Banking Insurance and Finance Union (Kenya) v Inoi Farmers Co-operative Society Limited (Cause E041 of 2024) [2025] KEELRC 2257 (KLR) (29 July 2025) (Judgment)

Neutral citation: [2025] KEELRC 2257 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CAUSE E041 OF 2024

ON MAKAU, J

JULY 29, 2025

BETWEEN

BANKING INSURANCE AND FINANCE UNION (KENYA) ..... CLAIMANT

AND

INOI FARMERS CO-OPERATIVE SOCIETY LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. By an internal memo to all permanent employees dated 12th August 2024, the respondent gave notice of its intention to declare redundancies to all its 24-permanent staff. The main reason cited was unsustainable wage bill since the permanent staff were being paid salaries under CBA negotiated on the basis of Wages (General) Order as opposed to the Wages (Agricultural Industry) Order. The respondent further served each individual permanent employee with a letter dated 22nd August 2024 terminating their employment due to redundancy with effect from 30th September 2024. The termination letters attached computation of severance pay for each employee.

2. The claimant filed a Memorandum of Claim and a Notice of Motion under certificate of urgency to challenge the intended redundancy exercise. The claim sought the following reliefs: -

    a. The redundancy notices issued by the Respondent to all the Twenty-three (23) Grievants dated 22/08/2024 are null and void.

    b. The Respondent is restrained and/or prohibiting from unlawfully, unfairly and unprocedurally terminating the services of the said Twenty-three (23) unionisable employees on account of redundancy.

    c. The Respondent to pay costs to the claimant.

    d. Any other relief the court deems fit to grant.

3. The Notice of Motion sought the following reliefs: -

    a. That the Honourable court be pleased to certify this application as being urgent and the same be heard ex-parte in the first instance and service be dispensed with.

    b. That this Honourable court be pleased to issue interim ex-parte orders injuncting and/or restraining and/or prohibiting the Respondent, or their recognised agents from unlawfully, unfairly and unprocedurally terminating the services of the said Twenty-three (23) unionisable employees on account of redundancy pending the hearing and determination of this Application and the Statement of Claim.

    c. That this Honourable court be pleased to issue interim orders compelling the Respondent to stop the already envisaged arbitrary unlawful, unfair and unprocedural termination of services of the Twenty-three (23) unionisable employees on account of redundancy pending the hearing and determination of this Application and the Statement of Claim.

    d. That this Honourable court be pleased to issue an order declaring the intended redundancy of the Twenty-three unionisable employees by the Respondent null and void ab initio.

    e. That the costs of this Application to be in the cause.

4. The respondent filed response and counter claim denying any wrong doing in the intended redundancies and prayed for the following: -

    a. It be allowed to carry out the re-organization /redundancy and operate within its means.

    b. The claimant to remove the unionized workers from the General Order and place then under the Agricultural Industry order.

    c. That the parties be at liberty to re-negotiate the collective bargaining agreement afresh and any worker be at liberty to join any other trade union of his/her choice.

    d. Cost and interest of this suit be provided.

5. On 20th September 2024, the court granted interim order suspending the termination notices and fixed the motion for interpartes hearing on 26th September 2024. On the said date, the matter was adjourned to 17th October 2024 to enable the respondent to file its responses. On the 17th October 2024, the parties compromised the motion by agreeing to extend the interim order till hearing and determination of the suit.

Evidence

6. Mr.William Koilekeu Ololchike, claimant's Education/Recruitment officer testified for the claimant as CW1. He adopted his written statement as his evidence in chief and produced 16 documents in the three bundles of documents dated 18th September 2024, 13th January 2025 and 14th March 2025.

7. In brief, he stated that the claimant has a recognition agreement with the respondent signed on 12th August 2012 and together they have negotiated several CBAs. The current CBA was registered by this court on 12th February 2025 as RCA No.19 of 2025. He contended that the said CBA was negotiated by representatives of both the respondent and the union and was approved by the Principal Secretary, Ministry of Labour and Social Protection.

8. CW1 further stated that the respondent issued notice of intention to declare redundancies to all the permanent staff by an internal Memo dated 12th August 2024. Subsequently, it served the individual

staff with a letter terminating employment on account of redundancy with effect from 30th September 2024. The letters were received on 26th August 2024 and the claimant, by letter on 28th August 2024, sought for a consultative meeting with the respondent on 4th September 2024.

9. The meeting was eventually held on 12th September 2024 but the parties failed to agree on the reason for and the extent of the redundancy, and the benefits payable especially whether they are to be calculated based on the Minimum Wage under the Wages (General) Amendment Order of 2022 on the Wages (Agricultural Industry) Order. He contended that the salary for some of the staff being declared redundant is below the statutory minimum as observed by the CPPMD in its letter dated 16th September 2024 (BF -2 of page 75-76).

10. He contended that the Minimum Wages published in Regulation of Wages (General) Order, *Legal Notice No.125 of 2024* is the irreducible statutory Minimum and it is comparable with the CBA herein. As such, he stated that the basic salary for some of the employees needs to be adjusted before the redundancy or retirement.

11. He contended that the redundancy exercise is not justified as there is no excess labour and the positions are not falling off. He contended that the redundancy is untenable as the employees are going to be replaced with new staff or be reappointed to the same positions after the redundancies.

12. He further stated that the procedure for redundancy under section 40(1)(a) of the *Employment Act* is mandatory and should be strictly followed before termination on account of redundancy. He stated that the procedure was not followed in relation to issuance of notice, selection process and computation of severance pay and that rendered the redundancy flawed, wrongful, unlawful, null and void. He urged the court to award the reliefs sought.

13. On cross examination, he confirmed that he attended CBA negotiations as an official of the Union. He contended that the respondent is a SACCO. He contended that the redundancy notice dated 12th August 2024 was issued to the employees directly as opposed to the union. He contended that the notice was sufficient but it was wrongly served on the employees directly.

14. RW1 was Felix Muriithi Mwai, a Coffee farmer, businessman and the respondent's chairman since February 2021. He adopted his written statement dated 28th October 2024 and a supplementary statement dated 21st January 2025 as his evidence in chief. He further produced 22 documents as exhibits for the respondent.

15. In brief, he stated that the respondent is about to sink under the weight of huge wage bill. The problem was caused by the union treating the respondent as a SACCO as opposed to a Cooperative Society and negotiating CBA based on the Wages (General) Order instead of Wages (Agricultural Industry) Order. He contended that the respondent has invited the claimant to renegotiate the CBA on the basis of the correct Wage Order, but with no success.

16. He further stated that, when the respondent realised that it cannot afford the wage bill in the CBA, it decided to restructure the institution to align with the correct industrial sector and activity with the agreement of the employees. He contended that the claimant was involved in the process until the last minute when it ran to court to stop the process.

17. He contended that the claimant was acting in bad faith and has not produced its Constitution to prove that it is authorised to represent employees in the respondent's sector. Finally, he contended that some of the documents produced by the claimant as exhibits bear the respondent's stamp and were not sanctioned by the Management Board but obtained through collusion with some employees.

18. He admitted that a CBA has duly been registered by the court and that it was negotiated without mentioning redundancy. He further admitted that redundancy notice dated 12th August 2024 was addressed to the employees.

19. RW2, Mr.Isaac Kariu Kamundia, former chairman of the respondent testified as RW2. He was replaced by RW1 as the chairman in 2021. He adopted his written statement dated 28th October 2024 as his evidence in chief.

20. In brief, he contended that the respondent has no recognition agreement with the claimant up to date. He denied that the respondent was a SACCO and averred that they have consistently used the name Inoi Farmers Cooperative Society Limited.

21. He further contended that the claimant forced its way to the respondent and ever since, there has been problem of paying salaries, allowances and retirement benefits as the workers were placed in the wrong category of the Wages (General) Order which does not apply to the Agricultural Industry. He maintained that the claimant has refused to rectify the error thereby forcing the respondent to carry out the restructuring in order to address the problem once and for all.

22. On cross-examination, he admitted that the respondent signed a Recognition Agreement dated 10th August 2012 with the claimant when Stanley Njagi Chore was the chairman.

23. After the hearing, both sides filed written submissions which summed their respective cases.

Issues for determination and analysis

24. Having considered the pleadings, evidence and submissions, it is clear that the respondent has initiated redundancy process against the claimant's members vide internal memo dated 12th August 2024 and termination letters dated 22nd August 2024. Section 40(1) of the *Employment Act* provides as follows: -

> " 40.
>
> (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 extent of, the intended redundancy not less than a month prior to the date of the intended 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 to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

25. The issues for determination are: -

a. Whether the redundancy is justified.

b. Whether the redundancy is in accordance with the procedure under section 40 of the *Employment Act*.

c. Whether the reliefs sought by the claimant should be granted.

d. Whether the reliefs sought in the respondent's counterclaim should be granted.

e. Who should bear the costs of the suit?

Justification

26. Justification for termination of employment on account of redundancy is the existence of a redundancy situation. The best judge of whether or not a redundancy situation exists is the employer who has the Managerial prerogative and the business experience to decide on the strategies of retaining his business profitability. In this case the respondent contended that the Wage Bill based on Wages (General) Order as opposed to Wages (Agricultural Industry) Order is now unsustainable.

27. It is the respondent's case that the claimant has refused to renegotiate the CBA which has since been registered on 12th February 2025. The CBA was checked by the Ministry of Labour and was found to be proper before it was forwarded to the court for registration. However, as I have observed already herein, the employer has a prerogative in managing its business and the court cannot yoke it with employee it cannot afford to pay. Besides the court notes RW1's contention that the respondents management committee was not involved in the negotiation of the CBA and that there was collusion between the negotiating teams both of whom had an interest in getting high salaries.

Procedure

28. The above provision is clear that where an employee is represented by a trade union, the redundancy process is initiated by a notice to the trade union and the area labour officer under subsection (1) (a). Where the said procedure is not followed the intended redundancy is unlawful.

