IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 281 OF 2014

UNIVERSITIES ACADEMIC STAFF UNION.....…APPELLANT

AND

KENYATTA UNIVERSITY.....…….1STRESPONDENT

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

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Ngugi, J.) dated 3rd October 2012

in

HC MIS. C. A. NO. 430 OF 2007)

****

JUDGMENT OF THE COURT

This appeal is a throwback to the days of the ***Industrial Court***, established by the ***Trade Disputes Act, Cap 234*** Laws of Kenya (repealed), which was the predecessor of the current ***Employment and Labour Relations Court*** established under the ***Constitution of Kenya, 2010.*** The central issue in the appeal, in which the High Court held divided opinion, is whether the High Court had supervisory jurisdiction over the Industrial Court. On 3rd October 2012, ***Ngugi, J.*** held that the High Court had such jurisdiction, entertained an application for judicial review, and quashed by *certiorari* an award of the Industrial Court which she found to have been made without jurisdiction. ***The appellant, the Universities Academic Staff Union*** now urges us to find, among other things, that the learned judge erred in quashing the award of the Industrial Court because under the repealed Trade Disputes Act, the award was final and not subject to appeal or review by the High Court. ***The 1st respondent, Kenyatta University,*** on the other hand, maintains that the Industrial Court, unlike the Employment and Labour Relations Court established by ***Article 162(2)(a)*** of the Constitution, was a subordinate court and therefore subject to the supervisory jurisdiction of the High Court as established by the former Constitution.

The circumstances under which the dispute landed before the High Court are not in dispute. At all material times, the 1st respondent, was established by the ***Kenyatta University Act***, ***Cap 210C*** (repealed) as a public institution of higher learning with the mandate of teaching, dissemination of knowledge, research, and awarding of certificates, diplomas, and degrees. The appellant is a duly registered trade

union under the ***Labour Relations Act***, ***2007,*** representing the interests and welfare of the academic staff of the public universities in Kenya, including the 1st respondent. Being a public institution, the 1st respondent's primary funding was provided by the Government of Kenya. Overtime, the funding proved inadequate for the 1st respondent's purposes and in 2003 it adopted a policy that would enable it to generate additional funds to supplement Government funding. The policy entailed introduction of a ***Self-Sponsored Students Programme (SSSP)*** under which the 1st respondent would offer tuition to fee-paying students. The programme, also dubbed "parallel programme" was to run side by side with the 1st respondents' regular programme, which catered for students on Government sponsored scholarships.

To properly operationalize the SSSP, the 1st respondent appointed an *ad hoc* committee chaired by one of its academics, **Prof H. O. Ayot** to mull over the issue and make recommendations. After considering the matter and taking into account the practice in some local universities and one regional university, the committee recommended, on 19th June 2003, that the money generated by the SSSP be utilized as follows:

Service providers	-	***35%***
Central Administration	-	***8%***
Capital Development for Schools	-	***15%***
Maintenance	-	***4%***
Teaching Materials and Equipment	-	***5%***
Library	-	***5%***
Research	-	***5%***
Staff Development	-	***3%***
Endowment	-	***5%***
Self-sponsored Coordination Office	-	***5%***
Bonus (top-up)	-	***10%***
TOTAL	-	***100%***

The dispute in this appeal relates to the 35% of the income, which the committee proposed to be paid to service providers, among them members of the appellant. The rationale was that although members of the appellant were employees of the 1st respondent, the SSSP entailed additional workload and responsibilities for which they deserved extra remuneration.

The proposal was tabled and considered by various committees of the organs of the 1st respondent. According to the Report of the 1st respondent's ***Senate Ad-hoc Committee on Guidelines on Devolution of 35% Service Providers' Funds*** dated 25th August 2005, the proposal was considered by the following committees of the 1st respondent:

i. The Ayot Committee which recommended payment of 35% of the SSSP funds to service providers on 19th June 2003;

ii. The 28th Council Meeting, which ratified the proposal on 2nd October 2003;

iii. The Committee chaired by Prof. M. S. Rajab which recommended devolution of SSSP and payment of 35% to service providers on 16th December 2004;

iv. The Senate Ad-Hoc Committee which made a similar recommendation on 21st April 2005;

v. The meeting of the full Senate held on 22nd April 2005 which recommended payment of 35% to service providers with effect from 1st July 2005; and

vi. The Senate Ad Hoc Committee chaired by Dr. G. Muluvi and appointed to, among others things, work out modalities and regulations for the implementation of 35% payment to service providers, which recommended, on 25th August 2005, that payment of the 35% be effected with effect from 1st July 2005.

The foregoing recommendations notwithstanding, the 1st respondent declined to implement the payment of 35% of the funds generated by the SSSP to the service providers, contending that it was not viable. In addition to the assertion that it was experiencing a budget deficit, the 1st respondent also contended that in 2004, the Government had granted members of the appellant salary increments of between 116 and 160% and increased the salaries and house allowances of middle grade staff by 20%. Lastly the 1st respondent maintained that its medical

scheme was costing ***Kshs 85,500,000*** and that it had pension scheme obligations to which its contribution was 27.5%. Accordingly the 1st respondent paid the service providers the equivalent of 14.3% from the SSSP funds.

Thereafter a stalemate ensued between the appellant and the 1st respondent, with the former initiating industrial action. The dispute was referred to the then ***Minister for Labour and Human Resource Development*** who invoked the provisions of the Trade Disputes Act and by a letter dated 6th October 2005 appointed an investigator to consider the matter. On 18th October 2005, the investigator submitted his report in which he recommended that the 1st respondent should pay the 35% of the SSSP funds with effect from 1st July 2005; look for an extra ***Kshs 205,078,843*** to fund the programme; open a separate account for the SSSP funds; and establish a Board, which was to include members of the appellant, to manage the SSSP.

The 1st respondent did not agree with the recommendation of the investigator and on 28th October 2005, the Minister referred the dispute to the Industrial Court for hearing and determination. After hearing the parties, the Industrial Court found for the appellant and in an award delivered on 8th March 2007, directed the 1st respondent to:

i. manage the SSSP through Kenyatta University Enterprise & Services Board;

ii. open a separate account for the SSSP;

iii. pay 35% of the funds generated from the SSSP to service providers or the staff involved in teaching the SSSP with effect from 1st May 2007 and

iv. forward to the appellant relevant information on the operation of the SSSP account at the end of every quarter with effect from the date of the award.

The 1st respondent was aggrieved by the award and on 25th April 2007 took out judicial review proceedings seeking, in the main, an order of *certiorari* to quash the award of the Industrial Court. As earlier intimated, the High Court, in a judgment dated 2nd October 2012, found that the Industrial Court as then established was a subordinate court and amenable to the supervisory jurisdiction of the High Court; that the dispute between the parties was not a trade dispute within the meaning of the Trade Disputes Act; and that by entertaining, hearing and determining the dispute, the Industrial Court had acted in excess of jurisdiction. Accordingly the High Court issued an order of certiorari and quashed the award of the Industrial Court.

It was now the turn of the appellant to be aggrieved. After filing a notice of appeal, it filed this appeal on 3rd October 2014 in which it impugns the judgment for finding that the High Court had jurisdiction to

hear and determine appeals from the Industrial Court; for failing to apply provisions of the Constitution of Kenya, 2010 to the dispute; for holding that the Industrial Court was a subordinate court and had acted in excess of jurisdiction; for finding that the issue before the Industrial Court was not a trade dispute; for ignoring the fact that the respondent had approved payment of 35% of the SSSP funds to members of the appellant; and for ignoring similar practices by other public universities regarding use of SSSP funds.

By consent of the parties, this appeal was heard through written submissions, with limited oral highlights. The ***Industrial Court, (the 2nd respondent)*** elected not to make any submissions, taking the position that it was neutral in the proceedings. For the appellant, ***Mr, Enonda, learned counsel,*** submitted that the High Court did not have jurisdiction to hear appeals from the Industrial Court because by dint of ***section 17*** of the repealed Act, its awards and decisions were final and not amenable to any appeal or review. It was contended that Parliament had expressly ousted the jurisdiction of the High Court and therefore section 17 must be given full effect.

While noting that in some cases, such as ***Kenya Airways Ltd v. Kenya Airline Pilots Association, HC Misc. App. No. 254 of 2001***, the High Court held that it had supervisory jurisdiction over the Industrial Court, learned counsel submitted that the correct view is that propounded in ***Kenya Guards & Allied Workers Union v. Security Guards Services & Others, HC Misc. App. No. 1159 0f 2003*** and similar decisions where the High Court held that section 17 of the Trade Disputes Act had effectively ousted the jurisdiction of the High Court over decisions of the Industrial Court. Counsel added that in ***United States International University & 3 Others v. Attorney General & 13 Others, IC Pet. No. 3 of 2012***, the Employment and Labour Relations Court held that the Industrial Court was not a subordinate court, but rather, a distinct dispute resolution mechanism established by presidential prerogative outside the judiciary.

Upon the promulgation of the Constitution of Kenya 2010, which established the Employment and Labour Relations Court as a court with equal status to the High Court, the appellant submitted, all cases pending before the High Court relating to employment and labour matters were to be transferred to the Employment and Labour Relations Court for hearing and determination. The judgment of the High Court in ***United States International University v. Attorney General, HC. Pet. No. 170 of 2012*** was cited in support of that proposition.

The appellant further invoked ***section 22*** of the ***Sixth Schedule*** to the Constitution, and contended that all judicial proceedings pending before any court at the promulgation of the Constitution ought to have been transferred to the corresponding court established by the Constitution, which in this case was the Employment and Labour Relations Court. On the authority of the judgment of this Court in ***Joseph Mchero Aoko v. Civicon Ltd, CA No. Nai 43 of 2012*** and that of the High Court in ***James Davis Njuguna v. James Chacha & 3 Others, HCC No. 198 of 2012*** the appellant submitted that upon the promulgation of the Constitution of Kenya 2010, the High Court did not have jurisdiction in the matter and that appeals from the Industrial Court were to be heard and determined by the Employment and Labour Relations Court established by the Constitution. The High Court therefore erred in this case, it was submitted,by entertaining the application for judicial review after the promulgation of the Constitution.

On whether the Industrial Court had acted *ultra-vires* or in excess of jurisdiction, the appellant submitted that it had not because all the committees of the organs of the 1st respondent had recommended payment of the 35% of income from the SSSP to service providers, which the 1st respondent had declined to implement. In the appellant's view, the dispute involved the terms and conditions of service of its members and was therefore a trade dispute within the meaning of ***section 2*** of the Trade Disputes Act and therefore within the jurisdiction of the Industrial Court. While the appellant was demanding 35% of the income, the 1st respondent was offering 14.3% and therefore there was a trade dispute. All that the Industrial Court did, it was contended, was to make orders for the enforcement of the recommended payments of 35%, which was within its powers. To underline further that the dispute was a trade dispute, the appellant relied on the fact that the Minister had invoked ***section 7*** of the Act to appoint an investigator before eventually referring the dispute to the Industrial Court. It was submitted that under the Act the Minister could not have so proceeded, if indeed there was no trade dispute.

Lastly, the appellant submitted that the High Court erred by disregarding the fact that other local universities had introduced SSSP programmes similar to that of the 1st respondent and had allocated between 35% and 40% of the income therefrom to service providers. In the appellant's view, the learned judge erred further by treating the proposed 35% payment to service providers as an income-sharing scheme. The appellant concluded by defending all the orders made by the Industrial Court, including for the opening of separate bank account and the involvement of the appellant in the management of the funds generated by the SSSP as lawful orders and within its powers to make. We were accordingly urged to find that there was no basis upon which the High Court could interfere with the award of the Industrial Court, allow the appeal, set aside the orders of the High Court and restore the Industrial Court's award.

The 1st respondent opposed the appeal, submitting through its learned counsel, ***Mr Mogere***, that the High Court's judgment cannot be faulted. It was contended that the Industrial Court whose award was quashed by the High Court is not the same institution as that provided for under Article 162(2)(a) of the Constitution. In the 1st respondent's view, whereas the court established pursuant to Article 162(2)(a) of the Constitution has equal status to the High Court, the Industrial Court established by the Trade Disputes Act was a subordinate court amenable to the supervisory jurisdiction of the High Court. This is because, it was urged, by dint of ***section 60(1)*** of the former Constitution, the High Court was a superior court of record with unlimited and original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the former Constitution or any other law. Section ***65(1)*** of that Constitution empowered Parliament ***to establish courts subordinate to the High Court,*** which, subject to the Constitution, were to have such jurisdiction and powers as the law may confer. Learned counsel added that although the Industrial Court was established by an order of the President, that order emanated from powers granted by ***section 14*** of the Act, meaning that it was still a court subordinate to the High Court, by virtue of creation by an Act of Parliament as contemplated by section 65(1).

Next the appellant submitted that section 123(1) of the former Constitution defined a subordinate court to mean a court of law other than the High Court, a court with jurisdiction to hear appeals from the High Court or a court martial. From the foregoing, the appellant posited that under the former Constitution, the Industrial Court was a subordinate court.

Regarding whether the Industrial Court had acted *ultra-vires* or in excess of jurisdiction in making the award leading to this appeal, the 1st respondent submitted that the decision that was contemplated to be final by section 17 of the repealed Act was a decision made within jurisdiction. Relying on the decision of the House of Lords in ***Anisminic Ltd v. The Foreign Compensation Commission & Another [1969] 1 All ER 208***, the 1st respondent contended that a decision made in excess of jurisdiction was a nullity and could not be protected by a finality or ouster clause like section 17.

As regards the award of the Industrial Court, the 1st respondent contended that the payment of 35%of the income generated by the SSSP to service providers had never been agreed upon with finality between the appellant and the 1st respondent because of its financial implications and that in the circumstances the appellant could not claim to have been entitled, as found by the Industrial Court, to 35% of the income from the SSSP. It was further submitted that resolutions of committees of organs of the 1st respondent are only recommendations, which are not binding on the 1st respondent.

The 1st respondent next contended that the effect of the Industrial Court's award was to award the appellant payments without any contractual or statutory basis, ignoring the fact that members of the appellant who were teaching the SSSP programme were already entitled to payment which was akin to overtime payment. It was also submitted that the orders of the Industrial Court had taken away the financial autonomy of the 1st respondent in violation of ***section 13 (1)*** of the repealed Kenyatta University Act and compelled the 1st respondent to spend almost ***Kshs. 1 billion*** without regard to its core mandate and public finance management procedures. In addition, the 1st respondent complained, the ***Kenyatta Enterprise & Service Board***, which the Industrial Court ordered to manage the SSSP did not exist and creation of such a body had legal and financial implications, which the Court did not address.

Lastly the 1st respondent submitted that each university was autonomous and what one university opted to do cannot be imposed on another university. By basing its decision on what other universities had

settled for, it was submitted, the Industrial Court took into account matters it ought not to have taken into account, which vitiated its decision. For all the foregoing reasons the 1st respondent submitted that the appellants appeal lacks merit and urged us to dismiss the same with costs.

We have anxiously considered the record of appeal, the award of the Industrial Court, the Judgment of the High Court, the grounds of appeal, the elaborate written submissions supplemented by oral highlights, the authorities cited by the respective parties, and the law. In our estimation, this appeal turns on two broad issues, namely whether the Industrial Court as established by the repealed Trade Disputes Act was a subordinate court amenable to the supervisory jurisdiction of the High Court and if the answer is in the affirmative, whether there were grounds to justify review of the Industrial Court's award by the High Court. Of course if the answer to the first issue is in the negative, it will not be necessary to consider the second issue.

Before we address the issues we have identified, it bears tracing in outline the evolution of the Industrial Court and its jurisdictional remit so as to contextualize the appeal. Before 2007 the Industrial Court was established by ***section 14(1)*** of the Trade Disputes Act, which provided as follows:

> ***"For the purposes of the settlement of trade disputes and other matters relating thereto the President may, by order, establish an Industrial Court..."***

By section 17 of the same Act, decisions of the Industrial Court were rendered final in the following terms:

> ***"(1) The award or any 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."***

Section 2 of the Trade Disputes Act defined ***"trade disputes"*** over which the Industrial Court had jurisdiction to mean:

> ***"a dispute or difference between employers and employees, or between employees and employees, or between employers and trade unions, or between trade union's and trade unions, connected with the 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."***

In 2007 there were fundamental legal reforms to the employment laws in Kenya, which saw the repeal of several statutes and their replacement by new enactments. Some of the new laws that were enacted include the ***Labour Relations Act, 2007*** and the ***Labour Institutions Act, 2007***. The Labour Relations Act, which commenced on 26th October 2007, repealed the Trade Disputes Act pursuant to which the Industrial Court was established (See ***section 84***). However, it was provided in the 5th schedule that any dispute pending in the Industrial Court before the commencement of the Labour Relations Act would be determined in accordance with the provisions of the Trade Disputes Act.

The Industrial Court was re-established by ***Part III*** of the Labour Institutions Act, 2007 which commenced on 2nd June 2008 (See ***Legal May 2008)***. Its jurisdiction was provided by

> ***"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 of the 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 the employer and employee in the course of employment, between an employee and employer's organisation and a trade union or between a trade union, an employer's organisation, a federation and a member***

thereof."

By ***section 27***, awards or decisions of the Industrial Court were now appealable to the Court of Appeal on matters of law only.

That is the situation which obtained until the promulgation of the Constitution of Kenya, 2010 which, by Article 162(1)(a) provided for the establishment of the Employment and Labour Relations Court as a court of equal status with the High Court. Pursuant to that Article, Parliament enacted the ***Industrial Court Act, No. 20 of 2011, section 4*** of which established the Industrial Court. ***Section 12*** of the Act provided for the jurisdiction of the Industrial Court and by ***section 33***, all proceedings pending before the Industrial Court established by the Labour Institutions Act were to continue to be heard and determined by that court or until the court under the 2011 Act came into operation or as the Chief Justice or the Chief Registrar of the Judiciary may determine. Under ***section17*** appeals continued to lie to the Court of appeal on matters of law only.

By the ***Statute Law (Miscellaneous Amendments) Act, No. 18 of 2014***, the Industrial Court was renamed the ***Employment and Labour Relations Court*** and the stricture to the right of appeal was removed so that appeals from the court to the Court of Appeal were on both facts and law.

The above background shows that by the time the changes were introduced to the employment laws, the award that gave rise to this appeal had already been heard and determined on 8th March, 2007 by the Industrial Court as established by the Trade Disputes Act. By that time too, the award had already been challenged before the High Court on 25th April 2007. As of the date of promulgation of the Constitution of Kenya, 2010 on 27th August 2010, the dispute giving rise to this appeal was pending for hearing and determination before the High Court. Accordingly, for the purposes of this appeal, what is in issue is the decision of the Industrial Court as established by the Trade Disputes Act.

In addressing the issues we have identified above, it is therefore important to bear in mind the two distinct phases in the history of the Industrial Court in Kenya, namely, on the one hand the Industrial Court under the former Constitution and the Trade Disputes Act, and on the other, the Industrial Court (subsequently renamed the Employment and Labour Relations Court) under the Constitution of Kenya, 2010 and the Employment and Labour Relations Act, 2011 (cap 234B). The former court was created pursuant to the provisions of a statute, namely the Trade Disputes Act, while the latter is created pursuant to Article 162(2)(a) of the Constitution. From the outset it cannot be gainsaid that juridically, their jurisdiction and powers derived from completely different legal norms.

The distinction is important for purposes of this appeal because, as the Supreme Court stated in ***Judges & Magistrates Vetting Board & 2 Others v. The Centre for Human Rights & Democracy & 11 Others, SC Pet. No 13A consolidated with SC Pet. Nos. 14 and 15 of 2013,*** clauses that seek to ouster jurisdiction of the courts may be either constitutional or statutory. Where the ouster clause is provided by the Constitution, as for example section of 23 of the Sixth Schedule to the Constitution which insulated decisions of the Judges & Magistrates Vetting Board from question or review by any court, such clause is readily given effect because it comes from a higher juridical norm, namely the Constitution. Where however a statute provides the ouster clause, questions such as the consistency of the statute with the Constitution are enjoined on account of the doctrine of supremacy of the Constitution, which voids or nullifies any statutory enactment to the extent that it is inconsistent with the Constitution.

After undertaking a wide-ranging comparative review of approaches to ouster clauses in various jurisdictions, the Supreme Court, in the ***Judges & Magistrates Vetting Board case*** ***(supra)*** distilled the following principles:

> ***"Our consideration of the judicial experience in other countries shows that the ousterclause in Constitutions and in statute law is by no means a novelty. It is apparent, in the case of all the jurisdictions we have considered, that the Courts have perceived such clauses as no more than a professional juristic challenge, each to be resolved in the context of its special facts and circumstances. However, the Courts have in general been guided by certain inclinations,***

especially the following: (i) the legislative bodies have a popular mandate to make law as they find appropriate, in the public interest; (ii) but their law-making function falls within a constitutional order in which the Judiciary is the regular custodian of the rule of law, and of the rights and freedoms of the individual; (iii) it is presumed by the Courts that the legislature perceives them as a critical player in the scheme of the process of justice, and so does not intend to deprive them of jurisdiction, in those cases in which special tribunals or agencies are established to perform particular tasks; (iv) the Courts have a conventional inclination to interpret statutes in a manner that precludes a ceding of jurisdiction to other agencies; (v) subject to these principles, the Courts have recognized that, indeed, there will be proper instances of jurisdiction being conferred upon other agencies by the legislature; (vi) but when the legislature does so, it has an obligation to express itself in clear, firm and unequivocal language – otherwise judicial interpretation is apt to take the stand that jurisdiction lies with the Courts; (vii) legislative provision for commensurate remedies at the hands of a non-judicial agency, is a relevant factor in determining whether or not the Court's jurisdiction has been ousted; (viii) it is also a relevant factor whether the ouster clause is likely to be a conduit for excess of power, such as would distort the principle of separation of powers, and the principle of balanced exercise of public powers."

Turning to the first issue in this appeal, namely whether the Industrial Court under the Trade Disputes Act was a subordinate court amenable to the supervisory jurisdiction of the High Court, it is apposite also to point out that the question had literally divided the High Court down the middle. On the one hand there was a line of decisions that took the view that the Industrial Court was for all intents and purposes a subordinate court, which under the former Constitution was subject to the supervisory jurisdiction of the High Court. Thus, for example in ***Kenya Airways Ltd v. Kenya Airline Pilots Association (supra), Visram J.*** (as he the was), held that by virtue of the provisions of the former Constitution, the Industrial Court was subordinate to the High Court and where it acted in excess of jurisdiction, it was amenable to the supervisory jurisdiction of the High Court. That view was followed in ***Mirage Fashion Garments (EPZ) Ltd & 4 Others v. Attorney General & 2 Others, HC Pet. No. 43 of 2008, (Gacheche*** and ***Dulu, JJ.)*** where the court reiterated that, by virtue of its creation by a statute, the Industrial Court was an inferior tribunal amenable to the supervisory jurisdiction of the High Court conferred by the Constitution. In ***Municipal Council of Thika v The Industrial Court of Kenya, HCCC No. 268 of 2007 (Wendo J.),*** although the High Court dismissed the application before it because it was not persuaded that the Industrial Court had acted in excess of jurisdiction, it agreed that where the Industrial Court acted in excess of jurisdiction, its decision would be amenable to review by the High Court. In ***Mecol Ltd v. Attorney General & 7 Others, HC Misc. App. No 1784 of 2004***, the High Court ***(Rawal, J.(as she then was)***,***Mutungi*** and ***Kasango, JJ***.) held that the High Court had jurisdiction under the former Constitution to grant judicial review orders in respect of proceedings and decisions of the Industrial Court like any other subordinate court. Specifically the court rejected the argument that the supervisory power of the High Court was limited to civil and criminal matters and did not extend to judicial review, which was neither criminal nor civil.

On the other side of the pendulum were decisions that held that by virtue of section 17 of the Trade Disputes Act, decisions of the Industrial Court were final and that the High Court had no jurisdiction to entertain challenges to decisions of the Industrial Court. Thus in ***Kenya Guards & Allied Workers Union v. Security Guards Services & Others***, ***(supra)***, ***(Nyamu, J***., as he then was) held that the section 17 of the Trade Disputes Act was not inconsistent with the jurisdiction of the High Court under the former Constitution and that in any event the supervisory power of the High Court was limited to civil and criminal matters whilst judicial review was neither criminal nor civil. The view that section 17 was an absolute bar to exercise by the High Court of jurisdiction over decisions of the Industrial Court was followed in ***Republic v. Industrial Court exparte Kenya Bankers Association, HC Misc. App. No. 1143 of 2004 (Ibrahim, J.,as he then was)*** where the Court observed that the Constitution did not confer on the High Court any express or specific jurisdiction over the Industrial Court, which the Court found is not even mentioned by the Constitution. (See also ***Opiyo & Others v. Attorney General & Others [2005] 2 KLR 502***; ***Robert De Jong & Another v. Charles Mureithi Wachira, HCCCA No. 137 of 2009***; and ***Republic v. The Industrial Court of Kenya & Another exparte Municipal Council of Thika, HC. Misc. App. No. 309 of 2009).***

In ***United States International University & 3 Others v. Attorney General & 13 Others (supra),*** in concluding that the Industrial Court under the Trade Disputes Act was not amenable to the supervisory jurisdiction of the High Court, the Employment and Labour Relations Court based its decision on the argument that it was established by ***"prerogative"*** of the President as a separate dispute resolution mechanism outside the Judiciary. This how the learned judges expressed themselves:

> ***"The creation of the Court, and appointment of Judges, and determination of their number, was a prerogative of the President. There was no role for the Judicial Service Commission as the Court was an institution created through tripartite engagement of the Government, the Employers and Organized Labour. It was not a Court within the Judiciary, but a Dispute Resolution Mechanism perched atop a Dispute Resolution Mechanism existing outside the Judiciary, in the Ministry of Labour. The Court acted as a Court of reference and appeals in matters originating from the Ministry. Its decisions were final and binding, reflecting the intention of its creators not to be part of the Judiciary. It was not a Subordinate Court, as submitted by the Attorney General, but a component of a separate dispute resolution system, outside the Judiciary, which could not be ranked within the hierarchy of Courts."***

In our view, to the extent that the Industrial Court was created and its jurisdiction defined by a statute, the first question that we have identified must first and foremost be considered on the basis of consistency of the statute with the express provisions of the Constitution. In our view, and with respect, the conclusion of the Employment and Labour Relations Court in ***United States International University & 3 Others v. Attorney General & 13 Others (supra),*** that the Industrial Court was created pursuant to the prerogative powers of the President is a misnomer in the context of a written constitution like the former one, from which all powers vested in constitutional offices and institutions flowed. The reality is that the powers that the President invoked to make the order creating the Industrial Court were donated to himby the Trade Disputes Act, an Act of Parliament. Notwithstanding the fact that it was created by an order of the President, the conclusion that the Industrial Court was created pursuant to an Act of Parliament is inescapable. In our view, juridically it makes no difference whether the Industrial Court was created directly by an Act of Parliament or by an order of the President pursuant to powers donated by an Act of Parliament. In both cases, the court is pure and simple, created pursuant to an Act of Parliament.

At the material time ***section 60(1)*** of the former Constitution provided as follows regarding the jurisdiction of the High Court.

> ***60. (1) There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law. (Emphasis added).***

As regards the other courts, the pertinent parts of ***section 65*** of the Constitution provided thus:

> ***"65. (1)Parliament may establish courts subordinate to the High Court and courts martial, and a court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law.***
>
> ***(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts." (Emphasis added).***

Lastly ***section 123*** of the former Constitution defined a subordinate court as follows:

> ***"Subordinate court," means a court of law in Kenya other than -***
>
> ***(a) the High Court;***
>
> ***(b) a court having jurisdiction to hear appeals from the High Court; or***

(c) a court-martial." (Emphasis added)

A careful consideration of sections 60(1), 65(1) and 123 against the Trade Disputes Act impels us to conclude that the Industrial Court created by the latter Act was a subordinate court and therefore subjectto the supervisory jurisdiction of the High Court. First it was created pursuant to powers donated by an Act of Parliament and secondly the Constitution donated power to the Parliament to establish only courts that were subordinate to the High Court and over which the High Court had supervisory jurisdiction. Accordingly, we also think that the argument that the Industrial Court was not a subordinate Court because the Constitution did not make any reference to it is not sound. All that mattered was that the Industrial Court was established in the manner provided in section 65 of the former Constitution for establishing subordinate courts. We would however agree with the High Court in ***Mecol Ltd v. Attorney General & 7 Others*** ***(supra)*** that when the jurisdiction of the High Court is categorised only into civil and criminal, the jurisdiction to issue judicial review orders is a civil jurisdiction.

Our view that the Industrial Court under the Trade Disputes Act was a subordinate court that was amenable to the supervisory jurisdiction of the High Court is bolstered by the fact that twice in the past when it was considered necessary tocreate courts that were not subject to the supervisory jurisdiction of the High Court, that eventuality was achieved by expressly providing for those courts in the Constitution and insulating therein their decisions from the supervisory jurisdiction of the High Court. The matter was not merely left to an Act of Parliament as in the Trade Disputes Act.

Thus for example, when it was considered necessary to create the ***Interim Independent Constitutional Disputes Resolution Court*** and make its decisions final, the Constitution was amended to introduce ***section 60A*** for that purpose. More recently, when the people of Kenya resolved to create the ***Employment and Labour Relations Court*** and the ***Environment and Land Court*** as courts of equal status with the High Court, Articles 162(2)(a) and (b) of the Constitution created those courts and recognised them, together with the Supreme Court, the Court of Appeal and the High Court as the superior courts. Specifically, Article 165(5) expressly provided that the High Court does not have jurisdiction in respect of matters reserved for the Employment and Labour Relations Court and the Environment and Land Court.

On the first issue, we conclude therefore that the Industrial Court was a subordinate court whose decisions were subject to the supervisory jurisdiction of the High Court. To that extent, we do not agree with the appellant that the High Court usurped a jurisdiction that it did not have.

A closely related question is whether the High Court erred in hearing and determining the application challenging the award of the Industrial Court instead of transferring that matter to the Employment and Labour Relations Court, which had been established by the time the High Court heard the judicial review application. As we have already noted the impugned award of the Industrial Court was made on 8th March 2007 and the 1st respondent took out the judicial review proceedings on 25th April 2007. The judgment of the High Court that is challenged in this appeal was delivered on 2nd October 2012, meaning that as of the date when the Constitution of Kenya 2010 was promulgated on 27th August 2010, those proceedings were pending before the High Court.

By dint of section 22 of the Sixth Schedule to the Constitution, those proceedings could validly be heard and determined in any of the following three ways. They could either continue before the court, in which they were pending, or they could be heard by a corresponding court established under the Constitution of Kenya, 2010 or they could be heard as directed by the Chief Justice or the Registrar of the High Court. The schedules are part and parcel of the Constitution and the Constitution must be interpreted purposively, broadly, holistically and as one whole so as to achieve harmony of all its provisions.(See ***Justice H. Kalpana Rawal v The Judicial Service Commission & Others, CA No. 1 of 2016)***. Accordingly, to the extent that section 22 of the Sixth Schedule allowed the High Court, before which the proceedings were pending, to continue hearing those proceedings, we are satisfied that Ngugi J. did not err by hearing and determining the application.

Ngugi, J. found that the dispute that was determined by the Industrial Court was not a trade dispute as

defined by section 2 of the Trade Disputes Act. We have carefully considered the definition trade dispute in section 2 of the repealed Act and are not able to share that view. Under that provision, a trade dispute is defined to include a dispute or difference between an employer and an employee connected with employment or the terms of employment or with the conditions of labour In our view the definition is broad enough to cover the dispute which is at the heart of this appeal, namely how members of the appellant should be remunerated for teaching the SSSP programme. While the appellant contended that they should be paid 35% of the income generated by the SSSP, the 1st respondent was offering about 14% thus leading to a disagreement. It should also be remembered that under section 2 of the Trade Disputes Act a trade dispute is defined to include even an apprehended trade dispute. Even the manner in which the parties themselves dealt with the dispute before it ended up in the High Court suggests that they treated it as a trade dispute. It was on that basis that they allowed the Minister to appoint an investigator and to refer the matter to the Industrial Court when the two parties could not agree on the recommendations of the Investigator.

The next question is whether the Industrial Court had acted *ultra vires* and or whether there were grounds that justified review of its award by the High Court. At the material time the 1st respondent was created by an Act of Parliament, the Kenyatta University Act. ***Section 12*** of the Act established the Council of the 1st respondent made up of more than 30 members, headed by a chairman. By ***section 13***, the Council was constituted the governing body of the 1st respondent through which the 1st respondent was to act. Specifically the section obliged the Council to ***"administer the property and funds of the University in a manner and for the purposes which shall promote the best interest of the University".*** The Council was expressly prohibited from charging or disposing off the immovable property of the University without the prior approval of the Chancellor. Lastly the Act empowered the Council to receive on behalf of the 1st respondent or its constituent colleges, donations, endowments, gifts, grants or other monies and to make disbursements therefrom to the constituent colleges or other bodies or persons.

