REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E487 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA AVIATION WORKERS UNION **CLAIMANT**

VERSUS

AGS WORLDWIDE MOVERS LIMITED **RESPONDENT**

RULING

Pending for determination before me is the Claimant's Notice of Motion Application dated 3rd September, 2020 seeking the following reliefs that:

> *1) Spent.*
>
> *2) Pending the hearing and determination of the Application, an order of injunction do issue to restrain the Respondents its servants, and or agents from commencing and/or continuing with the redundancy process*
>
> *3) Pending the hearing and determination of the Application, an order of injunction do issue restraining the respondents its members, agents and servants from terminating the employment of William Tolbert Omondi india or any other unionisable employee on account of redundancy or reconstruction or restructuring.*
>
> *4) The intended redundancy process be stopped forthwith pending hearing and determination of this suit.*
>
> *5) Costs of the Application be provided for.*

The Application is premised on the grounds as set out on the face of the Notice of Motion Application, in which the Applicant contends that it is a duly registered trade union enjoying a simple majority of unionizable employees with the Respondent and therefore ought to be engaged on matters involving its members including and not limited to the intended redundancies.

It further contended that the Respondent in complete disregard to the provisions of Section 40 of the Employment Act, 2007 failed to notify it of the intended redundancies of its members as well as notify the Labour Officer thereby rendering the process null and void ab initio.

The Applicant maintains that the Respondent's failure to comply with the requisite provisions of the law is illegal, unlawful and contrary to the provisions of the Employment Act, 2007 and therefore urged this Court to find merit in its Application and allow it in terms of the reliefs sought therein.

The Application is further supported by the Affidavit of **MOSS K. NDIEMA,** the Secretary General of the Claimant/Applicant herein sworn on 3rd September, 2020 in which he reiterates the grounds on the face of the motion.

In response to the Application the Respondent filed its Replying Affidavit deponed by **JACOB K. MULATYA**, its Human Resources Officer in which he avers that the Respondent was forced to restructure its business structure in the country following the adverse effects of Covid- 19 pandemic that negatively affected its operations.

He further averred that the process was conducted in a lawful and procedural manner that complied with the mandatory provisions of Section 40 the Employment Act, 2007.

He further averred that the Claimant union has failed to established the existence of any registered recognition agreement and/or collective bargaining agreement between itself and the Respondent in support of its assertion of enjoying majority membership of the Respondent's

work force.

The Affiant contended that the orders on record in this matter were obtained without the Applicant making full disclosure of material

facts and should therefore be vacate and/or set aside.

In conclusion the Respondent argued that the instant Application is devoid of merit and therefore urged the Court to dismiss it with costs.

Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

In its submissions the Claimant maintained that the respondent failed to follow the mandatory provisions of Section 40 of the Employment Act, 2007 in the manner in which it carried out the redundancy by specifically failing to notify it of the intended redundancy that was to affect its unionisable members. The Claimant/Applicant relied on the case of **Thomas De La ue (K) Limited v David Opondo Omutelema (2013) eKLR** *where the Court clearly highlighted the notices to be served prior to an intended redundancy to take effect as provided under Section 40 (a) and 40 (b) of the Employment Act, 2007.*

The Claimant further argued that given that the Respondent deals in the business of transportation of cargo it was not affected by the effects of the current pandemic which it alleges as being the reason

behind the intended redundancies.

The Claimant/Applicant further maintained that the Redundancy process contravened the provisions of Section 40(c) of the Employment Act, 2007 and Article 15 of the Supplementary Provisions to the ILO Recommendation No. 119, Termination of Employment Recommendation 1963, concerning reduction of the work force.

It further contended that an employer's prerogative to cut down labour costs by way of retrenching and/or declaring its employees redundant ought to be exercised as a measure of last resort as was held in the Supreme Court of Philippines decision in the case of **Fasap v Philippine Airlines GR No. 178083.**

The Claimant further argued that the redundancy is unlawful as it is neither substantially justified nor was it procedurally fair and should therefore an order of permanent injunction ought to be issued to bar the Respondent from continuing with the intended redundancies.

On the issue of signing a recognition agreement and collective bargaining agreement the Claimant maintained that the Respondent has failed and/or declined to sign the same despite the Claimant union enjoying a simple majority of unionizable members of staff. It further maintained that the Respondent has equally failed to make deduction and remit the requisite deductions to it a matter that is equally before this Court in **Cause No. 46 of 2020 Kenya Aviation Workers Union v AGS Frasers Kenya Limited.**

In conclusion the Claimant union urged the Court to find the redundancy process by the Respondent as unfair, un-procedural, unjustified and as a result it ought to proceed to issue a permanent injunction barring the Respondent from proceeding with it.

Respondent's Submissions

The Respondent on the other hand in its submissions maintained that the Claimant union is not the correct union to recruit from its labour force as the Claimant's Constitution and scope does not cover the Respondent's operations to necessitate the signing of a recognition agreement and/or negotiate for a collective bargaining agreement. The Respondent relied on the case of **Kenya Shoe and Leather Workers Union v Africa PVC Industries Limited (2017) eKLR** *where the Court emphasised on the need to ensure unions stick to their areas of operation while recruiting.*

The Respondent further relied on the Court's ruling in **ELRC Cause No. 46 of 2020** *where the Court in striking out the Claim involving the same parties hereto held that the Claimant union is not the union for the sector in which the Respondent operates.*

The Respondent further argued that the Claimant has further failed to prove that it enjoys a simple majority of unionizable members for it to negotiate a Collective Bargaining Agreement with the Respondent herein as it enjoys membership of 32 members out of a possible workforce of 123 permanent employees.

On the process of redundancy adopted the Respondent maintained that it has fully complied with the mandatory provisions of Section 40 of the Employment Act, 2007. The Respondent relied on the cases of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR** and **Aoraki Corporations Limited v Collin Keith McGavin; CA 2 of 1997 (1998) 2 NZLR 278.**

The Respondent further submitted that the Claimant has no case against it and is only seeking to arm-twist it and coerce this Court to delve into its internal matters.

In conclusion the Respondent argued that the Claimant has failed

to meet the threshold for the grant of the reliefs sought in its Application and therefore urged the Court to accordingly dismiss the same with costs.

Analysis and Determination

I have carefully considered the grounds in support of the applications as set out on the face of the motions and the Supporting Affidavits, the averments in the Replying Affidavit and the submissions made by the parties. I find that the issue for determination is whether the Applicant has established a prima facie case that would warrant this court to grant the orders sought in its Application dated 3rd September, 2020.

The principles for grant of interlocutory injunctive orders were set in the case of **Giella v Cassman Brown Co. Ltd (1973) EA 358**. The Applicant must first establish a prima facie case with a probability of success. The Applicant must further demonstrate that she will suffer irreparable harm that cannot be compensated with an award of damages. If the court is in doubt, then the application would be decided on a balance of convenience.

A prima facie case was defined in **Mrao v First American Bank and 2 Others (2003) KLR 125** as one where the court properly directing itself on the material before it, will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal.

In the instant application, the applicant maintains that due process

was not followed in the manner the Respondent conducted the intended redundancies on members of the Claimant union as the Respondent failed to inform the labour office as required by law.

The Respondent despite contending that all requisite notices were served upon all requisite parties including the Labour Office failed to attach any evidence to support this assertion in its pleadings.

In absence of any evidence to prove compliance with the provisions of Section 40 of the Employment Act, 2007, I find that the Applicant has demonstrated a prima facie case as against the Respondent to justify the grant of the orders sought in its Application.

> **On the issue of the Recognition Agreement, this being a matter pending before my brother Nzioki Wa Makau J. in ELRC Cause No. 46 of 2020: Kenya Aviation Workers Union v AGS Frasers Kenya Limited. The fact that there is a dispute on recognition is proof that the applicant has recruited employees of the Respondent. Section 40(1) of the Employment Act does not require that there be a recognition agreement for a trade union to be notified of redundancies. It refers to membership to the union. An employee is entitled to representation by the union upon signing up for membership. Recognition is only necessary for collective bargaining as is set out under Section 57 of the Labour Relations Act.**

In the circumstances. I find merit in the application dated 3rd November, 2020 and allow the same in terms of prayer 4 and 5 as follows –

> ***1) That pending the hearing and determination of the Application, an order of injunction be and is hereby issued restraining the Respondents, its servants, and or agents from commencing and/or continuing with the redundancy process without compliance with Section 40 of the Employment Act.***
>
> ***2) That pending the hearing and determination of the Application, an order of injunction be and is hereby issued restraining the respondents, its members, agents and servants from terminating the employment of William Tolbert Omondi india or any other unionisable employee on account of redundancy or reconstruction or restructuring without compliance with the law.***

In view of the fact that the subject matter herein is a redundancy, parties are directed to urgently comply with pre-trial requirements and have the case fixed for hearing expeditiously.

Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19TH DAY OF FEBRUARY 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE