REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE 524 OF 2012

STANLEY NGUGI GACHERU.......................................CLAIMANT

Vs
DR. EUNICE AMISSAH & ANOTHER..................RESPONDENT

RULING

There are two Applications before me for determination. The more recent one is in response to the first application. The Respondents Notice of Motion Application by M/s Hamilton Harrison & Mathews Advocates dated 29th May 2012 seeks, in the main, the following Orders:-

0. Stay of further proceedings pending the hearing and determination of the Application
1. Stay of the Order of 3rd May 2012 requiring the 1st Respondent to deposit Kshs. 1,200,000/- as security pending the hearing and determination of this application
2. The order of 3rd May 2012 requiring the 1st Respondent to deposit Kshs. 1,200,000/- in court as security pending the hearing of this matter be set aside.

The Application was brought under Section 12(3) of the Industrial Court Act 2011 and Rule 16(2) of the Industrial Court (Procedure) Rules 2010 and is premised on grounds on the face of the Motion and supported by the Affidavit of Dr. Eunice Brookman-Amissah the 1st Respondent.

The Claimant Stanley Ngugi Gacheru represented by M/s Muchangi Nduati & Co. Advocates has opposed the Application and filed an Affidavit in opposition.

What precipitated the Application by the 1st Respondent is a Notice of Motion Application by the Claimant under Certificate of Urgency dated 27th April 2012 stated to be premised on Rule 16, 19, 20 and 27 of the Industrial Court (Procedure) Rules 2010 Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and all other enabling provisions of the Law. The said Application came up for hearing *ex parte* before Judge Steward Madzayo on 30th April 2012. The Order extracted on 3rd May 2012 was in the following terms:

1. THAT the Application be and is hereby certified as urgent and heard *ex parte* and service dispensed with in the first instance.

2. THAT the Respondent deposits in Court the sum of Kshs 1,200,000/= being the amount in dispute as security pending the hearing and determination of the suit.

3. THAT the Application be served upon the Respondent forthwith.

4. THAT the Respondent files and serves the Replying Affidavit upon the Claimant on or before 16th May 2012.

5. THAT the *inter partes* hearing be on 17th May 2012 at 12.00 noon.

The Order though defective in form (it omits the name of the 2nd Respondent in the heading) captured the Order of the Court. The Respondents must have been served and the 1st Respondent being aggrieved by the Order moved the Court vide the present Application. Suffice to say, in opposition to the Application of 27th April 2012, the 1st Respondent filled an affidavit headed Further Affidavit on 24th May 2012.

The parties made submissions on the rival positions held in both applications and filed for consideration submissions on 6th July 2012 for the Claimant and 17th July 2012 for the Respondents.

The Application of 27th April 2012 is for all intents and purposes an application akin to those under Order 39 Rule 1 and 2 of the Civil Procedure Rules 2010 which provides as follows:

1. Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—

a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—

may be called upon to furnish security for appearance.

b) has absconded or left the local limits of the jurisdiction of the court; or

c) is about to abscond or leave the local limits of the jurisdiction of the court; or

d) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

e) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

2. (1) Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

In the Application dated the 27th April 2012, the Claimant applied to have the 1st Respondent to be Ordered to deposit her passport in Court until the matter was heard and determined and in the alternative an Order for the deposit of the sum of Kshs, 1,200,000/= which the Claimant estimates as the sum total of the dispute between him and the Respondents.

The Claimant was apprehensive that the 1st Respondent who is a Ghanaian national would leave the jurisdiction of this Court before the determination of the matter and make it impossible for the Claimant to recover any sums as may be adjudged by the Court.

The Application dated 29th May 2012 is as captured above, a response to the Orders flowing from the decision of the Court on 3rd May 2012.

It is submitted by the Claimant that the Application by the Respondents dated 29th May 2012 seeks to challenge/review the exercise of discretion by the Court and cannot be challenged in this manner.

