REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CIVIL APPLICATION NO. 121 OF 2009

IN THE MATTER OF: AN APPLICATION BY OSERIAN DEVELOPMENT COMPANY LIMITED FOR THE JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF: TRADE DISPUTES ACT

AND

IN THE MATTER OF: THE EMPLOYMENT ACT

AND

IN THE MATTER OF: INDUSTRIAL COURT CAUSE NO. 41 OF 2008 KENYA PLANTATION AND AGRICULTURE WORKERS UNION VS OSERIAN DEVELOPMENT COMPANY LIMITED

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE INDUSTRIAL COURT OF KENYA.....RESPONDENT

AND

EX PARTE.....OSERIAN DEVELOPMENT COMPANY LIMITED

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 12th March 2009 filed the same day, the *ex parte* applicant herein, **Oserian Development Company Limited**, seeks the following orders:

a. **An Order of Certiorari do issue herein directed to the Industrial Court to remove to the**

High court and quash the award of the Industrial Court in Cause No. 41 of 2008. Kenya Plantation and Agriculture Workers Union Vs Oserian Development Company Limited.

b. **An order of Prohibition do issue herein directed to the Industrial Court prohibiting the Industrial Court from;**

i. **Requiring the Applicant to implement the Award dated 6tg February 2009;**
ii. **Publishing or causing to be published the Award dated 6th February 2009 in the Kenya Gazette.**

c. **The Respondent do bear the costs of this Application and of the entire proceedings.**

***EX PARTE* APPLICANT'S CASE**

2. The said Motion is supported by Statutory Statement filed with the Chamber Summons herein and Verifying Affidavit sworn by **Theodore George Tsakiris**, the ex parte applicant's Administrative Director on 20th February 2009.
3. According to the *ex parte* applicant, in accordance with the law the Collective Bargaining Agreement entered into between the applicant and Kenya Plantation and Agricultural Workers Union as a representative of all the unionisable employees of the applicant (hereinafter referred to as the CBA), received sanction of the Industrial Court on 9th February 2005 when it was registered with the Respondent. Clause 26 of the said agreement gives the Applicant right to summarily dismiss a unionisable employee for gross misconduct as described or defined therein. In addition, to the said CBA, the ***Employment Act***, as it was then, gave the applicant the statutory right to summarily dismiss an employee for similar reasons and the acts of gross misconduct under the said clause include absence from the place of work without leave or other lawful cause or if an employee commits or on any reasonable grounds is suspected to have committed a criminal offence against or to the substantial detriment of his employer or his employer's property. It is deposed that under S. 34 of the ***Trade Disputes Act***, any person who declares, instigates or incites others to take part in an unlawful strike or takes part in any such strike commits and is guilty of an offence and that an unlawful strike is to the substantial detriment of the employer.
4. On 30th January 2006, seven (7) unionisable employees of the applicant incited the Applicant's employees to stage a strike and abstain from work based on alleged non-payment by the applicant of Kshs. 800.00 to unionisable employees in their wages for January 2006. The payment of the said sum of Kshs. 800.00, according to the deponent had been the subject matter of a dispute before the Respondent and in its award delivered on 20th December 2005, the respondent ordered the Applicant to discontinue the payment of the said sum with effect from January 2006. The Applicant upon learning of the said strike, established that the affected employees were the instigators of the strike and in accordance with the law and the terms of the said CBA, the applicant exercised its right of summary dismissal as the affected employees were not only in breach of the agreement by instigating and participating in an unlawful strike but were also disobeying the court order given by the Industrial Court. After the applicant had taken the above action, the said union which is the official representative of the affected employees under the said CBA, approached the Applicant and pleaded with the Applicant on behalf of the said workers to review its decision and instead terminate the employment of the affected employees with benefits and although it was not obliged to do so, the Applicant acceded to the said request and agreed with the union to terminate the employment of its seven (7) employees and to consider the reinstatement of the last one **Mr. Thomas Nyakundi** to his employment. Subsequently, the said union attempted to resile from the said agreement by declaring a dispute and referring the matter to the Minister for investigations pursuant to the provisions of the ***Trade Disputes Act*** as it was then and in exercise of his powers under the said Act, the Minister appointed an investigator to investigate the circumstances surrounding the dispute and give his report pursuant to which the Investigator carried out the investigation as required by law. In the course of these investigations he invited and received representations both from the Applicant and the union and upon conclusion of his investigations he made the following findings of fact;

a. That the summary dismissal is no longer contentious on account of the negotiations between the parties on the 31st January 2006 whereby the dismissal of the services of the affected employees were reduced to normal termination.

b. That the incident leading to dismissal of the several workers' representatives occurred on the 30th January 2006 and which related to a labour dispute the provisions of which are found both in law and in the parties' CBA.

c. The union failed to adhere to the above state commitment by continuously failing to channel their grievances through the stipulated grievance handling machinery, and allowing the same to degenerate into industrial action time and again.

d. The management on the other hand failed to adhere to the above stated commitment by allowing themselves to be provoked to an extent of taking the unilateral decision to summarily dismiss the services of the seven shop stewards for participating in an illegal strike.

5. The investigator recommended that the mutual agreement or settlement reached between the Applicant and the said union to reduce the summary dismissal of the seven (7) employees to normal termination inclusive of the benefits be upheld or honoured. However, being aggrieved by the said decision, the union referred the dispute to the Industrial Court and in their pleadings or submissions to the Industrial Court, the union did not make reference to the settlement reached between parties on 31st January 2006 and the said report was submitted before the Industrial Court as part of the union pleadings or submissions. It is averred that the Industrial court did not request the parties to adduce evidence on the cause of the industrial dispute that occurred at the place of work on 30th January 2006 and that the Industrial Court did not adjudicate on this issue.
6. Upon hearing the parties on their respective submissions, the Industrial court gave an award in which the Industrial Court found that;

    a. The summary dismissal of the affected employees was wrongful and that the said employees were representatives of the workers and were summarily dismissed while performing their duties as workers' representatives.

    b. There was no evidence that the Applicant had accorded the seven (7) employees the opportunity to be heard on the allegations of gross misconduct being made against them.

7. Upon reading the said award and on the advice of the applicant's Advocates, **M/s Shapley Barret & Co**., the ex parte applicant believes that there was no evidence before the Industrial Court as to the nature of the activities that the affected employees were engaged in at the material time when they were dismissed and further the finding by the Industrial Court that the said employees were discharging duties as workers representatives is not supported by any evidence before the Industrial Court. In the applicant's view, the only finding of fact before the Industrial Court on this issue was the investigation report by the Minister for Labour which clearly stated that in view of the settlement reached between the Applicant and Union of 31st January 2006, the said Investigator had not found it necessary to make a finding of fact on the cause of the said industrial dispute.
8. Based on the said findings that the Applicant had acted wrongfully, the Industrial Court ordered the unconditional reinstatement of the 7 employees and payment of all their salaries and other benefits from the time of dismissal up to the time of reinstatement.

RESPONDENTS' AND INTERESTED PARTY'S CASE

9. From the record both the Respondent and the Interested Party did not file any response to the application. The respondent however, filed submissions.

EX PARTE **APPLICANT'S SUBMISSIONS**

10. On behalf of the *ex parte* applicant, it was submitted that the respondent, the Industrial Court, was at all material times a Court established under the provisions of the Trade Disputes Act (now repealed) with special jurisdiction as prescribed under the said statute. Relying on **Kenyatta University vs. Industrial Court of Kenya Misc. Application No. 430 of 2007**, it was submitted that the High Court has jurisdiction to supervise the Industrial Court as it existed prior to the current Constitution and that should it find that the Industrial Court acted in excess of its jurisdiction, then the High Court would have jurisdiction to quash the decision if it was reached ultra vires the jurisdiction of the said industrial court. It is therefore submitted that this suit is properly before this Court in so far as the decision challenged herein was delivered on 6th February 2009 and these proceedings commenced on 23rd February 2009 before the new Constitution came into effect.
11. It is submitted that at present one of the seven persons, **Samuel Kiriga** is deceased and another, **Thomas Nyakundi**, has since collected his terminal dues from the applicant and signed a Discharge withdrawing any further claims against the Applicant leaving only 5 of the initial 7 employees still pursuing the matter.
12. While reiterating the contents of the verifying affidavit, the applicants prayed that the court allows the applicant's Notice of Motion dated 12th March 2009 and find inter alia as follows:

a. That the Industrial Court acted without jurisdiction in taking cognisance and hearing the dispute after the applicant and the affected employees Union had already resolved the dispute and entered into a settlement.
b. That the Industrial Court went beyond its jurisdiction and acted unfairly by declining or refusing to take cognisance of the fact that the Minister's Investigation Report had made a finding of fact that the Applicant and the affected employees' Union had reached a settlement and by reason thereof the said investigator did not find it necessary to investigate and establish the facts regarding the cause of the industrial dispute and/or the summary dismissal referred to above because this was nolonger in issue.
c. That the Industrial Court acted beyond its jurisdiction and unfairly by making a finding that the affected employees were engaged in a lawful activity as the workers' representatives without making any finding of fact as to the nature of the lawful activities relied upon to support the said finding.
d. That the Award of the Industrial Court is so unreasonable as to be wholly and manifestly wrong.
e. That the Award of the Industrial Court denied the applicant the right to a fair hearing by holding that the applicant acted unlawfully in the absence of any finding of fact as to the cause of the Industrial dispute and the said summary dismissal.
f. That there was no jurisdiction to make an Award of a claim for wrongful dismissal and reinstatement where there has been a settlement and/or where there is no finding of fact before the Court to support any wrongdoing by the employer in terminating the employment of the affected employees.
g. That there is no jurisdiction by the Industrial Court to make an order for reinstatement of employees without or before considering and/or determining the factors set out under Statute and which are required to be considered before such order for reinstatement is made.
h. That there is no jurisdiction to make an Award that does not comply with the law.

13. On the part of the respondent, it was submitted that the grievants were not given either reasons for dismissal or a chance to be heard and that in the report and observation by the Minister it emerged that the dismissal violated the spirit of ***International Labour Organisation Convention*** No. 135 and the provisions of section 17 of the ***Employment Act*** Cap 226 hence the employer failed to adhere to the cardinal rule of natural justice. It is therefore submitted that the foregoing justifies the finding of the court that indeed the dismissal was wrongful.
14. It is submitted that the Industrial Court as it was established then had the mandate to hear and determine labour disputes under the statute, both the ***Employment Act*** Cap 226, and ***Trade Disputes Act*** and that the dispute was legally and procedurally referred to the Court when recommendations of the Minister was disputed by the parties.

15. According to the respondent, judicial review proceedings is special jurisdiction, that is only invoked where it is found that the process making the decision so challenged did not meet the principles of natural justice, due process and/or it is within Wednesbury's principle of unreasonableness that the decision was so irrational or reached without following the due process that no reasonable body placed in the same situation can arrive at such decision. It is therefore submitted that it is not about the merits or demerits of the decision but the process and where the merits and demerits of a decision being challenged is in question, the remedy lies to Court of Appeal. According to the respondent, in the present case, both parties were given an opportunity of being heard, and were heard and that the Court considered the oral and written submissions before arriving at the decision. It is submitted that it is also clear that the Court had jurisdiction under the statute to hear and determine the dispute as it did.
16. To the respondent, there is no evidence of arbitrariness, oppressiveness or otherwise, in the conduct of the court and the decision so arrived at cannot be described as irrational but is based on sound principles of the law and well-reasoned. It is therefore submitted that the application before the court does not meet the threshold for judicial review and hence ought to be dismissed with costs.

DETERMINATIONS

17. After considering the foregoing this is the view I form of the matter.
18. However, before going into the merits of the matter, the first issue for determination is whether this Court has the jurisdiction to review a decision made by the Industrial Court as it then existed before the promulgation of the Constitution of Kenya 2010. The said court was established under section 14 the ***Trade Disputes Act***. Under the said section, the court was established by an order of the president and was not one of the superior courts under the former Constitution. The status of that court was the subject of **Kenya Airways Limited vs. Kenya Airline Pilots Association Nairobi HCMA No. 254 of 2001 [2001] KLR 520,** in which **Visram, J** (as he then was) held that the Industrial Court is a subordinate court 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 and 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, a distinction is to be drawn between an error of law which affects the jurisdiction and one which does not. The learned Judge further held that where an Act contains a finality clause that Act cannot prevent the High Court from acting where the inferior tribunal has acted without jurisdiction.
19. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect. Many modern statutes contain provisions, which attempt to remove decisions of tribunals or Ministers from review by the courts by making these decisions 'final' or 'conclusive'. The remedy by *certiorari* is never taken away by statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal" but does not mean without recourse to *certiorari.* It makes the decision final on the facts but not final on the law. Notwithstanding that the decision is by statute made "final" *certiorari* can still issue for excess of jurisdiction or for an error of law on the face of the records…… And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the

course of its exercise……. A statute setting up a tribunal may of course, in clear and precise words, debar any inquiry that may be necessary to decide whether the tribunal has acted within its authority or jurisdiction and such a provision would operate to debar contentions that the tribunal while acting within its jurisdiction has to come to wrong or erroneous conclusions. There would, however, even in such a case, be no difficulty in pursuing and adducing evidence in support of an allegation, for instance, that the members of the tribunal had never been appointed to act as such members or that those who had been appointed had by some irregular conduct disqualified themselves for membership of the tribunal. Further, it seems, there would be no difficulty in raising any matter that goes to the right or power of the tribunal to exercise the function of the power vested upon it. What an ouster clause does is to forbid any questioning of the correctness or the validity of a decision or determination, which it was within the area of jurisdiction of the tribunal to make. If the tribunal while acting within its jurisdiction makes an error, which it reveals on the face of its recorded determination, then the Court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a Court of law. If a particular issue is left to the tribunal to decide, then even where it is shown that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters, which are left to the tribunal for its decision such errors, will be errors within jurisdiction. If issues of law as well as facts are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called up in question in any court of law. If, therefore a tribunal while within its area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or as is often expressed, on the face of the record) then the superior Court could correct that error unless it was forbidden to do so and it would be so forbidden if the determination was 'not to be called in question in any court of law'. If so forbidden it could not then even hear the argument which suggested that error of law has been made. It could however, still consider whether the determination was within 'the area of the inferior jurisdiction'."

20. Accordingly, I hold that this Court has the jurisdiction to exercise its supervisory jurisdiction over the decisions of the Industrial Court as then constituted notwithstanding the finality clause in the repealed ***Trade Disputes Act***.
21. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal held:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

22. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual

judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

23. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

24. Similarly in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**, the Court expressed itself as follows:

"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…....…Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced…….It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles…..So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts."

25. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Court citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done,

that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

26. In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

27. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003**, **Omolo J.A**. stated as follows;

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."

28. It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him. Therefore in cases where the credibility of the witnesses is in issue, even an appellate court will not lightly interfere with a decision of the lower court since in that case the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence. The well known legal principle is that in the realm of "pure" fact, the advantage which the judge derives from seeing and hearing the witness must always be respected by an appellate court and that the importance played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, where credibility is crucial and the appellate court can hardly ever interfere. See **Aga Khan Hospital vs. Busan Munyambu KAR 378; [1976-1985] EA 3; [1985] KLR 127.**
29. However, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. Therefore where no evidence is adduced in respect of an issue and the Court goes ahead to make a finding of fact unsupported by evidence, such a finding would in my view be irrational since it would be arrived at as a consequence of gross unreasonableness as no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision taking into account the fact that there were no facts presented in support thereof. The decision, accordingly would be in defiance of logic. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary.
30. In this case, it is contended that the Industrial Court arrived at decisions which were not supported by evidence and on which the parties were not heard hence were arrived at in breach of the rules of natural justice. It is contended in the affidavit in support of the application that there was no evidence before the Industrial Court as to the nature of the activities that the affected employees were engaged in at the material time when they were dismissed and that the finding by the Industrial Court that the said employees were discharging duties as workers representatives is not supported by any evidence before the Industrial Court.
31. Whereas I agree that if the findings of the Industrial Court were not supported by evidence that would amount to irrationality and to an extent amount to breach of the rules of natural justice, for the Court to make such a finding it would be necessary that the proceedings which were before the Industrial Court be exhibited. In the absence of such proceedings, there is simply no material upon which this Court can make a finding in favour of the applicant based on the aforesaid allegations.

ORDER

32. In the result I am unable, based on the material on record to uphold the submissions made on behalf of the applicant with the result that the Notice of Motion dated 12th March 2009 fails and is dismissed but with no order as to costs as the respondent and the interested parties failed to respond to the application.

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Wananda for the applicant and Ms Omondi for Guserwa for the Interested Party