REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 283 OF 2010

REPUBLIC .....APPLICANT

VERSUS

THE INDUSTRIAL COURT OF KENYA.....RESPONDENT

KENYA CHEMICAL & ALLIED

WORKERS UNION.....INTERESTED PARTY

EX-PARTE

BOTANICAL EXTRACTS EPZ LIMITED

JUDGEMENT

Before this court is notice of motion application dated 2nd November, 2010 in which the ex-parte applicant (Botanical Extracts EPZ Limited) prays for an order of certiorari quashing the Award of the respondent (the Industrial Court of Kenya) and all orders incidental thereto issued on 8th April, 2010 in Cause No. 390 of 2009. The ex-parte applicant also seeks an order of prohibition, prohibiting the respondent from enforcing or compelling the applicant to implement the said Award.

According to the statutory statement dated 28th August, 2010 and the verifying affidavit sworn on the same date by Mr. Joseph M. Kiara the ex-parte applicant's Finance and Administration Manager, these proceedings arise from an Award made on 8th April, 2010 by the respondent in Cause No. 390 of 2009. The proceedings before the respondent had been instituted against the applicant herein by Kenya Chemical and Allied Workers Union (the interested party). In the matter before the respondent the interested party had sought orders compelling the ex-parte applicant to sign a Recognition Agreement with the union (the interested party) to represent the interests of unionisable employees in the ex-parte applicant company so as to pave way for negotiations. Through an award delivered on 8th April, 2010 the respondent ordered that **"(I)n the premises the Respondent be and is hereby ordered to sign a Recognition Agreement with the Claimant within 30 days."** Just for clarification, the respondent before the Industrial Court was the ex-parte applicant in these proceedings and the claimant was the interested party herein.

According to the statutory statement, the grounds upon which reliefs are sought are:-

(a) That, the Award made by the Respondent on 8th April 2010 under Industrial Court of

Kenya Cause 390 of 2009 has no basis in law whatsoever. In addition, the Respondent completely disregarded the provisions of the Labour Relations Act sections 48 (6) and (7) and 54 in making the said Award.

(b) That, the Respondent failed to take into account the fact that the Interested Party had not attained a simple majority in its membership of unionisable employees within the Applicant's company as mandatorily required in a dispute over recognition.

(c) That, the Award issued and dated 8th April, 2009 is perverse and unreasonable as it is based on no evidence of a simple majority of unionisable employees from the Applicant company being members of the Interested Party which is a mandatory requirement of the law.

(d) That, the Award is prima facie erroneous, null and void *ab-initio* by reason of being *ultra vires* the applicable law.

(e) That, in issuing the Award dated 8th April 2009, the Respondent failed to uphold the rule of law resulting in breach of the applicant's legitimate expectation.

The ex-parte applicant appears not to have been satisfied with the grounds in support of the reliefs sought found in the statutory statement and on 2nd November, 2010 introduced other grounds and named them as grounds in support of the notice of motion. Order 53 Rule 4(1) of the Civil Procedure Rules provides that:-

"4. (1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."

From the above rule it is clear that it is only the grounds and relief set out in the statutory statement that can be relied upon by an applicant unless the court's leave has been sought to amend the statutory statement. I will therefore ignore the grounds in support of the substantive notice of motion.

The respondent opposed the application by way of grounds of opposition dated 31st May, 2012 as follows:-

1. That the application as drawn and instituted is incompetent, has no merit and is otherwise an abuse of the court process.

2. That the issues of membership of the interested party are matters of facts and evidence which were canvassed and a determination made on merit hence not amenable to Judicial Review.

3. That the application for leave is non-compliant with the procedural requirements of Order LIII Rule 3(1) of the Civil Procedure Rules (now repealed) having been instituted outside the 21 days period after grant of leave.

4. That the Respondent acted well within its jurisdiction and followed all tenets of natural justice and fair hearing in arriving at its decision.

The interested party opposed the application through the replying affidavit of Dola Indidis sworn on 9th May, 2012. From the said affidavit it can be gleaned that the interested party opposes the application on three grounds namely:-

(a) That this court has no jurisdiction to entertain the matter and the ex-parte applicant ought to have filed an appeal in the Court of Appeal as provided by Section 27(2) of the Labour Institutions Act 2007.

(b) That the application is made in bad faith and is only aimed at defeating the Award of the respondent; and

(c) That the ex-parte applicant did not comply with Section 13A of the Government Proceedings Act (Cap 40).

After going through the papers filed by the parties herein it becomes clear that the issues for consideration by this court are:-

1. Whether this court has jurisdiction to entertain this application;

2. Whether the application before this court is competent;

3. Whether the respondent acted outside its jurisdiction;

4. Whether the respondent acted in error of law or fact;

5. Whether the reliefs sought should be granted; and

6. Who should meet the costs of this application?

It must be noted from the outset that the decision being challenged herein was made pre-promulgation of the current Constitution on 27th August, 2010. Any comment made in this judgement will therefore be in reference to the legal regime that existed before the current Constitution came into force. The interested party's view is that this court does not have jurisdiction to deal with this matter. The ex-parte applicant thinks otherwise. The ex-parte applicant relied on the decisions in **KENYA AIRWAYS LIMITED VS KENYA AIRLINE PILOTS ASSOCIATION, NAIROBI H.C. MISC APPLICATION NO. 254 OF 2001** and **BROOKSIDE DAIRY LTD VS ATTORNEY GENERAL & ANOTHER, NAIROBI HIGH COURT CONSTITUTIONAL PETITION NO. 33 OF 2011** to support its argument that this court was before 27th August, 2010 vested with supervisory jurisdiction over the respondent. In the **KENYA AIRWAYS LIMITED** case Alnashir Visram, J (as he then was) opined that:-

"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 suggest 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 **BROOKSIDE DAIRY LTD** case Majanja J observed that:-

"The status of the Industrial Court in relation to the High Court has been somewhat controversial in view of conflicting decisions of the High Court. In the case of Mecol Limited v Attorney General and Others Nairobi HC Misc. App. 1784 of 2004 (Unreported) the High Court declared that the Industrial Court was a subordinate court for the purposes of the exercise of the supervisory jurisdiction of the High Court under Section 65 of the former Constitution. In Kenya Guards and Allied Workers Union v Security Guards Services and 38 Others Nairobi H.C. Misc. 1159 of 2003 (Unreported) the Court expressed a contrary view on the basis of legislature policy favouring finality of labour disputes.

I take the position that the Industrial Court, as a creature of statute, is a court subordinate to the High court. Parliament did not have the constitutional authority under the former Constitution to create a court of equivalent status with the High Court."

I agree with the above cited decisions. The Industrial Court as it was then constituted was a body subordinate to the High Court and its decisions were subject to the supervisory jurisdiction of the High

Court. The fact that Parliament had attempted to elevate it to the status of the High Court by providing that appeals against its decisions were to be filed at the Court of Appeal did not in any way cast away its cloth of inferiority. I therefore hold that this court has jurisdiction to hear this application.

One of the grounds of opposition taken by the respondent is that this application is incompetent in that the substantive notice of motion was filed outside 21 days from the date of the grant of leave. In my view this argument has no basis. From the court record it is clear that leave to commence these judicial review proceedings was granted to the ex-parte applicant by Maraga, J (as he then was) on 21st October, 2010. The applicant subsequently filed the substantive notice of motion on 2nd November, 2010 well within 21 days. The applicant's application is therefore competent and properly before this court.

Another issue raised about the application's incompetency is the claim by the interested party that the ex-parte applicant did not comply with the provisions of Section 13A of the Government Proceedings Act (Cap 40). The said Section provides that no proceedings shall be commenced against the Government until after the expiry of a period of 30 days after a notice in writing has been served in relation to those proceedings. On this issue I will let the Court of Appeal speak. In the case of **COMMISSIONER OF LANDS VS. KUNSTE HOTEL LTD, Civil Appeal No. 234 of 1995** the Court of Appeal was faced with the question as to whether Section 13A the Government Proceedings Act was applicable to judicial review proceedings and the Court concluded that:-

"The appellant's case in the superior Court and also that of the interested party was, firstly, that the notice of motion is an action and that the Commissioner of Lands being a government servant notice under s.136(2) of the Government Lands Act and s.13A of the Government Proceedings Act, Cap 40 Laws of Kenya, should have been but was not given. Consequently, the notice being mandatory the action was incompetent……

By virtue of the provisions of S.7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom, which is applicable in this country by reason of S.8 (2) of the Law Reform Act, prerogative writs were changed to be known as "Orders", except for the writ of habeas corpus. So S.8 (1) above denies the High Court the power to issue orders of mandamus, prohibition and certiorari while exercising Civil or Criminal jurisdiction. What that then means is that notwithstanding the wording of S.13A, above, which talks of proceedings, [in] exercising the power to issue or not to issue an order of certiorari the Court [is] neither exercising Civil nor Criminal jurisdiction. It would be exercising special jurisdiction which is outside the ambit of S. 136 (1) of the Government Lands Act, and also, S. 13 A of the Government Proceedings Act, which, had the matter under consideration been an action, would properly have been invoked to defeat the present matter. It should be noted that S. 13A, above, when read closely, its wording, clearly shows that a suit within the meaning of the term "Suit" in S. 2 of the Civil Procedure Act is envisaged. "

I have nothing useful to add to those wise words from the Court of Appeal. The interested party's objection to the application on this ground therefore fails.

Did the respondent act outside its jurisdiction? This question will be considered together with the question as to whether the respondent acted in error of law or fact. The grounds upon which the remedies of judicial review can be issued were listed by Lord Reid in the case of **ANISMINIC LIMITED V FOREIGN COMPENSATION COMMISSION [1969] 1 All ER 208** as follows:-

(a) The tribunal does or fails to do something in the course of its inquiry which is of such nature that its decision is a nullity.

(b) The decision is given in bad faith.

(c) The tribunal makes a decision which it has no power to make.

(d) The tribunal fails to comply with the requirements of the rules of natural justice

(e) The tribunal had misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it.

(f) The tribunal fails to take into account something which it was required to take into account.

In my view, the ex-parte applicant has not adduced any evidence to convince this court that the respondent acted in excess of its jurisdiction. The respondent had jurisdiction to hear and determine the dispute that was placed before it by the interested party.

The question that remains to be determined is whether the respondent acted in error of law by misinterpreting or misapplying the law. Did the respondent consider facts that it ought not to have considered? Did it fail to consider facts that it ought to have considered? Were its findings based on no evidence? Did the respondent arrive at a decision so unreasonable that no reasonable tribunal acting on the evidence and facts placed before it could have arrived at? I think those are the questions that this court needs to answer.

In my view the ex-parte applicant's case on these issues was clearly brought out through paragraphs 10-14 of the verifying affidavit of Mr. Joseph M. Kiara as follows:-

"10. That, the Interested Party served the Applicant on 26th November 2007 with a check-off list indicating its total membership of the unionisable employees at 77 names and sought for recognition claiming it had recruited a simple majority of the Applicant's employees. (Find annexed hereto and marked JK4 copy of the check-off list)

11. That, apparently, the check-off list served on the Applicant had grave and fatal errors to which the Applicant declined to demands of recognition. That the fatal errors are:

(a) That, it contained seventeen (17) names of employees of the Applicant who were listed as the Interested Party's members but had not signed the check off list. That, it suffices to state that affirmation of membership is by signing of the check off list.

(b) That by the 13th November, 2008, 29 (twenty nine) of the Interested Party's members had withdrawn from its membership. This fact is acknowledged by a letter signed by the Interested Party's Branch Secretary on 13th November, 2008. That it is important to note that the withdrawal was before Recognition could be attained. (Find Annexed hereto and marked JK 5 copy of the letter of the Interested Party and a bundle marked JK 6 copies of the withdrawing letters from the Interested Party's members addressed to the Applicant).

(c) That under the circumstances a total of 46 employees of the Applicant had effectively failed to join the membership of the Interested Party, and hence the Interested Party was not in a position to have achieved a simple majority.

12. That, I know as a fact that the Applicant's total workforce has never been less than 95 unionisable employees at all material times that the Interested Party sought for recognition and hence a simple majority would work out to be 48 unionisable employees. (Find annexed hereto and marked JK 7 and JK 8 bundle copies of the Muster Roll showing the names of all the employees by September, October, 2008 and July, 2010 and payments slips of the Interested Party's members respectively).

13. That, I am further informed by the Applicant's Advocate on record which information I verily believe to be true that the decision of the Respondent to deliver the Award on 8th April 2010 without observing or taking into consideration the fact that a simple majority of 95 works out to be 95/2 + 1 = 48 had not been achieved, renders the Award perverse and unreasonable.

14. That, I am advised by the Applicant's Advocates on record which advise I verily believe to be

true that the decision of the Respondent was not guided by the provision of the substantive Act that regulates recognition of a trade union. That the Award is contrary to the provision of Section 54 of the Labour Relations Act which stipulates that a union seeking recognition must attain a simple majority of members of unionsable employees within an enterprise.

