REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

J. R. NO. 4 OF 2015

MUKAWA (HOTELS) HOLDINGS LIMITED T/A NAIROBI SAFARI CLUB...APPLICANT

VERSUS

INDUSTRIAL COURT OF KENYA.....1ST RESPONDENT

KENYA HOTELS AND ALLIED WORKERS UNION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

Mr. Kiunga for applicant

Mr. Chimau for 1st and 3rd respondent

Mr. Ng'etich for 2nd respondent

JUDGMENT

1. The matter came by way of a constitutional reference commenced under an originating summons dated 14th September 2005 and filed on the same date. Prayers 1 to 7 seek various declarations pursuant to Sections 77, 80, 84 (1) and (6) of the Constitution of Kenya 1969 (now replaced).

2. The application is further grounded on the Employment Act, Cap 226, the Trade Dispute Act, Cap 234 and the rules of natural justice.

3. The prayers 1 – 7 are as follows;

> 1. That the entire proceedings in the Industrial Court at Nairobi in Industrial Cause No. 105 of 2004 culminating in the award delivered on 12th August, 2005 be declared a nullity for the violation of the applicant's right to equal protection of the law as guaranteed under Section 80 of the Constitution of Kenya.
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> 2. That the entire proceedings and award in Industrial Cause No. 105 of 2004 were made in excess of jurisdiction and/or for want of jurisdiction.
>
> 3. A declaration do issue that the respondents through the proceedings in Industrial Cause No. 105 of 2004 contravened the rights of the applicant not to be subjected to unfair trial guaranteed under

Section 77 of the Constitution of Kenya.

4. A declaration that the provisions of the Employment Act Chapter 226 Laws of Kenya apply to the proceedings before the Industrial Court of Kenya.

5. A declaration that the award in Industrial Court of Kenya cause no. 105 of 2004 was issued in excess of and for want of jurisdiction as the court as convened contravened the provisions of the trade disputes act.

6. A declaration that the applicant's right to associate guaranteed under section 80 of the Constitution of Kenya is being and has been contravened by the Industrial Court of Kenya and the pronouncements of the said award so contravened the applicant's said rights.

7. An order that the respondent to pay the applicant's costs of the suit.

4. The constitutional reference is based on grounds set out on the originating summons as follows;

1. The Industrial Court found for the claimant union 2nd respondent herein on matters, which were not before it and which, the court had no powers to investigate.

2. There was no dispute pending or anticipated for recognition between the applicant and the claimant union for which the said court made a finding in the absence of any evidence.

3. That the Presiding Judge of the industrial court showed open bias to the applicant in that in the absence of any wrong doing by the applicant the said Judge sought more evidence from the union to enable him "**punish**" the employer.

4. That the reference by the Minister for Labour and which formed the issue before the court was the "**lockout**" of the workers. The court having found that there was no lockout should have dismissed the claim but went to determine extraneous matters to deny the applicant a fair trial.

5. The court relied on the faulty findings of the investigator to award the workers reinstatement whereas the said investigation had found that there was a lock-out, which in this case there was not.

6. The court having found that the applicant had a recognition agreement with a rival union Kenya Union of Domestic Hospitals Educational Institutions and Allied Workers' Union (KUDHEIHA) and there was an existing elaborate mechanism for resolving conflicts should have dismissed the representation of workers by the claimant union.

7. The court failed to adhere to the mechanism laid out in the Trade Disputes herein.

8. The Judge of the Industrial Court continually changed and reconstructed the members of the court to the detriment of the claimant.

9. The award was signed by all the members and was read out in the absence of Mr. M. M. Jahazi who apparently may not have participated in the writing and delivery of the said award but in the presence of a stranger to the proceedings.

10. The industrial court failed to adjudicate the issues before it fairly and impartially and discriminated the applicant in the application of the law especially found in the Employment Act and the Trade Disputes Act.

5. The reference is further supported by the affidavit of Hilda Wanjiku sworn on 14th September, 2005.

Reply

6. The reference is opposed by the defendants vide grounds of oppositions dated 11th November 2005 and filed on the even date to wit;

1. That the proceedings herein are a nullity in light of provisions of the Trade disputes Act.

2. There is material discourse and deliberate misrepresentation.

3. There is no decision that is capable of being declared a nullity herein.

4. The applicant herein was granted a fair trial

5. The respondent is non-suited.

6. The proceedings herein are a thin veiled attempt by the plaintiff to avoid meeting its obligations.

7. That the Industrial Court had jurisdiction to hear and determine the matter before it.

8. There was no and neither any evidence of bias, and if any bias was there which is denied then the same would not warrant the orders sought herein.

7. The defendant further filed a replying affidavit sworn by Joanes Okotch on 11th November 2005 and filed on the even date opposing the constitutional reference and primarily on the grounds set out above in the document filed on 11th November 2005.

8. The respondents maintain that the dispute was properly referred to the erstwhile Industrial Court and was properly heard and determined and an award made in Industrial Cause No. 105 of 2004.

9. That the Industrial Court did not act in excess of jurisdiction and considered properly issues before it.

10. That matter was regulated by the Trade Dispute Act, Cap 234 Laws of Kenya and the Judge entertained the matter in terms of Section 14 thereof.

11. That Section 14 (7) provides that the court shall upon application made to it in writing jointly by the parties to a trade dispute or upon a dispute being referred to it by the Minister take cognisance of such dispute and proceed as soon as practicable to inquire into the dispute and make an award thereon.

12. In this matter, the dispute referred to the Minister was not resolved and same was referred to the court for determination.

13. That the Industrial Court (as it then was) derived its mandate and jurisdiction from Section 65 of the former constitution which *interalia* provided that;

"*The parliament may establish court, subordinate to the High Court and Courts Martial and a court so established shall subject to this constitution have such jurisdiction and powers as may be conferred on it by any law*."

14. That it is not true that the court determined any matter that was not properly before it and which the court had no powers to investigate upon.

15. Furthermore, the conduct of the court in Cause No. 105 of 2004, did not contravene the rights of the applicants. The proceedings were conducted in a fair manner in that every party in the proceedings was accorded an opportunity to be heard and right to representation.

16. The proceedings of the Industrial Court observed the rules of natural justice and no complaint of bias was made to the Presiding Officers during the proceedings. The applicant in particular was heard and

tendered evidence to the court.

17. That the applicant has not demonstrated any violation of a right or injury or harm caused it by the proceedings and decision of the Industrial Court.

18. That Section 77 (a) of the Constitution recognises decisions or determination by judicial bodies and the 2nd respondent has a right to enjoy the fruits of the award.

19. That the applicants simply want to avoid execution of the award of the court.

20. Furthermore, the respondents did not violate the applicant's right to association guaranteed under Section 80 of the Constitution.

21. The employees joined a union of their own choice in line with Section 80 of the Constitution. The applicants have failed to demonstrate how the 1st respondent violated their freedom to associate.

22. The respondent prays that the reference be dismissed with costs as it lacks any sound basis.

Determination

23. The issues for determination are as follows;

1. Whether the Industrial Court (as it then was) acted in excess of jurisdiction.

2. Whether the applicant's constitutional rights were violated.

3. What remedies if at all are available to the applicant?

Issue i

24. The applicant filed skeletal submissions on 13th July 2015 and list of authorities on 23rd July 2015.

25. The applicant in the main alleges that the Industrial Court found for the claimant union the 2nd respondent herein on matters, whichwere not before it and which the court had no powers to investigate.

26. In particular there was no dispute pending or anticipated for recognition between the applicant and the claimant union for which the said court made a finding in the absence of any evidence.

27. That the reference by the Minister for Labour which informed the issue before the court was the "**lock out**" of the workers. The court having found that there was no lock-out should have dismissed the claim but went to determine extraneous matters to deny the applicant a fair trial

28. The court also relied on faulty findings of the investigation to award the workers reinstatement whereas the said investigation had found that there was a lock-out which in the case there was not.

29. The court having found that the applicant had a recognition agreement with a rival union, The Kenya Union of Domestic Hospitals Educational Institutions and Allied Worker' Union (KUDHEIHA) and there was an existing elaborate mechanism for resolving conflicts should have dismissed the representation of workers by the claimants' union.

Respondent's Submissions

30. The respondents on the other hand filed submissions as follows;

31. 1st and 3rd respondents filed written submissions on 3rd November 2015 and the 2nd defendant filed

submissions, dated 9th February 2015 in Kiswahili language and further submissions on 19th October 2015.

32. The nub of the opposition is summarised as follows from these submissions;

33. Cause No. 105 of 2005, was filed by the 2nd respondent herein on behalf of 68 members whose services had been terminated by the applicant herein.

34. The 2nd respondent reported a dispute to the Ministry of Labour in terms of Trade Dispute Act Cap 234 Laws of Kenya on 29th December 2000. In terms of the document the dispute reported was "*lock-out of 68 unionsable employees.*"

35. Upon filing of submissions by the union and management the Chief Industrial Relations Officer made a report in which he recommended that the dismissal of the 68 employees be reduced to normal termination and the workers be paid the terminal dues as per Cap 226 Laws of Kenya. The recommendation was not accepted hence this suit.

36. The court has perused the claimant's memorandum of claim dated 16th November 2004 and the following reliefs were sought by the claimant, now 2nd respondent as follows;

37. The claimant union prays that this Honourable Court be pleased to award that; -

1. The lock-out of sixty eight unionsable employees was unlawful.

2. The purported summary dismissal of the grievants was unlawful and the respondent should pay all the grievants the full range benefits due to them based on their respective lengths of service as per the earned rights under the registered Collective Bargaining Agreement at the material time.

3. The respondent to reinstate the grievants in their former position and alternatively compensate grievants in the maximum for loss of earnings.

38. The court has also perused the award by Honourable Murtaza Jaffer in cause no. 105 of 2004 delivered on 12th August 2005 and noted the following;

39. The court found that there was no evidence of a lock out within the meaning of the law in the circumstance of the case. The workers were involved in a sit-in and the respondent was justified to demand that they go back to work.

40. The respondent was however wrong in not engaging the workers' lawful representative. The workers therefore decided on a sit-in on the 15th December 2010 in order to pressurise management to resolve pending grievances. Court wondered why the existing works committee did not address the issue in the first place.

41. The court however found that the termination of the workers was unfair, the respondent having failed to initiate a process of resolving the grievance by the workers.

42. The court also found that the respondent's basis of reinstating nine (9) workers and dismissing the rest was discriminatory and unfair.

43. The court further noted the recommendation by the Conciliator Mrs Kezzah of the Ministry of Labour which had recommended reduction of the summary dismissal to normal termination and therefore pay terminal benefits to the employees.

44. The final orders of the court were that;-

"The respondent –

1. "Give each of the grievants in the dispute an opportunity to be reinstated in their original positions without loss of any benefits SAVE THAT, if they so opt for reinstatement, they shall not receive any salary and related benefits for the period they have been out of employment namely between 27th December 2000 and the 1st August 2005 being the effective date of reinstatement or alternatively,

2. The grievants and each of them upon not taking up reinstatement be paid their normal terminal dues in accordance with the CBA in force at the time. The grievants must also take some responsibility for their actions and the court does not intend to award any compensation to the grievants for loss of employment."

45. These are awards which the court was permitted to make under the Trade Disputes Act. These were matters canvassed in the reported dispute at the Ministry of Labour and are covered in the pleadings of the parties.

46. In the court's considered view the Industrial Court did not canvas any extraneous matters in arriving at its decision.

47. The issue of the court having acted in excess of its jurisdiction is preposterous and not founded in law or fact.

48. In ELRC Petition No. 31 of 2013 **Kenya Medical Research Institute –vs– The Honourable Attorney General and 3 Others (2014) eKLR** Justice Nderi Nduma, Lady Justice Mumbi Ngugi and Justice George Odunga had this to say at page 24 thereof; -

"*The law as we understand it is not that the court is barred from deciding a matter on an unpleaded issue. Whether the court would do so depend on the circumstance of the case and the manner in which the proceedings have been conducted before the court. The law is that a court may base its decision on any issue, where it appears from the course followed at the trial, that the issue has been left to the court for decision*."

See **Odd Jobs –vs– Mubia** (1974) E.A 476. **Abdirahman Shire –vs– Thabiti Finance Company Ltd**. (2003) EA 279 and **Marco Mohave Chieti –vs– Official Receiver and Interim Liquidator Rural Urban Credit Finance & Another** Civil Appeal No. 164 of 2002.

49. I have not noted any extraneous or unpleaded issue that the court decided upon in this matter. Even though the report of the dispute was couched as "lock-out of 68 employees" by the 2nd respondent, the fact of the matter is that the 68 employees were summarily dismissed by the respondent and that was the dispute handled by the investigator at the Ministry of Labour, which dispute was subsequently seized by the Industrial Court in this matter. This question is therefore answered in the negative. The Industrial Court as it then was did not act in excess of jurisdiction in cause no 105 of 2004.

Issue ii

50. The second question is whether the applicant's constitutional rights were violated as alleged in this constitutional reference or at all.

51. The applicant specifically complains that its right to equal protection of the law as guaranteed under Section 80 of the erstwhile Constitution of Kenya 1969, were violated by the Industrial Court. That the proceedings in Industrial Cause No. 105 of 2004 contravened the rights of the applicant not to be subjected to unfair trial guaranteed under Section 77 of the constitution of Kenya.

52. That also, the applicant's right to association guaranteed under Section 80 of the Constitution of Kenya has been contravened by the Industrial Court of Kenya and the pronouncements of the said award.

53. The court has already found that the Industrial Court did not act in excess of jurisdiction.

54. That the award in cause no. 105 of 2004 was informed by the pleadings before it and the proceedings by the parties. That no objections to the proceedings were raised by the parties for consideration in the course of the hearing or at all until this reference was filed.

55. There is in my considered view no error apparent on the record, nor was there any gross misapprehension or misapplication of law or fact by the Judge that may have resulted in violation of the applicant's right to equal protection of the law that was guaranteed in Section 80 of the erstwhile constitution of Kenya 1969.

56. Furthermore, there is absolutely no evidence that the trial by the Industrial Court (as then was) was unfair whatsoever or in violation of the rules of natural justice.

57. The applicant has failed to disclose any apprehended or actual violation of his right of association guaranteed under Section 80 of the said constitution. Indeed, the final decision of the court had no bearing at all on the right of association of the applicant in any way at all.

58. In the ELRC case of **Kenya Medical Research Institute (supra),** the three judge bench considered the alleged violations which related to the procedure the Judge in the Industrial Court followed in hearing and determination of the suit. The petition also contained an objection to the decision of the court to reinstate the interested parties to their previous employment.

59. This case was almost on all fours with the present case, where the applicant outlines mistakes made by the Judge of the Industrial Court which it is argued amounted to violation of its constitutional rights.

60. In the applicant's view, the Judge acted in excess of jurisdiction and in violation of the rules of natural justice and also that the court violated the applicant's freedom of association.

61. On this the Judges cited the case of **Kenya Revenue Authority –vs– Menginya Salim Murgani** Civil Appeal No. 168 of 2009 in which the Court of Appeal delivered itself as follows;

> *"There is ample authority on decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their procedures. Provided that they achieve the degree of fairness appropriate for their task it is for them to decide how they will proceed."*

62. In the present case, there were no objections to the procedure followed by the court nor the manner the hearing was conducted. The applicant allege that the court made a decision on an unpleaded issue and in so doing violated the freedom of association of the applicant. The court finds as a matter of fact, from the record before it, that this allegation by the applicant cannot be sustained.

63. The Judges rendered themselves thus;

> "[62] *Moreover, we are of the view that* a *wrong action or decision of a public body does not necessarily elevate a matter to a constitutional issue in order to warrant a party aggrieved thereby instituting proceedings by way of a constitutional petition. As was appreciated in* **Pattni and Another –vs– Republic [2001] KLR 264** in which **Harrikissoon –vs– Attorney General of Trinidad and Tobago [1980] Ac 265** *was cited with approval. The notion that whenever there is failure by an organ of Government or a public authority or public officer to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the Chapters of the constitution is fallacious …….. the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the provision if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no*

contravention of any human right or fundamental freedom."

64. The court places the present reference in this category of frivolous or vexatious and being an abuse of the court process in that the allegations on which alleged violation of constitutional rights and freedoms are based are not factual.

65. Secondly, under the rules of the erstwhile Industrial Court, the applicant had opportunity to apply for review and or setting aside of the award made by the trial Judge, to the Judge himself.

66. Furthermore, the Industrial Court (as it then was) was a subordinate court as was severally held in **Kenya Airways Ltd –vs– Kenya Airline Pilots Association NRB HCC Misc. Application No. 254 of 2001** per Justice Alnashir Visram and in **Mecol Ltd –vs– Attorney General and 7 others [2000] eKLR** per Lady Justice Kalpana Rawal (Rtd.), Justice Onesmus Mutungi (Rtd.) and Lady Justice Mary Kasango and the court was under the High Court's supervisory power in terms of Section 65 (2) of the old constitution.

67. This being so, the applicant ought to have filed an application for review of the decision of the Industrial Court to the High Court.

68. For these reasons the court finds that the constitutional reference by the applicant was ill conceived and without merit. The same is dismissed with costs of the proceedings before the trial court and this court.

Dated and delivered at Nairobi this 28th Day of April 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE