Case Number:	Civil Appeal 257 of 2016
Date Delivered:	01 Dec 2017
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram, Martha Karambu Koome, Wanjiru Karanja
Citation:	Brookside Dairy Limited v Attorney General & 2 others [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Appeal dismissed
History County:	Nairobi
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 257 OF 2016

BETWEEN

BROOKSIDE DAIRY LIMITED …….…….. APPELLANT

AND

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

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

BAKERY CONFECTIONARY, FOOD MANUFACTURING

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

(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Lenaola & Odunga & Ngugi, JJ.) dated and delivered on 28th September, 2015

in

Petition No. 33 of 2011)

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JUDGMENT OF THE COURT

(1) The appeal before us is about a protracted Labour Dispute that started way back in March, 2009 before the Industrial Court of Kenya, now Employment and Labour Relations Court **(ELRC)**. Ms. Bakery, Confectionary, Food Manufacturing and Allied Workers Union **(Union**) filed a claim before the Industrial Court against Brookside Dairy Limited (appellant).

(2) The Union was seeking two principal orders which were granted on 3rd January, 2011 by **Mukunya, J.** sitting with two members. The appellant was ordered to sign a **Recognition Agreement** with the Union within 30 days and also to deduct and remit union dues from members who are its employees and whose list was to be submitted by the Union within thirty (30) days of the said order. The deduction and remittance of such Union dues was ordered to commence within 30 days of the submission of the list.

(3) The appellant did not comply with the said orders, instead it filed a petition before the High Court claiming contravention of fundamental rights and freedoms that are enshrined under **Articles 25 (A), 25 (c), 36, 40, 41 (1) 50**

(1) of the Constitution. The Industrial Court award was challenged for denying the appellant a right to a fair trial, the right to fair labour practice, infringing on the petitioner's right to freedom of contract and freedom of association. The appellant therefore principally sought an order declaring the award by the Industrial court unconstitutional for breaching the petitioner's right to fair labour practice and for breaching its fundamental right and freedom to contract and association as guaranteed by **Article 36** of the Constitution.

(4) The constitutional petition was heard by three judges, **Lenaola, J**, *(as he then was),* **Mumbi Ngugi** and **Odunga, JJ** and on 28th September, 2015, that petition was dismissed. In so doing, the learned judges fastidiously went through the evidence that was before the Labour Court by revisiting the entire history of the dispute which started with a letter dated 19th January, 2009 addressed to the appellant by the Union stating that the Union had recruited a simple majority of the petitioner's employees as its members.

(5) On that basis, the Union sought to conclude a **Recognition Agreement** with the appellant and requested the appellant to process the deduction of union fees from its members. The appellant subjected the list of employees to verification and they came up with what they referred to as 'a number of errors and inconsistencies' they therefore challenged the authenticity of the Union's claim to have recruited a simple majority of its employees as required under the provisions of **section 54** of the Labour Relations Act. The appellant thus contended, as the Union had not recruited the requisite unionisable number of employees, it was not necessary for the appellant to execute a **Recognition Agreement** with it. On this basis, the appellant declined to sign the recognition agreement or to deduct the Union dues as in their view, the Union had not recruited the requisite number of employees to warrant the deductions and the recognition agreement. Due to this stalemate there was a flurry of exchange of correspondence leading to an attempt at conciliation under the Ministry for Labour who appointed a conciliator but there was no end in sight regarding this standoff between the appellant and the Union as there was no meeting that was held.

(6) Eventually the standoff snowballed to a claim by the Union which was filed before the Industrial Court on 20th March, 2009. The Union's claim in **Cause Number 124 (N) of 2009** was that it was registered and by law mandated to represent the interest of workers in the food and manufacturing industry particularly the milk processing industry. The appellant was described as a limited liability company involved in the milk processing industry. In its capacity as a Union, the respondent alleged that between the years 2007, and 2009, it recruited a majority of the employees of the appellant as its members; it sent the check off lists containing the names of the recruited employees with a request and a demand that the appellant do deduct the remitted Union dues in respect of the recruited employees and also to sign a recognition agreement with the Union but the appellant declined without reasonable cause.

(7) The Union's plea was principally that the appellant be ordered to deduct and remit Union dues for the recruited members and to sign a recognition agreement with the Union; there was also an auxiliary prayer that the appellant be punished for violation of the rights of workers. The appellant filed a reply denying all the allegations and maintaining their stand that the appellant had not recruited a simple majority. Further, the list of check off submitted by the Union contained irregularities of employees who had died, or left employment before being recruited or workers who were in management and therefore not unionisable. The dispute was heard by E.K Mukunya J., assisted by two members; Nahashon Udoto and Moses Hillary Allumande, who upon evaluating the evidence by the appellant and the Union's witnesses, allowed the claim by the Union.

(8) In so doing, the court made the following remarks which we think are necessary to restate;

"Upon careful consideration of the dispute including the contents of the written memoranda, the appendices annexed thereto, the testimony of the witness called and the oral submissions, the court holds and finds that the claimant has on a balance of probability proved having recruited 838 employees out of 1493 of all the employees of the respondent as on 31st March, 2009 and has established that it is entitled to be granted recognition as sought.

In reaching this conclusion the court has considered the provisions of Article 41 (1) of the Constitution of Kenya. The provisions of the Constitution guarantees every worker in the country the right to fair labour practices which includes the right to join and belong to trade unions and the right to collectively bargain through such trade unions. The witness called by the respondent admitted that the respondent has merged with another business enterprise known as Spin Knit whose employees had been recruited by the claimant union and with whom the respondent and claimant Union has a recognition agreement. Denial of the right of 838 employees to join and be members of Claimant Union as expressed in their application as shown in the check off forms annexed to the memorandum of claim as appendices 1 and 2 amount to denial of constitutional rights.

The claimant has sought prayers for payment of union dues. The respondent contends that the lists of employees submitted by the claimant may include deceased or terminated employees. In order to do justice herein the claimant union should submit a fresh list containing the current members from which the respondent will deduct and remit dues.

In the premises the court orders the respondent to sign a recognition agreement with the claimant union within thirty (30) days, and also to deduct and remit union dues from members who are its employees and whose list will be submitted by the claimant Union within thirty (30) days. The deduction and remittance of such Union dues to commence thirty (30) days of submission of the list"

(9) The appellant was aggrieved by the said orders and a Notice of Appeal was filed indicating that the appellant would file an appeal before this Court. However, no appeal was filed regarding the award by

the Industrial Court but for strange reasons Constitutional petition is the one that was filed. In the said petition, the appellant sought several declaratory orders alleging inter alia that they were denied a fair and impartial trial by the Industrial court; that the Industrial court proceeded with the hearing when the High Court had issued an order of stay in Constitutional Petition No 15 of 2010; failing to uphold the appellant's right to fair labour practices; freedom to contract and to associate as guaranteed in the Constitution. As indicated in the preceding paragraphs of this judgment, the learned judges who heard the petition found it had no merit and ordered it dismissed.

(10) The appeal is predicated on some 11 grounds of appeal which we will summarize as in our view, they are not only repetitive but also argumentative contrary to ***Rule 86(1)*** of the ***Court of Appeal Rules***. The Rule stipulates in mandatory terms thus;

"A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative the grounds of objection to the decision appealed against, specifically the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make." Emphasis added.

The learned judges are faulted for misdirecting themselves and failing to consider that the Union had not recruited a simple majority of the unionisable employees of the appellants, thus the Union did not merit recognition; failing to review the award of the Industrial Court by holding that the facts can only be reviewed in an appellate process thereby leaving the appellant without a remedy; failing to appreciate the constitutional issues that related to violation of fundamental rights including a right to a fair trial; taking a narrow approach to constitutional interpretation of fundamental rights. The appellants urged that, the appeal be allowed by setting aside the order by the three judges, thereby allowing the petition with costs.

(11) During the plenary hearing, Mr Thuo learned counsel for the appellant relied on written submissions and in his oral highlights he reiterated that the Union had not recruited a simple majority of the appellant's unionisable employees to justify recognition and deductions of Union dues because the list of employees the Union submitted on 15th January, 2009 was analyzed and it was found to have serious discrepancies which were brought to the attention of the Union vide a letter dated 7th February, 2009. Even after these anomalies were pointed out and the Union sent a revised list which fell short of the threshold of a simple majority as the appellant argued that by the time the Union filed suit, it had 1445 potentially unionisable employees and using the list supplied by the Union, they had only recruited 508 members who were less than the simple majority required by the law. In January, 2010 the appellant merged with another company, **Spin Knit Dairy Limited** thereby raising the number of unionisable employees even higher. The Union rushed to file a claim in court before the conciliator appointed by the Minister for Labour could complete the conciliatory process.

(12) Counsel also faulted the learned judges for failing to consider that the Industrial Court had no jurisdiction to deal with the issues which were pending before the High Court and an order had been issued on 30th July, 2010 in Petition No 13 of 2010 ordering a stay of proceedings until a chamber

summons dated 21st July, 2010 was heard or settled. Counsel further submitted that the proceedings before the Industrial Court were a nullity, given the supervisory jurisdiction of the High Court over the then Industrial Court; the Industrial Court was served with the order of stay but it nonetheless went on to conduct the hearing on 11th January 2011; the court was accused of conducting the proceedings in a biased way by denying the appellant a chance to adduce evidence in a manner that would satisfy the requirements of a fair trial. For example, denying the appellant a chance to cross-examine a maker of a report which the court relied on to make a finding against the appellant; and by rejecting the appellant's evidence thereby failing to consider the constitutional questions particularly the violation of the appellant's rights to a fair trial, freedom of association, freedom of contract and labour practices. The case of **Peter M. Kariuki Vs Attorney General** [2014] e KLR was cited to emphasize what was held by this Court that in determining a question of violation of human rights arising from a trial, the High Court has the power and duty to scrutinize the facts giving rise to the alleged violation. Counsel urged us to draw a parallel in that case where the Court of Appeal held that denying the appellant who was facing a trial before a court martial an adjournment and an opportunity to call a key witness was a violation of constitutional rights to a fair trial.

(13) On the part of the respondents, the Attorney General, did not attend Court on behalf of the 1st respondent, although duly served but the 2nd and 3rd respondents were represented by Mr. Maurice Ogosso and Dr. Khaminwa respectively who made oral submissions. Both counsel for the 2nd and 3rd respondents supported the judgment of the three judges which was in accordance with the Labour laws and practices that guarantee and protect employees from the high handedness of an employer by joining a Trade Union which would negotiate and defend their rights. This right to associate and join a Union is recognized and protected under **Article 41** of the Constitution. On the allegation that the appellant was denied a right to a fair hearing, no material was presented to demonstrate this and counsel made reference to the impugned Judgment, in particular paragraphs 66, 67 and 68 which quoted the Industrial Court's award extensively and concluded and rightfully so, according to counsel for the respondents; that the appellant was accorded an opportunity to present its case through their witness and written responses.

(14) On our part we have gone through the respective written submissions by counsel, the impugned judgment and the record of appeal. In considering the issues that arose for determination of whether there was a violation of the appellant's constitutional rights as enshrined under **Articles 25, 36** and **40** of the Constitution, the learned trial judges, as stated earlier, fastidiously considered all the issues and identified two issues that they found pertinent for determination that is; whether the High Court had jurisdiction to determine issues that arose from the judgment of the Industrial Court and secondly whether the petition disclosed violation of the appellant's constitutional rights. These are the same issues that have remained germane even in the present appeal, only that in regard to the issue of jurisdiction, the learned trial judges are faulted for failing to find that the Judge of the Industrial Court lacked jurisdiction to hear the complaint and to grant the orders sought in the face of the **High Court Petition No 13 of 2010.** We think it is not necessary for us to revisit an aspect of jurisdiction of High Court then, (before the promulgation of the 2010 Constitution) to supervise the Industrial Court. In determining this issue, the learned judges posited as follows which is not in issue;-

“In the period preceding the establishment of the Industrial Court provided for under Article 162(2) of the Constitution, the Industrial Court had been held to be a subordinate court and was therefore subject to the supervisory jurisdiction of the High Court. This question had been the subject of various decisions of the High Court, and was still an issue subsequent to the promulgation of the Constitution with its provisions which elevated the Court under Article 162, to the status of the High Court… we are of the view that a matter that had been heard and determined by the Industrial Court as it existed prior to the promulgation of the Constitution and the operationalizing of the Industrial Court established under the Industrial Court Act, 2011 was subject to review in respect of violations of constitutional rights, or for procedural improprieties, in accordance with the High Court’s powers of judicial review”

(15) That issue was fully thrashed to a pulp and we think we need not belabor the same save to state that under **Section 14(1) of the Trade Disputes Act Cap 234** *(Repealed)* provided the Jurisdiction of the then Industrial Court in general terms as thus:-

“For the purpose of the settlement of trade disputes and of matters relating thereto, the President may, by order, establish an industrial court, consisting of (a) …”

(16) The issue that is for our determination on jurisdiction is whether the Industrial Court Judge had jurisdiction to continue hearing the claim by the Union while there was a consent order staying any further proceedings in High Court Petition No 13 of 2010. There are no pleadings, or proceedings regarding this petition; we have only seen the order reproduced here below. It is not clear to us what became of the said petition because what is exhibited is an order recorded by consent in the following terms;

“**IT IS ORDERED BY CONSENT**

1. That the matter pending in the Industrial Court cause No 124 (N) of 2009 and Industrial Court Cause No 609 (N) of 2010 be and is hereby stayed pending the hearing of the Chamber Summons dated 21st July 2010 on the 17th September, 2010 for settlement.

2. That the respondents/interested parties do file and serve their reply to the chamber summons within 14 days hereof.

3. That the applicants do file and serve submissions /authorities within 10 days and the respondent/ interested parties have similar time within which to file theirs.

GIVEN under my hand and seal of the court this 28th day of July, 2010”

(17) As aforestated, we have not seen the proceedings relating to High Court Petition No 13 of 2010; those pleadings or proceedings are not part of this record of appeal therefore it is very hard for us to know whether the said order was spent upon the hearing of the chamber summons that was set for hearing on 21st July, 2010 as indicated therein. We cannot also tell whether the order was served upon the Judge of the Industrial Court as there is no affidavit of service on record; even the proceedings that were conducted before the Industrial Court are not available. During the hearing of the instant appeal, Mr. Thuo learned counsel for the appellant was hard pressed to provide us with evidence to show that the said order was brought to the attention of the Industrial Court. The only proceedings before us are in respect of Petition No 33 of 2011.

(18) As matters stand, we cannot say the Judge of the Industrial Court had no jurisdiction to determine the claim that involved a dispute between a union of workers and the employer as there is no evidence to show the Judge was served with an order from a Superior Court staying the proceedings. The High Court came to the same conclusion as we have when they stated in a pertinent paragraph of their judgment thus;-

“The petitioner alleges that though the attention of the Industrial Court was drawn to this order, it disregarded the order and proceeded to hear and determine the claim before it. However, the petitioner did not deem it necessary to provide the record of proceedings before the Industrial Court which could have helped in determining whether indeed the Court was aware of the consent order, and that it deliberately decided to disregard it.

We have perused the judgment of the Court and have not been able to find any allusion to a consent order between the parties, or that there was any application made to the Court not to proceed with the hearing before it as there was a hindrance to the proceedings. Without such evidence, we are unable to ascertain whether indeed the learned Judge was aware of the consent order, and we cannot therefore make a finding that the Industrial Court acted in breach of the said order”

We think it is necessary for us to emphasize that in civil cases, it is trite that a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or set of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.

(19) On the second issue whether the appellant’s rights were violated in that they were denied a right to fair trial, freedom of contract and association. The appellant’s complaint was that they were denied a hearing. The learned judges who heard this petition went through the award by the Industrial Court, and noted that the appellant’s Human Resource Manager one Ms. Grace Manugu, testified on its behalf, the issue in contention was whether the Union had recruited a simple majority of the appellant’s unionisable employees. It is the learned trial Judge of the Industrial Court who had the opportunity to hear and see the witness testify and in that regard he made the following conclusions;

“During the hearing of the dispute, the representatives of the parties made lengthy and extensive submissions. They relied on their written memoranda and repeated the averments made thereon and reiterated their demands and prayers. The respondent called one Grace Wambui Manugu as a witness. She testified that she was the Human Resource Manager of the respondent company. She stated that during the months of January and February 2009 the respondent received two (2) lists of names from the claimant Union which contained names of employees who had been recruited as members of the claimant Union. She stated that on 31st March 2009 when this dispute arose the respondent had 1688 employees. She stated that she had a list of such employees for whom the respondent/ employer paid NSSF dues. The number of employees for the months of January and February 2009 were different from the employees for the month of March 2009. The dispute was raised in March 2009. The Court has considered the list of employees for the month of March 2009 which was produced in evidence and marked respondent exhibit 1. She also stated that she had received a list of employees allegedly recruited by the claimant. She had scrutinized the names in the list submitted by the claimant and found anomalies and irregularities… The witness stated that the 2 lists contained names of employees who had been terminated or who died or repeated. However these statements were only claims which were not substantiated. However the list she relies on as containing the names of total workforce which was produced in evidence and marked as Exhibit No 1. It has 1493 names. According to her evidence there were 250 employees in management. This would leave 1253 unionisable employees. After the court rejects her contention and allegations of other irregularities in the list as unproven it is evident that Appendices 1 and 2 of memorandum of claim containing 838 recruited employees would translate into the claimant Union having recruited an overwhelming majority.

(20) A right to a hearing is a fundamental one under our Constitution. As this Court observed in the case of; - **Richard Ncharpi Leiyagu -vs- Independent Electoral and Boundaries Commission and 2 Others**, **C.A. No. 18 of 2013,**

Nyeri;

“The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality.”

(21) What we need to ask ourselves which we gather from the impugned judgment was also posed by the learned judges is whether the appellant was denied a constitutional right to a hearing, freedom of association and of contract. Arising from the said award, what matters were for constitutional interpretation" As stated earlier in this judgment, the appellant did not include the record of proceedings before the Industrial Court, what we have is only the award, and from it, the appellant’s witness gave evidence and produced several documents which were considered by the Judge as discussed in the award which we have reproduced here above. The fact that the Judge did not agree with the appellants contention regarding the Union’s claim that it had recruited a simple majority does not amount to denial of a hearing. That was a conclusion drawn by the Judge from the analysis of factual evidence before the Court and just like the High Court judges we are not persuaded there was any breach of fundamental rights or freedoms that are guaranteed in the constitution. This was a normal dispute involving a Union

and an Employer on matters of fact not even law let alone the interpretation of the constitution.

(22) For the aforesaid reasons we find no merit in this appeal, consequently we order it dismissed with costs to the 3rd respondents as the 1st and 2nd respondent did not participate in the hearing of the appeal.

Dated and Delivered at Nairobi this 1st Day of December, 2017.

ALNASHIR VISRAM

……

JUDGE OF APPEAL

W. KARANJA

……

JUDGE OF APPEAL

M.K. KOOME

……

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR