Jagani & 3 others v Industrial Court of Kenya; Bakery, Confectionery, Food Manufacturing and Allied Workers' Union (K) (Interested Party) (Miscellaneous Application 39 of 2012) [2023] KEELRC 2999 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2999 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION 39 OF 2012

AN MWAURE, J

NOVEMBER 16, 2023

BETWEEN

HASNAIN JAGANI ..... 1ST APPLICANT

MOHAMEDRAZA HUSSEIN JAGANI ..... 2ND APPLICANT

ALI HUSSEIN JAGANI ..... 3RD APPLICANT

RAZCO LIMITED ..... 4TH APPLICANT

AND

INDUSTRIAL COURT OF KENYA ..... RESPONDENT

AND

BAKERY, CONFECTIONERY, FOOD MANUFACTURING AND ALLIED WORKERS' UNION (K) ..... INTERESTED PARTY

JUDGMENT

1. The Applicants filed an application dated 17th July 2009 at the High Court of Kenya as Misc. Application 429 of 2009 filed by Messrs Obura Mbeche & company advocates and on 18th December 2012 the matter was transferred to the Industrial Court.

2. The Applicant seeks the following reliefs:

    1. An order of certiorari be issued directed at the Respondent, the Industrial Court of Kenya to remove to the High Court and quash the order of the said court dated and issued on 29th June 2009.

    2. An order of certiorari be issued directed at the Respondent to remove to the High Court and quash the order of the said court and issued on 14th July 2009.

3. An order of certiorari be issued directed at the Respondent to remove to the High Court and quash the order of the said court dated and issued on 16th July 2009.

4. An order of certiorari be issued directed at the Respondent to remove to the High Court and quash any further and or further orders of the Industrial Court arising out of or incidental to the orders issued by the said Industrial Court dated and issued on 27th June 2009, 14th July 2009 and 16th July 2009.

5. The Applicant be granted leave to apply for an order of prohibition prohibiting the officer commanding police division Kasarani or any other police officer or any other law enforcing person or agency from arresting the Applicant on orders issued on 27th June 2009, 14th July 2009 and 16th July 2009.

6. Leave granted herein do operate as stay of the orders dated and issued on 27th June 2009, 14th July 2009 and 16th July 2009 or any other proceedings in Industrial Court Case Nos 331(N) and 334(N) both of 2009.

Applicant's Case

3. The Applicants aver that on 11th June 2009, 24 employees of the 4th Applicant went on an illegal strike and declined to resume duty despite repeated request by the 4th Applicant's management

4. The Applicants aver that the 4th Applicant's directors and management appealed to the Interested Party's General Secretary to advise the said employees to resume duty but the said secretary declined and supported the strike course and on 12th June 2009, it was left with no alternative but to summarily dismiss the employees.

5. The Applicants aver that the Industrial Court, without affording an opportunity to the 4th Applicant or any of its directors to be heard issued orders directing the 4th Applicant to revoke the letters of dismissal of the striking employees; reinstate back the striking employees; pay the salaries of the striking employees and police to enforce the re-employment of the striking employees.

6. The Applicants aver that on 1st July 2009, the Industrial Court on Application of the 4th Applicant issued other orders:

    (a) restraining the Interested Party and the dismissed employees not to report to the 4th Applicant's premises;

    (b) restraining the Interested Party and the dismissed employees from threatening, harassing, intimidating or in any manner interfering with operations of the Claimants, its employees, customers, visitors or suppliers from entering, leaving or operating the normal services of the 4th Applicant;

    (c) restraining orders were to remain in force for 14 days and the matter was to be dealt with together with the earlier order the court had issued.

7. The Applicants aver on 14th and 16th July 2009, the Industrial Court unilaterally and without formal notice to the Applicants issued an order of arrest of the 1st, 2nd and 3rd Applicants on account of the supposed contempt of court orders dated 29th June 2009.

8. The Applicants aver that the court had issued an order dated 1st July 2009 setting aside the order dated 29th June 2009 yet it issued orders of arrest for not observing the aforesaid orders which were overtaken by events.

9. The Applicants aver the order of 29th June 2009 was never served on the 2nd Applicant and was a mandatory injuctive order issued before the 4th Applicant's defence was heard. Further, the order amounted to subjecting the 4th Applicant to servitude and violated its fundamental constitutional rights.

10. The Applicants aver that the court order to have the dismissed employees paid their salaries would amount to confiscation of the 4th Applicant's property to reward persons whom it had no contract.

11. The Applicants aver that the court violated the well-established principle of judicial civil process that the police should never be involved in execution of orders issued by civil courts or tribunals.

Interested Party's Case

12. In response, the Interested Party filed a replying affidavit dated 20th July 2009 sworn by its General Secretary, George Muchai.

13. The Interested Party avers that it was issued the aforementioned orders dated 29th June 2009, however, when the affected employees went to the 4th Applicant they were refused entry and none of the issued orders were complied with.

14. The Interested Party avers that upon being issued the aforesaid ex parte orders, inter-parties hearing was fixed for 13th July 2009 which was heard on 14th July 2009 with all parties present and oral application for the arrest of Applicant's managing director to explain his failure to comply with the said orders of which the judge granted the order to arrest the managing director by the officer commanding police division, Kasarani.

