



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
PETITION NO. 20 OF 2012

DR. MARANGU RUCHU.....1ST PETITIONER

DR.WALTER KONYA.....2ND PETITIONER

VS

THE REGISTRAR, INDUSTRIAL COURT & 9 OTHERS.....RESPONDENTS

FEDERATION OF KENYA EMPLOYERS INTERESTED PARTY

Mr. Okech for the Petitioners

M/S Nyoike for the Respondents

Mr. Masese for Interested Party

JUDGMENT

The Petitioners have approached the Court by way of an Amended Petition dated 6th December, 2012 seeking *inter alia*;

1. A declaration that the order of committal to civil jail made on 31st July 2012 by the Industrial Court of Kenya in Cause No.538 of 2011 is unconstitutional and invalid.
2. In the alternative to prayer (1) above, a declaration that the order dated 7th May, 2012 granting the 4th – 11th Respondents leave to commence contempt proceedings in cause No.538 of 2011 against the Petitioners was so granted without jurisdiction and is thus unconstitutional and invalid just like all subsequent proceedings premised therein.

The complaint emanates from a decision of the Industrial Court delivered on 31st July 2012 in Industrial Cause No.538 of 2011. This was an application to cite the Petitioners together with one other Respondent for contempt of court. The proceedings were commenced on the basis of jurisdiction conferred by the provisions of Section 5 of the Judicature Act (Cap.8 of the Laws of Kenya) which reads;

“(1) *The High Court and the Court of Appeal shall have the same powers to punish for*

contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding dignity of subordinate courts.

(2) *An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court”.*

It is settled law that the procedure to be followed in invoking the jurisdiction to punish for contempt of court as in this case, is the procedure that appertains in England.

In **CA No.36 of 198, Jacob Zedekiah Ochino & Anor –Vs- George Aru Okombo & Others (unreported)**, the Court of Appeal confirmed this position as follows;

“The power to deal with contempt of court is provided for under Section 5 of the Judicature Act (Cap. 8) and Order 39 Rule 2(3) of the Civil Procedure Rules. We have to follow the procedure and practice in England.....”

The procedure in England for the exercise of jurisdiction to punish for contempt of court is governed by Order 52 of the Supreme Court of England Rules.

Pursuant to this procedure, the applicant sought and obtained *ex parte* leave to commence contempt of court proceedings which was granted on 7th May, 2012. A substantive application dated 13th June 2012 was filed subsequently and the same was determined on 31st July, 2012.

It is the petitioners’ case that the contempt of court proceedings commenced with the application for leave on 7th May, 2012. That at the time when this leave was granted, the Industrial Court as now established under Article 162(2) of the Constitution of Kenya 2010, as read with Section 12 of the Industrial Court Act, 2011 had not come into being since the judges of the court were not appointed until 12th July 2013. Indeed the Application was heard and granted by Hon. Justice Mukunya, who was appointed under Part 111, Section 11 of the Labour Institutions Act, 2007, repealed by Section 30 of the Industrial Court Act, 2011 which reads;

“part 111 of the Labour Institutions Act, 2007 is repealed”.

The judge was able to continue sitting by virtue of Section 32(2) of the Industrial Court Act, 2011 which provides;

“A person who at the commencement of this Act is a judge of the Industrial Court shall be deemed to have been appointed under this Act for the remainder of that person’s term”.

It is the petitioners’ case that following the decisions in;

- (i) **Lipson Kiplangat Langat –Vs- Kenya Kazi Services Ltd [2012] eKLR**
- (ii) **Nzoia Sugar Company Limited –Vs- Attorney General & Others [2012] eKLR; and**
- (iii) **Kenyatta University –Vs- The Industrial Court of Kenya [2012];**

The erstwhile Industrial Court was a subordinate Court and could not have lawfully exercised a jurisdiction to grant leave to commence contempt of court proceedings which power is specifically donated to the High Court and the Court of Appeal by the provisions of Section 5 of the Judicature Act. The Petitioners urge the court to find that the leave granted on 7th May, 2012 to commence contempt of court proceedings against the petitioners was so granted without any jurisdiction in law and was therefore

a nullity. That this illegality tainted the subsequent proceedings before Hon. Justice Makau rendering his decision made on 31st July 2012, to commit the petitioners to serve a jail term *null* and *void* and of no effect.

The Petition is opposed by the Respondents and the Interested Party as follows;

That the orders sought are in nature of judicial review. The jurisdiction for granting the said orders stems from Order 53 of the Civil Procedure Act Chapter 75 of the Laws of Kenya. The said provision provides;

1. No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefore has been granted in accordance with this rule.
2. An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers and shall be accompanied by a statement setting out the name and description of the Applicant, the relief sought and the grounds on which it is sought and by affidavits verifying the facts relied on.

The court has perused the petition filed on 2nd August 2012, and is satisfied that the same is a petition brought in terms of Article 22, 12, 165 and 258 of the Constitution of Kenya. It is not a Judicial Review Application in terms of Order 53 of the Civil Procedure Act as alleged by the Respondents.

The orders sought in prayers 1 and 2 of the Petition are a Declaration;

1. that the order of committal of the Petitioners to civil jail made on 31st July 2012 by the Industrial Court of Kenya in Cause no. 538 of 2011 is unconstitutional and invalid and;
2. that the Industrial Court of Kenya has no jurisdiction under Section 5 of the Judicature Act (Cap. 8, Laws of Kenya) or any other provisions of the law to punish for contempt of court.

From the foregoing, it is clear that the suit before the court is not in the nature of a Judicial Review Application in terms of Order 53 of the Civil Procedure Act. To this extent no preliminary proceedings to seek leave were necessary to bring this petition as stated by the Respondents or at all. However, the orders of *certiorari* and *mandamus* sought in prayers 3 & 4 of the petition are not available to the petitioners since the same may only be obtained pursuant to Judicial Review proceedings under order 53 aforesaid.

This is not true with respect to the order of prohibition and damages. This court is empowered to grant these orders in an ordinary application, petition or claim in terms of Section 12(3)(ii) and (vi) of the Industrial Court Act, 2011.

It is not in dispute that the Industrial Court as presently established and constituted has jurisdiction to hear this petition. It is equally not in dispute that the court as presently constituted, being of the same status as the High Court has jurisdiction to entertain contempt of court proceedings. The only issue for determination is whether the present court as established was in place on 7th May, 2012 when leave to commence contempt proceedings that led to incarceration of the Petitioners was granted.

The Respondents have urged the court to reject the argument by the petitioners that Hon. Justice Mukunya was not suited to grant leave to commence the contempt proceedings as he was not appointed in terms of the Kenya Constitution 2010, as read with the Industrial Court Act, 2011. That these orders granting the said leave were granted without jurisdiction and violated the Constitutional rights of the petitioners.

The Court has considered these competing arguments and came to the following conclusion of fact and law. That the Industrial Act was enacted pursuant to Article 162(2) of the Constitution and it came to effect on 30th August, 2011.

That by the time leave to institute contempt proceedings was granted on 7th May 2012, the Industrial Court as presently constituted with the status of the High court was duly established.

That in terms of Section 32(2) of the Industrial Court Act cited earlier in this judgment, Hon. Justice Mukunya who granted leave to commence proceedings against the petitioners was “*deemed to have been appointed under this Act for the remainder of his term*”. The authorities relied upon by the petitioners are distinguishable from this case as they dealt with the erstwhile Industrial Court. Even with respect to the question of the status of the erstwhile Industrial Court, The High Court has made conflicting decisions on the matter, and the same has not been settled by the Court of Appeal.

The court therefore had jurisdiction to entertain contempt of court proceedings in terms of Section 5 of the Judicature Act, Cap.8 of the Laws of Kenya at the time leave to commence contempt proceedings was granted.

In terms of this provision and in particular Section 5(2) an order of the Court made by way of punishment for contempt of court “*shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court*”.

This means that the only avenue available to the petitioners was to appeal against the decision of the Industrial Court of 31st July 2012 committing them to jail for one month for contempt of court.

To this extent, the petition is misconceived and the same is dismissed with costs to the Respondents.

It is so ordered.

Dated and Delivered at Nairobi this 8th day of July, 2013.

MATHEWS M. NDUMA

PRINCIPAL JUDGE – INDUSTRIAL COURT