IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 57 OF 2014

BETWEEN

BAKE 'N' BITE LIMITED……APPELLANT

AND

RACHEL NUNGARE & 15 OTHERS……..……..RESPONDENTS

BAKERY, CONFECTIONARY, FOOD

MANUFACTURING & ALLIED WORKERS UNION……INTERESTED PARTY

(Appeal from the judgment and decree of the Industrial Court of Kenya at Mombasa (Makau, J.) dated 30th May 2014

in

I.C.C. No. 220 of 2013

****

JUDGMENT OF THE COURT

This appeal arises from a judgment of the Industrial Court of Kenya (now the Employment and Labour Relations Court) at Mombasa in which the court awarded the 16 respondents a total of ***Kshs 1, 764, 180/-*** being one months salary in lieu of notice, 6 months salary for unfair termination of employment, service pay for the number of years worked and leave pay for some of the respondents. From the outset, the manner in which the trial was conducted leaves a lot to be desired, and regrettably the parties as well as the court itself, must take their fair share of blame in that respect.

At all material times the respondents were employees, in the slice department of the appellant, ***Bake "N" Bite,*** a firm of bakers and confectioners. They were employed at different times but all were earning a salary of ***Kshs 14, 520*** per month. All the respondents were also members of the ***Bakery, Confectionary, Food Manufacturing & Allied Workers Union, (the Union)*** which had in force a ***Recognition Agreement*** with the appellant. In addition, the Union and the appellant had entered into a ***Collective Bargaining Agreement***, ***(CBA)*** which was accepted and duly registered by the Industrial Court as ***RCA No. 179 of 2010,*** on 2nd September 2010.

On 21st November 2011 the respondents sidestepped their Union and filed in their names a memorandum of claim in the Industrial Court at Nairobi seeking compensation and other reliefs arising from alleged unlawful termination of their employment by the appellant. In the memorandum of claim they averred that on 15th July 2011the appellant had unlawfully terminated their employment, occasioning them loss and damage. Accordingly they prayed for the following reliefs:

i. ***One month's pay in lieu of notice;***
ii. ***Leave pay;***
iii. ***Gratuity;***
iv. ***12 months pay being compensation for wrongful termination of employment;***
v. ***General damages***.

On 2nd April 2012 the appellant entered appearance to the claim and on 18th May 2012 it filed a notice of preliminary objection in which it prayed for the striking out of the claim on the grounds that it offended the provisions of the ***Labour Relations Act, No 14 of 2007*** and was otherwise premature, misconceived and incompetent. It was also contended that in the circumstances the court lacked jurisdiction to entertain the claim. On 5th November 2012 the appellant filed a Notice of Motion seeking stay of proceedings and or the striking out of the suit pending negotiations between the Union and the appellant as provided in the CBA. The Motion was based on the same grounds as the preliminary objection. The appellant did not file any defence, presumably because it expected its objection and Motion, which raised jurisdictional, or at any rate, questions whether the claim was ripe or otherwise properly before the court.

For its part the Union, on 8th July 2012, applied to be joined in the proceedings as an interested party. The basis of the application was that the respondents were its members; that it had a ***Recognition Agreement*** in force with the appellant; that it had on behalf of the claimants and other employees of the appellant entered into a CBA with the appellant; that the CBA was binding upon the appellant, the respondents and the union; that the CBA addressed among others, wages and terms and conditions of employment including termination of employment; that any dispute between the respondent and the appellant was to be resolved in accordance with the procedures and mechanisms set out in the CBA; and that the respondents had not exhausted the prescribed disputed resolution mechanism.

In their replying affidavit sworn on 18th February 2013 in opposition to the appellant's Motion, the respondents maintained that they had lost faith in the Union and contended that they had a right to lodge their claim in their names and through an advocate of their own choice. It was common ground though, that the respondents, right up to the hearing of this appeal, had not otherwise resigned from or terminated their membership in the Union.

The record indicates that by an order dated 12th February 2013 the Union was admitted as a party to the proceedings. By a further order dated 12th June 2013, the case was transferred from the Industrial Court Nairobi, to the Industrial Court Mombasa, for hearing and disposal.

When the parties appeared before ***Rika, J.*** in Nairobi on 5th November 2012 before the case was transferred to Mombasa, the learned judge made the following orders:

"(i) The application dated 2nd November 2012 filed by the respondent (present appellant) be served upon the claimants;

(ii) Claimants to file their replying affidavits/grounds of opposition within 7 days of service;

(iii) Parties to thereafter agree on a date for the hearing of the application at the registry."

