



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Petition 105 of 2010

IN THE MATTER OF SECTION 84(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 70, 75 AND 84 OF THE CONSTITUTION

BETWEEN

NAKURU INDUSTRIESPETITIONER

VERSUS

THE INDUSTRIAL COURT1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

JUDGMENT

1. In the petition dated 11th March 2010, the petitioner seeks the following orders:

(a) A declaration that section 27 of the Labour Institutions Act is unconstitutional for being inconsistent with Section 64 of the Constitution.

(b) A declaration that the 1st Respondent has breached the petitioner’s rights under section 70(a) and 77(9) when it failed to dismiss Industrial Cause Number 462 N of 2009 pursuant to section 73(3) of the Labour Institutions Act.

2. The petition is supported by the affidavit of R. P. Shah, a Director of the petitioner, sworn on the 16th of March 2010. The petitioner also filed written submissions dated 22nd May 2012.

3. The respondents oppose the petition and have filed Grounds of Opposition dated 17th February 2010 as follows:

i. No constitutional issue is raised in the petition.

ii. There is no violation of any constitutional right of the petitioners

iii. Section 27 of the Labour Institutions Act is not inconsistent with section 64 of the constitution.

iv. The Petitioners have deliberately refused to exercise their right of appeal.

4. The petition was argued before me on the 28th of May 2012 when the petitioner's Counsel indicated that the prayer regarding constitutionality of Section 27 of the Labour Institutions Act is now moot as the Industrial Court is now anchored in the Constitution and a right of appeal from its decisions to the Court of Appeal provided for. The court is therefore only required to deal with the question whether there was a breach of the petitioner's rights under section 70(a) and 77(9) of the former Constitution.

The Petitioner's Case

5. The facts as set out in the petition and the supporting affidavit of R. P .Shah are that in June 2009, the petitioner declared 51 of its employees redundant on terms negotiated and agreed on with the workers' union. The terms of the agreement were contained in an agreement dated 25th June 2009 which was witnessed by the Chief Industrial Relations officer in the Ministry of Labour. Pursuant to this agreement, the petitioner states that it made payment of the agreed sums to the Labour Office in Nakuru. A copy of the agreement dated the 25th of June 2009 entered into between the petitioner and the Tailors and Textiles Workers Union is annexed to the supporting affidavit of R.P Shah as annexure **RPS1**.

6. Some of the workers were, however, dissatisfied with the agreement arrived at by the union and the petitioner and instituted proceedings at the Industrial Court being Cause Number 327(N) of 2009. The Industrial Court found that their claim was in breach of section 73(3) of the Labour Relations Act, dismissed the complainant's Notice of Motion on 8th July 2009 and the workers thereafter withdrew their case.

7. Soon thereafter, however, without filing an appeal against the decision in Cause No. 327N of 2009, the workers filed yet another case in breach of Section 73(3) of the Labour Relations Act being Industrial Cause No. 462N of 2009 which repeated the same claims as had been made in Industrial Cause No. 327N which had been withdrawn.

8. To the petitioner's objection that the 1st respondent had already found that the workers could not make a claim against it without going through the union as required by the Labour Relations Act, the 1st respondent, in a ruling delivered on the 11th of February 2010, dismissed the objection on the basis that it relied on the doctrine of res judicata and estoppel which were not applicable to disputes before it. The 1st respondent also declined to avail its proceedings to the petitioner to enable it appeal against its decision.

9. The petitioner then filed this petition and obtained orders on the 30th of July 2010 staying proceedings in Cause No. 462N of 2009 which orders were duly served on the respondent on the 9th of August 2010 but despite these orders, the 1st respondent went on to issue an award on the 9th of February 2011 in Cause No 462 N of 2009.

10. The petitioner contends that the provisions of Section 70(a) of the former constitution required that the Industrial Court enforce Section 73(3) of the Labour Relations Act by insisting that claims by union members against the petitioner should be brought only by and through the union.

11. The petitioner contends further that the refusal by the second bench in Cause No. 462N of 2009 to uphold the provisions of Section 73(3) of the Labour Relations Act, which had initially been upheld by a different bench of the 1st respondent in Cause No 327N of 2009 in a dispute involving the same parties, indicated that the second bench had to have lacked impartiality for it to arrive at this decision.

