Kenya Universities Staff Union, Egerton University Branch v Egerton University & 2 others; Kenya Universities Staff Union (Interested Party) (Employment and Labour Relations Cause E026 of 2023) [2024] KEELRC 902 (KLR) (23 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 902 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS CAUSE E026 OF 2023

HS WASILWA, J

APRIL 23, 2024

BETWEEN

KENYA UNIVERSITIES STAFF UNION, EGERTON UNIVERSITY BRANCH ..... CLAIMANT

AND

EGERTON UNIVERSITY ..... 1ST RESPONDENT

THE COUNCIL, EGERTON UNIVERSITY ..... 2ND RESPONDENT

THE VICE-CHANCELLOR, EGERTON UNIVERSITY ..... 3RD RESPONDENT

AND

KENYA UNIVERSITIES STAFF UNION ..... INTERESTED PARTY

RULING

1. Before me for determination is the Claimant/ Applicant Notice of motion dated 19th June, 2023, seeking for the following orders; -

    1. That this Honourable court be pleased to certify this application as being urgent, in that regard the same be heard ex-parte in the first instance.

    2. That pending hearing and determination of this application inter-partes, the Honourable court be pleased to issue an order of temporarily injunction restraining the Respondents from proceeding with the redundancy process against the Claimants/Applicant members pursuant to the notice of intention to declare redundancy, issued to all staff on 21st of December, 2022.

    3. That pending hearing and determination of this cause/claim, the Honourable court be pleased to issue an order of temporary injunction restraining the Respondents from proceeding with

the redundancy process against the Claimants/Applicant members pursuant to the notice of intention to declare redundancy, issued to all staff on 21st of December, 2022.

4. That the costs of this application be borne by the Respondents jointly.

2. The Application is based on the grounds on the face of the Application and the supporting affidavit of Ernest O Wayaya, Claimant's Branch Secretary, sworn on 19th June, 2023.

3. The Affiant stated that the claimant is a branch of the Interested Party, duly registered under section 25 of the *Labour Relations Act*; and whose area of operations is limited, in the context of the recognition agreement between the Interested Party and the 1st Respondent to represent labour relations interest of Technical Administrative Sciences staff in accordance with the Interested Party's recognition agreement in Egerton University.

4. He stated that by a letter dated 21st December, 2022, reference No. EU/APD/DVC/103, title "NOTICE TO ALL STAFF" the Respondents notified all the staff of the University, of its intention to lay off some of its staff across all cadres through redundancy, on alleged difficulties in meeting the full requirements for staff salaries, other emoluments and benefits.

5. He stated that the said notice was neither copied/served upon the Claimant, the Interested Party or the County Labour Officer. Additionally, that the notice did not indicate the extent of the staff to be affected by the redundancy more so those who are members of the Claimant and by extension therefore, members of the Interested Party.

6. He avers that the Interested Party having learnt about the intended redundancy by the Respondents, wrote a letter dated 5th January, 2023, appealing and inviting the management of the University to a dialogue with a view of brainstorming on possible alternatives with a view of averting the intended redundancy.

7. He stated that as a matter of fact, the Interested Party presented to the management of the University, a proposal on alternative approaches that would, if adopted, generate finances and grow its financial base, including allowing natural attrition to take place due to the aging workforce, with many officers approaching retirement which essentially will lead to same desired result.

8. He stated that regardless of the proposals made and the applicable procedures on redundancy process, the Respondents have singularly without involving the Claimant or the Interested Party, developed a tool known as redundancy score sheet for administrative and technical staff (KUSU) to be used to determine those who shall be affected by the redundancy.

9. He stated that the tool developed by the Respondents is not fair for it contains subjective and unlawful parameters to the matter. The form is to be filled by respective head of departments and is seemingly the only determinant of those to be laid off through the process, with a prescribed retaining per centum of 70% and above. Particulars of subjective parameters include;

    a. Work Attendance- The university has no established work -attendance registration tool and without such a verifiable tool, the issue has been left to the subjective determination by the head of department.

    b. Work Performance- The University has been undertaking an annual performance appraisal. It would be unfair to merely rely on the score prescribed in the redundancy score sheet without regard to an employee's previous track record.

c. Team work /Ability to work well in a team -This a very subjective parameter left to managers to determine as they deem. The issue has as well been contained in the annual performance appraisal. An objective process would have regard to previous employee's rating on this matter.

d. Willingness to perform extra duties- The allocation of extra duties is a prerogative of the management. Employees are not usually invited to demonstrate their willingness to undertake extra duties.

