



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 90 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010

ARTICLES 10, 19(2), 20(1), (2), (3) & (4), 21(1), 27(4), 28, 41(1) & (2), 47, 165(3)(b) AND 260

AND

IN THE MATTER OF: EMPLOYMENT ACT, NO. 11 OF 2007, SECTIONS 2, 5, 7,

8, 9, 10, 15, 26(2), 35,40, 43, 45(4)(b), 49 AND 66

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACT NO. 4 OF 2015, SECTION 3, 4 AND 6

AND

IN THE MATTER OF: UNCONSTITUTIONAL AND UNFAIR LABOUR PRACTICES OF

ISSUANCE OF NOTICE OF INTENTION TO DECLARE REDUNDANCY

BETWEEN

WILSON WAWERU NDUNGU.....PETITIONER

VERSUS

INGREDION HOLDING LLC – KENYA BRANCH.....RESPONDENT

JUDGMENT

The Petitioner was at the time of filing this petition, an employee of the Respondent, having been employed as an Import and Export Officer of the Respondent on 21st March 2013. The Respondent is described in the petition is a subsidiary company of INGREDION HOLDING LLC having its Headquarters in Europe and branches in Europe, Middle East and Africa and dully registered in Kenya under the Companies Act, 2015 Laws of Kenya ("The Companies Act, 2015). Among its roles in the market is to make sweeteners, starches, nutrition ingredients and biomaterials that are used by customers in everyday products from foods and beverages to paper and pharmaceuticals.

It is common ground between the Petitioner and the Respondent that on the 3rd February 2020 the Respondent served upon the Petitioner a letter with the subject "Notice of Intention to Declare Redundancy".

i) The letter informed the Petitioner that following the review of the operations of the Kenya business to accelerate sustainable profitable growth, Ingredion had decided to leverage on the third-party partners. This was to be achieved by Ingredion, the Respondent, extending the distributors partnership by transferring more than 70 customers currently handled directly by Ingredion to a partner IMCD Kenya. The Respondent would maintain and serve less than 20 reserved customers and global key accounts. As a result the Company's people requirement would substantially reduce with some roles eliminated, merged, or changed in scope.

- ii) The letter stated that there would be open positions and the Petitioner was at liberty to apply and submit applications for consideration in the new structure subject to eligibility. If the Petitioner was successful, redundancy would not affect him.
- iii) The Respondent supplied a list of open positions incorporating the job descriptions.
- iv) The letter further notified the Petitioner that he would be assessed against the selection criteria of qualifications, skills, experience and knowledge in line with the relevant job specification requirements.
- v) The interview was to be conducted on 6th February 2020.

The Petitioner subsequently applied for the position of Supply Chain Coordinator and was interviewed on 6th February in line with the letter.

On the 20th February 2020, the Respondent informed the Petitioner that he had been offered the Position of Supply Chain Coordinator in the new organization and that the Petitioner was no longer at risk of redundancy.

By letter dated 19th March, 2020 the Respondent increased the salary of the Petitioner from Kshs.2,083,906.64 to Kshs.2,500,000.00 per annum. The Respondent informed the Petitioner that the salary increase recognized the additional responsibilities that the Petitioner had taken over.

It is a matter of public notoriety that following the outbreak of COVID – 19 Pandemic, a lock down was imposed in several parts of the Country which included Nairobi Metropolitan Area, the counties of Kilifi, Kwale and Mombasa. The Nairobi Metropolitan was designated as Nairobi City County, part of Kiambu County up to Chania River Bridge (Thika), including Rironi, Ndenderu, Kiambu Town; part of Machakos County up to Athi-River, and aprt of Kajiado County including Kitengela, Kiserian, Ongata Rongai and Ngong Town; and all other areas as set out in the order.

That lockdown meant that no person, passenger carrying bicycles, motorcycles, scooters, automobiles, vehicles, vessels railway wagon or aircraft were allowed into and out of the Nairobi Metropolitan Area and the counties of Kilifi, Kwale and Mombasa.

It is the Petitioner's averment that he was affected by the lockdown as he resides in Limuru, outside the designated Nairobi Metropolitan area. He avers that as a result he was not able to report to his workstation situated at Tulip House, Mombasa Road, Nairobi. He avers that he explained his predicament to his Supervisor who however remained adamant that the Petitioner reports to work, ignoring the advice to employers to encourage employees to work from home.

It is the Petitioner's averment that on 16th April 2020 his Supervisor one Mr. Lawrence Mbithi delivered a pass serial No. 012629 for the Petitioner's Motor Vehicle Registration No. KBT 040J to enable him move from Limuru to Nairobi to report for duty. That the pass delivered to the Petitioner was one designated for truck drivers transporting goods.

The Petitioner avers that on numerous occasions he tried to use the pass to no avail since the police were aware that it was not for personal cars. This hindered the Petitioner from reporting for duty as directed by the Respondent.

The Petitioner avers that his failure to report to work angered his supervisor who wrote an email to the Kenya Region Director Mr. Kennedy Ouma stating the following:

- a) That the Respondent processed and delivered special pass under Kenya Association of Manufacturers (KAM) for the Petitioner to enable him operate smoothly during the curfew period.
- b) That the Petitioner raised an issue that he still faced queries at Rironi road check/block- not backed by legal guidelines (that the officers at the Road Check/Block asked him for a letter from the Interior CS, Regional Commander and endorsed by OCS to allow him pass) even with the special pass.
- c) That the Supervisor Mr. Lawrence Mbithi reached out to KAM on the same issue and KAM guided that the Respondent issue the Petitioner with Form 1, and (d). That the Petitioner stayed off the office from Monday 27th April 2020.

The Petitioner avers that it is his failure to report to work due to the movement restrictions that caused the Respondent to issue him with the redundancy notice.

It is the Petitioner's contention that termination of his employment on account of not reporting to his work station is discriminatory and offends Article 27 of the Constitution of Kenya 2010.

The Petitioner avers that the failure to accord him the full benefit of his terms of service under the statutory regime he was appointed under and varying his contract to his detriment and disadvantage, amounts to unfair labour practice and violates the provisions of Article 41(l)of the Constitution of Kenya 2010.

It is the Petitioner's averment that the Respondent is bound by Article 10 of the Constitution which embodies national values and principles of good governance, the Fair Administrative Actions Act and the Employment Act.

The Petitioner avers that Article 20 of the Constitution permits every person to enjoy the rights and fundamental freedoms in the Bill of

Rights to the greatest extent and mandates the Court to adopt the interpretation that gives the greatest efficacy to the right or fundamental freedom in question and in so doing, adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

The Petitioner avers that this Court's jurisdiction to hear and determine this petition is enshrined at Article 165(3)(b) of the Constitution.

The Petitioner avers that this petition is anchored on the provisions of Articles 10, 19, 20(1), (2), (3) & (4), 21(1) & (2), 27(1) & (5), 28, 41(1) & (2), 47, 165(3) & (6) and 260 of the Constitution.

It is the Petitioner's averment that by virtue of the letter dated 20th February 2020 communicating to him that he was no longer at risk of redundancy following reorganisation of the Respondent's Kenya Team, he had legitimate expectation that he would continue in the employ of the Respondent.

It is against this backdrop that the Petitioner seeks the following reliefs –

- a. *A declaration that the issuance of the letter referenced "Notice of Intention to Declare Redundancy" to the Petitioner amounts to unfair dismissal and contrary to the Employment Act No. 11 of 2007.*
- b. *A declaration that the issuance of the letter referenced "Notice of Intention to Declare Redundancy" to the Petitioner was unfair and unconstitutional, null and void.*
- c. *A declaration that the Respondents have violated the Petitioner's right to fair Labour practice and lawful and legitimate expectation.*
- d. *Punitive damages in favour of the Petitioner against the Respondent for discrimination.*
- e. *Damages for unfair labour practices and violations.*
- f. *Damages for unfair dismissal.*
- g. *The Respondent to bear the costs of this Petition in any event.*
- h. *Such further orders as this Court may deem just and expedient.*

Together with the petition, the Petitioner filed an application by way of notice of motion under Articles 22, 23, 165(3) of the Constitution, Section 12 of the Employment and Labour Relations Court Act, Order 50 of the Civil Procedure Act and all enabling provisions of law in which he seeks the following orders –

1. *Spent.*
2. *That this Court be pleased to grant an order of stay of redundancy termination notice letter dated 2nd June, 2020 issued by the Respondent pending the hearing and determination of this application inter parties.*
3. *That pending the hearing and determination of this application inter parties the Court issues an injunction prohibiting/restraining the Respondent either by themselves, employees, servants and or agents from terminating the Applicant from his employment.*
4. *That this Court be pleased to grant an order of stay of the redundancy notice letter dated 2nd June 2020 issued by the Respondent pending the hearing and determination of this of this Petition.*
5. *That pending the hearing and determination of the petition the court issues an injunction prohibiting/restraining the Respondent either by itself, employees, Servants and/or agents from terminating the Applicant from his employment.*
6. *That the cost of this application be in the cause.*

The grounds in support of the application as set out on the face thereof are that –

- a) *That the Applicant's has been served with the letter referenced "Notice of Intention to Declare Redundancy"*
- b) *That the effects of that letter intents to terminate the contract of the Applicant from employment.*
- c) *That the Applicant has a legion of dependants and terminating his contract on a count of redundancy at this particular time when the country is battling with COVID-19 is unfair and unconstitutional.*
- d) *That the Respondent have not supplied the reasons for that action to the Applicant.*
- e) *That the Applicant is likely to be rendered jobless and subject him to untold suffering.*

