Muniu v Lexo Energy Kenya Limited (Cause E568 of 2023)
[2023] KEELRC 3141 (KLR) (27 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3141 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E568 OF 2023

JK GAKERI, J

NOVEMBER 27, 2023

BETWEEN

JESSE MUNIU ..... 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 21st 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 expressed under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010 and Section 3A of the *Civil Procedure Act*.

3. The Notice of Motion is based on the grounds set out on its face and the Affidavit of Jesse Muniu sworn on 17th July, 2023.

4. The affiant states he joined Prime Value Catalyst as Managing Director on 9th January, 2017.

5. That the Applicant was requested to invest in the company for purposes of shareholding and was also awarded share options worth approximately USD 1.7 million.

6. That the Claimant's position was declared redundant on 21st January, 2023 and the notice had errors in the calculation of notice period and the proper process was not followed.

7. The affiant deposes that his share options are valid according to the Respondent's reward and appreciation policy.

8. The Applicant expresses apprehension that the redundancy notice is aimed at pushing him out of the Respondent so as not to benefit from the shares held in the company and opposes the declaration of redundancy and prays for payment for the shares at market value and a refund of all monies invested in the company with interest at commercial rates.

9. It is the Claimant's case that he was negotiating with the Respondent and the minutes of the meeting held on 3rd July, 2023 reflected the Respondent's attitude.

10. That the affiant is privy to information that an event was highly likely and a letter dated 19th June, 2023 shows that a deal was in the offing between Vivo Energy Kenya Ltd and the Respondent.

11. That the Respondent's conduct was mischievous.

Respondent's response

12. In its Replying Affidavit sworn by Mr. Kelvin Gathara, the Legal and Human Resource Manager, Lexo Energy Kenya Ltd, the affiant states that the applicant had not demonstrated a prima facie case for the grant of the orders sought.

13. That the decision to declare the Claimant redundant was a carefully thought process necessitated by the adverse business environment occasioned by COVID 19 lock-downs and unpaid Government Fuel Subsidy.

14. The Respondent admits that the Claimant was employed as the Respondent's Managing Director from 25th November, 2016 to 20th July, 2023 and was declared redundant lawfully as the requisite notice was issued and the notice period was remedied by the agreement to pay 2 months salary in lieu of notice at the behest of the Claimant.

15. That the Claimant refused to attend a further consultative meeting on 18th July, 2023, service notice notwithstanding when the new organogram would have been explained.

16. The affiant states that the Respondent had not only issued a certificate of service but had also paid severance pay at 15 days per year, Kshs.2,978,100/=, salary upto 20th July, 2023 Kshs.661,800/=, 2 months in lieu of notice Kshs.1,985,400/=, 21.5 accrued leave days Kshs.711,435/= and May 2020 voluntary salary deduction Kshs.175,000/=.

17. The affiant deposes that the Claimant's redundancy dues were settled less a loan of Kshs.1,889,432.03 he had with the company and the process was conducted in good faith.

18. The affiant further deposes that the Share Option Policy in the letters on record is that they can only be cashed and/or earned when the majority shareholders are exiting and/or the company was being sold which is not the case and could not be cashed at this stage as the company Share Option Policy dictates.

19. That the share option and shareholding were distinct issues.

20. The affiant deposes that whereas the Claimant had shares in Lexo Energy Mauritius Ltd, he had no shares in the Respondent company and any claim for shares could only be made to the directors of

Stitching Administrative Kantour Lexo Energy Mauritius Ltd (STAK), the share administrator, as the Claimant was only an employee of the Respondent.

21. The affiant depones that there were no merger or takeover discussions between Lexo Energy Kenya Ltd and Vivo Energy, an allegation by the Claimant it characterises as misplaced, misguided and misinformed as the letter from the Competition Authority of Kenya (CAK) dated 9th June, 2023 attests.

22. The affiant deposes that the Claimant instituted the instant proceedings in bad faith and had not demonstrated that the Respondent had contravened the *Employment Act*, 2007 and no prima facie case had been established.

23. That the confidential emails provided by the Claimant touch on persons not privy to the instant suit and is a breach of confidentiality and the application did not meet the threshold in Giella V Cassman Brown & Co. Ltd (1973) EA 358 and the orders sought were final and their grant would not serve the interests of justice as the suit has not been heard on merits and evidence taken.

24. The affiant states that the Claimant has not disclosed his contract dated 25th November, 2016 and prays for dismissal of the suit with costs.

