REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT NAIROBI

PETITION NUMBER 3 OF 2012

[Consolidated with Industrial Court at Nairobi, Petition Number 1 of 2012, Petition Number 3 of 2013, Petition Number 10 of 2012 and Nairobi H.C. Petition Number 1964 of 2011]

IN THE MATTER OF ARTICLES 74 AND 166 [2] OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE INDUSTRIAL COURT ACT NUMBER 20 OF 2011

AND

IN THE MATTER OF

1. UNITED STATES INTERNATIONAL UNIVERSITY [USIU]

2. PROFESSOR KIAMA WANGAI

3. KENYA PIPELINE COMPANY LIMITED

4. KENYA HOTELS AND ALLIED WORKERS

UNION…….....PETITIONERS

VERSUS

1. THE HONOURABLE ATTORNEY GENERAL

2. HON. JUSTICE ISSAC E.K. MUKUNYA

3. THE REGISTRAR INDUSTRIAL COURT OF KENYA

4. THE MINISTER OF LABOUR

5. JUDICIAL SERVICE COMMISSION

6. KENYA ASSOCIATION OF HOTEL KEEPERS AND CATERERS

7. KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS, HOSPITALS AND ALLIED WORKERS

8. THE REGISTRAR OF TRADE

UNIONS…….…….....RESPONDENTS

AND

9. ERIC RADING OUTA

10. CENTRAL ORGANIZATION OF TRADE UNIONS

11. MAUREEN OCHIDO

12. HEZEKIAH ONGANYO MARENYA

13. RICHARD NJONI

14. PATRICK KINUTHIA KARANJA .....INTERESTED PARTIES

JUDGMENT

Preface

1. There were various Claims determined at the Industrial Court of Kenya, between 27th August 2010 when the new Constitution came into effect, and the 12th July 2012, when new Judges were appointed and sworn in as Judges of the Employment and Labour Relations Court. These decisions were made by Judges who were appointed first under the Trade Disputes Act Cap 234 the Laws of Kenya, and reappointed under the Labour Institutions Act No. 12 of 2007. The former Judges served without having taken any oath of office.

2. The decisions of the former Judges, made within this period, were the subject of various constitutional challenges made at the High Court in Nairobi, on among others, the following grounds:-

a) Pursuant to Article 162 of the Constitution, the Industrial Court Act Number 20 of 2011 was enacted and came into force in the year 2011, establishing the Industrial Court. The Act defines a Judge, as a person appointed under Article 166 [1] [b] of the Constitution of Kenya.

b) Section 32 [2] of the Industrial Court Act provides that any person who at the commencement of the Act was a Judge, would be deemed appointed under the Industrial Court Act for the remainder of that person's term.

c) Article 74 of the Constitution provides that before assuming a state office or performing the functions of such office, a person shall take and subscribe to the oath or affirmation of office, as provided for under the 3rd Schedule.

d) The Judges of the Industrial Court were not appointed and sworn in, in accordance with the Constitution, and all Proceedings, Rulings and Awards made by them are unconstitutional, illegal, invalid and /or inapplicable and of no legal effect.

Most of the decisions giving rise to the Petitions were made by Hon. Justice I.E.K Mukunya.

3. The Petitions were variously consolidated at the High Court and transferred to the reconstituted Industrial Court. The Honourable the Chief Justice, directed the consolidated Petitions be heard and

determined by 3 Judges of the Industrial Court [now Employment and Labour Relations Court].

4. The Petitioners seek:-

a) Section 32 [2] of the Industrial Court Act is declared unconstitutional.

b) Decisions made by the Judges of the Industrial Court between 27th August 2010 and 12th July 2012 are declared unconstitutional, illegal, invalid and of no effect.

c) Costs to the Petitioners.

5. The Petitions were heard on the 4th November 2015.

A. <u>The Petitions</u>

6. Mr. Ochieng' Oduol for the 1st Petitioner submits that Parliament, was upon the adoption of the new Constitution, to establish through legislation, Courts with the status of the High Court. Parliament enacted the Industrial Court Act, establishing the Industrial Court. Under Section 2 of the Industrial Court Act, a Judge is defined to be:

''a Person appointed in accordance with the provisions of Article 166 [1] [b] of the Constitution.''

Article 74 of the Constitution required Judges to take fresh oath of office. Judge Mukunya had not taken the oath at the time he made his decisions.

7. Section 32 [2] of the Industrial Court Act is inconsistent with Article 74 of the Constitution. It gives an automatic transition. The conflict must be resolved using the norms of the Constitution. The Constitution established a new legal regime for resolution of industrial disputes. It gave specific requirements for appointment of Judges. Judge Mukunya did not hold office at the time of making his decisions against the Petitioners, in accordance with the Constitution. The Judicial Service Commission thereafter recruited new Judges who were appointed, and sworn in, in accordance with the Constitution.

8. The oath of office is a requirement under the Constitution. It is prescribed under Schedule 3. Once new Judges were appointed, fresh oath was administered. Judge Mukunya could not assume office, and determine disputes after 27th August 2010, without meeting the requirements imposed on the appointment of Judges under the new Constitution. Taking of the oath is paramount. In ***Prieto Bail Bonds v The State of Texas, 994 S. W.2D,*** the Court of Appeal of Texas, US, found that all actions taken by a Judge who had failed to take a constitutional oath of office, were taken without authority, and therefore without effect. The Judge had sat for 5 years and made decisions without taking the oath of office.

9. Validity of decisions made by a Judicial Officer rests on the recognition that, that Officer is validly appointed. Every aspect of the appointment must conform to the Constitution. The 1st Petitioner relies on the Court of Appeal of Kenya decision ***Karisa Chengo, Jefferson Kalama Kengha & Kitsao Charo Ngati v. The Republic [2015] e-KLR*** in urging the Court to find appointment of Judges, and exercise of the judicial function, must be in conformity with the Constitution. Further support of this submission is to be found in the Supreme Court of Kenya case between ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 others [2012] e-KLR,*** where it was held that a Court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by the law. The Constitution must be upheld. Public policy issues arising from the decisions made by Judge Mukunya must be resolved in favour of the Constitution.

10. The failure by the Petitioners to challenge Judge Mukunya's jurisdiction at the respective trials did not result in conferment of jurisdiction. Acquiescence by any party to a claim does not confer jurisdiction where none is given by the law. Judgeship is not acquired through adverse possession or prescription. No

legitimacy is conferred by continuity in office. Petitioners who may have appealed are not barred from pursuing the Petitions. There is a difference between an Appeal and questions of Constitutionality.

11. The form of oath of office, for Judges of the Industrial Court, is as prescribed for Judges of the High Court, the Industrial Court being a Court of Equal Status. State Officers under the Constitution include Judges. The 6th Schedule provided for transition with respect to the Supreme Court. There was no such provision with regard to the Industrial Court. If there is a conflict between the Constitution and Legislation, the Constitution must prevail.

12. Professor Kiama Wangai, appearing on his own behalf, joins himself fully with the submissions made by Mr. Oduol. Articles 74, 162 and 166 of the Constitution are powerful. The Sovereign Power in establishing the Judiciary is from the People. Parliament cannot interfere with it. The Industrial Court Act is about Parliament exercising a power which is reserved for the Judiciary. The Constitution creates the Judicial Service Commission. Section 32 [2] of the Industrial Court Act, however read, is inconsistent with the Constitution. The decisions made by Judge Mukunya are a nullity and unenforceable. Professor Wangai urges the Court to adopt a brief filed by Amicus Curiae Mr. Geoffrey Obura, which concluded that Section 32 [2] of the Industrial Court Act is inconsistent with the Constitution. The Professor differs with Mr. Obura on the validity of decisions made by the Judges of the Industrial Court for the period in question. The decisions cannot be valid, if the Judges were not validly in office. Public Policy is not before the Court. The Petitioners cannot be denied a hearing because of Public Policy. There are Courts created under the Constitution and under Legislation. The old Industrial Court was not created by the Constitution. The new Constitution establishes Courts. Section 22 of the 6th Schedule in the Constitution relates to preservation of proceedings in Courts established under the Constitution. It is not a law that can offer refuge to the Respondents. The old Judges would not take the oath of office because they were not Judges recognized under the Constitution. The new Constitution raises the bar. Judge Mukunya was not at the level of a Constitutional Judge. In a separate Petition filed at the High Court, Judges of the old Industrial Court moved the Court seeking an order compelling them to be sworn. The Petition was dismissed. Lastly Professor Kiama submits that acquiescence does not confer jurisdiction.

B. <u>The Response</u>

13. State Counsel Ms. Kamande opposes the Petitions. She submits that Judges of the Industrial Court, at the time the decisions which are the subject matter of the Petitions were made, were in a transitory phase. They were appointed under the former Constitution. The current Constitution found them in office. They were not required to take an oath of office. The Industrial Court was subordinate to the High Court and Judges serving in the Industrial Court were not Judges under the former Constitution. Only Judges of the High Court were required to take the oath of office, under Section 63 of the former Constitution. Article 74 of the current Constitution is replicated from Section 63 of the former Constitution. Section 13 of the 6th Schedule states:

> ***''On the effective date, the President and any State Officer, or other person who had before the effective date taken and subscribed to an oath or affirmation of office under the former Constitution, or who is required to take and subscribe to an oath or affirmation of office under this Constitution, shall take and subscribe the appropriate oath or affirmation under this Constitution.''***

Serving Industrial Court Judges were not, upon adoption of the new Constitution, State Officers, required to take oath of office under Article 74.

14. The State holds Section 32[2] of the Industrial Court Act is not inconsistent with the Constitution. It was enacted after the Labour Institutions Act Number 12 of 2007. Section 33 provides that pending cases before the Industrial Court would continue to be heard by the old Court, until a new Court came into place. It was contemplated that the old Judges would continue hearing matters. Section 22 of the 6th Schedule to the Constitution preserves pending judicial proceedings. Section 33 of the Act is similar to Section 22 of the 6th Schedule. The Judges were protected by the Constitution and Legislation. They were

to serve for the remainder of their terms, read within the context of the Constitution and the Industrial Court Act. The Attorney General observes however that these transitional provisions relate to pending judicial proceedings, not freshly filed matters. To fill the gap on new matters, one would have to rely on Sections 22 and 43 of the Interpretation and General Provisions Act. The repealed law which regulated the old Industrial Court would remain in force, until the substituted provisions came into force; and unless a contrary intention was shown, the judicial powers and duties would continue to be performed by the old Judges. The decisions made by the said Judges cannot be unconstitutional. They were caught up in the transitory phase. Section 43 of the Interpretation and General Provisions Act Cap 2 the Laws of Kenya, provides that where a written law confers a power, or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the Person for the time being holding that office. The Court must look at the larger picture. Citizens have the expectation that decisions of the Court are complied with. Rights which have accrued to the Parties cannot be negated by the failure to swear in Judges of the Industrial Court. It cannot be said that those Judges had no authority. The Petitions have no merit.

15. Ms. Guserwa for 1st and 2nd Interested Parties agrees with the submissions of the State Counsel. It is not in dispute that the Court is being asked to declare decisions made by Judge Mukunya unconstitutional, based on the requirement that Judges were to take an oath of office under Article 74 of the Constitution. The Judges were initially appointed under the Trade Disputes Act Cap 234 the Laws of Kenya. The appointments were reaffirmed through letters issued by the Government under Section 63 of the Labour Institutions Act Number 12 of 2007. Judge Mukunya was to remain in office from 2nd June 2008 when the Labour Institutions Act came into effect. The requirement and administration of the oath are functions of the Executive and Parliament. A Judge cannot take an oath on his own. Sections 32 and 33 of the Industrial Court Act governed transition. The Industrial Court Judges exercised their power under Legislation, not under the Constitution. They were not required to take the oath. Their decisions cannot be unconstitutional. The new Judges took the appropriate oath. The old Judges did not sit in the new Court. The decisions of the old Judges were valid. Public policy looks at the bigger picture.

16. Mr. Oluoch holding brief for Mr. Obura for the 10th Interested Party associates himself fully with the submissions made by Ms. Kamande and Ms. Guserwa. The Constitution does not have a Form of Oath, to be administered on Judges of the Industrial Court. The Petitioners are forum-shopping. They accepted the jurisdiction of the Trial Court. They did not object. Being aggrieved by the decision of Judge Mukunya, Petitioner USIU lodged an Appeal in the Court of Appeal. The Appeal is pending. There was no objection to the jurisdiction of the Trial Court, at the time the respective trials started.

17. The Respondents and Interested Parties pray for dismissal of the consolidated Petitions.

C. The issues

18. We understand the issues to be:-

i. Is Section 32[2] of the Industrial Court Act Number 20 of 2011 inconsistent with the Constitution of Kenya, and void to the extent of the inconsistency?

ii. Were Judges of the Industrial Court in service upon the adoption of the Constitution on 27th August 2010, required to take the oath of office?

iii. Are the decisions made, and orders given, by the said Judges after 27th August 2010 valid and binding on the Parties?

iv. Should the Court declare such decisions and orders unconstitutional, invalid and of no legal effect?

v.Who should pay the costs of the Petitions?

WE FIND:-

19. The facts in all the Petitions are largely uncontested. Disagreement is purely on matters of law. The Petitioners were all unsuccessful litigants at the Industrial Court. They all were heard before Hon. Justice I.E.K Mukunya. It is common ground that at the time the Judge read his decisions, he had not taken the oath of office. There is no dispute that he came into office prior to the adoption of the new Constitution on 27th August 2010. The Judges of the Industrial Court were before this date, appointed under the Trade Disputes Act Cap 234 the Laws of Kenya, and reappointed through letters issued by the Permanent Secretary in the Ministry of Labour, upon coming into force of the Labour Institutions Act Number 12 of 2007, on 2nd June 2008.

D. Historical background

20. The Industrial Court has undergone rapid transformation. Its reform has not always been a tidy process, meeting the legal ideals, and the present dispute is a projection of historical challenges in the reform of the Court.

21. The Industrial Court was first established through a tripartite agreement involving the Government, Employers and Trade Unions. It was an *ad hoc* Court, which sat as and when the need arose. It was not originated under the Constitution, or under Legislation. It was later recognized and established under the Trade Disputes Act in 1965, and remained governed by that Act until 2008, when the Labour Institutions Act 2007, came into force. The Court fundamentally changed with the adoption of the new Constitution in 2010, which required Parliament to enact legislation heralding a new Court under the Constitution, with the exclusive jurisdiction in matters of employment and labour relations.

22. Section 14 [1] [a] of the Trade Disputes Act allowed the President, for purposes of settlement of Trade Disputes and matters related thereto, to establish by order:

> ***''an Industrial Court consisting of such number of Judges, not less than 2, as may be determined by the President.''***

In terms of legislation, this was the 1st generation Industrial Court. The creation of the Court, and appointment of Judges, and determination of their number, was a prerogative of the President. There was no role for the Judicial Service Commission as the Court was an institution created through tripartite engagement of the Government, the Employers and Organized Labour. It was not a Court within the Judiciary, but a Dispute Resolution Mechanism perched atop a Dispute Resolution Mechanism existing outside the Judiciary, in the Ministry of Labour. The Court acted as a Court of reference and appeals in matters originating from the Ministry. Its decisions were final and binding, reflecting the intention of its creators not to be part of the Judiciary. It was not a Subordinate Court, as submitted by the Attorney General, but a component of a separate dispute resolution system, outside the Judiciary, which could not be ranked within the hierarchy of Courts.

23. The Trade Disputes Act was repealed through Section 84 of the Labour Relations Act Number 14 of 2007. The Industrial Court was re-established under Section 11 of the Labour Institutions Act. It was no longer the prerogative of the President to create the Court; creation was legislated. Section 11 [2] [b] allowed the President, ***''acting on the advice of the Judicial Service Commission''*** to appoint as many Judges as he considered necessary to man the Court. This was the first time the Judicial Service Commission was drawn in. This was the 2nd generation Industrial Court.

24. Section 63 of the Labour Institutions Act provided among other things, that:-

> ***a) Persons who were at the commencement of the Act [2nd June 2008], Judges of the Industrial Court and Members of the Industrial Court, shall be deemed to have been appointed under the Act.***

b) For greater certainty, such Persons shall have and may exercise and perform all the powers and functions of a Judge or Member of the Industrial Court.

As stated by the Court in ***Hakika Transporters Services Limited v. Kenya Long Distance Truck Drivers and Allied Workers Union [2015] e-KLR***, the Labour Institutions Act was meant to elevate the Industrial Court to the status of the High Court; and ensure decisions of the Court were final and binding and not challengeable through judicial review in the High Court. The Act was meant to preserve the Court as a Dispute Resolution Mechanism outside the Judiciary, while at the same time elevating this Labour Institution, to the same judicial level of the High Court. Under the Act, decisions of the Court were to have the same force and effect as those of the High Court. The objective was not achieved, because the Court was created under an Act of Parliament without constitutional entrenchment.

25. The Constitutional Reform which culminated in the present Constitution, offered the social Partners an opportunity to entrench their Court in the Constitution and remove the weaknesses inherent in the Labour Institutions Act. Article 162 [2] provides that Parliament shall create Courts with the status of the High Court to hear and determine disputes relating to:

[a] employment and labour relations; and

[b] the environment and the use and occupation of, and title to land.

26. Under the 5th Schedule to the Constitution on Legislation to be enacted by Parliament, Parliament was to enact Legislation establishing the new Court charged with the hearing and determination of employment and labour relations disputes, within 1 year of the Constitution coming into effect. The Industrial Court Act was therefore enacted in 2011, creating the 3rd generation Court.

27. Section 4 of the Industrial Court Act establishes the 3rd generation Industrial Court. It expressly states the Court is created pursuant to Article 162 [2] of the Constitution. The Act has been renamed as the' Employment and Labour Relations Court Act,' and the Industrial Court renamed as the 'Employment and Labour Relations Court' through The Statute Law [Miscellaneous Amendments] Act 2014. The Act allows the President to appoint such number of Judges as the President may deem fit:

*''**acting on recommendations of the Judicial Service Commission.''***

Whilst the President under the Labour Institutions Act was bound to act on the 'advice' of the Judicial Service Commission, the new term used under the Industrial Court Act is 'recommendations' of the Judicial Service Commission. That is the only difference in the wording between the two laws on the appointment of Judges, with one law using the term 'advice', the other 'recommendations.'