To my mind what is clear for determination is whether this Court can competently review a decision made by the Court that granted the orders of 3rd May 2012, namely the decision by Hon. Madzayo to order a deposit of Kshs. 1,200,000/-.

At the onset, let me acknowledge the submissions made by counsel and their arguments ably captured in the Submissions filed herein. If I do not refer to all the authorities cited or positions taken, that should not denigrate from the importance of the said submissions or arguments.

Reliance was placed on the High Court case of ***Bayusuf Grain Millers v. Bread Kenya Limited [2005] eKLR*** where the Hon. Mr. Justice Luka Kimaru dealt with a similar application as the one dated 27th April 2012. In the decision, the Hon. Judge held that "for the order of an attachment before judgment to be issued, this court must be satisfied beyond per adventure (sic) that indeed the defendant intends to abscond from the jurisdiction of the court or dispose his assets with a view of defeating the cause of justice. The order of attachment before judgment is draconian and can only be issued in the clearest of the cases. "

In a Court of Appeal decision – ***Kanyoko t/a Amigos Bar and Restaurant v. Nderu and Others EALR [1986-1989] EA 232 (CAK)*** the Honourable Justices of Appeal – Nyarangi, Gachuhi and Apaloo held that " the burden resting on the Respondents to show facts justifying the attachment before judgment could only be discharged by testing the rival averments by evidence." At page 243 at letter g the Learned judges of Appeal acquit themselves thus " The respondent's hearsay assertion that the appellant was about to abscond was as vague an allegation as can be imagined. And there is no proof of any sort that the appellant was minded of committing the mischief against which the rule is directed, namely the disposal of his properties"

The analysis of the decision made reveals gaping holes where the court failed to consider the ingredients prerequisite for the grant of the Order sought. The principles of natural justice are the rule against bias ***nemo judex in causa sua*** – one cannot be a judge in their own cause. The second is ***audi alteram partem*** – no one is to be condemned unheard.

Natural justice is a term of art that has gained prominence in all law jurisdictions. In Common law jurisdictions the term denotes specific procedural rights. This has in recent times been replaced and broadened into the class of the general 'duty to act fairly'. What is required to fulfill this duty depends on the context in which the matter arises. In this case, the second cardinal rule of natural justice is at play. The court wrongly, in my view, condemned the Respondents without hearing them and made orders. It was superfluity at best to propose *inter partes* hearing yet the court had made final orders in respect of the application.

It has been said before but is surely worth repeating. This Court is a Court established pursuant to Article 162(2) of the Constitution of Kenya, the supreme law of the land. It is through the enactment of the Industrial Court Act, Act No. 20 of 2010 that the aspiration in the Constitution was brought to fruition.

Section 4 of the Industrial Court Act is the establishing section. It establishes the Court in the following choice terms:-

Section 4.(1) **In pursuance of Article 162(2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.**

(2) The Court shall be a superior court of record with the status of the High Court.

(3) The Court shall have and exercise jurisdiction throughout Kenya.

As seen above, this Court was established pursuant to Article 162 of the Constitution of Kenya 2010.

A proper appreciation of the law is imperative. Article 162(2) and 162(3) of the Constitution provide as follows:-

162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Section 4 (*supra*) confirms that this Court is a Superior Court of record with status of the High Court.

The predecessor of this Court was a Tribunal established pursuant to the Labour Institutions Act Part III and in particular Sections 11 to 27 which were repealed by the Industrial Court Act No. 20 of 2011. The court which was in existence until 12th July 2012 was amenable to the supervision of the High Court.

The proceedings before the predecessor of the Court were to continue in terms of Section 33. Section 33 of the Industrial Court Act 2011 provides as follows:-

Section 33. All proceedings pending before the Industrial Court shall continue to be heard and shall be determined by that court until the Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of the Judiciary.

This Court under Article 162(2) has now come into operation pursuant to the Swearing-in of 11 Judges of the Industrial Court on 13th July 2012. The President appointed the 12 Judges of the Court vide a Special Issue of the Kenya Gazette being Gazette Notice No.9797 published as Vol. CXIV—No. 65 of 19th July, 2012.

The case before me was heard by a Judge who had continued to sit in terms of section 33. His decisions were amenable to the supervision of the High Court. This is a High Court therefore capable of supervising the former Industrial court Tribunal.

In the case of ***Brookside Dairy Limited v Attorney General and the Industrial Court Nairobi Petition No. 33 of 2011 (Unreported)***, the Hon. Mr. Justice Majanja stated that "the Industrial Court (at the time), as a creature of statute, was a Court subordinate to the High Court. Under the former Constitution, the Industrial court was established under the Labour Institutions Act and it was subordinate to the High Court. Section 65 of the former Constitution provided that, "Parliament may establish courts subordinate to the High Court and courts martial, and a court so established shall, subject to this Constitution, have such jurisdiction and powers as may be conferred on it by any law."

Parliament prior to 27th August 2010 did not have the constitutional authority under the Constitution to create a court of equivalent status with the High Court hence the subordinate status of the predecessor to this Court.

This position was reiterated by the Hon. Mr. Justice Lenaola in the case of ***Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011*** (Unreported). I agree with my fellow brother Judges - the tribunal which preceded this Court was not remotely akin to the High Court and for all intents and purposes was an inferior tribunal.

In actualisation of the provisions of Article 162, the majority of the Judges of this Court were sworn in on 13th July 2012 at an elaborate ceremony presided over by the President of the Republic of Kenya and witnessed by among others the Chief Justice and President of the Supreme Court, the Hon. The Attorney-General and the Chief Registrar of the Judiciary among others.

There is no doubt that the predecessor of this Court was inferior to the High Court but not this Court as presently established. I am minded to look at the decision of the predecessor of this Court to establish whether there is merit in the Application to review the decision by the Hon. Madzayo.

The decision to allow the Order for deposit of cash amounting to Kshs. 1,200,000/- at the *ex parte* stage is what in the main falls for determination. Judicial discretion is rarely to be interfered with. The Court of Appeal for East Africa decided this issue in the case of **Shah v. Mbogo** (*infra*).

The principles which this court applies when deciding whether to interfere with the exercise of discretion by a Trial Judge are well known and are set out in the decision of ***Mbogo v. Shah [1968] E.A. 93***where, Newbold, P. at page 96, stated the principles thus "…........a Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."

The Claimant relied on the case of ***Giovannia Gnecchi-Ruscone v. Hermanus Phillipus Steyn HCCC 5972 of 1993 (unreported)*** wherein I. Lenaola Ag. Judge (as he then was) ordered the Defendant to deposit some funds as security. The case was brought under Order XXV Rules 1, 5 and 6 (of the former Civil Procedure Rules). He cited the case of ***Shah v. Shah [1982] KLR 95.*** The said cases are not on all fours with this case and therefore do not aid the Claimant in any way.

The case herein involves a dispute on employment issues, the Claims by the Claimant must prove. The employee – the Claimant has estimated his claim will be satisfied by a sum of Kshs. 1,200,000/-. There is all possibility that the claim may or may not succeed. If it succeeds, it may not entirely be so meaning the amount of 1,200,000/- is arbitrary. This Claim is not a liquidated claim with finite monetary limits. I rule that the Court order of 3rd May 2012 is one where the Hon. Madzayo fell into grave error. The draconian decision was made at the *ex parte* stage and this was manifestly unfair to the party who was not heard.

The Order that commends itself to me to make is vary the Order of the Hon. Madzayo as follows:

0. The Order of 30th April 2012 by Honourable S. Madzayo be and is hereby set aside.

0. The Respondent's Counsel to execute a suitable undertaking as to damages within 14 days of today.

0. Costs in the Cause

It is so Ordered

Dated and **Delivered** at Nairobi this 24th day of September 2012

Nzioki Wa Makau
<u>JUDGE</u>