The respondent's reply to these arguments is that the ex-parte applicant has based its application on disputed facts and the best forum for its case would have been an appellate court. In my view, the answer to the ex-parte applicant's case will be found in the Award of the respondent dated 8th April, 2010. The issue being raised by the ex-parte applicant is that the interested party had not recruited enough members to warrant recognition. The same issue had been raised before the respondent and the respondent captured the issue as follows:-

"The Respondent in a Memorandum of Reply dated 9th October 2009 has opposed the demand and prayer of the Claimant. It is contended that the Claimant has failed to achieve a simple majority of employees of the Respondent as its members. It is averred that from the list of names submitted in the check off forms, there were irregularities in the form of cancellation of certain names, some names did not have signatures and that employees had withdrawn their membership. It is claimed by the Respondent that upon scrutiny of the list only 19 members had by August 2009 remained as members of the Claimant. The Respondent contended that even if the Claimant was the most appropriate union to represent the interests of the workers of the Respondent and that there was no rival union claiming representation, the Claimant had failed to achieve a simple majority as required by law. It was therefore praying the Court to find and hold that the Claimant having failed to achieve a simple majority of the employees of the Respondent, it was not entitled to recognition and that therefore this claim is bound to fail and should be dismissed."

The respondent herein addressed the said issue at length as follows:-

The Court has considered the contents of the written memoranda, the appendices annexed thereto and the oral submissions. It is noted that Section 54(1) of the Labour Relatios Act, 2007 provides; "An employer, including an employer in the public service, shall recognize a trade union for purposes of collective bargaining if that trade union represents the simple majority of the unionisable employees."

The Claimant contends that it had sent a check off form showing that it had recruited 79 out of 90 unionisable employees. The Respondent counters that the unionisable employees were 95. This recruitment would still constitute more than a simple majority. The Respondent initially accepted this recruitment by deducting and remitting union dues in respect of 73 employees. This would constitute more than a simple majority of unionisable employees.

The Respondent states that by August 2009 the simple majority had reduced to 31%. This had happened according to the Respondent by cacellation of some of the names and resignation of others. It is not shown when those cancellations were made bearing in mind that the Respondent had initially accepted the list. The resignation of 29 employees is communicated by a third party and not by the employees themselves. They should have done it themselves if they had joined the union on their own. These resignations are hereby considered doubtful.

This dispute was investigated by the Ministry of Labour. A report was released to the parties and has been availed to the court as Appendix 11 of the Memorandum of Reply. It was a finding of the investigator that the Claimant had recruited more than a simple majority of employees of the Respondent as its own members.

It was also a finding of the investigation that, the Claimant had satisfied the requirements laid down in the law to entitle it to be accorded recognition. It was the recommendation of the Minister that the Claimant be accorded recognition. The findings are reasonable and so is the recommendation."

The ex-parte applicant did apply to the Respondent for a review of the said decision but through a ruling delivered on 30th July, 2010 the application for review was dismissed. The respondent noted that:-

"In this application the Applicant complains that the court made an error in deciding that the Respondent/Union had recruited a simple majority of the employees of the employer. This not an error on the face of the record, but it is the core of the decision of the dispute between the parties in the cause. It was arrived at after evaluation of all the evidence that was produced including but not limited to the findings and recommendation of an investigation of the dispute by the officials of the Ministry of Labour."

Looking at the decision of the respondent, it is clear that the respondent applied the law to the facts placed before it and reached its decision based on the evidence availed to it. It cannot be said it failed to consider the law and in particular Section 54 of the Labour Relations Act, 2007. It cannot be said that it failed to take into consideration factors it ought to have considered and neither can it be said that it took into consideration factors it ought not to have considered. The respondent did that which it was expected of it. If the ex-parte applicant was dissatisfied with that decision, then the avenue open to it was to file an appeal. There is nothing for this court to consider in its judicial review capacity. As was pointed out by the Court of Appeal in **KENYA PIPELINE COMPANY LIMITED V HYOSUNG EBARA COMPANY LIMITED & 2 OTHERS [2012] eKLR:-**

"In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly."

Echoing the words of the Court of Appeal, I must state that the respondent was entitled to reach the decision it reached so long as it was acting within its mandate and had complied with the rules of natural justice. It is not within the powers of this court to determine whether the respondent made a correct decision. Judicial review is not meant to give leeway to the judge to descend into the arena of a dispute and seize the issue by its scruff and place it before the court for determination. That would amount to usurping the powers bestowed on the respondent by Parliament. In short there is nothing for this court to review in the decision of the respondent. That being so, the ex-parte applicant is not entitled to the orders sought. The application before this court is therefore dismissed with costs to the respondent and interested party.

Dated, signed and delivered at Nairobi this 2nd day of May , 2013

W K KORIR,

JUDGE