



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO. E413 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS.....CLAIMANT/APPLICANT

VERSUS

SHOPRITE CHECKERS KENYA LIMITED.....RESPONDENT

RULING

Pending for determination before this Court is the Claimant's Notice of Motion dated 20th August 2020 seeking the following orders:

1. *Spent*

2. *Spent*

3. *That pending hearing and determination of this matter, this Court do order the Respondent to redeploy their employees at Nyali Branch to serve at the two remaining branches at Westgate and Garden City.*

4. *That this court orders the Respondent to observe the Principle of Last in First Out (LIFO) in the selection of employees to be affected looking at the entire labour force at the three branches currently in operation.*

5. *That pending hearing and determination of this Application, this Court be pleased to order the Respondent to provide the Applicant with the necessary information regarding or otherwise of this branch.*

6. *Spent*

7. *That this Court to order the Respondent to engage the Applicant in collective bargaining to agree on a redundancy package to the affected employees within the proposals now in their possession.*

8. *Spent*

9. *That this court be pleased to grant costs of this Application in favour of the Applicant.*

The Application is premised on the grounds as set up on the face of the Notice of Motion Application and in the supporting affidavit of Mike Oranga, the Assistant Secretary General of the Applicant, sworn on 20th August 2020.

The Applicant contends that the Respondent has refused to engage the Applicant in collective bargaining citing its dire economic state and kept postponing the said negotiations except for possible inflationary reviews of salaries in the second half of 2020. It states that while still hesitant to enter into the collective bargaining agreement, the Respondent indicated its intention to close its Waterfront Branch in Karen, Nairobi on 14th April 2020. It further proceeded to declare 104 employees redundant in May, 2020. That hardly two months later, the Respondent proceeded to serve a redundancy notice on 30th July 2020 for its Nyali, Mombasa Branch. That these decisions to close shop in Kenya are not in good faith as the Respondent also plans to exit other markets in Africa save for South Africa. That neither the local branch nor individual employees of the Nyali Branch have been served with said redundancy notices. As a result, the employees stand to be greatly prejudiced and incur substantial loss and damage.

Further, the Applicant claims that the Respondent appears to renege on the promises to compensate its employees on the effects of inflation and further refuses to agree to a redundancy package to compensate its employees. It avers that the intended redundancies appear to punish union members due to their trade union activities and to subvert collective bargaining. That based on the Respondent's letter dated 31st July 2020, it may go ahead and terminate the services of the targeted employees without being accorded the right to fair hearing.

The Applicant contends that the redundancy notice dated 31st July 2020 is due to expire on 31st August 2020 and there is fear that the employees will have their services terminated without an opportunity to negotiate their exit package. In addition, subsequent meetings between the Applicant and the Respondent yielded no positive results leaving the Applicant with no choice but to approach this court.

In response to this, the Respondent filed its Replying Affidavit sworn by Carolynne Walubengo, the Respondent's Human Resource Manager dated 1st September 2020. She avers that the Application contains grave misrepresentation of the facts intended to achieve favourable orders from the Court. That the prevailing economic conditions and future projections led to the painful decision to close down the Respondent's stores in Waterfront and Nyali respectively. This decision and the subsequent actions were in compliance with Section 40 of the Employment Act and no redundancy claim has been brought against it in relation to its Waterfront Branch by the Applicant or the former employees.

The Respondent avers that the Applicant had reported a trade dispute on the Waterfront closure with the local Labour Office. After hearing both parties, the Conciliator found that the Respondent had adhered to the strict provisions of the law. The Respondent contends that the Applicants prayer to have the employees of the Nyali Branch absorbed in the other stores is not tenable. This is because the staff were no longer employees on the date of filing its response. In addition, the other stores are optimally staffed and an increase of workforce would only result in increased expenditure which is strenuous on an already struggling enterprise.

On the Applicant's prayer to the Court ordering the Respondent to provide it with necessary information regarding its trading position at the Nyali Branch to ascertain its trading viability, the Respondent argued that there is no compulsion in the law on sharing books of accounts. Therefore, it deemed the information confidential and as such, it would not share those records.

The Respondent finally averred that it had paid all monies owed to its employees who had been declared redundant in line with the provisions of the law. That redundancy is not some "revisiting" or victimization measure on the Applicant's members and that it affected both unionized and non-unionized staff equally. It was a pure business decision taken in an endeavour to save the company.

The Claimant/Applicant filed yet another Notice of Motion Application dated 25th August, 2020 in which it prays for the following orders that:

- 1. This Application be certified urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.*
- 2. Pending hearing and determination of this matter, this court be pleased to issue an order restraining the Respondent from declaring ninety-two (92) unionisable employees redundant on 31st August, 2020.*
- 3. The Respondent be and is hereby ordered to meet the Claimant/Applicant with a view of reaching a compromise ahead of the scheduled hearing on 2nd September, 2020.*
- 4. Costs of this Application be in the cause.*

The Application is premised on the grounds that:

- 1. On 30th July, 2020 the Respondent served the Claimant/Applicant with a redundancy notice in which 92 unionisable employees are targeted to be redundant on 31st August 2020.*
- 2. Parties engaged with a final meeting on 13th August 2020 to explore possibilities of finding a solution but in vain.*
- 3. Without unreasonable delay and expeditiously as possible in the current circumstances, the Claimant/Applicant moved to this Court on 20th August, 2020 and filed the Application and claim, both dated 20th August, 2020.*
- 4. In the Application dated 20th August 2020, the Claimant/Applicant sought the orders, amongst them an order restraining the Respondent from declaring redundancies pending hearing and determination of the court suit.*
- 5. The court certified the matter as urgent, fixed inter parties hearing date on 2nd September 2020 and ordered against the victimization and further directed parties to explore possibilities for amicable settlement.*
- 6. Whereas the Claimant/Applicant shall subject itself to further discussions, the redundancy threat hangs and is due on 31st August, 2020 which shall have already been taken.*
- 7. The Respondent has plans underway to affect these redundancies on 31st August 2020 whereas inter-partes hearing has been fixed for 2nd September 2020 after the exit and separation as scheduled.*
- 8. Unless court stops these redundancies, the Claimant's Application dated 20th August, 2020 shall be rendered nugatory and a mere academic exercise.*

The Application is further supported by the Affidavit of Mike Oranga,

Assistant Secretary General of the Applicant/Claimant in which he reiterates the averments on the face of the motion.

The Application herein was dispensed with through written submissions.

Applicant/Claimant Submissions

The Applicant submitted it did not challenge the closure of its Waterfront Branch which declared 74 of its members among others redundant despite ignoring the laid down selection procedure. It submitted that the declaration of redundancy of the Nyali Branch without honouring the last in first out (LIFO) principle

as provided for under section 40(1)(c) of the Employment Act and failure to award the promised inflationary adjustment is intended to frustrate the Applicant. The LIFO principle is aimed at protecting long serving employees and as such would have seen new employees axed so as to give the old ones a chance to be considered in one of the Respondent's other operational branches.

It further argued that the Respondent has been in the Kenyan market for close to two years while the Nyalı Branch had been operational for one. Some employees were employed when the branch opened while others had been transferred from other branches to serve there. That these employees are not of long service and therefore by complying to the requirements of Section 40 of the Act, their take home package is near zero. It submits that the Respondent had deposited some money into individual accounts without indicating what it was for.

In conclusion, it prayed that this court allows prayer for orders 2-7 and 9 of the Application.

Respondent's Submissions

The respondent submitted that the Applicant has not approached the court with clean hands as it has misrepresented facts to the court with the intention of painting the Respondent in bad light. That the Applicant has not laid a claim faulting the process of the redundancy notices instead the claims herein are based on a non-existing CBA which was not signed by the parties or registered in court to render it enforceable.

On redundancy, the Respondent submitted that the order issued on the 2nd September 2020 staying the redundancy notices has been overtaken by events since the redundancy period had lapsed on 31st August 2020. It added that on the date of hearing, the Respondent's advocates appeared in court for virtual hearing and was informed that the Judge would be considering the matters in chambers. That the court order granting interim orders that was issued as a result of this also alluded to the fact that the Respondent had not filed a response was erroneous as the Respondent had filed its Replying Affidavit on 1st September as can be evidenced on the judiciary e-filing portal and the court receipt annexed hereto.

The Applicant served the said order on the Respondent despite knowing that all terminal benefits to the affected employees had been paid out. The employees whose employment the order sought to preserve were no longer in employment and the Nyalı outlet ceased trading. It therefore submits that even if the court was to reinstate the employees, they would have no station to report back to.

