REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT NAIROBI

CAUSE NO 1498 OF 2011

SAMUEL MUTONGA THIRU.....1ST CLAIMANT

GEOREGE OTIENO ODUOR.....2ND CLAIMANT

PAUL WAGANDI GUNGA.....3RD CLAIMANT

JOSEPH MBARE NDEGWA.....4TH CLAIMANT

MICHAEL ODAWO OWINO.....5TH CLAIMANT

WANDIMI MWANIKI.....6TH CLAIMANT

RAJAB GATHUNMBI ATHMAN.....7TH CLAIMANT

AMOS KINUTHIA MWAURA.....8TH CLAIMANT

PETER NGULI MUNGE MBURU.....9TH CLAIMANT

Versus

COLGATE PALMOLIVE (EAST AFRICA) LIMITED.....RESPONDENT

Mr. Oyalo for the Claimants

Mr. Njeru for Respondent

JUDGMENT

1. The nine (9) Claimants were employed by the Respondent at its factory in Nairobi. In a newsletter dated 12th July, 2004, the Respondent announced what it called an accelerated Restructuring and Global Business Building Plan whose main objective was to increase its gross profits and operating profits.

2. On 15th September, 2006, a meeting was called between the workers council and the Respondent's management team in East Africa and Middle East Division at the Respondent's factory in Nairobi. The restructuring plan was discussed and the workers council was to be informed when a conclusive decision is made on the way forward.

3. On 2nd October, 2006, the Respondent's employees working at the factory were asked to assemble and were joined by the General Manager and other members of the management team. The employees were informed that the respondent's manufacturing operations in Kenya had ceased and that they were to appear before two management teams one by one to sign severance statements.

4. It is the Claimants' case that there was no prior notice or consultation with the Claimants' Trade Union as required vide Clause 22(c) of the Terms and Conditions of Employment set out in the Memorandum of Agreement between the Respondent and Claimants' Union, the Kenya Chemical and Allied workers Union.

5. That the decision to terminate the Claimants' employment on account of redundancy was made before 2nd October, 2006 since the documentation was ready. The Claimants' state that they were only required to sign the severance documentation and no discussions were entertained.

6. On 9th October, 2006 the Union reported a dispute to the Minister for Labour and Human Resource Development. The reported dispute was failure to comply with Clause 22(c) of the Collective Bargaining Agreement. The parties were invited to a conciliation meeting on 23rd October, 2006. At the meeting the parties agreed that the Respondent had not complied with Clause 22(c) of the Collective Bargaining Agreement.

7. Also, the Respondent did not endeavor to get the Claimants alternative employment as per Clause 22(b) of the Collective Bargaining Agreement.

8. The Claimants state that they have demonstrated that the Respondent admitted violating Clause 22(b) and (c) of the Collective Bargaining Agreement and therefore the declaration of redundancy did not follow proper procedure, and was therefore unfair.

9. Mr. Peter Nguli Mburu the 9th Claimant testified on behalf of the nine Claimants in support the particulars of claim.

10. The Claimants thereafter filed written submissions on 19th October, 2015. The Claimants pray that the reliefs sought be granted.

Response

11. The Respondent admits that all the Claimants were its employees at the Respondents' factory in Nairobi.

12. The evidence by the Respondent on the subject matter was that on 15th September, 2006, RW1, Kenneth Muchai Ikiara, the respondent's Business Development Director for East and West Africa Region, together with other management team, met the Union's shop-stewards at the Nairobi factory. At the meeting, they explained to the shop stewards that studies had been undertaken in factories and offices worldwide and the Respondent would discontinue production in Kenya as part of a restructuring process but would retain a multifunctional selling team. That at this point no decision had been made about the restructuring and the management assured the Union officials that due process would be followed in case of redundancies.

13. In October, 2006, the management had another meeting with the Union in keeping with the earlier promise and they explained the reasons and the extent of the intended redundancies.

14. The Union claimed the meeting was informal and it did not comply with Clause 22(c) of the Collective Bargaining Agreement.

15. A conciliation meeting was held towards end of October, 2006 where it was agreed that the Respondent would set out the reasons for and the extent of the redundancy in a formal notice. The

Respondent served the notice on the Union and a meeting was held on 30th October, in terms of Clause 22(c) of the Collective Bargaining Agreement.

16. At this point no employee had been declared redundant. The Union wrote to the Minister for Labour again on 31st October, 2006 but no further meeting took place.

17. It is the respondent's case that the Claimants and the Union were at all material times aware of the impending redundancies.

18. That the Claimants were declared redundant and paid redundancy packages and signed discharge vouchers freely and voluntarily as seen on page 29 of the Respondent's bundle of documents.

19. The package comprised,

i. 45 days salary for each completed year of service and severance pay,

ii. Payment in lieu of four months' notice,

iii. Baggage allowance; and

iv. Extended insurance cover up to December 31st, 2009.

20. The Respondent organized sensitization seminars for the 49 affected employees who worked at the factory.

21. That out of the 49 employees declared redundant, only nine (9) have complained.

22. That the Respondent paid an enhanced package and adhered to Clause 22 of the Collective Bargaining Agreement. That the package was way ahead of that provided under 16A of the Employment Act, Cap. 236 of the laws of Kenya (now repealed) which was applicable at the time. That the Respondent followed the law and the Collective Bargaining Agreement and the termination was therefore lawful and fair and the clam should be dismissed with costs.

