



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO.16 OF 2012**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI**

**REPUBLIC**

**- VERSUS -**

**THE INDUSTRIAL COURT (AS ESTABLISHED UNDER THE**

**LABOUR INSTITUTIONS ACT NO.12 OF 2007).....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**- EX - PARTE -**

**JAMES MACHUKA.....INTERESTED PARTY**

**AND**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....APPLICANT**

(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> November, 2018)

**JUDGMENT**

The present judgment flows from the judgment of the Court of Appeal in **Industrial and Commercial Development Corporation –Versus- The Industrial Court (As established under the Labour Institutions Act No.12 of 2007) and 2 others, Civil Appeal No.66 of 2017** (Ouko, Kiage & Murgor JJ.A) delivered on 22.06.2018. The Court of Appeal stated as follows,

**“Finally, it is apparent that having come to the conclusion that leave to file the Judicial Review application was filed out of time, the learned judge did not pronounce himself on whether in fact an employer and employee relationship existed between James and the appellant. In view of this omission, we consider that, on this question, the appellant is entitled to such determination by the ELRC. In the circumstances, we deem it necessary to have the matter remitted back to that court for such determination.**

**In sum the appeal is allowed and the judgment and orders of the ELRC dated 5<sup>th</sup> December 2014 are hereby set aside. We order that the suit be and is hereby remitted back to the court for a determination of the question of whether an employer and employee relationship legally existed between the appellant and James, the 3<sup>rd</sup> respondent, which should be heard on a priority basis by any judge of that court, other than Nduma, J. The appellant shall have the costs of the appeal.”**

The substantive notice of motion before the Court in view of the foregoing decision by the Court of Appeal is the one filed on 30.08.2012 through Obura Mbeche & Company Advocates. The prayer is for an order of certiorari directed at the 1<sup>st</sup> respondent, the Industrial Court of Kenya (as was previously established under the Labour Institutions Act No. 12 of 2007) to remove to the Industrial Court of Kenya as established under Article 162 (2) of the Constitution of Kenya and quash the award and decree issued by the Industrial Court of Kenya (as was previously established under the Labour Institutions Act No. 12 of 2007) in Cause No. 514 (N) of 2009 (**James Machuka –Versus- Industriaial & Commercial Development Corporation**) dated and issued on 11<sup>th</sup> day of July 2012 and any subsequent orders arising therefrom; and costs of the application be provided.

The issue in dispute as the Court understands it is that if the applicant and the interested party were in employer-employee relationship, then the Industrial Court of Kenya (as was previously established under the Labour Institutions Act No. 12 of 2007) had jurisdiction to hear and determine Cause No. 514 (N) of 2009 (**James Machuka –Versus- Industriaal & Commercial Development Corporation**) and the award of 11.07.2012 will rest as undisturbed. On the other hand, if there was no such employer-employee relationship, then there was no jurisdiction to make the award of 11.07.2012 and the same must be quashed as prayed for in the present application.

It is not in dispute that the applicant and the interested party were initially in a contract of service. The interested party applied for early retirement and the applicant accepted the application that the interested party retires under what was known as “**ICDC Early retirement package**”. Later, by the letter dated 29.11.2006 the applicant withdrew the acceptance for early retirement on terms that had been offered under such retirement. The applicant instead replaced it with “**Normal Early Retirement**” so that the interested party would forfeit the early retirement package and upon the normal retirement:

- a. His return would be under new terms of employment as receiver and managers of KENATCO Taxis Ltd (under receivership) and that his appointment by the applicant was in its capacity as the debenture holder.
- b. That the interested-party’s appointment would be on a one year contract and the period “**may**” be reviewed as circumstances may warrant at the sole discretion of the debenture holder.
- c. And the letter concluded “**If you are prepared to accept this appointment under the Terms and Conditions stated hereabove, please sign the acceptance of the letter and return it to the undersigned.**”

The interested party accepted the letter and he was appointed as a receiver and manager of KENATCO Taxis Ltd (under receivership) and formal letter issued to that effect. Subsequent contracts were concluded and included the provision that the debenture holder had the absolute right and discretion to assign more duties or terminate the appointment without giving notice and or reasons thereof. Between 2006 and 2008 the interested party says he wrote letters to the applicant demanding payments upon headings that would ordinarily obtain in circumstances of a contract of service but there is no evidence that the applicant paid as was demanded. The appointment of the interested party as receiver and manager of KENATCO Taxis Ltd (under receivership) were renewed and concluded between the applicant and the interested party on 22.05.2007 and 16.12.2008.

