REPUBLIC OF KENYA

IN THE COURT OF APPEALAT NAIROBI

CIVIL APPEAL NO. 257 OF 2016

BETWEEN

BROOKSIDE DAIRY LIMITED.....APPELLANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE INDUSTRIAL COURT OF KENYA.....2ND RESPONDENT

BAKERY CONFECTIONARY, FOOD MANUFACTURING

AND ALLIED WORKERS UNION.....3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at

Nairobi (Lenaola, Odunga & M. Ngugi, JJ) dated 28th September, 2015) in HC Petition No. 33 of 2011)

RULING ON SETTLEMENT OF TERMS OF THE ORDER

Judgment herein was delivered on 1st December, 2017, pursuant to which learned counsel for the 3rd respondent, **Dr. Khaminwa** of Khaminwa & Khaminwa Advocates, extracted the order for settlement as follows:

> **"1. The appeal substantially dismissed in the following terms:**
>
> **(a) That this was a normal dispute involving a union and an employer on matters of fact not even law, let alone interpretation of the Constitution;**
>
> **(b) That the appellant do sign a recognition agreement with the 3rd respondent union within thirty (30) days and also do deduct and remit Union dues from the members who are its employees and whose list will be submitted by the claimant Union within thirty (30) days;**
>
> **(c) That the deductions and remittances of such union dues do commence thirty (30) days of submission of the list;**
>
> **(d) That for the aforesaid reasons the court finds no merit in this appeal, consequently it is dismissed;**
>
> **(e) That the 3rd respondent will have costs of the appeal as the 1st and 2nd respondents did not participate in the hearing of the appeal.**

The order was extracted and served on the respective parties who appeared before me on the 13th November, 2019 for the settlement of the terms of the order.

When called out, learned Counsel **Mr. Thuo G. N.** of Njoroge Regeru & Company Advocates appeared for the appellants, learned counsel **Mr. Maurice Ogosso,** a Senior State Counsel appeared for the 1st and 2nd respondents, while **Dr. Khaminwa** of Khaminwa & Khaminwa Advocates, with the order, appeared for the 3rd respondent.

Learned counsel **Mr. Thuo** intimated to the Court that he took issue with items (b) and (c) of the order as extracted because these were not part of the order issued by the Court of Appeal. **Mr. Ogosso**, on the other hand, intimated to the Court that although they were not served with the extracted order, they had no objection having the order *settled as* between the appellant and the 3rd respondent who were the main

contesting parties in the appeal.

The above being the position, the learned counsel present for the respective parties agreed to have the uncontested items of the extracted order settled by consent leaving the contested items to be ruled upon by the Court upon receiving their respective representations for and against those items.

Following the above consensus of the learned counsel for the respective parties, items (a), (d) and (e) of the extracted order were settled by consent as drawn, leaving items (b) and (c) for determination by the court upon receiving the respective parties representations thereon as already indicated above.

Determination of disputed item (b) and (c) of the Extracted Order

In opposition to the above items, **Mr. Thuo** stated that they were objecting to the above items of the extracted order because they have no basis in the Judgment of this court whose terms were sought to be settled by the extracted order.

Mr. Ogosso on his part supported **Mr. Thuo's** stand stating that the above disputed items were not provided for in the judgment of this court whose terms are sought to be settled.

In response to the above representations, **Dr. Khaminwa** explained that the matter originated in the old Industrial Court which issued an award in favour of the 3rd respondent. There was a petition filed by the appellant before the High court challenging the award granted by the old industrial court and which petition was dismissed by the High Court for want of merit. According to **Dr. Khaminwa**, the dismissal of the petition by the High Court had the effect of sustaining the award granted by the old industrial court. The appellant appealed to the Court of Appeal challenging the order of the High Court dismissing the appellant's petition to the High Court challenging the award of the old industrial court which was also dismissed by the Court of Appeal for want of merit. In light of the above undisputed position on the record, it is **Dr. Khaminwa's** submission that the impact of the above sequence of events was that the old Industrial Court's award was sustained throughout the litigation and is therefore enforceable at the conclusion of the litigation by the Court of Appeal whose Judgment is sought to be settled by the extracted order. Sustaining the appellant's objections to the inclusion of items (b) and (c) of the extracted order for settlement will be unfair to the 3rd respondent who has been the successful party at each level of the litigation herein. In **Dr. Khaminwa's** words, it would serve ends of justice to all parties herein if the old industrial court's award were subsumed into the Court of Appeal orders extracted for settlement for purposes of enforcement, especially when it is now a matter of public notoriety disputed that the old industrial court which is now defunct cannot be approached to execute its award. It will therefore be unfair if the said award were to be swept under the carpet, argues **Dr. Khaminwa**.

My invitation to intervene on behalf of the respective parties herein has been invoked under Rule 34 (2) and (3) of the Court of Appeal Rules (CAR). It provides as follows:

> ***"34. Preparation of orders:***
>
> ***(2) Where a decision or the Court was given a civil application or appeal –***
>
> ***(a) the party who has substantially been successful shall within 14 days from date of judgment prepare a draft of the order and submit it for the approval of the other parties;***
>
> ***(b) the party to whom the draft has been submitted shall approve the same within seven days from the date of delivery;***
>
> ***(c) if all parties approve the draft, the order shall, unless the presiding judge otherwise directs, be in accordance with it;***
>
> ***(d) if the parties do not agree on the form of the order, or if there is non-compliance with sub-rules (a) and (b), the form of the order shall be settled by the presiding judge or by such judge who sat at the hearing as the presiding judge shall direct, after giving all the parties an opportunity of being heard;***
>
> ***(e) …***
>
> ***(3) The order embodying the decision on an application or in a civil appeal will be issued out of the Registry or sub-registry in the place where the application or appeal was heard."***

I have construed the above Rule and considered it in light of the rival submissions highlighted above. My take on the construction of the said Rule is that under this rule the order to be settled has to embody elements drawn from either the ruling or judgment of the court, in respect of which the order is sought to be settled. I find nothing in the said Rule that donates jurisdiction for me to incorporate elements of the orders appealed from.

In light of the above assessment and reasoning, I am satisfied that **Mr. Thuo's** objection to items (b) and (c) of the order as extracted by the 3rd respondent for settlement herein and as supported by **Mr. Ogosso** for the 1st and 2nd respondents, well founded and is therefore sustained.

My sustaining of **Mr. Thuo's** objection to items (b) and (c) of the extracted order as supported by **Mr. Ogosso** does not in any way mean that the 3rd respondent has been left remediless in so far as its success in the litigation in the old industrial court is concerned. All it means is that the 3rd respondent will have to move back to the old industrial court armed with its success on the litigation both before the High Court

and now this Court and seek enforcement of the award granted in its favour by the old industrial court. It matters not that the old industrial court is now defunct. The award may be enforced through the court that both statutorily and constitutionally assumed the functions of the old industrial court through transitional provision both in the Constitution and the statutory provisions creating the new Court whose interrogation is beyond the scope of this ruling. The said court is none other than the current Employment and Labour Relations court (ELRC).

2. There will be no orders as to costs. Orders accordingly.

Dated and Delivered at Nairobi this 22nd day of November, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR