REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 15 of 2011

BETWEEN

THE DIRECTOR KENYA MEDICAL RESEARCH INSTITUTE.....APPELLANT

AND

AGNES MUTHONI & 35 OTHERS.....RESPONDENTS

(An appeal from the Award of the Industrial Court at Nairobi (E.K. Mukunya J)

and N.N. Udoto and M.H. Alumande (members) dated 13th May, 2010

in

Industrial Case No. 37(N) of 2010)

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RULING OF THE COURT

The background information to this ruling is that the preliminary objector/respondent **Agnes Muthoni** and 34 others filed Trade Dispute Cause No.37 of 2010 in the Industrial Court of Kenya at Nairobi vide memorandum of claim dated the 19th day of February 2010 and filed the same date. It was directed against the respondent/appellant **Kenya Medical Research Institute**. The issue in dispute was wrongful termination of appointment of **Agnes Muthoni & 34 others. The Union of National Research and Allied Institutes Staff of Keny**a were subsequently brought on board as an interested party. The memorandum of claim was supported by annextures among others giving details of the claimants inclusive of their letters of appointment, the instrument governing and or spelling out the terms of engagement of the disputants and the offending termination letters.

The respondent/appellant opposed the claim vide a statement in reply dated the 8th day of March 2010 and served on the preliminary objector/respondents counsel on the 9th day of March 2010. In this reply, the respondent/appellants sought to give justification for the procedure adopted by the appellant both in reaching the decision to dismiss the claimants and on terminating their employment.

Parties were heard by way of affidavits and submissions. The Industrial Court reached a verdict dated the 13th day of May, 2010. The Industrial Court made the following observations on the claimants' case.

"It is averred in the memorandum of claim that the "claimants" were on the 20th day of February 2007 employed as permanent employees by the respondent. They were issued with letters of offer of

employment and were subsequently issued with letters of deployment to various departments and centres where they worked for the respondent until 17th December, 2009 when the respondent issued all of them with termination letters. It is averred that the said termination was wrongful and unfair in that the employer respondent did not give valid reasons to the employees for the termination and that the employer did not give to the employees a chance to defend themselves before the termination. In consequence thereof the claimants prayed for orders that the letters of termination dated the 17th day of December 2009 be declared null and void; that the respondent be ordered to pay to each of the claimants damages for wrongful termination and costs."

With regard to the respondents defence the following observations were made:-

"***The respondent in a statement of reply dated the 8th day of March, 2010 has opposed the demands and prayers of the claimants. It is averred that the recruitment of the claimants by the respondent in December 2009 was irregular and that upon investigations carried out by a committee of the respondent the employer/respondent was left with no alternative but to terminate the employment of the claimants… that the termination of the claimants by the respondent was justified and was done in accordance with the letters of offer of appointment."***

With regard to the interested parties case the following observations were made:-

"The interested party in its memorandum of interest filed on 19th day of February, 2010 adopted the position taken by the memorandum of claim."

After due consideration of all the participating parties cases the Industrial Court made the following concluding observations and or remarks in a summary on the entire dispute:-

'"***There is no dispute that the claimants were employees of the respondent and were terminated through letters issued on 17th December,2009.... It is observed that the letter of termination dated 17th December 2009 and which is availed to the Court as per paragraph 4 of the statement of reply informed the employees that upon termination they would be paid one month salary in lieu of notice. This means that on the question of notice of termination the employer acted properly upon termination of contract of employment. …….there is ample evidence that termination of 35 employees who are also the claimants was violated with incurable irregularity. It was a capricious exercise of powers of termination by the employer which although giving salary of one month in lieu of notice was constructively a summary dismissal which was meant to get rid of unwanted employees. Good industrial relations would require an employer to use more transparent, means such as declaration of redundancy or normal termination. Where the employer would give valid reasons for termination. None of the claimant employees was involved in the irregular employment and none should be blamed or suffer for it.***

In the premises, the court accepts the case for the claimants and for the interested party and rejects as improbable the position adopted by the respondent. In the circumstances of this dispute the court orders the respondent/employer to unconditionally reinstate all the 35 grievants/employees who lost their jobs immediately with no loss of their basic pay or seniority and to reengage them in the respective position they were holding prior to the termination of 17th December, 2009"

Our setting out the above background information was for purposes of demonstrating that the respondents claim was laid before the Industrial Court under the employment/and or labour laws. It was received, assessed and ruled upon under the provisions of the said employment and or labour laws. It is undisputed that the appellant was aggrieved by that decision and moved to this court and presented a notice of appeal dated the 20th day of May, 2010 followed by the presentation of this appeal on 3rd day of February, 2011.

It is against the afore set out background information that the preliminary objector/respondent have raised a preliminary objection dated the 2nd day of February,2012 it was filed on the 11th day of February,2012 to the effect that:-

(1) ***That this court lacks jurisdiction to entertain the appeal filed here with.***

(2) ***The appeal herein violates section 64 of the repealed constitution as read together with the sixth schedule section 22.***

On the date appointed for the hearing of the preliminary objection, learned Counsel **Emmanuel Wetangula** appeared for the respondent/appellant while learned counsel **Enonda A.M. Dickson** appeared for the preliminary objector/respondent and **Zachary Alum Achacha** appeared for the interested party. In his oral submissions to court, learned counsel for the preliminary objector submitted that this court has no jurisdiction to entertain the pending appeal because firstly this court's jurisdiction is enshrined in section 3 of the Appellate Jurisdiction Act cap 9 Laws of Kenya and section 64 of the retired Constitution. Section 3 of the Appellate Jurisdictions Act mandates this court to hear appeals as mandated to it by law. In pursuance to this provision, section 64 of the retired Constitution mandated this court to hear appeals from the High Court only. Secondly, learned counsel admitted that the industrial Court had been set up by the Labour Institutions Act No.12 of 2007 vide section 11 thereof. Section 27 of this same Act (Labour Institutions Act (Supra) gave direct appeal from the Industrial Court to the Court of Appeal. Thirdly that it is the stand of learned counsel for the preliminary objector that section 27 of the Labour Institutions Act is wrong as it is ultra vires the provisions of sections 64 of the retired constitution. That the labour institutions Act being a parliamentary legislation it is subservient to the constitution which has primacy over other legislation. That this stand is fortified by the provisions of section 3 of the retired constitution which specifies clearly that the constitution has primacy over any other legislation and where there is a conflict then the constitutional provisions prevail. For this reason the court is invited to hold that as at the time the respondent to the preliminary objection moved and lodged a notice of appeal as well as the record of appeal to this court, this court had no jurisdiction to receive and act on those documents and this court should rule so because there is no way parliament could confer jurisdiction on to this court to hear direct appeals from the industrial court without amending the constitution. Fourthly the court is invited to distinguish the retired constitutional positions with the current constitutional position of the same institution (the industrial court). On this aspect of the argument, learned counsel for the preliminary objector submits that Article 162 (2) of the current constitution establishes an industrial court with the status of the high court with a mandate to adjudicate over industrial disputes. It is the adjudications of this new creation which have direct access to the court of appeal meaning that prior to the promulgation of the current constitutional adjudication from the definist industrial court could only find their way to the high court by way of judicial review and then from the high court decision to the court of appeal but as a decision from the high court. It is further learned counsel's stand that there is no provision in the transitional clause of the current constitution which permits retrospective operation of the current constitutional provisions to cure any defeat in any matter like the one subject of these proceedings. On that account learned counsel for the preliminary objector urged us to decline jurisdiction and dismiss the appeal with costs to them.

In response, learned counsel for the respondent/appellant has urged us to dismiss the preliminary objection on the grounds that it is imperative upon this court to enforce section 27 of the labour institutions Act as it has never been repealed; that the preliminary objection should be dismissed as it has been disguised as a constitutional issue which this court has no jurisdiction to entertain as it has no original jurisdiction to enable it dispose off this constitutional issue. Learned counsel submits further that they concede that this court has a mandate to determine whether it has jurisdiction or not, that section 60 and 64 of the retired constitution gives unlimited jurisdiction to the high court and appellate jurisdiction to this court respectively; that there appears to be a conflict between section 27 of the Labour Institutions Act No.12 of 2007 and section 64 of the retired constitution but they contend that it is not the business of this court to make a pronouncement on that issue as in doing so this court would be assuming original jurisdiction on the constitutionality of section 27 of the said Act which is original jurisdiction which this court has no mandate to assume and exercise as this courts' jurisdiction is limited to the determination of appeals.

Learned counsel went on to contend that section 12(6) of the Industrial Institutions Act should be given the force of law. It is their stand that in so far as the preliminary objection seeks to interpret sections 3 and 64 of the retired constitution vis avis section 27 of the Labour Institutions Act, a power which cannot be

exercised by this court, this court has no alternative but to turn down that request; that this court should presume section 27 of the Labour Institutions Act to be constitutional because if it does not , then it will be condemning the respondent/appellant to the status of a remediless party considering that section 17 of the Industrial Institutions Act (Supra) makes provision that an industrial court award is not subject to review by any other court and for this reason this court is invited to find that section 12 of the industrial relations Act (Supra) does not donate power to the high court to supervise the industrial court.

With regard to the application of section 22 of the sixth schedule of the current Kenya constitution 2010, it is submitted by the respondent/appellants' counsel that this provision should be construed in their favour because as at the time the current constitution 2010 took effect notice of appeal had already been filed. The said provision makes it clear that the current constitution does not operate to negative existing legal proceedings such as these ones. Lastly that this court is invited to hold that the preliminary objection laid is not proper as it can not dispose off the appeal and should therefore be dismissed, because if it is not dismissed, the respondent /appellant will be rendered remediless and be deemed to have earned a hollow undoubted right of appeal which cannot be pursued.

Zachary Alum Achacha for the interested party adopted and supported the submissions of the preliminary objector in its entirety and on that account urged this court to allow the preliminary objection.

In response to the opposing submissions, learned counsel for the preliminary objector reiterated his earlier submissions and invited us to take note that section 17 of the Trade Disputes Act was repealed and for this reason it was not applicable at the time the decision the subject of these proceedings was reached and it is also not correct as put by the responde that the respondent /appellant will be rendered remediless. It is learned counsel's stand that if time for judicial review has run out on the respondent/appellant they have a remedy in filing a petition. Lastly reiterated that if parliament has conferred a power to a body which it does not have, that in itself does not operate to cure the unprocedurality of the pending appeal and make it legitimate.

We have given due consideration to the rival arguments above and considered them in the light of the principles of law cited to us by the learned counsels on board and the interested party in person and we proceed to make findings on the disposal of the preliminary objection. With regard to the issue as to whether this is a proper preliminary objection or not. We wish to refer to the land mark decision in the case of **Mukisa Biscuit Manufacturing Company Limited versus West end Distributors Limited (1969) EA 696** a decision of the predecessor of this court, the Court of Appeal for Eastern Africa. At page 700 Pr. D,E,F,Law JA as he then was had this to say:-

"***So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration…"***

At page 701 Pr. A.,B,C Sir Charles **New Bold, P**. added the following:-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"

We have accordingly applied that parameter to the rival arguments herein on the sustainability of the preliminary objection raised, and we are satisfied that the preliminary objection laid is sustainable. Our reasons for saying so are firstly that it raises a pure point of law namely the court of appeals' jurisdiction to entertain a direct appeal from the industrial court as it was then constituted before the promulgation of the current Kenya Constitution 2010. Secondly it satisfied the ingredient of final disposal of the matter objected to because should this court finally arrive at the conclusion that it has no jurisdiction, then it will be obligated to down its tools and that will be the end of this appeal. Thirdly the facts pleaded by the opposite party are not in dispute in that there is no dispute that proceedings leading to the decision subject

of the appeal objected to were purely industrial relations issues within the mandate of the industrial court as it was then constituted. We are therefore satisfied that the preliminary objection laid is sustainable and will be considered on its merits.

With regard to the issue as to whether we have a mandate to entertain this preliminary objection, we wish to refer to the court of appeal decision in the case of the **Owners of the Motor Vehicle Lillians versus Caltex Oil (Kenya) Limited (1989) KLR1.** At page 14 line 29-43 and page 15 line 1-7 **Nyarangi JA** as he then was had this to say:-

"***By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute , charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance of or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exist, where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment… It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion, must be decided forth with on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the court….The moment a court determines that it has no jurisdiction it has to down its tools and proceed no further."***

We have given serious consideration to the afore set out observation, and we are satisfied it sets out the correct position in law as we know it, that issues of jurisdiction where these need to be raised should be raised at the earliest opportunity, that the proper party to determine whether jurisdiction is properly vested or not is the same court whose jurisdiction has been challenged; that the determining factor as to whether jurisdiction has been properly vested or not are the facts before the court . We wish to add that "***and the application of the relevant law to those facts"*** (emphasis ours). On that basis we are satisfied that we are best suited to determine whether we have been properly vested with the jurisdiction to determine the pending appeal or not. Our tools of trade will be the interrogation of the instruments creating the industrial court which gave rise to the decision giving rise to this appeal and that creating this court. In the result, we determine that we have jurisdiction to determine the merits of the preliminary objection because it has been addressed to the court of appeal.

As observed elsewhere in this ruling, the decision subject of the appeal pending herein arose from industrial relation issues which had been directed to the correct forum. Issue has only arisen because there is controversy as to whether any party aggrieved with that decision has recourse by way of seeking a second opinion to the high court or direct to the court of appeal. It is undisputed that the industrial court which handed out the offending decision had been established under section 11 (1) of the labour institutions Act No.12 of 2007. It provides:-

"There is established an industrial court with all the powers and rights set out in this Act or any other law for the furtherance, securing and maintenance of good industrial or labour relations and employment conditions in Kenya"

The mandate of the industrial court is set out in section 12 (1) of the same Act. It provides in part:-

"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 an employer's and employee in the course of employment between an employee or employers organization and a trade union or between a trade

union or employer organization, a federation and a member thereof.

Any decision or order by the industrial court shall have the same force and effect as a judgment of the high court and a certificate signed by the Registrar of the industrial court shall be conclusive evidence of the existence of such a decision"

Section 27 (1) (2) of the same Act makes provision as regards the forum to which the appeals from the industrial court lie. It provides:-

"Any party to any proceedings before the industrial court may appeal to the court of appeal against any formal judgment, award or order of the industrial court.

(2) Appeal from a judgment, award or decision of the industrial court shall only lie on matters of law"

We have construed the afore set out provisions of law and we are satisfied that indeed the correct position in law as it was at the time the decision giving rise to this appeal was made, permitted the appellant to seek access to the Court of Appeal seat of justice directly from the industrial court. There is therefore an apparent vesture of jurisdiction in this court on a matter emanating from the industrial court.

It is this apparent vesture of jurisdiction which is the central nerve in the preliminary objection, with the preliminary objector/respondent arguing that vesture is on a void power as it conflicts with the constitutional provisions of the retired constitution. The affected provisions are (1) section 3, 60 and 64 of the retired constitution and section 3 of the appellate jurisdiction Act No.9 laws of Kenya. These provide in part:-

"(3) This constitution is the constitution of the Republic of Kenya and shall have the force of law throughout Kenya and subject to section 47, if any other law is inconsistent with this constitution, this constitution shall prevail and the other law shall to the extent of the inconsistency be void.

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…"

64(1) There shall be a Court of Appeal which shall be a superior court of record and which shall have such jurisdiction and powers in relation to appeals from the high court as may be conferred on it by law"

Section 3(1) of the appellate jurisdiction Act (Supra) Provides:-

"The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law"

We have construed the afore set out provisions of law and considered them in line with the rival arguments herein and we are satisfied that as submitted by learned counsels of both sides, there appears to be a conflict of law here. We agree the question is whether we can resolve this conflict in the manner we have been approached. Our answer is in the negative. The reason being that in determining whether we have jurisdiction, we need not look beyond the legal prescriptions enshrining our mandate both legislative and constitutional. We have done so and we are in agreement that section 3 of the appellate jurisdiction Act (Supra) and section 64 of the retired constitution limit our appellate jurisdiction to appeals emanating from the high court. Section 3 of the interpretation and general provisions Act cap 2 defines the high court as follows:-

"***High Court means the High court established by the constitution:***

By the constitution is meant section 60 of the retired constitution. We are therefore in agreement with the arguments of the preliminary objector that the definition of the high court whose decisions are appealable

to the court of appeal does not include the industrial court**.**

We are alive to the invitation learned counsel for the respondent/appellant made to us to take refuge under section 12(6) of the labour institutions Act which gives a decision of the industrial court force of law equivalent to that given to a high court decision. We have considered that argument and we are in agreement that it is limited to enforcement of industrial court decisions. It does not affect appellate jurisdiction.

The industrial court as currently established is a creature of the industrial court Act No.20 of 2011. Section 4 (1) (2) (3) of the said Act provide:-

"In pursuance of Article 162 (2) (a) of the constitution, there is established the industrial court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.

(2) The court shall be a superior court of record with the status of the high court.

(3) The court shall have and exercise jurisdiction throughout Kenya"

Vide section 12 (1) of the same Act "***The court shall have exclusive original and appellate jurisdiction to hear and determine all dispute, referred to it in accordance with Article 162 (2) of the constitution and the provision of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including (***as specified in the act). Vide section 17 (1) (2) thereof ***Appeals from the court shall lie to the court of appeal against any Judgment ,a ward , order or decree or issued by the court in accordance with article 164 (3) of the constitution.***

(2) An appeal from a judgment, award, decision, decree or order of the court shall lie only on matters of law"

Our interpretation of the afore set out provisions of law is that there is now in place a legislative mandate elevating the Industrial Court as it is now to the status of a High Court. Appeals from this newly established Industrial Court are now directly appealable to the court of appeal. Unlike under the old arrangement there is now clear back up constitutional provision in the current constitution 2010. Under article 162 (1) the supreme court the court of appeal, the high court and other courts are set up. Vide clause 2 of this article, parliament was mandated to put in place legislation establishing courts with the status of the high court to hear and determine disputes relating to employment and labour relations and the environment and the use and title to land. It is under this enabling provision that the industrial court Act No. 20 of 2011 was borne. Vide Article 164 of the same current constitution, there is established the court of appeal with jurisdiction to hear appeals from the high court and any other court or tribunal as prescribed by an Act of parliament. One such court prescribed by an act of parliament is the industrial court as currently established. The net effect of the aforesaid provisions of law is that there is now in place a constitutional mandate enabling an aggrieved party aggrieved by a decision of the industrial court to access the court of appeal directly.

We are in agreement that both the decision appealed against giving rise to these proceedings as well as the desire to appeal against the said decision were undertaken before the promulgation of the current constitution of Kenya 2010. We are in agreement with the submissions of learned counsel for the preliminary objector that the current constitution is silent as to its retroactivity. To us silence means non existent. There is no jurisdiction for the provisions on direct appeals enshrined in the current constitution to be made to operate retrospectively to cure the alleged illegitimacy of the appeal objected to.

Learned counsel for the respondent/appellant has urged us to take refuge under section 22 of the sixth schedule dealing with the transitional and consequential provisions under the heading "***judicial proceedings and pending matters".*** It provides:-

"***All judicial proceedings pending before any court shall continue to be heard and shall be determined***

by the same court or a corresponding court established under this constitution as directed by the chief justice or the Registrar of the high court".

In the interpretation and general provisions Act (supra) "***court"*** means "**any court of Kenya of competent jurisdiction."** Whereas in the civil procedure Act Cap 21 laws of Kenya "***court"*** means ***"the High court or a subordinate court acting in the exercise of its civil jurisdiction."*** The Labour Institutions Act (Supra) under which the proceedings leading to these proceedings were undertaken does not define "***a court"*** but defines "***the industrial court,"*** as "***means the industrial court established under section 11 of the said Act."*** This is the same court which did not have the status of the High Court then. The court whose decisions vide section 27 of the same Act were to go direct to the Court of Appeal. That is the jurisdiction the preliminary objector has said it did not and does not exist and has invited us to declare so.

Learned counsel for the preliminary objector has argued that in so far as section 27 conflicted with section 60 and 64 of the retired constitution, this court should enforce section 3 of the same retired constitution and hold that the jurisdiction donated by section 27 of the labour institutions Act was non existent as the said section contravened constitutional provisions. The respondent /appellant's counsel has on the other hand cautioned us alleging that in doing so this court would be exceeding its mandate as it would have been invited to declare section 27 of the labour institutions act (Supra) unconstitutional, an original jurisdiction vested only in the high court.

We stand guided and are in agreement that the caution is well founded. But our finding that the caution is well founded not withstanding, we are in agreement that we are capable of construing section 3 of the retired constitution competently and when so construed it is evidently clear that by virtue of this provision the retired constitution declared both supremacy over and primacy legislative law. By reason of this afore said declaration of supremacy and primacy, section 27 of the labour institutions Act falls into the category of a legislative law. It therefore means that as long as section 3 and 64 of the retired constitution and section 3 of the appellate jurisdiction Act (supra) stood then as at the time appellate process objected to herein were set in motion, the court of appeal had no mandate to receive direct appeals from the industrial court as it was then established. We are in agreement with the argument of the preliminary objector that this was a right which was void and incapable of being enjoyed.

It has been argued by the respondent/appellant that if jurisdiction is declined by this court then the appellant will be rendered remediless. We do not think so. There is the right to judicial review and if the right to access judicial review has been foreclosed by effluxion of time then there is the remedy by way of declaratory suit and or by way of petition.

The net result of the afore set out reasoning is that we uphold the preliminary objection dated 2nd day of February, 2012 and filed on the 11th day of February,2012. We find that we have no jurisdiction to entertain this appeal. We uphold the preliminary objection. We accordingly down our tools and strike out the appeal as being incompetent with costs to the objector.

Dated at Nairobi this 10th day of May, 2013

R.N. NAMBUYE

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JUDGE OF APPEAL

P. KIHARA KARIUKI

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JUDGE OF APPPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR