REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 210 of 2004

KENYA RAILWAYS CORPORATION .....APPELLANT

AND

THOMAS M. NGUTI ..... 1ST RESPONDENT

J.M. MWANGI ..... 2ND RESPONDENT

R.M. MBABU ..... 3RD RESPONDENT

J. OMWOYO AHONGA .....4TH RESPONDENT

E. MNJALA .....5TH RESPONDENT

CHISSIWA C. KALUME .....6TH RESPONDENT

J.T. MWAMUDENYI .....7TH RESPONDENT

(suing on behalf of themselves and 190 others)

***(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Hayanga, J.) dated 26th September, 2003* in H.C.C.C. NO. 398 OF 2003)**

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JUDGMENT OF THE COURT

The appeal before us is an interlocutory one. It arises from a ruling of the superior court, (Hayanga, J.) made on 26th September, 2003 in a chamber summons filed by the respondents herein on 30th April, 2003. Technically the main suit is still pending before the superior court, but as we shall see shortly, the appellant contends that the main suit was determined even before summons to enter appearance was served or any defence filed. The appellant is the Kenya Railways Corporation (hereinafter "**the Corporation**") which at all times material to the suit was a State Corporation with the sole monopoly of rail transportation in the country. The Corporation is represented before us, as it was in the superior court, by Mr. Chacha Odera, instructed by M/S. Oraro & Co. Advocates. The respondents were at all times material to the suit, employees of the Corporation and were designated, in various grades, as locomotive drivers. Before us, they are represented by Mr. Kibe Mungai instructed by M/S. Kinoti Mbobua & Co. advocates, who also represented them in the superior court.

What is the background to this saga?

For more than 20 years before 1994, the Corporation had had its fair share of industrial unrest among its unionisable labour force, then in excess of 19,000 workers. Out of these, 489 were locomotive shunter drivers ("***the drivers***"). In that year, matters came to a head when 462 of the drivers staged a strike or walkout on 1st to 8th June, 1994 to press for better terms and conditions of their employment. When a peaceful settlement became elusive, the dispute was formally referred to the Industrial Court as **Cause No. 72 of 1995**. The claimants were the Railway Workers Union ("*the Union*") representing the drivers and the Corporation was the respondent. The issues put forward for determination were: -

1. Salaries

2. Mileage allowance

3. Housing

4. Disturbance and Separation allowance.

During the pendency of the dispute, the Union and the Corporation continued to hold "Central Joint Council Meetings" to resolve various issues relating to terms and conditions of service of the Corporation's employees, and Collective Bargaining Agreements were signed between them. The Corporation also created management portfolios for locomotive drivers with the result that they were no longer unionisable. One Collective Bargaining Agreement (CBA) was for the period 1st January, 1996 to 31st December, 1997 and it covered *inter alia, Wages and Salaries, Housing and House allowance,* and *Job evaluation.* In effect the CBA improved those terms and in relation to salaries, increased them by 10% to 33%.

The Industrial Court examined all the issues placed before it on both sides, including their CBA covering the period 1st January, 1996 to 31st December, 1997, and made a decision on 4th May, 1998. In respect of salaries and scheme of service the Court stated: -

"Keeping in view the foregoing and taking into account the agreement between the parties ('Annexure 'A') and the nature of their job, I am of the opinion that the locomotive drivers deserve a reasonable salary adjustment in salaries and a separate scheme of service. The Court, however, finds that the demand of the Union is very much on a higher side. In the circumstances, I am inclined to award to the locomotive drivers additional salary increase of 25% across the board for the period 1st January 1996 to 31st December 1997, and also recommend that a separate scheme of service for them be introduced forthwith. I so order"

Mileage allowance was adjusted to the rate of Kshs.1.5 per Km. covered on duty subject to a minimum qualifying distance of 2000 Km. The Housing claim was rejected, as was the demand for disturbance and separation allowance which was found vague. As required of such awards, it was gazetted on 28th August, 1998 in **Gazette Notice No. 4570**.

Despite the award and gazettement, it would appear that the Union and the Corporation continued to engage in collective negotiations which gave rise to CBA's for the year 1997/98, 1998/99 and 2000/2001 all of which improved the salary scales and other terms of employment of unionisable staff. The Corporation's view was that the increments made in the CBA's surpassed the award of the Industrial Court. But the drivers had other ideas. For them, the Corporation had blatantly refused to implement the Industrial Court Award and instead resorted to "*a mixture of arrogance, subterfuge, intimidation and without regard of the gravity of the issues."* Those of the drivers who had not joined the management level of the Corporation resorted to industrial action to enforce the award, and went on strike in April, 2003. The reaction of the Corporation to the strike was swift and devastating. The strike was declared illegal and the Corporation moved to issue notices to the striking drivers on 30th April, 2003, asserting that they had forfeited their appointments with the Corporation and they were given 24 hours to vacate the Corporation's residential quarters at the pain of eviction. The Corporation recalled retired locomotive drivers and started re-employing them as evictions continued against those drivers who had not complied with the notice. Alarmed by these developments, the drivers went to court.

The suit was filed in the superior court on 30th April, 2003 by 197 named drivers of the Corporation. They asserted that the Corporation had refused, failed or neglected to implement the industrial court award issued five years earlier in their favour and had instead engaged in intimidation, deceit, and delay tactics. In the end they prayed for the following final orders from the court:

"*a) A mandatory injunction to implement the Industrial Court Award in Cause No. 72 of 1995 dated 4th May, 1998.*

b) Payment of the plaintiffs' salary arrears under the respective contracts of employment as modified by the Industrial Court with effect from 1st January, 1996.

c) An injunction to restrain the defendant by itself, its servants or agents from intimidating, harassing or interfering in any manner whatsoever with the plaintiffs' employment and residences pending hearing determination of this suit.

d) An injunction to restrain the defendants from hiring, re-employing or otherwise re-engage retired locomotive drivers.

e) A declaration that the defendant has deliberately, willfully and contemptuously disobeyed the lawful orders of the Industrial Court of Kenya in Cause No. 72 of 1995.

f) Interest on (b) above at commercial rates of 25 per cent from 1st January, 1996 till payment in full.

g) Costs of this Suit.

h) Any other or further relief that this Honourable Court deems fit and just to grant"

Contemporaneously with the main suit, the drivers filed a chamber summons seeking leave to maintain the suit as a representative one, and for 7 of them to continue the suit on behalf of 190 others. They then listed down all the prayers they sought in the plaint and sought orders accordingly, pending the hearing and determination of the main suit. The only order which was not sought in the chamber summons but was in the plaint was "*a declaration that the Corporation had deliberately, wilfully and contemptuously disobeyed the lawful orders of the Industrial Court."* Leave to institute a representative suit was granted *ex parte* as was temporary injunctive relief to stem the evictions of the drivers from their residence. Other orders which do not concern us here were also made before the chamber summons was placed before Hayanga J, for hearing *inter partes*. By the time it was heard on 22nd May, 2003, the Corporation had not been served with the summons to

enter appearance and could not therefore have filed any defence. The defence was filed after service of summons to enter appearance, on 12th November, 2003 – long after the ruling of the superior court on the chamber summons on 26th September, 2003. Hayanga J. relied on the affidavits on record and the submissions of counsel before granting all the prayers sought by the drivers in their chamber summons. The orders as extracted and issued on 23rd October, 2003 were thus: -

"*1. The Respondent be and is hereby ordered to implement the industrial court award in cause No.72 of 19995 dated 4th May, 1998.*

2. The Respondent be and is hereby ordered to pay the Plaintiff's salary arrears under the respective contracts of employment as modified by the Industrial Court award with effect from 1st January 1996.

3. The Respondent be and is hereby restrained by itself, its servants or agents from intimidating, harassing or interfering in any manner, whatsoever with the Plaintiff's employment and residence pending hearing and determination of this suit.