25. In its grounds of opposition, the Respondent states that the application has been overtaken by events following the redundancy notice on 20th July, 2023.

26. That the Notice of Motion was defective and offended the provisions of the Oaths and Statutory Declaration Act.

27. In his Further Affidavit sworn on 14th August, 2023, the applicant deposes that the Respondent had not addressed the contentious issue of share options and COVID-19 and fuel subsidy had happened way before the event and the Respondent had performed well and the Respondent recruited an Exports Manager, Chief Finance Officer and Legal and Human Resource Manager.

28. According to the applicant, the Respondent did not explore other mechanisms to obviate the redundancy.

29. The applicant further deposes that the Respondent attempted to conceal its intention to defraud him by deceitfully manipulating minutes of meetings and contests the minutes.

30. That on 3rd June, 2023, the Respondent read out a prepared statement and the applicant did not respond.

31. As regards the shares, the applicant deposes that he deposited some funds in Lexo Energy Kenya which is owned by Lexo Energy Mauritius and he had no access to the Company Secretary of Lexo Energy Mauritius Ltd.

32. It is the applicant's case that he invested in Lexo Energy Kenya but was not treated as a shareholder as the funds were allocated to STAK and the shares had no voting rights and he was not given a Share Certificate.

33. The applicant deposes that Harvest had made an offer to acquire Lexo Tanzania and similar discussions were ongoing with Vivo Energy and other interested parties and the branding of Lexo Energy stations was the harbinger to the sale.

34. That the redundancy was the Respondent's scheme to expel the applicant from the organization to obstruct him from his entitlement to the share options and the shares.

Submissions

35. By 5th November, 2023, neither of the parties had filed and served submissions, the fact that they had been accorded 14 days a piece to do so notwithstanding.

Determination

36. The singular issue for determination is whether the application by the applicant herein is merited.

37. It is common ground that the only substantive order sought by the applicant is the suspension of the redundancy notice dated 21st June, 2023 pending the hearing and determination of the main suit.

38. The applicant's main argument is that the redundancy notice has errors in the calculation of the notice period and proper process was not followed.

39. Strangely, the applicant neither particularised the alleged errors nor the process which the Respondent did not comply with as the relevant parts of the Respondent's employees Handbook were neither attached nor reproduced.

40. The second ground relied upon is that the applicant was apprehensive that the redundancy was intended to get rid of him from the company so as not to benefit from the shares he hold in the company.

41. It is not in contest that the applicant was first appointed acting Managing Director of Newco Kenya, a company owned by Prime Catalyst registered in the Netherlands, effective 9th January, 2017.

42. From the documents on record, it is unclear as to how Newco Kenya became Lexo Energy Kenya Ltd and who the shareholders were.

43. However, it is not in contest that the Claimant was an employee of Lexo Energy Kenya Ltd.

44. The applicant alleges that he put in cash in the company for shareholding 'skin in the game', to ensure a commitment and was also awarded STAK share options.

45. The applicant has attached several funds transfer forms from Stanbic Bank and Barclays Bank of Kenya Ltd. The beneficiary of the funds is Lexo Energy Mauritius Ltd.

46. Some of the money was also deposited in the account of Lexo Energy (K) Ltd at the Stanbic Bank and details of payment is indicated as shareholding capital.

47. Email communication between the applicant and the Chief Executive Officer reveal that the applicant deposited a total of USD 81,374 to Lexo Energy Kenya Bank account and Lexo Energy Mauritius Ltd account in Mauritius.

48. From the foregoing, it is evident that the applicant deposited monies in two bank accounts but had no evidence of receipt or acknowledgement or other communication from the beneficiary.

49. Similarly, the applicant did not furnish any document on the terms and conditions under which the money was paid to Lexo Energy Mauritius Ltd.

50. As regards the share options, the applicant attached copies of four (4) letters dated 29th January, 2018, 10th April, 2019, 17th March, 2020 and 9th April, 2022 on salary review and award of share options under reference "Award of Share Options in Lexo Energy Mauritius Ltd.

51. The standard letters advise the applicant that the options granted was for the purchase of 70 shares, 100 shares, 100 shares and 125 shares respectively of the company's common stock at USD 870 per share in recognition of the Claimant's excellent performance, contributions made and goals achieved on behalf of the company.

52. The letters set out the terms and conditions of the share options.

53. Finally, it is common ground that the applicant and the Respondent have been in communication and consulted until the instant suit was filed, a fact acknowledged by the applicant in his Supporting Affidavit.

54. By an email dated 23rd June, 2023 to one Millicent Onyonyi under reference Exit discussions, the applicant makes reference to discussions held on 22nd June, 2023 on deposits made, a total of USD 95,395 and requests for a refund among other requests such as one month salary per year for every completed year as severance, waiver of company loan owing and recalculation of dues on duration worked and notice of 2- 3 months.

55. The email also alludes to the potential benefit in relation to the share options amounting to USD 1.6 million.

56. A second email to Heleen Van Poecke dated 4th July, 2023 seeks the recipient's intervention on the exit of the applicant and one Humphrey expressing disappointment on how the redundancy process was being conducted in relation to the deposits and share options.

57. Finally, the applicant attached minutes of a consultative meeting held on 3rd July, 2023 at 2.00 pm on the applicant's exit package as itemised in the applicant's email dated 23rd June, 2023.

58. The meeting addressed all the issues raised and provided a way forward and as deposed by Kelvin Gathara in the Replying Affidavit, the applicant was paid and issued with a certificate of service.

59. The payments were as follows;

60. Severance pay of 15 days for each completed year, salary upto 20th July, 2023, two months' salary in lieu of notice, 21.5 accrued leave days and May 2020 voluntary salary deduction.

61. The applicant has not furnished evidence to the contrary.

62. Similarly, the Respondent further avers that it had invited the applicant for another consultative meeting scheduled for 18th July, 2023 but the applicant did not attend and the meeting proceeded in the Claimant's absence.

63. 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 paid redundancy dues.

64. In sum, the applicant herein prays for the suspension of the redundancy notice dated 21st June, 2023 whose terms have been implemented and the applicant has received payment.

65. Needless to emphasize, the applicant's further affidavit raises serious issues whose supportive evidence can only be fully canvassed during the hearing.

66. The allegations on the hiring of new employees, fraud, deceit and the applicant's investment and entitlement can only be fully appreciated through tested evidence.

67. It requires no gainsaying 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.

68. The principles that govern the grant of a temporary injunction are well settled as laid down in Giella V Cassman Brown & Co. Ltd (1973) EA 358 namely prima facie case with probability of success, the applicant might otherwise suffer irreparable injury and if in doubt balance of convenience.

69. The concept of prima facie case was captured by the Court of Appeal in Mrao Ltd V First American Bank of Kenya Ltd & 2 others (2003) KLR as follows;

> " A Prima facie case in a civil application includes but 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."

70. The foundation of the applicant's case is that he invested monies in the Respondent company and has outstanding share options and fears that the redundancy by the Respondent could disadvantage him as the Respondent company could be sold to Vivo Energy as the company had already acquired Lexo Energy Tanzania, as documents on record reveal.

71. However, none of the documents availed reveal that the Lexo Energy Kenya Ltd and Vivo Energy were negotiating a merger or acquisition.

72. A copy of the letter from the Competition Authority of Kenya to MW & Company Advocates LLP dated 19th June, 2023 is explicit on the re-branding of Lexo Energy Kenya Ltd petro services stations.

73. However, even in the absence of documentary evidence that a merger or takeover or some other form of reconstruction is about to take place, the material before the court is sufficient to demonstrate that the applicant has a prima facie case.

74. On irreparable injury, 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."

75. (See also Nguruman Ltd V Jan Bonde Nielsen & 2 others (2014) eKLR).

76. In this case, the applicant is seeking suspension of the redundancy notice so as to obtain a refund of the monies allegedly invested in the company and the share options, all financial in nature.

77. Evidently, the harm likely to be suffered by the applicant is monetary.

78. In the circumstances, the court is not satisfied that the applicant has demonstrated the requirement of irreparable injury or harm.

79. Finally, from the evidence on record, the applicant has failed to demonstrate that the balance of convenience is tilted in his favour as explained in Byran Chebii Kipkoech v Barnabas Tuitoek Bargoria & another (2019) eKLR on the comparative inconvenience to the parties if the injunction is granted or withheld.

80. In the end, the applicant has failed to establish the three requirements for a temporary injunction to issue as ordained in Giella V Cassman Brown & Co. Ltd (Supra).

81. Flowing from the foregoing, it is evident the Notice of Motion dated 27th July, 2023 is for dismissal and it is accordingly dismissed with no orders as to costs.

It is so ordered.

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