By the letter dated 10.06.2009 the applicant terminated the interested-party’s contract as receiver and manager of KENATCO Taxis Ltd (under receivership) following allegations of certain malpractices in the cause of the interested-party’s duties. It is upon that termination that the interested party filed Tribunal Cause No. 514(N) of 2009 under which he claimed for service gratuity for the period he served as receiver and manager; 126 leave days for the same period; severance pay for each completed year of service; remuneration for three months being the remainder of the agreed period; retirement benefits; one month salary in lieu of notice; and 12 months’ salary by way of compensation supposedly for unfair termination of services as a receiver manager. The sum of quantified claim was Kshs. 6, 041, 650.00. He also prayed for general damages for trauma, depression, anxiety, stress, humiliation, frustration, and suffering occasioned by the applicant and KENATCO Taxis Ltd (under receivership).

The Court delivered its award on 11.07.2012 and the Industrial Court then as a Tribunal found that parties were in agreement that the interested party was the applicant’s employee up to 01.12.2005 when he retired under the early retirement programme. It was also found that the matters in dispute related to the contracts entered into after retirement of the interested party. The Tribunal considered the meaning of employee under the Labour Institution Act, 2007 that an employee is a person who has been employed for wages or a salary and includes an apprentice or indentured learner. The Tribunal also considered the accusations in the letter of termination of the interested party as a receiver and manager dated 10.06.2008 and returned that the interested party was an employee under the Act. In finding that the applicant and the interested party herein were in a contract of service, the award dated 11.07.2012 (Madzayo J) stated as follows, “**The 1<sup>st</sup> respondent maintained that the Claimant was not an employee of its company having offered him an appointment in their subsidiary company i.e. Kenatco Taxis Limited and could therefore, not seek to be bound by the terms governing the employees of the 1<sup>st</sup> respondent as the contract entered into between the 1<sup>st</sup> respondent and the claimant was based on the debenture, while the claimant maintained that he was an employee. Under section 3 of the Labour Institutions Act, No. 12 of 2007, Laws of Kenya an “employee” is defined as follows: “employee” means “a person who has been employed for wages or a salary and includes an apprentice or indentured learner,” and the “employer” is defined as follows: “employer” means any person, including the Government, who employs or has employed an employee and where appropriate includes:**

- a. an heir, successor, assignee or transferor of an employer; or
- b. an agent, director or any person authorized to represent an employer.”

**In the instant case, the definition of employee does not exclude any employee who at the end of every month receives his or her salary. The intention of the legislature to frame this enactment was to confer the benefits of the Labour Laws on person who would be covered by the definition of “employee”.**

**According to records, the 1<sup>st</sup> respondent duly signed the contract of service on its own behalf with the claimant on all the three written contracts of service. There are several letters written by the claimant to the 1<sup>st</sup> respondent with regard to information concerning his Contract of Service as a Receiver Manager dated 28<sup>th</sup> April, 2006, 15<sup>th</sup> April 2007, and 26<sup>th</sup> November 2008; which were not responded to by the 1<sup>st</sup> Respondent. According to records, no response was received instead on 27<sup>th</sup> May, 2009 the claimant received a letter from the Permanent Secretary, Ministry of Trade a parent Ministry of the Respondents accusing him of tribalism and mistreatment of workers. The Claimant responded by denying the accusations on 9<sup>th</sup>, June 2009. On 10<sup>th</sup> June, 2009 the claimant’s services were terminated....”**

The Tribunal then awarded the interested party Kshs. 847, 806.00 for 126 accrued leave days; Kshs. 140, 740.00 pay in lieu of notice; Kshs.

844, 440.00 6 months' compensation for loss of employment; compensation under ICDC early retirement Kshs. 2, 737, 147.00; and making a sum of **Kshs. 4, 570, 133.00**. A certificate of service was to issue and the claimant to be paid costs.

It is submitted for the applicant that the Industrial Court as Tribunal lacked jurisdiction to make the award because the parties were not in employer-employee relationship. It is submitted that the Tribunal misconceived, miscomprehended and misapplied the law by assuming that the appointment of the interested party as Receiver and Manager of KENATCO Taxis Limited (In Receivership) amounted to the interested-party's employment by the applicant thereby creating an employer-employee relationship and making the Labour Institutions Act applicable to the dispute.