4. The Respondent be and is hereby restrained from any future re-engagement not past ones.

5. The Respondent's letter dated 30th April 2003 addressed to the Applicants be and is hereby nullified.

6. Interest on (2) above at commercial rates of 25% per cent from 1st January 1996 till payment in full.

7. The Applicant be paid costs of this application."

The Corporation was aggrieved, hence the appeal now before us.

Although the Memorandum of Appeal put forward 8 grounds, learned counsel, Mr. Chacha Odera, argued them in two tranches. The grounds were as follows: -

"*1. **THAT** the Learned Judge of the Superior Court erred in failing to appreciate sufficiently or at all that the pleadings, affidavits and submissions made before him and the issues raised in the chamber summons application dated 30th April 2003 could only be effectively and properly determined at a full trial of the suit.*

2. The learned Judge of the Superior Court made a fundamental error of law in determining the suit at an interlocutory stage on conflicting, insufficient and inconclusive affidavit evidence.

3. The learned Judge erred in finding in spite of the evidence presented, that the Respondent had made out a case for the grant of mandatory and prohibitive injunction and for the payment of salary arrears whereas no evidence was presented by the Respondents herein proving their claim that there existed salary arrears.

4. In granting the orders appealed against, the learned Judge of the Superior Court made a final determination of the suit at an interlocutory stage in spite of the fact that summons to enter appearance had not been issued nor served thereby denying the Applicant herein a chance to file memorandum of appearance and statement of defence.

5. The learned Judge of the Superior Court erred in his ruling as its effect is to force the parties into a contract of service.

6. The learned Judge of the Superior Court misdirected himself in finding on the basis of the documents before him that the Respondents herein were entitled to the reliefs sought in spite of the material and fatal defects in the subject application.

7. The learned Judge misdirected himself in proceeding on the premise that the High Court could proceed and make a determination by way of affidavit evidence on whether or not the subject Industrial Court award had been implemented.

8. The learned Judge had no jurisdiction to hear and determine the suit together with applications filed in the said suit."

The first tranche covering grounds 1 – 4 essentially challenged the orders issued on the basis that they were not interlocutory at all but amounted to a final determination of the main suit without considering the pleadings thereon or any evidence that may be tendered by the parties. Mr. Odera particularly attacked orders No. 1 and 2 for mandatory injunction for enforcement of the Industrial Court award and payment of salary arrears when the issue as to whether the award was implemented or not was a live one, even on the affidavits on record, and could only be resolved at the hearing of the main suit. It was also his view that in granting an injunction to stop eviction of the drivers as order No. 3 does, and in stopping further employment of drivers under order No. 4, the main suit was determined and the Corporation was bound to accept employees who had unlawfully withheld their services through a strike contrary to the **Employment Act, Cap 234**. Whether or not the letter dated 30th April, 2003 should be nullified was also an issue that could only be answered after hearing evidence. Finally, he submitted, order No.6 required the Corporation to pay interest at a commercial rate of 25% p.a. without any justification. At any rate, any interest could only be paid if the award had not been settled, but on affidavit evidence, the Corporation had complied with the orders of the Industrial Court. In granting those orders, therefore, the superior court in Mr. Odera's submissions, committed serious errors of principle, and in the end, the Corporation's defence was rendered futile.

As for the second tranche of arguments covering grounds 5 to 8, Mr. Odera raised issues of the law relating to employment and

particularly the remedies available to an aggrieved employee. It was also his contention that the main suit was a nullity as it did not comply with **section 87** of the **Kenya Railways Corporation Act Cap 397**, which requires the service of notice on the Corporation before institution of any suit. No finding was made on that issue although it was raised in affidavits and submissions of counsel. Mr. Odera further argued that whether there was wrongful dismissal of the drivers through the letter dated 30th April, 2003, was a question of fact which, even if it was established, would only give rise to damages and not an order forcing the Corporation to accept in employment persons it had obviously and seriously disagreed with. There was no pleading at any rate, on the letter dated 30th April, 2003 and the order made by the superior court nullifying it had no basis in fact or in law. To buttress his arguments on contracts of service and the remedies available, Mr. Odera cited several authorities among them: **Eric Makokha & others v. Lawrence Sagini & others Civil Application NO. NAI. 20/1994 (UR)**, **Alfred Githinji vs. Mumias Sugar Co. Ltd. Civil Appeal No. 194/91 (UR)**, and **Ibrahim v Sheikh Brothers Investment Ltd. (1973) EA 118.**

