REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NO. 34 OF 2012

NALIN NAIL WORKS.....…….……..…… APPLICANT

VERSUS

THE INDUSTRIAL COURT……..…… RESPONDENT

KENYA ENGINEERING WORKERS UNION …….INTERESTED PARTY

JUDGMENT

The Ex parte applicants herein ANDREW DOUGLAS GREGORY, ZAHIR ABDUL SHEIK and NALIN NAIL WORKS LIMITED (IN RECEIVERSHIP) have moved the court by Notice of Motion dated 21st February 2005 seeking the following orders against the Respondent Industrial Court;

a. That an order of certiorari do issue to remove into the High Court and quash the award and amended award made in Industrial Court Cause Number 79 of 2002, on the 2nd and the 6th days of December 2004.
b. THAT an order of prohibition directed at the Industrial Court do issue prohibiting it from acting upon the said award or amended award by collecting, processing or seeking to recover the amounts therein awarded.
c. That the costs of and incidental to this application be awarded to the applicants in any event.

The application is supported by a Statutory Statement dated 28th January 2005 and verifying affidavit of ANDREW DOUGLAS GREGORY sworn on 27th January 2005.

The application was opposed by the Respondent, the Industrial Court represented by the Attorney General and the Interested party Kenya Engineering Workers Union.

Mr. Daniel Waweru Gakuya, the Registrar of the Industrial Court swore a Replying Affidavit on behalf of the Respondent while Mr. Charles Natili Wekesa, the National Secretary General swore an affidavit on behalf of the Interested Party.

The Ex-parte applicants filed their skeleton written submissions on 19th August 2009. The Respondent filed its skeleton arguments on 1st February 2006 while the Interested Party filed written submissions on 16th March 2011.

The application was originally filed as Nairobi High Court Civil Application No. 134 of 2005 but was transferred to this court following the promulgation of the Kenya Constitution 2010 and subsequent reconstitution of the Industrial Court through the Industrial Court Act 2011 with exclusive Jurisdiction to hear employment and labour matters.

A brief background of the case is that Nalin Nail Works Ltd (In Receivership) was placed under receivership by Kenya Commercial Bank Ltd who appointed the joint Receivers and Managers on 21st September 1999 under terms of a debenture by the said bank. The Receivers and Managers subsequently declared 51 employees redundant and the Interested Party (hereinafter referred to as the Union) filed a dispute in the Industrial Court seeking reinstatement of the employees or in the alternative that the employees be paid their terminal dues in accordance with the Collective Bargaining Agreement signed between the Union and the Company. The terminal benefits included appropriate notice, outstanding leave pay, travelling allowance, severance pay a house allowance and 12 months compensation for loss of employment.

The Receivers and Managers declined to pay the terminal dues as claimed on the basis that upon their appointment by the Bank, the provisions of the Companies Act took priority and the employees were entitled to a preferential claim for arrears of wages or salaries upto date of the appointment, but not exceeding kshs.4000/= or 4 months wages whichever is the lessor. The Receivers and Managers further argued that the Companies Act took priority over the Labour laws.

In the award of the Industrial court dated 27th August 2004 which was delivered on 2nd December 2004, and in the amended court award delivered on 6th Decembr 2004, the court decided that the Receivers and Managers must pay out the employees as a privileged debt before paying any other debt as follows.

a. Shs.3,000/= transport allowance promised by the Receivers Manager pursuant to agreement.
b. Up to (4) months' wages and benefits covering the period immediately prior to the declaration of redundancy;
c. All their benefits including severance pay, outstanding pay in lieu of accrued leave, housing and other allowances for the years of service with respondent as per the CBA between the parties SAVE THAT such sum in total does not exceed Twelve (12) months wages of the individual grievant;
d. All other claims beyond the amounts paid under (c) above rank at the next level of privilege and immediately after the debenture holder has secured its debt;
e. The aforesaid sums be paid out within 60 days of the date hereof.

It is against this award of the Industrial court that the ex-parte applicants have filed this application.

The grounds upon which the application is made are;

a. That the award and the amended award were made in excess of jurisdiction and contrary to express provisions of the law.
b. That the Industrial Court applied International Labour Organization Conventions which are not part of the laws of Kenya.
c. That the existence of the Industrial Court is unconstitutional as its establishment contravened Section 65 of the Constitution of Kenya.
d. That all awards of the Industrial court are consequently null and void *ab initio* and have no force of law.
e. That in the alternative, Section 17 of the Trade Disputes Act is unconstitutional and is therefore inapplicable

In the Skeleton written submissions the Applicants have set out their grounds for the grant of the orders under three subheadings as follows;

1. That the Industrial Court's establishment is unconstitutional as it is inconsistent with Section 65 (1) of the Constitution of the Republic of Kenya. Thus, any awards, orders or judgment of the Industrial Court are a nullity.
2. That Section 17 of the Trade Disputes (Repealed) Act, Chapter 234 of the Laws of Kenya, is inconsistent with the wording of section 65 (2) of the Constitution and it also constitutes a nullity in law. The said Section 17 purportedly ousts the High Court's supervisory jurisdiction.
3. That the Industrial Court acted ultra vires in its award in Industrial Cause No. 79 of 2002. It

improperly considered International Labour Organization Conventions while disregarding Section 311 of the Companies Act, chapter 486 of the Laws of Kenya.

I will adopt the subheadings of the Applicants.

1. Whether the Industrial court's Establishment is unconstitutional.

It has been submitted on behalf of the applicants that Section 14 of the Trade Disputes Act Chapter 234 of the Laws of Kenya (repealed) in unconstitutional because parliament abdicated its constitutional role and delegated its powers of establishment of the Industrial Court which is a subordinate court, to the President by delegating its powers under Section 123 of the Constitution of the Republic of Kenya(repealed hereinafter referred to as the Old Constitution) that the delegation of constitutional powers offend the maxim "delegatus non protest delegate" a power must be exercised only by the body or officer in whom it has been confided, unless sub-delegation of the power is authorized by express words or necessary implication).

The section referred to are the following;

Section 65(1) of the Old constitution *"Parliament may establish courts subordinate to the High court and courts martial, and a court so established shall, subject to this constitution, have jurisdiction and powers as may be conferred on it by Law".*

Section 14 of the Trade Disputes Act (repealed)

For the purpose of settlement of trade disputes and of matters relating thereto the President may by order establish an Industrial Court consisting of "

The Applicants have relied on vo. 1 Hulsbury's Law of Englian (4th Edn.) Para. 31, and the cases of Mwangi & 7 others v.a.g(200) 2KLR 709 at 715-716, Njoya & 6 others V A.G& 3 OTHERS (No.2) (2004), KLT 261 at 277 and Republic v The Kenya Union of commercial, food and Allied Workers. HCCC MISC. APP. NO. 933 OF 2005.

It is submitted for the interested party that the establishment of the Industrial Court was by the President and not under parliament mandate as was made clear in Kenya Guard & Allied Workers Union v Industrial Court & Another H C Misc. No. 1159 of 2003. That the mandate to hear and determine Labour disputes is a special function that has been bestowed on the court by legislation and that the old constitution allowed for creation of special courts as envisaged by Section 65(1), that the establishment of the Industrial Court is unconstitutional is misconceived and misplaced.

The Respondent has argued that the intention of the legislature was to confer special jurisdiction in all labour matters to the Industrial Court and that Section 65(2) of the Old Constitution does not give the High Court blanket jurisdiction to supervise all subordinate courts, that a trade dispute is neither civil nor criminal and the court is not subject to supervision by the High court.

In my opinion, this is a moot issue as the Industrial Court has changed its character twice since this case was filed in 2005. The case was filed under the Trade Disputes Act which was repealed by the Labour Institutions Act and later reestablished under Article 162(2) of the current Constitution and the Industrial Court Act (2011).

I however would not be of the same opinion as the applicants even if the law had not changed. I think that the argument of *delegatus non protest delegare* is not applicable to section 123 of the Old Constitution. As clearly stated in Hulsbury's Laws of England (supra) The explanation given is that a statutory power must be exercised only by the body or officer on whom it has been conferred unless sub-delegation is authorized by express words.

In my opinion the Old Constitution authorized parliament to establish subordinate courts without limiting

parliament's powers to provide in legislation for the establishment by a body other than itself the responsibility to establish a court. It directs the president on the manner of the establishment, which is to be by order meaning publication in the gazette.

I am also of the view that the Industrial Court as established under the Trade Disputes Act was not intended to be a "court" in the strict sense. It was more of a special court or a special quasi-judicial tribunal dealing strictly with trade disputes as defined in the Act. The trade disputes that were heard by the Industrial Court were only those involving trade unions hence the term "trade" disputes. The Industrial Court acted as an appellate level as all disputes were reported to the Minister for Labour as provided in section 4 of the Act. Section 14(9) provided for the court to hear cases referred to it by the minister only which reads as follows;

The Court shall not take cognizance of any trade dispute or deal with any matter connected therewith -

(a) where the trade dispute arises in any part of the public sector (as defined in section 27) and there is in the opinion of the Court adequate machinery for the determination of terms and conditions of employment in that part of the public sector (whether that machinery was established by regulations made under this Act or by any other written law);

(b) unless the trade dispute has been reported to the Minister and twenty-one days have elapsed since the date on which the dispute was so reported;

(c) while such dispute or matter is in the process of being settled, investigated or otherwise determined by means of any other proceedings under the provisions of this Act or of any written law;

(d) while use is being made of any of the machinery or arrangements for the settlement of disputes referred to in section 6 (1);

(e) unless the Court has received a certificate signed by the Labour Commissioner stating that the Minister has accepted the report of the trade dispute and that all available machinery (including statutory machinery) for the voluntary settlement of disputes prior to reference to the Court has been exhausted;

(f) where the trade dispute solely concerns the dismissal or reinstatement of any employee, unless the Court has received, in addition to the certificate required by paragraph (e) the written authority of the Minister for that purpose:

Provided that this subsection shall not apply to any reference or appeal to the Court under Part III, Part V or Part VI.

I believe that this is why the Industrial court is not mentioned in both the Old Constitution and in the Judicature Act. One only needs to look at the history of the Industrial Court which was originally presided over by a president before the title of President was changed to Judge, and the composition of the court which sat with 2 members to constitute a coram. For the foregoing reasons I find that the establishment of the Industrial Court under the Section 14 of the Trade Disputes Act was not unconstitutional and further that section 123 of the Old constitution did not apply to the Industrial Court.

b. The constitution of the Republic of Kenya and the High court's supervisory Jurisdiction.

It has been submitted for the applicants that section 17 of the Trade Disputes Act was inconsistent with the express wording of the old constitution and went against the spirit and purposes of Section 65 of the repealed Constitution which gives the High Court supervisory powers over "Civil and Criminal proceedings before a subordinate court or court martial.

It has been submitted for the Interested Party that Section 17 of the Trade Disputes Act is not inconsistent with Section 65(2) of the old constitution, that this was the intention of parliament. The Interested party

has relied on the High Court's decision in ***Kenya Guards case*** (supra) in which the court held that the Industrial Court held special jurisdiction by statute to give final awards in its area of specialization.

In that case the court stated as follows;

"Whereas the Industrial court is a subordinate court as defined in Section 123 of the constitution it has all the same been given special jurisdiction by a statute – namely Trade Disputes Act to give final awards in the area of specialization. The Trade Disputes Act Section 14 is in turn based on Section 65(1) of the Constitution which the learned counsel did not cite"

The Judge went on to state that the Industrial Court's Jurisdiction was "A special jurisdiction and the taking away of the right to judicial review awards by way of certiorari, prohibition or mandamus by Section 17(2) of the Trade Disputes Act does not in my opinion limit the Unlimited Jurisdiction of the High Court as envisaged by Section 60 (1) of the constitution or section 65 (2) of the constitution."

I wish to add here that the Trade Disputes Act was not the only legislation that Limited the right to appeals.

Under the Arbitration Act for example, the High court has been prevented from intervening in the arbitral process except where specifically empowered by the Act.

Again in my opinion this may be explained from the fact that the Industrial Court did not exercise original jurisdiction. Trade Disputes were reported to the Minister for Labour who either appointed a Conciliator or an Investigator. The dispute was only referred to the Industrial Court where it was not resolved through conciliation or Investigation. The other cases heard by the Industrial Court were appeals against decisions of the Minister or the Registrar of Trade Unions. The Industrial court therefore only reviewed decisions that had been made at some lower level where such dispute or appeal was referred to it. Looked at in this context, it is not difficult to understand the reason why parliament decided that decisions of the Industrial Court were final.

I therefore find that section 17 of the Trade Disputes Act (repealed) as it then was, was not unconstitutional.

C. the Industrial courts award in Industrial Court Cause no. 79 of 2002 is ultra vires.

The applicants have argued that the Industrial Court award is clouded by irrelevant considerations having made reference to international treaties and international Labour Conventions that have not been domesticated and enacted as part of the Acts of Parliament or subsidiary legislation and therefore capable of enforcement. The applicant has referred the court to the case of Pad field v Minister of Agriculture, fisheries and food (1968) 1 ALLER at page 717 paragraph F wherein the court held that unlawful behavior justifying judicial review would constitute ;

a) A outright refusal to consider the relevant matter.

b) Misdirection on a point of Law.

c) Taking into account some wholly irrelevant or extraneous consideration.

d) By wholly omitting to take into account a relevant consideration.