The interested party has opposed the application upon the following grounds:

- a. That the applicant cannot challenge the merits of the findings or decision because in judicial review proceedings, only the process of arriving at the decision and not merits of the decision can validly be challenged.
- b. The subject matter of the judicial review application had been heard and determined by the Tribunal.
- c. This Court had already determined the issue whether the applicant and the interested party were in employer-employee relationship when in the judgment of 05.12.2014 the Court (Nduma P.J) stated, **"27. That notwithstanding, the merits of the Judicial Review Application have been canvassed before me and the Court is also convinced that the erstwhile Industrial Court had jurisdiction to hear and determine the dispute as it did, since the same was founded on an employee and employer relationship...."**

The Court considers that the terms of remission the matter to the Court by the Court of Appeal sets the boundaries of the present proceedings. The Court considers that ground (c) as urged for the interested party that the Court cannot sit on appeal of its own decision wilts in view of the express terms of remitting of the matter to the Court by the Court of Appeal and the Court will not revisit the matter. The Court understands that the Court of Appeal considered the judgment as appealed against and the findings in paragraph 27 of the judgment as quoted above, in this Court's view, must have been viewed by the Court of Appeal as not a decision on merits by this Court that an employer-employee relationship existed and so it was necessary that the Court considers the matter on its merits.

It was submitted for the interested party that addressing the issue of employer-employee would be questioning the Tribunal's decision on merits and not on procedure and doing so was outside the purview of judicial review proceedings with a judicial review order as a remedy. The Court finds that the issue of employer-employee goes to the subject matter of the jurisdiction of the Tribunal so that if the jurisdiction was lacking, then whatever was done by the Tribunal was a nullity. Clearly, the issues goes to whether the Tribunal acted *ultra vires* or not and the Court finds that the doctrine of *ultra vires* is a well established ground for judicial review proceedings in which appropriate judicial review order can issue.

The applicant submits and admits that in the letter dated 06.01.2006 the applicant used the word "**salary**" while referring to remuneration if the interested party accepted the appointment. However, the letter did not constitute the terms of the appointment as Receiver and Manager but the terms were subsequently stated in the three consecutive annual agreements that the parties executed. It was submitted for the respondent that the purpose for the establishment of the Tribunal was provided in section 11(1) of the Labour Institutions Act, 2007 thus, **"There is established an Industrial Court with 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."** It was further submitted that the relationship between the applicant and interested party was purely commercial and was not to for the furtherance, securing and maintenance of good industrial or labour relations and employment conditions. It was also submitted that the relationship and disputes between a debenture holder and a Receiver and Manager was not covered under the provisions of section 12(1) of the Act which provided, **"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 and employee in the course of employment, between an employer's organisation and a trade union or between a trade union, an employer's organisation, a federation and a matter thereof."**

It was further submitted for the respondent that at the material times the Companies Act Cap. 486 of the Laws of Kenya (now repealed) under sections 88 to 95 provided for debentures and the Labour Institutions Act, 2007 did not apply to debentures. Thus, appointment of a Receiver and Manager by a debenture holder was not subject to provisions of the Labour Institutions Act, 2007 and an aggrieved party could not invoke the provisions of section 12(1) of the Act. It was submitted that the provisions of section 348 of the said Companies Act provided for Receiver and Manager appointed under the powers contained in any instrument. The section provided, **"(1) A receiver or manager of the property of a company appointed under the powers contained in any instrument may apply to the court for directions in relation to any particular matter arising in connection with performance of his functions, and on any such application the court may give such directions or may make such order declaring the rights of persons before the court or otherwise as the court thinks just."** It is further submitted that section 2 of the said Companies Act defined court to mean "**the High Court**" so that the proper forum in the dispute between the applicant and the interested party was the High Court and not the Industrial Court as established under the Labour Institutions Act, 2007. It was submitted that the said Companies Act did not extend jurisdiction of the Industrial Court as a Tribunal over disputes about the appointment and terms of engagement of Receiver and Manager. The applicant relied on David Randu –Versus- Malindi Water & Sewerage Company Limited [2013]eKLR, where the Court (Onesmus Makau J) held, **"In view of the foregoing finding that there was never any employment relationship between the parties herein, the court is ousted of the jurisdiction to determine the dispute involved in the suit. Section 12 of the Industrial Act read together with Article 162 of the Constitution of Kenya limits the jurisdiction of this court only to disputes related to employment and labour relations. On the other hand section 2 of the Companies Act Cap 486 grants the High Court the exclusive jurisdiction to determine all disputes related to the business and affairs of companies. The present case is clearly about the removal of a director from office and in my view it is filed before the wrong forum. The court therefore agrees with the defence that this court lacks jurisdiction to determine the real dispute involved on the merits...."**

The Court has considered the submissions made for the applicant and the interested party. The Court readily finds that matters expressly

preserved for the jurisdiction High Court under the then Companies Act would fall outside the jurisdiction of the Industrial Court as was then established under the Labour Institutions Act, 2007. Even if the transaction between the applicant and the interested party looked like a contract of service as found by the Industrial Court as was then established under the Labour Institutions Act, 2007, the express provisions of the Companies Act conferred the jurisdiction of determining the disputes arising from such appointment upon the High Court. The Court further finds that in fact and law the appointment of a Receiver and Manager by the debenture holder or by a Court does not amount to employment because the Receiver and Manager is an agent of the company which is subject of the receivership and management and not the agent of the appointing debenture holder or court – as it would obtain in a contract of service whereby the employee is an agent of the employer, the appointing authority. Thus the Court returns that in view of that finding, the element of remuneration of the Receiver and Manager as per the terms of the debenture under which the appointment is made or by agreement like it was done in the present case did not make such appointment to mutate into a contract of employment. The Court returns that the debenture holder and the Receiver and Manager were never in a contract of service.

It was submitted that the applicant being the sole shareholder of KENATCO Taxis Limited (In Receivership) it was therefore the interested-party's employer because it had the sole responsibility over the interested party. The Court finds otherwise. The Court finds that it is established law that a company duly incorporated is an autonomous legal person. The applicant and KENATCO Taxis Limited (In Receivership) were such autonomous persons in law and the fact that the applicant may have been the sole shareholder of KENATCO Taxis Limited (In Receivership) did not change the relationship in which the applicant as the debenture holder had appointed the interested party as a Receiver and Manager and as per the terms of the three successive annual contracts.

The judgment delivered on 04.10.2008 in **Cedric Flowers –Versus- RBTT Trust Limited Claim No. 471 of 2005 in the Supreme Court of Belize** (Awich J) as filed for the applicant is useful to the present dispute. On the common law function of a Receiver, the decision cited **Re Manchester and Milford Railways Co. Ex parte Cambrian Railway Co. (1880) 14 Ch D 645** (Lord Jessel M.R) thus, “A receiver is a term which was well known in the Court of Chancery as meaning a person, who received rents or other income, paying ascertained outgoings, but also who does not... manage the property in the sense of buying and selling or anything of the kind...” The court then held, “15. So, the function of a receiver of a charged asset of a company is to receive the income from the charged asset, and the proceeds of its sale, pay the costs and liabilities connected with the charged asset, and realise the security interest of the secured creditor, that is, pay off the debt charged to the asset.” The Court held that the duties and responsibilities of a receiver arise necessarily from his function to sell the charged asset, pay incidental costs and realise the security interest of the creditor who appointed him or on whose behalf he has been appointed. The Receiver is the agent of the debtor company, not of the secured creditor. However, if the secured creditor gives instructions to the receiver, the creditor may be liable for lack of duty of care if it occurs. The receiver must act honestly and *bona fide* so as not to harm the interest of the debtor company and the general creditors except to the extent it is necessary for realising the security interests. He must avoid conflict of interests and he must protect and preserve the asset (such as by securing and insuring the asset) while proceeding to sell it. Once the receiver establishes that he has discharged his function, he will be entitled to remuneration in a claim filed for that purpose (see paragraph 16 of the judgment).

A receiver appointed under a debenture will receive remuneration in accordance with the provisions of the debenture or terms of other appointing instrument like in the instant case. Ordinarily the appropriate remuneration would be the costs properly incurred by the receiver and remuneration obtained from monies coming in to the receiver's hands from sale of the assets of the debtor company – and at agreed rate of pay. And even if the receivership is not beneficial, the receiver would be entitled to his remuneration so that, as the court stated in the cited case, “30. It is usual that a receiver of charged assets of a financially troubled business, or a liquidator in company winding up will look to the person making the appointment or the applicant for the court winding up order, for remuneration in the event, payment has not been obtained out of the sale of the assets of the company. The instrument of appointment, or a letter of undertaking, or the court order, will usually provide for that.”

The Court has considered the foregoing decision and returns that the general rule is that a Receiver and Manager is not an employee but a special relationship between the parties under the Companies Act. The Receiver and Manger appointed under a debenture will be entitled to such remuneration as is provided for in the debenture or the instrument of appointment as was done in the instant annual agreements between the parties. The Court considers that nothing limits the debenture in the nature of provisions that may be in place and such provisions may be that the Receiver and Manager may be entitled to such benefits as they may apply in the employer-employee relationship – but such agreement will nevertheless not make the Receiver and Manager an employee – the Receiver and Manager would still remain the agent of the debtor company. The debenture will however, and is ordinarily expected to, provide for a clause on remuneration and other benefits to the Receiver and Manager as appropriate – and in the instant case the renewable annual agreements made conclusive and complete provisions on remuneration of the interested party.

In the instant case, the observation the Court makes is that while the applicant states that the interested party was appointed under a debenture with the applicant as the debenture holder, the debenture instrument appears not to have been exhibited in the Industrial Court as Tribunal at the hearing or in the instant judicial review proceedings. The Court has perused the notice of appointment of the interested party by the applicant as a Receiver and Manager for Kenatco Taxis Limited (In Receivership). He was appointed as Receiver and Manager of the whole or substantially the whole of the property of Kenatco Taxis Limited (In Receivership) on behalf of the applicant as debenture holder of a debenture dated 25.09.1989 under the powers contained in that instrument. The annual agreements of appointment are exhibited. The agreements specify the duties and powers of the interested party including targets to be achieved. He was to answer to the applicant's Loans and Investment Manager on day to day operations of the debtor company and was not to execute any deed in the name of the applicant without prior consent. The agreement dated 22.05.2007 then specifically stated as follows:

**13. The Receiver and Manager's remuneration will be the sum of Kenya Shillings One Hundred and Twenty eight Thousand, Two Hundred and Fourty Three cents Ninety only (Kshs. 128, 243.90/=), all inclusive payable by the Company at the end of the month net of the requisite tax, together with a monthly accountable entertainment allowance of Kenya Shillings Fifteen Thousand only (Kshs.15, 000.00/=). A quarterly review of the Trading performance will be done and achievement will result into an increment of the monthly salary on a per centum that will allow gradual upward mobility, subject to a maximum of Kenya Shillings One Hundred and Fifty Three Thousand, Two Hundred and Thirty Seven only (Kshs.153, 237/=).**

**14. The Receiver and Manager shall during his term in office be entitled to a Bronze Card Medical Cover by African Air Rescue (AAR) up to a limit of Kenya Shillings One Hundred and Seventy Two Thousand only (Kshs. 172, 000/=) per annum,**

which amounts are to be paid by the Company.

**15. The Receiver and Manager will be entitled to a re-imbusement of those expenses incurred where the approval to incur was first had and obtained from the debenture holder.**

**16. All books of accounts, profit and loss statements in respect of his tenure as Receiver and Manager shall be released to the debenture holder on expiry of his term.**

**17. The Receiver and Manager shall be personally liable in ensuring that all necessary returns, statutory or otherwise required to be filed at the registries, are done without delay and the debenture holder availed a copy of the same.**

**18. This agreement constitutes the entire agreement and understanding between the parties with respect to all matters and supersedes any other agreement, letters, or correspondence exchanged herein.**

The Court has perused each of the three annual agreements appointing the interested party and each had provisions similar to the foregoing and to the same effect. The Court returns that the applicant appointed the interested party as a Receiver and Manager and the agreement was inherently complete on the terms of the accruing relationship and which did not amount to employer-employee relationship under the Employment Act, 2007 and other labour laws. It was a relationship governed by the then Companies Act as submitted for the respondent and certiorari will issue as prayed for. As provided for in the Companies Act, the disputes arising from that relationship between the applicant and the interested party vested in the jurisdiction of the High Court as was submitted for the applicant and not the Industrial Court as was established under the Labour Institutions Act No. 12 of 2007.

The applicant has succeeded, the 1<sup>st</sup> respondent has since ceased to exist and the 2<sup>nd</sup> respondent is in place. The Court returns that 2<sup>nd</sup> respondent will pay the applicant's costs of the proceedings.

In conclusion judgment is hereby entered for the applicant against the respondent for:

1. The order of certiorari directed at the 1<sup>st</sup> respondent, the Industrial Court of Kenya (as was previously established under the Labour Institutions Act No. 12 of 2007) to remove to the Industrial Court of Kenya as established under Article 162 (2) of the Constitution of Kenya and quashing the award and decree issued by the Industrial Court of Kenya (as was previously established under the Labour Institutions Act No. 12 of 2007) in Cause No. 514 (N) of 2009 (**James Machuka –Versus- Industrial & Commercial Development Corporation**) dated and issued on 11<sup>th</sup> day of July 2012 and any subsequent orders or proceedings arising therefrom.

2. The 2<sup>nd</sup> respondent will pay the applicant's costs of the proceedings.

**Signed, dated and delivered in court at Nairobi this Friday 30<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**