- f) That the intended action of the Respondent is malicious, biased, oppressive, an abuse of office and discriminative against the Applicant therefore void ab initio, unlawful and inoperative.
- g) That the intended termination of the Applicant and the procedure applied was undignified, traumatizing, irresponsible and shocking, the notice of termination would occasion irreparable injury and wanton damage to the livelihood of the Applicant.
- h) That the intended termination of the Applicants employment is a flagrant violation of the constitutionally guaranteed rights such as the right to fair labour practice, fair administrative action and fair hearing.
- i) That the constitution binds all organs of the state and persons and therefore the Court is to uphold, protect and defend the Constitution and other Statutes and further that:
- j) That no prejudice is likely to be suffered by the Respondents if the orders sought herein are granted.
- k) That the Applicant has a right of access to the Court to safeguard the articles of the Constitution and Statutes, which have been or are in danger of further infringement.
- l) Articles 10, 41, 47 and 50 of the Constitution, Section 40 of the Employment Act 2007 will be violated if the Employment and Labour Relations Court does not uphold the supremacy of the Constitution.
- m) That orders sought are pursuant to the Employment and Relations Court's duty to promote and safeguard constitutionalism and the rule of law.
- n) It is only fair and just for the Court to issue the orders as prayed and that the Court has a right to interpose by way of injunction to restrain the Respondent from carrying out any intended acts which infringe on the rights of the Applicant and the Applicant has established a prima facie case.

The application is supported by the affidavit of the Petitioner in which he reiterates the averments in the petition and the grounds on the face of the application.

Upon hearing the application which was filed under certificate of urgency ex parte, the Court certified the application urgent and directed the Petitioner to serve the Respondent for inter partes hearing on 24th June 2020.

On 24th June 2020, the Court ordered status quo to be maintained until 1st July 2020 when the application was rescheduled for hearing in view of the fact that the Respondent had filed and served its replying affidavit and grounds of opposition to the application on 23rd June 2020.

In the grounds of opposition, the Respondent raises the following grounds: -

1. The application is an abuse of court process as it does not disclose any violation of the law by the respondent with respect to its intention to terminate the Petitioner's employment on account of redundancy.
2. No grounds have been set forth to persuade the court to interfere with the respondent's decision to restructure and re-organise its workforce, all provisions of the law having been observed and complied with in that;
 - a. The respondent began the reorganisation in February, 2020 which affected several employees of the respondent and not just the Petitioner;
 - b. The restructuring began before the first reported case of the COVID-19 virus in Kenya and the resultant changes were not necessitated by the effects of the pandemic.
 - c. The decision to abolish the Petitioner's role is as a result of a further review of the new structure, its ability to deliver on the expected efficiencies and its cost effectiveness. The review established that the various components in the role of supply chain coordinators could be plugged into existing outsourced and insourced functions.
3. It is a settled principle of law that any alleged breaches of contract of service should not be redressed by equitable remedies of injunction. See the **Court of Appeal** decision in **Eric V. J. Makokha & 4 Others v Lawrence Sagini & 2 Others [1994] eKLR**.
4. In any event, the Petitioner has not met the test for the grant of an injunction in that;
 - a. The Petitioner has not established that the respondent has acted in violation of the law and cannot therefore demonstrate that he has a prima facie case with a probability of success.
 - b. The relationship between the parties is one of contract and no irreparable loss will be suffered by the respondent, which could not adequately be compensated by an award of damages. The law provides for an award of compensation should the termination be

deemed to be unlawful and interlocutory injunctions should not be granted see Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Ltd & 3 Others [2014] eKLR.

c. The balance of convenience tilts in favour of the respondent.

5. The Petitioner has made unfounded allegations and also failed to make disclosure of material facts all of which disentitle him from any equitable reliefs.

6. No grounds have been established for the grant of the orders sought and the application should be dismissed with costs to the respondent.

In the replying affidavit sworn by KENNEDY OUMA, the Respondent's Business Director Africa, he deposed that the matters alleged by the Petitioner are inaccurate and intended to mislead the court. That the re-organisation of the Kenya organisation started before the COVID-19 pandemic was reported in Kenya and was solely informed by the need to right size the organisation. That the intended termination of the Petitioner's employment was not malicious, unfair or in violation of any constitutional rights.

He deposed that the Respondent has offices across the globe. In Africa, it has offices in South Africa and Kenya. The affiant deposed that from time to time, the Respondent reviewed its structures and personnel numbers to ensure efficiencies and optimal utilisation. That in the review undertaken in 2019, a review of the emerging markets business units revealed that while the Kenya organisation had the highest number of employees, it had the lowest numbers in net sales.

