



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E490 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS..... CLAIMANT

VERSUS

LONDON DISTILLERS (K) LIMITED..... RESPONDENT

RULING

There are two applications before me for determination. The first is the claimant's application dated 3rd September 2020 which seeks the following orders –

1. *Spent.*
2. *That pending hearing and determination of this matter, this Honourable Court be pleased to order the Respondent to put on hold and suspend the unlawful, improper and invalid Notice dated 12th August, 2020.*
3. *That pending hearing and determination of this matter, this Honourable Court be pleased to issue an order requiring the Respondent to maintain status quo as at 31st August, 2020 in regard with the 15 unionisable employees who are target for unlawful redundancy/retirement.*
4. *That pending hearing and determination of this matter, this Honourable Court be pleased to issue an order restraining the Respondent from declaring any of the remaining 394 employees redundant or force any of them to take early retirement on the basis of the improper, invalid and unlawful notice dated 12th August, 2020.*
5. *That costs of this Application be in the Cause*

The application is supported by the affidavit of REBECCA MUTHUKI and the following grounds –

1. *On 12th August, 2020, upon reporting for duties, unionisable employees the Respondent found a Notice posted within the factory premises at Athi Plant, contents of which touched on issues to do with Covid 19 pandemic and the planned reorganization of company operations.*
2. *The planned reorganization would lead to some of the 409 unionisable employee's services being dispensed with while those who have attained the retirement age would be retired, much as those above 58 years are not required to work.*
3. *All the affected employees will be paid in lieu of notice and all other dues will be paid before being released.*
4. *The Respondent's Notice dated 12th August 2020 promised to re-engage some of the "hardworking and dedicated employees".*
5. *The said notice was NOT copied to the Chief Shop steward and NOT copied to the Claimant/Applicant Union.*

6. The employees brought the contents of this notice to the Claimant/Applicant's attention and on 17th August, 2020, the Claimant/Applicant addressed the Respondent and raised issues with the contents of the said notice and further sought a meeting with them on 24th August, 2020 at 10.00 am given the magnitude and the urgency of the issues raised in the said notice.

7. On 24th August, 2020 the Respondent declined to grant the claimant/Applicant entry into their Athi River Plant for a meeting which had been proposed and turned the claimant/Applicant's Representatives away.

8. The Claimant/Applicant's letter dated 17th August, 2020 was email to the Respondent on 20th August, 2020 at 12.19 pm and a hard copy delivered to them on 21st August, 2020 and duly received at their Head Office.

9. On 26th August, 2020 the Claimant/Applicant again addressed the Respondent following the aborted meeting and requested the Respondent to convene an urgent meeting within some timelines to discuss this seemingly urgent matter but the Respondent not only declined to reply to the said letter, but they also equally failed to convene a meeting as requested.

10. By close of business on 31st August, 2020, the Respondent served ten (10) employees with letters terminating their services on account of redundancies while five (5) others were retired and the said letters are dated 28th August 2020.

11. The requisite redundancy notices according to the law and the parties Collective Bargaining Agreement were not served rendering the whole action unlawful.

he Respondent has from the year 2017 treated its employees with hostility and disrespect as hereunder:

(a) On 19th June, 2017, they threatened to terminate the Recognition Agreement for no reason other than trade union activities.

(b) On 19th June, 2017, they made attempts to terminate Recognition Agreement with Bounty Limited, a sister company only for reason of trade union activities.

(c) On 22nd January 2020, they, without reason or cause, declined to deduct and to remit union dues to the Claimant/Applicant in complete violation of section 48 of the Labour Relations Act, 2007.

12. Similarly on 24th July, 2017 the Respondent terminated the services of employees of the sister company Bounty Ltd for reasons of union membership.

13. The remaining 394 unionisable employees fear that they

14. are equally targeted the same way and may be declared redundant or forced to take early retirement in unlawful and improper manner

15. The present threat may as well follow the pattern as meted out on their colleagues at Bounty Limited who lost their jobs only for reasons of their union membership and replaced by contract labour.

The supporting affidavit of REBECCA MUTHOKI reiterates the grounds on the face of the application as set out above.

Upon considering the application ex parte on 4th September 2020, the court made the following orders –

1. Spent.

2. That the letter of redundancy by the Respondent addressed to the Claimant's members dated 28th August 2020, having not complied with Section 40 of the Employment Act and paragraph 23 of the parties CBA are suspended pending inter partes hearing of the application.

3. That the letters of retirement also having not specified whether the employees issued with retirement notice were retired under the 50 year or 60 year rule under paragraph 22 of the CBA, are also suspended pending inter partes hearing of the application.

4. That the application is fixed for hearing on a date to be fixed by the Registry within 14 days of resumption of court after current August recess/vacation.

5. That the Respondent to file response to the application within 14 days of service.

Upon being served with the application and orders, the Respondent filed a notice of motion dated 9th September 2020 seeking the following orders –

1. Spent.

2. *This Honourable Court be pleased to vary, review and/ or set aside the ex pa orders issued on 4/9/2020 pending the hearing and determination of t application.*
3. *This Honourable Court be pleased to set aside and/or vacate the ex parte orders issued on 4/9/2020 pending the hearing and determination of the Main Claim.*
4. *The honourable court be pleased to issue any other orders to meet the ends of justice.*
5. *Costs for this application be provided for.*

The grounds in support of the application are that –

- a) *The Claimant/Respondent procured ex parte interim orders on 4th September, 2020 with the effect of stalling a legal redundancy process by way of deceit and material misrepresentation.*
- b) *As a matter of fact, the requisite notices were issued to the employees and the relevant authorities before the redundancies and the retirements were undertaken.*
- c) *In undertaking the redundancy/retirement process, the Respondent/Applicant strictly complied with the provisions of Section 40 of the Employment contrary to what the Claimant/Respondent relayed to the court.*
- d) *The intended redundancies and retirement was solely to cushion tin- Respondent/ Applicant and its employees against the effect of the COVID -19 and the general financial outlook in the country and globally.*
- e) *At any rate, the determination of the validity of the Recognition Agreement between the Claimant and the Respondent is ripe before the Labour Board.*
- f) *The relationship between the parties herein is so strained and irretrievably broken down that no meaningful outcome can be foreseen from any deliberations. The continued involvement of the Claimant in the Respondent's employees' affairs only aggravates the situation.*
- g) *The Respondent/Applicant stands the risk of insolvency should the ex parte orders subsist, a situation that would have wide ramifications not only to the Claimant and Respondent but to the Kenyan economy in general.*
- h) *It is therefore imperative that the honourable court reviews the impugned orders given on 4th September, 2020.*
- i) *Unless the Honourable Court urgently intervenes, the Respondent/Applicant and its employees will suffer irreparable harm.*

The application is further supported by the affidavit of MOHAN GALOT sworn on 9th September 2020 in which he deposes that he is the subscriber, founder, governing director and Principal shareholder of the Respondent and therefore authorised to swear the affidavit. That the Respondent employs over 300 persons in its factory in Athi River and its headquarters at Dunga Road and several depots within the country.

He deposes that the Respondent, like other businesses in Kenya and globally, has not been spared the harsh economic effects of COVID 19 pandemic. That being a player in the alcoholic beverage sector, it has been especially affected by the shutdown of bars and entertainment joints. That one of the measures the Respondent has been constrained to take as recommended by financial advisors is scaling down of its employees to reduce the wage bill. That it commenced the impugned redundancies/retirements as a stop gap measure to keep the company afloat. That in doing so it complied with Section 40 of the Employment Act. That this notwithstanding the claimant obtained ex parte orders whose import is to stall the redundancies/retirement process.

Mr. Galot deposes that the orders were obtained clandestinely through misrepresentation/deceit and failure to disclose material facts.

The affiant further deposes that due to the claimant's interference with his private and domestic employees including directing them not to report to work, the Respondent referred the matter to the National Labour Board. He states that it would be prejudicial for the court to hear the instant dispute while the issue is pending before the National Labour Board as the parties have not exhausted the mechanism under the Labour Relations Act.

The claimant opposed the application through the replying affidavit of REBECCA MUTHOKI sworn on 13th October 2020 in which she deposes that the Respondent has ignored, disregarded and blatantly refused to comply with the court orders of 4th September 2020, which it seeks to be reviewed in its instant application. That the claimant and Respondent have a valid Recognition Agreement and a Collective Bargaining Agreement (CBA) that provides for retirement and redundancy at clauses 22 and 23 respectively as reproduced in the affidavit. That redundancy is further provided for in Section 40 of the Employment Act.

It is the deposition of Rebecca Muthoki that the Respondent did not comply with either the CBA or the Employment Act as no notice was issued to the union and nor did notice issue to all local labour offices where the affected employees were stationed being Nairobi, Kisumu, Eldoret, Nanyuki and Nakuru. That the only notice sent to the Labour Office which in any case was not compliant with the law or CBA was addressed to Sub-County Labour Officer, Industrial Area, Nairobi and was dated 13th August 2020. Further, that the Respondent did not comply with clause 6 of the CBA which provides for termination notice and service pay.

On initiation of termination of Recognition Agreement Ms Rebecca Muthoki deposes that the Memorandum of understanding between the Government, Federation of Kenya Employers and COTU(K) does not condone redundancy and to the contrary promotes the principles that no employee should loss employment due to the COVID-19 pandemic. She deposes that the intention of the redundancy is to do away with union representation. She prays that the application be dismissed.

Submissions

The court directed that the application be disposed of by way of written submissions. Both parties filed submissions in which they expounded on issues raised in their respective applications and affidavits.

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 orders granted to the Claimant on 4th September 2020 should be vacated.
2. Whether the orders sought in the claimant's application are 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 parties CBA at clause 22 and 23 provide for retirement and redundancy as follows –

“22. RETIREMENT

a) The normal age at which an establishment employee will be required to retire from the service will be 60 years.

b) An established employee may voluntarily apply for early retirement at the age of 50 years. Such application will be considered on merit and acceptance or otherwise will be subject to exigencies of the service.

c) An employee who disputes his age according to records will be referred to a government hospital or private hospital (as will be agreed by both parties) for the age of such an employee to be determined. On engagement, every employee shall give his age supported by documentary evidence.

d) An employee who retires or is retired including Medical retirement he/she will be entitled to 70 days of service pay for each completed year of service.

e) An employee may be retired or may retire voluntarily or on medical grounds; by receiving from the employer or he/she giving forty five (45) days' notice in writing.

f) An employee who retires or is retired will be given kshs.27,000.00 (twenty seven thousand shillings only) lump sum by the management.

23. REDUNDANCY

In the event of redundancy, the following principles shall apply: -

- a) The union shall be informed by the employer the reasons for the extent of the intended redundancy.
- b) The principle shall be adopted of “LAST IN, FIRST OUT in the particular category of employees affected, subject to all other factors such as skills, relative merit, ability, and reliability being equal.
- c) The redundant employee will be entitled to the appropriate period of notice or pay in lieu as per clause No. 6(b) of this CBA.
- d) The redundant employee will be entitled to a service pay as per clause No. 6(c) of this CBA.

Further clause 6 of the parties CBA provide for termination notice as follows –

6. TERMINATION OF SERVICES

- a) After the completion of the probationary period in employment, an employee may be terminated by giving one month’s notice or one month’s salary in lieu of notice.
- b) An employee with the service of between one (1) year -4 years shall be given 1 (one) month’s notice or salary in lieu of the one month’s notice. 5-9 years, shall be given 4 months’ notice or salary in lieu of four months. An employee who is above 9 years in employment shall be paid 5 months’ notice or salary in lieu of five months’ salary.
- c) The affected employee will be entitled to service pay of:-
 - I. 1 years- 4 years (30 days)
 - II. 5 years to 8 years (50 days)
 - III. 9 years and above (60 days)

The undisputed facts of this case are that on 12th August 2020 the Respondent posted a notice on the company’s notice board within its premises at Athi River whose contents are reproduced below –

“12th August, 2020

NOTICE

We wish to inform that owing to the prevailing conditions of COVID-19 In the country, which ha* drastically affected our operations, resulting to low sales, the management is planning to reorganize its operations. As a result, services of some employees will no longer be required. Likewise, some of the employees who have attained retirement age will be also be released from the company. This Is also as per the government COVID 19 guidelines that employees over 58 years, should stay at home for their own health and safety.

The management will arrange to pay all concerned the required lieu of notice and all other dues entitlement before being released from the company. However, should the situation normalize, the management will reconsider re-engaging some of the hardworking and dedicated employees.

Regards

P. S. MANN

G. M. ADMINISTRATION”

Upon learning of the circular, the claimant wrote to the Chairman of the Respondent rising concerns about the same and proposed a meeting on 24th August 2020 to discuss the matter. The last paragraph of the letter reads –

“We now write to ask you, in an effort to build consensus, to engage us and the Ministry of Labour (where necessary) as to seek remedies which protect employees who are most vulnerable in this regard. We are available and ready to explore other means other

than redundancies, termination or loss of jobs at this critical hour. Given the anxiety and job insecurity stirred by the said notice, we seek an urgent meeting with you at the earliest opportunity on 24th August, 2020 at 10:00 am at the Athi River Plant. Please do confirm your presence and readiness to engage on this matter.”

There was no response to the letter and when the claimant’s representatives availed themselves for the meeting on 24th August 2020, they were denied entry into the Respondent’s premises. The claimant wrote another letter on 26th August 2020 requesting for a meeting not later than 28th August 2020 but again there was no response.

On 28th August 2020 the Respondent sent out redundancy notices to several employees. The claimant has attached three redundancy notices addressed to Ezekiel Musembi Musyoki – Kisumu Depot, Michael Rapando – Nakuru Depot and Fredrick Gwiyaya Aradi, Nanyuki Depot.

The Respondent also sent retirement notices to several employees and the claimant has attached two of the notices addressed to Juliana Mbaika Kirai, and Ndongwa Musembi, both of Athi River Factory.

The contents of the letters of redundancy and retirement which are reproduced below –

“LDK/MG/412/11/20

28th August 2020

Ezekiel Musembi Musyoki,

Staff no. 1555.

KISUMU DEPOT

Dear Ezekiel,

RE: REDUNDANCY NOTICE

This is to inform you, owing to the prevailing conditions of Covid 19 in the country, which has negatively affected our operations, resulting to low sales, the management is reorganizing its operations and therefore your services will no longer be required w.e.f 1st September 2020.

In view of the above and by copy of this letter, you will be paid one month's salary in lieu of one month's notice.

Please note that you are supposed to handover any company properties at your possession and adequately clear with all the relevant departments.

Your final dues will then be computed subject to statutory deductions and any other amount owed to you.

We wish you the best in your future endeavours.

Yours Faithfully,

SIGNED

FOR: LONDON DISTILLERS (K) LTD”

“LDK/MG/412/5/20

28th August 2020

Juliana Mbaika Rival,

Staff no. 1309.

ATHI RIVER FACTORY

Dear Juliana,

RE: RETIREMENT NOTICE

This is to inform you, owing to having attained the statutory retirement requirement and also owing to prevailing Covid 19 situation

in the country, which has negatively affected our business performance, the management has decided to give you retirement with effect from 1st September 2020.

Meanwhile, the company will pay you one month's salary in lieu of notice not served.

Please note that you are supposed to hand over any company

properties at your possession and adequately clear with all the relevant departments.

Your dues will then be computed subject to statutory deductions and any other amount owed to you.

We wish you the best in your future endeavours.

Yours Faithfully,

SIGNED

FOR: LONDON DISTILLERS (K) LTD”

Earlier on 22nd January 2020, the Respondent had written a letter to the claimant stopping collection of union dues. The letter is reproduced below –

“LDK/MG/027/20

22 January 2020

Secretary General

Kenya Union of Commercial Food and Allied Workers

Comfood Building, Kilome Road

P. O Box 46818 – 00100

NAIROBI

Dear Sirs

RE: DEDUCTION OF UNION MEMBERSHIP FEES:

- Galot Estate, Kiambu

- London Distillers (K) Limited

We refer to the monthly deductions expected from us towards the Union and COTU dues.

You have forcefully, without seeking concurrence with us and in the absence of any enforceable Agreement with us, illegally proceeded to recruit all the workers of Galot Estate, Kiambu and all workers have been paying Union membership fees directly to you and COTU, which step is calculated to intimidate and interfere with our operations.

In view of the above illegal labour practices, similarly, from January 2020 you will have to arrange with your members working for London Distillers limited to pay their contributions directly to you and COTU

Best wishes

SIGNED

MOHAN GALOT

OWNER: GALOT ESTATE, KIAMBU

CHAIRMAN: LONDON DISTILLERS (K) LIMITED”

The claimant responded by its letter dated 23rd January 2020 which is reproduced below –

L/4/2020/02

23rd January, 2020

The Chairman

London Distillers (K) Ltd

P.O. Box 57387-00200

NAIROBI

Dear Sir,

RE: UNION DUES DEDUCTION

We acknowledge receipt of your letter Ref. LDK/MG/027/20 of 22nd January, 2020 on deduction and remittance of union dues.

Kindly revisit Section 48 of the Labour Relations Act, 2007 and be lawfully guided on the above subject. As a law abiding Union, we shall approach the Court should you fail to deduct and to remit union dues. The employees serving at Galot Estate-Kiambu have been subjected to some of the worst forms of unfair labour practice, some of who have been denied access to their jobs and houses all against the Court Order issued on 26th February, 2018 and dated 1st March, 2019, Copy enclosed. Judicial process may be slow but time will tell whether or not you are above the law of Kenya with the capacity to defy orders of our Courts and to act with impunity.

Finally, we feel you have gone overboard which have nothing to do with normal Industrial Relations Practices and that we are capable of handling the circumstances in the manner you choose to fashion it.

Yours faithfully,

SIGNED

BONIFACE M. KAVUVI

SECRETARY GENERAL”

On 19th August 2020, the Respondent wrote to the National Labour Board seeking to terminate the Recognition Agreement between the parties. It is under this background that the court is called upon to consider the dispute herein.

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 the instant case there was no notification to either the claimant or the affected employees. A notice posted on a notice board is not sufficient notification in terms of Section 40(1)(a) and (b) of the Employment Act. There was further no notice to the local county labour officers where the affected employees were working. Further, the Respondent did not comply with the provisions for notice, retirement and redundancy in its own CBA.

I however note that as at the date when the orders of the court were issued the Respondent has already retired five employees and declared 10 employees redundant. The orders of 4th September 2020 could not therefore reverse the redundancy of the 15 employees who were already out of employment on the date of the orders. There were no prayers for reinstatement in the application before the court. Prayer 3 in the application sought status quo as at 31st August 2020.

The orders granted by the Court on 4th September 2020 would however apply to the 394 employees who were still in employment on that date.

An order of reinstatement has been sought in the claim and will be dealt with at the hearing of the claim. For now, the court makes the following orders –

1. **The notice dated 12th August 2020 is suspended pending hearing and determination of the claim herein.**
2. **Status quo as at 31st August 2020 be and is hereby maintained pending hearing and determination of the claim herein.**
3. **The Respondent is hereby restrained for declaring the remaining 394 employees redundant pending hearing and determination of the claim herein.**
4. **The application dated 9th September 2020 filed by Respondent is dismissed.**
5. **Costs of both applications shall be in the cause.**
6. **In view of the fact that this claim concerns a redundancy, the Respondent is directed to file its defence to the claim within 14 days. Thereafter parties to fix a hearing date for the claim on priority basis.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH 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