REPUBLIC OF KENYA

Industrial Court of Kenya

Petition 26 of 2012

JOEL KANDIE CHEBII ……..…… CLAIMANT

VS

REGISTRAR OF TRADE UNIONS ……..…….RESPONDENT

RULING

The Petition was initially filed at Milimani Law Courts, as JR Misc. App No. 327/201. The Application was placed before Hon. Justice Githua on 30th July, 2012 who directed that the matter should be placed before the Industrial Court having been satisfied that the matter involves a dispute which touches on labour relations.

The Application before this court concerns a Preliminary Objection filed before court on 20th July through the firm of Lumumba, Mumma and Kaluma Advocates. The Interested Party seeks orders that the motion dated 6th July, 2012 be struck out on the following grounds:

1. That the motion offends the provision of Article 165(5) of the Constitution as read with Article 162 (2) (a) of the Constitution.

2. The motion is *res judicata* as it raised issues already heard and determined by a court of competent jurisdiction in JR Appl. No.327 of 2010 between the same parties herein.

3. The Motion is contemptuous of and seeks to sanction contempt of court process, judgment, decree and orders in JR APPL. No.327/2010 and Industrial Cause No.3 (N)/2010 between the parties.

4. The Applicant is not, has never and does not hold the position of General Secretary of the said Union as falsely claimed, as already been found by the Hon. Court in JR Appl. No.321/2010 and by the Industrial Court in Industrial Cause No.3(N) of 2010 between the parties herein.

5. The Motion is incurably defective as it offends the provisions of Order 53 rule 4(1) of the Civil Procedure Rules.

6. On the whole, the application is frivolous, vexatious and an abuse of the court process.

In answer to this Preliminary Objection, the 2nd to 18th Interested Parties filed their submissions in response through the firm of S.N. Gikera and Associates.

The 1st Interested Party filed a replying affidavit and made further oral presentations in court. The Petitioner chose to reply through oral presentations.

The 1st Interested Party the applicant herein has submitted that:-

1. The Industrial Court as established under Article 162(2) of the Constitution is a special court to determine disputes relating to Industrial and Labour relations. However, the applicants argue that this application being for Judicial Review (JR) can only be handled by the High Court. They argue that this dispute emanates from Industrial Cause no.3N/2010 in which an award was made declaring a purported election conducted by the Union presided over by the Applicants annulity. Thereafter, the Interested Party sought to challenge the decision of the Industrial Court before the High Court. From 3N of 2010, the applicants filed JR No.327/2010 to challenge the decision of the Industrial Court on the election. The decision for JR was dismissed by the High Court for lack of merit and also affirmed the decision of the Industrial Court as being arrived at meritoriously. The applicants therefore argue that the Petitioners are not entitled in law to bring a fresh suit herein before the High Court when the Industrial Court was existing.

2. The second argument by the applicants is on the issue of *res judicata.* The applicants argue that the issues raised in this current petition are the same raised and litigated in JR 327/2010 in High Court and Industrial Court No. 3N/2010. That the issues concern a purported election conducted by the *exparte* application for the Union. The dispute is what prompted the 1st Interested Party to file Cause No. 3N/2010. The Industrial Court heard the suit and reached a determination that the purported election by the *exparte* applicant had not been conducted in accordance with Labour Relations Act and Union's Constitution. The *exparte* applicant was aggrieved by this decision and his grievance is captured in the affidavit sworn on 6th July 2011, at paragraph 6 that he was aggrieved by the decision of Industrial Court in Cause No.3N/2010 and they filed JR 327/2010.

The decision of the High Court in JR application, dealt with the issue of an election not properly conducted and parties were expected to comply with orders issued by the Industrial Court in 3N/2010. Before complying with this order, the Applicants contend that the Applicant moved to the High Court in 255/2010. In that application they sought and were granted orders of stay and that orders that leave operate as a stay of process of Registrar Trade Unions to deregister the national officials of the Union. No conditions were placed on this order and the applicants herein contend that the matters are still the same and the elections held are still invalid.

3. The 3rd issues raised by the applicants herein concern contempt of court. The Applicants contend that this Motion is contemptuous as it seeks to sanction contempt of court of judgment and decree made in JR No.327/2010 and Industrial Court No.3N/2010. The applicants contend that while orders in 327/2010 were pending, the applicant purported to conduct a fresh election trying to pre-empt outcome of JR No.327/10. That the applicant colluded with office of the Registrar Trade Unions and purported to conduct elections in January 2011. That JR 327/2010 was determined in June 2012. The applicants aver that the law required that election of union be conducted every 5 years. First election was conducted in September 2006, the next elections was to be held in September 2011. The action of going for election in January 2011 was therefore made to circumvent order of court in 3N/2010.

The applicants further argue that Section 34 of the Labour Relations Act states that election of officials of a Trade Union shall be in accordance with the Union's Registered Constitution. Section 34 (1) (b) states that such election shall be by secret ballot at once every 5 years.

The applicants referred to the Union's Constitution rule 8(a) which indicates that the Quin Quinnial Conference shall be the supreme authority of the Union and shall be held every 5 years in September. The applicants contend that in the elections held in January, 2011, the Quin Quinnial Conference did not sanction it. That rule 11 of the Union's Constitution further states that all national officials shall be elected after 5 years at the Quin Quinnial Conference.

4. The fourth issue raised by the applicants is on elections. The applicants indicate that the applicant Petitioner was elected in September 2006 and their term was to expire in 2011. In those elections, the Applicant was elected Union Chairman and 1st Interested Party was elected Secretary General of the Union. That these positions could not expire in September 2011. However elections of January, 2011, the Petitioner was elected Secretary General and this was not done by secret ballot as is required by law. That this is why the previous elections were declared null and void.

The applicant 1st Interested Party also contend that the Motion is filed without following due process as envisaged under O.53 rule 4(1) of Civil Procedure Rules in relation to JR. The applicants contend that on the face of the application, the applicants state that they come under Order 3. Documents to be filed in JR are known. That they are an application accompanied by a statutory notice with a verifying affidavit. The next stage to be filed within 21 days. Rule 4 provides that it may be verified. It should then be served alongside the verifying affidavit if need be. In this case however, the applicants contend that the Notice of Motion is filed in an ordinary motion filed by a supporting affidavit. Order 53 also requires that before the motion is set for hearing, all the Interested Parties must have been served at least 8 clear days. The 1st Interested Party contends that to date they have not been served with that motion nor with the application for leave or even orders granting stay of orders and execution of orders of Court in 3N/2010. They seek that this Petition should be struck out as it is incurably defective.

In reply to these issues, the Petitioner averred that on issue of jurisdiction, the same was already handled by the High Court which transferred this case to the Industrial Court and the matter is now in the proper court.

On the issue of the matter being *res judicata*, the Petitioner submitted that the issue in JR is decision making process of the Registrar Trade Unions. What is being challenged is the decision of the Registrar Trade Unions to move and deregister current officials of the Union as per changed of 30th January, 2011 and further 12th August, 2011. What has prompted the Petitioner filing the JR application was action of Registrar Trade Unions moving to deregister the same officials following a letter from the advocates of 1st interested Party dated 30th June 2012, informing him that the application JR 327/2010 had been dismissed and they should move to deregister notice of change of officials and reinstate William Muga Aketch as Secretary General of the Union. The Petitioner contends that the issues arising have not been heard before. The Petitioner contends that in Industrial Court No. 3N/2010, the parties may have been the same but dealing with an earlier election seeking a declaration that a meeting held in December 2009 was improperly convened and appointments made therein were illegal. In this case, the applicants were seeking orders that Registrar Trade Unions deregistered officers already elected. The orders made by court were to the effect that:

1. The National Executive Committee meeting held on 30th December 2009 was improperly convened and appointments made were illegal *ab initia.*

2. Registrar Trade Unions was orders to immediately deregister notice of change of officials of 2nd Respondent in Form Q of LCE meeting of 30th December, 2009, status quo before the meeting was to be maintained. The Chairman was also to continue to hold the position of Secretary General of 2nd Respondent without any interruption up to and including 31st December 2011 after which 2nd Respondent may conduct elections in respect to position of Secretary General and in accordance with its registered Constitution.

The Petitioner avers that they moved to High Court in JR 327/2010 when JR application was pending there being no orders preventing trade unions from holding elections. On 10th December, 2010, the Registrar Trade Unions send a circular to all trade unions requiring them to conduct elections. The Petitioner wrote to all delegates concerning a Quin Quinnial Conference to be held on 30th January 2011. This notice was made also the Ministry of Labour. The Union thus proceeded to hold elections on 30th January, 2011, presided over by one Hellen Maneno Provincial Labour Officer. That those elections of 30th January, 2011 have not been challenged in any court. The Registrar Trade Unions cannot therefore

move to deregister the elected officials. The Petitioner submitted that Industrial court No. 3N/2010 was dealing with a different election and so was the JR application and so issues currently in court have not been determined in any court at all. The Petitioner referred to Justice Githua's judgment in JR 327/2011 delivered on 19th June 2012, where she granted an order of certiorari to quash the order of No.3 in the award delivered by court on November 2010. However, she was still aware that the term created had expired on 31st December, 2011. That is why the application was dismissed when the court found that it could not give orders in vain. The Petitioner therefore avers that the 1st Interested Party cannot use orders giving him a term that has expired and register himself as Secretary General. That the only option available is to challenge the election of 30th January, 2011. The matter, the Petitioner submits is therefore not *res judicata*.

On issue of contempt, the Petitioner has indicated that they are not in contempt as the order obtained for stay was not indefinite. That the order stated that the current officials were in office as per election of January, 2011 and they can challenge those elections.

On the defectiveness or otherwise of the Motion, the Petitioner submitted that under Order 53 rule 3, if any party not served, the High Court may adjourn the case so parties are served. The petitioner in any case submit that the option is not to dismiss the application but court can give time for service.

The petitioner therefore submits that the Preliminary Objection completely faults the threshold of Preliminary Objection as the 1st interested Party is referring to issues of facts and evidence and does not meet the decision of Mukisa Biscuit. The Petitioner pray that the Preliminary Objection should therefore be dismissed. The 2nd to 18th Interested Parties on the other hand submitted that the Industrial Court has jurisdiction to hear this court on issue of this matter being *res judicata*. The Interested Parties argue that what has been submitted by applicants is not on pure points of law as enunualed in Mukisa Buiscuit (1969) at page 700 EALR:-

"As far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or arises out of clear implication of the pleadings and if argued may dispose of the suit".

The case points on issues of jurisdiction limitation, parties being bound by a contract which refer parties to arbitration on being issues which can be raised in a Preliminary Objection.

The Interested Parties therefore submit that the issue of *res judicata* does not arise as issues raised in the application in court are different and distinct from issues raised in previous two cases quoted. That a Preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is exercisable judicial discretions of the court.

The 2nd to 18th Interested Parties also submit that the issues No.3 and 4 raised in Preliminary Objection raise issues of fact and not law. They cannot be determined as such.

On ground 5, they submit that on the form of JR filed in court, Article 159 of the Constitution is clear that justice shall be administered to all without undue regard to technicalities. They cited Justice Hayanga in High Court CC No.1094 of 2002 where he stated that powers to determine whether a matter is frivolous is a matter to be determined by court and cannot be said to be a point of law. They submit that this Preliminary Objection does not meet the threshold in cases cited and so should be dismissed with costs. They further pointed out that in judgment of court in JR 327/2010 page 18 to 20 counsel for applicant submitted that order issued by the Industrial Court had not been prayed for in pleadings and therefore the Industrial Court had acted in excess of jurisdiction and therefore creating another uninterrupted term of one year for 2nd Respondent to serve as Secretary General (who is the 1st Interested Party in this case) so that the Union of irrespective of whether it wanted to restructure organization structure or change of officials was barred from doing so or electing any person in office for 1 year. The Union was given liberty to elect a Secretary General after 30th January, 2011. These orders expired on 30th December 2011 and therefore there was no order barring the Petitioner from conducting and election and Union needed to have a body managing it.

Having heard these submissions, the issues for determination by this court are as follows:

1. Whether the Industrial Court currently constituted has jurisdiction to entertain this matter.

2. Whether the issues raised herein are *res judicata* having been argued and determined in Industrial Court cause No.3N/2010 and JR 327/2010.

3. Whether the petitioners are in contempt of court having proceeded to hold elections on 30th January, 2012.

4. Whether the application is defective having been filed without following the due process as provided by law.

I will consider the issue of jurisdiction of the Industrial Court as currently constituted. Article 162 (2) of the Constitution provides that-

"Parliament shall establish courts with the status of the High Court t hear and determine disputes relating to-

(a) Employment and Labour relations, and ….."

Pursuant to this provision, the Industrial Court Act 2011 was enacted into law on 30th August, 2011. Section 12 of the Industrial Court Act, 2011 states that-

"The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162 (2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including…"

It is therefore apparent that the Industrial Court is the court that has jurisdiction to handle any matters relating to employment and labour relations. The issue currently before court relates to labour relations.

Section 33 (4) of the Labour Relations Act further states that-

"Disputes arising from, or connected directly or indirectly to, elections held under this section may be referred to the Industrial Court".

The issue of the Industrial Court jurisdiction had also been discussed and determined in other cases before the High Court. In fact Justice Githua determined this issue and transferred the case to the Industrial case to deal. Justice Lenaola in Nzoia Sugar Company Ltd Vs Hon. Attorney General and Francis Oyatsi and Another Pet. 212 of 2012 High Court at Nairobi had this to say on the jurisdiction of the Industrial Court:

"The intentions of the drafters in my undesttanding are very clear, that there be established an employment and labour relations court under Article 162 (2) of the Constitution which is a superior court of record and over which the High cannot exercise supervisory jurisdiction (Art. 166 (6))….."

It is worth mentioning that the judges of the Industrial court are appointed under Article 162 as Judges of superior courts and as such just like their counter parts in the High Court can determine rights issues but only relating to employment and Labour relations issues.

Having said this, I find that this court has jurisdiction to entertain this matter and the Preliminary Objection in relation to this court's jurisdiction lacks Mont.

On the question No.2, is this petition ***res judicata***? The issues determined in Industrial Court case No.

3N/2010 related to elections of the Union in 2009. The JR 327/2011 herein relate to the same election. Hon. Justice Githua and Justice Korir in their judgment in JR 327/2010 even pointed out that:-

"JR is a challenge on administrative action. Remedies in JR can only be issued against a public or statutory body, subordinate courts or inferior tribunals or public officers where it is claimed that any of them have failed to perform their public duties. Put another way, JR is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, and tribunals and other bodes or persons who carry out quasi judicial function or who are charged with the performance of public acts and duties…".

This was in reference to issues raised in the JR application which related to orders of Justice Rika in Industrial Court No.3N/2010. The orders granted were not directed to the Registrar Trade Unions as sought herein in relation to current officials of the Union following elections of 2011. The issues herein are substantially different though relating to the same parties and I find that the application is not *res judicata*.

Now on the issue No.3, it is apparent that the orders given by the Learned Judges in JR 327/2011 were explicit at pages 25 that:-

"These orders are now spent meaning they are no longer in force and issuing orders of certiorari to quash them will not serve any useful purpose. As a general rule, courts of law do not issue orders in vain or orders which are incapable of enforcement".

The Hon. Judges were of the view that the orders sought could not be enforced at the time having been overtaken by events. It was pointed out by counsel for the Petitioner that the orders given in Industrial Court 3N/2010 expired on 30th January 2011. At the time of fresh election in January 2011, there was no order of court being flouted and therefore it cannot be said that the petitioners were pre-empting orders of court having held elections on 30th January, 2011.

I will now revert to the last issue on the form of the petition filed before this court by the petitioners. It is apparent that the petition may have been made without following the provisions of order 53. However, rule 3 of the said order does not indicate that failure to follow the said provisions became fatal to the application. In any case, Article 159 (2) of the Constitution also states that:-

"Justice shall be administered to all without undue regard to procedural technicalities".

It would be in breach of this Article if this court would strike out the petition because the petitioner failed to service. In any case, this is a matter of evidence which cannot be argued in a Preliminary Objection.

I may add that grounds 3 and 4 relate to matters which are purely not based on law and though I have had to handle them at this preliminary stage, the law on an application such as the one before court is laid down in the Locus classics case of Mukisa Biscuit case EALR [1969] 700 which state that-

"As far as I am aware a Preliminary Objection consuls of a point of law which has been pleaded or arise out of clear implication of the pleadings and if argued may dispose of the suit".

A Preliminary Objection cannot be raised if any fact has to be ascertained.

Having argued as above, I find that Preliminary Objection argued by the applicants herein lacks merit and the same is dismissed with costs to the Petitioner and the 2nd to 18th Interested Parties.

Signed, dated and delivered in court at Nairobi this 11th day of December, 2012.

HELLEN WASILWA

JUDGE