29. In De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR, the Court of Appeal held that: -

> " It is clear to us that section 40(a) and 40(b) provides for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a trade union, the notification is to the union and Local Labour Officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employees and the Local Labour Officer.
>
> There must be a sound reason why there is a distinction in section 40 based on whether the employee is or is not a member of a trade union. The right to form, join or participate in the activities and programmes of a trade union is under pinned by Article 41(2)(c) of *the Constitution*. The right is then actualized in the *Labour Relations Act*. Under the Act, membership is voluntary...
>
> Where an employee is a member of trade union, the law contemplates that the employer will deal with the employee through the union. That is why section 40(a) requires notification of the union in cases of redundancy of unionisable workers."

30. I need not say more on this issue because it is clear that the respondent was legally bound to serve the claimant with the redundancy notification but it chose to serve the employees directly. It also never served the Local Labour Officer with the notice. Failure to serve the notice as required under section 40(1)(a) of the *Employment Act* rendered the redundancy process unfair and unlawful.

31. The purpose of the said notification before redundancy was explained by the Court of Appeal in Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR. After seeking guidance from Article 13 of Recommendation 166 of the ILO Convention 158 on Termination of Employment Convention, 1982. Maraga JA held: -

> " As I have said, besides this convention, the requirement of consultation is implicit in the principle of fair play under section 40(1) of the *Employment Act* itself and our other Labour Laws. The notices under this provision are not merely for information...
>
> The purpose of the notice under section 40(1) (a) and (b) of the *Employment Act*, as is also provided in the said ILO Convention, No.158-Termination of Employment Convention, 1982 is to give the parties an opportunity to consider "Measures to be taken to avert or minimize the terminations and measures to mitigate the adverse effects of any termination on workers concerned such as finding alternative employment." The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible or the best way of implementing it, if it is unavoidable."

32. Had the parties given consultation a chance, with the assistance of the Local Labour Officer, maybe the redundancy could have been avoided. However, going by the hostility that was displayed by their representatives in this court, it is obvious that the rift between them, excluding the employees, had widened irretrievably.

33. Having said that, the legal burden of serving proper notices in order to initiate consultation was upon the respondent. It is now clear that it failed to discharge that legal burden and the court finds that the termination notices on account of redundancy were unlawful.

Reliefs to the claimant

34. The termination notices have not taken effect since the court suspended the notices by consent of the parties pending hearing. The employees are still discharging their duties and receiving their pay. In view of my finding above that the intended termination is unlawful, I declare the notices null and void.

35. I further prohibit the respondent from carrying out unlawful redundancy. However, the employer is free to exercise its right to declare redundancies in future if the right procedure is followed. The court or a trade union cannot run the business of employers. All that the court can do is to intervene if the employer is proceeding contrary to the law or the procedure set out in a CBA or HR Manual. The court does not intervene to stop the process altogether but to put the employer back on the track of the prescribed procedure for separating with its employees.

Counterclaim

36. The respondent prayed that it be allowed to continue with the reorganisation/redundancy and operate within its means. It also prayed that it be allowed to remove the unionized workers from payment of the rate prescribed under the Wages (General) Order to Wages (Agricultural Industry) Order. It also prayed to be allowed to revoke its recognition agreement with the claimant union or in the alternative they renegotiate the CBA.

37. The respondent is represented by an Advocate who is presumed to know the law that can guide the respondent to achieve the above outcomes. I have already explained that the court cannot muzzle the respondent from undertaking redundancies. However, in doing so it must follow the law because there is a legal telescope of International Labour standards that constantly observes how employments are terminated, and if the standards are violated, the court comes in to ensure that the right procedure is followed.

38. One more thing, the respondent cannot choose a trade union for its employees since doing so, the right of the employees to form, join and participate in activities of a trade union of their choice, under Article 41 (2) (c) of *the Constitution* would be violated. Nevertheless, the law provides for the procedure of revoking agreements with trade unions.

39. As regards the prayer for renegotiating the CBA, I see no big deal there because, as I have mentioned earlier, had proper notices been served on the union and the Local Labour Officer, consultation would have been done including the question of renegotiating the CBA terms. A registered CBA can be amended by subsequent collective agreement to avert redundancies. In the end, I dismiss the counterclaim for lack of merits.

Conclusion

40. I have found that the respondent has a valid reason for the intended redundancies. I have however found that the procedure followed offends the mandatory procedure for redundancy set out under section 40 of the *Employment Act* and therefore the notices are null and void. I have further found that the employer is at liberty to continue with the redundancies in future but upon strict adherence with the statutory procedure set out under section 40 of the *Employment Act*. Consequently, I enter judgment for the claimant as follows: -

    a. The redundancy notices issued by the respondent to all the 23 grievants dated 22nd August 2024 are unlawful, null and void.

b. The respondent is prohibited from laying off the grievants without following the lawful procedure.

c. For avoidance of doubt the respondent is at liberty to proceed with the intended redundancies provided that it complies with the lawful procedure under section 40 of the *Employment Act* and the CBA.

d. Costs of the suit shall be to the claimant.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF JULY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.