e. Respect for authority/cooperation- The opposite of respect for authority is 'disrespect for authority' which is a disciplinary matter. Without reference to a ascertainable incidents or occasion, then 'respect for authority/cooperation' becomes a subjective parameter. This parameter has the danger of being used against those who demand for accountability for the management and in particular, union leaders will be a special target in this parameter.

f. Confidentiality-Without clear definition or classification on a specific issue as being confidential, the general classification of 'office matters' as being confidential becomes subjective. The confidentiality parameter has a possibility of being used on whistle blowers and those who demand for accountability from the management. For this parameter to apply, the Respondents would have to demonstrate the prejudice suffered by the University on account of a disclosure of any alleged confidential matter.

g. Participation in Universities activities- The redundancy score sheet does not enlist, with certainty the particular activities which an employee is expected to be participating in and therefore, this parameter is not only subjective but amorphous as well.

h. Particulars of illegal parameters in the tool- Health status.

10. After giving them the said parameters, the Respondent gave the head of departments a deadline of 31st May, 2023 to submit the names of those to be affected by the redundancy process in order to commence the redundancy procedure.

11. It is averred that the process to be adopted by the Respondent infringes on the claimant's rights under Articles 10, 41(1) and 47 of *the constitution* as read with Section 4 of the *Fair Administrative Action Act*, Section 12 of the *Public Service (Values and principles) Act* and the Composition to be followed in declaring redundancy under Section 40(1) of the *Employment Act*.

12. The Affiant stated that the Court reiterated the importance of followed due procedure in redundancy in the case of Cargill Kenya Limited Vs Mwaka & 3 others [2021] KECA 115 KLR and the case of Kenya Airways Limited Vs Aviation and Allied Workers Union Kenya & 3 others [2014] eklr.

13. With regard to the defect in procedure, the affiant stated that the Respondent did not service/copy the Claimant or Interested Party and the county labour with notice of the intended redundancy as required by section 40(1) of the *Employment Act*.

14. Further that there has not been tripartite discussion, involving the Respondents, Claimant, Interested Party and the County Labour Officer, with a view of establishing that indeed the intended redundancy is inevitable, and if so, the criteria to be applied in the process. This would include a review that indeed those who are selected are as a result of a fair application of the agreed criteria.

15. He stated that since there was no tripartite discussion as required by section 40(1) of the *Employment Act*, the Claimant has been denied an opportunity to examine the validity or justification of the proposed redundancy including exploring all possible alternatives of averting the same or even reducing its extent.

16. Additionally, that the Claimant's constitutional right to a fair administrative action, including the right to examine the validity/ justification of the process on the basis of a factual and verifiable information data is threatened.

17. Furthermore, that the claimant had been denied the opportunity to; Consider and examine the university's other expenditures other than salaries and wages with a view recommending possible ways of reducing those costs; Exploring viable means of raising revenue for the university including canvassing with National government. This is on a background of the national government undertaking to increase capitation for public university there being a likelihood that Egerton University will get an additional three hundred and seventy-three Million in the next financial year 2023/2024; Examine the viability of inviting staff to voluntarily take an early retirement with an agreed send off or severance package rather than redundancy and Examine the viability of the natural attrition by attrition, as there will be two hundred and twenty nine (229) staff of the University across all cadres , exiting from service between 1st July, 2023 to 1st July, 2025.

18. The affiant also stated that the respondents have not been paying salaries at 100% but 50% as from November 2021 yet they want to now proceed with the redundancy.

19. He maintained that the process of redundancy being undertaken by the Respondent threatens to violate the Claimant/Applicant's constitutional rights to a fair labour practice in the matter and the fair administrative action and for that reason, should be arrested by way of an injunction.

20. The Application is opposed by the Respondent who filed a replying affidavit sworn on 3rd July, 2023, by Prof. Issac Kibwage, the Vice Chancellor of Egerton University.

21. He stated that the issue of redundancy arose due to the financial inability of the 1st Respondent to pay staff salaries in full and remit payroll deductions to various institutions. Consequently, the council of Egerton University, made a decision to carry out staff right sizing and on 21st December 2022, it issued a notice of intention to declare redundancy to all members of staff.

22. That the said notice was explicit that the process of declaring staff redundancy will be conducted fairly and within the confines of the law as provided in the *Employment Act* 2007,

23. He maintained that the decision made to declare some employee redundant was informed by the grave Financial situation which the 1st Respondent is in and the which has continued to deteriorate over the years and is now with a total debt in excess of Kshs. 9 billion and there has been no significant financial bailout from the National Government in spite of various past promises from the State Department for University Education and Research.

24. He broke down the debt and stated that from May 2023, the outstanding staff salaries and payroll deductions stood at Kshs. 6,870,990,296/ comprising of unpaid/deferred salaries of Kshs, 1,479,876,598.20 unremitted pension contributions Kshs. 2.2. billion amongst other staff payroll deductions that have not been remitted as required.

25. He stated that after issuing the aforesaid notice of intention to declare staff redundant. The 1st Respondent, through its established organs, embarked on a very wide consultative process which process involved all the staff members individually and through their unions such as the Interested party herein, the Claimant, the universities Academic staff union, together with its Egerton University chapter and KUDHEIHA.

26. He stated that there have been various meetings attended by members of the 1st Respondent's management and union representatives in which the key issue revolved around coming up with a

redundancy matrix/score and or tool to guide the process of staff redundancy before a redundancy Notice is issued in conformity with Section 40 (1) of the *Employment Act*.

27. He stated that the proceedings herein are premature as the 1st Respondent is still undertaking consultations pursuant to the notice of intention to declare staff redundant. That once the process of consultation comes to conclusion and the redundancy matrix confirmed, it's only then that the 1st Respondent will issue staff redundancy Notice Which Notice will be in accordance with Section 40 (1) of the *Employment Act*.

28. He reiterated that the Respondents have robustly engaged with the unions namely; KRUSE, UASU and KUDHEIHA in joint consultative meetings and received their input before the Respondents move to the next phase of issuing notice of staff redundancy under Section 40 (1) of the *Employment Act*, which notice will indicate the number of staff members to be affected through staff redundancy.

29. He stated that the Orders sought by the claimant cannot be granted as there is an ongoing internal consultative process that does not need to involve the labour department to develop the tool and/or redundancy matrix before the number of staff to be affected by staff redundancy Notice is established.

30. He also stated that the proposition by the Claimant that the financial challenges facing the 1st Respondent can be resolved by natural attrition of aging staff members is not viable as the debt continues to grow at an alarming rate and as a result of the 1st Respondent's inability to meet its financial obligations. In fact that several causes have been filed in court by staff members and or unions over various grievances and the courts have pronounced themselves on those issues. Some of these cases include; -

    a. Nakuru ELRC No. 16 of 2022 Universities Academic Staff Unions Egerton University Chapter/Branch –vs-Egerton University and 2 others- The Respondents were ordered to pay full salaries they were unable to pay salaries at 100% as ordered by the court. The Respondents were found guilty of contempt of court orders. The proceedings have been stayed in by the Court of Appeal.

    b. Nakuru ELRC No. 20 of 2023 Universities Academic Staff Union Egerton University Chapter/Branch Vs Egerton University and 2 others- The 1st Respondent was sued for not remitting pension contributions to the tune in excess of 2 billion.

31. That from the foregoing it is inevitable that the only way out of the financial quagmire facing the 1st Respondent is to declare staff redundant to remedy the prevailing situation where staff costs are higher than the total revenues of the Respondent.

32. The affiant avers that as a result of the 1st Respondent inability to pay its staff members salary in full and remit staff payroll deductions to various institutions, there have been multiple industrial unrest called by the unions that have severally paralyzed its academic calendar. Consequently, that in an attempt to avert such industrial unrests, it filed Nakuru ELRC petition No. E12 of 2022 Egerton University Vs University Academic Stall Union & Anor to stop a strike called by University Academic Staff union (UASU) and the court in dismissing the application, directed the 1st Respondent to give a financial proposal within 120 days on how to settle unremitted third party deductions including initiating redundancy process.

33. He avers that there exists a Collective Bargaining Agreement between Kenya Universities staff union and the 1st Respondent and the issue of staff redundancy is a matter to be handled by the National office within the context of the collective bargaining agreement. Therefore, that the 1st Respondent extended invitations to the National office to attend consultative meetings, which they complied.

34. The affiant stated that the Claimant has no locus standi to file this cause as under Article 4 (f) of Kenya Universities staff union constitution because it is the National office that is clothed with the legal mandate to decide whether any legal action or advise is in the best interest of the union or member(s) concerned.

35. Cognizant of that fact, the Claimant's Secretary wrote a Letter dated 9th June 2023 categorically on how the consultative meetings on the intended staff redundancy should be dealt with by the National office and all communications channeled through the Secretary General.

36. He stated that it is ironical that the Claimant, through its Secretary, who had clearly stated in the said letter of 9th June 2023 that it will not attend consultative meetings with the 1st Respondent to discuss the intended staff redundancy as the issue of staff redundancy falls with the province of the National office of the union, will then as a chapter rush to court seeking to stop the consultative meetings on the false pretext that the 1st Respondent has single handedly developed the criteria to be applied for staff redundancy.

