



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. E715 OF 2021

KENYA UNION OF DOMESTIC HOTELS,

EDUCATION INSTITUTIONS AND HOSPITAL WORKERS.....CLAIMANT

VERSUS

THE MAKINI SCHOOL LIMITED.....RESPONDENT

RULING

1. The Applicant union brought application dated 27th August, 2021 praying for an order in the following terms:-

(i) Spent

(ii) The decisions and actions by Respondent made through the letter dated 26th August, 2021 interfering with the ongoing discussions be stayed until this matter is heard and determined.

(iii) Spent

(iv) The parties be directed to proceed with open, candid ongoing discussions over the matter to build in harmonious industrial relations within the employment relations.

(v) Spent

2. The application is premised on grounds set out in paragraphs 2 to 24 on the face of the Notice of Motion the nub of which is that the respondents intend to restructure the respondent leading to redundancy terminations of the security, cleaning and grounds staff within Makini School.

3. That the exercise has been conducted without due consideration of the views of the applicant.

4. That the respondent has abused agreed terms of engagement with the union by proceeding to issue termination letters to the targeted staff members.

5. That the respondent has therefore not engaged in good faith and its conduct amounts to unfair labour practice and administrative action in violation of Article 41 and 47 of the Constitution. That conduct by the respondent also violate the provisions of the Employment Act, 2007 and the Labour Relations Act, 2007.

6. That the respondent has caused trauma and anxiety to workers and has violated also Article 27 and 28 of the Constitution, which are first generation rights that should be enjoyed by the workers in the workplace today.

7. The Supporting Affidavit of Albert Njeru, the Secretary General of the union buttresses the grounds set out herein before.

8. The applicant has attached the list of 91 employees already terminated from employment by the respondent.

9. The applicant has also attached a bundle of letters of termination which took effect from 26th August, 2021 which also outline the Redundancy package payable to each employee upon separation which include 1 month salary in lieu of notice; payment in lieu of leave days

not taken; severance pay calculated at 15 days salary for each completed years of service and gratuity calculated at 15 days salary for each completed year of service. The notices were dated the same 26th August, 2021 and so, were to take effect immediately.

10. The applicant prays for the reliefs sought.

Reply

11. The respondent filed a replying affidavit sworn to by **Jackie Van Der Merwe**, the Human Resource Director of the respondent on 24th September, 2021. He deposes inter alia that the claimant is guilty of concealing material facts on the subject matter of the suit and in particular that the redundancy exercise has already been concluded and payments to all affected staff have been made in accordance with their employment contracts and according to the relevant laws.

12. The respondent has attached a letter to the Labour Commissioner dated 27th August, 2021 confirming the conclusion of the redundancy exercise.

13. The respondent states the application has been overtaken by events and is thus spent.

14. The letter to the Labour Commissioner by the Human Resource office informs the office of the conclusion of the restructuring exercise in accordance with Section 40 of the Employment Act, 2007 and has attached the list of the 91 affected employees on whose behalf the claimant union litigates in this suit.

15. That the union is not candid on the issue of consultations between the parties that culminated in the conclusion of the retrenchment exercise. On 22nd July, 2021, the respondent held a meeting with the claimant's representatives where the respondent tabled Agenda for consultation including proposed transition to outsourcing of ground workers, security and cleaning functions, and the rationale for the proposal; and Respondent's proposal on how to best ease the effects of the transition to outsource as above. That consultations were undertaken candidly and in good faith and a further meeting was held on 2nd August, 2021 upon request by the claimant union. The union tabled their responses and counter-proposals to the respondent's proposal. That there was no agreement for any further meeting between the parties after discussions of 2nd August, 2021 being concluded.

16. That the claimant was invited to attend a meeting on 25th August, 2021 to be told of the final decision on the restructuring exercise but the union failed to attend the meeting.

17. That the redundancy exercise was concluded according to applicable law and procedure and the application be dismissed for lack of merit.

Determination

18. What is sought by the applicant union are orders to continue consultations on already concluded termination of 91 employees on grounds of redundancy.

19. In short, interim mandatory relief to discuss workers who have already been separated from the respondent is sought before the hearing and determination of the suit on the merits.

20. Prayers 1, II, III and IV in the Notice of Motion have been overtaken by events upon conclusion of the redundancy exercise as is clear from the depositions before Court.

21. The claimant union has accordingly, failed to establish a *prima facie* case with a probability of success as is required of it in terms of the case of **Giella -vs- Cassman Brown Company Limited**. The claimant has also not demonstrated that it would suffer irreparable loss not remediable by way of damages upon conclusion of the suit on the merits.

22. Furthermore, the balance of convenience is heavily in favour of the respondent whose operations would be placed in jeopardy by the interim reliefs sought.

23. The Court at this point is wary of predetermining the merits or otherwise of the redundancy exercise and that must await the decision of the Court upon hearing the suit on the merits.

24. The application lacks merit and is dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 10TH DAY FEBRUARY, 2022.

Mathews N. Nduma

Judge

Appearances

Mr. Maina for claimant

M/s Kimani for Respondent

Ekale – Court Assistant