



Kenya Union of Commercial Food & Allied Workers v Yemken Trading Company Limited (Cause E810 of 2022) [2023] KEELRC 249 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 249 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E810 OF 2022
L NDOLO, J
FEBRUARY 2, 2023**

**BETWEEN
KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS CLAIMANT
AND
YEMKEN TRADING COMPANY LIMITED RESPONDENT**

RULING

1. On November 9, 2022, the claimant filed a statement of claim with the issues in dispute being: intention to declare unlawful redundancy and unlawful redundancy of Kevin Ooko Obare (the grievant).
2. Alongside the statement of claim, the claimant filed a notice of motion under certificate of urgency, which is the subject of this ruling. By the notice of motion, the claimant seeks the following orders:
 - a. An order restraining the respondent from declaring any further redundancy;
 - b. An order suspending the redundancy notice issued by the respondent on October 24, 2022;
 - c. An order restraining the respondent from victimising, intimidating, coercing, harassing, discriminating, terminating or disciplining the claimant's members on account of their trade union membership.
3. The motion is supported by an affidavit sworn by the claimant's National Organizing Secretary, Mike O. Oranga, and is based on the following grounds:
 - a. That the parties have a valid agreement relative to recognition and negotiating procedure, setting out the terms of engagement between the parties on behalf of the Respondent's unionisable employees;



- b. That pursuant to the said agreement, the parties have negotiated and concluded a collective bargaining agreement which sets the terms and conditions of employment for the respondent's unionisable employees;
 - c. That the respondent wrote to the claimant, stating its intention to declare redundancy;
 - d. That the respondent intends to declare the redundancy without issuing the requisite notices or following the laid down procedure under section 40 of the [Employment Act, 2007](#);
 - e. That the grievant was issued with a termination letter on account of redundancy without any prior notice;
 - f. That the respondent has not stated the extent of the redundancy, including the number of employees to be affected and the names of the employees to be declared redundant; thus, the claimant does not know how many employees will be affected;
 - g. That the claimant tried to engage the respondent on the issue but the respondent has remained consistently adamant;
 - h. That the respondent has *malafide* intentions and the redundancy is malicious with an aim of targeting members of the claimant;
 - i. That the respondent has more outsourced employees than the principle employees but has not considered the outsourced employees for redundancy;
 - j. That the respondent intends to declare further redundancy to accommodate outsourced labour;
 - k. That the respondent's unionisable employees will be highly prejudiced and substantive loss may occur if the orders sought are not granted;
 - l. That the respondent intends to proceed with the unlawful and unprocedural redundancy and if it is not stopped, the employees will suffer colossal loss;
 - m. That the respondent will not suffer any loss, damage or prejudice if the orders sought are granted;
 - n. That there is more to the redundancy than the alleged economic down turn as the respondent's aim is to eliminate union members and bring on board outsourced labour, to the detriment of the principle employees.
4. In his affidavit in support of the motion, the claimant's National Organizing Secretary, Mike O. Oranga accuses the respondent of refusing to meet officials of the claimant to discuss issues relating to the redundancy. Oranga states that the respondent has failed to provide sufficient details on the redundancy.
 5. Oranga depones that on November 4, 2022, the respondent terminated the services of the grievant, who is one of the claimant's shop stewards, without issuing the requisite notice.
 6. In response to the claimant's motion, the respondent filed a notice of preliminary objection plus a replying affidavit.
 7. In the preliminary objection, the respondent states:
 - a. That the claimant's application is incompetent and fatally defective by dint of rule 5(1) of the [Employment and Labour Relations Court \(Procedure\) Rules](#);



- b. That the affidavit in support of the application offends the mandatory provisions of section 2 of the [Labour Relations Act](#) and ought to be struck out;
 - c. That the application is an abuse of the court process and ought to be dismissed with costs.
8. I have looked at the submissions made by the respondent in support of the preliminary objection whose gist is that the affidavit in support of the application was sworn by an incompetent person. The deponent, Mike O. Oranga describes himself as the claimant's National Organizing Secretary and I find nothing in law to suggest that a person holding this office in a trade union cannot swear an affidavit on behalf of the union.
9. I therefore overrule the preliminary objection and proceed to consider the application on merit.
10. The replying affidavit was sworn by Asha Juma on November 18, 2022. She concedes that the claimant and the respondent had entered into a recognition agreement.
11. She further concedes that the respondent had issued redundancy notices dated October 24, 2022 premised on huge losses because of harsh economic times due to high cost of imported raw materials, depleted sales revenue, stagnant stocks, unfavourable prices and an uncondusive local market.
12. Juma depones that in the redundancy notice, the respondent had given a better package than what is provided for in the [Employment Act](#) as follows:
 - a. Redundancy package equivalent to 3 months' pay;
 - b. Severance pay equivalent to 18 days for every year worked;
 - c. One month's salary *in lieu of* notice;
 - d. All unutilised leave days;
 - e. All other monies due;
 - f. Certificate of service.
13. Regarding the redundancy notice, Juma states that the Machakos County Labour Office and the union had been duly notified. She adds that the staff had been notified *vide* an internal meeting held on November 7, 2022.
14. Juma denies the claimant's claim that the respondent intends to eliminate union membership by outsourcing labour. She states that the respondent intends to pragmatically downsize and reduce its output and stock with the aim of shutting down completely.
15. According to Juma in the first batch of redundancies, the following staff had been let go and their dues duly paid:
 - a. Kevin Obare;
 - b. Dennis Ndaita;
 - c. Ben Opoko;
 - d. Susan Mwangi;
 - e. Florence Karimi.
16. Juma takes the view that the orders sought by the claimant have been overtaken by events since the redundancy has already kicked in. She asserts that the redundancy is lawful.



17. I have looked at the pleadings filed by the parties and it seems to me that the redundancy has already taken place. To issue any injunctive orders would therefore be to act in vain. In the circumstances, what is left for the court to do is to inquire into the lawfulness of the redundancy which can only be achieved at trial.
18. For this reason, the application dated November 9, 2022 is declined with costs in the cause.
19. The parties are directed to list the main claim for hearing on priority basis
20. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF FEBRUARY 2023

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JUDGE

Appearance:

Mr. Macharia for the Claimant

Mr. Ali for the Respondent

