



**KENYATTA
UNIVERSITY.....APPLICANT**

VERSUS

**THE INDUSTRIAL COURT OF
KENYA.....RESPONDENT**

AND

**UNIVERSITY ACADEMIC STAFF
UNION.....INTERESTED PARTY**

JUDGMENT

1. The applicant is a public university established under the Kenyatta University Act, Cap 210 Laws of Kenya. Pursuant to leave granted by this court on 26th April, 2007, the applicant filed the Notice of Motion dated the 27th of April 2007 challenging the award of the Industrial Court dated 9th day February 2007 in Industrial Cause No. 135 of 2005 between the applicant and the Interested Party.
2. The application is expressed to be brought under Section 8 of the Law Reform Act, Cap 26 Laws of Kenya and under the provisions of Order LIII Rules 3(1) and (3), and 4(1) of the Civil Procedure Rules. The applicant seeks an order of *certiorari* to remove into the High Court and quash the said award, such further or other relief as the court may deem just, and for the costs of and incidental to the application to be provided for.
3. The applicant also filed a Statutory Statement dated 25th April 2007 and a Verifying Affidavit sworn by Professor Mohammed Rajab, the Deputy Vice-Chancellor of Kenyatta University, sworn on 25th April 2007. A Supplementary Affidavit sworn on 18th April 2012 by Prof. Paul K. Wainaina, who also describes himself as the Deputy Vice Chancellor of the applicant, was also filed in support of the application.
4. The Interested Party filed an affidavit in opposition to the application sworn on 18th April 2008 by Muga Kolale, the Secretary General of the Interested Party. Both the applicant and the Interested Party filed written submissions on their respective cases. The respondent did not file any response or submissions on the application.

Background

5. The background to this matter as it emerges from the pleadings and submissions of the parties is as follows. A dispute arose between the Interested Party and the applicant over the use of funds from the applicant's self-sponsored students programme (hereafter **SSSP**). This programme had been initiated by the applicant in order to deal with the limited funding available to the applicant from the government. The applicant adopted a policy of providing tuition to fee paying students to supplement government funding

and set up an ad hoc committee to explore the possibility of broadening the applicant's financial base to meet the rising cost of running the University. This committee recommended that 35% of income generated from the SSSP should be devoted to service providers. The recommendation was adopted by the applicant's Finance and Terms of Service Committee which proposed payment of 35% to academic staff and a top up payment to all staff.

6. At a meeting held on 2nd October 2003, the University Council considered and approved the recommended 35% distribution of SSSP income and a Memorandum of Agreement between the Inter-public University Council Consultative Forum, the Federation of Kenya Employers and the University Academic Staff Union was signed and registered under the Register of Collective Agreements as entry no 106 of 2004.

7. According to the applicant, contrary to its expectations when it approved the recommendation of 35% to the service providers, the government failed to provide the additional funding. As a result, the applicant revoked its decision approving the payment of 35% of SSSP funds to academic staff. This was after it considered its financial position following the adjustment of salaries for academic and middle management staff, student enrollment in SSSP courses, and actual tuition fees raised, and found that implementation of the 35% apportionment was impossible in the circumstances. The applicant's Council instead approved apportionment of 14.3% of the SSSP generated funds to Service providers to cater for SSSP direct costs. This proposal was, however, rejected by the Interested Party. Following the disagreement between the applicant and the Interested Party over the SSSP fund, the Minister for Labour and Human Resource Development appointed an Investigator to look into the issue. The investigator found in favour of the Interested Party and directed the applicant to implement the 35% payment but the applicant declined to do so, leading to the referral of this matter to the Industrial Court.

8. Upon hearing both the applicant and the Interested Party, the Industrial Court made the award that has given rise to these proceedings on 9th February 2007. In the impugned award, the Industrial Court ordered as follows:

- a) **That the applicant herein be and is hereby directed to manage its self-sponsored students programmes through its Kenyatta University Enterprise and Services Board.**
- b) **That the applicant through its board, be and is hereby directed to open a separate account for its self-sponsored students programmes.**
- c) **That the applicant be and is hereby directed to pay 35% of the funds generated from the self-sponsored students to the service providers herein or teaching staff involved in teaching the self-sponsored students with effect from 1st May 2007.**
- d) **That the applicant through its Board be and is hereby directed to forward to the union relevant information on the operation of its self-sponsored programme account at the end of every three months with effect from the effective date of this award.**