12. The petitioner submits that the High Court has power to adjudicate on any claim that there is an infringement of a constitutional right and refers to the case of **Labhsons Limited-v-Manula Hauliers Ltd HCCC 204 OF 2003** and **Cannon Assurance Limited-v-Fredrick Kabue HCCC 523 of 1996 (Unreported)**

13. The petitioner submits further that the award of the 1st respondent in Cause No. 462N of 2009 was made in blatant breach of the orders of this court and contend therefore that this is ample ground for staying execution of that award until this matter is determined. It relies on the case of **Omega Enterprises Kenya Limited -v-KTDC & Others (1998) eKLR** for the proposition that an order of the court, even if irregular, remains an order, to be observed until it is set aside or varied. The principle is a key cornerstone of the justice system which required the maintenance of the court's dignity by observance of its orders. The court's dignity would be eroded if the orders sought by the petitioner were not granted.

The Respondent's Case

14. Mr. Moimbo presented the case for the respondents and relied on the grounds of objection dated 17th February 2011 and the written submissions dated 12th April 2012. While agreeing with the petitioner, as stated by the court in **Cannon Assurance Limited -v- Fredrick Kabue** (supra) that the court has jurisdiction to protect parties before it with genuine claims, Mr. Moimbo submitted that this petition does not raise any constitutional issue.

15. According to the respondents, the petitioner was indolent and had failed to exercise its statutory right of review or appeal, and such indolence could not give rise to a constitutional right. For the court to determine this petition would amount to the court sitting on appeal on the decision of the Industrial Court. The petition was misconceived and an abuse of the court process and ought to be dismissed.

16. Mr. Moimbo referred to sections 11(1) and 12(1) of the Labour Institutions Act and submitted that these sections give the Industrial Court jurisdiction to hear, determine and grant appropriate reliefs in respect of disputes between employers and employees. The matter before the court was a labour issue which the petitioner was alleging had given rise to a constitutional issue yet it was the petitioner who had chosen to walk out of the proceedings before the Industrial Court and file this constitutional petition based on its assessment of the conduct of the judge of the Industrial Court seized of Cause No. 462N of 2009.

17. The failure to file pleadings by the petitioner and to walk out of the proceedings before the Industrial Court and then file this petition was, in the view of the respondents, an abuse of the court process and based on the decision in the case of **Harrikisoon -v- A.G of Trinidad & Tobago (1980) AC 265** and **Alphonse Mwangemi Munga & 10 others -v- African Safaris Club Ltd**, litigants cannot be allowed to overlook statutory processes and file constitutional petition; they should only use existing processes to litigate claims which are not constitutional and should not convert everything into a constitutional issue. Mr. Moimbo also relied on the case of **Nairobi Safari Club Registered Trustees -v- Industrial Court of Kenya & Another Misc. Civil Appl. No. 605 of 2009**, where the court held that it could only inquire if the decision of the Industrial Court was arrived at in excess of jurisdiction

18. The respondents submit further that the petitioner was given an opportunity to present its case before the Industrial Court but failed to do so, its Counsel instead walking out of the proceedings; that it was ably represented by Counsel as provided by law, and it had submitted to the jurisdiction of the Industrial Court and it participated in Cause No 462(N) of 2009 and Cause No 327(N) of 2009. It cannot therefore question the jurisdiction of the Industrial Court. The respondents contend also that the petitioner has not cited any rule of procedure that was breached by the respondent and states that the award of the Court in Cause No. 462N of 2009 was based on merits. This petition is an abuse of the court process and should be dismissed with costs.

Determination

19. The only prayer that the petitioner seeks to have determined by this court is prayer No. b) which seeks

(b) A declaration that the 1st Respondent has breached the petitioner's rights under section 70(a) and 77(9) when it failed to dismiss Industrial Cause Number 462 N of 2009 pursuant to section 73(3) of the Labour Institutions Act.

20. From the submissions before me, I believe that there is no dispute with regard to the jurisdiction of the Industrial Court as provided under the Labour Institutions Act. What is in dispute is whether the Court has exercised its jurisdiction in accordance with the law, or whether it has failed to do so and thereby violated the petitioner's rights under the former constitution.

Violation of the Constitution

21. Section 70(a) of the former Constitution guaranteed to all, among other things, protection of the law while Section 77(9) provided that

'A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.'

22. I will deal first with the contention by the petitioner that in arriving at the decision it did in Cause No. 426N of 2009, the 1st respondent violated the petitioner's rights under Section 77(9) of the former constitution.

23. I have looked at the proceedings before the 1st respondent in Cause No. 426N. It is clear from the ruling of the 1st respondent dated 11th February 2010 that it availed the petitioner an opportunity to present its case before the Court when it gave its directions in the said ruling on 11th of February 2010, as follows

i. That the company are directed to file their reply statement to the claim on or before 26th February 2010;

ii. That the union are also directed to submit their rejoinder, if any, on or before 12th March 2010.

iii. That the parties should appear before me for mention of this dispute on 18th March 2010, at 9.30 a.m. to fix a convenient date for hearing of the main dispute on its own merits.

24. The 1st respondent had in that ruling also observed that the question whether the matter had been settled between the company and the union or not, and whether the settlement between the union and the company was adequate or not, could only be considered when the matter came up for consideration on its merits.

25. In the award made on 9th of February 2011, the 1st respondent, after setting out the directions above which it had given on the 10th of February 2010, observed as follows:

On 18th March 2010 the above mentioned counsel for the parties appeared, and by mutual agreement the dispute was fixed for hearing on 7th July 2010. The learned counsel for the company Mr. Ogunde did not file his reply statement on 26th February 2010 as directed, and on 7th July 2010 he attempted to file a stay order of this case arising from High Court Petition No 105 of 2010. However the court found out that the stay order related to cause no 327(N) of 2009. In the circumstances, the learned counsel for the Company Mr. Ogunde applied to be allowed to obtain and present a proper order for stay. Mr. Olonyi, for the claimants opposed the application for stay on three grounds, namely: (i) that the stay order did not relate to the case at hand, i.e cause No 462(N) of 2009, (ii) that he had not been served with the copy of the stay order, and (iii) that the

application for stay was an attempt to derail and delay the proceedings. The court upheld the objection and also observed that the Industrial Court is a special Court exercising special jurisdiction, and it is not subordinate to the High Court. On realizing that he had extracted the wrong order and that he had refused or neglected or failed to file his reply statement to the claim, Mr Ogunde existed from the proceedings on his own volition and the matter was heard in his absence.

26. The court concluded that the demand by the learned counsel for the claimants, Mr. Olonyi, stood unchallenged and granted the orders prayed for.

27. Clearly, it cannot be said that the petitioner's rights under Section 77(9) were violated by the 1st respondent. The petitioner had a chance to file its statement and challenge the claim on its merits, but for reasons that are not clear, it chose not to. It may have been relying on the orders of stay issued in this petition, but appears to have made an error in extracting the order issued by the High Court. Clearly it was at fault to a considerable degree in its inability to adequately deal with the matter on its merits before the 1st respondent.

28. The petitioner states that the violation of its rights occurred because only a tribunal that was biased could have reached the decision reached by the 1st respondent given the decision that a different bench of the 1st respondent had come to in Cause No. 327N of 2009 involving the same parties and on the same subject matter. From my reading of the award of the court in Cause No. 426N of 2009, I do not find anything that would lead to a conclusion that the tribunal dealing with the matter was not impartial.

Jurisdiction

29. However, I do have some concerns with regard to its exercise of jurisdiction in that matter given the express provisions of Section 73(3) of the Labour Relations Act. I will consider this aspect against the jurisdiction of the High Court to supervise decisions of the Industrial Court as it was at the time the award was made and against the provisions of Section 70(a) which guarantees to parties protection of the law.

30. According to the petitioner, the 1st respondent was under a duty to uphold its guarantee of protection of the law by upholding the provisions of section 73(3) of the Labour Relations Act. This section provides that

‘A trade dispute may only be referred to the Industrial Court by the authorised representative of an employer, group of employers, employers' organisation or trade union.’

