



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
PETITION 33 OF 2011

BROOKSIDE DAIRY LTDPETITIONER

AND

THE ATTORNEY GENERAL1ST RESPONDENT

THE INDUSTRIAL COURT OF KENYA2ND RESPONDENT

AND

BAKERY CONFECTIONERY FOOD

MANUFACTURING AND ALLIEDWORKERS UNION (K)INTERESTED PARTY

RULING

Preliminary Objection

1. This ruling is in respect of a preliminary objection raised by Dr. Khaminwa on behalf of the interested party. He asserts that this court, the High Court, has no jurisdiction to hear and determine this matter in light of **Article 162(2)** of the Constitution as the subject of these proceedings is a labour dispute emanating from the Industrial Court.

2. **Article 162** of the Constitution provides as follows;

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.**

Applicant's Submission

3. According to Dr. Khaminwa, the Industrial Court now has exclusive jurisdiction to deal with labour and employment matters including matters of enforcement of fundamental rights and freedoms. He argued that under **Article 21**, a duty is imposed on every organ of state to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. In this respect the Industrial Court, as a State Organ, will deal with matters of fundamental rights and freedoms and any party aggrieved by an order of that court should appeal to the Court of Appeal and not the High Court. He urged me to refer this matter to the Industrial Court for hearing and determination.

Respondent's Submissions

4. Mr. Marete, advocate for the petitioner, opposed the preliminary objection on several grounds. Firstly, he was of the view that the petition before the court raises issues of the enforcement of fundamental rights and freedoms and the High Court has original jurisdiction to deal with the matters under **Article 22** and **258** of the Constitution.

5. Secondly, he argued that since the Industrial Court is a creation of statute, the **Labour Institutions Act, 2007 (Act No. 12 of 2007)** and antecedent legislation, then it is a court subordinate to the High Court and therefore subject to its jurisdiction in so far as matters concerning the enforcement of fundamental rights and freedoms under the Bill of Rights are concerned.

6. As regards the provisions of **Article 162(2)** of the Constitution, Mr. Marete, argued that the court “*with the status of the High Court*” had not been established as contemplated therefore the petition could neither be filed nor heard in that Court. The High Court therefore cannot be divested of its original jurisdiction to enforce fundamental rights and freedoms. He urged me to dismiss the preliminary objection.

Status of the Industrial Court

7. The status of the Industrial Court in relation to the High Court has been somewhat controversial in view of conflicting decisions of the High Court. In the case of **Mecol Limited v the Attorney General and Others Nairobi HC Misc. App. 1784 of 2004 (Unreported)** the High Court declared that the Industrial Court was a subordinate court for the purposes of the exercise of the supervisory jurisdiction of the High Court under **section 65** of the former Constitution. In **Kenya Guards and Allied Workers Union v Security Guards Services and 38 Others Nairobi HC Misc. 1159 of 2003 (Unreported)** the court expressed a contrary view on the basis of legislative policy favouring finality of labour disputes.

8. I take the position that the Industrial Court, as a creature of statute, is a court subordinate to the High Court. Parliament did not have the constitutional authority under the former Constitution to create a court of equivalent status with the High Court.

Court with status of the High Court

9. **Article 162(2)** of the Constitution contemplates the establishment, by the legislature, of a court of the status of the High Court to hear disputes concerning employment and labour relations. Such a court was duly established by legislature by enactment of the **Industrial Court Act (Act No. 20 of 2011)** whose date of commencement was 30th August 2011.

10. Though the Act commenced on 30th August 2011, **section 33** thereof provides;

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

11. Prior to the operationalisation of the Act in accordance with **section 33** and the appointment of judges of that Court in accordance with the Constitution, the High Court still has jurisdiction to deal with all matters concerning the enforcement of fundamental rights and freedoms under the Constitution. The High Court cannot divest itself of this jurisdiction.

12. Further, the matters complained of occurred prior to the establishment of the ***Industrial Court Act, 2011***. As the matters complained of concern the conduct of proceedings of the Industrial Court and whether such infringement is a violation of the petitioner's rights under the Constitution. These are matters which this court, the High Court, has jurisdiction to determine.

Conclusion

13. In view of what I have stated, I find and hold that this court has jurisdiction to deal with this matter. The preliminary objection is therefore dismissed.

DATED and DELIVERED at NAIROBI this 6th day of February 2012.

D.S. MAJANJA

JUDGE

Dr J. Khaminwa instructed by Khaminwa and Khaminwa Advocates for the Interested Party/Applicant.

Mr Marete instructed by Njoroge Regeru & Company Advocates for the Petitioner/Respondent.