



REPUBLIC OF KENYA



**Akinyi v Lami Technologies Limited (Cause E093 of 2023)
[2023] KEELRC 813 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 813 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E093 OF 2023
M MBARŪ, J
MARCH 27, 2023**

BETWEEN

IMMACULATE AKINYI CLAIMANT

AND

LAMI TECHNOLOGIES LIMITED RESPONDENT

RULING

- 1 The claimant filed application dated February 9, 2023 under the provisions of article 41 and 47 of the [Constitution](#) and rule 17 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) and seeking for orders that;
 1. Spent.
 2. Spent.
 3. This court be pleased to grant the claimant a temporary order by way of injunction directed against the respondent restraining it from declaring the claimant/applicant redundant on the February 11, 2023 or on any other date pending hearing and determination of this suit.
 4. Costs of this application be provided for.
- 2 The application is supported by the supporting affidavit of the claimant and on the grounds that the claimant has been in the lawful employment of the respondent since June 14, 2021 holding the position of consumer business development before the unlawful redundancy on February 11, 2023 when the respondent through letter dated January 11, 2023 unlawfully and unprocedurally informed the claimant that she would be declared redundant with effect from February 11, 2023 and the claimant seek the court to restrain the respondent from such action and to be allowed to retain her position and to secure the same pending hearing of the suit herein.



- 3 In her supporting affidavit, the claimant avers that upon employment by the respondent she has been working diligently until January 9, 2023 when she received email from the respondent informing her that the leadership team had decided to change her position due to restructuring especially the business unit. On February 11, 2023 the claimant was served with notice of intended redundancy with information that her position of consumer business development manager would be declared redundant on February 11, 2023 and that the redundancy exercise would commence in the interim. The claimant was offered a Mutual Separation Agreement (MSA) whose terms she declined since they had not been negotiated.
- 4 The claimant avers that when she declined to take the MSA, the respondent commenced threats and intimidation against her so as to force her out of employment by maliciously and without justification changing the leadership team which the claimant has been heading and by informing the team that the claimant would be taking maternity leave on the last week of February, 2023. The respondent threatened to effect the redundancy on February 11, 2023 and unless the claimant is protected by the court, there will be loss and damage due to unrest, anxiety, stress and financial instability and the orders sought should issue pending the hearing of the suit.
- 5 In reply, the respondent filed the replying affidavit of Roy Perlot the Chief Finance Officer who avers that the claimant is guilty of material non-disclosure in her application where she has deliberately elected not to disclose that on February 7, 2023 her advocates were served with letter dated February 6, 2023 notifying the claimant and the labour officer of the extension of the notice of intended redundancy by 14 days from February 11, 2023 to allow for consultations and to explore alternatives to the proposed redundancy.
- 6 It is not correct for the claimant to assert that the respondent has already decided to declare her redundant on February 11, 2023 because parties are still discussing on any options that may be available as an alternative to the redundancy.
- 7 The claimant also failed to disclose to the court that following the issued notice of intended redundancy on January 11, 2023 a consultative meeting was held on February 3, 2023 to discuss on alternatives and the claimant is yet to get back on the offer given.
- 8 Perlot also avers that it is not correct that the claimant has worked diligently because she has been having performance issues which are recorded in the performance reviews noting poor performance and the department the claimant was running being unreasonably costly leading to discussions from July, 2022 with the purpose to;
 - a. Inform the claimant of her poor performance and that the consumer business department which she heads was performing poorly; and
 - b. Inform the claimant that as a result of the department's poor performance, the respondent was contemplating declaring the department redundant and the claimant was asked to consider other roles within the organisation.
- 9 Following the meeting held in July, 2022 the claimant declined to take other roles within the company and promised better performance in the next quarter ending October, 2022 but despite being given time for turnaround in her performance, there is underperformance with consistent losses and the claimant failed to offer a solution and based on her poor performance, several employees were terminated from employment.



- 10 Perlot avers that around October, 2022 the claimant informed the respondent of her pregnancy. At the time, there was documented history of poor performance and on-going discussions towards declaring the whole department redundant due to constant losses.
- 11 Perlot avers that in December, 2022 the respondent being considerate of the claimant's condition and needs opted to negotiate a MSA so that she could have employment terminated on more favourable terms based on poor performance or redundancy both of which were being contemplated. Since the department is no longer cost efficient and the claimant declined to take up other roles, there was no other option but to initiate a redundancy. Initial notice issued on January 11, 2023 which was extended while awaiting the claimant to reply which the claimant has failed to address and instead moved court without disclosing all material facts and hence should not enjoy the orders sought and her application should be dismissed with costs.
- 12 The claimant filed her supplementary affidavit and avers that it is not true that there is material non-disclosure because her advocates received letter dated February 7, 2023 which confirmed the respondent's intention to proceed with redundancy forcing her to move the court under certificate of urgency to secure her rights. This letter was issued after the notice of intended redundancy of January 11, 2023 had been issued and at the time of moving court there was real threat of termination of employment.
- 13 The claimant also avers that redundancy process seems to be targeted at her alone and matters with regard to poor performance have never been a reason for disciplinary action and it is not true that on October 31, 2022 she informed the respondent of her maternal state. At the time, there was nothing addressed with regard to any alleged poor performance and where indeed such matter existed there would be no need to negotiate a MSA. All the claimant's duties have since been reassigned to other employees, the redundancy is real leading to the claimant being put under pressure to accept the MSA without due consideration to her lawful expectations and in violation of articles 41 and 47 of the Constitution read together with section 5 and 40 of the Employment Act, 2007 (the Act) where the respondent has been unfair, acted unlawfully and applied discriminatory practice.
- 14 In his further affidavit, perlot avers that the claimant has had performance challenges as head of the consumer business department as evidenced by the commission income drop of the department and the respondent can barely sustain the claimant's salary which is well over USD2,000 while sales agents earns between USD 350 to 400.
- 15 From the claimant's department, 2 employees out of 7 were terminated due to underperformance; one (1) resigned while 3 are under performance review but have been terminated due to poor performance.
- 16 To support the evidence that the claimant is of poor performance, there are complaints by clients where she poorly handled their assignments and the claimant was unable to achieve her financial targets. Noting these challenges and to remain strategically placed and competitive by avoiding unnecessary salary overheads, the option to declare redundancy is imperative.
- 17 Both parties attended and made detailed oral submissions in support of each case and base on the affidavits filed.
- 18 The single issue for determination at this stage is whether the court should restrain the respondent from declaring the claimant's position redundant with effect from February 11, 2023 or on any other date pending the hearing and determination of the main suit.
- 19 The respondent is clear in this case to the extent that what is in issue is only an intention to declare a redundancy. Actual notice declaring a redundancy has not issued so far. Indeed, in both affidavits filed



- by the respondent sworn by Perlot, this aspect and clarity stands out. That upon discovery that the claimant was of poor performance and her department was not cost-efficient, the options taken was to terminate employment due to poor performance or through redundancy.
- 20 The respondent has indeed given the example that since discussions commenced in July, 2022 about the claimant's department, 2 employees out of 7 were terminated in their employment due to underperformance, 1 resigned while 3 others were under review and have since been terminated for poor performance.
- 21 What also comes out very clearly and powerfully from the respondent and what Counsel for the respondent gave emphasis is that the claimant is earning USD 2,000 while sales agents in the department earn between USD 350 to 400. That indeed, if the claimant's employment is terminated, her salary would be able to support several other employees.
- 22 Another impactful matter addressed by the respondent is that the claimant has been offered alternative employment within the company but has declined save what is not addressed and of concern to the claimant is that the offer relates to a lower cadre job and with less salary than her current position and salary.
- 23 What comes evident to the court is the underlying issue at hand. That of performance.
- 24 Under paragraphs 10 and 13 of Perlot's replying affidavit he avers that;
... I refute claims that the claimant has worked diligently and 'with no capability issues whatsoever'. Since the claimant commenced employment, she has been having performance issues, which are duly recorded in the performance review documents. Following the concerns of the claimant's poor performance and the department she was running being unreasonably costly to the respondent, discussions were held at the beginning of July 2022 ...
And that;
- 25 In December 2022, being considerate of the claimant's condition and needs, the respondent opted to negotiate a mutual separation agreement so that the claimant's employment could be terminated on more favourable terms than a termination based on poor performance or redundancy, both of which were being contemplated. ...
- 26 This then becomes a very dangerous trajectory in dealing with either redundancy or poor performance. on the one hand, redundancy is purely based on an operational requirement and should have nothing to do with misconduct in the nature of poor performance and which is regulated under section 40 read together with section 45 (2)(b)(ii) of the Act. on the other part, poor performance is part of the misconduct regime regulated under the provision of section 41 of the Act and should strictly be addressed under such framework as unlike a case of redundancy.
- 27 This matter is aptly addressed by the Court of Appeal in the case of *Kenya Airways Limited v Aviation and Allied Workers Union of Kenya and 3 others* (2014) eKLR that;
- 28 Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As section 43(2) provides, the test of what is fair reason is subjective. The phrase "based on operational requirements of the employer" must be construed in the context of the statutory definition of redundancy.
- 29 What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the



termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.

30 And as concerns poor performance, the court in in *Peter Kamau Mwaura and Another v National Bank of Kenya* held that;

31 Where poor performance is shown to be a reason for termination, the employer is placed at a high level of proof as outlined under section 8 of the *Employment Act* to show that in arriving at this decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance. Section 5[8] [c] further outlines the policy and practice guidelines that include having a performance evaluation system that can be used by an employer in ensuring their employees get a fair chance when they are of poor performance.

32 The respondent must then decide, is it a case of poor performance it is dealing with as regards the claimant or is it a purely operational matter? Where it is a case of poor performance, as addressed above, such becomes a disciplinary issue which must be addressed in accordance with the law. Where the matter is operational, then the claimant as a single employee cannot be the cause or target as to do so would negate the same as held in *Jane Khalechi v Oxford University Press EA Ltd* [2012] eKLR and in *Geoffrey Nyabuti Onguko v Blow Plant Limited* [2015] eKLR that to single out an employee and effect termination of employment under the guise of a redundancy is contrary to article 41 of the *Constitution* that guarantee the right to fair labour practices.

33 The application then to preserve employment pending the hearing and determination of the main claim in view of matters addressed above becomes justified at this stage. Before the court can address matters addressed in the memorandum of claim and particularised discriminatory treatment against the claimant, the orders sought find justification.

34 Before conclusion, the respondent has urged the court that following notice of intention to declare a redundancy, parties are engaged in negotiations to have the claimant deployed in another position or accept the MSA offer. This is done under the background and the view taken by the respondent that the claimant earns a high salary which can be applied to pay several other employees. However, the claimant was employed by the respondent on good basis and should not be victimised over matters outside her employment and to use such approach to change her employment terms and conditions to her disadvantage would be a violation of section 10(5) of the Act read together with section 13 thereof.

35 Ultimately, MSA is mutual and cannot be forced on the claimant by creating a hostile work environment. Such would negate the very essence of fair labour relations and practices, fair administrative action upon which provisions of the *Constitution* the instant application is premised.

36 Ultimately and based on the findings above, the application herein is found with good foundation and the court brings to the attention of the respondent the provisions of section 46 of the Act especially subsection 46(a) and (h) that;

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty —

a. a female employee's pregnancy, or any reason connected with her pregnancy;

...

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;



37 The respondent, with knowledge of the claimant's maternal status and having moved court for good cause, her employment shall be preserved pending hearing and determination of the suit herein on priority basis.

38 Accordingly, application dated February 9, 2023 is found with merit and is hereby allowed, the respondent shall preserve the claimant's employment pending hearing and determination of the main claim.

39 Hearing dates shall be allocated on priority basis. Costs abide the outcome of the claim.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MARCH, 2023.

M. MBARÚ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

.....and.....

