



**Transport Workers Union v South Africa Airways – SOC Limited (Cause E039 of 2021) [2023] KEELRC 1311 (KLR) (15 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1311 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E039 OF 2021  
NZIOKI WA MAKAU, J  
MAY 15, 2023**

**BETWEEN**

**TRANSPORT WORKERS UNION ..... CLAIMANT**

**AND**

**SOUTH AFRICA AIRWAYS – SOC LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant/Applicant filed submissions which it framed as its final submission on the initial Application dated January 15, 2021. In the submissions it states as follows;
  - 1) That, the Claimant filed the initial Application on January 15, 2021 seeking for payment of its members full monthly salaries from April, 2020 to date.
  - 2) That, before the full hearing and determination of the Application, the Respondent went ahead and declared redundant majority of its employees and the Claimant was forced to make a second Application - "on intended unlawful and unfair redundancy contrary to 40 of the [employment Act-2007](#) and clause 31 of the parties CBA" dated August 17, 2021 under the same Cause No.- E039/2021.
  - 3) That, the redundancy was unprocedural carried out without involving the Claimant and its members and the employees declared redundant have not been paid their rightful. entitlement as required by Law and the CBA.
  - 4) That, notwithstanding the above and during the pendency of both the Applications, the Respondent paid its employees part of their claim on monthly salaries for; June, July, August, December, 2020 and thereafter their other subsequence salaries until some were declared redundant in August, 2021 while others are in employment to date.



- 5) That, what is pending is payment of all the employees five (5) months salaries and allowances being for; April, May, September, October & November, 2020 and the rightful severance benefits to those declared redundant.
2. The Claimant submits that the Hon. Court on March 23, 2022 ruled on the Redundancy Application and directed the Claimant to list the matter for disposal of the initial clam which in this case is: a) Payment of pending five (5) months salaries for; April, May, September, October & November, 2020 and allowances to all employees; and b) Payment of the rightful severance benefits to employees declared redundant including their unpaid five (5) months salaries.
3. The Claimant resubmits herein that the Respondent employees were in employment until some of them were declared redundant in August, 2021 while the rest are in employment. It submits that there is no legal provisions for unpaid leave under the Kenyan Labour Laws. Section 28 of the [Employment Act, 2007](#) guarantees an employee right to paid leave. The Claimant submits that the employees can only take unpaid leave with their written consent and that the Respondent acted unilaterally without consulting its employees or the Claimant which is unfair labour practice.
4. The Claimant submits that the Respondent employees together with those declared redundant are entitled to their five (5) months full salaries and allowances. The Claimant submits it is aware that the Respondent has Stations/Branches in other Countries and in particularly Lilongwe in Malawi where likewise it subjected its employees to the same unfair labour process by withholding payment of their five months salaries. It submits that the Respondent employees in Malawi filed an application in the Industrial Relations Court at Lilongwe Matter No. IRC 690 of 2019 for "Unjustified withholding of workers benefits" between Nozгани Ngwira & 10 others (Applicants) v South African Airways (Respondent) where the Hon. Court held that "the Respondent's unilateral sending of the Applicants on unpaid leave and withholding their wages was unfair labour practice and contrary to employment Laws. Consequently, it is hereby ordered that the Respondent should pay the Applicants their 5 months wages which is withheld."
5. The Claimant submits that it is total agreement with the above position and same be held in this application, and that, further to the above, the Respondent by its letters issued to employees declared redundant dated August 17, 2021 indicated that the salary claim remains subject to the Court proceedings and as such, the Hon. Court is only called upon to order the Respondent pay employees their 5 months withheld salaries. The Claimant submits that the Respondent is to date operating optimally and must be held responsible to pay its employees their withheld five (5) months salaries. The Claimant submits that the Hon. Court has a duty and obligation to protect its citizen from unfair labour practice as exhibited herein.
6. The Claimant thus prays that the Hon. Court do order the Respondent to pay all its employees (either declared redundant or in employment) their withheld and unpaid five (5) months salaries and allowances for April, May, September, October & November 2020, each employee declared redundant be paid gratuity of 4 months gross salary, the Respondent to pay each employee declared redundant twelve (12) months gross salary as compensation for unfair redundancy.
7. The Respondent in its part submits that its submissions are in response to the "Claimant's final submission" dated July 6, 2022. It submits that in the opening line of those submissions, the Claimant stated that it is submitting on the "initial application dated 15/01/2021". The Respondent submits the Claimant's application dated January 15, 2021 has already been ruled upon by this Honourable Court through a ruling that was delivered on March 23, 2022. The Respondent submits the Claimant's representative was in court during the delivery of the ruling and that on that day, the Court dismissed



the Claimant's application on the basis that it sought final orders at an interlocutory stage. The Court also directed the parties to fix the matter for directions on the hearing of the claim.

8. 3) The Claimant then fixed the matter for a mention on June 22, 2022 and on that date, the Court was informed that parties had not complied with pre-trial requirements. They therefore sought and were granted leave to file and serve the Respondent's Memorandum of Response, Witness Statement and Bundle of Documents which they subsequently did. On the Claimant's part, its representative informed the Court that it had filed all its documents and requested for time to file and serve final submissions. This was in spite of the matter not having gone to trial. The Court directed the Claimant to avail its witness statement. The Respondent submits that one has been served on the Respondent to-date and instead, and quite curiously, the Claimant proceeded to file the submissions that are subject of the present submission. The Respondent submits that the Claimant's submissions are on the very same application that had been dismissed. This is in spite of having been in court during the delivery of the ruling.
9. The Respondent submits that arising from the ruling of the Court on March 23, 2022 it makes this preliminary point: the conduct of this matter by the Claimant is not only bewildering, it offends the objective of this Honourable Court to facilitate the expeditious and efficient resolution of disputes. The Respondent further submits that the Claimant's application dated January 15, 2021 is res judicata by virtue of the Court's ruling on it. It submits that the principle of res judicata serves to bring to finality litigation on a matter that has substantively been dealt with. Since the Honourable Court has substantively ruled on the Claimant's application dated January 15, 2021, it submits that the Claimant's recourse is either to seek to appeal or review that ruling if dissatisfied, not to re-litigate that application through subsequent submissions.
10. The Respondent submits that secondly, the Claimant has sought to re-litigate and seek relief on the issues of redundancy and gratuity in its submissions dated July 6, 2022. Both these issues were also introduced in the Claimant's previous submissions dated October 4, 2021, in spite of there not having been any amendment to its application then, or thereafter. Out of an abundance of caution, the Respondent responded to both those issues in its supplementary affidavit sworn on October 21, 2021 and in its submissions dated October 22, 2021. The Respondent submits that therefore, these were also issues that were before the Court when previously ruling on the Claimant's application. The Respondent submits that based on the foregoing the Honourable Court should again dismiss the Claimant's application. In dismissing it, the Respondent prays that the same be with costs owing to the issues that have been outlined above concerning the Claimant's conduct of this matter.
11. The Claimant has revisited the motion of January 15, 2021. The Respondent asserts that this is res judicata, the Court having pronounced itself on the matter vide a Ruling delivered on March 23, 2022. Res judicata is Latin for a thing adjudged. Put another way, it refers to a thing or matter that has been finally judiciously decided on its merits and cannot be re-litigated between the same parties. The Black's Law Dictionary 10<sup>th</sup> Edition defines res judicata as:  

“ An issue that has been definitely settled by judicial decision. The three essentials are

  - (1) an earlier decision on the issue,
  - (2) a final Judgment on the merits and
  - (3) the involvement of same parties, or parties in privity with the original parties
12. In this case the Respondent is off the mark in that other than the heading and introductory paragraph that suggest the Claimant is referring to the initial application, the submissions and thrust of the



Claimant's submissions are in relation to the claim. The Claimant's submissions merely contain a typo which does not detract from the intention of the same to address the final submissions in relation to the claim. Though inelegantly and poorly articulated, the submissions relate to the issues in the claim that will bring finality to the matter. As such, this decision is the final one in relation to the issue of non-payment of salaries as pleaded in the claim before the Court.

13. The Claimant filed a memorandum of claim and contemporaneously with the said filing sought interim orders vide the motion of January 15, 2021. That is the application that was subject of the Court's ruling of March 23, 2022. Subsequently, the parties entered into negotiations culminating in payment of withheld salaries and thereafter the redundancies that followed the decision by the Respondent to exit the stage. As of the last time a status report was given by the Respondent, it had been placed under fiscal and operational management under the South African laws on bankruptcies and insolvencies. The effect is that the debts claimed by the Claimants in this case will be one of the series of claims to be presented to the Receivers. The business rescue plan of South Africa Airways has been part of the proceedings before me though the Claimant did not articulate the same properly.
14. The Claimant's members seek dues being payment of all the employees' salaries and allowances for five (5) months ~ April, May, September, October & November 2020. There is also a claim for the rightful severance benefits to those declared redundant. The Claimant has not availed a list of employees whose salaries are pending, there is no list of employees of the Respondent who have been declared redundant and whose benefits have not been paid. In the Court's considered view, the relief sought by the Claimant against the Respondent is amorphous and does not have specificity as to allow for grant. The Court will not give a blanket decision as parties are to plead their cases with specificity. The Claimant did not press the claims competent to it to make with the required degree of certainty. In regard to the alleged unpaid salaries and allowances as well as the benefits accruing on account of redundancies, the Claimant having failed to avail material for the Court to make a pronouncement in its favour, this claim stands dismissed. However, acknowledging there may be live claims that have been addressed during the pendency of the suit especially on account of the Court instigated negotiations between the parties, I will make no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2023**

**NZIOKI WA MAKAU**

**JUDGE**