Section 20 (3) required all annual estimates of the 1st respondent to be approved by the Council before commencement of the financial year and to be submitted to the Minister of Finance for approval. Upon approval by the Minister, the Council was barred from increasing any sum in the estimates without the approval of the Minister. Then section 20(4) provided:

> ***"No expenditure shall be incurred for the purposes of the University except in accordance with the annual estimates approved under subsection (3) or in pursuance of an authorization of the council given with the prior approval of the Minister***."

Thus, by express statutory provisions, the Council was the organ responsible for governing the 1st respondent. In particular, it was responsible for the financial management of the 1st respondent and was under express statutory duty to promote the best interest of the 1st respondent.

The appellant contends that the 28th Meeting of the Council held on 2nd October 2003 ratified payment of 35% of the income generated from the SSSP to service providers while the 1st respondent maintains that the payment was found to be financially unviable and the Council subsequently declined to implement it. From the record, it appears to us that there was no clear and unequivocal acceptance of the proposal to pay 35% of the income from the SSSP to the service providers because if that was the case, why were several other *ad hoc* committees of organs of the 1st respondent making recommendations on sharing of the SSSP funds long after the Council had purportedly ratified the payment in October 2003? We have earlier in this judgment adverted to those *ad hoc* committees, some of which were still making recommendations for payment, almost two years after the date that the 1st respondent had allegedly ratified the payments.

In view of the express statutory duties imposed on the Council regarding the financial management of the 1st respondent, which the Industrial Court ignored, in our view it amounts to undisguised usurpation of the powers and role of the Council for the investigator or the Industrial Court to micromanage the 1st respondent and to direct it on how it must manage and utilize the funds generated by its programmes. It is clear to us beyond peradventure that under the Act, it was the responsibility of the Council of the 1st respondent, and the Council alone, to administer the funds of the 1st respondent in a manner that would

promote its best interest. With respect, we agree with the High Court that was not the role of the investigator or the Industrial Court. To ignore express statutory provisions imposing financial management obligations on the 1st respondent and to direct it on how to expend its funds, including placing on it an obligation to borrow, was acting *ultra vires.*

The 1st respondent contends that the award by the Industrial Court would put it to a deficit of close to Kshs 1 billion. The fact that the implementation of the proposed payment had serious financial consequences for the 1st respondent is made clear by the report of the investigator, who thought that the best solution was for the 1st respondent to borrow money so as to finance the payment. It is in this context that it has been stated time and again that where the law vests the power to make a decision in a body, when that body is acting within its mandate, it is for it rather than the court to make the decision. That approach applies with even stronger force in matters in which the court does not have expertise.

The appellants do not dispute that the ***Kenyatta University Enterprises & Services Board***, which the Industrial Court ordered to manage the SSSP funds did not exist. This then begs the question how a non-existent body was to manage the SSSP funds. And did that order not violate the Kenyatta University Act, which vested the responsibility for management of the funds of the 1st respondent in the Council rather than an unknown and non-existent body? Surely a court order that is *intra vires* cannot require a party to act in a manner that violates the law or otherwise undermines the party's legal obligations.

The further order made by the Industrial Court requiring that the SSSP funds be deposited in a separate account and that the 1st respondent be issuing quarterly reports regarding the account were also, in our view, in blatant breach of the express statutory duties vested on the 1st respondent by the Kenyatta University Act. To comply with the orders of the Industrial Court would have translated into an illegally and a breach of the 1st respondent's statutory obligations and no court of law should put a party in such a situation. Incidentally, the service providers who it was recommended be paid 35% of the SSSP funds were a broader group of workers of the 1st respondent and not restricted to members of the academic staff only, who in these proceedings are represented by the appellant. Yet the order of the Industrial Court appears to conflate the issue and assumed that the service providers to be paid 35% of the SSSP funds were only***"staff involved in teaching the SSSP."***

It would appear to us too, that in making its award directing the 1st respondent to pay the 35% of the SSSP funds to service providers, the Industrial Court allowed itself to be unduly influenced by what was happening in other universities. Yet it must be remembered that at the material time, each local university was set up by a separate and distinct Act of Parliament. Each university had its management structure and statutory roles and obligations. The resources available to the universities were not necessarily the same. Some universities were old and well established, with donors and endowment funds as well as other forms of investments, while others were relatively new and young. No university could therefore be directed to manage its financial resources in a particular manner merely because another university was doing so.

We have come to the conclusion that the Industrial Court as established by the Trade Disputes Act was a subordinate court amenable to the supervisory jurisdiction of the High Court, that in making its award dated 25th April 2007 the Industrial Court acted *ultra vires*, and that the High Court did not err in quashing that award. Accordingly this appeal stands dismissed. Granted the nature of the dispute that gave rise to the appeal, we direct each party to bear its own costs. It is so ordered.

Dated and delivered at Nairobi this 3rd day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

DEPUTY REGISTRAR