Case Number:	Civil Case 398 of 2003
Date Delivered:	26 Sep 2003
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Andrew Isaac Hayanga
Citation:	THOMAS M. NGUTI & 6 OTHERS v KENYA RAILWAYS CORPORATION [2003] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 398 OF 2003

THOMAS M. NGUTI & SIX OTHERS …… PLAINTIFFS

VERSUS

KENYA RAILWAYS CORPORATION…….. DEFENDANT

RULING

This application is made by about 8 people representing about 190 others for certain orders under O 1 rr 8 and 21, O. 39 r 2 of Civil Procedure Rules and S.3A of Cap 21 and S.16(6) of the Trade Disputes Act Cap. 234 of the Kenya Laws. The prayers after dispensing with the first four are:-

(5) A mandatory injunction to implement the industrial court award in cause No. 72 of 1995 dated 4.5.98 (6) Payment of the plaintiff's salary arrears under the respective contracts of employment as modified by the Industrial court award with effect from 1.1.96.

(7) An injunction to restrain the defendant by itself, its servants or agents from intimidating, harassing or interfering in any manner, whatsoever with the plaintiff's employment and residence pending hearing and determination of this application. (8) An injunction to restrain the defendants from hiring the, re-employing or otherwise re-engaging retired locomotive drivers.

(9) Interest on (b) above at commercial The supporting affidavit by the first plaintiff shows that the applicants are locomotive drivers numbering about 194 who in June 1995 took an industrial action against the respondents by filing a Trade Disputes Cause in Industrial court of Kenya at Nairobi Cause No. 72 of 1995 between Railway Workers Union (K) vs Kenya Railways Corporation. The issues were (a) salaries, (b) mileage allowance, (c) Housing and (d) disturbance and separation allowance and on 4.5.98 the Industrial Court delivered as ruling making an award in favour of the applicants awarding them 25% increment of their salary by the defendant and that a separate scheme for locomotive drivers be implements. This award was eventually gazetted in the Kenya Gazette issue of 28.8.92. The Industrial Court had said inter alia that: - "The court however finds that the demand by the Union is very much on a higher side. In the circumstances, I am inclined to award to the locomotive drivers additional salary increase of 25% across the board for the period 1st January 1996 to 31st December 1997 and also recommend that a separate scheme of service for them be introduced forthwith".

Secondly the court awarded a minimum qualifying distance of 2000 km payable at the rate of Kshs.150 per km covered on duty. Housing:- The demand for housing for locomotive drivers was rejected by the court but the court said further that: - "I would however direct the corporation to take urgent corrective measures to improve the housing facilities to acceptable standards consistent with the maintenance of human dignity within a period of six months from the date of this award".

The plaintiff's wrote a letter to the Managing Director Kenya Railways Corporation on 24.4.03 demanding implementation of the award but on 28.4.03 the Kenya Railways Corporation issued a Press

Release in the Daily Nation dated 28.04.03 stating that the increase has been effected systematically and progressively between January 1998 to December 1998 saying that “the commulative pay increase over the period was therefore between 45% - 70% well above the court award”.

No other awards were mentioned in the Press Release but in their response to this press release the applicants wrote a further letter to the Managing Director Kenya Railways Corporation accusing him of circumventing the issue saying that the press release does not even refer to implementation of the award by the Industrial Court and denied receiving the increase mentioned. It also charged the Corporation with intimidation.

In reply Andrew Wanyonde Managing Director Kenya Railways Corporation said that he was not served with a 30 days notice before institution of the suit as is required under Section 87 of the Railways Corporation Act. That the corporation has embarked on implementation of the award and by a Collective Bargaining Agreement commencing January 1996 to December 31 1997 the corporation factored in Industrial Court awarded a salary increase of between 10% and 33% to all unionisable staff which included locomotive drivers and again by a further agreement the corporation effected further increment to commence 1st January 1998. 45% to 70% and these awards have been implemented and that these awards even surpass the ones the industrial court gave and that mileage allowance is being implemented. That there is a new scheme in housing and further allowances are given aggregation including allowances like, messing allowance, stabling allowance, overtime allowance, under rest and over rest allowances.

That by going on strike the applicants forfeited their rights under their employment contract and have the corporation had a right and exercised that right to employ other employees and repossessed the houses.

This is the gift of the matter. So far this is an interlocutory application only. The Court does not need to get into the depth of the matter. Basically for mandatory and prohibition injunction, the principle applicable to both branches of injunction is the statement by SPRY JA in QUIELA vs CASSMAN BROWN & CO. LTD 1978 E.A. 358 where he said that for interlocutory injunction to issue the applicant must show that he has a prima facie case with probability of success, that if the injunction is not granted he is likely to suffer irreparable damage that cannot be adequately compensated in damages and if the court is in doubt to decide the case on balance of probabilities. The principle applies to mandatory injunction except that the latter is awarded sparingly and in very rare occasions because normally it involves un-winding, sometimes great expense, what had already been done so it becomes a point to consider whether the costs involved in regaining the position would be too much compared to the cost of leaving the position as it is. The application for mandatory injunctions is normally made under S.3A of the Civil Procedure Act as (3) 39 r is only applicable in prohibitory injunctions so the court has to use its inherent jurisdiction but it suffices to say that the court has jurisdiction here the issue of service is a question of few law be desired on anyone. There would be no purpose in enacting provisions of law for improving labour relations if Industrial Court awards are disregarded. They must be enforced and without enforcement then the powers of Industrial Court will be nugatory. Yet they are FINAL as per Section 17 of Cap 233. Hence, the High Court can only enforce them.

In this application the corporation has maintained that it has complied with the award but expressly in his own words the Managing Director has in his affidavit not said so all he has said is that the corporation effected some increments and improved some terms as a result of some bargain. There is no admission that an exercise towards implementation of the award was ever effected or embarked on by the corporation by avoiding to clearly effect the award and trying to fulfill its terms by an eastwhile mind as it were he leaves the beneficiaries of the award uncertain whether or not there has been award besides it

shows either defiance of the court order or too high to condescending attitude toward the beneficiary. Industrial court has no power to enforce its orders but those orders are FINAL. Saeed R. Cocker in his book the Kenyan Industrial Court says -

“The Industrial Court does not execute its award like the Civil Court where elaborate legal provisions exist in the Civil Procedure Code for the execution of the court decrees. The Trade Unions is generally have relied on their traditional right to strike in order to secure the enforcement of an award in their favour”. The writer says that where the strike is banned then execution is brought out through administrative pressure exerted by the Ministry of Labour. This is a last situation perhaps almost in desperation where you have an award against a Government Corporation like the Kenya Railways Corporation. I have looked at this matter and it is my view that in the strange occasions where an award is resisted the traditional judicial enforcement methods must be used and used freely to effect the awards of the Industrial Court.

For two reasons:- the Industrial court is just an adjunct of the High Court and its awards are under Section 17 of Cap 233 FINAL so they must be enforced, and two, by the time labour dispute has gone through the lawful path within labour and Industrial Statutes and obtained an award with FINAL effect under Section 17 of Cap 233, the observance of law and order must be given the support of the rule of law otherwise it would be an abdication to anarchy. I have not seen that the corporation effected the awards and seeming attempts to do so by proxy cannot be allowed. I would grant the prayers as stated including mandatory injunction. I am not certain if prayer 8 can be granted wholly because there is evidence that the said retirees had been engaged already. An order of prohibitive injunction can only apply to restrain what is supposed to be done. But prayer 8 will only operate to restrain any future re-engagement not past once.

Before concluding I must pay TRIBUTE to the hard work exhibited by the two counsels here, the depth of their research which helped me and I must say I have read the authorities and I am most obligated to them. This however is a mere interlocutory application. It may not discuss the main case as yet. Cost to the applicants.

The effect of my decision above does nullify the letter dated 30th April 2003 by G.N M’Kwenda, Locomotive Maintenance Engineer on behalf of the Kenya Railways Corporation addressed to all the Locomotive Drivers. Costs to the applicant.

Delivered this 26th day of September 2003.

A.I HAYANGA

JUDGE