REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 8 of 2002

REPUBLIC ……APPELLANT

AND

THE ATTORNEY GENERAL ……..……RESPONDENT

KENYA AIRWAYS LIMITED ……..INTERESTED PARTY

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Justice Visram) dated 7th day of August, 2001

in

H.C.MISCELLANEOUS CIVIL APPLICATION NO. 254 OF 2001)

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JUDGMENT OF THE COURT

This is an appeal from the ruling of the superior court (Visram, J.) delivered on the *7th August, 2001*, in which the learned Judge dismissed an application to set aside an ex parte order.

The genesis of the appeal can be traced back to a dispute in the ***Industrial Court of Kenya*** (the Industrial Court) being Cause No. 94 of 1993. The dispute was between ***Kenya Airline Pilots Association*** as the claimants and ***Kenya Airways Ltd.*** as the respondents. The issue in dispute was "*Notification to declare 15 Flight Engineers redundant"*. The Industrial Court considered the rival submissions made before it on behalf of the parties and in its award dated *6th May, 1994* stated inter alia:-

"***For the foregoing discussion and reasons we do not see any justification of (sic) ordering the Respondents to retrain the grievants as pilots or retain them in service. Accordingly, we allow them to declare the 14 grievants redundant with effect from the date of this award on the following conditions:-***

(a) That the grievants be paid all their entitlements up to 5th May, 1994 in accordance with Clause 40 of the parties' agreement.

(b) In addition, each be paid compensation equivalent to one year salary excluding allowances for loss of employment."

Arising from that award, the Kenya Airline Pilots Association filed an application for the interpretation of

the award pursuant to ***section 16(5)*** of the ***Trade Disputes Act (Cap. 234 Laws of Kenya)*** which provides:-

"***(5) If any question arises as to the interpretation of an award or as to an award being inconsistent with any written law, the Minister or any party to the award may apply to the Industrial Court which made the award for a determination of the question, and the Court shall determine the matter after hearing the parties concerned, or without such hearing if the parties consent, and any such determination shall be deemed to be an award made under this Act.***

Provided that where the question arises out of any clerical mistake, incidental error or omission, the Court may rectify such mistake, error or omission without hearing the parties concerned."

The Industrial Court considered the application for interpretation of the award and finally came to the following conclusion:-

"***Having discussed and found as above, the question now for consideration is what would be the relief or reliefs to which the grievants are entitled as reasonable and fair refund and/or expenses for their full and valid check. As deponed hereinabove, Mr. Muhuthia had his licence renewed or revalidated by the African Airlines (International) Ltd. at a cost of US$39,000, excluding other incidentals, e.g. uniforms, subsistence and transport, while Mr. Waweru stated that, on enquiry and in consultation with other grievants, the following quotations for a full and valid check were received:-***

(a) Air Transport International. = US$56,850.

(b) American Airlines. = US$57,226.

These quotations are contained in his annexture, marked "BKW-1", which relate to the year 2000. In reply, Captain Mutungi did not specifically challenge or controvert the aforementioned amounts, but only objected in general terms to the acceptability and admissibility of the two affidavits sworn by Messrs Muhuthia and Waweru. The fourteen (14) grievants who were affected by the award are listed at page 3 thereof; but, sorrowfully, however, I understand that three (3) of them, for whom no orders will be made, have since passed away, leaving eleven (11) grievants who are now affected by this interpretation of the award.

Some of these grievants, like Mr. Muhuthia, renewed their licences at their own expenses; and doing the best I can in the circumstances, and taking into account the pros and cons of the parties' contentions and the evidence on the record, I am of the considered opinion that the Company must pay to each grievant US$45,000, being a reasonable and fair refund and/or expense for a full and valid check in accordance with Clause 40(d)(ii) of the parties' collective agreement. It is also my considered view that since this is a refund or expense on a course, there should be no deductions whatsoever.

Finally, this ruling is not, however, a bar to those grievants who may, in the alternative, still wish or desire to obtain the renewal or revalidation of their licences through the arrangement and at the expense of the Company.

This is my ruling on the interpretation of the award and I so order.

The members have concurred with this decision."

That interpretation by the Industrial Court did not go well with the Kenya Airways Ltd which decided to file an application by way of judicial review. An ex parte application was made before Osiemo, J. who granted the same. Pursuant to the leave granted by Osiemo, J., Kenya Airways Ltd filed a Notice of Motion under ***Order LIII, rule 3(1)*** of the Civil Procedure Rules seeking the following reliefs:-

1. THAT an order of certiorari do issue to remove into this Honourable Court and quash all orders contained in the decision entitled "Interpretation of Award" delivered by the Industrial Court

(Mr. Justice Chemmuttut, Mr. S.M. Maithya and MR. A.K. Kerich) on 26th February, 2001 in Industrial Court Cause No. 94 of 1993. (Kenya Airline Pilots Association vs. Kenya Airways Limited).

2. THAT the costs of this application be provided for."

That application was brought on the following grounds:-

(a) The Industrial Court erred in law in holding in effect that it had jurisdiction under section 16(5) of the Act to make the orders sought in Kenya Airline Pilots Association's (KALPA's) application for an interpretation of the Award made on 6th May, 1994.

(b) The Industrial Court erred in law in failing to appreciate that under Section 16(5) of the Act, its only jurisdiction was to interpret the Award dated 6th May, 1994 and not to make what in effect is a new award.

(c) The Industrial Court acted in excess of its jurisdiction under Section 16(5) of the Act in allowing evidence to be adduced on matters which fell outside the ambit of the "interpretation" which it was empowered to carry out under the said Section.

(d) Having made the Award dated 6th May, 1994, on the basis of the provisions of Clause 40 of the parties' Collective Bargaining Agreement, it was not open to the Industrial Court, under section 16(5) of the Act, to ignore or override those provisions by recourse to the principle that "The Industrial Court is not …….. fettered by the Law of Contract or the terms of agreement between the employers and employees…."

(e) The Industrial Court had no power, under the guise of "Interpretation", to make a new award granting to each of the 11 Flight Engineers a sum of US$45,000.

(f) The Industrial Court's said purported decision is a nullity in law."

Before that application for certiorari could be heard, the Kenya Airline Pilots Association, through its lawyer, Mr. Adere, filed an application by way of Notice of Motion stated to be "***Under Sections 3A 26 & 80*** of the *Civil Procedure Act* and ***Orders VII Rule 6a XLIV Rule 1*** of the *Civil Procedure Rules"*. In that application, the Kenya Airline Pilots Association sought the following orders from the superior court:-

"***1. THAT this Honourable Court be pleased to set aside vacate and/or review its order given ex parte on 23rd March, 2001 giving the applicant leave to apply for an order of certiorari and staying proceedings in Industrial Court Cause No. 94 of 1993.***

2. THAT this Honourable Court be pleased to strike out the notice of motion dated 29th March, 2001applying for an order of certiorari.

3. THAT this Honourable Court be pleased to order that the applicant do pay interest as the aggregate sum of US$495,000 at the rate of 24% p.a. from 26th February, 2001 till full payment thereof.

4. THAT costs hereof be provided."

That application was brought on the following grounds:-

"***(a) The court gave leave to applicant without having jurisdiction to so do in such proceedings.***

(b) The ex parte application for leave was and subsequent motion on notice is incompetent and untenable.

(c) As the sum of US$495,000 was payable immediately and the applicant having delayed payment thereof by these proceedings the applicant be ordered to pay interest on the aforesaid sum."

It was that application that was placed before the superior court (Visram J.) for hearing and determination. The main issue before the superior court was whether the High Court could interfere with a decision of the Industrial Court by way of judicial review. The learned Judge of the superior court carefully considered the submissions by Mr. Adere, for Kenya Airline Pilots Association, and Mr. Inamdar, for Kenya Airways Ltd., and came to the conclusion that there was prima facie evidence to suggest that the Industrial Court did act in excess of its jurisdiction when it gave the interpretation of its earlier award. In concluding his ruling which he delivered on *7th August, 2001* the learned Judge stated:-

"***I agree with the applicant's contention that the Industrial Court is subordinate to the High Court as the Constitution, specifically sections 60 and 65(2) when read together with section 123(1) strongly suggests that the High Court is empowered to play a supervisory role over the Industrial Court. Further, the Constitution supersedes the Interpretation and General Provisions Act and I would therefore go by the Constitution and hold that the Industrial Court is inferior to the High Court.***

In the present case, I am satisfied that there is prima facie evidence to suggest that the Industrial Court did act in excess of its jurisdiction. I am also persuaded that where there is an ouster clause in an Act such as section 17(2)of the Trade Disputes Act and the Inferior court (the Industrial Court) acts in excess of its jurisdiction then the High Court has the power to interfere with that decision or award of that inferior court.

As the applicant has demonstrated that it has an "arguable case" (see Samuel Muchiri W. Njuguna v. Ministry for Agriculture (C.A. 144 of 2000), I am satisfied that the ex parte order giving the Applicant leave to apply for an order of certiorari was properly granted.

I accordingly dismiss the Interested Party's application with costs to the Applicant.

It was that ruling of Visram, J. that gave rise to this appeal before us. It may be appropriate to set out the grounds of appeal which were as follows:-

"***1. THAT the learned Judge erred in law in holding that the High Court has jurisdiction to entertain certiorari proceedings taken out in respect of the decisions of the Industrial Court.***

2. THAT the learned Judge erred in failing to uphold the clear provisions of Section 17(2) of the Trade Disputes Act, Cap.234 of the Laws of Kenya.

3. THAT the learned Judge erred in law in that while considering the application of the appellant that the superior court lacks jurisdiction he considered took into account and or was influenced by evidence and/or proceedings before the Industrial Court and held that the Industrial Court had acted in excess of its jurisdiction thereby the learned Judge further erred in:-

(a) failing to consider appreciate and uphold that the Industrial Court is self regulating in procedure and proceedings before it as provided for in the Trade Disputes Act (Cap. 234),

(b) failing to consider appreciate and uphold that the determination of the Industrial Court on an Interpretation proceedings is deemed to be an award of that court on the proceedings under the Trade Disputes Act (Cap. 234).

The above stated grounds of appeal set out the grievances of the appellant herein. We are grateful to counsel appearing for the parties herein for their very able and well researched submissions. Counsel presented their submissions with considerable force and clarity. We would however emphasise that our main task in this appeal will be narrowed to determining whether the learned Judge of the superior court (Visram J.) was right in dismissing the application before him. The history of this matter has been stated earlier. It was Osiemo, J. who granted leave for the order of certiorari. That order being made under

Order LIII of the Civil Procedure Rules was of course, an ex parte order in the first instance. It was that ex parte order that the appellant herein sought to be set aside and also to strike out a notice of motion applying for an order of certiorari.

In his submissions, Mr. Adere for the appellant, gave a brief background to the dispute and then proceeded to deal with his main argument which was to the effect that the High Court had no jurisdiction to hear matters from the Industrial Court as Industrial Court was a special tribunal established by a separate statute, the ***Trade Disputes Act*** *(Cap.234 Laws of Kenya).* Mr. Adere relied on ***section 65 (1)*** of the Constitution which establishes courts subordinate to the High Court. To buttress his arguments, Mr. Adere relied on ***section 17*** of the Trade Disputes Act which provides:-

"***17 (1) The award or 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."

In view of the foregoing, it was Mr. Adere's submission that the award of the Industrial Court cannot be challenged in the High Court. He therefore asked us to allow this appeal and set aside the order of Visram J.

Mr. Rotich, who appeared for the Attorney-General in this appeal, made very brief submission to the effect that he was not opposing the appeal and that he was in entire agreement with Mr. Adere's submission. Mr. Rotich pointed out that ***section 17*** of the ***Trade Dispute Act*** was very clear in that the decision of the Industrial Court was final and not subject to judicial review.

To counter the foregoing submissions, Mr. Inamdar, the learned counsel for the interested party, ***Kenya Airways Limited*** started his submission by stating that the issue was whether his client had shown a prima facie case for leave to have been granted by Osiemo, J. and that the judge was not required to go into the merits. Mr. Inamdar then submitted that jurisdiction to set aside leave should be sparingly exercised even if it is apparent that the applicant will face difficulties during the hearing of the substantive application. Mr. Inamdar's submissions were mainly to advance the above stated proposition. As regards ***section 17*** of the Trade Dispute's Act it was Mr. Inamdar's submission that Osiemo J must have considered the section before granting leave and that Visram J. also considered the submission of Mr. Adere on the same point but rejected Mr. Adere's submission.

In a bid to show that the High Court had jurisdiction to deal with the award of the Industrial Court, Mr. Inamdar raised three principal questions:- *(i) whether there was arguable case, (ii) whether the Industrial Court is subordinate to the High Court (iii) whether proceedings in the Industrial Court were subordinate to the High Court*. And finally *whether the applicant was precluded from applying for certiorari*. Mr. Inamdar then proceeded to deal in some great detail with each of the issues raised in his opening remarks.

We have considered the rival submissions and the authorities cited by respective counsel in this matter and we are of the view that the starting point must be the general principles of law applicable in matters of this nature. In ***AGA KHAN EDUCATION SERVICE KENYA V. REPUBLIC & 3 OTHERS*** – *Civil Appeal No. 257 of 2003 (unreported)* this Court said:-

"We think both Mr Inamdar and Mr Kigano are generally agreed on the principles of law applicable in these matters. They are agreed that in order to enable a judge to grant leave under ***Order 53***, there must be **prima facie** evidence of an arguable case and for that proposition both counsel rely on this Court's decision in: ***IN THE MATTER OF AN APPLICATION BY SAMUEL MUCHIRI WANJUGUNA & 6 OTHERS*** and ***IN THE MATTER OF THE MINISTER FOR AGRICULTURE AND THE TEA ACT, Civil Appeal NO 144 OF 2000*** in which the Court approved and applied the principles to be found in the English case of ***R V SECRETRAY OF STATE, ex p. HARBAGE [1978] 1 ALL ER 324*** where it was stated thus:

"*It cannot be denied that leave should be granted, if on the material available, the court considers without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the Respondent under the inherent jurisdiction of the court, to the judge who granted leave to set aside such leave* – see **Halsbury's Laws of England, 4th Edition Vol 1 (1) paragraph 167 at page 1276**."

So once there is an arguable case, leave is to be granted and the court at that stage is not called upon to go into the matter in depth. Again, by their very nature, ex parte orders are provisional and can be set aside by the judge who has granted it but if the judge who granted leave cannot sit for one reason or the other, as was the position in this case, then another judge would be perfectly entitled to hear the application to set aside the grant of leave for the jurisdiction is available to all judges of the superior court.

It cannot be denied that ***section 65*** of the Constitution makes provision for the establishment of subordinate courts. The Industrial Court on the other hand was established pursuant to ***section 14*** of the ***Trade Disputes Act***. A question now arises as to whether the Industrial Court is subordinate to the High Court. This is a question to be answered not by us but by the High Court since the substantive application has not been heard.

The next question to be considered was whether the proceedings in the Industrial Court were civil proceedings. Mr. Adere was of the view that those were not civil proceedings while Mr. Inamdar contended that they were civil proceedings.

The third and most difficult question was whether the High Court was precluded from granting leave by virtue of ***section 17*** of the ***Trade Disputes Act*** which provides that the award or decision of the Industrial Court shall be final. Both Osiemo and Visram, JJ. held that the applicant had shown a prima facie case notwithstanding the provision of ***section 17*** of the ***Trade Disputes Act***. It was Mr. Inamdar's submission that the Industrial Court acted in excess of its jurisdiction when it made an award on events which had occurred after the original award. It was contended that once an award was made it was final and that anything further could only be by way of interpretation. Finally, it was submitted that if there is excess of jurisdiction then the High Court would not refuse to grant an order of certiorari even where there is an ouster clause taking away certiorari. In ***Judicial Review of Administrative Action (5th Edition)*** by de Smith Woolf & Jowell at p. 234 we find the following:-

"*No certiorari" clauses*

"***Even where the right to certiorari had been expressly taken away by statute, the courts relying on one or other of the restrictive rules of interpretation already mentioned, or upon the proposition that Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior court, persistently declined to construe the words of the statute literally. It was held that certiorari would issue, notwithstanding the presence of words taking away the right to apply for it, if the inferior tribunal was improperly constituted (as here some of its members had a disqualifying interest), or if it lacked or exceeded jurisdiction because of the nature of the subject-matter or failure to observe essential preliminaries, or if a conviction or order had been procured by fraud or collusion. Such language would also be ineffective to exclude certiorari or a declaration of invalidity for breach of either rule of natural justice. Legislation purporting to exclude review by other named remedies (e.g. prohibition, injunction) was equally ineffective to prevent the courts from containing inferior tribunals within the limits of their jurisdiction."***

What is the final position in this appeal? We have deliberately refrained from making any determination on various issues raised in view of what we shall say finally in this appeal. Going back to the grounds of appeal it is to be noted that the first ground was that the learned Judge of the superior court erred in law in holding that the High Court had jurisdiction to entertain certiorari proceedings in respect of the decisions of the Industrial Court. It is our view that there was a prima facie case made before the judge who gave leave (Osiemo, J.) and as we have already stated at that stage, the Judge was not required

to go into the merits of the case. So that when the application to set side the ex parte order for leave came up before Visram J. it was a matter of limited jurisdiction. Indeed in ***Aga Khan case*** (supra) this Court said:-

"***We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course."***

The second ground of appeal was to the effect that the learned Judge erred in failing to uphold the clear provisions of ***section 17 (2)*** of the ***Trade Disputes Act***. This section of the law may appear clear to the appellant and its counsel but having regard to the issue of excess of jurisdiction, it cannot be said that the High Court would have no jurisdiction. More so, in view of what the learned authors say in **Judicial Review of Administrative Action** (supra).

The last ground of appeal related to the issue of the learned Judge being influenced by the evidence and proceedings in the Industrial Court. We find no substance in this ground since the learned Judge had, indeed, to consider the evidence/proceedings in the Industrial Court. The learned Judge was perfectly entitled to consider the evidence and proceedings in the Industrial Court.

Before we conclude this judgment, we want to make it absolutely clear that we have not made any final determination on a number of issues in this matter and this was a deliberate act on our part. We have not made any findings as to whether the Industrial Court is subordinate to the High Court. That will be dealt with by the High Court during the hearing of the substantive application. We have also refrained from making any determination as regards ***section 17*** of the ***Trade Disputes Act***. What we have decided in this appeal is that Osiemo, J. was entitled to grant leave as he did since a prima facie case had been presented to him to warrant the order he made. Secondly, we uphold the ruling of Visram, J. because at that stage he was exercising limited jurisdiction which had to be exercised sparingly. The main application is to be heard and we would hasten to add that the mere fact that the two Judges of the superior court were of the view that a prima facie case had been made and the same has been confirmed by this Court does not necessarily mean that the substantive application shall succeed.

We think we have said enough. Taking into account all the foregoing, we are of the view that although the learned Judge of the superior court (Visram, J.) might have gone into too much detail which might have been beyond what he was required to do at that stage, we are satisfied that the learned Judge was perfectly entitled to find that a prima facie case had been made to warrant the substantive application to be heard. A prima facie case does not and cannot mean a case that will, in the end, succeed. The Judge cannot therefore be faulted for dismissing the application to set aside the order granting leave. We accordingly order that this appeal be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 16th day of June, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O'KUBASU

…….

JUDGE OF APPEAL

W.S. DEVERELL

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u>