That in February 2020, the Respondent commenced an exercise aimed at right sizing the Kenya organisation and to position the East Africa region for growing specialities. The considerations included making greater use of the outsourcing partners and in-sourcing in shared service centres based in South Africa, Manchester (England) and Hamburg (Germany). A copy of the staff communication dated 3rd February 2020 was shared with all staff.

The Affiant avers that the contention by the Petitioner that the Respondent was transferring duties to a foreign country amid the challenges posed by the pandemic was misleading and failed to disclose material facts. The Affiant avers that the Petitioner failed to disclose that the shared service centres were in existence long before the pandemic. That the respondent only sought to maximise the use of already existing service centres for better efficiency.

The Affiant avers that the Respondent engaged its employees to inform them of the changes and shared with them the new organisation chart as well as a list of open positions.

That the Petitioner received a notice of intention to declare redundancy dated 3rd February 2020. The Affiant avers that the Petitioner applied and was interviewed for the position of Supply Chain Coordinator in the new structure. He was successful and as at 20th February 2020, the Petitioner had secured a new role with additional functions. That the contention that the Respondent is dismissing the Petitioner without cause is not borne out by the Respondent's actions including the fact that it reviewed the Petitioner's salary in March 2020.

The Affiant avers that COVID 19 pandemic caused massive disruptions in business operations. That the Respondent took all necessary steps to assist and facilitate the performance of its employee's duties including obtaining the requisite movement permits and where possible having employees work from home. The Respondent made every effort to facilitate the Petitioner in the performance of his duties. He deposed that he correspondence produced by the Petitioner confirms the Respondent's efforts and the Petitioner's intransigent position.

The Affiant avers that the Petitioner was not comfortable with the documents obtained for him by the Respondent with the assistance of KAM. He avers that the Petitioner informed the respondent that he would request for the travel pass himself using a process which he indicated he had been advised on by the Police. That with a view to assisting him, the Respondent provided the Petitioner with a letter addressed to the OCPD Limuru Police station to assist him in the process

The Affiant avers that the email dated 2nd May 2020 produced by the Petitioner raising safety concerns with regard to travelling to the office was responded to by the Respondent's Human Resource Manager for UK and Emerging Markets Ms Rebecca Woolridge. She informed the Petitioner that the respondent's offices remained open throughout the pandemic so that essential work could be carried out to ensure that the respondent continued to contribute to the supply chain of the critical food industry.

The Affiant avers that as would be expected in any restructuring, the Respondent continued to review the new structure and the support functions and what would work most effectively. In the initial structure, the Respondent planned to make the Treasury Accountant role redundant and outsource the accounting activities. Upon a further review of the costs/process of outsourcing these services, it became evident that it would be more cost effective to retain the position in house with an expansion of the scope of duties.

The Affiant avers that the Respondent had established that it would be cost effective to outsource the supply chain services to its warehousing partner who was already providing some of those services. That this meant that the position of supply chain coordinator was not required within the structure of the respondent. That there was nothing discriminatory in this decision.

That it was on the basis of these considerations that the Human Resources Manager and the Affiant contacted the Petitioner and informed him of the intention to abolish the position of Supply Chain Coordinator. That owing to the travel and movement restrictions, it was not possible to have a physical meeting with him. The Petitioner was therefore invited to ask questions or raise any concerns so that the company would respond to them.

That on 3rd June 2020, the Petitioner requested for his employment to be extended to 31st December 2020 to support him due to the COVID-

19 situation.

On 4th June 2020, the Human Resource Manager spoke to the Petitioner to understand this request in more detail, and she explained that the Company would give some further consideration to this. That the Human Resource Manager tried to arrange a follow

up call on 8th June 2020 but the Petitioner was off work sick.

The Affiant avers that he shared with the Petitioner confidential information, which demonstrated that the option to outsource certain functions was in the end not cost effective, which made it necessary for the respondent to review its organisation structure.

The Affiant avers that on 10th June 2020, together with the Human Resource Manager, he had a follow up discussion with the Petitioner to explain that the company was not in a position to extend his employment to the end of the year because of the organisation plans. That the Petitioner was also informed that the company had offered to enhance the separation package to provide him with financial support whilst he was seeking a new role.

The Affiant avers that the Respondent recognised that the COVID-19 situation was making the employment situation more challenging. In consideration of that, the company was prepared to offer an additional month's pay to the Petitioner. That the details of the package which was communicated to the Petitioner equated to an overall gross pay equivalent to nine (9) months' pay. That the Petitioner rejected the respondent's generous offer.

The Affiant explains that the decision to abolish the position of supply chain coordinator is not on account of liquidity problems. That on the contrary, it is to maximise the efficiency of its business model to ensure that the respondent maintains a competitive edge. That other emerging markets were generating higher revenues with a smaller staff complement and therefore cost base.