In his response, Mr. Kibe Mungai readily conceded that order No. 6 which awarded interest at the rate of 25% p.a was an obvious misdirection and he could not, therefore, oppose the reversal of the order. He took serious issues, however, on the claim that the other orders were granted without any basis in law. He argued forcefully that the Industrial Court award became an implied term of the contracts of each of the drivers by dint of **section 16 (6)** of the **Trade Disputes Act** and it became final by dint of **section 17** thereof once it was not challenged. For five years since the award, there was no implementation of the award in respect of the drivers and they could not return to the Industrial Court since it has no implementation machinery. They could either lawfully resort to strike action, which they eventually did, or submit the claim before the court which they also did. The affidavits on record, in his view, contained all the information the superior court needed to grant the orders as it was clear to the court that the manner of implementation of the award as pleaded by the Corporation was through CBA's which the court found had nothing to do with the Industrial Court award, hence the finding that there was no implementation. The promotion of some of the drivers to management level was also an attempt to circumvent the award. On the contentious issues as to whether the letter of 30th April, 2003 was pleaded and could not therefore be annulled, Mr. Mungai contended that the letter was an illegality which the court had, of necessity, to nullify in order to give effect to the remedies the drivers were entitled to. Citing, amongst other authorities, **Gusii Mwalimu Investments Co. Ltd & Anor. v. M/S. Mwalimu Hotel Kisii Ltd, C.A. No. 160/95 (ur)**, **Kamau Muckuha v. The Ripples Ltd, Civil Application No. Nai. 186/92 (ur)**, Mr. Mungai submitted that if a party reacts to an illegitimate position, the *status quo* is the one before the illegality and a mandatory injunction was the appropriate order. Citing further provisions of the law and authorities thereon, Mr. Kibe submitted that the **Trade Disputes Act** was meant for protection of unionsable employees; that **section 17** of the **Employment Act** under which the letter of 30th April, 2003 was issued, had no relevance to the dispute between the parties; that the strike action resorted to by the drivers was lawful since it sought enforcement of a lawful court order; that if any law confers a benefit on an employee, the benefit cannot be taken away through dismissal of the employee; that courts have an obligation to give an effective remedy where it is established that there was a breach of a right; and that the issues under consideration here must be considered in the wider context of socio-economic justice. On this wider plane, Mr. Mungai invited us to peruse various treatises among them "*The New Family and the New Property*" by May Ann Glendon, and "*The Worker and the Law*" by Lord K.W. Wedderburn. The writers advance the phenomenon that the right to earn a livelihood and the right to work are fundamental rights which courts ought to have cognisance of. The court must also play its part in protecting the legitimate interests of employees in their work. Finally Mr. Mungai submitted that **section 87** of the **Kenya Railways Corporation Act** was applicable to that statute only and it could not be imported to cover the issues at hand in this dispute which are under the Trade Disputes Act.

We are grateful to both counsel for their industry and their exposition of the law through the various authorities cited before us. There can be no doubt that the dispute herein involves numerous employees who have every right to agitate for justice when their very livelihood and the right to work is at risk. It also involves a vital state corporation which, at the times material to the dispute, provided essential services to the people of this country and beyond. It is not surprising therefore that the dispute raises considerable emotions on both sides. Nevertheless, the just resolution of the dispute cannot be guided by emotion but by sober application of legal principles on proven facts.

The decision of the superior court was made on an interlocutory application which called for the exercise of judicial discretion. It is trite law that this Court would not normally interfere with the exercise of such discretion except upon well defined parameters. They were stated by Sir Clement de Lestang V.P in **Mbogo v. Shah [1968] EA 93**, at pg. 94, thus:

"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Is there any justification for the challenge lodged by the appellant corporation in this appeal? With respect, we think there is, but only to some extent.

The application before the superior court, though interlocutory, clearly sought final orders even before all the pleadings in the main suit were on record. There is, of course, no general rule of law that final orders cannot be granted in an interlocutory application. But it will be a rare case when such orders will be granted where there are serious disputations of fact which can only be resolved after hearing the parties. The chamber summons before the superior court sought both prohibitory and mandatory injunctions and on both accounts, the applicants invoked ***Order 39 rules 1*** and ***2*** of the Civil Procedure Act. The prohibitory injunction was sought in support of two prayers which culminated in orders number 3 and 4 reproduced above. In summary, it was to restrain the Corporation from interfering with the drivers' employment; and from hiring or re-employing retired locomotive drivers. Order number 5, for nullification of the letter dated 30th April, 2003 was not sought in the chamber summons and it appears to have been granted by the superior court *suo motu*. Similarly the mandatory injunction was sought in respect of three prayers which culminated in orders number 1, 2 and 6. Again in summary, the Corporation was compelled to implement the Industrial Court award, and to pay all salary arrears to the drivers since January, 1996 with interest thereon at 25% p.a.

In granting the orders as sought, the learned Judge was of the view that the same principles applied in the grant of both types of injunctions except that a mandatory injunction is rare and is only issued in exercise of the courts inherent jurisdiction under ***section 3A*** of the

Civil Procedure Act. We may quote the learned Judge:

"The Court does not need to get into the depth of the matter. Basically for mandatory and prohibition injunction, the principle applicable to both branches of injunction is the statement by SPRY JA in GIELLA vs CASSMAN BROWN & CO. LTD. 1978 EA 358 where he said that for interlocutory injunction to issue the applicant must show that he has a prima facie case with probability of success, that if the injunction is not granted he is likely to suffer irreparable damage that cannot be adequately compensated in damages and if the court is in doubt to decide the case on balance of convenience. The principle applies also to mandatory injunction except that the latter is awarded sparingly and in very rare occasions because normally it involves un-winding, sometimes at great expense, what had already been done so it becomes a point to consider whether the costs involved in regaining the position would be much compared to the cost involved in regaining the position as it is. The application for mandatory injunctions is normally made under S.3A of the Civil Procedure Act as Order 39 is only applicable for prohibitory injunctions so the court has to use its inherent jurisdiction but it suffices to say that the court has jurisdiction here".

It was in exercise of inherent jurisdiction that the learned Judge made the finding that the Industrial Court award had not been implemented by the Corporation and a mandatory injunction would thus issue forthwith. Such finding was made despite serious conflicting affidavit evidence on the issue. It was apparent that the Union in whose favour the award was given had continued to engage with the Corporation and had signed several CBAs. For a period of five years since the award was given, there were no complaints raised by the drivers through their Union or at all. In our view, it was an issue which ought to have been resolved on evidence fully tested in cross-examination. We think in the circumstances that the learned Judge failed to appreciate the principles applicable before the grant of a mandatory injunction and thus misdirected himself in issuing such orders. We take the principles *in extenso* from Megarry J. (as he then was) in **Shepherd Homes Ltd v. Sandham [1971] 1 Ch. 340** at **p.348 E – 349 C**,

"As it seems to me, there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may..... require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials it if is ultimately established that the defendant was entitled to retain the erection. As Kindersley V. –C. said in Gale v. Abbot (1862) 10 W.R. 748, 750, an interlocutory application for a mandatory injunction was one of the rarest cases that occurred, "for the court would not compel a man to do so serious a thing as to undo what he had done except at the hearing." Even if today the degree of rarity of such applications is not quite so profound, the seriousness of such an order remains as an important factor. Another aspect of the point is that if a mandatory injunction is granted on motion, there will normally be no question of granting a further mandatory injunction at the trial; what is done is done, and the plaintiff has on motion obtained, once and for all, the demolition or destruction that he seeks. Where the injunction is prohibitory, however, there will often still be a question at the trial whether the injunction should be dissolved or continued; except in relation to transient events, there will usually be no question of the plaintiff having obtained on motion all that he seeks. I may add that I do not think that any question arises for the court refusing to grant an injunction on motion merely because that, in event, constitutes the sole relief claimed, for there is no rule against making such a grant: see Woodford v. Smith [1970] 1 W.L.R. 806, 817, 818.

The subject is not one in which it is possible to draw firm lines or impose any rigid classification. Nevertheless, it is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will, of course grant such injunctions as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction will be granted, even if it is sought in order to enforce a contractual obligation. If, of course, the defendant has rushed on with his work in order to defeat the plaintiff's attempts to stop him, then upon the plaintiff promptly resorting to the court for assistance, that assistance is likely to be available; for this will in substance be restoring the status quo and the plaintiff's promptitude is a badge of the seriousness of his complaint."

And later at page 351 – A-H,

"Charrington v. Simons & Co. Ltd., [1970] 1 W.L.R. 725 was a decision of Buckley J. on the trial of the action, and not on motion. He said, at p. 730:

"Different considerations may, I think, arise in a case where the court has to consider whether a defendant should be compelled by a mandatory order to remedy a breach of contract which he has committed from those which would arise if the question were whether the court should restrain a threatened breach of contract. To the latter case the principle enunciated by Lord Cairns L.C. in Doherty v. Allman. 3 App. Cas. 709, 710, 720, may apply in its full vigour… Where a mandatory order is sought the court must consider whether in the circumstances as they exist after the breach a mandatory order, and if so, what kind of mandatory order, will produce a fair result. In this connection the court must, in my judgment, take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant. A plaintiff should not, of course, be deprived of relief to which it is entitled merely because it would be disadvantageous to the defendant. On the other hand, he should not be permitted to insist on a form of relief which will confer no appreciable benefit on himself and will be materially detrimental to the defendant."

That passage is valuable, if I may say so, both in its statement of the concept of a "fair result" as the criterion, and also as necessarily indicating, I think, that the enforcement of a negative covenant at the trial by a mandatory injunction is far more a matter of judicial discretion and not of right than in the case of a prohibitory injunction.

I may summarise my conclusions as follows. First, Lord Cairns's statement of principle prima facie applies to mandatory injunctions; but it does not apply in its full width.

The matter is tempered by a judicial discretion which will be exercised so as to withhold an injunction more readily if it is mandatory than if it is prohibitory. Even a blameless plaintiff cannot as of right claim at the trial to enforce a negative covenant by a mandatory injunction. Second, although it may not be possible to state in any comprehensive way the grounds upon which the court will refuse to grant a mandatory injunction in such cases at the trial, they at least include the triviality of the damage to the plaintiff and the existence of a disproportion between the detriment that the injunction would inflict on the defendant and the benefit that it would confer on the plaintiff. The basic concept is that of producing a "fair result," and this involves the exercise of a judicial discretion.

Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

Those principles were followed by this Court in **East African Fine Spinners Ltd (In Receivership) & 3 others v. Bedi Investments Ltd Civil Application No. NAI. 72/94 (UR)**. The learned Judge of the superior court may well have arrived at a different conclusion if he had considered those principles but it is clear to us that he did not. In the result, we allow the appeal to the extent that the orders for mandatory injunction numbers 1, 2 and 6 in the order of the superior court given on 26th September, 2003 and issued on 23rd October, 2003 are set aside. In respect of order No. 5 nullifying the letter of 30th April, 2003, we set aside the order of nullification and substitute therefor an order suspending the letter dated 30th April, 2003. We have no reason to interfere with the orders 3 and 4 for prohibitory injunction and we dismiss the appeal in respect thereof. However, in the interests of justice and in order to ensure that this old matter is expeditiously resolved, we limit the life of orders 3, 4 and 5 (suspension) to 12 months from the date of this judgment unless it is extended by the superior court for good reasons.

The appellant has been partly successful in the appeal, but we do not think it would be right to award to it costs against its employees or former employees. We therefore order that each side shall bear their own costs of the appeal. It is so ordered.

Dated and delivered at Nairobi this 8th day of May, 2009.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

P.N. WAKI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR