REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. E273 OF 2021

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,

HOSPITALS & ALLIED WORKERS.....CLAIMANT

VERSUS

THE NAIROBI HOSPITAL.....RESPONDENT

RULING

1. The Claimant herein, the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals & Allied Workers (KUDHEIHA) filed a Notice of Motion application dated 26th March 2021 seeking to be heard for Orders:

i. Spent.

ii. Spent.

iii. THAT upon hearing and determination of this Application inter-partes, this Honourable Court be pleased to make a temporary order staying the intended staff reduction /laying-off employees, who are members of the Claimant Union, disguised as restructuring by the Nairobi Hospital.

iv. THAT pending the hearing and determination of the Main suit, this Honourable Court be pleased to make a temporary order staying the intended staff reduction /laying-off employees, who are members of the Claimant Union, disguised as restructuring by the Nairobi Hospital.

v. THAT the costs of this application be in the cause.

2. The Claimant's motion is premised on the grounds that the Claimant/Applicant represents employment interests of employees employed by the Respondent, within the scope of the Claimant Union representation and that the CBA it has with the Respondent is still in force and dates back to April 2019. The Claimant asserts that the Respondent has given two Notices dated 24th March, 2021 and 10th March 2021 on its implementation of a purported restructuring intended to take effect from 2nd April 2021. The Claimant also asserts that the Respondent has been experiencing shortage of beds for admissions of patients due to rise in the number of patients being admitted over the last 8 months due to the COVID-19 PANDEMIC yet it falsely claims experiencing a shrink in business due to the said pandemic. The Claimant asserts that the Respondent now wants to use this excuse to lay-off certain targeted employees who are members of the Claimant union and employ certain persons of their choice contrary to the law, without justification and without following the due procedure provided for in practice and in law. Further, that the Respondent's ill-intended wrong actions are despite the fact that its employees who are the Claimant union's members have throughout undergone yearly performance appraisal since they were employed and none has been found to be incompetent. The Claimant asserts that the Respondent has employed unfair Labour practices and should be stopped by this Honourable Court and that no criterion has been set out for carrying out the laying-off of the employees which is disguised as restructuring and that unless this Court stays the intended actions of the Respondent, the same shall cause the said employees serious financial embarrassment, loss of employment, loss of source of livelihood and further result in miscarriage of justice. In support of the motion the Claimant filed a Supporting Affidavit sworn on 26th March 2021 by its Secretary General, Albert Njeru Obed who annexed in his affidavit: copies of the notices by the Respondent, the CBA and evidence that the Hospital business is going on as usual. He deponed that the Respondent's actions totally violate current Labour Laws and are unacceptable in a civilized society. Further, that it is an established fair Labour practice that an employee who performs the functions of office shall not be victimized, discriminated, removed from office, demoted in rank save for very valid grounds as provided under Section 44 read with Sections 43 and 45 of the Employment Act, 2007.

3. The Respondent's Replying Affidavit was not in the Court file or in the e-filing system as at the time of hearing of the motion and even on

the 17th April 2021 when this Ruling was being prepared. Parties articulated their respective positions on 14th April 2021 virtually. Mr. Jaoko for the Claimant/Applicant stated that the Respondent has filed a Replying Affidavit dated 14th April 2021 which affidavit he submitted Claimant/Applicant entirely opposes. He referred to the Respondent's affidavit in reply at paragraphs 3, 9, 10, 11, 12 and 13 in that order, which assert that there is no notice and that the Claimant's Motion is defective for being premature. He submitted in opposition that there is indeed notice and that the Claimant's Motion is meritious and not premature. He argued that the notice dated 12th March 2021 addressed to the General Secretary of the Claimant/Applicant and which reads at the penultimate paragraph: "*There will be staff reduction*" thus indicating that the Respondent intends to reduce the number of staff. Further, that the said notice is signed by the CEO and copied to the Minister of Labour among others. The Claimant/Applicant's advocate further referred to para 5, 15 and 20 of the Replying Affidavit where in summary the Respondent says they are not prohibited and can remove the intended employees under Section 40. He submits that the same is wrong as the law does not allow an employee to be removed just anyhow and that the Respondent is seeking to remove some staff contrary to Article 236(2) (a) and (b) of the Constitution. That in this regard, the Constitution is supreme and overrides the Employment Act. He further referred to para 18 of the Replying Affidavit whereat the Respondent asserts they inevitably have to remove some employees from employment because of the economic downturn caused by the Covid-19 Pandemic. He submits that the truth is that the Respondent is overwhelmed by the flood of new admission of patients as a result of the Covid-19 Pandemic as shown at page 28 of the Motion. He submitted that there is a letter dated 23rd March 2021 signed by Kenya Medical & Dentists Medical to the Director Medical Services, Ministry of Health with analysis showing the Respondent Hospital listed at number 2 with 36 ICU beds, charging between Kshs. 130,000/- to Kshs. 300,000/- per admission and indicated to be full to capacity. Counsel submitted that the Respondent cannot be full to capacity then say it was suffering economic downturn. He submitted that the Respondent is blowing hot and cold and has some people in mind it wishes to remove. The Claimant/Applicant's advocate finally referred to para 16 read with para 21 of the Respondent's Replying Affidavit. He submitted that the Claimant has established a *prima facie* case and that the reason the letter appears at pages 26 and 27 of the Motion is because the Respondent has a sizeable number of employees who are Claimant's members. He referred the Court to pages 41, 59, 60, 61 and 62 of the Motion with a list between Claimant and Respondent and submitted that there is a danger in the number of employees who will lose employment if the restructure is not stayed. He prays there be grant and enforcement of the orders.

4. The Respondent was naturally opposed and Mr. Bwire for the Respondent stated that the Application is opposed by Affidavit of the CEO of the Respondent. He submitted that the Claimant has no *locus* to sustain or file the suit as admitted in the Claimant's own pleadings at *Annexure A001* at page 24, 25, 26 and 27 of the documents accompanying the Supporting Affidavit. He submitted that important is the letter of 10th March 2021 from the CEO of the Respondent to the Claimant. He further submitted that the letter at page 26 and 27 is not a notice within the tenets of Section 40(1) of the Employment Act and was written in good faith to open dialogue and only for purposes of mental preparation. That before declaration of intended redundancy, the particulars of the employee have to be mentioned and reason of restructuring given. He submitted that the notices under Section 40(1) can only issue thereafter and that the Claimant is intruding into the management of the Respondent and that there is no jurisdiction to restrain the restructure as it can only be so after decision to restructure is given. That the apprehension by the Claimant has no basis as the notices under section 40(1) do not terminate employee and that Sections 40(1), 43 and 45 would be available where the Court can give relief. He submitted that Article 236 relates to public officers and under Article 260, public officers are deemed to be staff holding public office and that the Respondent being a private entity, the same does not apply to it. He submitted that the letter on hospital beds only outlines ICU beds being full due to Corona Virus but does not outline the ordinary beds which are not full and that the said letter is not an audit report. He invites this Court to take judicial notice of the report of Corona Virus on the economy. He further submitted that there is no *prima facie* case established and cited the case of **Giella *v* Cassman Brown**. He submitted that the suit is premature. Further, he submitted that the members of the Claimant seeking relief from Court are employees who do not enjoy security of tenure and the law allows a separation as per provisions of the law. He submitted that Section 12 of the Labour Relations Act provides for how the benefits can be calculated and if a redundancy is declared the employees will be compensated. He submitted that there is no loss that cannot be compensated by damages and posed the question whether the Court cannot allow a health care institution to better harness its resources to give better health care. He submitted that the Court would be micromanaging the entity if it interfered. He argued that the CEO merely warned the Claimant that a process may follow on restructure and thus submitted that the restructure will affect both members of the Claimant and the management cadre. He prayed the process be permitted to proceed.

5. In a brief rejoinder, the Claimant/Applicant's advocate submitted that this Court has jurisdiction and that the Respondent's "evidence" from the bar that they are suffering economic downturn is not adequate rebuttal.

6. The elements to be met before a prayer for injunction is granted were well stated in the celebrated case of **Giella *v* Cassman Brown *&* Co. Ltd [1973] E.A. 358**. In that case it was held that: an applicant must show a *prima facie* case with a probability of success; that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; and if the court is in doubt, it will decide an application on the balance of convenience. Further, the Court of Appeal in **Nguruman Limited *v* Jan Bonde Nielsen *&* 2 Others [2014] eKLR** held that all the three conditions required for grant of interlocutory injunction are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially, and further held that:

> "*The party on whom the burden of proving a* prima facie *case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...'*

7. The Claimant's case is that the Respondent intends to undertake a redundancy exercise disguised as restructuring and should be stopped for not following the mandatory procedure as prescribed in Section 40(1) of the Employment Act. The Respondent's case is that the suit is to obstruct a restructuring that would lead to declaration of redundancy and that the same is premature as they are yet to commence the process. It is the Respondent's submission that it intends to first undertake a restructure process then issue the appropriate notices as under Section 40 in the event the process leads to redundancy. In **Kenya Airways Limited *v* Aviation *&* Allied Workers Union Kenya *&* 3 Others [2014] eKLR**, the Court of Appeal upheld the view that the decision to declare redundancy has to be that of the employer and the Court quoted with approval the case of **Aoraki Corporations Limited *v* Collin Keith McGavin; CA 2 of 1997 [1998] 2 NZLR 278** where the Court of Appeal of New Zealand held that it is for the employer to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business. The Court of Appeal of New Zealand further held that to impose an absolute requirement that an employer must consult with all potentially affected employees in making a redundancy decision would be inconsistent with the employer's *prima facie* right to organize and run its business operation as it sees fit. Further, in **Rose Kosgei *&* Another *v* Kenya Airways**

PLC [2020] eKLR, the Court observed as follows:

> *"28. …the issue of redundancies concerning the Respondent's employees herein is a matter which this Court has adjudicated upon in other Causes with the Court making a finding that there should be caution and Parties should consult before the redundancies are affected. The Applicants seem to be saying that in this case there has been no consultation and as such the process being employed by the Respondents is flawed and disadvantages them.*
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> *29. Due to this contention, the best way to handle this issue is to have the Parties consult on way forward on the restructuring with the help of a Conciliator. In the circumstances, I will refer this issue to the Labour Commissioner for conciliation and the same be conducted within 30 days. In the meantime, the status quo be maintained.* (emphasis mine)

8. It is my considered opinion that restructuring and redundancy are two separate and distinct processes. Section 40(1) of the Employment Act prohibits, in mandatory tone, termination of a contract of service on account of redundancy unless the employer complies with the conditions thereat including issuance of notices to the union and specific notices to employees and the labour officer in writing. The process of restructuring on the other hand is not expressly provided for in Statute.

9. It is clear from the wording of the Inter-Office Memorandum dated 24th March 2021 from the Respondent's CEO to all staff of the Respondent that the same was a communication/warning on an intended organisational restructuring. Since the Respondent has admitted in its submission in Court and further in its letter dated 10th March 2021 to the Claimant/Applicant's Secretary General, that the said communication was simply meant to open dialogue, the proper solution would be to have the Parties consult on the way forward on the restructuring. Since Courts are loath to interfere with managerial prerogatives the matters at play are within the purview of the parties to deal with under the dispute resolution mechanisms under the CBA or through the conciliatory process at the Ministry of Labour. The application is dismissed but each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2021

NZIOKI WA MAKAU

JUDGE