



Kenya Shoe and Leather Workers Union v Techno-Plast Limited (Cause E781 of 2023) [2024] KEELRC 100 (KLR) (1 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 100 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E781 OF 2023
JK GAKERI, J
FEBRUARY 1, 2024**

**BETWEEN
KENYA SHOE AND LEATHER WORKERS UNION APPLICANT
AND
TECHNO-PLAST LIMITED RESPONDENT**

RULING

1. Before the court for determination is the Claimant/Applicant's Notice of Motion dated 21st September, 2023 seeking orders that:
 1. Spent.
 2. The Honourable Court be pleased to issue an order restraining the Respondent by itself or through its authorised agents or servants from recruiting new employees to replace the unlawfully employees declared redundant until this matter is heard and determined.
 3. The Honourable Court be pleased to order the Respondent by itself or through its authorised servants to reinstate the unlawfully employees declared redundant pending the hearing and determination of this matter.
 4. The Honourable Court be pleased to order the Respondent to pay the costs of this suit.
2. The Notice of Motion, filed under Certificate of Urgency is based on the grounds set out on its face and the Supporting Affidavit of Julius Ndombi Maina sworn on 21st September, 2023.
3. The affiant deposes that he is the Secretary General of the Claimant/Applicant union and thus competent to swear the Affidavit.
4. The affiant avers that the parties herein have a valid recognition agreement and a Collective Bargaining Agreement (CBA) which provides for consultations in the case of a redundancy.



5. The affiant deposes that the Respondent breached clause 18 (b) of the CBA and agreement signed during the conciliation meeting as it declared employees redundant unprocedurally and has no reason not to reinstate them.
6. That the employees will suffer irreparable harm if the orders sought are not granted as they will lose employment benefits under clause 18 (c) of the CBA.
7. The affiant further deposes that some of the employees joined the Respondent in 2012.

Respondent's case

8. In its Replying Affidavit sworn on 31st October, 2023, Mr. Skhwinder Sandhu deposes that the Respondent has three categories of employees, namely; permanent, contractual and casual.
9. That on 13th July, 2023, the Respondent wrote the applicant requesting for a meeting to be held on 17th July, 2023 on an intended redundancy of some employees, the union attended and parties agreed on the number of persons to be declared redundant as acknowledged by the union's letter dated 10th August, 2023 and casuals were not involved.
10. That on 15th August, 2023, the Respondent informed its employees that it had to discontinue production due to lack of raw materials and they would be contacted to resume duty when the materials arrived.
11. That casual workers stormed out of the company premises while being addressed by management and demanded payment of dues alleging that they had been declared redundant.
12. The affiant avers that the workers paralyzed operations of the Respondent and scared other employees and the incident was reported at the Lunga Lunga Police Station and Labour Officer, Industrial Area via letter dated 15th August, 2023 who called for a meeting on the same day where parties agreed that records of casual employees be supplied to the Labour Officer for clarification and a final report prepared, but in the meantime, the Claimant reported a trade dispute to the Ministry of Labour, Social Security and Services on 16th August, 2023 and as a consequence, Ms Kanyiva was appointed a conciliator.
13. That parties were invited for a conciliation meeting on 4th October, 2023 but the Claimant prepared the instant application on 21st September, 2023 and filed on 5th October, 2023 prematurely.
14. The affiant states that the list of 72 cited by the Claimant was incorrect as there was another suit in court on termination, No. E1769 of 2023 Joseph Alfred Mutia V Technoplast Ltd.
15. It is the affiant's case that after restocking of raw materials, the Respondent sought the services of casual employees but they declined stating that it would sabotage their cases.
16. That the Respondent did not declare the casual workers redundant but they failed to report to work when their services were sought and the orders sought had been overtaken by events as the Respondent has the raw materials and the employees are unavailable.
17. Finally, the affiant states that the issue as to whether there was a redundancy should go to full trial for a determination.

Applicant's submissions

18. The applicant isolated no specific issues but submitted on the declaration of 72 employees redundant citing various clauses of the CBA and the provisions of Section 37 of the *Employment Act*, 2007 to



urge that the Respondent had no casual employees as the 72 employees were continually employed since 2012 and were members of the National Social Security Fund.

19. The Claimant admits that the appointment of Ms. Joyce Kanyiva was rescinded and Mr. Laurent Mulwa was appointed conciliator and filed the instant suit as dictated by law.
20. Puzzlingly, the bulk of the Claimant's submissions are a response to the Respondents Replying Affidavit.

Respondent's submissions

21. Counsel submitted on;
 - i. Whether the instant Notice of Motion is premature.
 - ii. Whether the court should grant the orders sought.
 - iii. Who should bear costs?
22. On the 1st issue, counsel recapitulates the facts as alleged by the parties up to the moment the conciliator was appointed and a meeting was convened, only for the Claimant to file the instant suit.
23. Reference was made to the sentiments of the court in *Janet Mwacha Mwaboli V Modern Soap Factory Ltd (2019) eKLR* to urge that the instant suit is premature as the conciliation process was not concluded.
24. Counsel submitted that the Claimant has no Conciliator's Report.
25. As to whether the Notice of Motion is merited, counsel submitted that the Claimant had not met the threshold of *Giella V Cassman Brown & Co. Ltd (1973) EA 358* as the Respondent halted operations due to lack of raw materials and would contact the workers when the materials were available but they came to court on October 5th 2023 and the Respondent had already restocked and the employees declined to resume duty.
26. That the Respondent had to source labour elsewhere since the employees were casual and the restraining order sought was unavailable.
27. That the grievants refused to offer services and were not dismissed.
28. On reinstatement, counsel submitted that this was a substantive remedy which ought to be determined upon full hearing as it was unclear as to how the Claimants lost their employment.
29. Reliance was made on the sentiments of the Court of Appeal in *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR* as well as *Kenya Tea Growers Association & another V Kenya Plantation & Agricultural Workers Union (2018) eKLR* and *Alfred Nyungu Kimungui V Bomas of Kenya (2013) eKLR* to urge that reinstatement, which amounted to specific performance of the contract was unavailable in the instant suit as no exceptional circumstances had been shown.
30. Counsel submitted that the Respondent should be awarded costs of the Application.

Determination

31. The issue for determination is whether the Claimant's Notice of Motion dated 21st September, 2023 is merited.



32. The parties appear to be in agreement that the Respondent was experiencing challenges in securing raw materials and had by letter dated 13th July, 2023 notified the Claimant union of an intended redundancy and summoned a meeting scheduled for 14th July, 2023 at 11.30 a.m.
33. The letter is explicit that the Respondent was acting in accordance with the requirements of the CBA between the parties.
34. By letter dated 10th August, 2023, the Claimant union makes reference to the Respondent's letter and a meeting held on 17th July, 2023 which agreed that 10 drivers be declared redundant. By this letter, the union is also complaining that its attention had been drawn to the declaration of another 4 drivers redundant without consulting it and plans were underway to declare other employees redundant without involving the Claimant union as per the CBA.
35. The Respondent does not appear to have responded to the union's letter but by letter dated 15th August, 2023 to the Sub-county Labour Office and copied to the Claimant, the Respondent informs the office that its casual employees had engaged in a sit-in the day before to demand their dues and refused to work and attempts to address them had fallen through as they stormed out of the Respondent's premises leaving their work unattended occasioning loss to the Respondent.
36. That the same continued on 15th August, 2023 when the employees closed the gate and threatened other employees and police had to be notified for help under OB NO. 18/15/08/023.
37. The Respondent threatened to engage other persons to stem its losses.
38. However, on the same day, a meeting was held between the Claimant union, Labour Officers and the Respondent and agreed that;
 - i. Any redundancy undertaken be in accordance with the law.
 - ii. Respondent to produce employment records for clarification and scrutiny.
 - iii. Final Report be submitted before 5th September, 2023.
 - iv. Finalization meeting be held on 7th September, 2023.
 - v. Normal operations to continue pending conclusion of the matter.
 - vi. Any pending wages (due) to be settled on or before 17th September, 2023.
39. The handwritten memorandum was signed by the Branch Secretary of the Claimant union, General Secretary, Chief shop steward, Operations and Finance Manager of the Respondent as well as the Factory Manager in the presence of two Labour Officers, Mr. Edward Chemei and Laurent Mulwa.
40. Strangely, on the following day, by letter dated 16th August, 2023, the Claimant union informed the Cabinet Secretary, Ministry of Labour, Social Security and Services that there was a Trade Dispute on unlawful redundancy of 7 employees. The letter is changed by had to read 72, and the change lacks authentication. However, the list availed by the Claimant has 72 names.
41. The Claimant union informed the Cabinet Secretary that attempts to settle the matter had failed, which was patently untrue as the parties had had only two (2) meetings and there had been no disagreements.
42. By letter dated 20th September, 2023, the Chief Industrial Relations Officer appointed M/s Joyce Kanyiva as the Conciliator, who by letter dated 25th September, 2023 invited parties for a conciliation meeting on 4th October, 2023 at 10.30 a.m.



43. There is no record as to what transpired thereafter save that the Claimant filed instant suit on 5th October, 2023 seeking various orders.
44. Although the Claimant union submitted that it filed the instant suit in accordance with the provisions of Section 74 of the *Labour Relations Act*, 2007, it did not explain the circumstances in which it invoked Section 74 of the Act.
45. For unexplained reasons, the Claimant union appear to have been in a hurry to seek court orders when other processes were still on-going and no disagreement had manifested itself in the mediation process.
46. The conciliator herein wrote to the parties and scheduled a meeting within 5 days of her appointment to obviate delay in the conciliation process which the Claimant union abandoned before it commenced.
47. Although it is difficult to speculate how the proceedings may have proceeded, it is essential to underscore the fact that such processes require the parties to the dispute to engage willingly and in good faith and endeavour to compromise as much as possible in the interests of the grievants and the employer.
48. Any notion that courts of law have instantaneous and highly effective solutions is not borne by facts as exemplified by legions of cases.
49. The foregoing finds support in the sentiments of Rika J. in Janet Mwacha Mwaboli V Modern Soap Factory Ltd (Supra), relied upon by the Respondent’s counsel as follows;

“Section 69 of the *Labour Relations Act* requires the Conciliator to issue a certificate if the dispute is unresolved. Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016 states that where the dispute has been the subject of conciliation, the statement of claim shall be accompanied by a report of the Conciliator on the conciliation process, supported by minutes of the conciliation meeting. It is mandatory also to have the certificate of conciliation issued under section 69, accompanying the statement of claim. Where there is no certificate of conciliation, the Claimant or his Representative shall swear and file an affidavit, attesting to the reasons why the Conciliator has not issued the certificate. Where report has been made and conciliation has not taken place, the Claimant shall swear and file an affidavit attesting to reason why conciliation has not taken place.

Conciliation is therefore meant to be a binding and effective dispute resolution mechanism with the court’s intervention sought only when there are compelling reasons to do so. Parties can only move to the court under Rule 5 above . . .

Non-adjudicatory mechanisms are anchored on Article 159(2)(c) of *the Constitution* of Kenya. They must be taken as binding and effective dispute resolution mechanism, not merely as stepping stones to the judicial forum”.

50. The court is guided accordingly.
51. Having invoked the process by reporting the dispute to the Cabinet Secretary, Ministry of Labour, the Claimant was bound by the process and any abandonment must have been justified. The Claimant has not demonstrated by affidavit or otherwise any compelling reason(s) to abandon the conciliation process mid-way.
52. The court is inclined to agree with the Respondent’s submission that the Claimant has not placed sufficient material before the court to justify the instant Notice of Motion after having initiated



mediation by writing to the Cabinet Secretary. It is the finding of the court that the instant Notice of Motion was filed prematurely and is thus unsustainable.

53. As regards the restraining orders, the Claimant union seeks to have the Respondent restraining from engaging other persons to replace the employees declared redundant.
54. The Respondent on the other hand argues that it did not declare anyone redundant but the grievants declined to resume duty on 15th August, 2023 after the Respondent invited them for a meeting.
55. These are issues of fact which can only be disentangled through evidence during the hearing.
56. Similarly, the Respondent alleges that the grievants absence is occasioning loss as production ought to continue.
57. As held in *Abel Salim & others V Okong'o & others* (1976) KLR 42 at 48, the whether or not to grant an interlocutory injunction involves the exercise of discretion, which is exercised under the aegis of the principles enunciated in *Giella V Cassman Brown & Co. Ltd* (Supra), namely; prima facie case with probability of success, the applicant might otherwise suffer irreparable injury and if in doubt rely on the balance of convenience.
58. Using the test of the Court of Appeal in *Mrao Ltd V First American Bank & 2 others* (2003) eKLR, the Claimant has demonstrated that it has a prima facie case but relying on the test in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (2014) eKLR, on irreparable injury, it is evident that the Claimant union had failed to prove that the grievants will otherwise suffer irreparable injury if the restraining orders sought is not granted.
59. Finally, relying on the test in *Byran Chebii Kipkoech V Barnabas Tuitoek Bargonia & another* (2019) eKLR on the balance of inconvenience, the court is unpersuaded that the balance of convenience is tilted in favour of the Claimant union.
60. Having failed to establish the three conditions, the Claimant union had failed to meet the threshold for the grant of an injunction.
61. Finally, as regards the remedy of reinstatement, the court proceeds as follows;
62. The remedy of reinstatement is provided for under Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 read with Section 49(3)(a) of the *Employment Act*, 2007 and can only be decreed where an unjustifiable dismissal or termination of employment has taken place and the court is satisfied that it is the most efficacious relief in the circumstances.
63. Needless to emphasize, the grant or refusal of the remedy in matter of judicial discretion exercised on the basis of the provisions of Section 49(4) of the *Employment Act*, 2007.
64. More significantly, and as submitted by the Respondent's counsel, reinstatement is a final remedy and typically ought to be granted at the end of the hearing, if the court, based on the evidence adduced arrives at the conclusion that it is the most appropriate remedy and as held by Rika J. in *Alfred Nyungu Kimungui V Bomas of Kenya* (Supra), the remedy of reinstatement is;

“substantive, not a temporary relief. The law does not contemplate that reinstatement issues as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer and the employee.”
65. As the Claimant has not demonstrated any unique, special or compelling circumstances to justify the remedy of reinstatement at this stage, the prayer is unmerited.



66. From the foregoing, it is discernible that the Claimant's Notice of Motion dated 21st September, 2023 is for dismissal and it is accordingly dismissed.

67. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