The Affiant avers that the Petitioner had failed to demonstrate what was unlawful and/or unconstitutional in the Respondent's decision to further review its structure and abolish the position of supply chain coordinator. That the redundancy process had been undertaken in accordance with the law, as the Petitioner had been notified of the intention to declare him redundant. This notice lapsed on 2nd July 2020 after which the respondent would be entitled to terminate the Petitioner's employment

That contrary to the Petitioner's allegation, the restructuring was not due to the pandemic. That there was no claim by the respondent that it is performing poorly. That the Petitioner was offered an enhanced severance package on certain terms. That the respondent was at liberty to withdraw the enhanced package.

The Respondent prayed that the application be dismissed with costs.

Submissions by the Parties

The parties were heard on both the application and the petition on 7th July 2020. Mr. Kilenyet for the Petitioner summarised the facts as already set out above. He submitted that the first redundancy carried out by the Respondent in March 2020 was in compliance with the law. That the second redundancy is what the Petitioner is disputing. He submits that the letter of intention to declare the Petitioner redundant dated 2nd June 2020 goes against the assurance that the Petitioner had been given that he was no longer at risk of redundancy. That the Respondent did not comply with the requirements under Section 40(1) of the Employment Act as no selection criteria was adopted in the second phase of redundancy. Further, that no reasons were given for the redundancy. He submitted that the redundancy targeted the ejection of the Petitioner from the Respondent.

He submitted that the Labour Officer was not notified of the second redundancy and that there is no evidence of any consultation on the second redundancy. That the Respondent did not demonstrate that the Petitioner cannot be deployed or engaged in any other position leaving redundancy as the only option.

Counsel submitted that by virtue of the fact that the Petitioner was the only employee targeted in the second redundancy, he was discriminated and the redundancy was malicious. That the Respondent failed to explain why the Petitioner was being declared redundant only two months after reassurance that he was not at risk of redundancy. He submitted that the Respondent had confirmed that outsourcing was not cost effective and did not explain why the Petitioner's duties were being outsourced. He submitted that the Court should always opt for lower risk rather than high-risk injustice, citing and relying on the decision of Wasilwa J. in the case of **Florence Adhiambo v Wananchi Telcom Limited & Another (2017) eKLR**.

For the Respondent Ms. Michi Kirimi, Counsel appearing for the Respondent submitted that notice of intention to declare the Petitioner redundant had run its course and what was before the Court were prayers 3 and 4 of the application.

She submitted that the Petitioner had not set out any grounds to support the prayers to the effect that no other employee was declared redundant or that notice was not issued to the Labour Officer. She submitted that reorganisation is a continuous process. That the Respondent started the process in February 2020. That the head count was indicated as six employees. She submitted that the notice to Labour Officer in February 2020 covered the Petitioner's redundancy in June 2020, which was communicated to employees.

She submitted that a whole new structure was being put in place to optimise the efficiency of a smaller chain. That upon further review after it was rolled out it became clear that some costs required further review as what had been proposed was no longer making economic sense.

Ms. Kirimi submitted that the assertion that the Petitioner was not consulted is not borne out of the documents before the Court. She

submitted that the new structure was discussed with the Petitioner on 2nd June 2020. That after considering the notice the Petitioner's only request was that separation be extended to December 2020 so that he could prepare for the change. That in response the Respondent offered him a month's pay and an additional notice to access counselling support.

Ms. Kirimi submitted that it is not true that the Petitioner was not given reasons for the redundancy. Further, that there was no need for a second notice to the Labour Officer. That should the second notice be necessary, the Respondent was ready to give the same.

On the issue of selection criteria, Counsel submitted that this would not arise as it was only one position to be impacted. She submitted that the fact that the Petitioner secured a position in February 2020 did not disentitle the Respondent from relooking into the process and carrying out further redundancy.

Ms. Kirimi submitted that the Petitioner has not disclosed any constitutional violations. She relied on her bundle of authorities.

On the case of **Florence Odhaimbo v Wananchi Telkom** relied upon by the Petitioner, Ms. Kirimi submitted that the circumstances were different from the instant case as in the said case there were no consultations and notice.

She urged the Court to dismiss the application and petition as no prima facie case had been established by the Petitioner and the balance of convenience tilted in favour of the Respondent.

By way of rejoinder, Mr. Kilenyet submitted that the notice of March 2020 was specific on the redundancies in March 2020 and lapsed on 13th March 2020. That the notice also informed the Labour Officer that the employees had been invited to apply for roles in the new structure. That the Petitioner was not affected by that redundancy since he secured a place in the new structure.

On the Respondent's assertion that there was consultation with the Petitioner, Counsel submitted that no evidence had been presented to Court in the form of minutes or even an invite for such consultation. He further submitted there was no notice to Labour Officer.

Determination

I have considered all the pleadings by both parties, the documents and authorities they rely upon. I have further considered the Respondent's skeleton submissions dated 25th June 2020 and oral submissions by Counsel. It is important to note here that after the oral submissions by Counsel on 6th July 2020 there were further developments as have been set out in the affidavits filed by the parties. The main developments are set out in the grounds supporting the Respondent's notice of motion dated 12th October 2020, which I reproduce below: -

Orders sought

1. *The Respondent be granted leave to file a further Affidavit.*
2. *The Further Affidavit of Kennedy Ouma sworn on 12th October 2020 and the exhibit marked "KO-2" filed herein be deemed to properly filed and served.*
3. *The costs of this application be in the cause.*

Grounds in support thereof

- a. *The hearing of the Petition and Application dated 15th June, 2020 was conducted on 6th July, 2020. At the hearing, one of the issues raised by the Petitioner was whether or not a fresh notice of intention to declare a redundancy ought to issue to the Labour Office.*
- b. *As this was the first time the issue of a fresh notice was coming up in the proceedings, the Respondent indicated that it would proceed to issue the notice to the Labour Office. The said notice was indeed issued to the Labour Office on 7th July 2020.*
- c. *There have been developments subsequent to the hearing of 6th July, 2020 in the matter which have been set out in the Further Affidavit of Kennedy Ouma filed herein that are required to be brought to the Court's attention for just and fair determination of the matter;*
 - i. *The Petitioner's employment with the Respondent came to an end on 7th August, 2020.*
 - ii. *The Petitioner has failed, refused and/or neglected to return company property belonging to the Respondent and complete the handover process, despite numerous reminders.*
 - iii. *The Petitioner's final dues have been paid to him.*
 - iv. *Efforts to settle the matter have not been successful.*
- d. *The Further Affidavit of Kennedy Ouma filed herein is necessary for the court to be apprised of the status of the matter.*

e. *The documents produced as annexures to the further affidavit of Kennedy Ouma are necessary to enable the Court make a full and fair determination of all the issues in dispute in the matter.*

f. *It is in the interests of justice and the expeditious disposal of the matter that the application be allowed as prayed.*

These grounds have been considered in the determination herein in view of the fact that the Respondent's further affidavit of Kennedy Ouma sworn on 12th October 2020 and the annexures thereto was admitted on record.

The issues for determination in my view are whether the notice to declare the Petitioner redundant was valid, whether the Petitioner's constitutional rights were violated by the Respondent and if the Petitioner is entitled to the orders sought.

Notice of Intention to Declare Redundancy

It is common ground that the Respondent first issued a notice of intention to declare redundancy to the Petitioner on 3rd February 2020. This notice gave reasons for redundancy.

The letter had also given notice of open positions, which the Petitioner successfully applied for. Consequently, he was issued with a fresh letter of appointment to the position of Supply Chain Coordinator. The letter dated 20th February 2020 further assured the Petitioner that he was no longer under threat of redundancy. The letter is reproduced below –

“Private and confidential

Wilson Waweru Imports/Exports Officer

20 February 2020

Dear Wilson

Following on from the Notice of Intention to declare redundancy letter, issued on 3 February 2020, I write to confirm the outcome of the process.

Further to the consultation discussions on 3 February, and the subsequent interview on 6 February, I am pleased to offer you the position of Supply Chain Coordinator in the new organisation. Please find attached the job description for the role.

Therefore, you are no longer at risk of redundancy following on from the recent announcement to reorganise the Kenya Team.

Please do not hesitate to contact me if you have any further questions.

Please: could you sign and return one copy of this letter (scanned is fine).

I look forward to working with you in the future.

Yours faithfully

Rebecca Woolridge

HR Manager, UK and Emerging Markets”

[Emphasis added]

The Petitioner was further issued with a letter dated 19 March 2020 with regards to his new position and the subsequent salary increase as a result of the same. The letter is reproduced below: -

“Private and confidential

Wilson Waweru Imports/Exports Officer

19 March 2020

Dear Wilson

With effect from 16 March 2020, I am delighted to confirm that your salary will increase to 2,500,000 KES per annum. The salary increase recognises the additional responsibilities that you have taken on as part of your new role.

There are no other changes to your terms and conditions of employment.

Please can you sign and return one copy of your letter.

Yours faithfully

Rebecca Woolridge

HR Manager, UK and Emerging Markets”

It is further common ground that the Petitioner was issued with another letter of intention to declare him redundant dated 2nd June 2020. The letter is reproduced below. I will make reference to the letter again hence the need to reproduce it here:-

“Private and confidential

Wilson Waweru

Imports/Exports Officer

2 June 2020

Dear Wilson

Notice of Intention to Declare Redundancy

We refer to the discussion with you on 2 June 2020.

