IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 100 OF 2013

BETWEEN

KAREN BLIXEN CAMP LIMITED.....APPELLANT

AND

KENYA HOTELS AND ALLIED WORKERS UNION.....RESPONDENT

(An appeal from the Ruling and Order of the Industrial Court

of Kenya at Nairobi (J. Rika, J) dated 13th October, 2011

in

Cause No. 647 of 2011)

****

JUDGMENT OF THE COURT

1. This appeal arises from the ruling of the Employment and Labour Relations Court **(ELRC)**, formally the Industrial Court **(Rika, J.)** delivered on the 13th of October, 2011 dismissing a Preliminary Objection **(PO)** raised by the appellant herein. The substance of the PO was that the suit filed by the respondent herein was invalid for the reason that they did not exhaust the Alternative Dispute Resolution **(ADR)** mechanism set out under Part VIII of the **Labour Relations Act, 2007 (LRA).** As a consequence, it was contended, the ELRC lacked jurisdiction to hear and determine the claim. Although, as we shall see, the appellant has raised seven grounds of appeal in his memorandum, the main issue for our determination is whether the PO was well founded in law, and this calls for the true construction and intent of Part VIII **(Part 8)** of the LRA.

2. The dispute itself is fairly simple and it is ironic that it remains undetermined seven years since it arose, despite the peremptory directive in **Article 159 (2) (b)** of the Constitution that justice shall not be delayed. Between December 2010 and January 2011, the appellant summarily terminated the services of three employees from its Hotels in Masai Mara. The employees were members of the respondent union which had a recognition agreement with the appellant. On behalf of the employees, the respondent complained that the terminations were unfair and unlawful, and it is common ground that the matter was referred to the Minister for Labour on 16th February, 2011 pursuant to ***section 62*** of LRA. The section requires the Minister, upon referral, to appoint a conciliator within twenty one days and if he does not, to give the parties written reasons for not doing so, whereupon the aggrieved party may proceed to the Industrial Court. Again it is common ground that the Minister simply made no response to the referral, either within the timelines set by the law or at all. He just kept mum! That is why the respondent moved to the Industrial Court on 26th April, 2011 and filed the claim.

3. In essence, it was contended before the ELRC that the provisions of Part 8 of the LRA are mandatory and a party is not at liberty to circumvent them. It was further contended that if, as in this case, the Minister failed or neglected to act on the referral, the only course open to the claimant was to go to the High Court and seek the Judicial Review order of *mandamus* to compel him to act in accordance with the law. On the other hand it was urged by the respondent that it was not mandatory to refer the matter to the Minister and that, in any event, the Court had a wide mandate under ***section 12*** of the **Labour Institutions Act, 2007 (LIA)** and the **Employment Act, 2007 (EA)** to resolve trade disputes.

4. After considering written and oral submissions of the respective counsel, the trial court formed the view that the Industrial Court had no power to compel the Minister to perform his statutory duty. It was ***section 12*** of the LIA which provided redress to such injustices as the one committed by the Minister in this case. The court traced the history of ADR in trade disputes from the **Trade Disputes Act (TDA)** which

preceded the LRA and found that the ADR under the former Act was compulsory since the parties were obligated to consult and negotiate informally before proceeding to the Minister who would put in place a tripartite committee to attempt a settlement before the matter ended up in court, if at all. On the other hand, the court found, the LRA and the EA retained ADR but improved it and widened the jurisdiction of the court. Henceforth, there was no compulsion for any party to report a trade dispute to the Minister.

5. We may let the trial court speak for itself:-

> ***"The objective of the Labour Relations Act is to promote orderly and expeditious dispute settlement conducive to social justice and economic development. Part 8 however, is not couched in mandatory terms like section 5 of the repealed law. Section 62 states that a party 'may report the dispute to the Minister.' A party is not compelled to report to the Minister. There are specific disputes under section 74 - on recognition, redundancy, retrenchment, and essential services that cannot be brought to Court as a matter of urgency, without the trade union having first made a report in terms of section 62. There is nothing to suggest however, that where a party does not invoke urgency, it must go for conciliation on the issues listed under section 74. A dispute involving unfair dismissal of employees nonetheless is not covered under section 74. It is not a dispute that expressly or by implication of any legal provision calls for mandatory conciliation. Section 73 requires that if the dispute is not resolved after conciliation, a party may refer the matter to the Industrial Court. This is only where a dispute has been reported for conciliation. Section 62 unlike the previous law under section 5 of the Trade Disputes Act, is not a mandatory procedure. Parties and the Court have been availed a wider latitude in settlement of trade disputes. The non-adjudicatory mechanisms are not adopted rigidly and are not to be treated as a condition precedent to judicial intervention. Being an alternative means of dispute settlement, failure to exhaust them, particularly where such failure is not of the claimant's making, cannot be a ground for the Court to decline jurisdiction. Labour dispute settlement should not be viewed as a staircase where parties are required to walk up from non-adjudicatory to adjudicatory means; this is an open field where parties have the flexibility to roam with the sole aim of achieving the goal of dispute settlement. The Court is called upon to encourage parties to consult, negotiate and conciliate. Sections 20 of the Labour Institution Act, as read together with Rule 18(5) of the Industrial Court [Procedure] Rules 2010 require the Court to encourage the use of diplomatic means. This is not to say that the Court should impose these mechanisms where a third party, in this case the conciliator, has failed to discharge his mandate".***

6. The court further opined as follows:-

> ***"ADR mechanisms are flexible and parties retain control of their dispute settlement. The Industrial Justice System would be slowed down considerably, if parties went seeking for support of trade dispute proceedings from the Civil Courts. There were options open to the claimant, but the exercise of these options would have resulted in delay. The role of Labour Officers under the Employment Act 2007 is to facilitate parties in their attempt to arrive at a voluntary settlement. There is no obligation imposed on an employee who is unfairly dismissed to initially seek the intervention of the Labour Office. Failure to seek the assistance of the Labour Office in any event would not invalidate a claim filed in Court. It should always be understood that even in embracing the ADR mechanisms, parties are mindful of other statutory constraints such as time limits. A party should not be compelled to go through the non-adjudicatory mechanism if in so doing for instance, that party ends up having his/her claim time-barred under section 90 of the Employment Act. Diplomatic means of settlement should be seen as complimentary to Adjudication. Negotiation in particular, as seen daily in the work we do here, is not closed out by initiation of litigation. The Labour Institutions Act and presently the Industrial Court Act 2011, the Labour Relations Act and the Employment Act, all have provisions that enable the Court to assume jurisdiction in the broadest sense, in all employment disputes, notwithstanding the requirements and the probable failings of the non-adjudicatory dispute settlement mechanisms."***

7. Those are the findings that aggrieved the appellant who complained that the learned Judge erred in law and fact in rejecting the PO; finding that it was not compulsory to report a trade dispute on termination of employment to the Minister for conciliation before being taken to court; finding that the provisions of Part 8 did not oust the jurisdiction of the court; and finding that ***section 12*** of LIA gave unfettered jurisdiction to the court in all trade disputes. Learned counsel for the appellant **Mr. C. O. Oyomba** relied on written submissions without any oral highlighting and asked us to peruse the authorities filed and relied on before the ELRC. The submissions before us are largely a rehash of the submissions made before the trial court. He singled out ***section 62 (3)*** and ***65*** of the LRA and submitted that they respectively require in mandatory tone that the dispute be referred to the Minister and that the Minister must appoint a conciliator. The further provision allowing the Minister to give reasons for refusal to appoint a conciliator was also, in counsel's view, couched in mandatory tone, and therefore there must be a written refusal and not a presumed one. The respondent did not have evidence of refusal or the reasons therefor and so it could not be allowed to access the court on the pretext that the Minister had 'refused.' At all events, submitted counsel, such refusal did not grant any jurisdiction to the court to adjudicate on the merits of the dispute but only the reasons for refusal. The only avenue open to the respondent in the situation it found itself in, was to move to a civil court to enforce the public duty.

8. Counsel cited several authorities, including ***Lloyd & Others vs Mahon [1987] 1 All E.R 1118*** for the proposition that when a statute has conferred the power to make decisions on any person, the court will require the procedure to be followed; ***Five Star Agencies Ltd & 3 Others vs East Africa Portland Cement Company & 2 Others, HCCC No. 154 of 2004 (UR),*** that only clear provisions of statute can oust the jurisdiction of the court and where an alternative remedy exists, the court will require that the remedy be exhausted first. Counsel concluded that the failure by the respondent to comply with the law deprived the appellant of the opportunity to take part in ADR which was more flexible and cheaper, thus causing prejudice and injustice.