It relied on **Kenya Aviation Workers Union v Tradewinds Aviation Service Limited (2018) eKLR** where Wasilwa J. in dismissing a prayer for stay of redundancy notices whose period had already lapsed stated:

"The issue of redundancy has since been overtaken by events since the Union members were terminated in June 2016. In the circumstances, the only claim the Claimants can pursue is of either illegal termination or redundancies. There are no orders to give in respect of the redundancy, which has been overtaken by events."

The Court of Appeal in **Kenya Tea Growers Association & Another v Kenya Plantation & Agricultural Workers Union (2012) eKLR** held:

"Clearly the applicants motion had as at the date it came before us for hearing, been overtaken by events. There is nothing to stay and the applicants having not applied for leave to amend their motion it is not open to this Court to treat it as duly amended by a mere statement from the bar that the applicants were in effect seeking a mandatory order against the respondent's employees."

The Respondent submitted that the LIFO principle as relied upon by the Applicant is not founded in law despite the Applicant trying to pin it to Section 40 of the Employment Act. It argued that the reading and construction of this section even when liberally stretched alludes to no such principle. That the Applicant

has not adduced any legal instrument, both local and international or any authority to guide the court as to how the principle can be applied in Kenya.

Regarding court orders that were issued on the 31st August 2020, the Respondent submitted that

In its final submission, the Respondent highlighted that the Applicant

has adduced evidence of payments of monies into its members' account in their submissions bringing to light new information to which the Respondent is not able to respond to. It argued that the Applicant ought to have filed a further affidavit introducing the evidence and substantiating it. It relied on **Daniel Toroitich Arap Moi & Another v Mwangi Stephen Murithi & Another (2014) eKLR** where the court stated submissions cannot take place of evidence as they are generally parties "*marketing language*".

It implored the court to dismiss the Application with costs to the Respondent.

Analysis and Determination

Having considered the applications and responses thereto and having further considered the submissions filed by the parties, the issues airing for determination are the following –

1. Whether the Application dated 20th August 2020 is merited.
2. Whether the Application dated 25th August 2020 is merited.

Whether the Application dated 20th August 2020 is merited

Section 40(1) of the Employment Act provides for redundancy as follows –

40. Termination on account of redundancy

(1) 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 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;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

The undisputed facts of this case are that on 30th July 2020 the Respondent issued a notice to declare redundancy to the Applicant whose contents are reproduced below –

“30 July 2020

The Secretary General

Kenya Union of Commercial Food and Allied Workers

Comfood Building

Elgon Road, Upper Hill

Kilome Road

P. O BOX 46818-00100

Nairobi

Dear Sirs,

RE: NOTICE OF INTENTION TO DECLARE REDUNDANCY: NYALI BRANCH

The Company is of the intention to permanently close the Shoprite Nyali Branch. It is contemplated that the proposed closure will cause employees of the said branch to be declared redundant and therefore the termination of their employment contracts on account of redundancy. This decision will impact some members of KUCFAW. This letter therefore serves to provide KUCFAW with not less than a month notice prior to the date of the intended termination on account of redundancy in terms of Section 40 of the Employment Act of 2012. (“the Act”).

We take this earliest opportunity to assure you that as a responsible corporate citizen, the Company will at all times abide by the law and honour our obligations towards our employees, suppliers and other interested parties.

We therefore invite representatives of KUCFAW to a consultative meeting to be held at the Branch on 04 August 2020. The purpose of the meeting will be to discuss the reasons for, and the extent of, intended redundancy of persons employed at the Shoprite Nyali Branch.

For your convenience and in preparation of the meeting, we wish to provide you with some background in relation to agenda items:

1. Reasons for the proposed redundancy:

Endeavours to continue trading at the Nyali Branch is no longer viable. Financial and other data will be provided and discussed at proposed meeting.

2. Extent of redundancy:

It is envisaged that the extent of redundancy will impact all employees at the said branch, there are currently 115 persons employed at the branch of which 92 are members of KUCFAW.

3. Intended date of termination:

It is contemplated that the intended date of termination on account of redundancy will be 31st August 2020. It should be noted that the branch will cease trading operations on a sooner date but this will not prejudice employees as they will continue to tender the services at the said branch until the termination date.

6. Accrued Annual Leave days:

The provisions of the Act will apply.

7. Notice Period/pay

The provisions of the Act will apply.

8. Severance pay

The provisions of the Act will apply.

Should you require any additional information for meaningful consultation, please address this request to our HR Manager, Ms. Carolyne Walubengo in writing at least 24 hours prior to the scheduled meeting time so that the information can be supplied prior to the meeting, if at all possible.

Kindly confirm your acceptance of this invitation at your earliest.

Yours Sincerely,

SIGNED

CAROLYNE WALUBENGO

HR Manager

Copy: Shoprite Checkers (Kenya) General Manager.”

On the same date, the Respondent issued a Notice of Intention to declare redundancy at the Nyali Branch to the Mombasa Labour Office whose content is:

“30 July 2020

The Labour Officer

Ministry of Labour and Social Protection

County Labour Office,

Social Security House,

Nkrumah Road,

P. O. BOX 90361

Mombasa

Dear Sirs,

RE: NOTICE OF INTENTION TO DECLARE REDUNDANCY: NYALI BRANCH

The Company is of the intention to permanently close the Shoprite Nyali Branch. It is contemplated that the proposed closure will cause employees of the said branch to be declared redundant and therefore the termination of their employment contracts on account of redundancy.

This letter therefore serves to provide KUCFAW with not less than a month notice prior to the date of the intended termination on account of redundancy in terms of Section 40 of the Employment Act of 2012. (“the Act”).

This decision was not taken lightly. The reason for the proposed redundancy are simply that the Nyali branch is not an economically viable trading proposition. There are no prospects that this situation will change and it should be noted that at the end of the financial year losses suffered was KES 150.9 million. We take this earliest opportunity to assure you that as a responsible corporate citizen, the Company will at all times abide by the law and honour our obligations towards our employees, suppliers and other interested parties.

The Nyali branch currently employs 115 persons and it is envisaged that the extent of redundancy will impact all employees at the said branch. It is contemplated that the intended date of termination on account of redundancy will be 31st August 2020. It should be noted that the branch will cease trading operations on a sooner date but this will not prejudice employees as they will continue to tender the services at the said branch until the termination date where they will assist with the winding up of the branch.

The company has invited the trade union KUCFAW to a consultative meeting (letter of notice and invitation is attached for ease of reference). The trade union represents 92 of the employees. The company will also engage non-unionised employees (23 in total) in a consultative meeting to discuss the reasons for, and the extent of the intended redundancy of persons employed at the Shoprite Nyali branch.

We wish to assure the Ministry of Labour and Social Protection that matters pertaining to remuneration due, accrued annual leave days, notice period/pay and severance pay will be dealt with in terms of the Act.

Should you require any additional information, kindly address this to our HR Manager, Ms. Carolyne Walubengo.

We take this opportunity to sincerely appreciate the support you have accorded our company.

Yours Sincerely,

SIGNED

JOHN MAINA

Act. General Manager”

Section 40(1)(a) provides that notice of redundancy where an employee is a member of a union should be issued to the union and the local Labour Officer at least one month prior to the redundancy. The notice should state the reasons and extent of the redundancy as well as the selection criteria.

In the case of **Thomas De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR** the Court of Appeal explained the provisions of Sections 40(1)(a) and 40(1)(b) as follows –

“It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the

union, the notification must be in writing and to the employee and the local labour officer. Section 40(b) does not stipulate the notice period as is the case in 40(a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”

In this case, the Respondent has shown sufficient proof that it had complied with the requirements of Section of the Act and as such I find that it was in compliance with the law on the same. It is worthy to acknowledge that on the date the orders were granted on 2nd September 2020, the Respondent had already closed the Nyali branch and the employees had left its employment. The application is devoid of merit as such I dismiss it with costs to each party.

The Respondent’s averment that the law does not provide for LIFO (Last In First Out) principle is however worth clarifying. Subsection 40(1)(c) provides for due regard to seniority in time. This is what LIFO means. That is, the longer serving employees are to be given preference over shorter serving employees where the ability, reliability and skill of the employees are the same. In other words, the employee who came in last would be the first to be released while those who came in first would be the last to be released. LIFO is thus entrenched in Section 40(1)(c) of the Act.

Whether the Application dated 25th August 2020 is merited.

On the Applicant’s prayer for the employees to be sent to other branches pending hearing and determination, this court finds that it would be in vain to grant such orders as the grounds for redundancy was that the Respondent could not sustain the staff. As submitted by the Respondent such orders would only aggravate an already bad situation. I also have to agree with the Respondent that given that the Nyali outlet had ceased trading, even if this court were to order reinstatement, the question would arise as to where the place of work would be.

For the foregoing reasons, both applications are accordingly dismissed with no orders as to costs.

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