On 19th February 2013 the parties again appeared before Rika, J, who, with their consent, allowed the Union to be joined in the proceedings. He made a further order similar to the one he had made on 5th November 2012, which among other things directed the parties to take dates at the registry for the hearing

of appellant's Motion.

In the meantime the case was transferred to Mombasa and the parties appeared before ***Makau, J.*** 28th August 2013. The record of that day's proceedings indicates that the court ordered the appellant's pending motion as well as the Union's application to be joined in the suit be heard and determined by way of written submissions. The parties were given 3 weeks within which to file their submissions and it was directed that the case be mentioned on 30th September 2013 presumably for further directions.

As should be apparent from what we have already said, there was no basis for the order regarding the hearing of the Union's application for joinder because that application was determined by consent before Rika, J. on 19th February 2013.

It appears that only the Union complied with the time set by the court. It filed its submissions on 17th September 2013 while the appellant and the respondents filed theirs on 4th October 2013. Those submissions addressed squarely the issues raised in the Motion, whether the respondents' claim was in law properly before the court. It was to be expected that having filed their submissions as directed, the court was going to consider the submissions and determine the application and either terminate the case, stay proceedings or dismiss the application before hearing the respondents' claim on merits. But that was not to be.

When the parties next appeared before the learned judge on 8th November 2013, they intimated that they were negotiating a settlement. The court gave them up to 20th December 2013 to conclude the negotiations, failing which the appellant was to file and serve its defence. Clearly the effect of this order was that if the negotiations fell through, the claim would be heard on merit. Yet there were fundamental legal issues raised in the appellant's Motion and submissions of the parties, which were awaiting determination by the court before it could hear the claim on merits. As of that date, the parties had placed before the court their respective arguments and what was outstanding was the court's decision.

Be that as it may, on 19th December 2013 the appellant and the union filed in court a consent order compromising the dispute and awarding the respondents a total of ***Kshs 380,043/-.*** When they appeared before the learned judge on 13th February 2014, the respondents indicated that they were in agreement with the consent order, save for three issues only, namely:

i. ***notice pay;***
ii. ***compensation for unfair termination; and***
iii. ***costs.***

They therefore requested a hearing limited to those three issues. The order recorded that day was that in view of the disagreement, the consent order would not be recorded until all the issues were ironed out. The suit was fixed for further mention on 20th February 2013 (sic).

On 20th February 2014, the parties appeared before the learned judge and informed him that they had not reached agreement on the three contentious issues. The learned judge then made an order directing the parties to file written submissions on the three issues regarding notice pay, compensation for unfair termination and costs. The implication was that the parties had accepted the consent order and the only matters they were leaving for the determination of the court were the three issues that the claimants were unhappy with.

The claimants were accordingly directed to file their submissions by 15th March 2014 and the appellant and the Union by 31st March 2014. As of the date the order was made, the appellant and the Union had not filed any defence to the respondent's claim, supposedly because they were awaiting determination of the preliminary issues. How exactly they expected to be heard on the three issues, having filed no defence, is not clear to us.

As before the parties did not observe the timelines, save for the respondents who filed their submissions on 10th March 2014. The Union filed its submissions on 8th April while the appellant filed its on 14th April. While the respondents took the position that their claim was unopposed and tried to justify why the notice pay, compensation for unfair termination and costs should be paid to them (without quantifying any figures), the appellant and the Union still contended that the claim was not properly before the Court and that in any event the consent order signed by the appellant and the Union and filed in court on 19th December 2013 was binding and had fully determined all the issues in dispute.

Makau, J. delivered his judgment on 30th May 2014 and awarded the respondents the relief's already referred to. As regards the appellant's application on the competence of the claim and in respect of which the parties had filed submissions in September and October 2013 as directed by the Court, the learned judge took the view that the parties had abandoned the application. On page 1 of the judgment the learned judge stated:

"The respondent never filed any defence but only a notice (of) preliminary objection to the suit followed by motion seeking stay of the suit proceedings both of which were never prosecuted."

At page 10 of the judgment the claim was repeated in the following terms:

"The two had no defence on record and abandoned their objection to the suit when they failed to prosecute them…"

Exactly why he concluded that the application had been abandoned is not readily apparent. Having filed their submissions as directed by the court, the parties were entitled to expect a ruling on the issues.

