REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 128 of 2006

COMMUNICATION WORKERS UNION OF KENYA…….……..PLAINITFF

VERSUS

TELCOM (K) LTD…….……..1ST DEFENDANT

GILGIL TELECOMMUNICATION INDUSTIRIES LTD…….…..2ND DEFENDANT

SAMMY KIRUI…….……..……..3RD DEFENDANT

RULING

On the 14th of June, 2006 the plaintiff, a union representing the employees of the 1st defendant, Telkom (K) Limited and the 2nd defendant, Gilgil Telecommunications Industries Limited, filed a suit seeking declaratory orders of this court that the notices of termination served upon the employees of the 2nd defendant were null and void *ab initio* as they contravened the recognition and collective bargaining agreement entered between the plaintiff and the defendants. They further sought a declaration that the attempted termination and closure of the 2nd defendant was discriminatory, unfair and (in)humane and was undertaken without consultation and in total violation of the **Employment Act** and **The Trade Unions Act**. They prayed that the defendants be restrained from implementing the 2nd phase of the rationalization, retrenchment or in any manner whatsoever terminating the employees of the 2nd defendant until the finalization of the suit.

At the same time, as is usual in such cases, the plaintiff filed the application under the provisions of **Order XXXIX Rules 1 & 2 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** seeking an interlocutory order of injunction to restrain the defendants by themselves or their agents from terminating, rationalizing, suspending or in any way interfering with the employment of the workers of Gilgil Telecommunication Industries Limited, the 2nd defendant herein or in any way implementing the 2nd phase of the rationalization process of the employees of the 1st and 2nd defendant pending the hearing and determination of the suit. The plaintiff further prayed for an order of this court to declare that the rationalization or the termination of employment of the employees of Gilgil Telecommunication Industries Limited violated the agreements entered into between the plaintiff and the defendants and is hence discriminatory, illegal, null and void *ab initio*. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of Emmanuel K. Kanda, the National chairman of the plaintiff union.

The defendants opposed the application. Khadija Mire, the Chief Human Resources officer of the 1st defendant swore a lengthy replying affidavit in opposition to the application. Similarly, Albert P. Onyango, the acting General Manager of the 2nd defendant swore a replying affidavit in opposition to the

application. I heard the submissions that were made by Mr Odhiambo, learned counsel for the plaintiff and Mr Wekesa, learned counsel for the respondent. I have also carefully considered the decided cases that were referred to me by the said counsels. The fact that I may not specifically mention the said decided cases does not imply that this court did not give due consideration and weight to its importance in the arguments presented before me.

After evaluating the said arguments, the questions that came to the fore for determination by this court are as follows; did the plaintiff and the 1st defendant enter into an agreement involving the retrenchment of the employees of the 2nd defendant? What were the terms of the said agreement? Is the 1st defendant a different entity from the 2nd defendant? Was the staff rationalization programme undertaken by the 1st and 2nd defendants in respect of the employees of the 2nd defendant in accordance with the agreement entered between the plaintiff and the 1st and 2nd defendants? Are the alleged breaches of agreement on the part of the 1st and 2nd defendants amenable to be enforced by this court issuing orders of interlocutory injunction? And finally, is the plaintiff's suit competently filed before this court? In answering these questions, this court shall determine whether or not the plaintiff is entitled to the order of the injunction sought. This court has not lost sight of the fact that in deciding whether or not to grant the order of injunction, the principle applicable in the grant of the said order of injunction has to be considered.

What are the facts of this case? On the 4th of November, 2004 the plaintiff and the 1st defendant entered into an a collective bargain agreement whereby it was agreed that should there be any staff rationalization programme, then the 1st defendant was obligated to consult the plaintiff before giving effect to the said staff retrenchment. In the year 2006, due to the dire financial situation of the 1st defendant, it became imperative that the staff rationalization programme be put into effect immediately. According to the 1st defendant, it was forced to rationalize its staff for its very survival as a business enterprise. On the 12th of April, 2006, the 1st defendant entered into an agreement with the plaintiff whereby the criteria was agreed upon which the members of staff of the 1st defendant were to be retrenched or prematurely retired. The criteria that was adopted as contained in clause 8 of the agreement was that the employees of the 1st defendant were to be retrenched in two phases; the 1st phase would involve employees who were over the age of 50 years whilst the 2nd phase involved the employees who were aged less than 50 years.

