



Kenya Union of Commercial, Food and Allied Workers v London Distillers (K) Limited (Cause E237 of 2023) [2023] KEELRC 1680 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1680 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E237 OF 2023**

**JK GAKERI, J
JULY 12, 2023**

BETWEEN

**KENYA UNION OF COMMERCIAL, FOOD AND ALLIED
WORKERS CLAIMANT**

AND

LONDON DISTILLERS (K) LIMITED RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Applicant dated 23rd March, 2023 seeking Orders That;
 1. Spent.
 2. Spent.
 3. Spent.
 4. This Honourable Court do grant any other order deemed fit and just to meet the ends of justice.
 5. Costs of the Application be in the cause.
2. The Application is not expressed under any legal provisions and is based on the grounds set out on its face and the Supporting Affidavit dated 23rd March, 2023 sworn by Mike Oranga who deposes that the Applicant and the Respondent have a valid Recognition Agreement and a Collective Bargaining Agreement (CBA) the last of which came into effect on 1st May, 2015 for 2 years and still in force and review pending in court in Cause No. 912 of 2018.
3. The affiant states that by letter dated 25th February, 2023, the Respondent served a redundancy notice which did not;



- i. Declare the extent of the intended redundancy;
 - ii. The period of the said notice.
 - iii. Number and names of employees to be affected.
 - iv. Departments to be affected.
 - v. Selection criteria.
 - vi. Basis of the payments to the employees affected.
 - vii. When the redundancies would take effect.
4. That by letter dated 3rd March, 2023, the Applicant requested the Respondent to declare the extent of the intended redundancy as well as address all the other concerns above but to no avail as its letter dated 7th March, 2023 did not provide the information.
 5. The Applicant dispatched a further letter dated 15th March, 2023 seeking information but no reply was forthcoming.
 6. The affiant states that time is of the essence as the Respondent may declare employees redundant and close the company based on its notice of 25th February, 2023, in contravention of the provisions of Section 40 of the *Employment Act*, 2007 and Clause 23 of the Collective Bargaining Agreement as it was not the only redundancy it had attempted to declare having done so on 12th August, 2020 when it declared 10 employees redundant and retired 5 others and declined to pay them as per the CBA and had appealed the decision in Cause No. 490 of 2020 in Civil Appeal No. 51 of 2022.
 7. That the Applicant has sought confirmation of tabulation of dues as there is no stay of execution of judgement.
 8. That a threat to declare redundancies on 1st August, 2022 was not executed and was withdrawn after the Applicant filed Cause No. 564 of 2022 which was also withdrawn.
 9. That the present notice is intended to force the applicant to abandon the judgment in Cause No. 940 of 2020 for inferior terms to be relied upon to settle the judgment.
 10. The affiant states that the Respondent had no other option but to follow the law and the CBA.
 11. That members of the Claimant stand to loose irreparably if the orders sought are not granted.

Response

12. In its Replying Affidavit sworn by Mohan Galot on 11th April, 2023, the affiant states that he was the Subscriber, Founder and Governing Director and Principal Shareholder of the Respondent.
13. That the Respondent's business is distillery of alcoholic beverages on continuous supply of molasses and huge quantities of molasses continue to be illegally exported leading to a shortage for local industries molasses users as the Agriculture and Food Authority acknowledges in its letter of 26th January, 2023.
14. That of the 7 bottling lines at the Respondent's, only one (1) continues to operate and the Respondent could no longer maintain its staff at previous levels and has engaged in redundancies as a stop gap measure to remain a float.



15. That its letter dated 25th February, 2023 to the Commissioner of Labour was copied to the Claimant and indicated the reasons for the redundancy and extent thereof.
16. That the Respondent responded to the applicant's letter dated 7th March, 2023 on the redundancies and all cadres of employees would be affected.
17. That the Respondent subsequently made a decision to declare 60 employees redundant and issued termination letters to the affected employees who as per the letters would be paid;
 - a. Salary for the days worked.
 - b. Severance pay at 15 days per year.
 - c. Leave days accrued but not taken.
 - d. 3-5 months salary in lieu of notice.
 - e. Service pay of between 30-60 days salary.
 - f. Certificate of service.
18. That the issues that led to the redundancies in 2020 were different from the current circumstances and the two are unrelated.
19. That the parties differed on the computation of the judgement sum and were filing submissions on their respective computations and the Respondent being aggrieved had appealed the decision at the Court of Appeal.
20. That the notice of intended redundancy dated 1st August, 2022 was halted after parties negotiated and agreed.
21. The affiant states that the Respondent has complied with the law in the redundancy process.
22. That the Respondent had engaged and consulted the applicant as by law required and explained all aspects of the redundancy and proposed payments are in accordance with the law.
23. The Respondent prays for dismissal of the Notice of Motion with costs.

