REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISCELLANEOUS APPLICATION NO. 1144 OF 2007

REPUBLIC. ……..…….....…….…… APPLICANT

VERSUS

THE INDUSTRIAL COURT OF KENYA ……. RESPONDENT

AND

BAKERY CONFECTIONARY MANUFACTURING

AND ALLIED WORKERS UNION. …….....…….. INTERESTED PARTY

EX PARTE APPLICANT. ……..…… PATCO INDUSTRIES LTD

J U D G M E N T

This is a Notice of Motion dated 26th October, 2007 filed by M/s Mohamed Muigai Advocates for the ex-parte applicant **PATCO INDUSTRIES LTD**. The respondent is the **INDUSTRIAL COURT OF KENYA**. There is an interested party named as **BAKERY CONFECTIONARY MANUFACTURING AND ALLIED WORKERS UNION (K).** The application was filed under Order 53 Rules 3(1), (3) and 4(1) of the Civil Procedure Rules, as well as section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya) and section 8 of the Law Reform Act (Cap 26 Laws of Kenya).

The prayers in the application are two as follows: -

1. THAT an order of certiorari do remove into the High Court for the purposes of quashing the award purportedly made by the Industrial Court sitting at Nairobi on 17th April 2007 in cause Number 19 of 2004 (Bakery, Confectionary Manufacturing and Allied Workers Union (K) Vs Patco Industries Limited).

2. THAT costs of this application be provided.

The application has grounds on the face of the Notice of Motion. The grounds are as follows: -

1. THAT the award which is the subject matter of this application was purportedly issued on 17th April 2007 without notice to the ex-parte applicant and is purportedly singed by Murtaza Jaffer as the Presiding Judge.

2. THAT although some of the proceedings were conducted before the said Murtaza Jaffer as Presiding Judge of the Industrial Court, the said Mr. Murtaza Jaffer sometimes in 2006 resigned as a Judge of the Industrial Court and has not since presided as a Judge of the Industrial Court.

3. THAT any award made by him as the Presiding Judge after his resignation as a Judge of the Industrial Court is without or in excess of jurisdiction and a nullity.

4. THAT such award would and is incapable of being an award of the Industrial Court which can be enforced or implemented.

The application is grounded on the Statutory Statement dated 16th October, 2007 and the affidavit sworn on 16th October, 2007 by **SALIM ISLAM** a director of the ex-parte applicant, both filed with the Chamber Summons for leave as required by law. The statement has the reliefs requested. The affidavit gives the surrounding circumstances of the matter. It was deponed in the said affidavit, inter alia, that the ex-parte applicant was represented in the Industrial Court proceedings by a representative from the Federation of Kenya Employers (FKE); that although the proceedings were presided over by Mr. Murtaza Jaffer, the Principal Executive Officer of FKE (Mr. Onyango) had informed the deponent that Mr. Jaffer had resigned from the Industrial Court on 1st February, 2006; that Mr. Jaffer had ordered that the Industrial Court would deliver its decision/award on notice; that no notice had been given to FKE on behalf of the ex-parte applicant; that on 27th September, 2007 the ex-parte applicant received a letter from

the interested party informing it of the alleged award which award was signed by Mr. Murtaza Jaffer; that a Manager Mr. Munir Thabit was sent by the ex-parte applicant to peruse the court file but the court staff were not co-operative; that the award was made without or in excess of jurisdiction.

The ex-parte applicant also filed a supplementary affidavit sworn by the same deponent on 17th December 2007. It was deponed in this affidavit, inter alia, that Mr. Jaffer had signed a consent to resign dated 6th January, 2006 in which he stated that he would have finalized all pending cases and announced all wards by 31st March 2006; that he would therefore not be able to prepare a ruling after that date; and that the award herein was a nullity as it was delivered on 17th April 2007 when Murtaza Jaffer was not a Judge of the Industrial Court.

The ex-parte applicant also filed written submissions through their counsel on 21st January 2008. It was contended in the said submissions, inter alia, that the issues for resolution by this court were two. Firstly, whether decisions of the Industrial Court were amenable to Judicial Review. Secondly, whether the decision of 17th April 2007 was a lawful decision capable of enforcement.

On the first issue it was contended that section 17 of the Trade Disputes Act (Cap 234) provided that the decisions of the Industrial Court were final. It was contended that recent decisions of High Court had established that such decisions were amenable to be challenged in the High Court if they were unconstitutional or illegal. Reliance was placed on the case of **R. Vs THE INDUSTRIAL COURT OF KENYA – ex- parte KENYA PLANTERS CO-OPERATIVE UNION** – Misc. Application No. 933 of 2005 wherein the court adopted the following passage from Wade, Administrative Law 6th Edition page 720: -

"If a statute says that the decision or order of some administrative body, or tribunal shall be final or final and conclusive to all intents and purposes, this is held to mean merely that there is no appeal. Judicial control of legality is unimpaired."

Reliance was also placed on the case of **ANISMINIC LTD Vs THE FOREIGN COMPENSATION COMMISSION & ANOTHER (1969) 1 ALL ER 208**, wherein the English Court stated, inter alia, that: -

"It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning I think that if such a provision is reasonably capable of having two meanings that meaning shall be taken which preserves the ordinary jurisdiction of the court"

It was submitted therefore, that this court had the jurisdiction to look into the legality, and to determine its validity or otherwise of the decision of the Industrial Court. It was contended that the only restriction to the High Court relates to the merits of the decision, which this court cannot look into.

On the issue of whether the decision impugned was a decision legally capable of enforcement, reference was made to the letter from Mr. Jaffer dated 6th January, 2006 which was very clear that he would stop working on 31st March 2006. It was contended that when the decision or award was made on 17th April 2007, Mr. Jaffer was not a Judge of the Industrial Court. He could not therefore purport to deliver an award on that date and describe himself in that award as a Judge. It was contended that under section 14(5) of the Trade Disputes Act the jurisdiction of the Industrial Court could only be exercised by a Judge. The said subsection states: -

"14(5). The jurisdiction of the court shall be exercised by a judge and two other members of the court selected by him for that purpose, and the court shall sit in divisions."

It was emphasized that there was no recognition under the Act of retired Judges, therefore a Judge who resigned could not in good faith, purport to be a Judge.

Reliance was placed on the case of **ASSOCIATED PROVINCIAL PICITURE HOUSES LTD vs. WEDNESBURY CORPORATION [1947] 2 ALL ER 680** and the case of **R VS SECRETARY OF STATE FOR THE HOME DEPARTMENT** – ex-parte **FIRE BRIGADES UNION [1995] 2 ALL ER 244,** wherein it was stated that bad faith and dishonesty could be grounds for judicial review. It was the contention that Mr. Jaffer acted in bad faith and dishonestly in delivering the award, which resulted in illegality and serious adverse consequences to the ex-parte applicant.

It was lastly, contended that since judicial review is concerned not with the merits but the process, a former Judge of the Industrial Court who retired from the service in March 2006, could not purport to make a decision in 2007 as such Judge.

The application was opposed. The respondent through the Attorney General opposed the application by relying on grounds of opposition dated 8th July, 2009. The said grounds of opposition are brief and I will reproduce them verbatim. They are as follows: -

1. ***The application is bad in law.***

2. ***The application has no basis in law, is misconceived and a gross abuse of the court process.***

In opposition to the application, the interested party through their counsel M/s Guserwa & Company, filed a replying affidavit sworn by George N Muchai on 20th November, 2007. It was deponed in the said

affidavit, inter alia, that the case was heard by Industrial Court Justice Murtaza Jaffer before his resignation on 1st February 2006; that sections 15, 20, 21 ad 58 of the Trade Disputes Act gives the Industrial Court the parameters within which it can grant orders, which were duly followed; that the award made on 17th April 2007 was made by a competent sitting Judge, Steward Madzayo J, as was the practice when a previous Judge retired; that section 12 of the Trade Disputes Act covered the present situation as would happen under the Civil Procedure Act (Cap 21) and Criminal Procedure Act (Cap 75); that the interested party is not a stranger to these proceedings; that since Justice Murtaza Jaffer heard the dispute in cause No. 19 of 2004 it was proper for the same Judge to write the award; that notice of delivery of judgment was sent to the applicants through Federation of Kenya Employers; that failure to notify a party of the date for delivery of an award cannot nullify an award; and that failure by the applicant to implement the award was a contemptuous act and that they should not be allowed to disobey court orders.

The interested parties also filed a further affidavit sworn by George Muchai on 14th March 2008.

The interested party further filed submissions on 20th March, 2008, through their counsel M/s J A Guserwa & Company Advocates. Counsel contended that the issues for determination were two as follows: -

1. Whether or not the awards of the Industrial Court are open to judicial review.

2. Whether the award of 17th April 2007 in cause No. 19 of 2004 is capable of enforcement, having been signed by a Judge who resigned from the bench.

Reliance was placed on the case of **JACOB OPIYO Vs ATTORNEY GENERAL & INDUSTRIAL COURT & ANOTHER – HC MISC. NO. 1971 OF 2001** - wherein the court held that in terms of section 17 of the Trade Disputes Act (Cap 234), the High Court did not have jurisdiction to entertain judicial review proceedings against decisions of the Industrial Court.

Counsel argued that, in addition to the above, the proceedings herein were challenging the capacity of Justice Murtaza Jaffer at the time he signed the award after he had retired, while such capacity was protected under section 61(6) of the Constitution, which provides: -

"61(6) A person appointed under subsection (5) to act as a puisne judge shall, subject to subsection (4) and (7) of section 62, continue to act for the period of his appointment or, if no period is specified, until his appointment is revoked by the President, acting in accordance with the advice of the Judicial Service Commission, and may continue to act thereafter for so long as may be necessary to enable him to deliver judgment to do any other thing in relation to proceedings that have already been commenced before him."

It was contended that the applicants had not demonstrated that they suffered any prejudice due to the procedures adopted by the Industrial Court, and that there was no irregularity in the process leading to the decision being impugned.

The court was lastly, asked to consider the peculiar facts of the case, and find that the orders sought were not available to the ex-parte applicants. Reliance was placed on the case of Misc. Civil application No. 993 of 2005 – **KENYA COFFEE PLANTERS CO-OPERATIVE UNION VS THE INDUSTRIAL COURT.**

On the hearing date, Mr. Khaseke learned counsel for the ex-parte applicant argued in support of the application. Learned State Counsel Mr. Mutinda for the respondent argued in opposition to the application. Learned counsel for the interested party, M/s Guserwa argued in opposition to the application.

I have considered the application, documents filed, the submissions, the authorities cited, and the law. In my view, the issues for this court's determination are three as follows: -

1. ***Whether this court has jurisdiction to interfere with the decisions of the Industrial Court.***

2. ***Whether the decision signed by Murtaza Jaffer as Judge of Industrial Court, and delivered by Justice Madzayo is a decision of the Industrial Court.***

3. ***Whether this court can grant the prayers sought?***

I will now go ahead to consider the three issues.

1. <u>Does this court Have Jurisdiction to Intervene or Interfere with the Decisions of the Industrial Court?</u>

Counsel for the ex-parte applicants contends that this court can entertain these judicial review

proceedings against the impugned decision of the Industrial Court herein. Counsel for the respondent, and counsel for the interested party contend that this court has no jurisdiction to entertain these proceedings or interfere with decisions of the Industrial court.

Indeed, section 17 of the Trade Disputes Act (Cap 234) purports to out the jurisdiction of the High Court to interfere with the decisions of the Industrial Court. It provide as follows: -

"17(1) The decisions 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."

I am aware that there are conflicting decisions of the High Court an whether the High Court has jurisdiction to exercise Judicial Review powers on decisions of the Industrial Court. In **KENYA GUARDS & ALLIED WORKERS UNION VS SECURITY GUARDS SERVICES & OTHERS (HC MISC. APPLICATION NO. 1159 OF 2003** Nyamu J (**as he then was**) held that the Industrial Court was given special jurisdiction by law. It was autonomous and its decisions could not be interfered with by the High Court, in view of the provisions of section 17 of the Trade Disputes' Act. Additionally, in **JACOB OPIYO VS THE INDUSTRIAL COURT OF KENYA, ATTORNEY GENERAL AND BANKING INSURANCE AND FINANCE (supra)** Ibrahim J. held that the Industrial Court is a special court, and in view of the clear and categorical ouster, was not amenable to the Judicial Review jurisdiction of the High Court.

On the other hand, in **R VS THE INDUSTRIAL COURT OF KENYA** ex parte **KENYA COFFEE PLANTERS CO-OPERATIVE UNION LTD** Nairobi HCC Misc. Application NO. 933 of 2005: - being an application for leave to file judicial review proceedings against a decision of the Industrial Court, Emukule J held that section 17 of the Trade Disputes Act could not oust the wide jurisdiction of the High Court under section 65(2) of the Constitution.

IN **MECOL LTD VS ATTORNEY GENERAL & OTHERS** –Nbi HC Misc Application No. 1784 of 2004, a three Judge bench consisting of Rawal J Mutungi J, and Kasango J, went even to the extent of declaring section 17(2) of the Trade Disputes Act as unconstitutional. The court was of the view that the section contravened the provisions of section 65(2) and 84(2) of the Constitution.

I myself, am of the view that, even if the provisions of section 17(2) of the Trade Disputes Act were not unconstitutional, they do not mean that this court does not have jurisdiction to entertain judicial review proceedings from the Industrial Court. The first reason is illegality. If the Industrial Court makes a clearly

illegal decision, only the High Court, through judicial review proceedings can correct that decision. The second reason is this. There does not appear to be any room for appeal from decisions of the Industrial Court. It is the first and last court under the provisions of the Trade Disputes Act. That scenario, if not checked, creates a dictatorial institution. It can easily degenerate into what is commonly called "***impunity***" in the exercise of power. Such should not be allowed in a democratic country that cherishes the rule of law. Suppose the Industrial Court makes a grave error, who can be a judge of the Industrial Court? It cannot be a judge in its own cause. That is where the High Court must come in, since there is no provision for appeals.

The third reason has to do with the provisions of section 65(2) of the Constitution. The powers conferred on the High Court to make orders to safeguard justice under that section are very broad. They would still cover review of the decisions of the Industrial Court. That broad power of the High Court can only be limited by provisions of the Constitution, but by an ordinary Act of Parliament, such as the Trade Disputes Act.

I find and hold that this court has jurisdiction to entertain these proceedings, and to interfere with decisions of the Industrial Court in Judicial Review.

2. <u>Is the Decision Signed by Murtaza Jaffer as Judge of the Industrial Court and Delivered by Justice Madzage a Decision of the Industrial Court?</u>

I now turn to the second issue. That is whether the decision of Murtaza Jaffer who signed it as a Judge of the Industrial Court was a decision of the Industrial Court. Parties do not have any dispute that Murtaza Jaffer heard the case before the Industrial Court. They do not have a dispute that he left service around March 2006. They do not dispute that the decision was delivered by a sitting Judge of the Industrial Court, Madzayo J., in April 2007 but was singed by Murtaza Jaffer as Judge of the Industrial Court. Counsel for the interested party relies on section 61(6) of the Constitution to support her contention that Murtaza Jaffer could still sign the award, after he retired from service as an Industrial Court Judge.

I am afraid, section 61(6) of the Constitution only applies to Judges appointed under section 61(5) of the Constitution. Murtaza Jafffer, and other Judges of the Industrial Court, are not appointed under that section of the Constitution. They are appointed under section 14 of the Trade Disputes Act (Cap 234). Unless that Act, or other legislation provides for finalization of rulings and judgments after retirement, section 61(6) of the Constitution (now replaced) cannot assist Judges of the Industrial Court to write and sign decisions or rulings as such Judges after leaving the service. I have not been refered to any law that allows a Judge of the Industrial Court to finalise decisions after leaving service. I have also not seen any such law. The decision impugned herein was signed by Murtaza Jaffer long after he retired. Consequently I find and hold that the award or judgment herein challenged was, at the time it was written, done by a person who was not a Judge of the Industrial Court. It was therefore not an award of the Industrial Court. Mr. Justice Madzayo only delivered it. He did not prepare the judgment or the award. That more delivery did not make it a decision of the Industrial Court.

3. <u>Can this Court Grant the Orders Sought</u>?

The prayers herein, are for orders of certiorari and costs. Having found that the award was not an award of the Industrial Court, it stands for nothing. It is null and void. Certiorari orders are issued to quash such illegal, null and void decisions.

I will quash the same by granting certiorari orders. On costs, I will order that each party bears it own costs.

Consequently, and for the above reasons, I allow the application and order as follows: -

1. An order of certiorari is hereby issued to remove into this court for the purposes of quashing the award purportedly made by the Industrial Court sitting at Nairobi on 17th day of April 2007 in cause No. 19 of 2004 (Bakery, Confectionary Manufacturing and Allied Workers Union (K) Vs Patco Industries Ltd), and the same is hereby quashed forthwith.

2. Parties will bear their respective costs of these proceedings.

Dated and delivered at Nairobi this 2nd day of March 2011.

…….

GEORGE DULU

JUDGE

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<u>In the presence of</u>

Nganga holding brief for Ms Guserwa for the interested party.

Catherine Muendo – court clerk