REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. E166 OF 2021

KENYA UNION OF DOMESTIC HOTELS,

EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS.....APPLICANT

-VERSUS-

UNITED STATES INTERNATIONATIONAL UNIVERSITY - AFRICA

VICE CHANCELLOR- PROF PAUL ZELEZA.....1ST RESPONDENT

UNITED STATES INTERNATIONAL UNIVERSITY-AFRICA.....2ND RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 23.2.2021 seeking the following orders:

a. That this Honourable Court be pleased to, in the interim issue orders restraining the Respondents, from carrying out the redundancy exercise vide their letter dated 25.1.2021 addressed to all workers and two unions giving one month notice thereof or through any other letter or otherwise in any other way until this matter is heard and determined

b. That the Honourable Court do find the Respondents 'action as having been against the provisions of the Employment Act 2007 section 40, the Constitution 2010 Articles 27,28, 41 and 47 on fair labour practices, fair administrative action hence unfair and unlawful.

c. That the Honourable Court be pleased to issue permanent orders quashing the intended redundancy in respect of the letter dated 25.1.2021 or any other letter forthwith until parties complete the ongoing discussions and if need be undertake any redundancy in line with the law.

d. That the costs of this application be provided for.

2. The application is premised on grounds that:

a. The parties have a suit, Cause No. 51 of 2019, before Lady Justice Maureen Onyango on the refusal to sign a recognition Agreement and another suit on the unilateral pay cut where redundancy issues have arisen.

b. There is an Order in Cause No. 51 of 2016 restraining the Respondent from unfair labour practices to its members. Unfortunately, the Respondents acting in contempt of the said orders have since executed the pay cuts to some of its members and sent others on unpaid leave.

c. When the Respondents invited the Applicant to discuss redundancy in the name of staff rationalization, the Applicant was categorical that the process was wrong and needed to be suspended for the right procedure to be followed.

d. The Applicant in a letter dated 1.2.2021 requested the Respondent to suspend the redundancy process and in a letter also dated 1.2.2021 the Respondent stated that they had no obligation to inform or involve the union and were doing so out of good will.

e. The Respondent was required to report to the court on 24.2.2021 on the engagement of the Federation of Kenya Employers, staff leadership, unions and the Respondents' management and council regarding its financial status.

f. However, the Respondents are yet to invite the parties for consequent engagements which were intended to amicably settle all outstanding issues including redundancy.

g. The Respondents want to open so many fronts of discussions to create confusion, fear and disorder which will eventually lead to a drop in the existing industrial harmony hence going against the principles behind the enactment of the labour relations Act.

3. The application is supported by the affidavit of Albert Njeru sworn on 23.2.2021.He deposed that it is legally wrong for the Respondents to engage employees on redundancy without the knowledge of the Union.

4. He contended that the proposal by the Respondents to carry out a rationalization exercise is essentially intended to reduce staff is an unfair labour practice while the parties are having discussions on the situation.

5. In response to the application, the Respondents filed a Replying Affidavit sworn on 2.3.2021 by Night Nzovu, the Director-Administration of the 2nd Respondent, in which he deposed that the prayer (b) of the application confirms that the Respondents involved the Union in the redundancy exercise; and that prayers (c) and (d) seek permanent orders which cannot be granted before trial of the suit.

6. He deposed that the Applicant has acknowledged that there is no recognition agreement between the parties and the Respondents have merely out of abundance of good will engaged the Applicant on that basis and not as a matter of right. Further, he deposed that the Applicant lacks *locus standi* to bring the present application and Claim.

7. He contended that the pleadings in Cause No. 51 of 2019 and Cause No. E525 of 2020 do not touch on the issue of redundancy and urged that if the Court finds that the redundancy issue has been raised in the said suits, then the instant should be stayed pending the hearing and determination the same.

8. He contended that the was redundancy commenced pursuant to the provisions of the law and will be finalized in accordance with the laid down procedures; that the Applicant has not demonstrated or proved the confusion/disorder caused by the redundancy process; and that the rationalization and cost efficiency measures are necessary in order to save the 2nd Respondent and to ensure its survival and smooth running as the situation has been worsened by the effects of Covid-19 which resulted in the decline of student enrollment in the university.

9. He averred that if the redundancy measures are not undertaken, the 2nd Respondent is likely to shut down and this will not only affect the Applicant but also the current and prospective students of the 2nd Respondent.

10. He contended that the Respondents have invited the Applicant for consultative meetings on several occasions including but not limited to the meeting of 3.2.2021, 11.2.2021 and 18.2.2021 but has refused, and it appears to have had a predetermined solution on the issue. He urged this Court to decline the Applicant's invitation that both the Applicant and the Court be involved in the 2nd Respondent's day to day management or operations by dismissing the application and claim.

Applicant's submissions

11. The Applicant submitted that the Respondents issued redundancy notices before consulting it, and as such the process was contrary to the mandatory provisions of section 40 (1) of the Employment Act. It contended that once the procedures were offended the whole exercise did not fit within the threshold of redundancy. It further argued that its effort to have the Respondents to regularize the process was adamantly and without regard to the law rejected. Therefore, it submitted that the Respondents actions were illegal, null and void for failure to comply with mandatory procedures set out under section 40 of the Employment Act.

12. It denied being against redundancy but clarified that its interest was to see the exercise was done within the lawful procedures set by the law. It submitted that for redundancy to be effected, proper restructuring must ensue as had been proposed in the meeting concerning unilaterally effected pay-cuts, pensions and leave.

13. It submitted that the report by faculty, staff and unions identified that the Respondents had a downward trend that started in 2017. It submitted that the Respondent must own up that there is need for forensic checks. It further submitted that the financial valuable summary 2014 -2020 shows huge spending of funds as the current liabilities between the years 2015 to 2020 rose form 513, 206 to 876,550.

14. It submitted that the Court ought to be interested and enquire why the Respondents would in one letter issue a notice of intended redundancy while in the body of the same letter propose that a restructuring will first ensue.

15. It relied on **Eastleigh Mattress Limited v Cabinet Secretary Ministry of Labour Social Security and Services & ano [2015] eKLR** where the Court held that the notices were defective because they were not made to the Union as provided under section 40 (1) (a) of the Employment Act.

16. It argued that in 2017 it recruited 167 employees out of 228 unionisable employees but recognition was denied. It submitted that the refusal to give it recognition for collective bargaining is curtailing the union's duties of adequate representation. Further, it submitted that the issues of restructuring/reorganization, cost cutting and outsourcing are also aimed at curtailing signing of the recognition agreement and derailing of CBA negotiations.

17. It argued that the Respondents' actions of meeting the workers first without any form of representation amounts to intimidation. It submitted that the Court of Appeal in **Team Accounting Limited v Judith Brake [2014] NZCA 541** confirmed previous decisions of the Employment Court that employers' reasons for making an employee redundant were to be vigorously tested.

18. It submitted that Kenya is a state party to the International Labour Organization (ILO) and is bound by **Article 13 of Recommendation No. 166 of the ILO Convention No. 158 Termination of Employment Convention 1982** which requires consultation between the employers and employees or their representatives. It further submitted that the requirement of consultation is implicit in the principle of fair play under section 40 (1) of the Employment Act.

19. It argued that in addition to providing parties with an opportunity to try and avert or minimize terminations, the other objective of a reasonable notice was stated in **Williams v Compare Maxam Ltd** as enabling a union or employees to take early steps and consider possible alternative solutions. It further relied on **Cammish v Parliamentary Service12** and **Article 15 of the Supplementary Provisions to the ILO Recommendation No. 119 Termination of Employment Recommendation 1963.**

20. It relied on **Kenya Engeering Workers Union v Africa Metal Workers Limited [2019] eKLR** where the Court held that section 40 of the Employment Act does not prescribe conclusion of a recognition agreement as a precondition of involving a trade union in the work place.

21. Finally, it submitted that there ought to be massive and conclusive discussions first with the union before bringing employees on board. It submitted that its application should be sustained.

Respondents' submissions

22. The Respondents submitted that the law on redundancy is well settled under section 40 of the Employment Act. They argued that for there to be redundancy, the requirement for notices as anticipated by law has to be met and the employer has to pay the affected employees their dues.

23. They maintained that they complied with the requirement of giving notices, and that it is the issuance of the notices that triggered the present suit. They submitted that this is a demonstration that they complied with the law and procedure envisaged at the initiation stage.

24. They submitted that in **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR** the Court of Appeal held that the applicable redundancy notices are those provided for under section 40 (1) (a) and (b) of the Act and the employer was not required to hold direct consultations with the employee and that a notice given to the union discharged the duty of an employer under the Act.

25. It argued that an employer must always be free to organize and re-organise its operations as long as this is done procedurally. They reiterated that the process of redundancy was necessitated to save the 2nd Respondent.

26. It submitted that the Applicant has not discharged the burden of demonstrating any impropriety or illegality in the manner that the Respondents initiated the proceedings. It argued that the redundancy process has not yet been finalized and the letter to all employees and staff spelt out that the details of the exact positions and staff members would to be communicated. Therefore, according to the respondents, the import of this was to engage in appropriate negotiations and was merely at the very initial stage and should not have triggered the current claim.

27. They submitted that the Applicant was invited to several meetings but elected not to attend some of the meetings thus the suit was prematurely filed. It relied on **Banking Insurance and Finance Union (Kenya) v Kirinyaga District Co-operative Union Ltd & ano [2014] eKLR** where the court held that the notification is aimed at calling into participation the Union and Labour Official to ensure the other provisions of section 40 (1) of the Employment Act are observed.

28. It submitted that the Court in **Kenya Hotels and Allied Workers union v Nairobi Gymkhana Club [2019] eKLR** found the claim to have been prematurely instituted without there being negotiations or exploitations of the available avenues of dispute resolution. They also relied on **Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR** to fortify their submissions on notification and negotiations prior to redundancy.

29. With regard to *locus standi*, they argued that the Applicant acknowledged that there is no recognition agreement between the Applicant and the 2nd Respondent, and consequently, they submitted that the applicant lack the authority and capacity to bring the claim on behalf of the persons they purport to represent.

30. Finally, they reiterated that they have demonstrated goodwill, good faith and adherence to the law and procedure, and prayed for the application to dismissed suit is prematurely brought.

Issues for determination

31. I have carefully considered the pleadings, application, affidavits and submissions filed by the parties, and I agree with the respondents that the order (c) and (d) in the motion are final in nature and therefore not capable of being granted before trial. It follows that, only prayer (b) and (e) can be entertained at this stage. Consequently, the main issues for determination are:

a. Whether the Applicant has the locus standi to institute the suit

b. Whether the Court should restrain the Respondents from carrying out the impugned redundancy

***Locus standi*.**

32. The Respondents averred that the Applicant has no locus standi to institute the suit because there is no recognition agreement between the

Applicant and the 2nd Respondent. The Applicant did not address the issue of locus standi.

33. Section 54 (1) of the Labour Relations Act provides that an employer is to recognize a trade union for purposes of collective bargaining. Recognition is therefore not a requirement for a representation of its members. Membership to a Trade Union gives the Union the right to represent its members because it has a mandate to protect and advance its members' interest.

34. Recently, the Court of Appeal in **Modern Soap Factory v Kenya Shoe and Leather Workers union Civil Appeal No. 37 of 2019 (unreported)** held:

> **"Article 41 of the Constitution of Kenya on labour relations protects the right of every person to fair labour practices and the right, among others, to join a trade union, which in turn has the right to determine its activities. Article 258 of the Constitution on enforcement of the Constitution provides in Article 258(2) (d) that an association acting in the interest of one or more of its members may institute proceedings where the Constitution is contravened or threatened with contravention…**
>
> **A recognition agreement is defined under Section 2 of the Labour Relations Act as an agreement in writing made between a trade union and an employer, group of employers or employers' organisation regulating the recognition of the trade union as the representative of the interests of unionisable employees employed by the employer or by members of an employers' organisation. It is a bilateral agreement between a trade union and an employer on the basis of which the trade union engages with the employer regarding the terms and conditions of employment of its members. It is not the basis upon which the trade union represents its members in court. As the learned Judge correctly stated, the two roles are distinct."**

35. Guided by the foregoing binding precedent, I proceed to hold that the Applicant has the *locus standi* to sue on behalf of its members.

Interlocutory injunction.

36. The principles for grant of an interlocutory injunction were laid out in in **Giella –vs- Cassman Brown & Co. Ltd. [1973] E.A. 360** where the Court of Appeal held that:

> **"The conditions for the grant of an interlocutory injunction are now settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

Prima facie case

37. A Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American of Kenya limited & 2 others [2003] eKLR** as: -

> **"…in civil cases is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."**

38. The Applicant averred that the impugned redundancy process should be stopped because it is proceeding contrary to the mandatory procedure set out under section 40 of the Employment Act. It prayed for the process to be halted in order for the statutory procedures to be complied with and for a solution to be arrived at within the Committee which comprises various stakeholders. It opined that the Respondents ought not to continue declaring the redundancy while parties are seeking solutions.

39. The Respondents stated that that they have so far complied with section 40 of the Employment Act because it is the issuance of the notices that triggered the present suit. They further stated that the application and suit are premature since the Applicant was invited for consultative meetings but refused to attend the meetings slated for 11.2.2021 and 18.2.2021. However, the applicant contended that the letter dated 25.1.2021 was not a redundancy notice but staff rationalization notice.

40. I have considered the material presented by the parties herein and found that indeed, the Applicant was issued with a notice dated 25.1.2021 referenced as "Staff Rationalization Exercise". The notice pin-pointed that it had been issued pursuant to section 40 (1) of the Employment Act and that it served as the one month's notice of the intended redundancy. Consequently, I dismiss the applicant's contention the notice served was not a redundancy notice and proceed to hold that, section 40 (1) (a) of the Employment Act was complied with.

41. With respect to the consultative meetings, the Respondent produced various minutes of the virtual meetings including those held on 22.1.2021 and 3.2.2021 which were attended by Benson Maina, the applicant's Senior Industrial Relations Officer where rationalization was discussed. It is evident from the letter dated 23.2.2021 that the meetings scheduled for 11.2.2021 and 18.2.2021 did not take place due to lack of representation from the Applicant and the Kenya Private Universities Workers Union (KPUWU). Consequently, having snubbed those meetings, the Applicant cannot now cry foul and allege intimidation of its members who have at any point attended a meeting or were engaged by the Respondents.

42. It is now trite law that an employer is free to organize its operations to realize profits provided that it does so within the mandatory procedures set out under the law which provides safeguards to the employees' rights. In this case, the respondent has not established that the impugned redundancy has breached or is about to breach the legal rights of its members. Without demonstration of infringement of a legal right, I proceed to hold that the applicant has failed to prove a prima facie case with chances of success that would justify this court's

intervention by interlocutory injunction.

43. In the absence of demonstrating a prima facie case with a likelihood of success, it is needless to address whether the Applicant shall suffer irreparable injury or if the balance of convenience tilts in its favour. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** where it held as follows:

> **"If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."**

44. Suffice it to say that, even if the Applicant had established a prima facie case with a probability of success, the injunction sought would not issue since it has not proved that its members will suffer irreparable if the order is denied. In my view, if the employees are laid off, and after trial the process is found to have been unlawfully done, an award of damages will adequately compensate them.

45. In addition, I am satisfied that the issue of balance of convenience does not arise since the court is clear in its mind that the applicant has not demonstrated that the rights of its members are being violated by the respondent or that they will suffer irreparable harm.

46. consequently, the application is dismissed with costs.

DATED AND DELIVERED IN NAIROBI THIS 13TH DAY OF MAY, 2021

ONESMUS N. MAKAU

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 April 2020, this ruling has been delivered to the parties online via Google Teams with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE