



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

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

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

**BETWEEN**

**REPUBLIC ..... APPLICANT**

***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**

**AND**

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

**INDUSTRIAL & COMMERCIAL DEVELOPMENT  
CORPORATION.....EXPARTE**

**Mr. Orao Obura for Applicant**

**Mrs Masaka for 1<sup>st</sup> and 2<sup>nd</sup> respondent**

**Mr. Kimondo for Interested Party**

**JUDGMENT**

1. The exparte Applicant sought leave to apply for an order of certiorari directed at the 1<sup>st</sup> Respondent, The Industrial Court, as established under *Part V* of the *Labour Institutions Act No. 12 of 2007* (now repealed), herein after the '*Tribunal*' to remove to the Industrial Court as presently established under *Article 162(2)* of the *Constitution of Kenya 2010* as read with *Section 10* of the *Industrial Court Act*

2011, and quash the Award and Decree of the Tribunal dated and issued on 11<sup>th</sup> July 2012 and any subsequent orders arising therefrom.

2. That the leave granted to operate as stay of execution of the Award and Decree until the final determination of the proceedings.

3. The ex-parte application was granted by Hon. Abuodha J. on 15<sup>th</sup> August 2012 pursuant to which orders the substantive application for judicial review now under consideration was filed.

#### 4. Basis of Application

The Decision of Hon. Steward Madzayo issued on 11<sup>th</sup> July 2012 is challenged by the Applicant on the following grounds;

(i) The Tribunal had no jurisdiction to entertain the dispute because the Claimant in **Cause No. 514 of 2009** was a Receiver Manager appointed in terms of the provisions of **Companies Act Chapter 486** of the Laws of Kenya and not an employee of the Applicant as contemplated under the **Labour Institutions Act No. 12 of 2007**.

(ii) That the Tribunal failed to observe the law and did not take into consideration relevant materials placed before it and therefore made perverse and unreasonable decision.

(iii) That the Award and Decree of the Tribunal delivered on 11<sup>th</sup> July 2012 is null and void and same be quashed by the Court.

#### 5. Opposition by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed grounds of opposition to the Judicial Review application on 8<sup>th</sup> November 2012 as follows;

- i. That the application has no merit, is based on a misconception of law and is otherwise intended to delay ends of justice;
- ii. That the Tribunal acted within its mandate and powers as provided for under **Section 12** and **Section 15** of the **Labour Institution's Act, 2007** and **Section 87(1) of the Employment Act**;
- iii. That the holding and findings of the 1<sup>st</sup> Respondent was within the provisions of **Section 3** of the **Labour Institutions Act No. 12 of 2007**, **Section 43 and 45** of the **Employment Act 2007** and based on sound judicial principles.
- iv. That the ex-parte applicant is challenging a final decision and / or findings of the Tribunal as opposed to the process of making decision which should be determined at the appeal level as provided for under **Section 27 of Labour Institutions Act 2007**.
- v. That from the material placed before the Tribunal by both parties, it was undisputedly clear that the Claimant (then) now the Interested Party was at the material time an employee of the Applicant within the definition and meaning of employee-employer relationship as contained in the provisions of **Employment Act 2007 and Labour Institutions Act No. 17 of 2007**.

#### 6. Opposition by the Interested Party

The Interested Party filed a Notice of Preliminary Objection to the Application on 8<sup>th</sup> November 2012 the nub of which was;

- i. The Tribunal made orders on the issue of its jurisdiction on 2<sup>nd</sup> June 2011 and no objection was raised by the Applicant, hence the matter proceeded on the merits.
- ii. That the issue of jurisdiction was not even raised in the statement of defence filed on 20<sup>th</sup> September 2011, almost four months after the preliminary objection on the Tribunal's jurisdiction

was dismissed.

- iii. That no appeal or application for review was filed against the Tribunal's ruling on 2<sup>nd</sup> June 2011.
- iv. That the Judicial Review under order **53 Rule 2** of the **Civil Procedure Rules** and the **Law reform Act, Cap 23** of the **Laws of Kenya** must be brought written six months after the date of the impugned order which in this case was made on 2<sup>nd</sup> June 2011. The Judicial Review Application therefore is time barred and ought to be dismissed with costs.

7. In a ruling delivered on 5<sup>th</sup> February 2013, the Court found that the preliminary points raised by the Interested party herein were not pure points of law and that same would be determined upon hearing of the application on the merits.

8. Subsequently, both parties filed written submissions and lists of authorities on the matter. The written submission were then highlighted by the counsel for the parties.

9. The Court has delineated the issues for determination as follows;

1. Whether the application for Judicial Review is time barred in terms of order **53 Rule 2 of the Civil Procedure Rules** and **section 9(3)** of the **Law Reform Act Cap** of the **Laws of Kenya** and therefore the same ought to be dismissed;
2. If the answer to (1) above is in the negative, whether the Tribunal had jurisdiction to hear and determine the dispute in **Cause No. 514(N) of 2009**.
3. If the answer to 2 above is in the affirmative whether the Tribunal followed due process and the law in determining the matter in its award dated and issued on 11<sup>th</sup> July 2012.

#### 10. **Determination**

The Applicant raised a Preliminary Objection in **Cause No. 514(N) 2009** dated 18<sup>th</sup> January 2010 to the effect that the Tribunal had no jurisdiction to entertain the claim as there was no employer employee relationship between the Claimant (Interested Party) and the Respondent (Exparte Applicant).

11. The Claimant filed a response to the Preliminary Objection dated 20<sup>th</sup> April 2010.

12. Hon. Madzayo J. made a Ruling on the Preliminary Objection dated and delivered on 2<sup>nd</sup> June 2011.

13. In the said ruling, it outlined the four issues raised in the notice, noted the submissions by all counsels on the issue as to whether there existed an employee and employer relationship between the then Claimant and Respondent and stated as follows at page 4 of the Ruling;

*“Further, it is not in doubt that at one time there existed a working relationship between the Claimant and the respondents. To what extent that relationship developed into, can only be achieved if each party is accorded an opportunity to be heard”.*

14. The matter proceeded on its merits and the Hon. Judge delivered the award of the Court on 11<sup>th</sup> July, 2012.

15. It is not in doubt that the Tribunal in its ruling of 2<sup>nd</sup> June 2011, found that there existed an employee and employer relationship between the Claimant and the Respondent and went ahead to dismiss the Preliminary Objection dated 8<sup>th</sup> January 2010, challenging the jurisdiction of the Tribunal to entertain, hear and determine the dispute.

16. The Court effectively found it had the jurisdiction and it is on the strength of that finding that it proceeded to hear the matter on its merits. Had the ruling of the Tribunal been otherwise, it would have downed its tools forthwith and dismissed the substantive suit.

17. Accordingly, upon delivery of that ruling on 2<sup>nd</sup> June, 2011, it was the opportune time for the Applicant to institute a Judicial Review application like the present one or apply for review for the ruling under **Rule 32** of the **Industrial Court Rules, 2010** or file an appeal against the ruling of the Court in terms of the repealed provisions of **Section 27** of the **Labour Institution Act, 2007**.

18. In short, time for purposes of filing this application started running from 2<sup>nd</sup> June 2011 and not as submitted by the Applicant, that time started running from the date of the Award on the merits delivered on 11<sup>th</sup> July, 2012.

19. According to **Section 9(3)** of the **Law Reform Act, Cap 26** of the **Laws of Kenya** Judicial Review Application has to be brought within six months after the date of the impugned decision, in this case, the ruling on Preliminary Objection on jurisdiction delivered on 2<sup>nd</sup> June 2011. Furthermore, according to order **53 Rule 2 of Civil Procedure Rules**, application for an order of *certiorari* is to be filed within six months from the date of the action challenged, in this case from 2<sup>nd</sup> June 2011.

20. The Court of Appeal in the case of **Njuguna –vs- Minister for Agriculture [2000] EA 184** observed that the appropriate procedure for challenging leave which has already been granted is to apply under the inherent jurisdiction of the Court, to the Judge who granted leave to set it aside.

20. No such application was filed, but instead counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and Interested Party filed Notices of Preliminary Objection on 8<sup>th</sup> November 2012.

21. In its ruling dated 5<sup>th</sup> February 2013, this Court found that there were issues of fact to be determined regarding whether or not the trial Court made a determination on its jurisdiction to hear the matter in its ruling of 2<sup>nd</sup> June 2011, and the Court therefore deferred the determination of the issue until the hearing of the substantive application for Judicial Review.

22. In the **High Court of Kenya at Busia Judicial Review Appeal No. 6 of 2012, Hon. S. M. Kibunja** observed:

*“This Court has no doubt that had the materials or facts that were presented after the leave was granted before the Court dealing with the application for leave, the orders of 23<sup>rd</sup> January 2012 would have been different and most probably leave would have been declined.”*

23. This Court echoes the same sentiments in this matter. The Court has no doubt that had the materials or facts that were presented during the hearing on the merits of this Application for Judicial Review been before the Court then, the orders of 15<sup>th</sup> August 2012 would have been different and most probably leave would have been declined.

24. The **Court of Appeal** in **Kimanzi Mboo –vs- David Mulwa C.A.C No. 233 of 1996** and **Wilson Osolo –vs- John Ojiambo & Another (1996) eKLR** held; that the period of six months within which leave to file substantive application for an order of *certiorari* orders should be made from the date of the order or action complained of cannot be extended.

25. This Court now seized of all the facts of the case has no doubt that the ruling of 2<sup>nd</sup> June 2011, determined the issue of jurisdiction of the trial Court and any challenge to the orders of the Court should have been made within six months from 2<sup>nd</sup> June 2011.

26. The Court therefore sets aside the leave granted and the substantive application therefore is left without leave and consequently must fail.

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 determination on the merits is however unnecessary at this stage, the Court having found that the Application for leave was time barred and therefore the substantive Application is bad in law.

The Exparte Applicant is to pay the costs of this Application.

*Dated and Delivered at Nairobi this 5<sup>th</sup> day of December, 2014*

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**