



**Harun v Watu Credit Limited (Employment and Labour Relations Cause E1054 of 2023) [2024] KEELRC 350 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 350 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1054 OF 2023  
BOM MANANI, J  
FEBRUARY 16, 2024**

**BETWEEN**

**WILFRED NYANUSI HARUN ..... CLAIMANT**

**AND**

**WATU CREDIT LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. By a contract of service dated 2<sup>nd</sup> March 2022, the Respondent engaged the services of the Claimant as Senior Human Resource Manager. On 1<sup>st</sup> September 2022, the Claimant was promoted to the position of Head of Human Resources.
2. By a Deed of Variation of Contract dated 1<sup>st</sup> July 2023, the Respondent varied the Claimant's contract with the consequence that the latter was to now serve in the position of East Africa Recruitment, Compensation and Benefits Lead. By the same instrument, the Respondent gave the Claimant an assurance that the new position would be tenable for a period of not less than one year from the date of its establishment.
3. By an instrument dated 21<sup>st</sup> July 2023, the Respondent allowed the Claimant to proceed on paid sabbatical leave for a period of six (6) months with effect from 1<sup>st</sup> September 2023. In effect, the Claimant was to resume duty at the commencement of March 2024.
4. The Claimant avers that whilst he was on the sabbatical leave, he was summoned to a meeting with the Respondent's management on 30<sup>th</sup> November 2023. He avers that at the meeting, the Respondent informed him that his position was no longer tenable. As such, it was likely to be declared redundant. The Claimant states that the Respondent handed him a notice of intended redundancy on the same day.



5. The Claimant contends that the impugned redundancy notice was defective because it was expressed to run from an unspecified date after 30<sup>th</sup> November 2023 until 29<sup>th</sup> December 2023. The Claimant avers that according to the law, the notice begun to run on 1<sup>st</sup> December 2023. As such, its duration was for less than one calendar month.
6. The Claimant contends that a redundancy notice under section 40 of the Employment Act must run for a minimum of one calendar month. Consequently, he argues that the Respondent's notice of 30<sup>th</sup> November 2023 was insufficient in terms of its duration.
7. The Claimant further avers that since the Respondent had given him an assurance that the new position that he had been posted to was going to be in existence for a period of at least one year, it cannot be lost through redundancy until after the guaranteed period. As such, the purported redundancy notice is irregular. Hence, the decision to institute the instant suit to challenge the process.
8. Together with the Statement of Claim, the Claimant filed the application dated 19<sup>th</sup> December 2023 in which he sought for orders to bar the impugned process pending trial of his case. The foundation of the application is substantially the same as the substantive suit.
9. On 20<sup>th</sup> December 2023 when the matter was placed before the court, an order was issued to restrain the Respondent from terminating the Claimant's employment on account of the impugned redundancy notice of 30<sup>th</sup> November 2023. The matter was thereafter scheduled for 7<sup>th</sup> February 2024 for further directions.
10. It would appear that in the interceding period, the Respondent withdrew the redundancy notice of 30<sup>th</sup> November 2023. According to the Claimant, the notice was withdrawn through the Respondent's communication to him dated 18<sup>th</sup> January 2024.
11. The Claimant states that on 25<sup>th</sup> January 2024, the Respondent issued him with a fresh redundancy notice. This new notice was expressed to run from the date of issue to 27<sup>th</sup> February 2024.
12. Faced with this development, the Claimant filed an amended application dated 9<sup>th</sup> February 2024. In the amended application, the Claimant prays that the new notice be declared null and void for circumventing the court process. He further prays that the notice be declared null and void for want of substantive justification to trigger the impugned redundancy. As well, he prays that the court issues an order of injunction to bar the Respondent from terminating his contract of service on account of the fresh redundancy notice.
13. The application is opposed. According to the Respondent, once the redundancy notice dated 30<sup>th</sup> November 2023 was withdrawn the substratum for the Claimant's suit was removed. As such, the suit, in so far as it was founded on the notice of 30<sup>th</sup> November 2023, is overtaken by events.
14. The Respondent further argues that the suit is in any event premature since no actual redundancy has been declared. According to the Respondent, all that has happened is that it (the Respondent) has expressed the intention to declare a redundancy.
15. The Respondent contends that the notice of intended redundancy merely opened avenues for consultations between the parties on the process. During the ensuing consultations, the parties are to examine the grounds in support of the proposed redundancy. Should they be wanting, the process will be terminated meaning that there will be no job loss. Conversely, should the reasons be sound, the process will proceed to conclusion with the consequence that the Claimant's position will be declared superfluous and hence lost.



16. The Respondent contends that employers have a right to restructure their businesses. And hence the entrenchment of the redundancy tool in the law. It is the Respondent's contention that this right should not be curtailed unless it is demonstrated that the redundancy process has been undertaken outside the law.

### **Analysis**

17. The general principle of law is that parties are bound by their pleadings. They cannot found their case on facts that are not pleaded in their Statements of Claim. And neither can a court of law found its decision on matters that have not been pleaded (*South Nyanza Sugar Company Limited v John Gituki Gomba* [2022] eKLR).
18. As mentioned earlier, the Claimant's initial complaint was anchored on the redundancy notice that was issued on 30<sup>th</sup> November 2023. Indeed, the Statement of Claim dated 19<sup>th</sup> December 2023 shows that the suit challenges this specific redundancy notice.
19. The preliminary record shows that when the Respondent was served with the instant suit, it withdrew the aforesaid notice. The withdrawal was communicated to the Claimant through a notice that was addressed to him and dated 18<sup>th</sup> January 2024. Subsequently and as the record shows, the Respondent issued the Claimant with a fresh redundancy notice dated 25<sup>th</sup> January 2024.
20. When the Respondent withdrew the impugned notice dated 30<sup>th</sup> November 2023 and in its place issued the notice dated 25<sup>th</sup> January 2024, the Claimant filed the amended application dated 9<sup>th</sup> February 2024 to introduce new prayers to challenge the legality of the said withdrawal and as well the subsequent notice dated 25<sup>th</sup> January 2024. However, he did not amend the Statement of Claim to capture these developments.
21. In effect, the Claimant is asking the court to adjudicate on the validity of the notice that was issued on 25<sup>th</sup> January 2024 without first making it the subject of trial in the main suit through amendment of his Statement of Claim. With respect I do not think that the court can do that. The court cannot issue interim orders to annul or stay a notice whose validity is not the subject of litigation in the main cause.
22. As indicated earlier, parties are bound by their pleadings. They (the parties to an action) cannot invite the court to adjudicate on an issue that is not raised in their pleadings in the main claim.
23. In my view, it was quite unhelpful for the Claimant to only amend the application for interim reliefs in a bid to challenge the fresh redundancy notice without making attendant amendments to the Statement of Claim to anchor this challenge.
24. On the other hand, it is conceded by the parties that the notice of 30<sup>th</sup> November 2023 has since been withdrawn by the Respondent. As such and as a matter of fact, the said notice is nonexistent. In effect, any orders that the court may issue in respect of it (the withdrawn notice) shall have issued in vain.
25. I appreciate the sentiments expressed by the learned Judge in the case of *Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (KUDHEIHA) v Aga Khan University Hospital Nairobi* [2015] eKLR. However, I hold a contrasting view on the matter.
26. On my part, I do not think that the law forbids an employer from unilaterally withdrawing a redundancy notice that is perceived to be defective in order to replace it with a fresh one. In my view, the mere fact that the notice is the subject of litigation is, of itself not a bar to its withdrawal at whatever stage in the litigation.



27. As such, once the Respondent withdrew the notice of 30<sup>th</sup> November 2023 and replaced it with the one dated 25<sup>th</sup> January 2024, it became obligatory on the Claimant to amend his Statement of Claim if he wished to question these changes. As the record shows, he has not. Therefore, the plea in the amended Notice of Motion Application dated 9<sup>th</sup> February 2024 is not founded on the Statement of Claim that is currently before the court.

**Determination**

28. For the foregoing reasons, I decline to allow the amended Notice of Motion application dated 9<sup>th</sup> February 2024.

29. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED ON THE 16<sup>TH</sup> DAY OF FEBRUARY, 2024**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

.....for the Claimant

.....for the Respondent

**Order**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

**B. O. M MANANI**