Arguments were made by the defendants before this court that the said agreement entered between the 1st defendant and the plaintiff did not refer or cover the employees of the 2nd defendant. After carefully evaluating the said submissions made, I hold that the same was misplaced. It was clear from the word go that when the plaintiff and the 1st defendant were negotiating on the retrenchment programme, it concerned all the employees of the 1st defendant including the employees who were employed in the subsidiaries of the 1st defendant. According to the replying affidavits filed by the defendants in this case, they have conceded that the 2nd defendant is a wholly owned subsidiary of the 1st defendant. It is also clear that the retrenchment exercise of the employees of the 2nd defendant in respect of the 1st phase, was conducted in accordance with the agreement of the 12th of April, 2006. There was no doubt in the minds of the parties to this suit that the retrenchment exercise involving the employees of the 1st defendant was also to apply to the employees of the 2nd defendant.

In my view, it is apparent that after the 1st phase was successfully concluded, the defendants reached a decision to implement the 2nd phase of the retrenchment exercise in respect of the employees of the 2nd defendant without consulting the plaintiff. It is apparent that the defendants proceeded with the said phase II in respect of the employees of the 2nd defendant in contravention of clause 3 of the agreement of the 12th of April, 2006 which required that the 1st defendant was to consult the plaintiff for the purposes of identifying the employees who would be retrenched in the 2nd phase. The reasons advanced by the 1st defendant for its blatant breach of the agreement is that, according to it, the agreement of the 12th of April, 2006 did not cover the employees of the 2nd defendant, which according to it was an independent company. As stated earlier in this ruling, it is clear that the 1st defendant negotiated with the plaintiff

with the clear understanding that the said agreement in respect of retrenchment of its employees would cover the employees working in its subsidiaries. When the 1st defendant therefore acted unilaterally by undertaking the 2nd phase of retrenchment of the employees of the 2nd defendant, it acted in bad faith. It also breached the agreement entered between itself and the plaintiff.

Having found that the defendants breached the agreement entered between themselves and the plaintiff, is this court entitled therefore to grant the plaintiff the order of injunction sought? From the outset, it is clear that the plaintiff was not opposed to the retrenchment exercise being undertaken by the 1st defendant on its employees, both working for the 1st defendant and for the 2nd defendant. The main concern of the plaintiff is that the retrenchment exercise was to be undertaken in accordance with the agreement entered between the plaintiff and the 1st defendant and in a transparent and least painful manner for the said employees. There was no problem with the retrenchment of the employees of the 2nd defendant in the 1st phase. Problems arose when the defendants unilaterally commenced the 2nd phase of the retrenchment exercise in respect of the employees of the 2nd defendant without consulting the plaintiff as was provided by clause 3 of the agreement dated the 12th of April, 2006 which provided as follows:

"*3. **IDENTIFICATION OF THE RETRENCHEES***

These shall be carried out during phase two (2) by;

- *A steering committee that shall be drawn from all stake holders including the General Secretary (**COWU**).*

- *The committee shall address all pertinent issues in relation to the company's core business, skills inventory and job evaluation*."

Phase II of the retrenchment exercise involved employees who were aged below 50 years. The plaintiff was obviously concerned that the 1st defendant wanted to ride roughshod on it by undertaking the 2nd phase of the retrenchment exercise without due regard to the agreement entered between itself and the plaintiff.

