



REPUBLIC OF KENYA



**Mumene v Lexo Energy Kenya Limited (Cause E567 of 2023)
[2023] KEELRC 3140 (KLR) (27 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3140 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E567 OF 2023
JK GAKERI, J
NOVEMBER 27, 2023**

BETWEEN

HUMPHREY MUMENE CLAIMANT

AND

LEXO ENERGY KENYA LIMITED RESPONDENT

RULING

1. Before the court for determination is the Applicant's Notice of Motion dated 17th July, 2023 filed under Certificate of Urgency seeking Orders That:-
 1. Spent.
 2. Spent.
 3. The redundancy notice dated 23rd June, 2023 be and is hereby suspended pending the hearing and determination of the main suit herein.
 4. The costs be provided for.
2. The Notice of Motion is supported by the grounds set out on its face and the Applicant's Affidavit sworn on 17th July, 2023.
3. The affiant deposes that he was employed by the Respondent on 14th November, 2018 as Head of Engineering and was requested by the shareholders to put in money for shareholding 'skin in the game' and sent a total of USD 15,269.00 between 10th June, 2019 and 5th October, 2019 and was also awarded staff share options worth about USD 302,890.00.
4. The affiant states that his position was declared redundant by letter dated 21st June, 2023.
5. That the redundancy notice had errors in calculation of notice period and the proper process was not followed as per the employee outplacement process in the Respondent's employee Handbook.



6. The affiant deposes that his share options are valid as per Lexo Energy reward and appreciation policy which restrict the benefit from the cases of merger and when one is an employee as per the letters of the offer and the redundancy notice is intended to push him out of the company so as not to benefit from the shares held in the company.
7. The affiant prays for the Respondent's provision or upfront payment of the current market value of the share options and refund of monies invested with the Respondent with interest from the date of exit from the company.
8. That the applicant could not file the suit earlier as the parties were negotiating but the Respondent had not shown commitment to protect the applicant's interests as an employee/investor.
9. That the Respondent doctored the minutes on record.
10. That the applicant was privy to information on a merger or takeover of the Respondent as evidenced by the letter dated 19th June, 2023 on the Proposed Retail Supply agreement between Lexo Energy Kenya Ltd and Vivo Energy K. Ltd.
11. That a previous deal had been proposed for the sale of Lexo Energy Tanzania.
12. That the Respondent's conduct was mischievous.

Response

13. In its grounds of opposition, the Respondent urges that the applicant had not made out a prima facie case for the grant of the orders sought as he had not demonstrated how the Respondent contravened the provisions of the Staff Handbook and Section 40 of the *Employment Act, 2007*.
14. That the applicant failed to disclose material facts by not producing the Notice of Intended of Declaration of redundancy dated 20th June, 2023 and the consultations that took place.
15. According to the Respondent, the application has been overtaken by events as the notice had taken effect and the order sought would be in vain.
16. The Respondent urges the court to dismiss the application with costs.
17. In its Replying Affidavit sworn by Kelvine Gathara, the Respondent's Legal and Human Resource Manager, Lexo Energy Kenya, the affiant states that the applicant had not demonstrated a prima facie case for the grant of the orders sought.
18. The affiant states that the redundancy was actuated by the adverse business environment traceable to the COVID-19 lock-downs and unpaid Government subsidy which occasioned the re-organization and reduction of the Respondent's operations.
19. That the applicant's position was lawfully declared redundant as due process was followed and the Respondent agreed to pay 2 months salary in lieu of notice at the behest of the Claimant during the consultation meeting held on 3rd July, 2023 but the applicant did not attend meeting slated for 18th July, 2023, invitation notwithstanding.
20. The affiant deposes that the Respondent had paid the applicant redundancy dues comprising;
 - Severance pay at 15 days per year Kshs 1,470,000/=
 - Salary upto 20th July, 2023 Kshs 490,000/=
 - 2 months salary in lieu of notice Kshs 1,470,000/=



27.8 accrued leave days Kshs 681,000/=

May 2020 voluntary salary deduction Kshs 140,000/=

Total Kshs 4,251,100/= and also issued the certificate of service.

21. The affiant states that the process was conducted in good faith and in accordance with the law.
22. According to the Respondent, the share option was provided by the attendant letters and can only be cashed and/or earned when the majority shareholders are exiting and/or the company is being sold and none of these events have taken place and they cannot be cashed and the Claimant does not qualify to encash the share option.
23. The affiant affirms that the share option and shareholding were separate issues and the Claimant had some shareholding in Lexo Energy Mauritius as opposed to the Respondent.
24. That any claim for shares would lie with Stitching Administrative Kantour Lexo Energy Mauritius Ltd (STAK), the Share Administrator.
25. The affiant depones that the Relationship between the applicant and the Respondent was employer/employee, a position anchored in the contractual relationship between the parties.
26. The affiant denies that there were any merger or takeover discussions and the applicant's allegations were misplaced, misguided and misinformed as informed by the letter from the Competition Authority of Kenya dated 19th June, 2023.
27. According to the Respondent, the applicant acted in bad faith by filing the suit. That since the orders sought were final and are replicated.
28. That the application does not meet the threshold for the grant of temporary injunction under the rule in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358.
29. The affiant states that since the orders sought are also sought in the main suit, it would not serve the interests of justice to grant them before the suit is heard on merits.
30. In his Further Affidavit in response to the Respondent's response, the applicant attached pictures and copies of documents downloaded from the internet as evidence.
31. The applicant deposes that the redundancy notice was a scheme to ensure that he was not an employee of the Respondent by the time the inevitable takeover of the company by Vivo Energy was sealed and thus lose his contractual benefits.
32. That the rebranding of Lexo gas stations with Vivo Energy was a smoke screen of the intended transaction.
33. By the time the court retired to prepare this ruling, none of the parties had filed submissions.

Determination

34. The only issue for determination is whether the Applicant's Notice of Motion dated 17th July, 2023 is merited.
35. It is common ground that the only substantive order sought by the Applicant is the suspension of the redundancy notice dated 23rd June, 2023 pending the hearing and determination of the main suit.



36. The applicant is in essence seeking an injunction to restrain the Respondent from implementing the Notice of Redundancy dated 21st June, 2023 pending the hearing and determination of the suit.
37. The Notice of Motion is grounded on two main arguments, namely; shortcomings of the redundancy notice and the applicant's investment and/or share options in the Respondent company.
38. As regards the 1st ground, the applicant, in ground No. 3 and paragraph 11 of the Supporting Affidavit state that;

“ the redundancy notice had errors in calculation of notice period and proper process was not followed as per the employee outplacement process as per the company's employee handbook.”
39. Puzzlingly, the applicant provided neither particulars of the alleged errors nor the process which the Respondent did not comply with as the Supporting Affidavit makes no reference to specific clauses of the Respondent's Procedural and Operational Manual.
40. The second ground is that the applicant is apprehensive that the redundancy notice was a scheme to push him out of the Respondent company so as not to benefit from the shares he holds in the company.
41. It is not in contest that the applicant joined the Respondent company on 1st January, 2019 as the Head of Engineering at Kshs 650,000/= per month referred to as Base Compensation.
42. The first three months was probationary or (Trial Period) and thereafter the employment would be for an indefinite period of time and the Base Compensation would be adjusted to Kshs 700,000/= per month.
43. Some barely visible three (3) requests for SWIFT Customer Transfer Forms from Barclays Bank of Kenya (ABSA) dated 10th June, 2019, 19th September, 2019 and 5th October, 2019 respectively show that the applicant transferred at least 8,770 US Dollars to Lexo Energy Mauritius Ltd and the purpose of the payment is identified as “Capital Call for Lexo Energy Mauritius.”
44. A further USD 6,499 had been deposited on 10th June, 2019 making a total of USD 15,769.00.
45. Surprisingly, the applicant has not attached any document to explain the basis on which the payments to Lexo Energy Mauritius Ltd was made.
46. The applicant deposes that he was opposed to the redundancy and seeks the Respondent's provision for or upfront payment of the current market value of the share options and a refund of all monies invested with the Respondent with interest at commercial rates before the effective date of the redundancy or exit from the Respondent.
47. As noted above, as regards the monies allegedly invested with the Respondent, the applicant has not furnished any document on the terms and conditions of the investment bearing in mind that the money was sent to a foreign named company.
48. However, an email message from one Robert Erich to the applicant and 2 others dated 7th September, 2020 under the reference STAK Capital Call 4th Call, requests the recipient to transfer the monies as soon as possible as the other shareholders would do it that week. The amount transferred had to be net of transfer fees.
49. As regards the share options, the applicant attached two letters from the Respondent dated 17th March, 2020 and 4th April, 2022 respectively under reference Award of Share Options in Lexo Energy Mauritius Ltd advising the applicant of grant of special bonus share options for excellence



performance, contribution and achievements in 2019 and 2021 respectively for a total of 70 shares of the company's common stock at \$870 per share on certain prescribed terms and conditions.

50. From the foregoing, it is clear that the applicant deposited monies in a bank in Mauritius for the benefit of Lexo Energy Mauritius Ltd and had no evidence of acknowledgement or receipt by the payee.
51. Finally, it is common ground that the applicant and the Respondent had been in communication and consulted until the instant suit was filed.
52. By email message dated 23rd June, 2023 by the applicant to Millicent Onyonyi and copied to Kelvin Gathara, the applicant is *inter alia* making a case for pay of more than one month's salary in lieu of notice based on a precedent set in Haron Kiumbe's redundancy and the request was acceded to. There is no contestation of the redundancy notice.
53. Equally, by email message dated 30th June, 2023 at 1.09 pm, the applicant is invited for a consultative meeting scheduled for 3rd July, 2023 at 3 pm at the Respondent's Boardroom and the applicant confirmed attendance but no minutes of the meeting were attached.
54. The minutes attached are those of the meeting attended by Jessee Muniu at 2.00 pm with the Chief Executive Officer and the Legal and Human Resource Manager.
55. The applicant acknowledges that negotiations were on-going before the suit was filed.
56. This position is reinforced by the Respondent's deposition that it had paid the applicant his redundancy benefits and issued a certificate of service and the applicant has not denied the allegation.
57. The foregoing is also consistent with the fact that in the main suit, the applicant is not seeking any monetary reliefs which would appear to suggest that the Respondent has fulfilled its obligations as regards the redundancy.
58. In a nutshell, the applicant herein is seeking the suspension of a redundancy notice whose terms have been implemented by the Respondent and the applicant has accepted payment.
59. Significantly, it is trite that whether or not to grant an interlocutory injunction involves the exercise of judicial discretion as held in *Abel Salim & others v Okong'o & others* (1976) KLR 42 at 48.
60. It requires no belabouring that the principles governing the grant of a temporary injunction are well settled as enunciated 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 the application on a balance of convenience (*E.A Industries Ltd V Trufoods* (1972) EA 420.”

61. As regards a prima facie case, the sentiments of the Court of Appeal in *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (2003) KLR are instructive;

“A Prima facie case in a civil application includes but is not confined to “genuine and arguable case.” It is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently have been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



62. The substratum of the instant application is the applicant’s averments that he invested certain funds to purchase shares and has outstanding share options and some communication between the parties on the investment and share options have been provided.
63. Although the documents on record reveal that the parties had dealings other than the employment relationship, they do not explain the dealings in their entirety, which can only be ascertained at the hearing.
64. However, the material before the court is sufficient to demonstrate that the applicant has a prima facie case.
65. As regards irreparable injury in *Nguruman Ltd V Jan Bonde Nielsen & 2 others* (2014) eKLR the Court of Appeal stated 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 of the injury.”
66. According to the *Halsbury’s Laws of England*, 3rd Edition Vol. 21 at page 739 at page 352;
- “ . . . By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot be possibly repaired. . . In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.”
67. Although the applicant’s Supporting Affidavit alleges that the Respondent had shown that it did not intend to protect the applicant’s interest as an employee/investor, he is silent on the prejudice he stood to suffer if an injunction was not granted and has not alleged that the harm likely to be suffered is irreparable by damages.
68. In the circumstances, the court is not persuaded that the second requirement has been met.
69. Finally, the principle of balance of convenience was explained in *Byran Chebii Kipkoech v Barnabas Tuitok Bargarora & another* (2019) eKLR as follows;
- “In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”
70. In this case, the applicant has not demonstrated the comparative inconvenience to the parties if the injunction sought is granted or withheld.
71. In the final analysis, having failed to prove that he stood to suffer irreparable injury as ordained by *Giella v Cassman Brown & Co. Ltd* (Supra), if the temporary injunction is not granted, the court is unpersuaded that the balance of convenience would tilt in his favour.
72. For the foregoing reasons, it is the finding of the court that the applicant has failed to demonstrate that the application herein is merited.
73. In conclusion, the Notice of Motion dated 17th July, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF NOVEMBER 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

