



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

(Before: Paul K. Kosgei, Judge, S.K. Luyali & C.M Mulupi – Members)

CAUSE NO. 752 OF 2010

JOSEPH KAHUKO MWANGI & 183 OTHERS.....CLAIMANTS

Vs.

KENYA SHELL LTD.....RESPONDENT

Mr. Kenneth Kiplagat of M/s Okoth & Kiplagat Advocates for the claimant

Mr. Kiragu Kimani of M/s Hamilton Harrison & Mathews Advocates for the respondent

RULING

On 30th June 2010 the claimants through their advocates filed the memorandum of claim herein seeking the following prayers:

- a. A declaration that the intended sale of the respondent's business in Kenya amounts to a material change in relationship between the claimants and respondent and the intended sale is in effect a transfer of business from the respondent to a third party requiring the consent and/or acquiescence of the claimants.
- b. A declaration that the purported and/or intended sale amounts in law to a wrongful dismissal and unfair termination and illegal dismissal of the claimants by the respondent.
- c. A declaration that the claimants are entitled to make an election as to whether to transition to the new buyer of the respondent's business or to opt out of their employment contracts.
- d. A declaration that the intended sale of the respondent's business in Kenya has the effect of declaring the claimants redundant entitling the claimants to the full rights and privileges of statutory, common law and equitable compensation and damages.
- e. An injunction restraining the respondent by itself, its servants, employees, agents, assigns and/or any other person howsoever:
 1. from selling, transferring, disposing or otherwise its assets, shares and or control in Kenya Shell Limited to any third party before the respondent has first:
 - i. sought and received the express written consent, on terms, of all the claimants agreeing to transition, on terms, to the respondent's business under new owners; or
 - ii. formerly declared all the claimants herein redundant and paid to the claimants all their redundancy benefits and claims.

2. from applying for any change of ownership in its shares in Kenya Shell Limited or in any manner altering its ownership status with the Registrar of Companies pending the full and faithful satisfaction of the condition of (d) (1)(i) and (ii) above.
 3. from applying or seeking the consent of any statutory authority required to sanction any change of shares or ownership in the respondent company pending the full and faithful satisfaction of the conditions in (d) (1)(i) and (ii) above.
 4. From continuing to conduct business in Kenya under any other name, form or arrangement other than the name, form or arrangement under the Royal Dutch Shell PLC headquartered at The Hague.
- f. Damages for wrongful dismissal and unfair termination.
 - g. Interest on (f) above at Court rates from the time of filing suit until payment in full.
 - h. Costs of this suit.
 - i. Any other or further relief that this court may deem fit to grant.

The claimant also filed a Notice of Motion dated 30th June 2011 seeking the following orders:

1. That this court be pleased to certify this application as being urgent and direct that the same be heard ex-parte in the first instance.
2. That an interlocutory injunction do issue restraining the respondent by itself, its servants, employees, agents, assigns and/or any other person howsoever:
 - a. from selling, transferring, disposing or otherwise its assets, shares and or control in Kenya Shell Limited to any third party before the respondent has first:
 - i. sought and received the express written consent, on terms, of all the claimants agreeing to transition, on terms, to the respondent's business under new owners; or
 - ii. formally declared all the claimants herein redundant and paid to the claimants all their redundancy benefits and claims.
 - b. from applying for any change of ownership in its shares in Kenya Shell Limited or in any manner altering its ownership status with the Registrar of Companies pending the full and faithful satisfaction of the conditions in (d)(1)(i) and (ii) above.
 - c. from applying or seeking the consent of any statutory authority required to sanction any change of shares or ownership in the respondent company pending the full and faithful satisfaction of the conditions in (d)(1) and (ii) above.
 - d. from continuing to conduct business in Kenya under any other name form or arrangement other than the name, form or arrangement under the Royal Dutch Shell PLC headquartered at The Hague.
3. That the costs of this Application be provided for.

Pursuant to the ex-parte proceedings on 30th June 2010 the court issued a temporary injunction in terms of prayer 2 of the Notice of Motion hereinabove and directed that the application be heard inter-partes on

20th July 2011. The hearing did not proceed because the respondent obtained an order from the High Court of Kenya staying these proceedings pending the hearing of the respondent's application before the High Court in **Nbi HC Miscellaneous Application No. 254 of 2010 Republic v. Industrial Court of Kenya ex-parte Kenya Shell Ltd.**

On 20th July 2011 this court ordered a stay of proceedings pending the outcome of the application before the High Court. Owing to the delay in the hearing of the application at the High Court the claimant filed

a Notice of Motion dated 7th September 2010 seeking the following orders:

1. That this court be pleased to certify this application as being urgent and direct that the same be heard ex parte in the first instance.
2. That the orders recorded in this matter on the 20th July, 2010 at the instance of the respondent be vacated and the following original orders of this court be restored, to wit that an interlocutory injunction do issue restraining the respondent by itself, its servants, employees, agents, assigns and/or any other person howsoever:
 - a. from selling, transferring, disposing or otherwise its assets, shares and or control in Kenya Shell Limited to any third party before the respondent has first:
 - i. sought and received the express written consent, on terms, of all the claimants agreeing to transition, on terms, to the respondent's business under new owners; or
 - ii. formerly declared all the claimants herein redundant and paid to the claimants all their redundancy benefits and claims.
 - b. from applying for any change of ownership in its shares in Kenya Shell Limited or in any manner altering its ownership status with the Registrar of Companies pending the full and faithful satisfaction of the conditions in (d) (1)(i) and (ii) above.
 - c. from applying or seeking the consent of any statutory authority required to sanction any change of shares or ownership in the respondent company pending the full and faithful satisfaction of the conditions in (d) (1)(i) and (ii) above.
 - d. from continuing to conduct business in Kenya under any other name, form or arrangement other than the name, form or arrangement under the Royal Dutch Shell PLC headquartered at The Hague.
3. That the costs of this application be provided for.

The respondent reacted by filing a replying affidavit sworn by one George Brunton on 13th September 2011.

On 5th November 2010 this court ruled that it can proceed to hear the application as it is the court's duty to determine its jurisdiction in the light of the provisions of the newly promulgated Constitution of Kenya. The application was heard on 6th April 2011. The parties filed written submissions and authorities in support of their submissions.

Mr. Kiplagat for the claimant submitted as follows:

This court is seized with this matter and has jurisdiction to determine its jurisdiction. This is a power that cannot be ceded to another court.

The respondent's filing of proceedings before the High Court amounts to forum shopping and an attempt to dictate the claimants regarding the forum at which they should seek justice. It is an abuse of the process of the court. The application is designed to frustrate the determination of this matter on merits by this court. This offends Article 159(2) of the Constitution that discourages use of technicalities. The powers of this court were enhanced by the new Constitution which grants it exclusive jurisdiction to determine all matters appertaining to employment. This fact was upheld by the High Court recently in **Petition No.573 of 2009 Kenyatta University v. The Attorney General & Industrial Court.** Consequently the judicial review proceedings cannot stop the proceedings of this court.

Even before the enactment of the new Constitution the Labour Institutions Act 2007 and Employment Act 2007 vested the court with exclusive jurisdiction to hear and determine all employment matters as ruled by the High Court in **Jane Maina & Others v. KTDA Ltd. Nbi HCCC No. 121 of 2009**

The respondent is in the process of disposing of its business as a going concern to persons whom the claimants are not minded to associate with. Their human rights will be violated as it could amount to imposing servitude upon the claimant. The claimants have raised issues which this court and no other has jurisdiction to determine. The consequences of the intended transaction affect the rights of the respondent's employees.

As ruled by Justice Musinga the Industrial Court will serve as the court contemplated under Article 162 of the Constitution pending legislative intervention.

Mr. Kiplagat urged the court to allow the claimant's application.

Mr. Kiragu for the respondent opposed the application and submitted as follows:

Before the promulgation of the new Constitution the High Court had supervisory jurisdiction over the Industrial Court by virtue of section 60, 65 and 123(1) of the old constitution. The new Constitution under Article 162 requires parliament to within one year set up a court to deal with employment and labour relations. Parliament would determine the jurisdiction of that court. The Industrial Court as presently constituted is not the court contemplated under the new Constitution. The word "shall" is used meaning it is mandatory for parliament to set up the new court.

If the intention of parliament was to constitute the current court as the court pursuant to Article 162, it could have stated so in the Constitution. This has happened in other jurisdictions e.g. Uganda, Ghana, Tanzania and South Africa where the Constitutions state that the courts be deemed to be set up in the Constitution.

The decision of Justice Musinga did not benefit from the foregoing arguments as they were not raised before the court.

The High Court had the powers to issue the order of prohibition that it did and has the power to quash this court's decision. The respondent is not shopping for a forum. The respondent questioned the jurisdiction of the court and the issue must be determined first before any other issue can be addressed. The court has no jurisdiction to grant the order sought.

The claimants' case is an attack on the intended sale of the respondent's shares. There is no law that requires employee's consent in the transaction. The respondent's shares are owned by 3rd parties who are its shareholders. The respondent has no interest in the same. The respondent has not violated the Employment Act 2007, Labour Institutions Act 2007 and the Labour Relations Act 2007. It is the shareholders who want to sell their shares and this is not an infringement of contracts of employment. The injunction is being addressed to the wrong party and is an infringement of the respondent's right to own property. The sale does not affect the claimants' rights and if they do they can make a money claim against the respondent.

The court be guided by **HCCC No. of Gatiba v. The Boots Co. Ltd.(Kenya) & Others[1995] LLR 5469**

There should be no further proceedings in this matter in view of the High Court order issued.

We have carefully considered the claimants' application and the respondent's response plus the submissions of the learned counsels and the authorities cited.

In this matter the claimants have moved the court alleging that their rights as the respondent's employees have been infringed by the intended sale of the respondent's business without any reference to them. They argue that the sale of the business affects their rights as employees as the respondent seeks to hand them over to a new employer without their consent. It is argued that this amounts to servitude. The claimants would prefer a separation between the parties before the sale as it has happened before sale in other oil companies that exited Kenya including Mobil, Caltex and Esso. In the cited cases it is alleged

that the employees were paid their severance pay and asked to elect whether to serve the new employer or quit.

The respondent on the other hand argues that the sale of the respondent's shares does not affect the respondent's employees as the sale is being effected by a third party namely the respondent's shareholders. The claimants' contracts of service will be continued under the new arrangement under the new shareholders.

What the respondent is trying to do through the said arguments is to divorce the respondent from its shareholders. This is not possible. The respondent deals with the claimants and other employees and all other persons in the course of its business on behalf of the shareholders. Consequently even the proposed sale is being arranged by the respondent on behalf of its shareholders and we do not accept the proposition that the respondent is an innocent party in the matter who has no interest in the sale. The respondent is the face of its shareholders in all activities that it chooses to engage in and this cannot be an exception. We also do not accept the proposition that the infringement of the claimant's rights is not manifested in this matter. The claimant signed contracts of employment with the respondent. The respondent now wishes to exit from the scene and transfer the performance obligations in the claimants said contracts to another person who is not known to the claimants. In the circumstances the claimant's rights as employees are squarely in the heart of the proposed transaction. The claimants are entitled to be involved in the matter with a view to safeguarding their rights during the proposed transition and thereafter. They are entitled to know the identity of the new employer and to decide whether they should continue serving under the new employer. They are also entitled to know who will be responsible for the settlement of their accrued rights under the respondent's employment and at what point the accrued rights will be settled. It is these fears that the claimants have tried to address in this matter. The dispute is therefore a labour dispute since it flows from the claimants' employment contracts with the respondent.

Section 87 of the Employment Act 2007 and section 112 of the Labour Institutions Act 2007 gives the Industrial Court exclusive jurisdiction to deal with labour disputes as affirmed by the court in the authorities cited above. We concur with the statement of Justice Hatari Waweru in **Jane Wanjiku & 343 other v. KTDA Ltd. [2009] eKLR** that:

“Section 45(5) of the Employment Act 2007 leaves no doubt that the person and authority with the jurisdiction to determine whether it was just and equitable for an employee to terminate the employment of an employee is a labour officer and the Industrial Court. Section 50 of the same Act enjoins the Industrial Court to be guided by section 49 in determining a complaint or suit under the Act involving wrongful dismissal or unfair termination of employment.

It is thus clear that the jurisdiction of the ordinary courts, including the High Court has been ousted and the same vested in the Industrial Court. Notwithstanding section 60 of the Constitution, the original unlimited jurisdiction of the High Court is not limitless. The Court of Appeal has held that where a statute confers jurisdiction upon an inferior court of tribunal or upon some other person or authority, the original jurisdiction of the High Court in such matter is ousted, and the parties to the dispute must first exhaust that jurisdiction conferred upon that inferior court or tribunal or other person or authority. See for instance the case of Narok County Council-vs-Transmara County Council [2000]IEA 161. See also the case of Wamutu vs. Kiarie[1992]KLR 480.

I therefore have no hesitation in holding that the Plaintiffs must first exhaust the elaborate machinery set out in the Employment Act 2007 for resolution of the disputes with their former employer regarding their retirement or termination of their contracts of service. This court has no jurisdiction to determine those disputes as such jurisdiction has been specially vested in the Industrial Court by the said Act.”

The foregoing statement was made before the promulgation of the new Constitution. The new Constitution gave the Industrial Court a constitutional underpinning by creating a superior court of record with the status of the High Court to deal with labour disputes. This is the essence of Article 162(2) of the Constitution. The respondent argues that this court is not the court contemplated by the new Constitution

as a new court must be constituted. Even if this argument is accepted, section 22 of the sixth schedule of the Constitutions gives this court the jurisdiction to deal with the said matters pending the establishment of the new court. In the circumstances we totally agree with the ruling of Justice Musinga in the said petition **573 of 2010**. Since the High Court has no supervisory jurisdiction over the Industrial Court the respondent's adventure to the High Court in the form of **Miscellaneous Application No. 254 of 2010** was unwarranted.

The respondent's arguments were demolished by parliament through the enactment of the Industrial Court Act of 2011 which endorsed this court as the court contemplated under Section 162(2) of the Constitution. The transition clause of the Act i.e. section 32 states as follows:

1. **Any regulation or other instrument made or issued under the Labour Institutions Act, 2007, shall continue to have effect as if such regulation or other instrument were made or issued under this Act.**
2. **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.**
3. **The persons who at the commencement of this Act are members of the Industrial Court shall be deemed to have been appointed under this Act.**
4. **Every person who at the commencement of this Act is an employee of the Industrial Court not being under notice of dismissal or resignation shall, on that day and subject to this Act, be deemed to be an employee of the Court."**

Parliament has therefore spoken in a clear and loud voice.

The intention of the legislature is clear from the foregoing provision.

Parliament did not take the respondent nihilist route of demolition and reconstruction that was suggested by the respondent.

This court has been reconstituted as the court created pursuant to Article 162(2) of the Constitution with the full powers vested under the Constitution. Under Article 165(2) the High Court has no jurisdiction to entertain matters that fall within this court's jurisdiction. The basis of the respondent's application before the High Court has been removed. The case must be dealt with exclusively by this court and if any party will be dissatisfied by the outcome of this court's proceedings, that party will have to appeal to the Court of Appeal.

The logical conclusion of our foregoing conclusions is that we have the jurisdiction to proceed to hear this case. But we however, do not have the power to vacate the order made by the High Court prohibiting further proceedings in this matter. The order was made prior to the enactment of the new Constitution and the Industrial Court Act 2011. It is our hope that the parties will petition the High Court to vacate its orders so that this court can hear and determine the dispute as prescribed by the Constitution and the Industrial Court Act 2011. It is trite law that an order of a court however unpalatable remains a valid order of the court until it is vacated. We will proceed to hear this matter as soon as the High Court order is vacated. In the circumstances we are unable to grant any of the substantive orders sought for the time being.

DATED and DELIVERED at Nairobi this 29th day of September 2011.

Paul K. Kosgei

JUDGE