9. Finally, Counsel referred to ***section 12*** of LIA which confers jurisdiction on the court and submitted that the jurisdiction was not unfettered. In his view, before the court can assume jurisdiction, it has to comply with the conditions precedent to the exercise of such jurisdiction and, in this case the provisions of the LRA. Counsel was also of the view that the EA was flouted since a dispute on summary dismissal should first be presented to a labour officer under ***section 47 (1)*** of the Act. He called for termination of the court proceedings on account of violation of clear statutory provisions.

10. The response to those submissions was made in written form only as there was no representation of the respondent at the oral hearing of the appeal despite service of hearing notice. It was clear to the respondent that the provisions of Part 8 of LRA did not oust the jurisdiction of the court. The respondent had every right to seek the protection of the court under **Article 22 (1)** of the Constitution when the rights of its

members were violated and frustrated by the Minister. In its submission, if Part 8 was inconsistent with the Constitution, it ought to be struck out. The respondent nevertheless took the view that Part 8 was merely permissive, as was the EA in its provisions regarding ADR, and it supported the decision of the ELRC.

11. We have considered the matter fully. As stated earlier, the germane issue to determine is whether the PO was meritorious for any of the reasons advanced by the appellant. The primary mechanism for resolution of disputes is the courts and tribunals established by or under the Constitution. That is **Article 159 (1)** which relates to judicial authority**.** That is why all other mechanisms are 'alternatives'. Nevertheless, ADR is now in vogue since the supreme law itself in **Article 159** ***(2) (c)*** commands its promotion in all its various forms. It abounds in all spheres of human interaction including family matters, commercial matters, employment and labour matters, among others. There are arbitrators, mediators, conciliators playing their roles in bigger numbers than before. In the industrial justice system, which is relevant to the matter before us, ADR is meant to ***"promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development..".*** See the preamble to the LRA. Can it then be argued that the provisions of the various statutes governing employment and labour relations give primacy to ADR over the court system? We have not found support for such blanket proposition.

12. Take Part 8 of LRA which is relied upon by the appellant. It is about **'DISPUTE RESOLUTION'**. It contains ten ***sections (62 to 72)*** providing the procedure and timelines for reporting trade disputes to the Minister, the Minister's duty to appoint a conciliator and the role of the conciliator in resolving the dispute. That machinery is set off by ***section 62*** which provides as follows:-

> ***"62, Reporting of trade disputes to the Minister***
>
> ***(1) A trade dispute may be reported to the Minister in the prescribed form and manner -***
>
> ***(a) by or on behalf of a trade union, employer or employers' organisation that is a party to the dispute; and***
>
> ***(b) by the authorised representative of an employer, employers' organisation or trade union on whose behalf the trade dispute is reported.***
>
> ***(2) A person reporting a trade dispute shall -***
>
> ***(a) serve a copy by hand or registered post on each party to the dispute and any other person having a direct interest in the dispute; and***
>
> ***(b) satisfy the Minister that a copy has been served on each party to the dispute by hand or by registered post.***
>
> ***(3) A trade dispute concerning the dismissal or termination of an employee shall be reported to the Minister within -***
>
> ***(a) ninety days of the dismissal; or***
>
> ***(b) any longer period that the Minister, on good cause, permits.***
>
> ***(4) If the issue in dispute concerns the redundancy of one or more employees, a trade union may report a trade dispute to the Minister at any stage after the employer has given notice of its intention to terminate the employment of any employee on grounds of redundancy***
>
> ***(5) The reporting of a trade dispute by a trade union under subsection (4) does not prevent an employer from declaring employees redundant on the expiry of notice of intention to declare the employees redundant.*** [Emphasis added].

