



Kenya Shipping Clearing Freight Logistics and Warehouses Workers Union v Multiple Icd (K) Limited (Cause 94 of 2019) [2022] KEELRC 56 (KLR) (13 May 2022) (Judgment)

Neutral citation: [2022] KEELRC 56 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 94 OF 2019**

**B ONGAYA, J
MAY 13, 2022**

BETWEEN

**KENYA SHIPPING CLEARING FREIGHT LOGISTICS AND WAREHOUSES
WORKERS UNION CLAIMANT**

AND

MULTIPLE ICD (K) LIMITED RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 02.12.2019 in person. The claimant is at all material times in the process of recruiting members being employees of the respondent towards attaining simple majority for recognition purposes as envisaged in section 54(1) of the *Labour Relations Act*, 2007. The claimant discovered that the respondent had served ten of its recruited members a redundancy notice dated 17.10.2019. The notice conveyed that the respondent was closing its Nairobi Terminal Yard and therefore employees working at the yard would be declared redundant. The closure had been due to respondent's numerous unsuccessful effort to secure business after the infamous SGR effect came biting and leading to diminished work volumes at the respondent's Mombasa CFS Terminal. The redundancy notice stated that the redundancy decision had been arrived at on account of reasons beyond control of the respondent's management and which included:
 - a. Complete lack of sustainable business volumes.
 - b. Unprecedented decline in profitability and reduced revenue.
 - c. Lack of CFS revenue generating activities.
2. The letter (dated 17.10.2019) therefore served as the one-month statutory redundancy notice for the position held by each of the 10 affected claimant's members and redundancy would be effective 30.11.2019. The letter stated that each affected employee would be paid as follows:



- a. One-month notice payment.
- b. Accrued leave days.
- c. Severance pay at 15 days per completed year worked.

The letters notifying redundancy were each copied to County Labour Officer, Nairobi.

3. The claimant's case is that the respondent could not declare valid redundancy without notifying the union as per section 40(1) (a) of the *Employment Act, 2007* which provides that an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions – "(a) where the employee is a member of a trade union, the employer notifies the union to which the the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;"
4. The claimant pleaded that the respondent should pay the ten (10) employees if the parties agree that the issue the respondent is alleging is genuine. The claimant prayed for:
 - a. The respondent to sit with the applicant or claimant union to find out if the redundancy issue is genuine before the final payment is made to ten (10) employees.
 - b. The respondent to pay the costs of the suit.
5. The claimant filed the memorandum of claim on 02.12.2019 together with a notice of motion seeking praying for orders:
15.
 - a. That the Honourable Court be pleased to certify the application as extremely urgent, service be dispensed with and it be heard ex-parte in the first instance.
 - b. The Honourable Court be pleased to order or direct the respondent to sit with the applicant union to decide the fate of the intended redundant employees as the 30.11.2019 is approaching.
 - c. That there be a temporary injunction to restrain the respondent from action of intending to declare the ten (10) employees redundant.
6. That application was supported with the affidavit of James O. Tongi, the claimant's General Secretary.
7. The respondent opposed that application by filing on 10.12.2019 the replying affidavit of Daniel Muasa, the respondent's Human Resource and Administration Manager. The affidavit explained in detail that the reasons for the redundancy were genuine as expressed in the letter to each of the 10 employees notifying the redundancy. The letter of redundancy notice had been served upon each of the 10 employees between 22nd and 24th October 2019 so that it had taken effect on 30.11.2019. The final redundancy dues had been paid per exhibited final pay slips and bankers' cheques signed by each of the affected employees acknowledging receipt thereof. Further the claimant had reported a trade dispute to the Cabinet Secretary responsible for labour and a conciliator appointed and who had made an opinion in favour of the respondent and the claimant advised to put more effort in recruiting members towards a threshold for recognition by the respondent. The claimant's application had therefore been overtaken by events and the suit lacked merits.
8. On 01.12.2021 the Court ordered that the application had been marked overtaken. On 16.02.2022 the Court ordered that the replying affidavit was deemed response to the claim; the parties not to file



further pleadings or documents; and the suit be determined on the basis of the material on record. Parties filed their respective submissions.

9. To answer the 1st issue for determination, there being no dispute that the claimant had recruited the 10 respondent's employees, the respondent was obligated to serve the claimant the notice of the looming redundancy as per section 40 (1) (a) of the Act. The Court finds that the provision is mandatory and was express and was clearly independent of existence of a recognition agreement. Thus, the Court holds that once a trade union has recruited members and duly notified an employer, under the section, such an employer is obligated to serve the redundancy notice to the trade union as envisaged under the section. To that extent, the Court finds that the redundancy proceeded in violation of the procedural requirement to serve a notice to the union the affected employees had already joined and the respondent being aware of the union membership as at the time of declaration of the redundancy.
10. To answer the 2nd issue for determination, while submitting that the affected 10 employees be paid compensation for the unfair termination because section 40(1) (a) had not been complied with, the claimant made no such claim and prayer in the memorandum of claim. The claim and prayer was that parties convene to determine if the redundancy was genuine. As urged for the respondent and as already ordered by the Court in determining the interlocutory application, as at the time the suit was filed, the redundancy had already taken effect and the prayer as made had been overtaken. The Court finds as much and the prayers in the memorandum of claim are unjustified and are declined as overtaken. The claimant filed no further affidavit in response to the replying affidavit and in absence of any further evidence, the Court finds that the respondent has by that replying affidavit established that as at time of declaration of the redundancy, indeed it had been unable to secure business to keep the affected employees in continued service and in view of the adverse effects of the SGR on the respondent's enterprise. Thus the Court further finds that the purpose for which the Court would make the prayer for parties to convene to determine if the redundancy was genuine has already been served and the prayer as made for the claimant rendered superfluous or indeed, itself redundant.
11. To answer the 3rd issue, the Court returns that each party to bear own costs. In so finding the Court has considered the otherwise established respondent's breach of section 40(1) (a) of the Act; that the claimant's prayer was indeed overtaken; and the parties' continuing relationship towards recognition of the claimant by the respondent should be nurtured.
12. In conclusion the memorandum of claim is hereby dismissed with orders each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 13TH MAY, 2022.

BYRAM ONGAYA

JUDGE