Applicant's submissions

24. According to the applicant, a total of 65 employees had been declared redundant since 23rd March, 2023 and on 12th April, 2023, the Respondent confirmed that it had declared 60 employees redundant. That on 10th April, 2023 (incorrectly stated as 10th August, 2023), 10 more were declared redundant.
25. That the Respondent's notice dated 25th February, 2023 was merely copied to the Applicant and the extent of the redundancy had not been explained including and had no selection criteria and effective date.
26. As to whether the Application herein was still necessary, the applicant submitted that since the decision is exclusively that of the employer, a notice devoid of the extent of the redundancy was a violation of the law on redundancies and the CBA provided a selection criteria based on LIFO to safeguard long serving employees from losing benefits.
27. That the court had jurisdiction under Section 12(3) of the *Employment and Labour Relations Court Act*, 2011 to issue interim orders including injunctions and prohibitory orders among others.



28. It was submitted that the Respondent intentionally violated Section 40(1)(a) of the *Employment Act*, 2007 and Clause 23 of the CBA between the parties and it effected redundancies after 12th April, 2023.
29. That the process was initiated on unlawful and unprocedural grounds and thus unlawful ab initio and should not be allowed to continue as all are subjects of the law and the Respondent should be sanctioned.
30. The Applicant made reference to the main suit and evidence at the hearing which is irrelevant to this application.
31. Further reference was made to Cause No. E490 of 2020 to urge that the Respondent followed a similar pattern in 2020.
32. Finally, as to whether the applicant had satisfied the conditions for an injunction, it was submitted that the applicant had demonstrated that;
 - i. It had a prima facie case with a probability of success.
 - ii. If the orders sought were not granted, it would suffer irreparable injury and
 - iii. The balance of convenience was in its favour.
33. The Court of Appeal decision in *Mrao Ltd V First American Bank Kenya Ltd & 2 others* (2003) KLR 123 was relied upon to reinforce the concept of prima facie case.
34. That since the Respondent ignored the provisions of Section 40(1)(a) of the *Employment Act*, 2007 and Clause 23 of the CBA, the orders sought ought to be granted.

Respondent's Submissions

35. Counsel for the Respondent submitted that prayer 2 and 3 were spent as the orders were sought pending the hearing and determination of this application and no orders have been sought upon hearing. That the application had been overtaken by events and was for dismissal.
36. Counsel submitted that the Respondent had already issued termination letters and the dues payable were indicated.
37. It was submitted that prayer 2 could not issue as the redundancy had already taken place and prayer 3 could also not issue as the Respondent concluded the redundancies on 11th April, 2023.
38. Counsel submitted that since the application herein sought to injunct the redundancies initiated by the notice dated 25th February, 2023 and redundancies had taken place, the application and the suit herein was an academic exercise.
39. Counsel urged that the letter of the Agriculture and Food Authority dated 26th January, 2023 revealed that shortage of molasses locally had affected distilleries and the Respondent in particular had only one operational bottling line out of 7.
40. That the Respondent's Notice of intention to declare redundancies to the Commissioner of Labour was copied to the Sub-County Labour Officer and the Claimant and indicated the reasons for the redundancy and the extent.
41. Counsel submitted that the Respondent responded to the Claimant's letter dated 3rd March, 2023 through its counsel's letter explaining the reasons for the redundancy.
42. That a decision was made to declare 60 employees redundant effective 26th March, 2023.



43. According to counsel, the redundancies in 2020 were different from the current and the triggers were different.

Determination

44. The singular issue for determination is whether the Application meets the threshold for the grant of a temporary injunction to restrain the Respondent from declaring any redundancies unless the provisions of Section 40(1) of the *Employment Act, 2007* were complied with.
45. It is not in dispute that the Claimant and the Respondent have a Recognition Agreement and a Collective Bargaining Agreement dated 14th July, 2017 awaiting a review after lapsing in May 2017.
46. Equally not in contest is the fact that by letter dated 25th February, 2023, the Respondent notified the Commissioner for Labour that it intended to declare about 300 employees redundant.
47. The letter had no effective date of the proposed redundancy.
48. A similar but different letter of even date was sent to the Secretary General of the Claimant.
49. This is the letter that precipitated the present suit and Application herein by which the Applicant seeks to have the Notice dated 25th February, 2023 declared unlawful or null and void among other orders in the main suit.
50. The Application seeks temporal orders to restrain the Respondent from declaring redundancies pursuant to the notice.
51. To put the dispute into context, the suit herein was filed on 24th March, 2023 under a Certificate of Urgency and the court directed that service be effected and the Application be responded to within 2 days and be placed before the court on 29th March for inter partes hearing.
52. Unbeknown to the applicant, the Respondent issued termination letters dated 23rd March, 2023 to 2 employees and the effective date of the termination was either 26th or 28th March, 2023.
53. Puzzlingly, although Mr. Moham Galot stated in the Replying Affidavit that the Respondent engaged the Applicant and shared relevant information regarding the extent of the redundancy and a selection criteria, there is no evidence on record of any meeting or selection criteria.
54. It is unclear to the court how the Respondent engaged the Claimant as the letter does not appear to have been aware of the letters to the employees or how far the process had gone.
55. As adverted to elsewhere in this ruling, the letter sent to the applicant was different from the letter sent to the Commissioner for Labour. While the copy sent to the Commissioner for Labour was emphatic that the Notice was issued pursuant to the provisions of Section 40(1) of the *Employment Act, 2007* and would affect approximately 300 employees who would be issued with notices with full redundancy payments made, the copy to the union had no such detail.
56. For unexplained reasons, the Respondent by design deleted paragraph 3 of its letter dated 25th February, 2023 in the copy sent to the applicant and the detail therein was never brought to the applicant's attention thereafter.
57. Although counsel's letter 7th May, 2023 explaining some background information was an admission by the Respondent that its letter to the union was inadequate, analogous to the Respondent's letter, it did not assuage the Applicant.



58. The applicant was entitled to know the number of employees that were likely to be affected by the proposed redundancy as it prepared to engage the Respondent on the proposed modalities and timing. In the court's view, the Respondent did not exhibit good faith in its dealing with the Claimant.
59. Regrettably, the Notice of Motion dated 23rd March, 2023 seeks orders exclusively pending the hearing and determination of the instant application. No specific order is sought pending the hearing and determination of the main suit or upon hearing of the application.
60. As to whether the Notice of Motion meets the threshold for the grant of a temporary injunction to restrain the Respondent from effecting redundancies, counsel for the Respondent submitted that the horse had bolted since the redundancies had been declared. The applicant urged that court could still hold the Respondent to account at this stage so as not to get away with non-compliance with the law but concomitantly submitted that it would avail witnesses during the hearing of the main suit to prove the Respondent's transgressions.
61. The principles governing the grant of a temporary injunction are well settled and have been applied routinely by courts as enunciated by the Court of Appeal in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358 as follows;
- First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*E.A. Industries Ltd v Trufoods* (1972) EA 420.)
62. As regards the establishment of a prima facie case, the sentiments of the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR, cited by the applicant are as follows;
- “A prima facie case in a civil application includes but is not confined to “genuine and arguable case.” It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
63. The pith and substance of the applicant's case is that the Respondent has not complied with the provisions of Section 40(1)(a) of the *Employment Act*, 2007 and should therefore be restrained from proceeding with the proposed redundancies.
64. From the documentary evidence on record, it is clear that the contents of the letters dispatched by the Respondent to the Commissioner of Labour and the Applicant were not identical. The one sent to the applicant had no paragraph 3 and the Respondent has not offered any explanation for its apparent deliberate act of deleting the paragraph.
65. In the totality of the evidence before the court, the court is persuaded that the applicant has demonstrated that it has a prima facie case with a probability of success.
66. As regards irreparable injury, the court is guided by the sentiments of the court in in *Nguruman Ltd v Jan Bonde Nielsen & 2 others* (2014) eKLR as follows;
- “On the second factor that the applicant must establish that “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an



injunction, is a threshold required and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury.

67. In the instant application other than the statement that “the union members stand to suffer irreparably by loosing their jobs . . .” the applicant tendered no evidence to demonstrate neither the nature nor extent of the irreparable injury.
68. In the absence of such evidence, the court is satisfied that the second requirement is unproven.
69. Finally, since the three requirements must be established for an injunction to issue and the second requirement has not been proved, the balance of convenience cannot be in favour of the applicant.
70. As adverted to elsewhere in this ruling, since the orders sought could only be operative if they had been made pending the hearing and determination of the instant application, the court is constrained to agree with the Respondent counsel’s submission that the orders are spent and no specific order prayed for commends itself for issue pending the hearing and determination of the main suit.
71. In the premise, the Notice of Motion dated 23rd March, 2023 is for dismissal and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF JULY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