13. The normal rules of statutory construction, in our view, do not admit of compulsion in those provisions. In the case of ***County Government of Nyeri & Another vs Cecilia Wangeci Ndungu [2015] eKLR,*** this Court cited with approval the English Supreme Court decision in ***Cusack vs Harrow London Borough Council (2013) 4 ALL ER 97,*** which observed:-

> ***"Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."***

14. The courts have also in the past interrogated the use of the expression "may" and "shall" as used in statutes, stating thus:

> ***"…. a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory, whether there has been substantial compliance. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid……. In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statue." Whether the words "shall" or "may" convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters."***

See the Australian High Court case of ***Project Blue Sky Inc. vs Australia Broadcasting Authority*** ***[1998] 194 CLR 355***, and this Court's decision in ***Sony Holdings Limited vs The Registrar of Trade Marks & Another*** ***[2015] eKLR.***

15. We agree with the trial court that ***section 62 (1)*** is permissive and allows all trade disputes to be reported to the Minister by the parties listed thereunder in the manner prescribed. There is no compulsion for the referral, and it was certainly not the intention of Parliament to confine parties into a straight jacket, place them at the mercy of the Minister, or oust the jurisdiction of the court. At best, it was tailored to enhance good industrial relations between an employer and an employee and to achieve improved industrial relations between the employer and the trade union representing the employee, as partners in social dialogue.

16. Section 62 (3), however, focuses on 'dismissal or termination of an employee' and the time within which the report, if any, must be made, that is 90 days. In our view, the word 'shall' in that section relates to the time limit and not the fact of reporting to the Minister, as erroneously construed by counsel for the appellant. A plausible reason for singling out 'dismissals and termination' for time limitation is not only expedition in a situation where the dismissed/terminated employee may suffer economic deprivation by a prolonged process, but also to avoid any claim being time barred under ***section 90*** of the Employment Act, which makes no provision for sideshows. The time limit under the TDA in ***section 4 (4)*** was even shorter at 21 days.

17. In this case, the respondent took the option of reporting the matter to the Minister although it would have been perfectly entitled to proceed to court directly. The dispute would have been resolved possibly within 90 days if the time table set out in section 62 to 72 was followed. But it was not and the Minister was responsible for frustrating the time table. There is no provision in the Act on what happens when the Minister so behaves. One way, not the only way as suggested by the appellant, was for the ELRC to entertain a petition for an order of *mandamus* to compel the Minister to Act. The trial court was of the view that the court had no jurisdiction to entertain matters seeking Judicial Review orders, but that was before the decisions in ***Prof. Daniel N. Mugendi vs Kenyatta University & Others*** ***(2013) eKLR***, ***United States International University vs Eric Rading*** ***2012 eKLR, Dr. Anne Kinyua vs Nyayo Tea Zone Development Corporation & 3 Others*** ***[2012] eKLR),*** all to the effect that a claim that a fundamental right under Constitution has been violated or fair administration procedure has not been followed in the course of employment is a dispute relating to employment and labour relations, hence within the jurisdiction of the ELRC. But that option would be about procedural propriety only and would entail further costs and delay in agitating the actual claim.

18. The other option for the respondent was to invoke the primary mechanism for dispute resolution under ***section 12*** of the LIA which provided as follows:-

> ***"The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between employee and employer's Organization and a trade union or between a trade union, an employer's organization, a federal and a member thereof".***

19. Furthermore***, section 87*** of the ***Employment Act, 2007,*** has similar provisions, thus:-

> ***"87. Complaint and jurisdiction in cases of dispute between employers and employees***
>
> ***(1) Subject to the provisions of this Act whenever—***
>
> ***(a) an employer or employee neglects or refuses to fulfill a contract of service; or***
>
> ***(b) any question, difference or dispute arises as to the rights or liabilities of either party; or***
>
> ***(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.***
>
> ***(1) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).***

The respondent resorted to court action on 26th April, 2011 and in our judgment, it made no error of law in so proceeding.

20. The appellant pleads prejudice if the matter proceeds in court but we cannot see how this can arise. There is equality of arms as both parties have filed their pleadings and will be afforded an opportunity to present their cases by calling witnesses whose evidence will be tested in cross examination and a judicial decision with some finality will ensue. At all events, as correctly held by the trial court, the court is at liberty at all times, in appropriate cases, to stay its proceedings and refer parties to explore any ADR, including the conciliation suggested under Part 8 of LRA.

21. In view of the foregoing, we find no basis for the PO raised by the appellant and agree with the trial court that it was not meritorious. It was properly rejected and we so find. Consequently, we order that the appeal be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 16th day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR