**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIAGE, M'INOTI & MURGOR, JJ.A.)**

**CIVIL APPEAL NO. 189 OF 2009**

**BETWEEN**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION.....APPELLANT**

**AND**

**JAMES FINLAY (K) LIMITED.....1ST RESPONDENT**

**SOTIK TEA COMPANY LIMITED.....2ND RESPONDENT**

**MINISTER FOR LABOUR & HUMAN**

**RESOURCE DEVELOPMENT.....3RD RESPONDENT**

***(Appeal from the Judgment and Decree of the High Court***

***at Nairobi (Wendoh, J.) dated 6th December 2006***

**in**

**HC MISC. APP. No. 309 of 2006(JR))**

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**JUDGMENT OF THE COURT**

The central question in this appeal is the role of technology in Kenya's economic development, and in particular in the tea industry. At its heart is a contestation between, on the one hand, employers who assert their right to adopt technology to make their operations and undertakings more efficient and cost-effective, and on the other, workers who perceive such technology as a threat to their employment. Kenya is among the top world producers of tea, which is also her leading export crop. The country's Vision 2030 seeks to transform Kenya into a newly industrializing, middle-income country providing a quality of life to all its citizens by 2030 in a clean secure environment. The blueprint has three pillars, namely economic, social and political, all anchored on among others, science, technology and innovation. While appreciating that this litigation commenced before the adoption of the blue print in 2008,

the promise of Vision 2010 is nevertheless relevant as the appeal now before us challenges, among others, the use of technology as a driver in the tea sector.

Some years before 2006, members of the ***Kenya Tea Growers Association***, among them ***James Finlay (K) Ltd*** and ***Sotik Tea Company Ltd, (the respondents)***, mechanized their tea plucking and pruning operations because they were convinced that adoption of the technology would ensure that their businesses ran more efficiently and economically, resulting in higher productivity and better export earnings.

***The appellant, the Kenya Planation & Agricultural Workers Union***, which is the trade union of the respondents' workers, apprehending that mechanization of the tea industry would result in loss of employment of its members, resisted the introduction of the technology.

On 4th May 2006 the appellant demanded that the respondents discontinue the use of the tea plucking and pruning technology, otherwise it would call a strike on 25th May 2006. It also reported, pursuant to ***section 28*** of the ***Trade Disputes Act (repealed)***, a trade dispute to ***the 3rd respondent, the Minister for Labour & Human Resource Development (the Minister)***. ***Section 28*** of that statute provided as follows:

***"28. Where it appears to the Minister that there is an actual or a threatened strike or lock-out arising out of a trade dispute in any section of industry, and the Minister is of the opinion –***

***(a) that there is machinery for negotiation or arbitration for the voluntary settlement of disputes in that section of industry; and***

***(b) that a substantial proportion of the employers and a substantial proportion of the employees in that section of industry are, either directly or through their respective organizations of employers or employees, parties to any agreement or arrangement for the use of that machinery; and***

***(c) that that machinery is suitable for the settlement of that dispute; and***

***(d) that all practicable means of reaching a settlement of that dispute through that machinery have not been exhausted, the Minister may by order –***

***(i) require the parties to that dispute to make use of that machinery; and***

***(ii) declare any strike or lockout (whether actual or threatened) in that section of industry to be unlawful."***

As is abundantly clear, the powers vested in the Minister by the above provision related to ensuring, in a situation of strike or lockout, real or threatened, that the parties adhered to any agreed dispute resolution procedures, if any, where such procedure were suitable but had not been invoked or exhausted.

On 24th May 2006, the Minister issued an order in the following terms:

***"ORDER UNDER SECTION 28 OF (THE) TRADE DISPUTES ACT***

***(CAP 234, LAWS OF KENYA)***

***THREATENED STRIKE BY KENYA PLANTATION AND AGRICULATURAL WORKERS UNION OVER MECHANIZATION OF PLUCKING AND PRUNING PROCESSES IN THE TEA SECTOR***

***Whereas it appears to the Minister for Labour and Human Resource Development that there is a threatened strike by employees of members of the Kenya Tea Growers Association over the use or introduction of machines in plucking tea in the sector, and the Minister is of the opinion that:-***

***(1) There is a suitable machinery for settlement of the dispute and***

***(2) That all practical means of reaching a settlement of that dispute through that machinery have not been exhausted.***

***I make the following Order:-***

***(a) The parties should make use of the investigation panel which I have appointed under section 7 of the Trade Disputes Act, Cap 234 and***

***(b) The appointed committee should expeditiously execute its mandate and furnish me with the report and recommendations on the issues in dispute***

***(c) The tea plucking machines in the estates of the member companies of the Kenya Tea Growers Association be withdrawn with immediate effect***

***(d) I hereby declare the intended strike action in the tea sector unlawful."***

***Hon. Dr. Newton W. Kulundu, EGH, MP***

***MINISTER FOR LABOUR AND HUMAN RESOURCE DEVELOPMENT."***

The respondents were aggrieved by part (c) of the Order, which prohibited them from using their tea plucking and pruning machines. On 8th June 2006, they took out judicial review proceedings, praying for an order of *certiorari* to quash the above Order to the extent that it purported to stop them from using tea plucking and pruning machines and an order of *prohibition* to stop the Minister from interfering with the mechanization of their businesses. On 9th June 2006, the High Court granted them leave to commence judicial review proceedings and directed the leave to operate as stay of the Minister's Order, in so far as it prohibited use of the technology, thus enabling the respondents to continue using the machines in their businesses. It is common ground that use of that technology by the respondents has continued unabated to this day.

In the High Court the respondents pitched their case primarily on the grounds that the Minister's Order, in so far as it prohibited the use of the machines, was *ultra vires* and in excess of his jurisdiction under section 28 of the repealed Act; that no law prohibited them from adopting technology in their businesses; and that the Order was in contravention of ***Articles 136*** and ***152*** of the ***Common Market for Eastern and Southern Africa (COMESA) Treaty*** and ***Article 127*** of the ***East African Community (EAC) Treaty*** which, among other things, oblige member states to dialogue with and provide enabling environment for the private sector to improve business environment; to protect private property; to ensure that regulation of the private sector is proper and reasonable; to promote rural development through appropriate mechanization and development of rural industries; and to encourage efficient use of resources.

The Minister opposed the application contending that his Order was within the law and that he had issued the same in good faith to forestall chaos in the tea sector, before a lasting solution was found.

The appellant applied and was joined to the application as an interested party pursuant to an order dated 7th July 2006. It joined the Minister in opposing the application, arguing that it had a valid Recognition Agreement with the respondents' Association, which obliged them to consult the appellant regarding any proposed changes in the terms and conditions of service, including adoption of new technology. It contended further that the respondents had, in breach of the agreement failed to consult, resulting in a dispute in respect of which the Minister had power under section 28 of the repealed Act, to issue the impugned Order. The appellant added that in any event, introduction of technology was likely to render the respondents' employees redundant, thus violating the Government's policy of job-creation and poverty reduction.

In further replying affidavits, the respondents contended that the Recognition Agreement produced and relied upon by the appellant was fraudulently altered to provide for prior consultations before introduction of technology and that the genuine agreement, which they produced, did not have any provisions in that regard. They categorically denied that they intended to declare any of their employees redundant. ***Wendoh, J***. heard the application and by the impugned judgment, held that it was not possible to determine which of the two collective bargaining agreements was the genuine one; that the machines had already been in use for a considerable period to the appellant's knowledge; that there was no evidence of any redundancy or loss of jobs as a result of introduction of the machines; that withdrawal of the machines would have negative consequences for the respondents and the economy; and that the Minister had acted *ultra vires* section 28 of the repealed Act and unreasonably within the meaning of the ***Wednesbury Principles (Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 KB 223)***. Accordingly the learned judge issued an order of *certiorari* and quashed the part of the Minister's Order that prohibited the respondents from using tea plucking and pruning machines. She, however, declined to issue the order of *prohibition*. That is the judgment that spurred this appeal.

In its submissions before us by its learned counsel ***Mrs. Guserwa*** and ***Mr. Museve***, the appellant contended that the learned judge erred by relying on the machines importation documents and holding that the machines were in use before the Minister's Order was made. It added that the respondents neither informed nor notified its members of their intention to introduce the machines and that if indeed the machines were introduced, it was done surreptitiously or secretively. The appellant further maintained that under the Recognition Agreement, the respondents were obliged to consult their workers before introducing technology in their business, which they failed to do, amounting to a deliberate breach of the agreement.

The appellant also faulted the learned judge for holding that the Minister's Order was *ultra vires* section 28 of the repealed Act. In view of the impending strike, it was submitted, the Minister had power to intervene to avert chaos in the industry, and further that it was both the appellants and the respondent who sought the Minister's intervention. The appellant added that the Minister acted in good faith and did not *stop* the use of the machines but merely *suspended* their use pending resolution of the dispute. It was the appellant's view that because the use of the machines was bound to result in loss of jobs and undermine the Government's economic recovery strategy underpinned by employment and creation of wealth, the Minister was justified in intervening and issuing the impugned Order, which was very reasonable in the circumstances as it also stopped its members from going on strike.

Lastly as regards the COMESA and the EAC treaties that were alleged to be violated by the Minister's Order, the appellant submitted that they were not consistent with the law of Kenya and in particular that the latter treaty had not been domesticated at the material time.

The respondents, represented by ***Mrs. Opiyo,*** learned counsel, opposed the appeal contending that to all intents and purposes the appeal was academic, having been overtaken by events because the machines have been in continuous use for a period of over eleven years, since the date of the impugned judgment. Relying on the decision of this Court in ***Tanzania Roads Agency v. Kudan Singh Construction Ltd [2013] eKLR***, the respondents urged us not to act in vain in an appeal, which has been overtaken by events. They also urged that it would cause more economic harm, loss and damage, to reverse the use of the machines after such a long period of time. It was the respondents' further submission that the alleged fear of redundancy, which impelled the appellant to oppose the tea technology, was unfounded because no employee has been declared redundant as a result of use of the machines.

As regards the powers of the Minister under section 28, the respondents submitted that he did not merely suspend the use of the machines, but directed their withdrawal with immediate effect. In their view the Minister did not have such power under the provision and on the authority of ***Sagoo v. Dourado [1983] KLR 365***, contended that no words should be written or added into section 28 by means of interpretation so as to confer on the Minister a power he did not have. They further relied on the decision of this Court in ***Municipal Council of Mombasa v. Republic & Another [2014] eKLR*** and those of the High Court in ***Republic v. City Council of Nairobi & Another ex parte Monier 200 Ltd & 7 Others [2005] eKLR*** and ***Republic v. Inspector General of Police David Kimaiyo ex parte Okola [2014] eKLR*** and submitted that the Minister can only exercise the powers that have been vested in him by the statute.

Next the respondents submitted that the Minister's order was unreasonable and oppressive because the machines were already in use for a number of years before the Order. They contended too that the Order amounted to taking away their rights and property without any statutory basis. In their view, the order of *certiorari* issued by the High Court was justified for the additional reason that no law prohibited them from deploying technology in their businesses. To the contrary, they submitted, the COMESA and EAC treaties committed Kenya, as a member State, to support the private sector and to the use technology in rural development.

Regarding the Recognition Agreement, the respondents submitted that the one relied upon by the appellant to demand consultations before introduction of the machines was deliberately and fraudulently altered to specifically provide for that pre-condition. It was their contention that the genuine agreement, which is what they produced, did not contain such a clause. They accordingly urged us to find that the appeal has no merit and to dismiss the same.

The Minister, although duly served, did not participate in the appeal.

We have carefully considered the record of appeal, the judgment of the High Court, the memorandum of appeal, the submissions by learned counsel and the authorities they cited. All the grounds of appeal raise the single question whether in the circumstances of this appeal, the learned judge erred by issuing an order of *certiorari* to quash the Order of the Minister dated 24th May 2006, to the extent that it purported to prohibit the respondents from using tea plucking and pruning machines.

Judicial review remedies are issued at the discretion of the trial court. (See ***Aberdare Freight Services Ltd v. Kenya Revenue Authority [2006] eKLR).*** For an appellate court therefore to interfere with exercise of discretion by the court below, it must be satisfied that the decision was clearly wrong because the judge misdirected himself or because he acted on matters on which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision. (See ***Mbogo & Another v. Shah [1968] EA 93*** *and* ***Matiba v. Moi & 2 Others [2008] 1 KLR 670).***

There can be no legitimate contest that in making the impugned order the Minister was proceeding under section 28 of the repealed Act. That much is obvious from the order itself, which expressly states that it is made under section 28. The powers vested in the Minister by that provision empowered him to declare a real or threatened strike or lockout illegal and to direct the disputants to refer the dispute to any suitable existing dispute resolution mechanism agreed upon by them, if it had not been exhausted. In our perception the remedies available to each party were to be determined by the alternative dispute resolution mechanism to which the dispute was committed, rather than by the Minister himself. In this case the Minister clearly usurped the powers that the dispute

resolution mechanism was meant to exercise. All that the Minister was empowered to do was to declare the strike or lockout unlawful and leave the dispute resolution mechanism to deal with the dispute and the remedies.

The evidence on record persuades us, as correctly found by the learned judge, that by the date the Minister made the Order, the machines were already in use for a considerable period of time. We think it is disingenuous for the appellant to claim that the machines had not been introduced because that begs the question, why was the Minister then directing withdrawal, with immediate effect, of that which never was" In addition, the former ***Permanent Secretary, Secretary to the Cabinet and Head of the Public Service, Amb. Francis Muthaura,*** wrote a letter on 29th May 2006 expressly stating that the owners of the tea plantations ***"have been using the machines to pluck green leaves for over seven years".***

In view of that evidence, we are not persuaded that the appellant was unaware for seven years that the respondents were using the machines in their plantations or that the machines were introduced secretly. By their very nature, those are not the kind of machines that can be operated in secrecy for a whole seven years without members of the appellant, who were working in the same tea plantations, knowing about them. This finding also completely destroys the credibility of the Recognition Agreement relied upon by the appellant which purports to show that negotiations and consultations between the appellant and the respondents were a condition precedent before adoption of technology in the tea sector. We are persuaded that the reason why the respondents were able to use their machines for several years before the Minister's Order, and with the full knowledge of the appellant and its members, is because there was no clause in the Recognition Agreement barring the use of the machines without consultations with the appellant. We also agree with the respondents that it is rather odd that in all the correspondence exchanged between the parties prior to the Minister's Order, the appellant never raised the issue of the alleged breach of the consultation clause of the Recognition Agreement.

If, as we have stated, the respondents had been using the machines for seven years before the Minister's Order and with the knowledge of the appellant, then it was unreasonable, oppressive and in blatant breach of the respondents' legitimate expectation for the Minister, in one sudden fell swoop to direct them to withdraw the machines in which they had heavily invested. The Minister completely failed to address or take into account the consequences that his order for immediate withdrawal of the machines would have upon the respondents.

The appellant has made a strong case that the Minister made the impugned Order to forestall a redundancy situation leading to massive loss of jobs and adverse economic consequences. It is validly contended that the respondent's right to mechanize their operations cannot be to the prejudice of the employees or at the expense of the employees' jobs and other labour and employment rights. We think that is a powerful and legitimate argument and that the right of the respondents to adopt technology must be subject to the employees accrued rights and the procedure and processes provided by the labour laws.

But, with respect, the redundancy and loss of jobs argument in this appeal is a red herring. The respondents contend, and the appellant does not dispute, that no workers have been declared redundant as a consequence of the introduction and use of the machines. The Employment Act provides today, as it did at the time when this dispute arose, a very elaborate process and procedure on redundancy, which an employer is required to comply with. The respondents had not set in motion the process of declaring their employees redundant so as to justify the order for the withdrawal of the machines. Accordingly we cannot fault the learned judge for holding that the order of the Minister directing the respondents to withdraw their machines was rushed and not justified in law.

It is for the employer to make the commercial and business judgment whether it will adopt technology or not in its operations,

subject to following all prescribed procedures should its adoption of technology result in a redundancy situation. In ***Kenya Airways Corporation Ltd v. Tobias Oganya Auma & 5 Others*** ***[2007] eKLR***, this Court held that it is not the role of the court to prevent an employer from restructuring or adopting modern technology in his business, so long as he observes all the relevant regulations. (See also ***Kenya Airways Ltd v. Aviation Workers Union of Kenya & 3 Others [2014] eKLR***).

In this appeal we have noted that the adoption of machines by the respondents in their operations did not, and has not resulted in any redundancy. We therefore do not see any legitimate basis upon which the Minister ordered the respondents to withdraw their machines. Even if adoption of technology was going to result in redundancy, there was a prescribed procedure to protect the rights of the workers, which could easily have been invoked.

Lastly, we do not think that the learned judge committed any error by considering the country's obligations under the COMESA and EAC treaties. (See ***Rono v. Rono*** ***[2005] eKLR***). The provisions of those two treaties are not in any event inconsistent with Kenya's relevant laws and policies.

We have ultimately come to the conclusion that the learned judge properly exercised her discretion when she issued the order of *certiorari*, given the circumstances of this appeal. This appeal therefore is bereft of merit and is hereby dismissed with costs to the respondents. It is so ordered.

**Dated and delivered at Nairobi this 13th day of July, 2018**

**P. O. KIAGE**

**.....**

**JUDGE OF APPEAL**

**K. M'INOTI**

**.....**

**JUDGE OF APPEAL**

**A. K. MURGOR**

**.....**

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**