IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, G.B.M. KARIUKI & J. MOHAMMED JJ.A.)

CIVIL APPEAL NO 172 OF 2013

KENYA BREWERIES LIMITED.....1ST APPELLANT

EAST AFRICAN BREWERIES LIMITED.....2ND APPELLANT

KENYA MALTINGS LIMITED.....3RD APPELLANT

EAST AFRICAN MALTINGS LIMITED.....4TH APPELLANT

VERSUS

SYMON WAIROBI GATUMA.....RESPONDENT

(Being an appeal from the Award and decree of the Industrial

Court of Kenya Nairobi, (Rika, J.) delivered on the 25th January, 2012

in

Industrial Cause No. 1011 OF 2010)

****

JUDGMENT OF THE COURT

1. This is an appeal from the Award of **James Rika, J.** in Industrial Court Cause No 1011 of 2010 filed by **Symon Wairobi Gatuma** (respondent) against **Kenya Breweries Limited, East African Breweries Limited, Kenya Maltings Limited** and **East African Maltings Limited** (1st, 2nd, 3rd & 4th appellants respectively).

Background

2. The respondent, vide a Memorandum of Claim dated 31st August, 2010 sought several reliefs against the appellants herein. It was the respondent's case that he was employed by the 1st appellant as a machine technician on 29th October, 1986; that he was attached to the malting section in the engineering department; that he left employment on 30th June, 2009, after a service spanning twenty-two years; that the 2nd appellant is the parent company of the 3 other appellant companies which are subsidiaries of the parent company; that on 23rd April, 2003, the 1st and 2nd appellants de-linked their malting unit from the

beer production company with the malting function being transferred to the 3rd and 4th appellants; that the respondent and his fellow employees were informed that they were in the employment of the 3rd appellant; that the respondent continued to perform the same duties under the employment of the 3rd appellant as he had previously done while in the employment of the 1st appellant; and that he was forced to accept a lower salary and allowances than what he had previously received when he was under the employment of the 1st appellant.

3. It was the respondent's further claim that he was a member of a trade union, **Kenya Union of Commercial Food and Allied Workers** (KUCFAW); that the employees were forced to sign fresh letters of employment with the 3rd appellant, failing which they would be summarily dismissed for insubordination and that the new salaries and allowances had not been negotiated and agreed between the employer and the trade union or between the employer and the individual employees.

4**.** The respondent further claimed that on de-linking of the companies, he was entitled to a differential payment on account of house rent allowance totalling Kshs 162,128. This amount was however retained by the 1st and 2nd appellants to be paid to him upon retirement from employment. Further, that the said amount was not deposited in his retirement benefits scheme account which would have earned him interest. The respondent left employment on 30th June 2009, but this benefit was only paid to him on 28th July 2010 which amount had unaccounted deductions. The respondent therefore claimed the deducted amount together with interest on the principal amount at 12% from 1st May, 2003.

5. It was the respondent's further claim that the change of terms and conditions of service on de-linking was illegal and unfair; that an employee's salary cannot be reduced without reasons and that the shift schedules increased for him on de-linking.

6. The respondent prayed for a declaration that he was an employee of the 1st and 2nd appellants until 30th June, 2009 and that there was no severance of employment between the 1st and 2nd appellants and the respondent; that the reduction of his salary between the period May 2003 and June 2009 was illegal and unfair as a consequence of which he is entitled to Kshs. 3,076,915/= ; that the retention of house allowance payable from May 2003 to July 2010 was illegal and the respondent is entitled to interest at court rates including the amount deducted totalling Kshs. 184,697/= and that he was entitled to a 20 years Long Service Award in view of the fact that he was in the employment of the 1st Appellant for a period of over 20 years.

7. The appellants filed a Statement of Response and submitted that the decision to separate the 1st appellant and its barley growing operations led to the registration of the 3rd appellant; that this was a prudent commercial decision aimed at ensuring the eventual survival and prosperity of the two entities in a changing commercial environment; that in furtherance of the said objectives, the 1st appellant released all its employees who had been seconded to the 3rd appellant and followed due process by issuing the requisite redundancy notices to the Union and the affected employees, which included the respondent; that the respondent was paid a redundancy package by the 1st appellant before taking up employment with the 3rd appellant; that the differential payment arising from the 2003 de-linking process was paid into the respondent's Retirement Benefits Scheme Account; that the sum due to the respondent upon his retirement was duly computed and paid out to him in full; that there is no further payment due to the respondent in respect of the differential payment; that the respondent was procedurally declared redundant by the 1st appellant and duly paid a fair redundancy package and of his own free will took over the employment offer subsequently made by the 3rd appellant; that all salary due to the respondent before the redundancy declared by the 1st appellant was paid in full to the respondent in the redundancy package; that the respondent's claims are an afterthought coming over seven years after he took up employment with the 3rd appellant during which period his salary and allowances were paid every month as they become due and payable and that the respondent is not entitled to the 20 year long service Award having ceased to be an employee of the 1st appellant in 2003 before he completed 20 years of service with the 1st

appellant.

The appellants called three Defence witnesses who all testified that they willingly accepted the offer of employment from the 3rd appellant; that the respondent signed and accepted the letter of appointment from the 3rd appellant dated 25th April, 2003 and that some employees declined the offer of employment from the 3rd appellant.

After considering the Memorandum of Claim, statement of Response and submissions, the learned Judge allowed the respondent's suit and determined that there was no justification for the appellants retaining the respondent's differential payments assessed in 2003 up to 28th July, 2010 at Kshs. 162,128; that if this amount had been deposited in the respondent's retirement benefits scheme account, it would have earned interest, that this amount was not subject to deductions; that a long service Award was awarded to employees on serving for fifteen years; that the respondent was awarded the same after fifteen years of service; that the respondent was entitled to being awarded the 20 years Long Service Award on the ground that his employment commenced in 2003; that the respondent should have transited to the 3rd appellant at a gross salary of Kshs. 66,064 and not Kshs. 29,865 since, while appreciating that employment compensation is not always a precise science, due regard must be paid to what is fair, and nearest to what satisfies the injury occasioned to the aggrieved party and that courts must ask which relationship presents the vulnerabilities justifying protection. Accordingly, the learned Judge made the following declarations in favour of the respondent, that:

> *a.* ***The respondent was an employee of all the four appellants up to the date of termination on 31st May 2009.***
>
> *b.* ***There was no lawful severance of the contract of employment in 2003 and his employment continued up to 31st May 2009.***
>
> *c.* ***The reduction of the respondent's salary between 2003-2009 was unlawful. The appellants were ordered to pay the respondent underpayment of salary for the 72 months totalling to Kshs. 1,881,846.***
>
> *d.* ***The retention and reduction of the respondent's house allowance differential payments was unlawful. The appellants were ordered to pay the respondent Ksh. 184,826.***
>
> *e.* ***The Respondent is entitled to a long service reward of Ksh. 130,000 given after 20 years of employment.***
>
> *f.* ***The total sum of Ksh. 2,196,672 to be paid to the respondent by the appellants within 30 days of the delivery of the award.***

9. Dissatisfied with the Judgment, the appellants now bring this appeal on the grounds that the learned Judge erred in law and in fact by:

> *1.* ***Holding as he did in lifting the veil of incorporation of the 1st, 3rd and 4th appellants, and declaring them departments and subsidiary companies of the 2nd appellant.***
>
> *2.* ***Holding as he did that the appellants companies are facade companies formed to avoid liability or escape the obligation of an employer under the regime of labour law and fair practice and***
>
> *3.* ***Declaring that there was no lawful severance of the respondent's contract of employment in 2003 and that the respondent was an employee of the 1st appellant from 1986 to 2009 and thereby disregarding the contract of Employment between the 3rd appellant and the respondent.***

4. ***Holding that there was unlawful reduction of the respondent's salary between 2003 and 2009 and ordering the appellants to pay the respondent Kshs. 1,881,846 as underpayment of salary for seventy two months.***

5. ***Holding that the respondent was entitled to a differential amount of the house rent allowance and ordering the appellants to pay the respondent Kshs. 184,826.***

6. ***Holding that the respondent was entitled to and should have been awarded long service award for 20 years upon his termination and ordering the Appellants to pay the respondent Kshs. 130, 000 as long service award.***

10. The appellants prayed for the appeal to be allowed with costs and that the Judgment and decree of the Industrial Court be set aside and substituted with an order dismissing the respondent's suit.

Submissions by Counsel

11. When the matter came up for hearing before this Court, all parties were represented by learned counsel. Mr. J.O. Okeyo was present for the appellants while Mr. J.S. Namada represented the respondent.

12. On behalf of the appellants, Mr. Okeyo submitted that the appeal revolves around redundancy; that there were two (2) declarations of redundancy; the first one dates back to 2003 and came after the respondent had worked for the 1st appellant for 15 years; that the redundancy was lawful; that the Memorandum of Claim alludes to the circumstances around the redundancy; that the evidence tendered in the trial Court was that it was a redundancy that was procedural; that there was due notice to the Union as the respondent was a member; that there was also due notice to the employee; that there was payment of terminal benefits which made redundancy complete. Counsel faulted the learned Judge for not giving these factors due consideration.

13. Counsel submitted further that the appellant's contention is that redundancy took effect on 30th April, 2003; that the appellants did not unprocedurally terminate the respondent's employment with the 1st appellant as negotiations took place with the Union; that employees were paid their terminal dues; that the respondent was paid a total of 2 million once he was declared redundant is not in dispute; that the 3rd appellant was ready to take on some employees on new terms; that there was complete cessation of employment after payment of redundancy dues. Counsel invited the court to find that there was redundancy and that the respondent's claims should, therefore, not arise. Further, that the respondent claimed that as there was no redundancy, he was entitled to a long service award which the learned Judge wrongly awarded him. Counsel urged us to allow the appeal.

14. Mr. Namada, learned counsel for the respondent, opposed the appeal. According to counsel, the appellants trampled on their employee's rights; that on the issue of (National Social Security Fund), the 3rd appellant was a separate entity; that in addition, Kshs 162,000/= due to the respondent at the time he was allegedly paid off was retained by the appellant after retrenchment; which explained the 1st appellant's retention of the appellant's dues. According to counsel there was no delinking between the two companies, that the payment made to the respondent was a global payment agreed upon as a reason to release some employees and retain others; that the respondent's employment grade was grade Z which was the same grade that he had while employed by the 1st appellant; that employees who were in a weaker position than the employer were not represented at the time of negotiation of salaries; that it was, therefore, a unilateral decision by the appellants to retrench the respondent; that the respondent is being referred to as an employee of the 3rd appellant yet the respondent was never given any letter of employment by the 3rd appellant; that the clearance certificate of employment was issued to the respondent by the 2nd appellant, while the Certificate of service was from the 1st appellant.

15. According to counsel, this clearly proves that there was no cessation of employment from the 1st appellant to the 3rd appellant by the respondent. Counsel urged us to dismiss the appeal.

Determination

16. We have considered the record of appeal, the submissions made and the law. This being a first appeal, the Court is enjoined to reconsider the evidence, evaluate it itself and draw its own conclusions bearing in mind that it has neither seen nor heard the witnesses.

As succinctly pronounced in the case of ***Selle and Another v Associated Motor Boat Company Limited and Others [1968] E A 123***;

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

17. It is the respondent's contention that the 1st, 3rd and 4th appellants are working specialised units of the 2nd appellant. The appellants contend that a company acquires legal personality independent of its owners and the appellants are therefore all separate legal entities.

18. On the issue of separate legal entities, we are guided by paragraph 83 of Halsbury's Laws of England, 4th Edition which states as follows: -

> ***"When incorporated, the company is a legal entity or persona distinct from its members, and its property is not the property of the members. The nationality and domicile of a company is determined by its place of registration".***

A limited liability company has legal personality and it acquires its own property, rights and liabilities separate from its members upon incorporation.

19. The case of ***Victor Mabachi & Another v Nutinn Batex Limited Nrb Civil Appeal No. 247 of 2005***, expounds on this issue further:-

> ***[A company] is a body corporate, is persona jurisdica, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil".***

20. The same position has been asserted in the case of ***Kolaba Enterprise Ltd. v. Shamsudin Hussein Varvani & Another (2014) eKLR*** that:

> ***"It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO. LTD. v SALOMON [1887] A.C. 22 H. L. that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities".***

We, therefore, find that the appellant companies being duly registered companies are separate legal entities with rights and liabilities appropriate to itself. See ***Salomon v Salomon & Co. Ltd***. (supra).

21. On the question whether the respondent's employment was terminated on account of redundancy upon

the de-linking, both section 2 of **Employment Act** and **Labour Relations Act** (now repealed) define redundancy thus:

> ***"The loss of employment, occupation, job or career by involuntary means through no fault of the employee involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."***

Section 40 of the Employment Act (now repealed) deals with termination of employment on account of redundancy and provides:

> ***"(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions -***
>
> *a.* ***Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extend of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;***
>
> *b.* ***Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***
>
> *c.* ***The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***
>
> *d.* ***where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;***
>
> *e.* ***the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***
>
> *f.* ***the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***
>
> *g.* ***the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."***

22. In the instant case, did the appellant meet the foregoing requirements? The respondent has argued that his employment was not terminated but he was transferred to the 3rd appellant because the 1st and 2nd appellants de-linked the malting section, that after his transfer to the 3rd appellant he worked at the same unit and the workload became even heavier as many employees were retrenched leaving only two persons to undertake similar duties, that even though the appellants have argued that his employment was made redundant, that was not the case but rather that there was change of terms and conditions of service on de-linking which was illegal and unfair. The appellants on the other hand have maintained that there was redundancy which was procedural and legal.

23. ***E.M. GITHINJI, J.A.,*** in the case of ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others*** ***[2014] eKLR expounded on redundancy as follows;***

> ***"Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is a fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy. What the phrase***

means, in my view, is that while there may be underlying causes leading to a true redundancy situation, such as reorganization, the employer must nevertheless show that the termination is attributable to the redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment."

24**.** It is the appellant's submissions that the delinking of the 1st and 3rd appellant companies was as a result of a prudent commercial decision whose objective was to ensure the survival and property of the 2 entities in a changing commercial environment. In the circumstances of this case, we find that this was a valid ground for declaring some employees redundant.

25. We note that the respondent was a member of a trade union. The respondent has maintained that the trade union was not informed but the decision was unilateral. Indeed, there is evidence that the respondent's union was informed. The learned Judge with regard to this issue stated:

"The claimant was a member of KUCFAW. He was covered in a CBA concluded between the Union and Kenya Breweries Limited. The de-linking process was discussed between the Union and the employer on various occasions. The initial communication to the union came from J.L. Mwakisha, the Human Resource Manager of the 1 st respondent. He informed the secretary general of KUCFAW that the 1st respondent intended to release some of the union members, employees of the 1st respondent, in early March 2003, on what was said to be early retirement. The malting unit was experiencing market constraints that resulted from excess barley stock. it intended to reduce barley purchasing, which would significantly change the company's market activities."

26. From the record, it is evident that by a memorandum dated 23rd April, 2003 the 1st appellant issued a redundancy notice to the respondent. The 1st respondent also notified KUCFAW by a letter dated 25th February, 2003 that as a result of the delinking of the 1st and 3rd appellants, the 1st appellant would declare some employees redundant. The 1st appellant thereby gave the Union the required 2 months redundancy notice.

27. We are guided by the case of **Aoraki** ***Corporations Limited V. Collin Keith Mc Gavin; CA 2 of 1997* [*1998] 2 NZLR 278*** where the Court of Appeal of New Zealand stated in relation to termination brought about by redundancy;-

"…It is convenient in other termination cases, and essential in redundancy cases, to consider whether the dismissal was substantively justified. Thus if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subject to significant procedural irregularity as to cast doubt upon the outcome….

Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business.

It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment

possibilities."

In the circumstances of this case, we find the redundancy notice issued by the 1st appellant to the valid and procedural in compliance with Section 40 (1) of the Employment Act.

28. We note that the respondent accepted the 1st redundancy severance payment made by the 1st appellant in 2003 and further, that the respondent accepted the letter of offer in respect of the employment from the 3rd appellant dated 25th April, 2003. We do not therefore agree with the respondent that the 1 st appellant's decision to declare him redundant was unilateral and unprocedural. The said letter of offer clearly spelt out the employment terms including the salary and house allowances and the respondent worked on these agreed terms and conditions for a period of 6 years.

29. It is instructive that after 6 years, the respondent received and accepted the second redundancy severance payment in 2009. We, therefore, find that the respondent was declared redundant by the 1st appellant in 2003 and paid his redundancy severance payment in accordance with the employment and labour laws. We also find that the respondent acquiesced to the new terms of employment by the 3rd respondent from 2003 and 2009 and was paid his dues during the term of his employment.

30. Regarding the long service award, we note that the respondent was not employed by the 1st or 3rd appellants for a period exceeding 20 years. Accordingly, the appellant was not entitled to a long service award of 20 years or any payment attached to the award.

31. The upshot is that this appeal is allowed and the judgment and decree of the Industrial Court of 25th January, 2012, is hereby set aside.

Each party will bear its own costs.

Dated and delivered at Nairobi this 14th day of July, 2017.

W. KARANJA

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JUDGE OF APPEAL

G. B. M. KARIUKI, SC

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR