REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION 22 OF 2012

THE WRIGLEY COMPANY (EAST AFRICA) LIMITED.……..……..……
PETITIONER

VERSUS

THE HONOURABLE THE ATTORNEY GENERAL…….……....…**1ST RESPONDENT**

THE INDUSTRIAL COURT OF KENYA…….…….... **2ND RESPONDENT**

THE BAKERY, CONFECTIONARY

MANUFACTURING AND ALLIED WORKERS UNION……....…..…...…**3RD RESPONDENT**

SHEER LOGIC MANAGEMENT CONSULTANTS LTD…….……..**INTERESTED PARTY**

JUDGMENT

1. When this matter appeared before the 3 judge bench constituted by the Chief Justice on 10th December 2012, objection was taken to the sitting of one of the judges in the panel. The file was sent to the Chief Justice to reconstitute the bench afresh and the Chief Justice reconstituted the bench to the present one where the Principal Judge Mathews Nderi Nduma is sitting with Lady Justice Linnet Ndolo and Justice Nzioki wa Makau. When the Petition took off, the appearances were as follows, Mr. Obura appeared for the Petitioner, Dr. Khaminwa appeared for the 3rd Respondent, Mr. Ojwang State Counsel appeared for the 1st and 2nd Respondent while Mr. Kibanya appeared for the Interested Party.

2. On 4th April 2013 after a series of preliminaries and directions taken, the matter finally took off. Dr. Khaminwa pointed out that he and Mr. Ojwang had been served late with a voluminous list and bundle of authorities by the Petitioner. He proposed that the Petitioner starts and the Respondents would seek an adjournment to enable them prepare for the response. This was acceded to by the counsels for the Petitioner, Interested Party, and the 1st and 2nd Respondents as well as the Court.

3. Mr. Obura commenced his submissions by stating that there was a breach or intended breach of the Petitioner's rights under the Constitution. He sought to invoke the supervisory powers of the High Court and Industrial Court as newly constituted. He submitted that the Court has the jurisdiction to quash the proceedings of the former Industrial Court which was constituted as a

Tribunal first under Trade Disputes Act and later under the Labour Institutions Act. By way of introduction, he stated that the Petitioner operates a factory at Industrial Area and at the material time it had 2 kinds of workers – workers directly employed by Petitioner under contracts of employment and then workers employed by the Interested Party to work within the Petitioner's premises under a commercial contract which the Interested Party had with Petitioner. The workers employed by the Petitioner were governed by a Recognition Agreement and a Collective Bargaining Agreement negotiated between the Petitioner and the 3rd Respondent Union. In 2007 the 3rd Respondent went to the Industrial Court as then constituted and claimed under Cause No. 76 of 2008 that the Petitioner had violated the Recognition Agreement it had with the 3rd Respondent in relation to employees employed by the Interested Party. The matter was heard by the Industrial Court (Rika J.) and an award given. Mr. Obura addressed the Court on the issue of jurisdiction and submitted that the Industrial Court was established by S.12 of the Labour Relations Act at the material time. He submitted that the Industrial Court being a creature of statute was amenable to supervision of the High Court as a creature of the Constitution. Industrial Court proceedings could be declared quashed or altered by the High Court. The Industrial Court Tribunal was a creature whose decisions were appealed at the High Court and some went to the Court of Appeal. This was reiterated in the case of **Mecol Ltd v. Attorney General & 7 Others [2006] eKLR** and the case of **United States International University v. Attorney General [2012] eKLR** and the case of **Telkom Kenya Limited v. Industrial Court & Anor [2012] eKLR**. It was held in all these cases that the Industrial Court at the time was amenable to supervision by the High Court. It was submitted that this Court has status as the High Court and jurisdiction to entertain this dispute. For this proposition he relied on the case of **Samuel G. Momanyi v. Attorney General & Anor. [2012] eKLR**. The Petitioner submitted that the Court has jurisdiction to hear the matters of breach of the Petitioners rights. The Industrial Cause was filed on 10th December 2008 and the award was on 6th December 2010 after promulgation of the Constitution on 27th August 2010. Mr. Obura submitted that Article 159(2) requires that justice be done to all irrespective of status and that under Article 162(2) Parliament has power to create a Court of the same status as the High Court. He posed a question to the effect that if the Industrial Court was not previously amenable to supervisory power of the High Court why was Article 162(2) put there? He submitted that the superior courts have supervisory role over inferior courts and have authority to correct the situation. When injustice is occasioned in the proceedings of a tribunal so as to invite the intervention of the superior court it would be permitted to intervene. Legislatively, at the time of the dispute, the power of intervention was under S.65 of the Repealed Constitution S. 65(2) gave the supervisory powers. He submitted that this power is replicated in Article 159(2) and 165(3) of the Constitution of Kenya. If injustice is occasioned, recourse is to Article 23 which gives the Court power under Article 23(3)(f) to review lower court decisions through Judicial Review and also under Article 165(6) and 165(7). He relied on the cases of **Anisminic v. Foreign Compensation Commission and Another [1969] AC 147** and **Ngurangwa & Others v. Registrar of Industrial Court [1992] 2 EA 245** to explain what is unfair proceedings. He submitted that the learned Judge misapprehended the case. He stated that the dispute before the Judge covered and was in relation to 2 Agreements and the employees represented by the 3rd Respondent had a Collective Agreement while the rest were not in the employ of the Petitioner. He submitted that it was also alleged that the preamble to CBA had been violated. The Preamble states clearly that it was to regulate the wages and general working conditions within the company and it applied to all unionisable employees.

