



**Kenya Union of Commercial, Food and Allied Workers v Fish and Chicken Bar Limited (Cause E326 of 2022) [2022] KEELRC 1288 (KLR) (15 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1288 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E326 OF 2022**

**SC RUTTO, J**

**JULY 15, 2022**

**BETWEEN**

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

**AND**

**FISH AND CHICKEN BAR LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant is a trade union suing on behalf of nine (9) grievants, who are its members and who were employees of the Respondent at the material time. The Motion Application which is dated 18<sup>th</sup> May, 2022, is supported by the Affidavit of Caleb Nyamwaro, who describes himself as the Applicant's Rongai Branch General Secretary.
2. The Application seeks orders to compel the Respondent to pay the grievants half of their severance pay and to deposit security in Court for the remaining half of the severance pay or total severance pay.
3. The Application is premised on grounds that: -
  - i. The parties herein do have a valid Collective Bargaining Agreement effective 1<sup>st</sup> March, 2019 for twenty four months governing terms and conditions of service, one among such terms being clause 14 covering redundancy.
  - ii. By a letter dated 16<sup>th</sup> March, 2022, the Respondents notified the Claimant of its intention to declare nine (9) employees redundant for reason of extreme economic difficulties and their inability to pay running costs, which notice would lapse after 30 days of 16<sup>th</sup> March, 2022 but the Respondents choose to release the grievants on 31<sup>st</sup> March, 2022.
  - iii. On the same date as the Respondents served the Claimant with the said redundancy notice, they also notified each of the nine employees of such intention.



- iv. Following meetings between the parties which ensued, the Claimant did not oppose the said redundancy and asked the Respondents to comply with clause 14 of the Collective Bargaining Agreement and Section 40 of the *Employment Act*, 2007 to settle the grievant's redundancy benefits.
  - v. By a letter dated 24<sup>th</sup> March, 2022, the Respondent addressed the Claimant on their decision to pay March, 2022 salaries and one month's notice pay and at the same time they informed the Claimant that severance pay would be discussed during the next meeting to be held on Wednesday, 30<sup>th</sup> March, 2022.
  - vi. The Respondent went ahead and tabulated payment of severance pay which they referred to as service gratuity for each of the grievants.
  - vii. By an email dated 12<sup>th</sup> April, 2022 the Respondents informed the Claimant that they have no funds to make any further payments and that the said payments would be made in the future should they have funds to do so.
  - viii. Arising from the Respondent's final position on payments, the grievants stand to suffer from a plan to pay them in the future, whose timing is equally unknown.
4. The Applicant had initially sued Mr. Ghalib Mohamed as the 2<sup>nd</sup> Respondent. Through a Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent contended that he was not party to the Collective Bargaining Agreement (CBA) with the Applicant, hence there was no cause of action against him. That further, the 1<sup>st</sup> Respondent is a separate and distinct entity in law from the 2<sup>nd</sup> Respondent hence does not bear any personal liability on its obligations.
  5. On 20<sup>th</sup> June, 2022, the Applicant conceded to the Preliminary Objection hence the name of the 2<sup>nd</sup> Respondent was struck off the suit.
  6. In response to the Application, the Respondent filed Grounds of Objection premised on section 74 of the Labour Relations Court Act.
  7. The Application was scheduled for interpartes hearing on 13<sup>th</sup> July, 2022.
  8. Despite the hearing date being taken mutually, the Respondent was absent from Court.
  9. The Applicant proceeded to canvass the Application through oral submissions.
  10. The Applicant clarified at the outset that it is not opposed to the redundancy process by the Respondent. That Section 40 of the *Employment Act* requires for payment to be made prior to the redundancy. The Applicant submitted that the Respondent had indicated that it was to pay the benefits of the grievant who had been declared redundant at a future date. That the said future date was not indicated. It was further submitted that the only order being sought was for payment of half of the benefits payable following the redundancy process and a surety that the remaining half was to be paid when the Court determines the main claim.
  11. It was further submitted that the Respondent had already computed the benefits and the Applicant was not disputing the same.
  12. As regards the Respondent's Grounds of Objection, the Applicant submitted that section 74 of the *Labour Relations Act* allows a trade union to move the Court in cases of redundancy and recognition. That further, the courts have been clear that when one goes for conciliation, then it proceeds with the same until the end but in this instance, it had opted to move the Court directly. It thus asked the court to dismiss the Grounds of Objection.



13. It is evident that the gist of the Application is payment of benefits following the redundancy exercise effected by the Respondent.
14. From the record, the Respondent notified some of its employees of the intended redundancy on account of extreme financial difficulties. The Applicant has expressly stated that it is not opposed to the redundancy process and they only seek payment of half of the severance pay due to the grievants.
15. The Respondent did not tender a substantive response to the Application hence the claim that the severance pay of the grievants was yet to be paid, was not controverted.
16. It is notable that the prayers sought by the Applicant at this juncture are in the form of a mandatory injunction in that it seeks to compel the Respondent to pay the grievants half of their severance pay following the redundancy exercise.
17. In the case of *Locabail International Finance Ltd v Agro. Export & another* [1986] ALL ER 901, the principles applicable before grant of mandatory injunctions, were set as follows: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the court thought that the matter ought to be decided at once or where the injunction was directed at simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial, it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory order.”
18. This position was adopted by the Court of Appeal in *Kenya Breweries Ltd & another v Washington O. Okeya* [2002] eKLR.
19. Back to the case herein, Section 40 of the *Employment Act* which is key in the determination of this issue, is couched as follows: -

“[40](1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—”

Underlined for emphasis
20. The import of the above provision is that the preconditions listed from clause (a) to (g), have to be complied with by an employer prior to terminating an employee’s service on account of redundancy.
21. Part of the stipulated preconditions include payment of terminal benefits which constitute unpaid leave, notice pay where no notice has been given and severance pay at the rate of not less than fifteen days’ pay for each completed year of service.
22. From the record, the Respondent had already computed the benefits and the Applicant has expressed that it does not dispute the same. Further going by the redundancy notice, the redundancy already took effect.
23. It is therefore not clear why the Respondent has failed to pay the said benefits in form of severance pay to the grievants.



24. Coupled with the foregoing, the Respondent did not proffer any substantive response as to why it is yet to make the payments to the grievants.
25. Indeed, the actions and omissions of the Respondent are in clear conflict with the provisions of Section 40 (1) of the *Employment Act* and as a matter of fact, it has potentially exposed the grievants to unfair labour practices contrary to Article 41 of *the Constitution*.
26. Against this background, I am satisfied that the Applicant has demonstrated that there exist special and exceptional circumstances that warrant the granting of the orders of mandatory injunction at this stage.
27. I therefore find that the Application dated 18<sup>th</sup> May, 2022 to be with merit and the same is hereby allowed in the following terms: -
  - a. The Respondent is hereby ordered to pay the following grievants half of their severance pay;
    - i. Daniel Otieno;
    - ii. Dennis Nyangau Moruri;
    - iii. Stephen Kyalo Wambua;
    - iv. Ndeke Mutiso Muthwii;
    - v. Wambua Muindi;
    - vi. Amos Gacii Mwaniki;
    - vii. Justin Mailu Mwakavi;
    - viii. Paul Ndichu Kiragu; and
    - ix. Onesmus Mutisya Musango.
  - b. Costs shall be in the Cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF JULY, 2022.**

**STELLA RUTTO**

**JUDGE**

**Appearance:**

Mr. Nyumba for the Claimant/Applicant

Mr. Wanjohi for the Respondent

Court Assistant Barille Sora

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**

**JUDGE**