I agreed with the submission made by Mr Wekesa, learned counsel for the defendants when he stated that an employment agreement is essentially an agreement for personal service. Parties to an employment agreement cannot be forced to continue in an employment relationship when one party obviously does not desire to continue in such a relationship. As was held by the Court of Appeal in the case of **Eric V.J Makokha & Others vs Lawrence Sagini & Others C.A Civil Application No. NAI 20 of 1994 (12/94 UR)** (*unreported*), in a case involving university lecturers who had been terminated from employment after they had gone on strike and who insisted on remaining in their subsidized houses pending the hearing and determination of the suit which they had filed in court challenging their termination from employment, the Court of Appeal had this to say at page 10 of its ruling;

"…….***if they should leave their appointments without giving the stipulated notices, they would have been in breach of contract. What remedy can the university have against them for this breach? It is well established that they cannot be forced to resume their office by the equitable remedy of specific performance. So, the only remedy the university can pursue against them would be a claim for damages for breach of contract. Equitable remedies are said to be mutual. If that is so, if the university itself commits a breach of contract against them, the mutuality rule dictates that they, for their part, can only seek damages against the university for breach of contract. If the university can properly compel them to return to its services by the equitable remedy of specific performance, then, and then only, can they claim a remedy against the university the coercive equitable remedy of specific performance. To compel performance of a contract of personal service in this way, will turn a contract of service into a status of servitude***."

So, having found that the agreement between the plaintiff and the defendants was in respect of personal service in the nature of an employment contract, can this court grant the plaintiff the order of

injunction to compel the defendants to stop from breaching the said terms of employment as relates to the retrenchment of its employees? I do not think so. Although this court has found that the 1st defendant breached the agreement that was entered between itself and the plaintiff on the 12th of April, 2006 as regard the implementation of the 2nd phase of the retrenchment exercise of the employees of the 2nd defendant, it is clear that the only remedy that can only be available to the plaintiff is an award of damages.

As was held by Akiwumi, the Lord President of the COMESA court of justice in the case of **Muleya vs Common market for Eastern and Southern Africa & Another (2) [2003] 2. E.A 623** at page 625;

"***An employee 'who is wrongfully dismissed will generally not be able to obtain a declaration except, perhaps, in special circumstances' (****See The Law of Termination of Employment by Robert Upex (5 ed.) sweet & Maxwell [1997] at page 373 paragraph 10.82)* ***where mutual confidence, which is not the case here, continues to subsist between the parties (****See Hill vs CA Parsons and Company Limited [1972] Ch.D 305****) I have considered the dictum of Lord Reid in*** *Ridge vs Baldwin [1964] AC 40* ***referred to in the summary of the points of law submitted by the applicant's advocate and have this to add that Lord Reid in the same judgment also said: 'there cannot be specific performance of a contract of service.'*** *Fry LJ in De Fransesco vs Barnum [1890] 45 Ch.D 430 at page 438 stated:*

'I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations with one another to continue those personal relations… the courts are bound to be jealous lest they turn contracts of service into contracts of slavery; and … I should lean against the extension of the doctrine of specific performance and injunction in such a manner.'"

Even the oft quoted case of **Giella vs Cassman Brown [1973] E.A 358** on the principles to be considered by the court in determining whether or not to grant an order of interlocutory injunction, requires that the court would not normally grant an order of injunction if the breach complained of would be compensated by an award of damages.

Therefore, having considered the arguments made, and having analyzed the facts of this case, it is clear that the plaintiff has established that the 1st defendant blatantly breached the agreement it had entered with the plaintiff on the 12th of April, 2006 when it commenced the 2nd phase of the retrenchment exercise of the 2nd defendant's employees without consulting the plaintiff. However since this court cannot grant the equitable remedy of specific performance to compel the defendants to perform a contract of a personal service in the nature of an employment contract, this court cannot similarly grant the equitable relief of an injunction to compel the defendants to accept back the employees it had unlawfully terminated. The only remedy available to the plaintiff is to pursue its case so that it may be awarded damages on account of the said breach. The employees who were unlawfully terminated, would be paid damages in accordance with the provisions of the collective bargain agreement entered between the plaintiff and 1st defendant and other applicable laws.

The upshot of the above reasons is that the plaintiff has failed to establish that the breach complained of as against the defendants is amenable to the relief of the interlocutory orders of injunction. The application dated the 14th of June, 2006 is therefore dismissed with costs. The interim orders of injunction which were granted on the same date and extended on the 10th of July, 2006 is hereby vacated.

DATED at Nakuru this 9th day of August, 2006

L. KIMARU

JUDGE