37. He stated that the issue of underfunding is not only unique to the 1st Respondent but as at now public Universities have accumulated debt in excess of Kshs. 60 billion and already Rongo University and Kisii University have effected redundancy process to stay afloat.

38. By a rejoinder through a further affidavit of Ernest O Wayaya sworn on 8th December, 2023, the affiant maintained that the Respondent's notice of intention to declare redundancy does not comply with the mandatory provision of Section 40 of the *employment Act*. Indeed, that the Respondent has not disputed the fact that the said notice was never served upon the Applicant, interested party and Nakuru County Labour Officer as by Law provided. Hence, on this ground alone, the application herein ought be allowed as prayed.

39. He stated that the Applicant herein is a registered corporate body hence has capacity to sue on behalf of its members.

40. He stated that the interested party only deals with issues pertaining strikes but the other functions of instituting legal proceedings on behalf of its members is delegated to the Union at the branch level. In fact, that this Court already pronounced itself on this issue confirming that the Applicant has legal capacity in instituting suits on behalf of its members in the case of Republic V Registrar Of Trade Union Ex Parte Universities Academic Staff Union Egerton University Chapter; Joseph Juma Mafura & 6 Others (Interested Parties) [2021] Eklr involving the same parties herein.

41. The deponent stated that the Respondent did not invite the Applicant and the interested party's officials to any meeting prior to issuing the notice of intended redundancy dated 21/12/2022 because no single evidence on the same has been tendered in support of this allegation. He stated that the interested party only got to know of the intended redundancy when its members were served with the notice of the same dated 21/12/2022.

42. The affiant denied any involvement of their officials in the consultation stage and the making of the redundancy tool. Also that it is worth noting that even the local County Labour office was neither involved in the process nor said notice served upon him/her.

43. He stated that through the Respondent's illegality in the intended redundancy, their members were issued with a redundancy score sheet singularly prepared by the Respondent and further forced to fill in the said forms and hand them over to the Respondent's Heads of Departments.

44. He contends that the procedural defects in the said process cannot be cured and they prayed that the Court declares the intended redundancy unlawful.

45. He stated that it is in the interest of justice that the Application herein is allowed, failure to which the Applicant's members will suffer irreparable loss and damages.

46. The Application herein is canvassed by written submissions.

Applicant's Submissions.

47. The Applicant submitted on Four issues; whether the Applicant has locus stand to file this suit on behalf of its members, whether the Applicant is entitled to orders sought, whether the Applicant has demonstrated it would suffer irreparable damage if injunction is not granted and who should bear the costs of this suit.

48. On the first issue, it was submitted that the purpose and objective of registration of branches of unions, is to clothe them with juridical personality with distinct rights separate from the mother national union and on that ground, a branch may commence and sustain legal proceedings more so proceedings alleging violation of constitutional rights in line with Articles 22 and 258 of *the Constitution* and read with Section 21 of the *Labour Relations Act* .

49. He argued that no branch can act as such without being Registered as provided for under section 25 (5) of the Labour Relations. To support this, the Applicant relied on the Court of Appeal decision in LSK Nairobi Branch VS Malindi LSK & Others [2017] eKLR while relying on Mumo Matemo Case where the learned JJA stated as follows;

> " It is to be noted that the promulgation of the 2010 constitution enlarged the scope of Locus Standi in Kenya. Article 22 & 258 have empowered every person, whether corporate or non-corporate to move the court, contesting any contravention of the Bill of Rights on *the constitution* in general...." The locus standi to file judicial proceedings, representation or otherwise has been greatly enlarged by *the constitution* in Article 22 and 258 of *the constitution* which ensures unhindered access to justice....."

50. Similarly, that having proved that it is a registered body, clearly, the Applicant herein has locus standi to sue on behalf of its members.

51. To buttress its argument, the Applicant relied on the case of Republic V Registrar Of Trade Union Ex Parte Universities Academic Staff Union Egerton University Chapter' Joseph Juma Mafura & 6 Others Interested Parties [2021] Eklr touching on the very same issue of the Applicant's capacity to file suits on behalf of its members and involving the same parties herein, where the Court ruled that the Claimant being a registered corporate body had the jurisdiction to sue and be sued. Similarly, that the Applicant is properly before this Court.

52. On whether the Applicant is entitled to the Orders sought, it was submitted that the Respondent herein started a redundancy process against the Applicant's members and clearly the same if allowed to continue shall infringe on their constitutional right to fair Labour practices and fair administrative action on account that; The process is non-compliant with section 40 (1) of the *Employment Act* as the notice issued does not show the extent of the intended redundancy and was never served upon the Claimant who is the union representative of the non-teaching staff of the Respondent herein. Secondly, that the Respondent has single handedly developed a criterion to be applied in the process containing subjective and unlawful parameters which is outside section 40 of the *Employment Act*.

53. He argued that any non-compliance with the above mandatory provision of the Law renders the intended redundancy unfair and unlawful and as such unconstitutional in the circumstances hence the process must be arrested by way of an injunction.

54. He submitted that the application herein has demonstrated how the Applicant, having learnt about the intended redundancy, wrote to the Respondent vide a letter dated 5/1/2023 appealing and inviting the management of the university to a dialogue with a view of brainstorming on possible alternatives with a view of averting the intended redundancy. Further that, they have demonstrated how the Respondent has singularly without any involvement of the Claimant or the interested party developed a tool to be used in determination of those who shall be affected by the redundancy.

55. It was submitted that the said tool developed by the Respondent is not fair for it contains subjective and unlawful parameters to the matter in the following terms;-

    i. There is no established work attendance registration tool and without such a verifiable tool, the issue has been left to the subjective determination by heads of departments.

    ii. The work performance appraisal as prescribed in the redundancy score sheet without considering past performance of an employee's previous track record is unfair.

    iii. The score card on whether an employee is able to work as a team member has been left to the heads of department to determine as they deem fit.

    iv. On the allocation of extra duties, the employees have not been given any chance to demonstrate their willingness to perform any extra duties. Thus "willingness to perform extra duties' is a subjective parameter; Without any reference to a ascertainable incident or occasion, the "respect to authority' has become a subjective parameter;

    v. On the issue of confidentiality, without there being any specific issue classified as being confidential, the general classification of office matters as being confidential is a subjective parameter.

    vi. On the participation of university activities, the redundancy score sheet does not enlist with certainty the particular activities which an employee is expected to be participating and as such the same is a subjective parameter.

    vii. The issue of sickness and inability to perform duties, including the procedure to be applied to at arriving at the conclusion that an employee is unable to perform their duties is extensively provided in the Collective Bargain Agreement (2012-2013), The same as enshrined in the redundancy score sheet is thus unconstitutional as the same is discriminatory on account of an employee's health status

    viii. The score sheet further does not exclude the disciplinary proceedings which have been successfully challenged in Court or even those pending in Court awaiting determination- This is more so in respect to union officials whom malicious disciplinary proceedings have been instituted by the Respondent for their role arising out of or associated with industrial actions.

56. The Applicant also submitted that the Respondent's heads of Departments have further submitted names of those they deem fit for the intended redundancy as per the notice issued to the said head of departments who were supposed to do by 31st May, 2023. Thus clearly, the intended redundancy is a gross violation of the Applicant's Union members' rights to fair labour practices. To support this, they

relied on the Court of appeal decision in the case of CARGILL KENYA LIMITED VS MWAKA & 3 OTHERS 2021 KECA 115 KLR where the 3 Judge bench held as follows;

> " For a claim of redundancy to be proved, an employer should include the factors set out in section 40(1)(c) of the *Employment Act* in the criteria for evaluating and selecting the employees to be declared redundant. In the absence of strict adherence to any of the mandatory requirements, then the intended redundancy must be rendered unlawful."

57. The Applicant also cited the Court of Appeal decision in the case of Kenya Airways Limited vs Aviation and Allied Workers Union Ken a & 3 others [2014] eklr where the 3 Jude-e bench _held as follows;

> " for redundancy to be lawful, it must be both substantially justified, and procedurally fair. Both are clearly mandatory requirements..."

58. On that basis, he submitted that the provisions of section 40 of the *Employment Act* must be strictly adhered to. Therefore, that since the Applicant has demonstrated the procedural defect in the process of redundancy by the fact that notice of the intended redundancy was not served coupled up with the fact that there was no tripartite discussion involving the Claimant, interested party and the county labour officer with a view of establishing that indeed the intended redundancy is inevitable and if so, what criteria to be applied in the process. The Applicant members right to fair administrative action was infringed.

59. On whether the Applicant has demonstrated it would suffer irreparable damage if injunction is granted. The applicant relied on the case of Nguruman Ltd Vs Jan Bonde Nielsen & 2 Others [2014[Eklr, where the Court defined what amounts to irreparable damages as follows;

> " The Applicant must show that he might otherwise irreparable injury which cannot adequately be remedied by damages in the absence of an injunction. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy..."

60. Similarly, that the Applicant's members have been living on half salary from November, 2021 as such the move to now declare them redundant is unfair and the Court ought to protect the employee by allowing the injunctive Orders sought are granted, failure to which its members will suffer irreparable and untold damages.

Respondent's Submissions.

61. The Respondent also submitted on four issues; whether the Notice of Intention to declare redundancy dated 21/12/2022 by the 1st Respondent is a Notice of redundancy as contemplated under Section 40 (1) of the *Employment Act*, whether the Claimant is entitled to an order of temporary injunction restraining the Respondents from proceeding with the redundancy process against the Claimant's/ Applicant's members pursuant to the notice of intention to declare redundancy issued to all staff dated 21st December 2022, whether the Claimant has locus standi to file this cause on an issue of redundancy when the same is a subject of Collective Bargaining Agreement between the Interested party and the 1st Respondent and who should bear the costs of the application.

62. On the first issue, it was submitted that the Notice of intention to declare redundancy is not a Notice of termination on account of redundancy that requires to comply with the procedural conditions stipulated under Section 40 (1) of the *Employment Act*. He argued that the Notice, subject of these

proceedings, was issued on the 21/12/2022 addressed to all staff members of the 1st Respondent and that no termination had been effected at the time of filling this suit.

63. He argued that contrary to the assertions by the Claimant, the Notice of 21/12/2022 was merely a declaration of intention to declare redundancy that was meant to initiate the process of internal consultations to agree interalia on the number of the employees to be affected and the tools/materials to be used to identify the employees to be affected by the process of redundancy. To Support this the Respondent relied on the case of Kenya Airways Limited –vs- Aviation and Allied Workers Union Kenya & 3 others (2014) eKLR where the Court emphasized on the importance of issuance of general notice of intended redundancy Justice Maraga J.A observed as follows: -

> " Mr. Mwenesi further submitted, quite correctly, that the section also requires redundancy notice to be given to the Labour Officer for the area of employment but in this case no such notice was given to the Labour Officer. I disagree with Mr. Mwenesi that the appellant's letter of 1st August 2012 did not constitute the notice envisaged by Section 40(1)(a) of the *Employment Act* as it did not have the names of the affected staff and there was no notice addressed to the appellant's individual employees. My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to a calendar months' notice as Mr. Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant. I also disagree with Mr. Mwenesi that where an employee is a member of a recognized trade union, notice of intended redundancy should be given to both the employee concerned and his trade union. A reading of the subsection (1) of Section 40 of the *Employment Act* does not warranty that interpretation. As this Court made it clear in the case of Thomas De La Rue (K) Ltd v. David Opondo Umutelema, 9 paragraphs (a) and (b) of Section 40(1) provide for 2 alternative notices. If the affected employee is a member of a trade union, notice should only be given to his union and not to both. Notice is to be given to the employee himself if he is not a member of trade union. 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. Read together with Part VIII of the *Labour Relations Act*, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see Section 62(4)) for conciliation, I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for 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 to minimise the terminations and measures to mitigate the adverse effects of any terminations on the 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. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting

from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law."

64. Similarly, that the notice of 21/12/2022 is not the same thing as a notice of termination of employment. In any event that the Respondent has not indicated or suggested when the termination of employment of the employees who will be affected will take place, or determined how many employees will be affected. Hence the purpose of the notice was only to open discussion with all the staff members and the unions on the possible redundancy situation. Therefore, that since it is not a redundancy process, the same cannot be carried out in line with the provisions of Section 40 of the *Employment Act* and the Injunction as sought is premature.

65. On whether the Claimant is entitled to an order of temporary injunction, it was argued that the Applicant is not entitled to grant of orders of temporary injunction for the reason that the Notice the Claimant is disputing does not state the date of termination of employment on account of redundancy, neither does it state the number and identity of the employees to be affected and/or whose employment will be terminated on account of redundancy. Further that before the filing of this cause, the process of consultation had been going on for about 6 months on account that the 1st Respondent is not able to pay staff salaries in full and other emoluments as set out in various collective bargaining agreements.

66. Moreover, that the Claimant has not disputed the fact that there have been several court cases that have been presented to court against the 1st Respondent on account of failure to pay salaries, emoluments and other benefits to its members of staff in full. Therefore, that there is a valid justifiable reason to initiate the process of right sizing the number of employees through the process of redundancy.

67. The Respondent denied the allegations that it single handedly developed the tools and/or matrix for redundancy and submitted that they have annexed various attendance registers for joint consultative meetings Egerton University management negotiation team and KUSU Union officials for various dates which meetings the deponent to the supporting affidavit, Mr. Ernest Wayaya, attended and signed the registers confirming attendances.

68. It was argued that the consultative meetings were attended by the officials of the Claimant and the officials of the Interested party and on the 27/3/2023, the 1st Respondent through the Registrar, Human Capital and Administration, wrote to the Branch Secretary & National organizing Secretary Kenya Universities Staff Union Egerton University Branch a letter addressed as follows;-

RE: REDUNDANCY MATRIX/SCORE SHEET FOR KUSU STAFF

"Attached herewith please find a draft redundancy matrix score sheet for KUSU staff for your perusal and input your feedback is expected within Seven (7) days from the date of this letter"

69. He submitted that the said letter was copied to the secretary general of the Interested Party and on the 30th day of March 2023 the Secretary of the Claimant wrote to the 3rd Respondent a letter confirming that they had received the draft matrix and requested for 21 days to give their feedback on it. These correspondences and minutes of joint consultative meetings disapproves the contention by the Claimant that the Respondent has single handedly developed the matrix/tools for redundancy that are subjective and illegal.

70. It was also argued that the Claimant has not demonstrated how the Notice of Intention to declare redundancy and subsequent consultations violated fair administrative action, fair labour practice and

therefore likely to infringe on the Constitutional rights of its members. He thus urged this court to reject the prayer for grant of injunctive orders at this stage as the application is premature only intended to stifle the internal consultations. To support this, they relied on the case of Geoffrey Mworia-Versus-Water Resources Management Authority and 2 others [2015]eKLR where the court expressed itself as follows:-

> " The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of *the Constitution* or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

71. The Respondent also cited the case of Communication Workers Union of Kenya (COWU) v Telkom (K) Limited [2016] eKLR where this Court, observed ;-

> '... the orders the Applicants seek cannot be granted at this point unless the Respondents are going against the law, The Court therefore makes a ruling that the redundancy exercise should continue so long as the law is being observed''.

72. Moreover, that this Court has expressed itself on the issue redundancy while addressing the financial woes bedeviling the 1st Respondent In Universities Academic Staff 9 Union (UASU) Egerton University Chapter v Egerton University & 2 others (Cause E016 of 2022) [2022] KEELRC 13430 (KLR) (7 December 2022) (Ruling) [2022] KEELRC 13430 (KLR) that:-

> " An employer who is unable to meet the wages of employees is not helpless in law. Section 40 of the Act provides on how an employer may reduce the workforce by lawfully terminating the excess workers on redundancy. The Legislature foresaw a situation where, for whatever reason, an employer may not continue keeping workers in payroll yet not able to meet their wages and other needs. In such situations one of the options is for the employer to let go some of the workers by adhering to the law on redundancy."

73. On whether the Claimant has locus standi to file this cause on an issue of redundancy which is the subject of collective bargaining agreement between the Interested party and the 1st Respondent. It was argued that the Claimant's Secretary Mr. Ernest Wayaya in a letter dated 9th June 2023 wrote to the 3rd Respondent upon being invited for a courtesy meeting and stated as follows;

> 'We acknowledge receipt of your "courtesy meeting letter Ref EU/APD/R/HCA/176 dated 6/6/2023 we wish to advice that the agenda to discuss sits within the province of the National office. We also humbly recall National office having presented to the employer alternative way the Employer can use to improve finances. We are aware that the Union awaits for Employer's response. We therefore request you to please communicate to the Secretary General on any matter on Redundancy.'

74. Accordingly, that the Claimant's secretary was unequivocal that the Claimant, as a branch, had no mandate to negotiate/engage with the Respondents on issues of staff redundancy and that the issues was exclusively the mandate of the Interested Party. Consequently, that the minutes of the attendees

register clearly shows that the officials of the Interested Party were attending the joint negotiating team with the management of the 1st Respondent. Further that the Collective Bargaining Agreement in force and the recognition agreement was with the Interested Party and not the Claimant in line with Article 4 (f) of KUSU Constitution which provides as follows;-

> " To seek to obtain legal advice and any other assistance on any matters affecting the Union, or for promoting/protecting the rights of member(s) on matters arising out of the relations the National Governing Council shall have the sole right decide whether or not such legal advice or assistance is in the best of interest of the union of member(s) concerned".

75. It is on this basis that the Respondent submitted that the Claimant cannot usurp the mandate of the Interested Party. Moreover, the consultations that the Respondents initiated on intended declaration of redundancy involved Two (2) other trade unions which are Universities Academic Staff Union (UASU), KUDHEIHA and non unionisable members of staff who are not parties to these proceedings but will be affected if injunction orders were to be granted.

76. On who should bear the costs of this application, it was submitted that section 27 of the *Civil Procedure Act* provides for costs to follow event. In this, the Respondent cited the case of Hellen Wandiga Ngeru vs National Land Commission [2020] eKLR, where Justice M. C Oundo relied on the case of Republic vs Rosemary Wairimu Munene, Exparte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd in Judicial Review Application No. 6 of 2004 where the court held as follows;

> " The issue of costs is the discretion of court as provided for in Section 27 of the *Civil Procedure Act*. The basic rule on the attribution of costs is that costs follow the event.....It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case'

77. Similarly, that the application herein is filed by the claimant without any valid grounds in a bid to frustrate the Respondent's pure intentions. Thus, they prayed to be awarded costs of the suit as a matter of course to compensate them for the trouble taken in opposing this application.

78. I have examined the averments and submissions of the parties herein. The issues for this court's determination are as follows:-

(1) Whether the applicants have locus to file this suit.

(2) Whether the application is merited.

79. On issue No 1 above the Respondents have submitted that the applicants have no locus to institute this claim and hence the application. The Respondents aver that the applicants had in their communication with them averred that what the Respondents wanted to discuss with them as per the letter of 6/6/2022 Ref. No EU/APD/R/HCA/176 sits within the province of the National office.

80. The applicants on their part submitted that it was well within their mandate to initiate this claim because this court has previously expressed itself on this matter in various cases. They cited RVS RTU Ex Parte, Egerton Academic Staff Union Egerton University Chapter & Others (2021) eKLR and LSK Nairobi Branch Vs Malindi LSK & Others (2017) eKLR where JJA relied on the Muma Matemo case.

81. Indeed, this court pronounced itself on this matter reaffirming the position that a branch chapter of a Union being a registered branch has locus to institute proceedings on its own motion.

82. This issue is therefore resolved with a verdict that the applicants have locus standi to institute this claim/application.

83. On the 2nd issue, the Respondents have submitted at length that the applicants came to this court prematurely as the parties are still consulting on the issue pursuant to the notice of intention to declare staff redundant.

84. The Respondents aver that they have not issued any notice of redundancy and this can only be issued after the process of consultation comes to conclusion and redundancy matrix confirmed.

85. In determining whether a redundancy notice was issued or not, I refer to the Notice issued to all staff dated 21st December 2022 which stated as follows:-

> " Following the difficulties the University has undergone in meeting the full requirement for staff salaries and other emoluments and benefits, the University Council on advice has reached a decision to declare staff redundancies across all cadres of staff in a bid to manage the wage bill and bring more efficiency in delivering the University's mandate to its employees and customers.
>
> All staff are given notice of the intention to declare redundancy in the University. It is also assured that the process will be conducted fairly and within the confines of the law as provided in the *Employment Act* 2007, laws of Kenya."

86. My examination of this notice, affirm that this cannot be referred to as a redundancy Notice as envisaged under section 40 of the *Employment Act* which envisages that a redundancy notice shall be served on a union where the employer is dealing with unionsable employees and this notice shall also be served upon the labour office.

87. The notice usually has a definite time frame given the provision that it must be served not less than a month prior to the date of the intended date of termination on account of redundancy.

88. In the current scheme, the notice of Intended redundancy has no date of termination. It is an invite to engage in negotiations and with an assurance that the process will be conducted fairly within the confines of the law,

89. Following this notice, the union Applicant engaged with the University and there is communication to this effect. On 9/6/2023, the Applicants were even invited to a meeting to discuss the issues and they responded to the issues and to the effect that "We kindly wish to advice that the agenda to discuss sits within the province of the National office, we also humbly recall National office having presented to the employer alternative ways, the employer can use to improve finances. We are aware the union awaits the employer's response.

    We therefore request you to please communicate to the Secretary general on any matter of redundancy.

    Thank you …."

90. The above letter is an indication that the applicants having been invited to a consultative meeting declined referring the matter to the national office.

91. My take on this is that once an intention to declare redundancy is issued parties must engage and, in this case, the applicants declined the invite to engage and instead filed this application prematurely.

92. It is my finding that the applicants declined the invite to engage with the Respondents and failed to adhere to the procedures envisaged under section 40 of the *Employment Act* 2007.

93. I find the application is therefore unmerited and decline to grant the orders sought and ask the parties to continue engaging with a view of resolving this matter.

94. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 23RD DAY OF APRIL, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mogire holding brief Konosi for Respondent – Present

Bosibori holding brief Ndubi for Respondent - Present

Oseko holding brief Kahiga for Claimant – Present

Court Assistant - Leah

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