31. The interpretation section of the Act contained in Section 2 provides as follows with regard to a trade dispute:

"trade dispute" means a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, location of work or the recognition of a trade union; (Underlining mine)

32. The dispute before the 1st respondent was a 'trade dispute' as defined above, relating to the redundancy of the aggrieved parties, referred to in the matter before the 1st respondent as 'the grievants.' It had been addressed and dealt with by the workers union, the Tailors and Textiles Workers Union, as evidenced by the agreement annexed to the affidavit of R.P. Shah in support of the petition.

33. The intention behind section 73(3) of the Labour Relations Act was clearly to exclude individuals who are members of a trade union from lodging complaints in their individual capacity before the Industrial Court, the rationale for this again doubtless being to bring certainty to the relationship between employers and employees so that the employer would be certain that once he has reached agreement with a workers' union, individual members of that union would not then turn around and, as

in the instant case, lodge their own claims against the employer. To do otherwise would be, in my view, to deny the petitioner the protection of the law that it was guaranteed under Section 70(a) of the constitution. Further, in entertaining the complaint by the complainants in Cause No. 462N of 2009, the 1st respondent was acting in excess of its jurisdiction and in violation of the law as the statute expressly provided that such disputes could not be properly brought before the 1st respondent. The bench that had heard Cause No. 327N of 2009 had properly directed itself in dismissing the motion filed by the complainants in that matter.

34. Having found as set out above, I must next address the question whether this court has jurisdiction to supervise the 1st respondent which, in Cause No. 462N of 2009 described itself as ‘...**a special Court exercising special jurisdiction, and it is not subordinate to the High Court.**’ While there has been some conflict in judicial decisions on the relationship between the Industrial Court and the High Court, I believe that the decisions lean towards the finding that the Industrial Court as it existed prior to the new Constitution was an inferior tribunal which was subject to the jurisdiction of the High Court.

35. This is what the court found in the case of **Kenya Airways Limited-v- Kenya Airlines Pilots Association Nairobi High Court Misc. Appl. No. 254 of 2004** where Visram, J(as he then was) observed as follows:

I agree with the applicant’s contention that the Industrial Court is subordinate to the High Court as the Constitution, specifically section 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. 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.

36. The Learned Judge went on to observe that:

‘In the present case, I am satisfied that there is prima facie evidence to suggest that the Industrial court did act in excess of its jurisdiction. I am also persuaded that where there is an ouster clause in an Act such as Section 17(2) of the Trade Disputes Act and the inferior court (the Industrial Court) acts in excess of its jurisdiction then the High Court has power to interfere with that decision or award of that inferior court’.

37. A similar finding with regard to the jurisdiction of the High Court to quash decisions of the Industrial Court if made in violation of the law was made in the case of **Mecol Limited-v-Attorney General & Others High Court Misc. Civil Appl. No. 1784 of 2004** and, more recently, in the case of **Kenya Ports Authority-v-The Industrial Court & Others High Court Misc. Civil Case No. 995 of 2007** where Korir J, citing the above authorities, observed that the High Court would have been entitled to step in ‘***if it had been demonstrated by the applicant that the respondent heard a dispute which it had no jurisdiction to hear.***’

38. In the present case, the 1st respondent entertained and adjudicated on a dispute which the law at Section 73(3) of the Industrial Relations Act clearly provided it had no jurisdiction to entertain. It therefore exceeded its jurisdiction, thereby rendering its decision amenable to the supervisory jurisdiction of the High Court.

39. In the circumstances, I find and hold that the award of the 1st respondent in Cause No. 462 N of 2009 was null and void for being arrived at without jurisdiction and for violation of the petitioner’s right under Section 70(a) of the former constitution.

40. Ordinarily, as the successful party, the petitioner would be entitled to the costs of this petition. However, by its own omissions in failing to file the requisite pleadings before the 1st respondent and in electing to opt out of the proceedings, it has occasioned the costs incurred in this petition. I therefore order that the petitioner shall pay half of the costs of the petition to the respondents.

Dated Delivered and Signed at Nairobi this 11th day of July 2012

MUMBI NGUGI

JUDGE