



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR CASE NO. 257 OF 2015**

**EASTLEIGH MATTRESS LTD .....APPLICANT**

**VERSUS**

**CABINET SECRETARY, MINISTRY OF LABOUR**

**SOCIAL SECURITY AND SERVICES .....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

1. The Applicant, Eastleigh Mattress Ltd is a limited liability company incorporated in Kenya and carrying on business as a supermarket. The 1<sup>st</sup> Respondent is the Cabinet Secretary for Labour, Social Security and Services whereas the 2<sup>nd</sup> Respondent is the Attorney General of the Republic of Kenya.
2. Through a letter dated 9<sup>th</sup> July, 2015 the Labour Commissioner, an officer under the 1<sup>st</sup> Respondent, informed the Applicant that the Cabinet Secretary had received information from the Kenya Human Rights Commission and a certain union that the Applicant engaged in unfair labour practices by not complying with the labour standards provided by the Kenyan labour laws as well as international standards. Through the said letter the Labour Commissioner listed the areas of concern and concluded by stating that:  
  
**“You are therefore required to move with speed and produce all your employees’ employment records for the last three years for audit in this office on 13<sup>th</sup> July, 2014 (sic) .....**”
3. Apparently, the Applicant did not comply with the directive. Letters were exchanged thereafter and on 10<sup>th</sup> August, 2015 the Applicant moved this Court and obtained leave to commence these judicial review proceedings.
4. Through the Notice of Motion application dated 12<sup>th</sup> August, 2015, the Applicant prays for orders to quash the Labour Commissioner’s decision to audit its labour records and prohibit any audits. There is also a prayer to prohibit any criminal charges against the Applicant.
5. According to the statutory statement dated 4<sup>th</sup> August, 2014, the grounds upon which relief is sought are:

**“a) The decision to re-inspect the Applicant by the Commissioner of Labour is *ultra-vires* his**

**powers.**

- b. The decision to re-inspect the Applicant by the Commissioner of Labour is in bad faith.**
  - c. The decision to re-inspect the Applicant by the Commissioner of Labour is an abuse of power, in the sense that the Commissioner is exercising the power for improper purpose and taking into account irrelevant considerations.**
  - d. The decision to re-inspect the Applicant by the Commissioner of labour is unreasonable, unfair and disproportional in the circumstances.**
  - e. The decision of the Commissioner of Labour to prefer criminal charges against the Applicant and its directors is ultra-vires, abuse of power, unreasonable, unfair and in bad faith.**
  - f. The Respondents are subject to the supervisory jurisdiction of this Honourable Court.**
  - g. Such other and further grounds to be adduced at the hearing hereof.”**
6. From the pleadings and submissions filed in Court, the Applicant’s case is that under Section 30 of the Labour Institutions Act, Cap 234 (“the Act”) various offices are created. The offices of Labour Commissioner and labour officer are among the offices created by that provision. Under Section 35 of the Act, an authorised officer is mandated to inspect employers in order to ensure compliance with the labour laws.
  7. It is the Applicant’s case that Section 2 of the Act defines an authorised officer as a labour officer, employment officer or medical officer appointed under Section 30. The Applicant asserts that the Labour Commissioner not being an authorised officer had no jurisdiction to inspect the Applicant and thus acted *ultra vires* by issuing the order dated 9<sup>th</sup> July, 2015.
  8. The Applicant submitted that the functions relating to labour were devolved to the counties by the Constitution and the person mandated to inspect the Applicant is the labour officer of Nairobi County. The Applicant asserted that it had previously been inspected by the labour officer, Nairobi County and found to have complied with the labour laws and therefore the Labour Commissioner’s decision to re-inspect it was done in bad faith and amounted to abuse of power.
  9. The respondents opposed the application through the replying affidavit of James Mwangi Kiraguri, an Assistant Labour Commissioner. He averred that he is an authorised officer under Section 3 of the Act and under Section 34(1) of the Act he is mandated to call for employment records from any employer. Further, that section 35 (1)(a) of the Act authorises a labour officer to call for wage sheets and other employment records kept by an employer for the purpose of monitoring or enforcing compliance with any labour laws.
  10. Mr Kiraguri averred that Section 35(5) of the Act gives an authorised officer power to institute criminal proceedings in respect of any contravention of the said Act or for any offence committed by an employer under any other labour law. Further, that Section 49 of the same Act empowers a labour officer to institute proceedings on behalf of an employee for the recovery of monies owed by an employer.
  11. Mr. Kiraguri deposed that prosecutorial powers under the Act had been delegated to him by the Director of Public Prosecutions under Gazette Notice No. 9399 of 5<sup>th</sup> July, 2013 and he was therefore authorised to prosecute criminal offences arising from breach of labour laws.
  12. It was also averred by Mr. Kiraguri that he had indeed demanded employment records from the Applicant through the letter dated 9<sup>th</sup> July, 2015 for the purpose of carrying out an audit but the Applicant had not produced the record. Further, that by a letter dated 3<sup>rd</sup> August, 2015 he gave notice of intention to carry out inspection at the Applicant’s premises for the period from August, 2014 up to the date of the notice. He asserts that the said notice excluded the period under which the previous inspection had been carried out.
  13. Looking at the pleadings and the submissions of the parties, it is evident that the only question is whether the Commissioner for Labour is an authorised officer as defined by Section 2 and of the Act.

Section 30 of the Act provides:

**“(1) Subject to the laws governing the public service, there shall be appointed—**

**(a) a Commissioner for Labour;**

**(b) a Director of Employment; and**

**(c) such other officers as may be necessary for purposes of administration of laws relating to labour and employment.**

**(2) The Minister may designate officers appointed under subsection (1)(c)—**

**(a) labour officers;**

**(b) employment officers; or**

**(c) medical officers.**

**(3) The persons appointed under subsections (1) and (2) shall be authorised officers for purposes of this Act.”**

14. Section 30 therefore provides for the appointment of the Commissioner for Labour (30(1)(a)), the Director of Employment (30(1)(b)) and any other officers as may be necessary for purposes of administration of laws relating to labour and employment. The other officers may be designated by the Minister as labour officers, employment officers or medical officers.

15. It was the submission of Mr. Ojiambo for the Applicant that the power to inspect premises which is found under Section 35 of the Act is reserved for an authorised officer. Section 35 of the Act specifically refers to the powers of a labour officer. Maybe counsel was referring to Section 34 of the Act which provides for powers of entry to premises by an authorised officer. Whatever the case, whether Mr. Ojiambo was referring to Section 35 or 34 does not in any way subvert the course of his argument.

16. It was his case that Section 2 of the Act defines an authorised officer as a labour officer, employment officer or medical officer appointed under the Act. Once again Mr. Ojiambo was wrong on the definition Section of the Act. The definition clause of the Act is actually Section 3. Again, that does not in any way derail his train of argument. He posited that the Commissioner for Labour is not a labour officer, an employment officer or a medical officer and could not therefore purport to execute the powers reserved for an authorised officer by the Act.

17. The respondents’ position is that the demand for the records was made by one Mr. James Mwangi Kiraguri an Assistant Labour Commissioner.

18. A reading of the Act clearly shows that the Commissioner for Labour is the chief labour officer. Under Section 32(1) the Commissioner for Labour may in writing delegate to any labour officer any of his/her powers, functions and duties. Under the Section 33 the Commissioner for Labour shall issue a certificate of authority to a labour officer. If the Commissioner for Labour can exercise all those powers, how can one then say the Commissioner for Labour cannot do the work of an authorised officer? Can a public officer empowered to delegate certain powers, functions and duties be said to be incapable of executing those powers, functions and duties? One cannot delegate powers that he does not have. I therefore find that the Applicant’s argument has no legal basis and hold that the Commissioner for Labour can do that which a labour officer can do.

19. There was an argument by the Applicant that the powers of the Commissioner for Labour were being exercised in bad faith as the Applicant had been inspected by the labour officer for Nairobi County. The respondents clarified that the intended inspection was not for the period covered by the previous inspection. This statement by the respondents was not contradicted by the Applicant. Indeed there was an averment by the Respondent that the Applicant’s advocate had written to indicate that the audit carried out was for the period from January 2012 to August 2014. In the

circumstances bad faith cannot be read into the actions of the Commissioner for Labour.

20. Finally, there was an argument during the oral submissions that the function of ensuring compliance with labour laws was devolved by the 2010 Constitution and the Commissioner for Labour had no business inspecting the Applicant which is located in the jurisdiction of Nairobi County. This point needs not be considered as it was not in the Applicant's pleadings. However, if it will give the Applicant any consolation, it is noted that in accordance with the Fourth Schedule of the Constitution, labour standards fall under the remit of the National Government. This particular argument therefore falls by the wayside.

21. In short, I find the Applicant's case has no merit. The same is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 2nd day of Dec., 2015

**W. KORIR,**

**JUDGE OF THE HIGH COURT**