15. The Interested Party avers that the court ordered the production of the managing director before the court on 16th July 2009 and on the said date the Inspector of Ruaraka Police station Inspector Kosgey informed the court he failed to arrest the managing director.

16. The Interested Party avers that it orally applied that the 4th Applicant's directors to be included in the warrant of arrest and the court allowed the application and extended the orders dated 29th June 2009.

17. The Interested Party avers that the orders issued on 29th June 2009 have still not been complied with and the Applicants are in contempt of court orders.

18. The Interested Party avers that the Applicants application is circumventing orders still in force issued by the Industrial Court and such attempt should be opposed strongly in the interest of justice.

Applicants' Submissions

19. The Applicants submitted that the High Court had a supervisory role over the Industrial Court as provided under section 65(2) of the Repealed Constitution of Kenya which states:

> " the High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts."

20. The Applicants submitted that the mere fact that the Industrial Court exercised some powers similar to the High Court did not mean that it is equal in judicial rank to the High Court and hence exempt from certiorari orders. The only tribunal exempt from certiorari orders is one which is a branch of the

High Court and the Industrial Court was not a branch of the High Court since it was provided in the repealed constitution to that effect.

21. The Applicants submitted that the High Court had jurisdiction to entertain the application for orders of certiorari and prohibition against the Industrial Court proceedings.

22. The Applicants submitted that in Anisminic Ltd v. Foreign Compensation Commission and Another [1969] 2 A.C. 147, listed grounds which an order of certiorari may issue against a tribunal's decision irrespective of the fact that there might exist an ouster clause in statute establishing the tribunal militating against issuance of certiorari. In the instant case, the ex-parte proceedings are seeking quashing of 3 orders issued by the Industrial Court and any other orders of the Industrial Court out of hand or incidental to the 3 orders.

23. The Applicants submitted that the order issued by the court on 29th June 2009 was issued without jurisdiction, given in bad faith, based on a misconception of what was in dispute and did not consider fundamental aspects of the dispute.

24. The Applicants submitted that the Industrial Court had no jurisdiction entertaining an order relating to the dismissal of the 24 employees since that was not the trade dispute before it and could only take cognizance of and deal with the trade dispute referred to it in the Memorandum of Claim.

25. It is the Applicants' submission that the Industrial Court failed to be guided by the basic principles on the law of injunction. There was no prima facie case since the injunction application was against dismissal of 24 employees yet the memorandum of claim prayers were on lock out. Further, the proceedings in the court indicate there was no effort made by the court to establish the issue in dispute in the first place.

26. The Applicants submitted that the 24 employees having been terminated there was no basis which the Industrial Court could recreate a rescinded contract and order payment of salaries to the employees and this amounted to use of a null and void judicial order to deny the 4th exparte Applicant the right to its property contrary to section 76 of the repealed constitution.

27. The Applicants submitted that assuming the order dated 14th July 2009 was issued within the jurisdiction of the Industrial Court by directing the arrest of the managing director of the Respondent without following procedures set up in law to be observed in the course of contempt proceeding the order remained null and void.

28. The Applicants submitted that it was irregular and illegal for the Industrial Court to issue orders of arrest of directors without giving them an opportunity to be heard.

Interested Party's Submissions

29. The Interested Party submitted that the Industrial Court has no powers to review and punish for contempt like the High Court and a party dissatisfied by its decision appeals to the Court of Appeal but not the High Court.

30. The Interested Party submitted that the Applicants could have made an application to the Industrial Court to review its orders made against the Applicants including orders of arrest or alternatively, proceeded to the Court of Appeal under section 27 of the Labour Institution Act for variation.

Submissions

31. The court considered the submissions of the interested party dated 23rd July 2010.

Analysis and Determination

32. The industrial court was of course replaced by employment and labour relations court under article 162(2)(a) of *the Constitution* of Kenya 2010. Several acts were implemented to give jurisdiction and power to the employment and labour relations court. Even as the court is writing this ruling it is an academic exercise as the industrial court now employment and labour relations court has since become a court with equal status with the High Court.

33. The first issue for determination is whether this court has jurisdiction to entertain this matter. In Kenya Airways Limited vs. Kenya Airline Pilots Association Nairobi HCMA No. 254 of 2001 [2001] eKLR 520, the status of the Industrial Court and the High Court under the repealed constitution, Visram, J (as he then was) held as follows:

> "…..the Industrial Court is a subordinate court 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 and that in determining whether the High Court has power to correct an error on the face of the record by way of certiorari notwithstanding the ouster clause, a distinction is to be drawn between an error of law which affects the jurisdiction and one which does not. The learned Judge further held that where an Act contains a finality clause that Act cannot prevent the High Court from acting where the inferior tribunal has acted without jurisdiction."

34. Article 162 (1) and (2) (a) of *the Constitution* of Kenya, 2010 states: -

> "(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
>
> (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations."

35. Under the Repealed Constitution, the Industrial Court was subordinate to the High Court and was therefore subject to supervisory jurisdiction of the High Court by the way of judicial review. In view of this and consideration of Article 162 of the current constitution, this court now has jurisdiction to hear and determine such matters.

36. The other issue for determination is whether the Applicants are entitled to the orders of certiorari and prohibition. In Esther Victoria Wanjiku Mahoro v Mary Wambui Githinji & 3 others [2021] eKLR, the court observed:

> " The Purpose of Judicial Review was set out in the case of Municipal Council of Mombasa... Vs...Republic, Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR, where the Court of Appeal held that:-
>
> > " The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the

decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review".

37. Further, circumstances under which orders of Judicial Review can be issued were elaborated by Justice Kasule in the Uganda case of Pastoli vs Kabale District Local Government Canal & Others (2008) 2EA 300 at pages 300-304.

> " In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.
>
> Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----.
>
> Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.

38. Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice to act or to act with procedural fairness towards one to be affected by the decision – it may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislature instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehidswi...Vs... Secretary of State for the Housing Department (1990) AC 876".

What Judicial Review Orders entails was elaborated in the case of Kenya National Examination Council Vs Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1996, where the Court held that: -

> " That now brings us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See Halsbury's Law of England, 4th Edition vol.1 at Pg.37 paragraph 128."

39. The Applicants submitted that Industrial Court lacked jurisdiction since there was no trade dispute before it. The memorandum of claim dated 22nd June 2009 was for an unlawful and irrational lockout, the application filed the suit upon which the order dated 29th June 2009 was based is seeking relief against unlawful and unfair dismissal and the said order ended up injuncting the 4th Applicant against dismissing the 24 employees and ordering their reinstatement.

40. The Applicants submit that the Industrial Court had no jurisdiction to entertain the application made to it under certificate of urgency on the issue of dismissal of the employees since section 74 of the *Labour Relations Act* does not identify that issue as an urgent dispute.

41. The jurisdiction of the Respondent was set out in section 14(1) of the Trade Disputes Act (now repealed). The section provides that the Industrial Court was established

> " for the purpose of the settlement of trade disputes and of matters relating thereto".

42. A trade dispute is defined under Section 2 of the Trade Disputes Act as:

> "a dispute or difference between employers and employees, or between employees and employees, or between employers and trade unions, or between trade unions and trade unions connected with employment or non-employment, or with the terms of employment or with the conditions of labour, of any person and includes disputes regarding the dismissal or suspension of employees, the redundancy of employees, allocation of work or recognition agreements, and it also includes an apprehended trade dispute."

43. In view of the foregoing, the Respondent had jurisdiction to hear and determine the application and the memorandum of claim as it fell within meaning of trade disputes under section 2 of the Trade Dispute Act.

44. On whether the Respondent's decision/ orders is tainted with illegality, irrationality and procedural impropriety the following are the guidelines.

45. In Republic v The Industrial Court Of Kenya Ex-parte Oserian Development Company Limited the court observed:-

> " However, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. Therefore where no evidence is adduced in respect of an issue and the Court goes ahead to make a finding of fact unsupported by evidence, such a finding would in my view be irrational since it would be arrived at as a consequence of gross unreasonableness as no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision taking into account the fact that there were no facts presented in support thereof. The decision, accordingly would be in defiance of logic. However mere allegation of insufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be a ground for quashing a decision if there was material on record which would have warranted a finding to the contrary.

46. In this case, it is contended that the Industrial Court arrived at decision which was not supported by evidence and on which the parties were not heard hence were arrived at in breach of the rules of natural justice. It is contended in the affidavit in support of the application that there was no evidence before the Industrial Court as to the nature of the activities that the affected employees were engaged in at the material time when they were dismissed and that the finding by the Industrial Court that the said employees were discharging duties as workers representatives is not supported by any evidence before the Industrial Court.

47. Whereas the court agree that if the findings of the Industrial Court were not supported by evidence that would amount to irrationality and to an extent amount to breach of the rules of natural justice, for the Court to make such a finding it would be necessary that the proceedings which were before the Industrial Court be exhibited. In the absence of such proceedings, there is simply no material upon which this Court can make a finding in favour of the applicant based on the aforesaid allegations."

48. The Industrial Court granted the Interested Party ex parte orders which were tantamount to making the main suit nugatory as they were final in nature. This was done without hearing the Applicants' case therein and therefore the same was irrational and unreasonable. There was no evidence rendered that there was a hearing of the application and only the courts orders are presented in this court. These were final and far reaching orders which should not have been granted at that point.

49. In conclusion the High Court at the time this application was filed did had jurisdiction to hear appeals of matters from industrial court which was then subordinate to the High Court. But obviously that is not the case now since the two special courts are of equal status to the High Court.

50. The court has struggled to write this ruling as is not clear what is to be achieved about 14 years since these orders were granted and were as earlier submitted by the parties to this the same had been overtaken by events. The parties had even compromised the applications and by consent marked them as settled but on second thoughts insisted on proceeding and demanding judgment be written.

51. As earlier said for academic exercise the applicant's application dated 17th July 2009 is found merited and is granted.

52. The parties will meet their respective costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

Anna Ngibuini Mwaure

Judge