The Applicant's Case

9. In presenting the applicant's case, Mr. Mogere submitted that the decision the applicant wished to quash was made by the Industrial Court as established under Section 14 of the Trade Disputes Act; that the High Court has jurisdiction under the Constitution to supervise the Industrial Court as it was a subordinate court. Such jurisdiction was conferred under section 60 (1) of the former constitution. Section 65(1) gave Parliament power to establish courts subordinate to the High Court, while section 123 defined what subordinate courts were. He submitted that Section 17 of the Trade Disputes Act sought to oust the jurisdiction of this court, but the supervisory jurisdiction of the High Court remained. He relied on the decision of Korir J, in **Kenya Ports Authority -v- The Industrial Court High Court Misc. Civil Case No 995 of 2007** which considers the relationship between this court and the Industrial Court. He contended that while the new Constitution had now changed the position with regard to the status of the Industrial Court, the constitutional provisions in the 2010 Constitution would not apply to this case as the

court established under the Trade Disputes Act is not the court provided for under the Constitution since the Constitution does not have retrospective application. He relied in this regard on the decision of Majanja J, in the case of **Brookside Dairy Ltd -v- The Attorney General & Another Petition No. 33 of 2011**. He therefore submitted that there should be no dispute with regard to the jurisdiction of this court to determine this matter.

10. The substance of the applicant's case is that the Industrial Court lacked jurisdiction to make the orders that it made in the matter before it in **Industrial Cause No 135 of 2005**. The issue that the court had framed for determination was whether the Interested Party was entitled to 35% of the SSSP revenue from the respondent. According to the applicant, the term '*entitled*' used by the respondent implies a legal right; that with regard to union members who are employees, the source of entitlement is the contract of employment, the collective bargaining agreement and the law. Mr. Mogere submitted that there was no document signed by the Interested Party and the applicant which states that the Interested Party is entitled to 35% of the SSSP funds; that there were only a series of documents, minutes and reports of ad hoc committees of the applicant in which the idea of paying 35% of the funds was mooted; that the reports of the ad hoc committees do not bind the applicant to a third party even if the third party would stand to benefit from those reports.

11. According to the applicant, the case of the Interested Party before the respondent was that the applicant was being stubborn in refusing to enforce recommendations of its committee. In the applicant's view, the respondent made an error of law by giving the Interested Party 35% of the SSSP funds without placing any additional obligation on it. By this order, the respondent gave an extra-contractual, extra-statutory right to the Interested Party without a corresponding obligation. Mr. Mogere submitted that for the respondent to do this was to act unreasonably; that the respondent seemed to be concerned that the members of the Interested Party would be taking on additional work and would therefore require additional remuneration. The applicant pointed out that in its award, the respondent had correctly identified the rate for the additional work for the academic staff as 1.5 of the normal rate but did not apply it. The applicant referred the court to the decision of Lord Diplock in the case of **Council of Civil Service Unions & Others -v- Minister for the Civil Service (1984)3 All ER 935** and submitted that the decision of the respondent should be quashed for being unreasonable.

12. The applicant contended that in any event, the issue of additional work for the members of the Interested Party for teaching self-sponsored Module II students had been addressed in the Collective Bargaining Agreement. The applicant referred to the supplementary affidavit of **Prof. Paul K. Wainaina** sworn on 18th April 2012 in which the deponent avers that contrary to the assertions by the Interested Party that its employees are not being compensated for the extra work that they do in teaching the module II students, the students at the Kenyatta University are in classes and courses which are not distinguished in terms of module 1 and 11 and that they are integrated and taught together, and that the Collective Bargaining Agreement (CBA) in place between the applicant and the Interested Party makes provision for the extra work load that may arise as a result of the self-sponsored students programme in light of the fact that the courses are integrated; that any extra work that the lecturers are required to handle is compensated at rates discussed and agreed upon with the Interested Party.

13. The applicant submitted therefore that for the Interested Party to argue and the respondent to find that there was no payment for the extra work resulting from the SSSP programme was incorrect; that the respondent failed to take cognizance of this fact when it arrived at its decision, and its decision is therefore unreasonable as its implementation will result in a double payment for the same volume of work; that the academic staff would have their terms of service negotiated and governed by the CBA currently in place and in addition have the sums guaranteed in the award by the respondent. According to the applicant, since the CBA has provision for periodic review but the award by the respondent does not, any claim for increased pay should be channelled through the collective bargaining process as recognised by law.

14. The applicants also contended that the decision of the respondent was wrongful on the grounds of irrationality; that it was based on the argument that since other universities had an obligation to pay the staff union 35% of the SSSP funds, the applicant should bear a similar obligation. This, according to the

applicant, was irrational as, even if one assumed it was the case, the fact that other universities were paying that percentage to the union cannot form a basis for imposing the same obligation on the applicant.

15. The order of the court, in the applicant's view, interfered with the applicant's right, vested in it under Section 13 of the Kenyatta University Act, to administer its funds. The Kenyatta University Act gives the University Council exclusive power to administer the applicant's funds, but the respondent's order distributes that power between the Council and other bodies. The applicant contended further that the respondent gave an order that it cannot supervise. The order required the applicant to manage the SSSP funds through the Kenyatta University Enterprise and Services Board, a non – existent entity whose composition and powers were unknown, yet it would be expected to manage, without regard to the authority of the University Council, funds which, as at 2007, were in excess of Kshs 2 billion. The applicant therefore asked the court to quash the decision of the respondent made on the 9th of February 2007.

The Case for the Respondent

16. Mr. Bitta for the respondent submitted that his submissions were based on public policy considerations. He argued that an analogy could be drawn between this case and a decision of a Magistrate's Court. Where such a court makes a decision and that decision is challenged in the High Court, it would be wrongful for the court to come and assert its decision. The court is an impartial tribunal to which whatever the outcome of the challenge to its decision would be in order.

17. Mr. Bitta submitted further that a perusal of the affidavit in support of the application reveals that it is sworn on the advice of Prof. Githu Muigai who is now the Attorney General. This therefore placed the State in a tricky position and the state would therefore wish to take a neutral position and take no position one way or the other on the matter. He submitted further that there are conflicting decisions by the High Court on the issue of the Industrial Court and the power of the High Court to supervise it, and that in any event courts have a right to make decisions which are either right or wrong, and there are provisions for review or appeal. In this case, Mr. Bitta took the view that provided the decision is made bon fide, it cannot be said to be illegal as it can be subjected to review or appeal. In this case, the applicant should have applied to the Industrial Court itself to determine the question of the inconsistency of its decision with the Kenyatta University Act.

The Case for the Interested Party

18. Mr. Enonda presented the case for the Interested Party in opposing the applicant's prayers for orders of judicial review. He relied on the affidavit of Mr. Muga Kolale sworn on 18th April 2007 and the written submissions dated 6th December 2011.

19. The Interested Party supports the decision of the respondent and contends that there was no illegality or unreasonableness in the award of the respondent. Mr. Kolale avers that the application and the affidavit in support are tinged '*with malicious false hoods and half-truths.*' He contends that the decision of the respondent with regard to the management of the funds was not unlawful; that the Kenyatta University Act envisages the award given by the Industrial Court; that the autonomy of the applicant has not in any way been interfered with by the respondent's order; and that it is only just and fair that the award of the Industrial Court be implemented in its totality.

20. The Interested Party contends further that the award of the respondent is clear, and that there is no impracticability or vagueness in the award as the service providers were clearly defined in the award. It contends that in awarding the members of the Interested Party 35% of the funds generated in the SSSP, the respondent acted within its mandate as the dispute between the parties is purely an industrial dispute.

21. The Interested Party also took issue with the filing of this petition before this Court, arguing that this Court has no jurisdictions to supervise the Industrial Court as the Trade Disputes Act provided that the decisions of the respondent were final. Mr. Enonda submitted that there have been two schools of thought on the issue of the jurisdiction of the High Court to supervise the Industrial Court, resulting in a conflict

that had not been resolved by the Court of Appeal. He submitted that at the time the decision impugned in this application was made, the High Court did not have supervisory jurisdiction.

22. On the substance of the applicant's case, Mr. Enonda submitted that while the applicant argues that the decision of the Industrial Court is illegal, it has not pointed out the illegality or the sections of the law that had been violated; that in any event, if the decision was illegal, there were build-in mechanisms within the Trade Disputes Act for the Court to review the decision.

23. To the applicant's argument that the respondent's decision is unreasonable, the Interested Party submitted that the decision was reasonable and within the respondent's mandate; that the respondent was sitting as an appellate court in a finding by an investigator appointed by the Minister for Labour; that the investigator's finding was final in his finding that 35% of the SSSP funds be paid to the union, and in any case all the other public universities pay the same percentage to the Interested Party.

24. The Interested Party submitted that the payment of 35% of the SSSP funds was a dispute within the meaning of the Trade Disputes Act; that there had been several meetings between the Interested Party and the University; the parties had in principle agreed to make the payments and that it was only upon failure to agree that the matter went to the Ministry of Labour and thereafter to the respondent.

25. Mr. Enonda submitted that there had been collective bargaining agreements between the parties signed subsequent to the filing of this matter, but the issue of the payment was not covered as there was a stay order issued by the Court. According to the Interested Party, there is nothing illegal or unreasonable about the award of the respondent as the decision was reached after serious analysis of the facts and the law. The Interested Party therefore asked the Court to dismiss the application with costs.

Determination

26. From the pleadings and submissions of the parties in this matter, two issues, both relating to jurisdiction, arise for determination. The first relates to the jurisdiction of this court to entertain the present application and to supervise the respondent. The second issue, inquiry into which is dependent on the answer to the first issue, relates to the jurisdiction of the respondent to issue the orders that it did on 9th February, 2007 in Industrial Cause No. 135 of 2005.

Jurisdiction of the High Court

27. The Interested Party has questioned this Court's jurisdiction to entertain and determine this matter. It relies on the provisions of section 17(2) of the Trade Disputes Act, Cap 234 Laws of Kenya (now repealed) which was the operative statute at the time the decision impugned in these proceedings was made. Section 17 provided as follows:

“17 (1) The award or decision of the Industrial Court shall be final.

(2) The award, decision or proceedings of the Industrial Court shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, certiorari or otherwise either at the instance of the government or otherwise”.

28. The jurisdiction of the High Court vis a vis the Industrial Court has now been settled by the Constitution. Article 165 (5) provide that the High Court shall not have jurisdiction to determine matters pertaining to employment and labour relations. Jurisdiction over such matters is now vested by Article 162(2) in the Industrial Court, a court with the status of the High Court established under the provisions of the Industrial Court Act, 2011. However, as neither the Constitution nor the Industrial Court Act operate retrospectively, I take the view that the matter in dispute in this case falls for determination under the constitutional and legislative regime in force in February 2007.

29. The jurisdiction of the High Court to supervise the Industrial Court was a matter of some contention under the former constitution. One school of thought took the position that the High Court had

no jurisdiction to supervise the Industrial Court as such jurisdiction was ousted by the provisions of Section 17 of the Trade Disputes Act cited above. See in this regard the decisions of the High Court in **Republic –v- Industrial Court of Kenya and Kenya Bankers Association, Nrb HC Misc Applic No. 1143 of 2004** and **Kenya Guards and Allied Workers Union v Security Guards Services and 38 Others, Nrb HC Misc. Applic No. 1159 of 2003**.

30. The second school of thought, took the position that the Industrial Court as it existed under the former constitution is a subordinate court and was therefore amenable to the supervisory jurisdiction of the High Court. In **Kenya Airways Limited -v- Kenya Airlines Pilots Association Nairobi High Court Misc. Appl. No. 254 of 2004** 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.

31. Justice Visram went on to find as follows:

‘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’.

32. 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**. In this latter case, Korir J 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.’

33. See also the decision of this court in this regard in **Nakuru Industries Limited –v- The Industrial Court and the Attorney General, Petition No. 105 of 2010**.

34. I find and hold therefore that this Court has jurisdiction to supervise the Industrial Court as it existed in February, 2007 when the decision impugned in this application was made. 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 respondent.

Whether the Respondent Acted in Excess of its Jurisdiction

35. The applicant’s case is that in making the orders impugned in this application, the respondent acted beyond its powers and jurisdiction in several respects. First, the respondent had jurisdiction to entertain trade disputes only. It therefore acted *ultra-vires* its powers by ordering the applicant to open separate bank accounts for the SSSP funds and to submit quarterly account information to the Interested Party. The opening and running of bank accounts and allocation of revenue are internal governance functions vested in the University Council by section 13(1) of the Kenyatta University Act.

36. The applicant argues that the respondent’s order to the applicant to pay 35% of the funds generated from the SSSP to the Interested Party is unlawful as it purports to create an income sharing scheme between the applicant and members of the Interested Party, something that is not contemplated under the Kenyatta University Act; that the respondent could not make decisions on the disposal and allocation of the applicant’s income as such allocation is a preserve of the University Council; that the order of the

respondent was irrational as it called for the use of the SSSP funds through the Kenyatta University Enterprise Services Board, a Board that was not in existence.

37. The applicant also argues that the award of the respondent is irrational as it did not recognise the contractual relationship between the applicant and members of the Interested Party which is an employer-employee relationship. According to the applicant, the award gave the Interested Party a stake in the applicant's funds; that this would lead to double payment for the Interested Party's members as their contract and collective bargaining agreement factored in the work that they would do under the SSSP.

38. On its part, the Interested Party contends that on the contrary, the Kenyatta University Act ***'clearly contemplates and envisages the award given by the Industrial Court.'*** It also submits, which somewhat contradicts its earlier submission, that ***'...the self-sponsored student programme is not a creature of the Institution's statute and thus the program and the governing of the same is not in any way conflict (sic) with any statutes.'***

39. The jurisdiction of the respondent was set out in section 14(1) of the Trade Disputes Act (now repealed). The section provides that the Industrial Court was established

"for the purpose of the settlement of trade disputes and of matters relating thereto".

Section 2 of the Trade Disputes Act defines a trade dispute as

"a dispute or difference between employers and employees, or between employees and employees, or between employers and trade unions, or between trade unions and trade unions connected with employment or non-employment, or with the terms of employment or with the conditions of labour, of any person and includes disputes regarding the dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements, and it also includes an apprehended trade dispute."

40. The dispute between the applicant and the Interested Party that was before the respondent was whether or not the Interested Party was entitled to 35% of the funds from the SSSP. Was such a dispute a 'trade dispute' as defined under the Trade Disputes Act? To my mind, the issue pertaining to the allocation of the SSSP funds was not a 'dispute' as contemplated by the Act. How the applicant utilizes funds generated in any of its programmes must, in my view, fall within the powers of the University Council. Section 13 of the Kenyatta University Act provides as follows:

(1) Subject to this Act, the Council shall be the governing body of the University through which the corporation of the University shall act and shall administer the property and funds of the University in a manner and for purposes which shall promote the best interests of the University; but the Council shall not charge or dispose of immovable property of the University without prior approval of the Chancellor and of the President if the President shall not be the Chancellor.

41. I believe that it cannot be disputed that the members of the Interested Party are entitled to remuneration for the work that they do. However, such remuneration must, in my view, be as provided in their contract of service or as may be agreed upon between the applicant and the Interested Party as part of their collective bargaining agreement. It cannot be the proper function of the respondent to apportion income arising from the SSSP programme of the applicant, or indeed any other programme of the applicant, between the applicant and the Interested Party.

42. It cannot also, in my view, amount to proper exercise of the respondent's jurisdiction to direct the applicant to open bank accounts, or to manage the funds through a particular board or institution, or to direct the furnishing of monthly statements by the applicant to the Interested Party. Such orders clearly go over and above the jurisdiction of the respondent to determine 'trade disputes' as defined under the Trade Disputes Act. The making of such orders was, in my view therefore, ultra vires the powers of the respondent.

43. In the circumstances, I find in favour of the applicant and hereby grant an order of Certiorari to quash the award of the respondent dated 9th February 2007 made in Industrial Cause No 135 of 2005.

44. Each party shall bear its own costs of this application.

Dated, delivered and Signed at Nairobi this 3rd day of October 2012

MUMBI NGUGI

JUDGE

3/10/012

Before -0 Hon M. Ngugi J

Court Clerk – Kazungu

Mr. Enonda for the Interested Party

Mr. Mogere for the applicant

Judgment delivered in open court in the presence of the parties.

MUMBI NGUGI

JUDGE

3/10/012