Amalgamated Union of Kenya Metal Workers v CMC Motors Group Limited (Cause E350 of 2023) [2023] KEELRC 1420 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1420 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E350 OF 2023

NZIOKI WA MAKAU, J

MAY 31, 2023

BETWEEN

AMALGAMATED UNION OF KENYA METAL WORKERS ..... CLAIMANT

AND

CMC MOTORS GROUP LIMITED ..... RESPONDENT

RULING

1. The application before me is the Claimant's Notice of Motion dated May 3, 2023. It seeks in the main orders in terms of prayers 2 and 3 which are to the effect that pending inter partes hearing and determination of this suit, the Honourable Court do issue an order restraining the Respondent from declaring 169 employees who are in this dispute redundant. The third prayer is that pending hearing and determination of this application, the Honourable Court be pleased to restrain the Respondent from any acts of threats, intimidation, victimisation, or coercion to the Applicant members during the pendency of this suit.

2. The motion was argued parol before me on May 25, 2023 by Mr. Ondiege representing the Union and Mr. Makori counsel for the Respondent instructed by M/s Hamilton Harrison & Mathews Advocates. Due to the urgency of the matter a Ruling was to be delivered today.

3. Mr. Ondiege argues that the grounds in respect of the matter are under section 40(1)(a) of *Employment Act* which grants the Union a right to be notified in advance of an intended redundancy. He referred the court to the CBA attached. In particular he cites Clause 17(1)(a), (b) and (c). He submits that the Union has 15 days to notify the employer if they have any issue to raise on the intended redundancy. He states that there is a letter from the Respondent stating the intention to declare redundancy and the same is dated 24th April 2023. He asserts the letter was served on 24th April 2023 in the afternoon. The Claimant submits that the letter clearly stated the redundancy was effective the next day April 25, 2023. The Claimant submits that the leading question up to the point is where is the 30 days notice as there is only one day notice. He argued that they had 15 days to communicate with the employer and the

letter did not contain the relevant information. He submits that the Claimant only heard of phases in court. He stated that the letters indicate that phase is to be underway in a week. The Claimant submits that the letter gave information the grievant employees were to be affected by redundancy within 2 or 3 days of the notice. The Claimant submits a notice should be not on what has already been executed as the Respondent served the Claimant with a process that had been exhausted. He submits that there is a preliminary objection stating there should have been conciliation. He submits that conciliation is subordinate to this court and the court can handle such a claim per section 12 or can refer it to a conciliator if it deems fit. The Claimant cites the case of *Amalgamated Union of Kenya Metal Workers v Kenya Coach Industries* [2020] eKLR and seeks preservation and status quo.

4. The Respondent being opposed filed grounds of opposition as well as a replying affidavit on 18th May 2023. It is submitted that the replying affidavit of Serah Kitheka was filed and the facts therein are uncontested. Counsel for the Respondent Mr. Makori submits that in respect to prayer No. 2, it seeks orders pending inter partes hearing to bar the declaration of redundancy. He submits that only 84 are unionisable employees and at the Minutes of 24th April and May the court will confirm the employees who are unionisable are 84. The Respondent submits it Group Chief Executive Officer is among those affected. The Respondent submits the parties the Claimant seeks to stop redundancy for is the company secretary and others who are excluded from the application. The Respondent submits that the order as framed is incapable of grant. It is submitted that only 6 employees remain who can be affected by the order sought. It is submitted that the rest of the employees have not yet been given notices. The Respondent submits that the minutes produced before the court shows there have been consultations and two employees have got position elsewhere with the group. The Respondent submits the orders cannot be granted. It was submitted that Clause 17 of CBA indicates the employer is to give notice of intention and that the letter heading is on notification to declare employees redundant. The Respondent submits that the letter explains the redundancy faced and that the letter is issued in terms of section 40. It is merely a notice of intention. Counsel submits that the Union and employer have met and mitigate the measures on redundancy per section 40. He referred to the case of *Kenya Airways Limited v Aviation & Allied Workers Union & 3 others* [2014] eKLR and submits that the parties have had weekly meetings on the redundancy. He submits that the Claimant is frustrating the process and are interfering with management of the company. He referred to the case of *Alfred Nyungu Kimungui v Bomas of Kenya* [2013] eKLR. He submitted that prayer number 3 is to the effect that the court bars intimidation or coercion. The Respondent submits that there is no evidence of coercion, intimidation and threats as no evidence has been led on this. The Respondent submits that the union and employer have been in talks. The Respondent thus prays the notices be effected and if there is no procedure they have remedy under section 40 and 49 of the *Employment Act*. The Respondent cites the cases of *Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd & 3 others* [2014] eKLR as well as *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 on injunctive orders and the case of *Geoffrey Muthinja & another v Samuel Maguna Henry & 1756 others* [2015] eKLR on the exhaustion doctrine.

5. The matter before the Court relates to redundancy at the Respondent. From the facts before me, the dispute as reported to the Court was properly before the Court in the sense that the certificate of urgency spoke of redundancy being effective the next day. Prima facie, there was no time for the Court to refer the matter to conciliation as by the time the Conciliator would be appointed by the Minister the redundancy would have been effected in full. It was therefore appropriate in the circumstances for the Union to come to Court for urgent relief as was done in this case. That settles the exhaustion doctrine issue.

6. The Claimant refers to 169 employees targeted for redundancy. In the bundle presented to Court at page 56 is a letter under the hand of Mr. Sakib Eltaff the Group Managing Director and addressed to

one of the employees (there was an attempt to redact the name). This letter under confidential cover is dated 28th April 2023 and refers to the redundancy coming into effect a month later. Since the position of Quality Controller/Tester is not known to be either unionisable or not, the Court cannot ascertain whether this notice accords with section 40(1). However, if the employee is not a member of the Union, then the notice does not accord with section 40(1)(b) as there is no copy to the Labour officer. If there was sufficient material placed before the Court this may have been one of the instances where the redundancy declared could have been halted for that reason. The Claimant did not attach all the letters to show the employees affected, their positions at the Respondent and as such deprived the Court of the opportunity to interrogate the process underway. It may be that the Respondent is not following the law on redundancies but without more material being availed it would be nigh impossible to sanction the Respondent. The Respondent though must be cognisant of the provisions of section 40 of the *Employment Act*. Given the Court does not have all the facts and has not had occasion to consider all the facts on merit, the Court declines to affirm the orders granted at ex parte stage and instead directs that if there are grievances due to the ongoing redundancy, the affected can articulate the facts and seek relief in the substantive claim. I will rely on dicta by Nduma Nderi J. in the case of *Churchill Ongalo v Kenya Kazi Security Services Limited* [2014] eKLR where the learned judge stated thus:

> The substantive issue as to whether or not the declaration of redundancy of the Claimant by the Respondent is lawful, just and fair is a matter that cannot be determined until the court has heard all the relevant facts placed before it. This matter must therefore await the full hearing and determination of the suit.
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> The issue before court is whether or not the Claimant/applicant is entitled to an injunction which has the effect of keeping him in employment notwithstanding the express intention of the employer to declare him redundant and effectively terminate his services. [Emphasis supplied]

7. The Court therefore will decline issuing the orders sought by the Claimant as there will be a remedy upon a full hearing and determination of the issue as to the redundancies declared over the employees who are members of the Union or others who are not members but who may opt to file suit. Motion is dismissed. Costs in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2023

Nzioki wa Makau

JUDGE