Determination

23. The issue for determination is whether the Respondent complied with Clause 22(b) and (c) of the Collective Bargaining Agreement in declaring the Claimants redundant and whether the Claimants are entitled to the reliefs sought.

24. Clause 22(b) of the Collective Bargaining Agreement provides,

> *"In an effort to avoid redundancy, the company will endeavor to arrange suitable alternative employment within the company. If the employment is not acceptable to the employee concerned, he will be classified as redundant and therefore eligible for the entitlements outlined in Clause 22 paragraph (f) except where alternative employment offered is of the same grade in which latter case, the redundancy benefits will only be paid at the discretion of the company."*

25. It is not in dispute that the respondent's factory in Kenya was closed down. All the 49 factory employees were declared redundant. The sales team was not affected by the redundancy. The Claimants have the onus of demonstrating that the Respondent had alternative employment opportunities for the employees declared redundant which the Respondent did not make available to the Claimants.

26. In the circumstances of the case, the Claimants have failed to prove on a balance of probability that such alternative employment was available to them upon closure of the only factory in Kenya. The Respondent could not therefore in the circumstances of the case apply Clause 22(b) to the Claimants.

27. Clause 22(c) on the other hand provides,

> *"In the event of redundancy, the company undertakes to consult the Union concerning the reasons for and the extent of the intended redundancy."*

28. From the evidence of the 9th Claimant who testified on behalf of other Claimants and that of RW1, Kenneth Muchai Ikiara, the employees were notified of the imminent worldwide restructuring of the Respondent as early as 12th July, 2004. The Claimants were to be appraised of the developments as and when they arose. From the testimony of the Claimants, on 15th September, 2006 the shop stewards held a meeting with the management of the Respondent and discussions were held on the impending restructuring of the Respondent in East Africa and Middle East Divisions. The General Manager of the Respondent Mr. David Smell attended the meeting.

29. On 2nd October, 2006, the General Manager and management team members met each of the targeted employees in which meeting the employees were made aware of the declarations of redundancy and were asked to sign the exit package.

30. The Claimants have not challenged the package given to them upon being declared redundant. It is admitted that the package was far superior to the statutory exit package provided under Section 16A of the Employment Act Cap. 236 of the laws of Kenya (now repealed) applicable to the matter at the time. However, the Claimants are aggrieved by the lack of giving one months' notice to the affected employees and the Ministry of Labour after discussing the various options available to the affected employees prior to getting them to sign the exit packages.

31. Indeed, the Respondent signed on 26th October 2006, an agreement after a conciliation meeting held at the Labour Headquarters on 26th October, 2006 that *"the company did not comply with the parties Agreement Collective Bargaining Agreement on redundancy Clause 22(c)."*

32. It was understood that the Respondent would then move to rectify this situation by discussing with the Union all the reasons and the extent of the intended redundancy and then proceed to issue the necessary one month notice of the intended redundancy to the Union and the Ministry of Labour. It is not in dispute that all the employees had already signed their exit packages on 2nd October, 2006 to take effect on 31st October, 2006. Apparently the Respondent did not consider it necessary to rectify the situation.

33. It is also not in dispute that on undisclosed date, the Respondent held exit seminars with the Claimants to ameliorate the effects of the intended redundancies. No wonder 40 out of the 49 employees did not file suit and were satisfied with the manner the Respondent had treated them.

34. The letter by the Respondent to the Minister for Labour and Human Resource Development dated 3rd November 2006 encapsulates the mindset of the Respondent which is that, it had fully complied with Clause 22(c) and 22(f) of the Collective Bargaining Agreement by offering a superior package to the affected employees and that there was no requirement to negotiate the entitlement to redundant employees or methodology of redundancy benefits in Clause 22(f).

35. It is the court's considered view that, the payment in lieu of notice, in this case two months' salary in lieu of notice, though commendable does not substitute the statutory requirement to provide the Union and the Ministry of Labour at least one month notice to allow the parties and if necessary the Minister for Labour opportunity to know the intended redundancy and have opportunity of at least one month to fully canvass the relevant issues. The lack of this opportunity is the real grievance by the Union. Whether or not this opportunity if granted would have changed the plight of the Claimants or the package given to them is neither here nor there, the point is that this is a legal requirement that must be followed by an employer who intends to lay off its employees on ground of redundancy. Admittedly, this did not happen.

36. Having carefully considered all the circumstances of this case however, the court finds that the failure

by the Respondent to provide one month notice to the Ministry of Labour and the Union did not materially, negatively impact the Claimants. The payment of an enhanced package, way above the minimum provided by the statute, well mitigated this omission. Each case must however be judged on its own merits and this should not be seen as an opening to circumvent the statutory procedure provided by the law then, under Section 16A of the Employment Act, Cap. 236 of the laws of Kenya (now repealed). The provision is replicated under Section 40 of the current Employment Act, 2007.

37. Accordingly, the court finds that the declaration of redundancy to the Claimants was fair and just and the suit by the Claimants therefore lacks merit and the same is dismissed with no order as to costs especially bearing in mind the procedural omission by the Respondent noted by the court in this matter.

Dated and delivered in Nairobi this 1st day of April, 2016.

MATHEWS N. NDUMA

PRINCIPAL JUDGE