



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

MISCELLANEOUS APPLICATION NO. 4 OF 2018

(Formerly Cause No. 1512 of 2017)

Before Hon. Lady Justice Maureen Onyango

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

BOUNTY LIMITED.....RESPONDENT

JUDGMENT

The Claimant and a trade union registered in Kenya to represent workers in the commercial, food and allied sectors, has a recognition agreement with the respondent signed on 8th March 2010 and has negotiated several collective agreements with the respondents, the last one covering the period up to 30th October 2016. They were in the process of negotiating the DBA for the period 1st November 2016 to 30th October 2018 when they disagree on several issues.

On 29th July 2017, the Respondent issued the Machakos County Labour officer with a redundancy notice stating that it intend to declare all its employees redundant due to financial constraints. The Claimant was aggrieved by this decision and filed the claim herein seeking that the Court makes orders -

- (i) That the Respondent to open the gates of the factory to allow employees to access their working areas and to end the illegal and unlawful lock out.
- (ii) That the Respondent to withdraw their notice dated 24th July 2017 served upon the Machakos County Labour Office and pinned at the factory gate.
- (iii) That the Respondent to engage the workers through their trade union to discuss and resolve the redundancy intention within the provisions of section 40 of the Employment Act, 2007 and Clause 20 of the parties Collective Bargaining Agreement.
- (iv) That the Respondent to continue with negotiations and/or conciliation to conclude the parties' Collective Bargaining Agreement which is the very cause of this unlawful/unprocedural redundancy.
- (v) That the Respondent to pay costs of the suit in favour of the Claimant.

The Claimant avers that the Respondent scheduled a meeting for 24th July 2017 to review the CBA but at the meeting the Respondent disregarded previous negotiations and came up with fresh proposals for negotiations.

In support of its claim, the Claimant filed the Affidavit of Joshua Mulwa Samuel sworn on 8th May 2019. The Affiant avers that on the same date the redundancy notice was pinned at the factory gate, the grievants were locked out and denied entry into the factory. He further avers that the Claimant requested the Respondent to withdraw the notice but the request was ignored.

He deposes the purpose of the lockout was to curtail union activities. In addition, the affiant deposes that since other employees were hired to fill their positions, their jobs were still available.

It was his evidence that the redundancy notice was issued at a time when the Claimant and Respondent were engaged in negotiations for review of the CBA.

The affiant avers that when paying their salaries for the month of August, the Respondent paid some extra money into their bank accounts without clarification. Further, that they never received letters declaring their services redundant, their full and final settlement of claims or a certificate of service.

In the Replying Affidavit of Mogan Galot sworn on 4th August 2017, the Affiant contends that the Respondent informed the Claimant of the financial constraints it was experiencing and during negotiations, the Claimant was requested to cede on some of its demands, for instance, an annual salary increment of 40%, which would have crippled the Respondent's operations. The Respondent offered to pay a maximum annual salary increment of 10%, which proposal was declined by the Claimant.

The affiant avers that the Respondent threatened to terminate the recognition agreement due to the Claimant's conduct of recruiting its personal staff to the union in a bid to gain an advantage. Further, that the Claimant threatened to call for industrial action if the Respondent refused to accede to its demands.

The Affiant avers that on 24th July 2017, a meeting was held in the presence of all union leaders and the Respondent's management where it was unanimously decided that due to the negotiations stalemate, the Respondent would close down and the employees would be paid their dues. This resolution, culminated into the issuance of the impugned redundancy notice, computation of the employees' terminal and the pay out to their accounts.

By 29th July 2017, all employees had been rendered redundant. The Affiant contends that none of its employees were discriminated against. The Respondent has been closed and remains closed.

The Affiant avers that the Respondent notified all the relevant authorities of its intention to terminate the recognition agreement, there being no employees to be represented by the union.

The matter was disposed of by way of written submissions where the Claimant filed its submissions 13th May 2019 while the Respondent filed theirs on 26th June 2019.

Submissions by the Parties

The Claimant submitted that they never consented to the issuance of redundancy notices as alleged by the Respondent. They further submit that they were not served with the notice issued to the County Labour Officer, Machakos and neither were its members issued with individual notices of redundancy.

The Claimant submits that the decision to declare its members redundant was malicious and intended to undermine union activities and negotiations. This is evident from the fact that Respondent engaged casual workers after declaring its employees redundant.

For the Respondent it is submitted that the Claimant has not disputed the amount paid to its members or the actual payment. Further, that no employee has moved this Court to challenge the payment of their terminal dues.

The Respondent further submits that the redundancy notice was served upon the Claimant, the County Labour Officer, its employees and the Sub County Labour Officer as required by section 40 of the Employment Act and Clause 20 of the CBA.

The Respondent further submits that the remedy of reinstatement as sought by the Claimant is one of specific performance which is contrary to the provisions of Section 49(3) and (4) of the Employment Act. It is their position that the relationship between them and their employees is untenable thus it would be impossible to implement reinstatement. They rely on the case of ***Parliamentary Service Commission vs. Christine Mwambua [2018] eKLR*** and ***Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR***.

Lastly, the Respondent submits that the Claimant is bound by its pleadings and cannot bring novel issues which were not pleaded in the memorandum of claim. The Respondent relies on the following cases which have buttressed this position: ***Zacharia Orwa Ondoro vs. South Nyanza Sugar Company Limited [2018] eKLR***, ***Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR***, ***Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR***, ***Efil Enterprises Limited vs. Dickson Mathambyo Kilonzo [2018] eKLR*** and ***Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR***.

Determination

I have considered the pleadings filed by the parties and the annexures thereto, together with their submissions. The issues for determination before this Court are the following –

- a. Whether the right procedure for the issuance of the redundancy notice was followed.
- b. Whether the Claimant is entitled to the reliefs sought.

The procedure to be followed by an employer when declaring an employee redundant has been outlined in section 40 of the Employment Act and Clause 20 of the parties' CBA. Section 40(1) (a) requires an employer to notify the employee's union and the area labour officer, of the reasons for the intended redundancy not less than a month prior to the date of the intended date of termination, where an employee is a member of a union.

Indeed, as stated by the parties, a notice dated 24th July 2017 was issued to the Machakos County Labour Officer. The Claimant has contended that it was not served with the same. However, the notice is copied to the Claimant. Additionally, there are two stamps on the said notice; one indicating that the notice was received on 1st August 2017 and the other one with the initials KUCFAW (Annexure marked MG6 at page 22 of the Replying Affidavit of Mohan Galot). As such, I find it hard to believe the Claimant's allegation that it was not in receipt of the redundancy notice.

The Act does not require the employer to issue an employee with a redundancy notice where they are a member of a trade union. However, clause 20 of the parties' CBA provides as follows-

“In the event of redundancy, the following principles shall apply –

a. The employee shall be informed by the company the reasons for the redundancy and the letter copied to affected Union, District Labour Officer of the affected employee.”

As such, the Respondent was required to give notice to each of the employee. At paragraph 4 of the Affidavit of Joshua Mulwa Samuel, he avers as follows-

“That I served the Respondent up to 29th July 2017 when I and other grievants found a redundancy notice dated 24th July 2017 addressed to Machakos County Labour Officer and pinned at the factory gate to the effect that our services had been declared redundant.”

This was not sufficient communication. The fact that the premises were made inaccessible and there was no notice period meant that the redundancy was effective immediately. This has not been controverted by the Respondent and is contrary to what is anticipated in Section 40 and Clause 20 of the CBA. The grievants were to work for the period indicated in the notice after which, their employment would come to an end on account of redundancy. To this end, I find that clause 20 of the CBA was not complied with.

This notwithstanding, from the nature of the prayers sought, I find that this claim has been overtaken by events. In Joshua Mulwa's Affidavit, at paragraph 17, he states that the Respondent paid some extra money into their bank accounts without clarification. Additionally, in Mohan Galot's Affidavit, he avers that the grievants were paid their full and final dues and has annexed copies of the schedule of salary transfer for the month of August and their respective payroll reports.

Further, it was the Respondent's evidence that it had remained closed since declaring its employees redundant and that it had written to the relevant parties seeking to terminate the recognition agreement it had with the Claimant.

In view of the foregoing, the orders sought by the Claimant is not tenable. This Court is however unable to establish whether the grievants were paid their full and final dues, and in particular severance pay which they are entitled to by law. This is because no payment breakdown or pay slip for August 2017 was produced before this Court. As such, this Court orders the Respondent to give a breakdown of the payments made to the grievants and make any payment owing to them, including severance pay in accordance with Clause 20 of the CBA and Section 40 of the Employment Act. The tabulation to be filed in court on or before 30th January 2020 and a copy served upon the claimant union.

The case is fixed for mention on 18th February 2019 to confirm the tabulation and payment thereof to the affected employees.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF DECEMBER 2019

MAUREEN ONYANGO

JUDGE