



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR. MISC. CIVIL. APP. NO.161 OF 2011

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY
FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF: THE LABOUR INSTITUTIONS ACT, NO.10 OF 2007

AND

IN THE MATTER OF: AN ORDER ISSUED ON THE 17TH JUNE 2011

**BY THE INDUSTRIAL COURT IN THE CAUSE NO.394(N) OF 2009; SIMON
MUKIRI AND 58 OTHERS -VS- DOMINION ENGINEERING WORKS LTD**

BETWEEN

DOMINION ENGINEERING WORKS LTD.....APPLICANT

AND

THE INDUSTRIAL COURT OF KENYA.....RESPONDENT

AND

**SIMON MUKIRI & 56 OTHERS.....INTERESTED
PARTY**

RULING

This is a ruling on an application filed under Certificate of Urgency by the Exparte Applicant, Dominion Engineering Works Ltd (*hereinafter referred to as the Applicant*) vide a Chamber Summons dated 11th July 2011 seeking the following orders:

- (1) THAT the Honourable Court be pleased to certify this matter as urgent.
- (2) THAT service of this application be dispensed with in the first instance due to its urgency.

(3) THAT the Honourable Court be pleased to grant the Applicant leave to apply for:

(a) An order of certiorari to remove to this Honourable Court for the purpose of being quashed the decision contained in the Respondent's Order dated 17th June 2011 striking out from the record a Notice of Change of Advocates filed on 1st March 2011 and also setting aside a consent filed on 20th May 2011 in Industrial Court Cause No.394(N) of 2009; Simon Mukiri & 58 Others –vs- Dominion Engineering Works Limited.

(b) An Order of prohibition to restrain the Respondent, its Registrar and officers subordinate to him/her from dealing with the matter to the detriment of the Applicant.

(4) THAT an order be issued that the grant of leave do operate as a stay to prohibit any further action in Industrial Cause No.394(N) of 2009; Simon Mukiri & 58 Others –vs- Dominion Engineering Works Limited either by way of execution against the Applicant or otherwise until the determination of this Judicial Review Cause.

(5) THAT costs of this application be provided for.

The application is supported by the statutory statement of facts dated 11th July 2012, the verifying affidavit sworn by Avtar Singh Bhabra, the managing director of the Applicant herein and the supplementary affidavit sworn by Job Mwangi Thiga, Counsel for the Applicant. The application is based on the following seven grounds:

1. The Respondent made or issued an order on 17th June 2011 setting aside a Consent Order filed in Industrial Court Cause No.394(N) of 2009; Simon Mukiri & 58 Others –vs- Dominion Engineering Works Limited which had marked the matter as settled.

2. The order complained of was made at unscheduled sitting of the Respondent which act was procedurally wrong and *ultra vires* its powers and without any colour of right, a nullity, invalid and void *ab initio*.

3. The affected parties being the Respondent and the firm of M/s Munyalo Muli & Co. Advocates were not heard prior to the making of the said Order contrary to the principle of natural justice that posits that a party must not be condemned unheard.

4. The Applicant, to whom a legitimate expectation of closure of the Industrial Claim had accrued, thereby lost the benefit of the same unheard.

5. The Respondent made the order despite there clearly being no sufficient evidence that M/s Njeri Mburu & Co. Advocates had full and exclusive instructions from all the Interested Parties or that M/s Munyalo Muli & Co. Advocates had absolutely no instructions in the matter from the said parties.

6. The Respondent's decision contained in the order made on 17th June 2011 is in the circumstances reckless, malicious, unreasonable and motivated by ulterior motives and amounts to abuse of office in that the judgment sought to be reinstated and which was being challenged by the Review Application was clearly unprocedural, unlawful and illegal having been entered without any proof whatsoever from the interested parties as averred in paragraph 2 above.

7. It is only this Honourable Court exercising its supervisory jurisdiction Under Order 53 of the Civil Procedure Rules that is capable of redressing the injustices occasioned upon the applicant by the decision of the Respondent aforesaid.

The application is opposed by the Respondent and the Interested parties.

The Respondent filed grounds of opposition on 20th September 2011 while the Interested parties opposed the application through replying affidavits sworn by Alois Otieno and Njeri Mburu on 15th July 2011. Alois Otieno swore the affidavit on his own behalf and on behalf of Simon Mukiri as the two were the claimants in Industrial Cause No.394 (N) of 2009 filed on their own behalf and on behalf of 56 other former employees of the applicant.

To advance their respective positions, each of the parties filed written submissions which their advocates highlighted before me on 6th December 2011.

The undisputed facts in this case are that the Applicant was the Respondent in Industrial Court Cause No.394 (N) of 2009 instituted by the Interested Parties herein on 23rd July 2009 claiming employment benefits. By an award made on 19th November 2009, the Industrial Court found in favour of the applicants (now interested parties) and ordered the Respondent (the applicants herein) to pay the Interested Parties the terminal dues claimed in the Industrial Court action. By this time the advocates on record for the Interested Parties were Njeri Mburu & Co. Advocates but by a notice of change of advocates dated 1st March 2011, the firm of M/s Munyalo & Co. Advocates replaced the firm of Njeri Mburu & Company Advocates.

Before the change of advocates was effected, the applicants herein aggrieved by the award given by the Respondent had on 19th November 2009 filed an application for review of those orders on 26th August 2010 on grounds that they had discovered new evidence to the effect that the Interested Parties had already been paid their terminal dues before they had filed the claim at the Industrial Court.

Before this application for review was fixed for hearing, the firm of Munyalo Muli & Company Advocates purporting to act for the Interested Parties and the firm of Waruhiu K'Owade and Ng'ang'a Advocates for the Applicants filed a letter of consent on 20th May 2011 marking the matter as settled. Njeri Mburu, Counsel for the Interested Parties depones in her replying affidavit that she had not been served with the notice of change of Advocates and she did not know that a consent had been filed in the matter and that she only discovered that the firm of Munyalo Muli & Co. Advocates had taken over the matter when she was informed of the development by a letter addressed to her by the Applicant's advocates after she had served them with an application to commit the director of the Applicant to civil jail for failure to settle the award.

She further depones that upon receipt of that information, she filed

an application at the Industrial Court to strike out the notice of change of advocates and the consent filed on 20th May 2011. It is the case of the Respondent and the Interested Parties though this is disputed by the Applicants that both the applicants and the Interested parties were heard on that application before J. Chemuttut allowed the application striking off the record the notice of change of advocates filed by Munyalo Muli & Co. Advocates and setting aside the consent filed on 20th May 2011. This was done on 17th June 2011 and this is what triggered the current application seeking leave for the Applicant to commence Judicial Review proceedings.

The Applicant contends that leave should be granted to challenge the orders of the Respondent issued on 17th June 2011 because the Respondent did not follow the correct procedure before issuing those orders. It was argued on behalf of the applicant that the Orders were issued at an unscheduled sitting of the court and nor the firm of Munyalo Muli & Co. Advocates nor the advocates for the Applicant (then Respondent) and the firm of Njeri Mburu & Co. Advocates who had filed the application were given opportunity to be heard before the court issued final orders on 17th June 2011.

The Applicant claims that it had acquired legitimate expectation that the case had been closed after letter of consent was filed and it is a party which was directly affected by the impugned orders and should have been heard before they were issued.

The Respondent on its part through Counsel M/s Mahari contends that the application is an abuse of the court process since there was evidence that Counsels representing the parties were heard before the setting aside orders were issued.

M/s Mahari submitted that the applicant's remedy does not lie in Judicial Review but in an appeal to a superior court or by Review to the Industrial Court since the applicant was not challenging the award in the Industrial Court Cause.

Mr. Maina, on behalf of the Interested parties submitted that the applicant had no *locus standi* to bring the instant application as the same is filed on behalf of Munyalo Muli & Co. Advocates which is the aggrieved party with respect to the consent that was set aside. This submission was informed by the applicant's position that the firm of Munyalo Muli & Co. Advocate was not heard before they were struck off the court record.

It is also the Interested Parties' case that the application was filed

with the sole aim of delaying payment of the award made in their favour at the Industrial Court and that substantive justice demands that the application is dismissed so that they are able to reap the fruits of the award to avoid any further delay.

Having summarized the cases presented by the parties herein, I now wish to turn to the preliminary point on jurisdiction raised by the Respondent. The Respondent has raised an objection on a point of law in its grounds of opposition to the application to the effect that this court does not have jurisdiction to entertain these proceedings in the light of Articles 162, 165(5), (6) and 169 of the Constitution.

Article 162(2) of the Constitution reads as follows:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land”.

Article 162 (3)

“Parliament shall determine the jurisdiction and functions of the courts contemplated in clause 2”.

The effect of Articles 165(5),(6) and 169(d) of the Constitution whose content I do not see the need of duplicating here when read together is to oust the supervisory jurisdiction of the High Court over the courts contemplated or established under Article 162 (2). A reading of the above Constitutional provisions leave no doubt that once the court to deal with disputes relating to employment and labour relations is established by Parliament in accordance with Article 162(2) of the Constitution, that court will have the status of the High Court and will not be subject to the supervisory jurisdiction of this court.

However, it is common ground that though parliament passed the Industrial Court Act in August 2011 (***herein referred to as the Act***) which established at Section 4, the Industrial Court which is the Court contemplated by Article 162 (2) of the Constitution, the said court is yet to be constituted and operationalized and before this is done by virtue of Section 33 of the Industrial Court Act (***transitional provision***) all proceedings pending before the Industrial Court as presently constituted will continue to be heard and determined by that court until the Industrial Court established under the Act comes into operation or other directions are given by either the Chief Justice or the Chief Registrar of the High Court.

I am to date not aware of any directions given by the Chief Justice or the Chief Registrar under Section 33 of the Act.

It is clear from the pleadings and submissions by the parties herein that the Industrial Court Cause No.349 (N) of 2009 was filed in Year 2009 and the impugned orders were made on 17th June 2011. Though the orders were made after the promulgation of the Constitution of Kenya 2010, the Courts with the status of the High Court contemplated under Article 162(2) were not constituted then and have not been constituted to date.

As matters now stand, Cause No.349 (N) of 2009 is still properly before the current Industrial Court established under the Labour Institutions Act of 1997 which is still subject to the supervisory jurisdiction of the High Court. If one looks at the wording of the Respondent's objection to these proceedings on account of jurisdiction, it is not difficult to see that the Respondent was making a tacit admission that prior to the promulgation of the Constitution of Kenya 2010, the Industrial Court as currently constituted was an inferior court to the High Court subject to the High Court's supervisory jurisdiction.

In the circumstances, I find no merit in the said preliminary objection and it is hereby dismissed. I find that this court has jurisdiction to entertain these proceedings.

Coming now to the issues raised in this application, I wish to state at the outset that I am aware that this being an application for leave, I am not required to investigate in depth the merits of the application but in order to grant leave, I should be satisfied that *prima facie*, the applicant has made out an arguable case which has chances of succeeding at the substantive hearing.

I am guided in this regard by the test that was laid by the Court of Appeal in the case of Njuguna -Vs- Minister of Agriculture [2000] IEA 184; 185 where it was held as follows:

“The test as to whether leave should be granted to an applicant for judicial review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application”

In this case the major complaint by the applicant is that it was not given an opportunity to be heard before the consent order marking the Industrial Court case as settled though it was a party that was directly and adversely affected by the decision. I agree with Mr. Thiga that by virtue of that consent, the applicant had acquired legitimate expectations that the matter at the Industrial Court was settled and had a right to be heard before such consent was set aside. To that extent the applicant had *locus standi* to file the current application for leave.

However, looking at the impugned order annexed to Njeri Mburu's replying affidavit, it is clear that both Counsel for the Applicant and the Interested parties were heard at length before the said orders were issued. If the orders had been made at an unscheduled sitting of the Respondent, it is not clear how both parties got to know about the hearing and made an appearance before the Industrial Court. None of the parties disclosed to the court how their attendance was procured on that date. However, the important point to note is that both parties attended the Industrial Court at its sitting on 17th June 2011 and were heard before the impugned orders were issued. I make this finding as I have no reason to doubt the contents of the order issued by the Industrial Court exhibited as annexure NM7 to Njeri Mburu's Replying affidavit.

Secondly, it is important to note that the applicant is not challenging in these proceedings the award made by the Industrial Court. The applicant has however challenged the said award through filing a notice of appeal to the Court of Appeal and by filing an application for review at the Industrial Court which is yet to be heard.

The effect of the impugned orders was to reinstate the award and the other proceedings pending in the Industrial Court and since the applicant was aggrieved by the award, a way was opened for it to challenge the award through pursuing its application for review or appeal to the Court of Appeal. Unless the claim by the Interested parties that the applicant filed this application to buy time and frustrate execution of the said award is true, it is my finding that this is the remedy that was most suitable for the applicant to pursue instead of filing this application and in my opinion it remains the best remedy as it will

substantively address and resolve the main dispute between the parties herein.

Since Judicial review is concerned with the decision making process and not the merits of the decision being challenged, it is my considered view that in this case the Applicant has not demonstrated that ***prima facie***, the Respondent violated any statutory procedure or breached the rules of natural justice in the process of arriving at the impugned decision. The applicant has therefore failed to establish a ***prima facie*** and arguable case that would justify the grant of leave as prayed.

Consequently, I find no merit in the Chamber Summons application dated 11th July 2011 and it is hereby dismissed with no orders as to costs.

Dated, Signed and Delivered by me at Nairobi this 2nd day of March 2012.

C. W. GITHUA

JUDGE

In the presence of:

Florence – Court Clerk

N/A for the Applicant

N/A for the Respondent

N/A for Interested Parties

Though notified of today's Ruling date