4. The agreement expired on 31st December 2002 and at the time of filing suit there had been no proposal on the same and as at 2008 there was no CBA in force. A new CBA was only entered into in 2011 and as such the report of a dispute alleging violation was misplaced and the report was null and void. Mr. Obura submitted that the Court also misdirected itself in interpreting the case before it as the Claimants were not employees of the Petitioner and employment agency was not applicable. He submitted that there was an agency relationship as defined under the Labour Institutions Act. He submitted that the definition of employment agency is restricted to a person and it does not cover a person who partners with another. He submitted further that the Judge erred in calling the third party an exploiter and that the Judge miscomprehended the employment

of the law as far as the issue of agency went. He stated that the Court determined there were "administrative" restrictions and purported to quash the interested party and petitioner's agreements. He submitted that in words of the Tanzanian case of **Ngurangwa** (*supra*) there was excess jurisdiction and that there was clear error of interpretation on the face of the decision. He submitted that the relationship between the Petitioner and Third Party was commercial in nature and that there can be no employment between a company and another company. He submitted that there can only be employment of an individual by another or between a company and an individual.

5. He relied on the case of **Rashid Odhiambo Allogoh & 245 Others v. Haco Industries Limited [2007] eKLR** and submitted that the contracts entered into were entered into voluntarily and there was no coercion so as to vitiate the contracts. He stated that on this basis the Judge's award was misplaced. The thrust of the Respondent is based on Namibian case **Africa Personnel Service v. Government of Namibia** in the 3rd Respondent's submissions. In Namibia there is a legislation which prohibited outsourcing of labour. In that case, the Petitioner appealed to Supreme Court of Namibia and the Supreme Court of Namibia quashed the provision and overturned the decision.

6. To illustrate the point he was making, Mr. Obura stated that there are currently call centres in existence as services are outsourced and Courts cannot interfere with that. He submitted that the Court has upheld the practice of outsourcing. Contracts were not contracts of service but contracts *sui generis* since the workmen had agreed with Respondents to render services to third persons. Article 50 of Constitution and S.77(9) of the Repealed Constitution provided determination was to be before an independent tribunal.

    (1) Petitioner submitted that the Industrial Court did not give the Petitioner a fair hearing because it considered employees who were not employees of Petitioner as employees. It imposed a contract on the Petitioner.

    (2) The Industrial Court did not establish if the 3rd Respondent had *locus* to represent employees of the sub-contracted interested party.

    (3) The Industrial Court did not establish if there was had a recognition agreement between the Interested Party and the union.

7. The basis of the 3rd Respondent coming to Court was against the Petitioner on account of employment of the employees of the Petitioner. The basis of representation was that there was a check off list in respect of the employees produced to the Court. All the check-off lists are dated 31st August 2009. He submitted that the check-off lists came on record through the supplementary memorandum which the Court allowed the 3rd Respondent to file. He submitted that the Industrial Court allowed the 3rd Respondent to panel beat its case. Mr. Obura submitted that the Petitioner had no opportunity to challenge the evidence. He submitted that the Court should have synthesized the evidence and established the documents were not in place when the case was being decided. He submitted that a dispute between the Petitioner and 3rd Respondent was extended to cover employees who were not employed by the 3rd Respondent. He submitted there are no indications they gave instructions to 3rd Respondent to represent them. He submitted there was unfair trial as reliefs were given against the Petitioner vis-à-vis the employees yet there was no involvement of the Interested Party who was only summoned as a witness. He submitted that under the Labour Institutions Act, the Interested Party could have declined to appear. He further submitted that the Judge brought in extraneous issues.

8. He submitted that the order to pay salary to the 110 employees was contrary to Article 140 and definition of property. The Petitioner was deprived of opportunity to safeguard its property and the order also violated the Petitioner's freedom of association. He submitted that the Petitioner was denied a fundamental right.

9. Dr. Khaminwa opposed the Petition and submitted with due respect that Mr. Obura had gone into extraneous matters. He submitted that the Award of Rika J. on 6th December 2010 summed up clearly the issues before Court. He submitted that a CBA had been breached and a CBA is a cornerstone of contractual relationship between company and the union, CBAs are registered and it is imperative that they be adhered to. He submitted that the source or strength of recognition agreement is to be found in the Constitution under Section 80 of former Constitution and currently in Article 41 and as such the contractual relationship has a constitutional backing in the Constitution. The CBA in contention is the one exhibited on Replying Affidavit of George Muchai which made provision for its continuity.

10. Dr. Khaminwa submitted that the CBA applies to all unionisable employees covered by the CBA and as provided for by current industrial relations. He submitted it is a binding arrangement, a binding contract between employer and the unions on how to control the product of labour within the company. He submitted that things done outside this agreement are *ultra vires* and in breach of the agreement of parties. He submitted that the company can only employ on terms agreed upon in CBA and on the Recognition Agreement.

11. He submitted that the 2nd Respondent moved the Court because CBA and Recognition Agreement had been breached and this was the issue before Justice Rika. He submitted that if the company wanted to go elsewhere they should have invoked clause 4 of the CBA. He submitted that there was no amendment to the CBA at all and the engagement of employees outside the agreement was a breach of the CBA, and was in breach of the Recognition Agreement. He submitted that the learned Judge directed himself properly since there was no modification of CBA or Recognition Agreement and the provisions of clause 4 of the CBA were not amended. He submitted that the cornerstone of peaceful industrial relations is instruments such as CBA. If parties disregard this there would be industrial unrest, anarchy and chaos and as such CBA's ensure internal harmony. He submitted that the employees who were hired by Interested Party were hired on inferior terms. He submitted that the Judge ordered all former employees to be converted into permanent employees because Sheer Logic were not party to the CBA, or the Recognition Agreement. Dr. Khaminwa submitted that this is not a matter to do with freedom of contract nor were parties dealing with issue of agencies but dealt with the 3rd Respondent and the Petitioner only. The 124 employees represented by Dr. Khaminwa in the case precipitating this Petition were beneficiaries of the award and they had been contracted by the Interested Party and sent to the Petitioner herein. He submitted they were to receive remuneration as if they were permanent employees of the company and the company was supposed to cancel the contracts with Interested Party. He submitted that in spite of religiously reporting at the Petitioner's premises they have never received the benefits of the award of Justice Rika. They remain locked out to this day. Dr. Khaminwa submitted that no Constitutional provision has been breached or violated at all. He submitted that during pendency of the order of the High Court Petitioner terminated its employment contract with 1st Interested Party in breach of specific orders of the Industrial Court. He submitted that Wrigley could easily have gone to the Industrial Court for review if they felt aggrieved; instead, they went to the Constitutional Court. He submitted that there was nothing constitutional at stake in this matter. He submitted that Article 41(5) of the Constitution recognizes the right of any trade union or employers' organization to collective bargaining was safeguarded. He submitted that these provisions are on account of International Labour Conventions ratified by this country. He urged the Court to remove the stay orders of the High Court, confirm the award of Rika J. and order Wrigley to comply with the order and allow the 124 employees take benefit of the award of Justice Rika by dismissing the Petition and granting costs on a high scale.

12. Mr. Ojwang submitted on behalf of the 1st and 2nd Respondents. He relied on the grounds of objection filed on 15th June 2012 as well as the submissions filed. He associated himself with the submissions of Dr. Khaminwa and urged the Court to be guided by Article 41 of the Constitution. He submitted that what was before us was whether the Industrial Court at the time had jurisdiction to give the relief it gave the employees. He submitted that it had jurisdiction at the material time under Section 12(1) of the Labour Institutions Act 2007, Act No. 12 of 2007. That section is now

repealed. He submitted that if the Petitioner was aggrieved it should have filed a review before the Industrial Court or filed an appeal before the Court of Appeal per section 27. For this he relied on the case of **Rashid Odhiambo Allogoh & 245 Others v. Haco Industries Limited Civil Appeal No. 110 of 2001** where the Court of Appeal held that if a party makes allegations that its rights have been breached it has to show what rights have been infringed and how they have been infringed. He submitted that the Petitioner merely states its rights were infringed but not exactly what rights were infringed. He urged the Court to uphold the decision of Rika J and dismiss the Petition.

13. Mr. Kibanya for the Interested Party submitted that the Interested Party wished to associate itself wholly and completely with the Petitioner's submissions and pleadings and also relied on its submissions. He stated that there is no dispute that the Interested Party was not a party to Cause 76 of 2008 but the Director of the Interested Party was summoned to that Court. He submitted that at the time, Section 55(2) of the Labour Institutions Act outlawed the carrying out the business of employment agencies in Kenya and the Interested Party filed a Petition to challenge that section. The Interested Party also sought stay orders barring the Interested Party and its Director being summoned in Cause 76 of 2008. The High Court excused the Director from appearing as a witness in the case and ultimately an Award was issued in Cause 76 of 2008 which affected the contractual interest of the Interested Party. He submitted that the Interested Party pursued the issue of the agency under the Labour Institutions Act with the Office of the Attorney General and subsequently the Miscellaneous Amendment Act 2012 was published amending Section 55(2) of the Labour Institutions Act 2007. He submitted that the Court in cause 76 of 2008 received evidence on the business or conduct of the Interested Party and the Interested Party was stated to be an illegal entity in the Award, packaging and selling labour. Mr. Kibanya submitted that it was said that the activities of the Interested Party amounted to introduction of servitude and slavery in the Kenya economy and that the Interested Party had no legal validity and practiced unfair labour practices. He submitted that as a result of that evidence, the Court made adverse conclusions regarding the interests of the Interested Party and that is why the Interested Party sought leave of Court to be joined in these proceedings. He submitted the issues that arise are whether this Court has Jurisdiction to hear the Petition. He submitted that the 1st Respondent held that the High Court had no jurisdiction. He submitted that at the time when the 2nd Respondent was delivering the award on 6th December 2010, the status of the Industrial Court at that time was not equivalent to the High Court but that of an inferior tribunal. Section 65(1) of the former Constitution was clear - Parliament could only enact laws to establish courts subordinate to the High Court. He submitted that when Parliament enacted the Labour Relations Act, and sought to have decisions of the Industrial Court have the same effect as decisions of the High Court and that the appeals be to the Court of Appeal, Sections 12(b) and 27 of the Act were *ultra vires* the Constitution as Parliament had no power to do so. He submitted that Section 3 of the former Constitution was clear - Anything done which was inconsistent to that Constitution was null and void. He submitted that pursuant to the promulgation of the Constitution of Kenya 2010, Article 162(2)(a) established the Industrial Court a Court of the same status as the High Court to deal with issues of Labour and Employment.

14. Mr. Kibanya submitted that the Industrial Court was constituted by the Industrial Court Act 2011 and the constitutionality of the Court is not in question. At the time proceedings were filed in the High Court the Court had jurisdiction and when the Industrial Court was constituted the matter was properly moved to this Court. The former Court was an inferior tribunal but this Court as presently constituted is the Court of the same status as the High Court.

15. He submitted that the Award issued on cause 76 of 2008 made adverse conclusions of fact and made orders which adversely affected the Interested Party in that when the 2nd Respondent (the Court) varied contracts and proceeded to try and amend or vary contracts of employment, the 2nd Respondent's conduct violated the Interested Party's constitutional rights to be heard and the Court should not have made any orders or in the alternative should have accorded the Interested Party an opportunity to be heard. He submitted that the Interested Party never sought to be joined

and became aware of the matter when the Director was summoned to appear to explain why the Interested Party was conducting the business of an employment agency. He submitted that the 3rd Respondent should have applied Article 50 of the Constitution and section 75 of the former Constitution. He submitted that the concerned employees were employees of the Interested Party and not employees of the Petitioner and there is no evidence their rights to contract were vitiated.

16. He submitted that there was no recognition between those employees and the Interested Party, there was no CBA between the 3rd Respondent and the Interested Party and it has not been demonstrated that the employees were union members. He posed a question - Did 3rd Respondent have *locus* to challenge the contracts of the Interested Party and its employees? He submitted that the first contract is the contract of service between the employees and the Interested Party and the other contract is the one between the Petitioner and the Interested Party. He submitted that it was a contract for provision of services and NOT a contract of service and that is what he believed the 3rd Respondent sought to challenge. He submitted that was a contract of provision of services and the concerned were employees of the Interested Party and they were not hired out to the Petitioner but were at all times employees of the Interested Party. He submitted that these are outsourced labour contracts and gave the example of contracts for cleaning.

17. He submitted that in this case, they were working at the premises of the Petitioner full time under instructions of the Interested Party as employees of the Interested Party on a fixed term contract for 1 year. He submitted that they were like employees under the cleaning services where employees clean premises and are instructed on where to clean and what to do but are still the employees of the cleaning company. He submitted that the Interested Party was constituted as an independent contractor.

18. Mr. Kibanya submitted that the 2nd Respondent became a creator of policy instead of leaving the issue to Parliament and that it amounted to judicial activism. He submitted that in the contract, which was a commercial contract, the 3rd Respondent was not privy to the same and therefore could not challenge the same. He thus submitted that the 2nd Respondent while executing its mandate with the law did not have the jurisdiction to interfere with the contract between the Interested Party and the Petitioner and thus violated the Petitioner's constitutional rights.

19. He submitted that the Constitutional right to property was also abridged. He submitted that under Section 75 of the former Constitution and Article 40 of Constitution these rights are enshrined. He stated that Article 260 defines property to include money. He submitted that the 2nd Respondent's action violated the Interested Party's right to property – money. He submitted that the other right infringed was the right to provide services as the Interested Party has a constitutional right to provide services to the public and the Petitioner. He submitted that the Award seriously adversely affected the reputation of the Interested Party and portrayed the Interested Party as rogue and an illegal creature and if that information gets to other customers of the Interested Party it will have adverse effect on the Interested Party's business.

20. He submitted that there is nothing in the law that prohibits what is commonly known as contracts of outsourcing labour and no provision of the Constitution, labour laws or Act has been cited which prohibits that kind of activity. He submitted that the Award in Cause 76 of 2008 attempted to compare the provision of services of the Interested Party as the equivalent of hiring out. Reference was made to Namibian law and the case of **Africa Personnel Services (PTY) Ltd v. Government of the Republic of Namibia & 3 Others No. SA51/2008**. The laws in Kenya do not have a similar provision as that of S.128 of the Namibian law. The Interested Party was not hiring out the employees. He submitted that the decision of the Namibian Industrial Court was overturned by the Namibian Appeal Court and thus, he submitted, it was not proper for the Industrial Court to rely on the decision which was overturned. He submitted the fact that there was no complaint by the 3rd Respondent's employees, the Court had no right to interfere with employment of the Interested Party employees. He submitted and urged the Court to allow the Petition and grant the orders prayed for therein.

21. Mr. Obura in a reprise stated that the case of **Rashid Aloggah** *(supra)* answers the question whether the Petitioner should have appealed or reviewed. He submitted that a Court can only interpret an existing legislation not a non-existent law. He submitted that on Recommendation of ILO Convention No. 198 of 2006, a contract cannot be taken from one party and imposed on another party. He submitted that the judgment was a judgment *in rem* and cannot be enforced. He submitted that the beneficiaries of the judgment are unknown and Article 159(1) and (2) were violated. He submitted that the decision violated the Petitioner's right to fair trial and violated the rights of the Interested Party by deciding a matter between the Petitioner and parties unknown. He submitted that the Court should make a judicial review of the decision.

22. It is not in dispute that a dispute arose between the Petitioner and the 3rd Respondent leading to proceedings before Justice Rika as he sat in the former Industrial Court in Cause No. 76 of 2008 – **Bakery, Confectionery, Food Manufacturing and Allied Workers Union versus The Wrigley Company (E.A) Limited**. It was the decision of the Judge that led to the Petition before the High Court as Petition No. 22 of 2012. As a Tribunal, the industrial Court was an inferior Court as has been held by Judges of this Court and the High Court. As such Court, it was amenable to supervision by the High Court and the Petition was therefore validly before the High Court before transfer to this Court. The Industrial Court was established by the Constitution under Article 162(2) as a Court of equal status to the High Court. The Court was properly constituted by the appointment of 12 Judges on 12th July 2012 and the consequent swearing-in of the judges under Article 165 of the Constitution the next day. The Hon. Justice Rika was appointed as a judge in the Industrial Court after successful interviews conducted by the Judicial Service Commission and sworn in on 13th July 2012 as a Judge of the High Court. That explains why the decision he made was referred to a bench of three judges, not to sit on appeal but to determine the Petition and if a departure from the judge's finding was made, then it would not be inimical to the administration of justice if we held there was either no jurisdiction to make the determination or to review the decision as might be done since the decision was made by Rika J. when he sat as an inferior tribunal.

23. We have read the decision he made and heard the challenge mounted by the Petitioner and the Interested Party on the same. The grouse was in respect of a contract outsourcing labour from the Interested Party by the Petitioner. The Cause which was filed as a result of the dispute was determined in favour of the 3rd Respondent. It was submitted that the Court has the jurisdiction to quash the proceedings of the former Industrial Court which was constituted as a Tribunal first under the Trade Disputes Act and later under the Labour Institutions Act. We agree. In appropriate cases this Court sitting either as a bench of three or as single judges can quash the decision of the previous Industrial Court which was a court subordinate to the High Court. Section 65 of the repealed Constitution of Kenya provided as follows:-

65. (1) 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.

(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.

24. Parliament had in its wisdom set up various tribunals to hear various disputes such as the VAT Appeals Tribunal, the Industrial Court, the Rent Tribunal and so on. The High Court had the jurisdiction to supervise all these Courts. The Constitution of Kenya promulgated on 27th August 2010 provided as follows under Article 162.

162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(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).

(4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

(emphasis ours)

25. The Court before whom Cause 76 of 2008 was heard and determined was a Court established by dint of the provisions of Section 65 of the Constitution and specifically was set up under the legal provisions ensuing from that Section of the former Constitution firstly under the Trade Disputes Act (now repealed) Section 14 and subsequently under Section 12 of the Labour Institutions Act, Act No. 4 of 2007. Section 12 of the Labour Institutions Act was repealed by the Industrial Court Act, Act No. 20 of 2011. The Act established the Court even before the Industrial Court as presently constituted was sworn in. The Court before whom this Petition has now been argued is a Court under Article 162(2)(a). We accordingly have jurisdiction to handle the dispute before us.

26. The primary issues in dispute are the contracts between the Petitioner and the Interested Party which were entered into on 1st May 2008 expiring on 30th April 2009 and the second one entered into on 1st May 2009 and expiring on 30th April 2010 and the one entered into on 1st May 2010 and expiring on 30th April 2013. The contract made provisions on the employment of various employees and apart from one contract which straddled the regime which would have permitted it, all the other contracts ran when the legal regime in place at the time in regard to outsourcing was encapsulated by Section 55(2) of the Labour Institutions Act.

27. On 12th July 2012, The Statute Law (Miscellaneous Amendments) Act 2012 published as Kenya Gazette Supplement No. 72 (Acts No. 12) amended various statutes. Section 55(2) of the Labour Institutions Act, Act No. 12 of 2007 was amended in the following respect:- Insert the words “unless the person is registered under this Act” immediately after the words “No person shall”. The relevant portion of Section 55 of the Labour Institutions Act 2007 previously provided as follows:-

(2) No person shall-

(a) carry out business as an employment agency; or

(b) charge or recover any payment in connection with the procurement of employment through an employment agency.

28. After the amendment, the Section now reads as follows:-

55. (2) No person shall unless the person is registered under this Act

(a) carry out the business as an employment agency; or

(b) charge or recover any payment in connection with the procurement of employment through an employment agency.

By its own admission, the Interested Party was one of the architects of the amendments to the Section. The reason for doing this? Because the law prohibited the Interested Party and by extension the Petitioner from engaging in outsourcing contracts similar to the one which is enumerated above. Plainly put, the two contracting parties had no legal basis for negotiating and entering into the contract which led to the Cause No. 76 of 2008. The Interested Party managed somewhat to hide behind the skirts of the High Court and avoided appearing before the trial Court. It was submitted that the Director had been summoned and the Interested Party felt that it would be prejudiced if it was to participate and sought refuge under the petition it lodged in the High Court barring the Industrial Court from summoning the Director of the Interested Party as a witness. We find that even after becoming aware of the Cause aforesaid, the Interested Party deliberately sought to be shielded against the processes and proceedings ongoing before Rika J. It did not want to be heard. The Interested Party cannot now turn and state that it was prejudiced by the failure to be heard in the Cause which precipitated this Petition.

29. The relationship created between the Petitioner and the Interested Party by the impugned contracts was one of an agent and his superior and inherently imported vicarious liability in any dealings between the parties and third parties. Vicarious liability is a common law doctrine of agency and in Latin is stated as *respondeat superior*. It imposes upon the superior responsibility for the acts of the subordinate or, in a broader and more fitting sense as in this case, the responsibility of any third party which had the right, ability or duty to control the activities of a violator.

30. The decision of the Judge was correct in almost all respects. The only fault we have found with the decision is what amounts to an error on the face of it. Courts ordinarily ought not and should refrain, as far as is possible, to rewrite contracts of employment. In the Petition, sufficient cause and basis had been laid to suggest that there was an error apparent on the face of the record. Though the Petitioner and the Interested Party were engaged in an illegality, the rewriting of the contracts of employment was a fundamental breach on the part of the 2nd Respondent. Relying on the case of **Nairobi City Council v. Thabiti Enterprises Ltd (1995-98) 2 EA 231** we find that that there was no jurisdiction to do what the court had done and as far as we can make out, there is an error apparent on the face of the record in that the court had committed a fundamental breach. The cure for the illegality lay not in rewriting the contracts of employment but holding both parties jointly and severally liable in all respects regarding the contracts of employment. Both stood in the place of the employer albeit one was a putative one. Appropriate relief would have been to order payment of damages allowed in law for the breach of employment contracts of the employees who had been sublet to the Interested Party by the Petitioner.

31. The Petitioner and Interested Party are liable for the sorry mess the members of the 3rd Respondent have found themselves in. The Court granted the former employees of the Petitioner some reprieve but it has been difficult to actualize the relief. Dr. Khaminwa has submitted that they dutifully present themselves at the premises of the Petitioner but are not in the employ of the Petitioner. None of them has stated what else they have been doing in terms of upkeep or seeking alternative employment. The sad reality is that their contracts of employment came to an end in a dramatic fashion as a result of the actions of the Petitioner and the Interested Party. Just when the employees had obtained recognition status the contract was terminated.

32. The International Labour Organisation's Private Employment Agencies Convention, 1997 Convention No. 181 of 1997 provides under Article 1 as follows:-

> *1. For the purpose of this Convention the term private employment agency means any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:*
>
> *(a) services for matching offers of and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;*

(b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person (referred to below as a "user enterprise") which assigns their tasks and supervises the execution of these tasks;

(c) other services relating to job seeking, determined by the competent authority after consulting the most representative employers and workers organizations, such as the provision of information, that do not set out to match specific offers of and applications for employment.

2. For the purpose of this Convention, the term workers includes jobseekers.

3. For the purpose of this Convention, the term processing of personal data of workers means the collection, storage, combination, communication or any other use of information related to an identified or identifiable worker.

33.Article 11 of the same Convention provides:-

A Member shall, in accordance with national law and practice, take the necessary measures to ensure adequate protection for the workers employed by private employment agencies as described in Article 1, paragraph 1(b) above, in relation to:

(a) freedom of association;

(b) collective bargaining;

(c) minimum wages;

(d) working time and other working conditions;

(e) statutory social security benefits;

(f) access to training;

(g) occupational safety and health;

(h) compensation in case of occupational accidents or diseases;

(i) compensation in case of insolvency and protection of workers claims;

(j) maternity protection and benefits, and parental protection and benefits.

34.The Convention further provides under Article 12 that:-

A Member shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the services referred to in paragraph 1(b) of Article 1 and of user enterprises in relation to:

(a) freedom of association;

(b) collective bargaining;

(c) minimum wages;

(d) working time and other working conditions;

(e) statutory social security benefits;

(f) access to training;

(g) occupational safety and health;

(h) compensation in case of occupational accidents or diseases;

(i) compensation in case of insolvency and protection of workers claims;

(j) maternity protection and benefits, and parental protection and benefits.

35. It is obvious that the provisions of the Convention as far as the case before us was concerned were never applied. Article 2(5) of the Constitution of Kenya provides that:-

(5) The general rules of international law shall form part of the law of Kenya.

It is amply clear that the Convention applies to all contracts of employment agency contemplated in Section 55 of the Labour Institutions Act 2007.

36. The fact that the arrangement between the Petitioner and the Interested Party led to the Interested Party having a stake in the contracts entered into with the employees who worked for the Petitioner somewhat negates the provisions of Article 1 of the Convention. The employees were not allowed to enter into collective bargaining and had to seek recourse from the Court only to end up unemployed after the contract between the Petitioner and the Interested Party was terminated. It seems the contracts were calculated to circumvent the Collective Bargaining Agreements entered into between the Petitioner and the 3rd Respondent.

37. We would on our part order that each of the former employees in the Petition before us would have been entitled to compensation if they had quantified their claims. As this was not done we cannot order the payment of compensatory damages to the said employees.

38. To the extent the Court ought not to have forced employment contracts on the Petitioner, the Petition succeeds. Each party will however bear their own costs.

39. Before signing off this judgment we find it necessary to set the parameters for a credible outsourcing program as follows inter alia:

a) Ordinarily, employers are not expected to outsource their core functions;

b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;

c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and

d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.

It is so ordered

Dated and delivered at Nairobi this **31st** day of **July** 2013

Hon. Mr. Justice Mathews Nderi Nduma

Judge

Hon. Lady Justice Linnet Ndolo

Judge

Hon. Mr. Justice Nzioki wa Makau

Judge