Organisational Change

In March 2020, Ingredion made changes to the Kenya organization to accelerate sustainable profitable growth i.e. Ingredion extended their distributor partnership with IMCD by transferring more than 70 customers previously handled directly by Ingredion to IMCD Kenya.

Since the implementation of the new structure, Ingredion has continued to review and monitor the new structure to ensure that it is ‘fit for purpose’ to deliver our growth strategy. Specifically, Ingredion has focused on the support functions such as HR, Finance and Supply Chain to ensure that the services can be delivered in the most efficient and cost-effective way.

As a result of this review, Ingredion has made the decision to implement a new business model relating to Supply Chain Activities. This will include insourcing some activities to the Ingredion South Africa, outsourcing some supply chain activities to our partner DB Schenker, and allocating some responsibilities to the Finance Kenya team. This will provide efficiencies for the business.

Risk of Redundancy

Because of this restructuring, I am sorry to have to confirm that your job has been identified as one of those that will be impacted by the restructuring, and that with effect from today you are being served with notice of the intention to terminate your contract for reason of redundancy. The notice will run for a period of not less than 30 days.

The Company will consult with you regarding the reasons for the business change, and the implications for your role. We encourage you to provide your feedback, ask questions and raise any concerns during this time. Please speak to your Line Manager or HR if you have any questions.

Open Positions

Ingredion does not currently have any suitable open positions available.

Redundancy Terms and Conditions

Your anticipated last date of employment is 1 July 2020. Ingredion will confirm the final leave date in due course.

In this event, you will be entitled to receive the following redundancy package: -

Notice pay in accordance with your contract of employment severance pay of 1 month’s basic pay for each completed year of service.

Salary to the last date of employment.

Accrued leave if any is outstanding at the last date of employment.

Outplacement service support.

All the above payments will be net of applicable taxes and statutory deductions.

You will also be issued with a Certificate of Service.

The statutory redundancy payment in Kenya is based on 15 days basic pay for each year of service. Ingredion have enhanced this amount to 1-month's basic pay for each year of service to support you whilst you seek alternative employment.

The enhanced redundancy payment is provided entirely at the discretion of the Company. The enhanced redundancy payment is in consideration of and subject to you signing a Release and Discharge. This will be provided to you separately.

Further support

I appreciate that this can be an unsettling and difficult situation for everyone involved. Therefore, please let me know if the Company can support you in anyway.

For any further information regarding what impact this process has on your position, please contact myself or Rebecca Woolridge, HR Manager, UK and Emerging Markets.

Please do not hesitate to contact me if you have any further questions.

Yours faithfully

Kennedy Ouma

Business Director Africa"

It is this letter that caused the Petitioner to file this suit. The Respondent's position is that it had a right to continue with restructuring and that it did not have to notify the Labour Officer again after the notification on 3rd February 2020. The Petitioner disagrees.

The 3rd February 2020 notice to the Labour Officer is reproduced below: -

"Private and Confidential

The Labour Officer

Nairobi Area

Room 16, 16th Floor

Nyayo House

NAIROBI

3 February 2020

Dear Sir,

RE: Notice of Intention to Declare Redundancy

Pursuant to section 40(1)(a) of the Employment Act No, II of 2017, we hereby notify you that we intend to undertake a restructuring process which may result in the termination of employment of six employees on account of redundancy. This is due to the streamlining and reorganization of our business, which will result in the downsizing of the operations in Kenya.

The impacted employees have been invited to apply for roles in the new structure. Upon an evaluation process, the employees who are not retained will be declared redundant with effect from 13 March 2020.

In declaring the redundancy, every measure has been taken to ensure compliance with the requirements of Section 40 of the Employment Act. The employees have been notified of the intent to declare a redundancy. We will also during this period be consulting with the employees regarding various aspects of the intended redundancy.

We confirm that the severance payment as stipulated by law will be paid out to the employee as follows:-

- (a) 15 days' pay per year of service.
- (b) Notice pay.
- (c) Salary to the date of termination.
- (d) Leave accrued and not taken.

Kindly acknowledge receipt of this letter by stamping the copy forwarded herewith.

Yours faithfully

SIGNED

Kennedy Ouma

Business Director Africa”

[Emphasis added]

The second paragraph of the letter is relevant. It states that out of the six employees targeted for redundancy, only those not retained in the new structure will be declared redundant with effect from 13th March 2020.

The Petitioner was not impacted by that redundancy and therefore that notice could not apply to his redundancy in June 2020 whose reasons were different from the redundancy notice of 2nd February 2020.

The Respondent admitted this and indeed issued a fresh redundancy notice to the Labour Officer dated 7th July 2020 while this suit was pending in court.

This admission itself is proof that no notification was sent to the Labour Officer as required under Section 40(1)(b) of the Employment Act.

The Petitioner also faulted the reasons for redundancy. According to him, there was malice and discrimination in his selection due to the fact that he was not working during lockdown. Both parties have submitted correspondence during the period relating to the Petitioner's failure and/or inability to report for work.

I have considered the material placed before the court and I am unable to agree with the Petitioner that he was singled out for redundancy due to his inability to report to work during COVID 19 lock down or that there was malice and/or discrimination. I find no proof of either malice or discrimination. Specifically, the Petitioner did not establish any malice or discrimination.

Whether the Petitioner's Constitutional Rights were violated

The Petitioner cited violation of Articles 27, 28, 41, 47, 165(3) & (6) and 260.

I have already found above that there is no proof of discrimination.

Thus the Petitioner has not proved violation of Article 47(5) which would be the relevant provision for discrimination.

The Petitioner has not adduced any evidence in respect of violation of Article 28 and neither did he adduce any evidence to support violation of Articles 41 or 47. He further did not demonstrate the relevance of Article 165(3) and (6) or Article 260 to this suit or his prayers.

I find that the Petitioner has not demonstrated or proved violation of any of the provisions of the Constitution he relied upon or any other constitutional provision.

Remedies

The Petitioner has demonstrated that there was no notice to the Labour Officer, which notice was only sent after he filed this suit.

Section 40(1) of the Employment Act is categorical that an employer SHALL NOT TERMINATE A CONTRACT OF SERVICE ON account of redundancy unless it has complied with the requirements under (a) to (g) thereof. Section 40(1)(a) as read with 40(1)(b) require notification of both the employee and the Labour Officer at least one month before the redundancy, of the intention to carry out the redundancy. (Refer to **Thomas De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR**.)

For such notice to be valid, it must be a notice of at least one month to both the employee and the Labour Officer. Notice to one without the other is not valid notice. The Section provides –

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the Labour Officer;

Both the employee and the Labour Officer are to be notified of the intended redundancy at least one month in advance. I find that there was no valid notice to either the Petitioner or the Labour Officer as the notice to the employee is dated 2nd June 2020 while the notice to the Labour Officer is dated 7th July 2020 and therefore begs the question; When did the notice to the employee and Labour Officer as anticipated under Section 40(1) start to run? Is it 2nd June or 7th July 2020? Each of the notices is supposed to be issued at least one month before the redundancy. In this case, the Petitioner was terminated before the notice to the Labour Officer was issued.

I thus find the redundancy unlawful due to want of valid notice of intended redundancy to either the Petitioner or the Labour Officer. I accordingly declare the redundancy unlawful and amounting to unfair termination.

Punitive Damages

The Petitioner prayed for punitive damages. Punitive damages are ordinarily awarded to punish a person who acts maliciously and usually against servants of the Government who have acted in an oppressive, arbitrary and unconstitutional manner. The Petitioner has not demonstrated that he qualifies for award of punitive damages.

Damages for Unfair Labour Practices

As I have already held above the Petitioner has not proved unfair labour practice under Article 41(1) of the Constitution. He is thus not entitled to damages under this head of claim.

Damages for Unfair Dismissal

Having found that there was no valid redundancy notice the Petitioner's termination was unfair under Section 45 of the Employment Act for failure to comply with statutory procedure for redundancy.

In addition, I find that the Respondent violated the Petitioner's legitimate expectation. The Respondent had by its letter to the Petitioner dated 20th February 2020 assured the Petitioner that: "... you are no longer at risk of redundancy following on from the recent announcement to reorganise the KENYA Team." See letter dated 20th February 2020 above.

This promise was also made in the notice of intended redundancy to the Labour Officer dated 3rd February 2020 (also reproduced above) where the Respondent intimated that –

"The impacted employees have been invited to apply for roles in the new structure. Upon an evaluation process, the employees who are not retained will be declared redundant with effect from 13 March 2020.

I therefore find the Respondent liable for breach of legitimate expectation.

Taking into account all the circumstances of his case, I award the Petitioner compensatory damages equivalent to 5 months' salary in the sum of **Kshs.1,073,095/=**.

I have further noted from the further affidavit of Kennedy Ouma sworn on 12th October 2020 that the severance pay for the claimant was tabulated at 15 days per year worked. In the notice sent to him which the Respondent relied on to declare him redundant, severance pay was stated to be at the rate of a month's pay for each year of service. The Respondent is directed to adjust the tabulation of the Petitioner's severance pay accordingly and pay him the difference.

The Respondent shall pay the Petitioner's costs of this suit and interest on decretal sum shall accrue from date of judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF APRIL 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 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.

MAUREEN ONYANGO

JUDGE