28. The Transitional Provisions under Section 32 of the Industrial Court Act are as follows:-

a) Any regulation or other instrument made or issued under the Labour Institutions Act shall continue to have effect as if such regulation or instrument were made or issued under the Industrial Court Act.

b) A Person who at the commencement of the Industrial Court Act is a Judge of the Industrial Court shall be deemed to have been appointed under the Industrial Court Act, for the remainder of that Person's term.

c) The Persons who are at the commencement of the Industrial Court Act are Members of the Industrial Court shall be deemed to have been appointed under the Industrial Court Act.

d) Every Person who at the commencement of the Industrial Court Act was an Employee of the Industrial Court, not being under notice of dismissal or resignation shall, on that day and subject to the Industrial Court Act, be deemed to be an Employee of the Industrial Court.

29. Section 33 preserves the proceedings of the Industrial Court in the following terms:

> ***''all proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that Court, until the Court established under the Industrial Court Act, comes into operation, or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary.''***

30. Section 32 of the Industrial Court Act was modeled on the earlier transition contained in Section 63 of the Labour Institutions Act. Section 63 did not however mention preservation of judicial proceedings. The equivalent of Section 33 of the Industrial Court Act, would be found in the 5th Schedule of the Labour Relations Act, under Section 84, which states that any trade dispute that arose before the commencement of the Labour Relations Act; any trade dispute referred to the Industrial Court before the commencement of the Labour Relations Act; any revision or interpretation of an Award by the Industrial Court; and any summary dismissal that took place before the commencement of the Act; would be dealt with in accordance with the Trade Disputes Act. Proceedings of the Industrial Court, under the Trade Disputes Act, were preserved through the 5th Schedule, under Section 84 of the Labour Relations Act. It is to be noted all disputes in the Industrial Court prior to the Labour Reforms of 2007/ 2008, were processed and determined solely under the Trade Disputes Act.

31. Historically therefore, as can be seen from the above legal developments, Parliament made every effort through legislation, to ensure there were no gaps in preserving the institutional work of the Industrial Court, even as the structure was being changed from one generation to the other. It was never intended that there would be an ***interregnum*** or discontinuity in terms of the judicial work, and the availability of staff to discharge that work.

E. Defects in legislation

32. There is no doubt however that the Industrial Court Act as enacted, had many legal defects. It is these defects which perhaps, necessitated amendment of no fewer than 20 out 35 Sections, under the Statute Law Miscellaneous [Amendments] Act 2014. Section 21 for instance stated that the Court shall be properly constituted for the purposes of its proceedings, by a single Judge. Not less than 3 Judges impaneled by the Chief Justice could hear disputes raising substantial matters of law under Article 165 [3] [b] or [d]. Under Section 11 [3] of the Labour Institutions Act, the Coram was a single Judge sitting with 2 Members, who were appointed under Section 17 of that law. Section 21 of the Industrial Court Act removed Members from the Coram, while Section 32 [3] preserved the employment contracts of the Members, stating the Members were deemed to have been appointed under the Industrial Court Act. Their role on the bench was removed, yet the same law retained them as Members. Section 32[4] preserved the jobs of all other Employees of the Industrial Court, which overlooked that the Court did not employ, and was only a department of the Ministry of Labour, all Employees being Employees of the Public Service Commission. This would serve to create problems for these Employees when the Court was placed under the Judiciary.

F. Constitutionality of Section 32 [2]

33. Like Section 63 of the Labour Institutions Act, we have observed that Section 32 [2] was aimed at preserving the positions of serving Judges for the period of the transition into the Constitutional era. It is correct that a 'Judge' is defined under Section 2 of the Industrial Court Act, to be a Person appointed under Article 166 [1] [b] of the Constitution. Judges who served the Industrial Court before, and at the time, the Constitution was adopted, were not appointed under Article 166 [1] [b]. The Article was not there at the time of their appointment. Article 166 [1] [b] requires Judges of all Superior Courts, are appointed in accordance with the recommendation of the Judicial Service Commission.

34. Section 11 [1] [b] of the Labour Institutions Act as seen above placed a similar requirement on the President in respect of appointment of Judges. It required he appoints on the advice of the Judicial Service Commission. There was no material placed before this Court, to show that the President obtained the advice of the Judicial Service Commission under this law, before serving Judges were reappointed on 2nd June 2008. The requirement under Article 166 [1] [b] would therefore not be deemed to have been met

through the law under which the Judges of the Industrial Court held their positions, at the time the Constitution was adopted.

35. Besides, Article 166 read in its entirety gives specific constitutional qualifications to be met, for Persons to be appointed as Judges of any Superior Court. There are other considerations under the under Article 172 [2] of the Constitution which would be overstepped if Section 32 [2] of the Industrial Court remains in place. The constitutional qualifications are not the same qualifications contained in Section 11 [4] of the Labour Institutions Act. The definition of the term 'Judge' under the Industrial Court Act, which specifically refers to Article 166 [1] [b], cannot be reconciled with Section 32 [2] of the Industrial Court Act. The Section creates an avenue outside the Constitution, through which a Person could become a Judge, without meeting the constitutional criteria. The Constitution does not allow that Judges are deemed appointed through legislation.

36. The argument by the Attorney General that Section 32 [2] is not unconstitutional because it specifies that appointment is for the ***'remainder of that Person's term,'*** and that the sitting Judges' terms would end with the coming into place of the new Court, is a weak attempt at amending the Constitution through a poorly crafted Act of Parliament. Section 13 [2] of the Labour Institutions Act regulated the tenure of Judges of the Industrial Court. A Judge would continue to hold office until the Judge retires; resigns from office; is removed from office by operation of the law; or dies. The tenure of Judges under the Constitution is governed by Article 167. The tenure given under Section 32 [2] is not consistent with Articles 167 and 172 of the Constitution.

37. Ultimately we agree with the submissions of the Petitioners, that whichever way looked at, Section 32 [2] of the Industrial Court is unconstitutional. The authors of the Industrial Court Act adopted the same approach on transitioning the Court from the Labour Institutions Act to the Constitution, as they had in moving the Court from the Trade Disputes Act to the Labour Institutions Act. The Industrial Court Act was crafted like the past labour statutes, without regard to the new constitutional demands. The Judges' positions were preserved by legislation as they had always been. The preconditions for judicial appointment under the Constitution were disregarded**.** It was not constitutionally possible for the former Judges to assume the role of Judges in the Court created under the Constitution, through legislative supersession. In ***Michuki & Another v. Attorney General & Others [2003] 1 EA -158,*** the High Court held Section 5 of the Districts and Provinces Act 1992 unconstitutional, null and void, as it purported to amend the Constitution of Kenya. A similar holding obtained in Kenya Court of Appeal decision in ***Taib v. Minister of Local Government [2008] 1 EA 422,*** where a provision of the Local Government Act donated excessive powers to the Minister for Local Government in dismissal of nominated Councillors, outside the criteria set under the Constitution. Section 32 [2] of the Industrial Court Act has the effect of amending the Constitution, by creating an additional route outside the Constitution, through which Persons could be appointed Judges of a Superior Court. ***We are convinced, hold and declare Section 32 [2] of the Industrial Court Act to be unconstitutional, null and void***.

G. <u>VALIDITY OF PROCEEDINGS AND DECISIONS</u>.

<u>[i] Oath of Office</u>

38. Section 13 of the 6th Schedule to the Constitution states:

> ***'' On the effective date, the President and any State Officer or other person who had, before the effective date, taken and subscribed an oath or affirmation of office under the former Constitution, or who is required to take and subscribe an oath or affirmation of office under this Constitution, shall take and subscribe the appropriate oath or affirmation under this Constitution.''***

39. Clearly, Judges of the Industrial Court appointed under the Trade Disputes Act and the Labour Institutions Act, had not taken an oath of office. They were not affirmed. The law under which they were appointed, as discussed above, did not require them to take an oath of office. The Trade Disputes Act and the Labour Institutions Act had no provisions on swearing in of Judges of the Industrial Court. The

former Judges were not appointed under the Constitution as concluded above. They were not appointed under, or pursuant to the old Constitution. They were not required by the old or the new Constitution, to take any oath of office. They were not in the category of State Officers required to be sworn under Article 74 of the Constitution. Judges assuming Office under Article 166 [1] [b] would be required to take the prescribed oath. Judges who had taken the oath under the old Constitution were required to retake the oath. Industrial Court Judges did not fall within the Judiciary, but under the Ministry of Labour, where there was no requirement for them to be sworn in. They were not reappointed under Article 166 [1] [b] of the Constitution, and the legislation holding they were deemed to be so appointed, suffers constitutional invalidity. The submission that former Judges of the Industrial Court would need to take an oath of office would only be acceptable, if Section 32 [2] of the Industrial Court Act, was a valid and constitutional piece of legislation. Nothing in the old or new Constitution, or in the legislation under which they were appointed, required serving Judges of the Industrial Court to take oath of office to continue discharging their judicial work, until the new Court was put in place. ***Prieto Bail Bonds v. The State of Texas, 994 S. W. 2D,*** cited by the 1st Petitioner, relates to a Judge who was required to be sworn under an express provision of the law. The Judge, Mr. Woodard, was a retired Judge, who had previously taken an oath of office, and who was recalled from retirement. He did not take a fresh oath before exercising the judicial function post-retirement. ***Prieto Bail Bonds*** cannot apply in a situation where there was no legal requirement for a Judge to take an oath on appointment, such as was the case with the former Judges of the Industrial Court. This comparative jurisprudence, would be relevant, if a Judge appointed under the old Constitution, had failed to take fresh oath under the new Constitution, before undertaking any judicial functions after 27th August 2010. ***The proceedings and decisions made by the former Judges of the Industrial Court cannot be invalidated on the ground that those Judges did not take the oath of office after the adoption of the new Constitution.***

[ii] <u>Validity of proceedings</u>

40. Section 22 of the 6th Schedule to the Constitution states:

> ***''All judicial proceedings pending before any Court shall continue to be heard and shall be determined by the same Court, or a corresponding Court established under this Constitution, or as directed by the Chief Justice or the Registrar of the High Court.''***

This is the same law stated under Section 33 of the Industrial Court Act. Section 33 of the Industrial Court Act refers to the ***''****Chief Registrar of the Judiciary''* while Section 22 of the 6th Schedule refers to the *'' Registrar of the High Court.''* Section 33 states proceedings would continue under the old Court, ***''until the Court established under this Act comes into operation.''*** The Court came into operation, not with the passage of the Constitution in the year 2010, or the passage of the Industrial Court Act in 2011, but with the swearing in of the new Judges in 2012. The two provisions preserve pending Judicial Proceedings, and specifically state such proceedings would continue to be entertained, and decisions taken by the same Court, or a corresponding Court established under the Constitution. With regard to the Industrial Court, the Act is specific proceedings continued under the old regime, until new Judges came into office.

41. Pending proceedings should in our view not be read to exclude matters which were filed in the Industrial Court, after the Constitution came into effect, or even after the Industrial Court Act came into effect, but should be understood to include all matters filed and pending up to the date the new Court was established through the appointment and assumption of office, of the new Judges under the Constitution. The former Judges were seized of full jurisdiction in hearing and determining employment and labour relations disputes up to the date new Judges were put in office. There was no interruption in the institutional work. Every matter filed becomes pending proceedings, and there does not seem to be any reason to adopt the interpretation given by the Attorney- General, that outgoing Judges would only deal with matters which were actively ongoing on the diverse effective dates. The Constitution intended the work of the Court would not stop, or in any way interrupted, and the old Judges would continue to oversee such proceedings and make the necessary decisions, until the new Court with new Judges was in place. All cases, regardless of their filing date, would continue to be heard by the same Court, with the same Judges, until the new Court was in place, or the Chief Justice, the Chief Registrar Judiciary, or the

Registrar of the High Court directed. We agree with the Attorney- General, that Section 22 of the 6th Schedule and Section 33 of the Industrial Court Act imply that the former Judges would continue to hold office, and discharge the judicial function, until there were new Judges in office appointed under the new Constitution. They were to continue discharging their role by dint of the legal instruments through which they entered the Judicial Office. Section 33 however, does not have any effect on the constitutionality of 32 [2]. The Constitution would not preserve judicial proceedings, without preserving in the ***interim***, the positions of the Officers to preside over those proceedings, until the new order was fully in place.

42. Existing Offices, established under the former Constitution, were preserved through Section 31 [1] of Schedule 6 of the Constitution. Judges of the Industrial Court did not hold office under the Constitution; they held public office established under the Trade Disputes Act and later the Labour Institutions Act. Their public office was preserved under Section 31 [2] of the Schedule. But such office would only continue to exist and the Judges continue to act in that office, in a manner consistent with the Constitution. The Section states serving Judges:

> ***'' would continue to hold or act in that office as if appointed under this Constitution***.''

This provision of the Constitution is consistent with Section 43 of the Interpretation and General Provisions Act Cap 2 the Laws of Kenya, which provides that:

> ***''where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.''***

Section 32 [2] of the Industrial Court Act, seems to have misinterpreted Section 31 [1] and 31 [2] of schedule 6 as enabling substantive reappointment of Persons as Judges, while the Constitution only intended such Persons would serve until the new Court was put in place. The former Judges were not appointed under the Constitution, but for purposes of the transition, would continue to discharge their judicial work as if they were appointed under the Constitution. The Constitution intended that there would be a new Court established, filled with Judges appointed under Article 166 [1] [b], and that once the new Court was in place, the old Court would be deemed to have exited, with its work continuing to be performed by a Successor Court, guided by the Constitution. The old Court and its Judges were preserved for the period it would take to establish a new Court. The old Court therefore ceased to exist and the new Court was established, when the new Judges were sworn in, in July 2012. There was no hiatus in the institutional work. Section 33 of the 6th Schedule further underlines the importance of continuity of the work carried out by Institutions, notwithstanding the structural changes of those Institutions. The Industrial Court established pursuant to the Constitution, whether known by the same or new name, is the legal successor of the former Court. The Judges of the new Court are successors of the former Judges, and there is no gap in judicial proceedings, in between the time the succession took effect. There are no proceedings at any time, which can be said to have taken place without the authority of the law, so as to be declared unconstitutional and invalid.

43. The former Judges had constitutional authority as Public Officers, whose Judicial Offices were established under legislation, to hear and determine the disputes subject matter of the Petitions. They derived their temporal authority from the transitional law in the new Constitution which demanded they hold over, and fulfill the need for continuity in the institutional work. They derived their primary authority from the Trade Disputes Act and the Labour Institutions Act under which they were appointed. Section 32 [1] of the Industrial Court Act preserved the letters of appointment issued upon the Judges by the Ministry of Labour under the Labour Institutions Act. The initial appointments were contained in gazette notices issued under the Trade Disputes Act, later preserved under Section 63 of the Labour Institutions Act and Section 32 [1] of the Industrial Court Act. The former Judges still held their letters of appointment at the time they presided over the disputes upon which these Petitions are founded. Those letters of appointment only ceased to have legal force, when the new Court was established and made operational, with new Judges sworn in, as contemplated by the Constitution. The former Judges exercised transitory judicial authority as given by the Constitution, and judicial authority as given by the successive Acts of Parliament. Their decisions were valid and constitutional. The shortcomings of the Industrial

Court Act did not take away this Judicial Authority. Issues of public policy do not fall to be considered, as the Court is convinced the Trial Court was legally constituted; properly seized of jurisdiction; and the presiding Judge clothed with transitory judicial authority under the Constitution.

44. We do not think the Court should go as far as suggested by the Amicus Curiae Mr. Geoffrey Obura, and find that Judges of the Industrial Court in the transitional period were ***'De Facto Officers.'*** Such a position would go contrary to the accepted legal position, that Judges derive their jurisdiction from Legislation or the Constitution, as held in the cases of ***Karisa Chengo & Ors v. Republic [CA] [2015] e-KLR***, and ***Samuel Macharia v. Kenya Commercial Bank Limited [SC] [2012] e-KLR***. A ***De Facto Officer*** has no lawful authority. Judges of the Industrial Court always had authority donated by successive legislation and transitional provisions in the Constitution itself. A ***De Facto Officer***, is also defined to be one who has the reputation of the officer he assumes to be, and yet is not a good Officer in point of law. The Judges of the Industrial Court did not assume to be Judges; they were Judges properly so called, appointed on the authority of valid legislation. Judge Mukunya derived his mandate from a valid Act of Parliament. He exercised jurisdiction within the parameters set out under the case of ***Samuel K. Macharia.*** These Judges would not, and did not, acquire judgeship through *'adverse possession'* as suggested by the Petitioners. Thirdly, a ***De Facto Officer*** is one whose acts are not those of a lawful Officer, whose acts the law, upon principles of policy and justice, will hold valid. The Judges of the Industrial Court, up to the date the new Court was established and new Judges assumed office, acted under lawful authority. They did not usurp Judicial Office; they entered Judgeship through valid Acts of Parliament, and had full authority under the law to act as Judges of a specialized Dispute Resolution Mechanism. They continued to work under the transitional arrangement offered by the Constitution and the relevant Acts of Parliament. ***We find and hold that Judge Mukunya had lawful authority, in hearing and determining the disputes which gave rise to the Petitions herein. Those proceedings and decisions were valid and constitutional.***

45. We order: -

[A] Section 32 [2] of the Industrial Court Act [Employment and Labour Relations Court Act] is unconstitutional, null and void.

[B] All the proceedings and decisions of the Court presided over by the Hon. Judge I.E.K Mukunya, subject matter of the consolidated Petitions, were constitutional, legal and valid.

[c] Parties to meet their costs of the Petitions.

Dated and signed at Mombasa this 25th day of January, 2016

James Rika

Judge

Dated, signed and delivered at Nairobi this 5th day of February, 2016

Mathews Nderi Nduma **Linnet Ndolo**

Principal Judge **Judge**