worked with the Respondent for more than that period- it is said upto seventeen years. Mr. Aloggoh lacks the capacity to swear to the actual issues in dispute in respect of the Applicants who have worked for more years than him.

There is an established Industrial Court under section 14 of the Trade Disputes Act, Cap 234 Laws of Kenya. The mandate of the said court is such that, all matters raised by the Applicants herein including the allegations of slavery, can adequately be addressed thereby. Section 14(10) of the said Act provides:

"(10) In the exercise of its powers under this Act the Industrial Court shall be bound by any guidelines or other directives relating to wage and salary levels and other terms and conditions of employment that may be issued from time to time to the court by the Minister for the time being responsible for finance."

It appears to us that the Applicants have not exhausted, first, the internal machinery provided by the Respondent and, secondly, the provisions provided by the statutes we have referred to. If we were to grant any orders as sought by the Applicants, we would be imposing them on the Respondents which would clearly offend the basic considerations relating to contracts of service. Further, we would then be acting as a Labour Tribunal a duty we believe falls within the province of the Industrial Court.

In the end, we must find, as we hereby do, that the Applicants have not presented a case to warrant the granting of the orders sought. Their application therefore fails.

We know costs follow the event. However, we have weighed the attendant circumstances in this case and the respective positions of the parties herein. We believe that, although the Applicants have lost the battle, they should not be penalised in costs. Accordingly there shall be no order as to costs.

Orders accordingly.

Dated and delivered at Nairobi 6th day of June 2000

A. MBOGHOLI MSAGHA

J. W. ONYANGO OTIENO

JUDGE

JUDGE