The applicants submit that the court took into account the CockAr Task Force recommendations, labour rights in Zambia, India, South Africa and Israel. Further that the court applied the International labour Organization convention No. 95, on protection of Wages of 1949 and No. 173 on the Petition of workers claims (employer's Insolvency) of 1955. The applicants further submitted that the law applicable to employees dues in the case of winding up is section 311 of the Companies Act, chapter 486 of the Laws of Kenya.

The applicants referred the court to the decision in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 2 AUER 680 at page 682 paragraph 1f-g** where the court stated as follows;

"If in the statute conferring the discretion there is to be found expressly or by implication matters to which the authority exercising he discretion ought to have regard, then in exercising the discretion out to have regard, ten in exercising the discretion, they must have regard to those matters."

The Application further referred court to Vol. 1 Hulsbury's Laws of England, (4th Edition) paragraph 76 where it is stated ***"The exercise of such power will be quashed where, on a proper construction of the relevant statue, the decision maker has failed to take account of relevant considerations or has taken into account irrelevant considerations."***

The Interested Party submits that the Industrial Court is obliged to implement the provisions of international law, especially the UN charter and conventions and more specifically the conventions of the International Labour Organization to which Kenya is a member. It further alleges that the Applicants would want the court rule that the right of the applicants to remain in business overrides the right of employees to remain in employment at fair wages/salaries, that this would constitute servitude and would be a violation of the constitution. It is further submitted for the Interested party that this case is an afterthought, belated and that this court has no powers to look into the merits of the decision of the Industrial court unless such a decision was made outside its jurisdiction. That this was the finding in Kenya airways Ltd V Kenya Pilots Association Misc. Application no. 254 of 2001 and HCCC Misc. No. 268 of 2007 Municipal Council of Thika v Kenya Local government workers Union. The Interested party urges court to find the application misconceived and an abuse of the court process, and to dismiss it with costs.

The Respondent submitted that the Industrial Court is obliged and persuaded to implement the provisions of International law and UN Conventions and specifically the International labour Organization to which Kenya is a member as long as the same is not in conflict with any existing laws in the country.

I have read the award delivered by the Industrial court (as it then was). The applicant has not pin pointed the relevant parts of the Award that they have complained of. From my reading of the Award I think that the portion complained of is from the 3rd paragraph of page 10 to 18. The relevant portion of the Award are produced herein below for each of reference.

"……..the balance of potential inequity in the case of default. The courts thus make it their business to seek the middle path between the right of the employer to conduct its business unhindered by employee interference and the right of the employee to be guaranteed a decent living wage and conditions of employment and the receipt of wages in time. The employer thus becomes a trustee of the employee for his/her outstanding dues; just like an administrator of an estate or next friend of a minor is presumed to be a trustee of those whose property they handle.

An employee, especially at the lower end of the scale who is on near minimum wages, were often than not, has no other property save is/her labour. Labour is her property or as the Kiswahili saying goes "Nguvu ni Mali", Labour is property. Normally when the state acquires property compulsorily, it must pay compensation. It would be safe to say that in the context of Kenya, employees have no choice but to sell their labour (both physical and intellectual) on the market, often on terms unfavourable or not fully negotiable. Once sold they are in effect at the mercy of the employer that they get paid or compensated for their property, the labour. That is why there are laws and regulations governing the payment of wages as well as the timing of the payment. That is why the law requires a maximum wage paying period of one (1) month in a normal contract that may be permanent and pensionable.

In the context of labour laws, in addition to the provisions of the Constitution of Kenya, the Trade Disputes Act cap 234, the employment Act Cap 226 and the Regulations of Wages and conditions of employment Act Cap 229, we are also obliged to implement the provisions of international law,

especially the UN Charter and conventions and more especially the Conventions of the International labor Organization (ILO) of which we are a member. Kenya has ratified around 46 of the ILO Conventions and if the new Constitution under discussion is approved, we will automatically ratify all regional and international agreements and conventions.

I do not agree with the Applicants. I think the basis of the decision of the court in the Award is at page 18 to 20 which I reproduce here below;

We have made board arguments for the domestication of International law into the interpretation of citizen rights. We accept the proposition that in the event of insolvency of an employer for whatever reason, an employee's wages and benefits must be accorded privilege over and above other creditors. The law in Kenya does accord such privilege to the limit of shs.4,000/= which sum is not even equivalent to one monht's minimum wage. Can it be said that the court are therefore entitled to interpret a reasonable sum, in the context of the law, in order to give meaning to the spritit of the privilege? Can the courts safely take on board interpretation of international law and learn from judicial decisions of similar jurisdictions elsewhere? We think that it is our responsibility to do so if justice is seen to be done. We therefore turn to assess how the courts, here and elsewhere, view the place of international conventions in domestic cases.

The High court in Misc. Application 343 of 2000 Amenya Wafula & others v. Republic (Githinji, Mwera, Angawa JJ) makes the following observations with approval. On fundamental rights, the Learned Judges state at page 26 that "….it all boils down to one thing: those rights are serious aspects of man's existence in his society that they are known. They are known and superior courts, as we here assembled, are enjoined by the same law to guard and protect those rights and jealously do those courts executive that duty. " In further approving the applicability of international conventions and treaties, the Learned Judges state at page 40: "Kenya is a democratic society. Not fully-fledged though, but on the way there. In fact there is no fully-fledged society on the earth surface. For that reason we have conventions and treaties binding states in blocks or otherwise to ensure that they adhere to and promote rights and freedoms of their individuals. For instance there is the European court of Human Rights dealing with that aspect in Europe and we have the African Charter on Human and People's Rights which came into force on 21st October 1986."

The Learned Judges then went on to quote Article 11 of the African Charter and Article 21 of the UN International Covenant on Civil and Political Rights and further stated that:

"These two documents contain what in the spirit and substance is in Section 80 of the constitution of Kenya. There need not be any repeating. Rights are to be enjoyed but subject to the laws passed to regard public interest and rights and freedoms of others… the two codes reproduced above are continental and universal. If what they say on freedom of assembly and the limitations thereto is similar to what our constitution says, and if in the implementation of the laws governing the exercise of the rights is right as we do not doubt it is, then the law and there the Public Order Act is surely justifiable law in a democratic society"

What clearly emerges from the above decision is the express approval of international obligations of the country entered into by the State and the test for validity of national legislation vis-à-vis the Constitution of Kenya in that (1) the international conventions be of a similar sprit as the constitution of Kenya and (2) that the national legislation, in the words of Section 80 of the constitution, "be reasonably justifiable in a democratic society".

Kenyan jurisprudence has unfortunately not yet extensively considered the implications and applicability of international law. In order to assist in the determination of this dispute, we turn to other jurisdictions with a similar judicial tradition as ours is order to seek the rationale behind the sue of international obligations that the State has entered into on behalf of the citizen and which the citizen now reasonable expects to be implemented.

My understanding is that the court considered the law in Kenya, then also for comparison purposes

considered what is happening elsewhere in the world on similar issues. The basis of the decision is at pages 25 to 28 of the award where the court that there is a conflict between the Labour legislation as they were then, and the Companies Act that the Labour legislation was enacted long after the enactment of the companies act and therefore take precedence. This is contained in paragraph 2 of page 28 of the Amended Award quoted below;

We find therefore that the Grievants and each of them are entitled to their just dues from the respondent and/or their agents, the Receivers and managers. The confusion on this issue needs to be urgently resolved through legislation that perhaps can be incorporated in the proposed bills from the Cockar Task force. In the meantime we find that the law clearly accords a privilege to employee's wages and benefits by (1) expressing the intent to secure up to 4 months wages under the Companies act; and (2) by remaining silent in the other labour laws and thus allowing the courts to ensure that no impediments are placed in the way of the parties as they seek their respective rights in court of law. The protection of the law must be both meaningful and socially acceptable.

A shs.4,000/= limit is clearly not meaningful in the current context. The Trade Disputes Act empowers the Industrial court to grant up to 12 months wages by way of damages for wrongful termination. We take this ceiling as being both meaningful and socially acceptable, and it has been applied many times by the Industrial court.

We further find, from the documents before us, that there was a clear and unambiguous offer from the Receivers managers to the Grievants that the Bank had agreed to pay out to the Grievants a sum of shs.3,000/= by way of transport money. This was an ex-gratia payment and the Bank was not obliged to offer it. However, once offered and incorporated into an agreement, the Receivers managers cannot now be heard to renege".

The court did not apply the propositions in the Cocker Report, nor any treaties and conventions that have not been domesticated by Kenya. Neither did the Court apply any decision from other jurisdictions, although I would see no harm in that as they are of persuasive authority.

I therefore find that the applicants have not persuaded me that the court acted ultra vires in its award.

The upshot is that the Notice of Motion is dismissed with costs.

Orders accordingly.

Read in open Court this **4TH** day of **OCTOBER** 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Oraro_____for Claimant

No appearance_____for Respondent

Ms. Ashubwe_____for Interested party