



REPUBLIC OF KENYA

Industrial Court at Nairobi

Cause 171 of 2009

GEORGE WAINAINA KAMAU.....CLAIMANT

VS

MUTHAIGA COUNTRY CLUB.....RESPONDENT

RULING

Background

1. On 30th July 2009, the Court delivered an Award for Kshs. 1,423,296 in favour of the Claimant, being compensation for wrongful dismissal and failure to pay terminal benefits. On 7th August 2009, the Respondent filed a Notice of Appeal and applied for typed proceedings.
2. Thereafter on 28th August 2009, the Respondent filed a Notice of Motion seeking the following orders:
 - a) That the said Award and any orders thereunder be reviewed and/or set aside;
 - b) That the dispute should proceed for hearing *de novo* by way of *viva voce* evidence and the Respondent be allowed to call witnesses;
 - c) That the Respondent be allowed to submit to the Court additional facts and/or material particulars.
3. The application for review was dismissed on 16th February 2010 and on 18th February 2010 the Respondent filed an application for stay of execution of the Award pending hearing and determination of an intended appeal in the Court of Appeal. The Respondent undertook to deposit the decretal amount in an escrow account in the joint names of the Advocates on record.
4. The Claimant's Advocate secured a decree on 4th July 2011 and on 7th July 2011, he was served with an order in the following terms:
 - a) That execution of the decree drawn on 4th July 2011 be stayed;
 - b) That the decretal amount be deposited in an escrow account within 21 days;
 - c) That the decree issued on 4th July 2011 be returned un-executed.
5. According to the Claimant, he was never served with the Respondent's application and the consequential orders were obtained *ex parte*.

6. On 26th July 2011 the Claimant filed an application for review and setting aside of the order dated 5th July 2011 staying execution of the decree dated 4th July 2011. This application is the subject of this Ruling.

Submissions by the Claimant

7. Mr. Wandabwa for the Claimant submitted that the former Industrial Court was a subordinate court and that no appeal from its decisions could lie in the Court of Appeal. Section 65 of the old Constitution placed the former Industrial Court in the category of subordinate courts and under Section 3 of the Appellate Jurisdiction Act, appeals to the Court of Appeal could only lie from decisions of the High Court.

8. The appeal by the Respondent was therefore an act in futility. Again, the appeal was filed out of time. The Certificate of Delay indicates that the typed proceedings were issued in December 2012. Following the Award, the Respondent filed an application for review which was heard *inter partes* and dismissed.

The Respondent's Reply

9. In reply, Mr. Njuguna for the Respondent submitted that the practice in the former Industrial Court was that the Judge would consider the court record and determine whether to hear the parties or proceed to make its decision based on the documents filed in Court. According to the Respondent, none of the parties was heard in this case. Mr. Njuguna further submitted that the Claimant's Advocate was served with the application for stay of execution pending appeal but declined to receive it.

10. Mr. Njuguna argued that the right forum to challenge the jurisdiction of the Court of Appeal to entertain appeals from the former Industrial Court, was the Court of Appeal itself. In any event, Section 27 of the Labour Institutions Act (repealed by the Industrial Court Act) granted a party aggrieved by a decision of the former Industrial Court the right of appeal to the Court Appeal. In this regard, the right of appeal was created by statute as a substantive right not a procedural one. The right in the Labour Institutions Act which was substantive in nature could not therefore be obliterated by the procedural law in the Appellate Jurisdiction Act.

11. A review was heard and determined but the grounds for review were different from the grounds of appeal. Counsel argued that while an appeal operates as an estoppel for review, a review cannot be an estoppel for an appeal. Moreover, under the Industrial Court Act and the applicable Procedure Rules, there is no prohibition akin to the one found in Order 45 of the Civil Procedure Rules. The delay in filing the appeal was not occasioned by the Respondent but by the Court as evidenced by the Certificate of Delay. Counsel went on to submit that the appeal had merit.

Claimant's Final Reply

12. In final reply Mr. Wandabwa submitted that the order under challenge was granted after promulgation of the new Constitution whose Article 50 provides for the right to be heard. The practice rules of any court cannot be the reason for flouting of the rules of natural justice. Counsel added that the appeal raised the same issues canvassed in the application for review.

Findings and Determination

13. The first issue for determination is whether appeals from the former Industrial Court can legitimately lie with the Court of Appeal.

14. The matter of the status of the former Industrial Court has elicited divergent judicial pronouncements from the High Court. One view is that the former Industrial Court was subordinate to the High Court and that the High Court in fact had supervisory powers over it. Taking this view to its logical conclusion, appeals from decisions of the former Industrial Court could not go directly to the Court of Appeal. The other view is that the former Industrial Court was at the same level of the High Court and that therefore

appeals from its decisions lay with the Court of Appeal, just like decisions from the High Court.

15. Whatever view one takes on this issue, the provisions of Section 27 of the Labour Institutions Act (repealed by the Industrial Court Act) which provided for appeals from decisions of the former Industrial Court to the Court of Appeal cannot be wished away in this case. For this reason only, I hold that the Respondent had a right to prefer an appeal in the Court of Appeal.

16. I will now address the question whether having pursued and lost an application for review, the Respondent is barred from pursuing an appeal. Counsel for the Respondent argued that Order 45 of the Civil Procedure Rules, 2010 only bars a party who has filed an appeal from pursuing a review and not vice versa. Moreover, neither the Industrial Court Act nor the Industrial Court (Procedure) Rules carries a prohibition such as the one found in Order 45. Counsel for the Respondent submitted that the grounds of appeal are different from the ones canvassed in the application for review.

17. A reading of the ruling dismissing the application for review suggests that the main issue considered by the Court was whether there was an error on the face of the record. The grounds contained in the Memorandum of Appeal evidently cover a wider scope. In view of the foregoing, I find that the application for review did not extinguish the Respondent's right of appeal as set out by the Court of Appeal in the case of **The Chairman Board of Governors Highway Secondary School Vs William Mmsoi Moi [2007] eKLR**. On the question of delay, the Court was unable to apportion blame to any of the parties.

18. I will now deal with the manner in which the order for stay of execution was granted. Counsel for the Claimant submitted that the order of the Court in this respect flew right in the face of the cardinal rules of natural justice since the Claimant was not heard. In fact the Claimant was not even served with the application. Counsel for the Respondent submitted that service was effected on Counsel for the Claimant who declined to acknowledge receipt.

19. In response to the issue of the order having been granted *ex parte* Counsel for the Respondent submitted that the Respondent was not heard either; that according to the procedure obtaining at the former Industrial Court the Judge would consider the pleadings filed in Court and determine whether to hear the parties or not.

20. From the Court record, there was no evidence of any of the parties having been heard by the Court. There was however exchange of correspondence between the Court and the Respondent's Advocate. The order in issue was granted on 5th July 2011, well into the new Constitution promulgated in 2010. The right to be heard is well anchored in this Constitution and it is impossible to support a decision that abrogates from this fundamental right. Although the Respondent may not have been heard either, the order was in its favour and it is therefore not aggrieved. For this reason alone, I find that the stay order was issued in fundamental breach of the express provisions of the Constitution and I proceed to set it aside forthwith.

I make no order for costs.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF MAY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**