Even after concluding that the appellant had abandoned its application, the learned judge addressed in a rather fleeting manner the appellant's objections before concluding that there was no legal bar contemplated in the present Kenyan legal framework to the respondents approaching the court without regard to the Union and that since the appellant and the Union had not complied with the procedure prescribed by the CBA for dispute settlement, the suit by the respondents was justified.

As regards the consent, the learned judge trashed it and reopened all the issues. Thus whilst all the parties had by consent submitted to the learned judge only three issues for determination, the learned judge, *suo moto*, determined other issues that were not in dispute such as service pay of 15 days per year of service and pay in lieu of leave days.

We have carefully considered this appeal and the submissions of the appellant and the Union which fault the learned judge for peremptorily ignoring the Recognition Agreement and the CBA; setting aside the consent order without being moved by any of the parties; determining issues that were not raised by the parties; and allowing the respondents to approbate and reprobate through the taking of benefits under the CBA whilst at the same time refusing to follow the procedures and mechanisms prescribed by it.

We have also carefully considered the respondents' submissions for affirmation of the judgment, such as their right to approach the court for redress of their grievances; their right to enjoy the fruits of the CBA without being bound by it; their right to act for themselves without first resigning as members of the Union or opting out of the CBA; and the alleged abandonment of the appellant's application.

The issues we have highlighted above are sufficient to dispose of this appeal. The appellant raised fundamental issues in its application dated 2nd November 2012 before the trial judge and all the parties filed written submissions in support of or in opposition to the application. Instead of determining the issues raised, the learned judge erroneously concluded that the application had been abandoned. As a consequence he did not give any meaningful consideration to the weighty issues raised by the appellant and the Union, issues that clearly have fundamental implications, not only to the parties before the court, but also to labour relations in the Republic of Kenya. The effect is that we do not have the benefit of the learned judge's proper consideration of the grave issues raised by the appellant.

In ***NORTH STAFFORTSHIRE RAILWAY COMPANY V. EDGE*** ***(1920) A.C. 254, Lord Birkenhead, L.C***. articulated the concern that we now have as follows, at p. 263:

"The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below."

Secondly the learned judge was plainly wrong in trashing the consent order that had been entered into by all the parties. None of the parties had moved the learned judge to set it aside. He did so *suo moto* and without affording the parties an opportunity to be heard on whether the consent order should indeed be set aside or not. In ***HIRANI V. KASSAM*** ***(1952), 19 EACA 131***, the predecessor of this Court, quoting from ***SETON ON JUDGMENTS & ORDERS, 7TH ED. VOL.1 P.124*** stated as follows:

"[P]rima facie ,any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court…"

(See also FLORA WASIKE V. DESTIMO WAMBOKO (1988) 1 KAR 625 and

KENYA COMMERCIAL BANK LTD V. BENJOH AMALGAMATED LTD & ANOTHER, CA NO 276 of 1997).

Lastly, the learned judge ought not to have determined issues that were not placed before him by the parties. The parties had agreed that the judge should determine only three issues. Those are the issues that the parties addressed in their written submissions. But the learned judge introduced, of his own motion and without affording the parties an opportunity to be heard, other new issues, which he also purported to resolve.

In ***IEBC & ANOTHER V. STEPHEN MUTINDA MULE & ANOTHER, CA No 219 of 2013*** this Court cited with approval the decision of the Supreme Court of Appeal of Malawi in ***MALAWI RAILWAYS LTD V. NYASULU*** ***[1998] MWSC, 3*** where the role of the trial court in a jurisdiction of a legal system similar to ours was encapsulated as follows:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute, which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

In ***DAVID SIRONGA OLE TUKAI V. FRANCIS ARAP MUGE & OTHERS, CA NO. 76 OF 2014***, this

Court once again reiterated the limited role of the trial court in adjudicating the dispute framed by the parties:

"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense. The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

We are satisfied that this appeal has considerable merit. However, having found that the central question before the court was not determined properly or at all, the order that best commends itself to us is to allow the appeal, set aside the judgment and decree dated 30th May 2014 and in lieu thereof, remit this case back to the Employment and Labour Relations Court for proper hearing and determination, by a judge other than Makau, J. Considering all the circumstances of this appeal and the active roles that all the parties played in actualizing a flawed hearing, we make no orders on costs. It is so ordered.

Dated and delivered at Malindi this 29th day of May, 2015

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.