IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, WARSAME & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 70 OF 2012

BETWEEN

MARTIN JOHN WHITEHEAD …………………............… 1ST APPELLANT

JOHN STANLEY WARD …………………...................….. 2ND APPELLANT

AND

THE INDUSTRIAL COURT …………………......….…. 1ST RESPONDENT

THE BAKERY, CONFECTIONERY, MANUFACTURING

AND ALLIED WORKER'S UNION (KENYA)………….2ND RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Nairobi, (Wendoh, Dulu & Sitati, JJ.) dated 8th February, 2011

in

CIVIL APPLICATION NO. 644 OF 2007)

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JUDGEMENT OF THE COURT

[1] This is an appeal against the judgment of the High Court of Kenya at Nairobi, (Wendoh, Dulu & Sitati, JJ) dated 8th February, 2011 in HC Misc. Appl. No. 644 of 2007. In the judgment, the *ex parte* applicants, Martin John Whitehead and John Stanley Ward (former Receiver Managers of the House of Manji Ltd (the

"Company)" hereinafter referred to as the appellants sought orders of Judicial Review to remove to the High Court for purposes of quashing, the award by the Industrial Court in case No. 65 of 2005 dated 30th April 2007. They also sought an order of prohibition against the enforcement of the said award.

[2] The dispute that ended before the Industrial Court and has now given rise to the instant appeal has its genesis from the time when the appellants were appointed as joint receiver managers of the House of Manji Ltd (Company) on 7th November, 2001 by Kenya Commercial Bank (KCB). KCB were the

debenture holders having extended to the Company certain banking facilities which the Company was unable to service, and when the company was placed on receivership, the loan was in excess of one (1) billion. The receivers undertook to sell the assets of the company which realized a sum representing 25% of the sum owned to KCB. This sum was paid to KCB being the secured creditor under the debenture and the company law that provides the priority of settlement of creditors when a company is wound up. However the workers who were declared redundant as a result of the insolvency of the company were not paid their terminal dues.

[3] Upon the appointment of receiver managers, by a letter dated 7th November 2001, they informed employees that their services would be retained under the existing contracts with the company but with a rider that they were not accepting any personal liability but were acting as an agent of the company. The receivers were not able to retain all the workers, and after a few weeks, on 30th November 2001, the process of laying off workers started with some 74 employees being declared redundant. These were the grievants through their Unions/respondents who filed a claim with the Minister for Labour alleging that the employees' services were illegally terminated. The claimants contended that the redundancy benefits for the employees should have been ranked as secured creditors and the receivers were bound by employment laws and terms and conditions of service according to a collective bargaining agreement to pay the employees as secured creditors. It was not right for the receivers to pay some contractual benefits and refuse to pay others and therefore they ought to have been paid redundancy benefits.

[4] After hearing the dispute, the Judge of the Industrial Court, (Mutaza Jaffer, J assisted by two members) by an extensively researched opinion that considered International Labour Law, United Nations Human Rights Law that touches on the fundamental rights of right to work and equal pay for equal work, the collective bargaining agreement, the International Labour Organization declaration on fundamental principles and rights at work, and many decided cases from the European Union and the Constitutional Court of South Africa, held that upon the appointment of the receiver managers, they stepped in the shoes of the employer and they were obliged to pay the employees all their statutory dues including redundancy and other terminal dues in accordance with the collective bargaining agreement and they were given 60 days to do so. The receiver managers were held personally liable to settle the aforesaid award.

[5] It is apparent from the records, the matter went back to the Industrial Court for clarification or amendments of certain omissions which were further considered and by a well-reasoned amended award dated 6th December 2012, the Court held as follows;-

> **"Given the ambiguity in the law and in order to balance the rights of both parties, we find that the respondent and/or its agents, the receivers and managers must pay out to the grievants and each of them, as a privileged debt, before paying any other debts, the following:**
>
> > **a. Shs. 3,000/= transport allowance promised by the receivers managers pursuant to agreement.**
> >
> > **b. Up to four (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 the 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."**

[6] It is therefore clear that the award delivered on 30th April, 2007 was later reviewed by a further

amended award of 6th December 2004. The appellants applied in the High Court by way of Judicial Review seeking orders of *certiorari* to remove to the High Court for purposes of quashing the award in Industrial Court Cause No. 65 of 2002 made on 30th April, 2007. They also applied for an order of prohibition against the enforcement of the said award. The Judicial Review application seems to have been filed sometimes in June 2007, before the award was amended on 6th December 2004, thus this appeal is essentially against the award of 30th April, 2007.

[7] The grounds in support of the aforementioned Judicial Review application stated that the award made by the Industrial Court was made in excess of jurisdiction and powers of the said Court. Counsel for the appellants argued and the judges of the High Court agreed the Industrial Court was a subordinate court to the High Court as per the provisions of **Section 123** of the retired Constitution and therefore subject to Judicial Review where the court acted in excess of its jurisdiction. Counsel for the appellant faulted the Industrial Court for ordering the appellants to personally pay the employees redundancy and terminal dues despite the fact that the Receiver Mangers were agents of the company and their mandate was only to sell company assets and payment of creditors in accordance with terms of the deed of appointment, the terms stated in the debenture and the company law. Further, they contended that their role as receiver managers was not defined as an employer under the Trade Dispute Act, or the collective bargaining agreement; therefore they had no dispute with the former employees of the company within the meaning of **Section 2** of the Trade Disputes Act.

[8] Lastly, it was contended by the appellants that the award requiring the receiver managers to pay the money personally breached the rules of natural justice as they were not sued in their personal capacities and as such they were not granted a fair hearing having defended the matter in their capacity as receiver managers who were appointed for a specific role of selling the assets of the company and paying the debenture holder before other creditors.

[9] The notice of motion was opposed on the grounds that the Industrial Court was established for purposes of determining and settling industrial disputes; it was a specialized court with distinct jurisdiction whose decisions were not amenable to appeal or review. It was therefore not subordinate to the High Court within the meaning of **Section 65** of the retired Constitution and did not fall within the category of court's defined under **Section 123 (1)** of the said Constitution. The High Court did not have jurisdiction to go into the merits and demerits of an award by the Industrial Court which has jurisdiction to hear and determine labour disputes according to the law and to apply international conventions as far as they are applicable.

[10] The union also opposed the application stating that when the receiver managers declared a total of 194 employees of the company redundant, they stepped into the shoes of the employer; they were duty bound to pay the employees their lawful terminal dues in accordance with the provisions of **Section 80** of the Constitution, the Trade Dispute Act and the Employment Act. The said payments were also to be made in accordance with the collective bargaining agreement signed between the employees and the company on 4th December, 1998.

[11] This judicial review application was heard by three judges, (Wendo, Dulu & Sitati, JJ) and they framed 6 questions for determination, to wit:-

1. Is the Industrial Court Subordinate to the High Court?

2. What is the effect of the ouster clause set out in **Section 17** of the Act?

3. Was the award made in excess of jurisdiction?

4. Have the rules of natural justice been breached in relation to the applicants?

5. Are the applicants entitled to the orders of *certiorari* and prohibition?

6. Who should bear the costs of this application?

[12] Upon examining the above issues in the order stated above, the learned judges held that the Industrial Court was subordinate to the High Court and was therefore subject to supervisory jurisdiction of the High Court by way of judicial review. As regards the second issue, the effect of the ouster clause set out in

Section 17 of the Trade Dispute Act, the judges held that it did not preclude the High Court from exercising judicial review jurisdiction on decisions of the Industrial Court in cases where there are allegations of illegalities, irrationalities, or excess of jurisdiction or where the award was made in excess of jurisdiction.

[13] The judges went on to state that the award made by the Industrial Court although in excess of 12 months monetary wages was not *ultra vires* or in excess of jurisdiction. On the issue of whether the appellants were condemned unheard, the judges were of the view that the receiver manager's point of view was put across to the Industrial Court in the multiplicity of actions that were filed in court and the very comprehensive arguments that were presented before the learned trial Judge and the members. Whether the award was in accordance with the law especially the provisions of **Section 15 (1)** of the Trade Dispute Act, the judges found there was consensus and justification in the circumstances of the matter to declare the employees redundant. The issue that was before the Industrial Court was the monies payable to the employees on redundancy, therefore, it was not a matter for judicial review but a matter to be pursued as per the procedure provided under **Section 16 (4)** of the Trade Dispute Act.

[14] Regarding the final award that covered 184 former employees of the company instead of the initial 74 grievants, the judges found no justification regarding this allegation as there was no evidence that the additional 184 employees were not former employees of the company or that they were ghost workers. The last issue on whether the Industrial Court exceeded jurisdiction by ordering the receiver managers personally liable for the payment of the award, the judges cited the provisions of **Section 348** of the Companies Act, and held that by declaring the employees redundant, the receiver managers became personally liable for the payments of the redundancy dues and they had the opportunity to revert to the debenture holders or the company for the payment of the award made on their behalf. The judges therefore held the Industrial Court did not act contrary to law or in excess of jurisdiction.

[15] In conclusion, the Court found the appellants were not denied an opportunity to be heard, and held that the rules of natural justice were not breached and the application seeking orders of *certiorari* and prohibition were dismissed as the appellants were found to have come to the High Court prematurely before exhausting the procedures set out under the Trade Dispute Act. This is the decision that has now provoked the instant appeal where the appellants have raised the following grounds of appeal:-

a. The Judges erred in law by supporting the Industrial Court Award that held that the applicants were personally liable to pay all the statutory dues, redundancy and other terminal dues within 60 days of the award.

b. The judges erred in law by failing to consider that the applicants were no longer receivers and managers by the time the Award had been delivered 8 months later.

c. The judges erred in law by failing to find and hold that the rules of natural justice were flouted by the Industrial Court which did not follow the due process of the law and condemned the applicants unheard when they had not been sued personally in the dispute.

d. The judges erred in law by failing to hold that the applicants in their personal capacity were not employers as defined in the repealed Trade Disputes Act Chapter 234 of the Laws of Kenya.

e. The Judges erred in law when they ignored the company law principles set out in **Section 95** of the Companies Act, the requirements of the Trade Disputes Act, the common law and the binding precedent set by the Court of Appeal in the case of **Lochab Brothers vs. Kenya Furfural Co. Ltd** [1983] KLR 257 that provide that no property is vested in a receiver and manager personally.

f. The judges erred by infringing on the applicants' constitutional rights to a fair trial, right to own property and personal liberty by making them personally liable to pay the former employees of House of Manji (in receivership) from their own resources when no property was vested in them personally.

g. The judges erred by holding that the applicants as receivers and managers should have applied to be enjoined in the proceedings before the Industrial Court when in actual fact they were agents of House of Manji (in receivership) and had no legal duty to apply to be enjoined when they had not been sued personally.

h. The judges erred in law by failing to hold that the applicants were found personally liable when the issue of liability was never an issue for determination.

[16] Mr. Ogunde, learned counsel for the appellants expounded on the above grounds and urged us to determine the extent to which a receiver manager of the company can be ordered to assume personal liability to pay the debts of a company which are not provided for under the Company Act. The Law as provided in the Company's Act and from case law is that receiver managers only assume personal liability in respect of contracts they enter into. The case of **Lochab Brothers vs. Kenya Furfural Co. Ltd** was cited to reinforce the above argument. That notwithstanding, counsel for the appellants submitted the judges misapprehended the law the by holding that the Industrial Court did not exceed its jurisdiction by holding the receiver managers personally liable for employees who had entered into a collective bargain and agreement with the company. Under the Company Law, a priority ranking of payments among creditors of a company under receivership is well established and the question we are asked to determine is whether the Industrial Court upset the prescribed ranking of the creditors and set up a new criteria. By referring to the provisions of **Section 348 (2)** of the Companies Act, the judges of the High Court collectively recognized there were set guidelines or the priority that is well established.

[17] Counsel for the appellants further submitted that it was common ground throughout the period of receivership that the receiver managers were not assuming personal liability, but they were acting as agents of the debenture holder. Holding them personally liable to pay the award was a great error of law which was amenable for review by the High Court. There is no provision whatsoever in the Companies Act for receiver manager to settle the remuneration of employees in priority of secured creditors. The letter issued by the receiver managers to employees excluded the receivers from personal liability and indicated they were acting as agents of the company. The assets of the company, that is, The House of Manji, were disposed off according to debenture. The proceeds of sales were disposed off according to criteria set out by the law. This is the criterion that was disregarded by the Industrial Court and by High Court. The Companies Act expressly provided for certain circumstances of what should be paid such as taxes, employees' salaries for four months and the Industrial Court exceeded their jurisdiction by ordering payments for redundancy beyond what is provided in the law. This excess of jurisdiction was obvious as there is no property that vested in the receiver managers, nor were they held culpable of any offence for them to be held liable to settle from their own resources such a huge award.

[18] Counsel for the appellant also relied on a list of authorities, citing following cases;-

Top Time Enterprises Ltd vs. Pvr Rao [2014] eKLR, **Michael Oyugi and 181 others vs. Industrial Plant East Africa** [2006] eKRL, **Lochab Brothers vs Kenya Furfural Co. Ltd** [1983] e KLR **Halsbury's Laws of England** Volume 39 para. 805 page 406, **Gavin Lightman & Gabriel Moss (Sweet & Maxwell)** The Law of Receivers of Companies [1986] page 201-207, and; **Nairobi City Council vs. Thabiti Enterprises Limited** [1997] eKLR. We have perused these authorities and the principles ensuing from them.

[19] This appeal was opposed by Mr. Kaumbo, learned counsel for the 1st respondent. He submitted that the appeal lacks merits on the grounds that the appellants were properly heard according to rules of natural justice; the records show the appellants filed their response to the claim which was substantively heard; the issues were interrogated and the reasons were given by the Industrial Court. The appellants were properly ordered to personally pay the award and the reasons for holding them liable were properly

articulated in the award by the Industrial Court. This is because the receiver managers found the employees in the office; they continued to use the services of the employees to run the business of the company which was a ratification of a continued contract of employment; the letter issued by the receiver manager was one sided; there was no evidence the employees accepted it; thus the employees' contract was there and the receiver managers had a duty to honour the employment contract by paying the employees before the debenture holders who were secured creditors.

[20] Commenting on the provisions of **Section 348** of the Companies Act, counsel termed it as a proviso which does not exclude the payments of salaries of employees by the receiver managers. Also priority is given to creditors or company's' employment contracts as statutorily recognized; once there is a failure to pay remuneration, it becomes a statutory due or debt which is run to priority to other creditors. Counsel for the 1st respondent urged us to dismiss the appeal for lacking merit.

[21] Mrs. Guselwa, learned counsel for the 2nd respondent opposed the appeal; she associated herself with the arguments of the 1st respondent but went on to add that from 7th November, 2001 when appellants were appointed as receiver managers, they continued to use the services of the employees until 1st August 2006 when the company was wound up; that was a period of 5 years. Within that period, the receiver managers were trading using the services of the employees to generate income for the company. By the time they were gazetted as having ceased to be receiver managers, they had used the services of the employees for 5 years.

[22] Counsel also drew our attention to a letter written by the receiver managers on 7th November, 2001 confirming that the employees would continue to be employed by the company under the same terms and conditions prevailing there before. On 20th November, 2001 the receiver managers also gave a similar letter to the Union as they continued to manage the company until when they declared the employees redundant. It is for that reason the Industrial Court found that there was justification to pay the employees all redundancy and terminal dues. All along the receiver managers did not inform the court that they had ceased to be receivers. They also agreed the employees were entitled to redundancy benefits. The only issue was whether they were to be ranked as secured creditors. These issues were let for determination by the Industrial Court; thus the appellants cannot turn around to claim they were not given a fair hearing. Counsel thus urged us to dismiss the appeal.

[23] In a brief rejoinder, Mr. Ogunde for the appellants maintained that although the receiver managers assumed responsibility of existing contract, it did not extend to their personal liability. He also pointed out the employees were declared redundant in December, 2001 which was only after four months. However, the award was for payments of dues beyond four months which went beyond the preferential payments that is provided under the Companies Act.

[24] This appeal is essentially against the decision of the judges of the High Court where they declined to grant orders of *certiorari* to quash the decision of the Industrial Court where the appellants were ordered to bear personal liability and settle an award in respect of redundancy benefits of the former employees of the **House of Manji** (under receivership). Judicial Review orders are concerned with the process of decision making as opposed to the merit of the decision. In other words, this is not an appeal against the orders of payment of redundancy dues, the appellants only challenged the excess of jurisdiction by the Industrial Court which (according to them) exceeded the mandate of the court by ordering receiver managers to bear personal liability and settle the award. It is for this reason that they sought for an order of *certiorari* which can issue to quash a decision made without or in excess of jurisdiction, or where the Rules of Natural justice are not complied with.

[25] The award being challenged in the instant appeal was made by the Industrial Court which under the applicable law, then fell under the categories of subordinate courts or Tribunals that gave the High Court supervisory jurisdiction. The position of Labour Laws in this country have changed drastically with the promulgation of the Constitution of Kenya 2010 which created the Industrial Court, now known as Employment and Labour Relations Court which is a court of equal status as the High Court. The judges of the High Court examined this issue at length, and reviewed several provisions of the retired Constitution,

the Trade Dispute Act and decided cases and arrived at the conclusion that the provisions of **Section 17 (2)** of the repealed Disputes Act did not *"preclude the High Court from exercising Judicial Review Jurisdiction on decisions of Industrial Court, where those decisions are illegal or made in excess of Jurisdiction."*

[26] This was a labour dispute over the payments of redundancy benefits of the several employees of the company which was placed under receivership on 7th November, 2001. We are not at all called upon to determine the merits of how the award was arrived at, the only issue for our determination as we understand it from the pleadings, the record of appeal, and the submissions made before us is whether by holding the appellants personally liable to settle the award, the High Court erred. It is abundantly clear that the appellants were appointed receiver managers pursuant to the deed of appointment of 7th November 2001 and in accordance with the supplemental debenture which provided that receiver managers shall be agents of the company. The receiver managers indicated in all the communication they wrote to the employees and to the Union that they were acting solely as agents of the company and put a rider in the communication that they accepted no personal liability for the employment contracts. In the letter of 7th November 2001, it was indicated as follows;

> "**Please note that by retaining you in employment under the same terms, I am not adopting your contract of employment which remains with the company. I am acting solely as an agent of the company and accept no personal liability in respect of your employment."**

This position was further elucidated to the employees in a subsequent letter date 7th December 2001, in which the receiver managers indicated in the penultimate paragraph as follows:

> **"The receivers act as agent of the company. Your contracts continue with the Company. The receivers have not and will not adopt your contracts personally. The receivers accept no personal liability."**

[27] The receivers went on to discharge their mandate, and sold the assets of the company realizing a mere 25% of the debts owned which they paid according to the provisions of the Company's Act which gives guidelines on the priority of payments. Unfortunately, wages or salaries of employees are ranked after the secured creditors, payment of government taxes and what is secured as employees remuneration is a paltry sum only limited to Ksh. 4,000/=. The learned Judge and members of the Industrial Court decried the unfortunate situation of the Kenyan Company Law that seems to contradict the labour laws that clearly secured the payment of at least equivalent of 4 months' salary in the event of retrenchment of an employee from service. This is what they posited in a pertinent part of the award;-

> **"This court once again expresses concern that the state of the law with "regards to the rights of employees and employer, especially in this economically uncertain time, is totally unsatisfactory. The law must be clear, have certainty for parties to apply its provisions and be in consonance with the constitution and laws made thereunder whose essential spirit is the upholding of human dignity through rights and obligations that are fair and equitable for all who fall under its ambit."**

[28] By those statements, the court admitted there was a problem with the Company's Act that ranked the settlement of debts owed to the bank above those owned to the employees. In our view, holding the receivers personally liable for following the provisions of the company law was in excess of the court's jurisdiction. We say so because the dispute that was before the court was a determination of the payment of the employees' dues after they were declared redundant. The claim or dispute was not a direct determination of whether the claim should be paid by the receivers personally. If that was the case, they would have prepared themselves adequately. That explains why the receiver managers urged the ground that they were not given a hearing; the hearing was within the context of receivers having to bear personal liability. All through the proceedings, there is no indication that personal liability of the receivers was an issue for determination. Even the award shows the court identified the following as the issue for determination;-

> **"The claimant is seeking the appropriate interpretation from the honourable court on the application of the Companies Act, the receiver managers position *vis – a vis* the existing CBA and the redundancy clause in the CBA."**

[29] There was no interrogation of issues of whether the appellants were negligent in the performance of their mandate or misappropriated the assets of the company for their own benefits. Unless those issues were interrogated and answered in the affirmative by the court, then the court could not order the receivers to bear personal liability to discharge contracts emanating from the collective bargaining agreement that was entered into with the company. The appointing instrument and the provisions of the Company's Act are clear the receiver managers can only be held personally liable for the contracts they entered into. The receiver managers were entitled to a hearing regarding the issue of personal liability. A right to a hearing is a fundamental one and as this Court stated in the case of;- ***Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 others***, *Nyeri C.A. No. 18 of 2013;-*

> **"The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law."**

See also a persuasive authority by Court of Appeal of Tanzania in the case of; ***Ismail and Another v Njati,*** ***EALR 2008 EA 2EA 155***, in which Munuo, Kileo, Iuonda, JJ.A. Held:-

> **"In line with the *audi alteram partem* rule of natural justice, the court is required to adjudicate over a matter by according the parties a full hearing before deciding the matter in dispute or issue on merit. The omission to give the parties a hearing on the issue of jurisdiction occasioned miscarriage of justice…."**

[30] In our view, the excess of jurisdiction in the circumstances of this matter related only to the order that the receivers bore personal liability to settle the award as per the collective bargaining agreement that was entered into with the company. Secondly, by the court failing to hear the receivers on the issue of whether they could bear personal liability which issue was not part of the claim, the court acted in excess of its jurisdiction by considering extraneous matters. This was a dispute against The House of Manji, a company under receivership, and the receivers were acting as agents, thus any award is supposed to be settled by the company or by the receivers on behalf of the company from the assets of the company. Personal liability can only be ordered if the receivers are found culpable of fraud or negligence in the discharge of their duties or for particular contracts that they entered into.

[31] For the aforesaid reasons, we find merit in this appeal. We allow the appeal and set aside the orders of the High Court dismissing the appellants Notice of Motion dated 19th July 2007 to an extent that an order of *certiorari* do issue quashing the orders made in the Industrial Court on 30th April 2007, the portion stating the appellants do bear personal liability in settling the award. Due to the circumstances of this matter that involves employees who are pursuing their employment rights, we order each party to bear their own costs of this litigation.

Dated and delivered at Nairobi this 29th day of July, 2016.

M.K. KOOME

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR