



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION 31 OF 2013

KENYA MEDICAL RESEARCH INSTITUTE.....CLAIMANT

VERSUS

THE HON. ATTORNEY GENERAL1ST RESPONDENT

INDUSTRIAL COURT OF KENYA.....2ND RESPONDENT

AGNES MUTHONI & 34 OTHERS.....1ST INTERESTED PARTY

UNION OF NATIONAL RESEARCH AND ALLIED

INSTITUTE STAFF OF KENYA.....2ND INTERESTED PARTY

RULING

1. The thirty five (35) former employees of the petitioner were dismissed from employment on 17th December 2009. They brought a Trade dispute in cause No 37(N) of 2010. The matter was heard and determined and an award granted by erstwhile Industrial Court (Tribunal) on the 13th May 2010.

2. Aggrieved by the decision of the tribunal, the employer lodged an appeal to the Court of Appeal which appeal was dismissed by a ruling of the Court of Appeal delivered on 10th May 2013 pursuant to a preliminary objection raised by counsel for the respondent Emmanuel Wetangula to the effect that the court of appeal lacked jurisdiction to entertain an appeal from a decision of the erstwhile Industrial Court and therefore the appeal violated section 64 of the repealed Constitution as read together with the sixth schedule section 22 of the new constitution.

3. In upholding the objection, the Court of Appeal held *inter alia*;

“By reason of the aforesaid declaration of supremacy and primacy, section 27 of the Labour Institutions Act falls into the category of a legislative law. It therefore means that as long as section 3 and 64 of the retired constitution and section 3 of the appellate jurisdiction Act (supra) stood then as at the time appellate process objected to herein were set in motion, the court of appeal had no mandate to receive direct appeals from the industrial court as it was then established”.

4. The court went on to say;

“It has been argued by the respondent/appellant that if jurisdiction is declined by this court then the appellant will be rendered remediless. We do not think so. There is the right to judicial review

and if the right to access judicial review has been foreclosed by effluxion of time then there is the remedy by way of declaratory suit and or by way of petition”.

5. With that, the appellant then lodged this petition at the Employment and Labour Relations Court in 2013 and the same was heard by a three (3) judge bench and the petition was found unmeritorious and dismissed in favour of the 35 employees who continue to pursue execution of the award granted to them by the erstwhile Industrial Court in 2010.

6. The matter has gone full circle and has taken a long time and it is likely that the relief of reinstatement granted to the 35 employees then has suffered tremendous prejudice for purpose of practical implementation. This is a case where one feels that the delay in finalizing this matter has caused immense injustice to the 35 interested parties.

7. It is with this background that one has to weigh whether or not to grant stay of execution of the award of the erstwhile court pending the hearing and determination of the appeal against the judgement of the Employment and Labour Relations court delivered on 16th July 2015.

8. The petitioner filed a Notice of Appeal against the judgement of the court delivered on 16th July 2015 and thereafter filed a notice of motion application dated 10th November 2015 on 11th November 2015, four (4) months after the judgement of the court.

9. The applicant seeks; a conservatory order staying execution of the judgement delivered on 13th May 2010 in cause No 37(N) of 2010 pending the intended appeal against the three Judge Bench judgement delivered on 16th July 2015. The applicants submits that the petitioner is apprehensive that execution of the award in Trade Dispute Number 37(N) of 2010 will render the appeal nugatory.

10. That the award of the tribunal which granted reinstatement will require the petitioner to pay out substantial sums of money which sums may not be recoverable from the former employees in the event that the appeal is successful.

11. The 1st and 2nd interested parties oppose this application and have filed written submissions on 11th February 2016 and 22nd June 2016 respectively and the nub of their submissions is as follows;

12. The Court of Appeal never entertained the petitioner's appeal hence filing of this suit. That the petition was heard and determined in favour of the interested parties by the unanimous judgement delivered on 16th July 2015 in which the court found; that the 2nd respondent did not violate any constitutional rights of the petitioner as set out in the petition or at all. That since the petitioner had three times lost her case before the tribunal, the Employment and Labour Relations court and the Court of Appeal, the interested parties have all right to process execution of the judgement in case No 37(N) of 2010 delivered on 13th May 2010.

Determination

13. Whether or not the Court of appeal has jurisdiction to entertain an appeal on the judgement of the ELRC arising from a petition seeking constitutional review of the judgement of the erstwhile tribunal is a matter for the Court of Appeal to determine applying the law applicable at the time the cause of action arose in cause No 37(N) of 2010 which is the year 2009 when the 35 interested parties were dismissed from their employment.

14. The other issue for consideration is the extent to which the Court of Appeal may interfere with the decision of the erstwhile tribunal having in the first place declined jurisdiction over the matter directly. It is without a doubt that the Court of Appeal has jurisdiction to entertain an appeal over decisions of Employment and Labour Relations Court but the issue still remains as to whether this decision opens up for attack by the Court of Appeal, the decision of the tribunal over which the appellate court had no jurisdiction in the first place.

15. These are weighty issues that are no doubt arguable. However, the very long period this matter has taken to conclude weighs heavily on the court in seeking the justice of the case and the balance of convenience.

16. The interested parties have not been able to enjoy the fruits of their judgement delivered on 13th May 2010 in cause No 37 (N) of 2010.

The Tribunal directed that;

1. The respondent/employer to unconditionally reinstate all the 35 grievants/employees who lost their jobs unfairly immediately with no loss of their basic pay or seniority and to re-engage them in the respective positions they were holding prior to the termination of 17th December 2009. (emphasis mine)

17. This award of reinstatement comes with monetary value equivalent to the monthly basic pay of each of the 35 employees from the date of termination on 17th December 2009 to the date of reinstatement. As a middle way, the court is inclined to order stay of execution of the judgement of the tribunal in Cause No 37(N) of 2010 and the judgement of this Court delivered on 16th July 2015 on condition that the petitioner to deposit with the court and or in an interest bearing account held jointly by counsel for the petitioner and 1st interested party, the equivalent of the basic salary for the 35 employees from 17th December 2009 to 16th July 2015, the date of the judgement in this petition within 30 days of this judgement failing which the order for stay of execution will lapse and execution to issue.

Dated and delivered at Nairobi this 9th day of September, 2016

MATHEWS N. NDUMA

PRINCIPAL JUDGE