



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.E403 OF 2021

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS, HOSPITAL AND ALLIED WORKERS (KUDHEIHA).....CLAIMANT

VERSUS

THE NAIROBI HOSPITAL RESPONDENT

RULING

The claimant filed application dated 13th May, 2021 seeking urgent orders that;

- a) *Upon hearing and determination of this application inter-parties, the court be pleased to make a temporary order staying the on-going process of staff rationalisation exercise/redundancy by the Nairobi Hospital against the following claimant union members; Ian Noah Omeno, Benson Chelimo Tuitoek, Jeremiah Muteti Kituku, Leakey Okeyo Warwa, Michael Omollo Masiro, Roselyne Anindo Otiato, Elphas Mbayi Savara, Florence Kamene Mbuti, Brian Nyakwaka Odhiambo and Lilian Ooyi Onyango as communicated in the letters dated 28th pair, 2021.*
- b) *Pending the hearing and determination of the main suit, the court be pleased to make a temporary order staying the on-going process of staff rationalisation exercise/redundancy by the Nairobi Hospital against the following claimant union members; Ian Noah Omeno, Benson Chelimo Tuitoek, Jeremiah Muteti Kituku, Leakey Okeyo Warwa, Michael Omollo Masiro, Roselyne Anindo Otiato, Elphas Mbayi Savara, Florence Kamene Mbuti, Brian Nyakwaka Odhiambo and Lilian Ooyi Onyango as communicated in the letters dated 28th pair, 2021.*
- c) *Costs be in the cause.*

The application is supported by the affidavit of Albert Njeru Obed the secretary general of the claimant union and on the grounds that the claimant is a registered trade union representing employees in the employment of the respondent and through letters dated 30th April, 2021 the respondent declared redundancy affecting several employees (grievants) and members of the claimant Ian Noah Omeno, Benson Chelimo Tuitoek, Jeremiah Muteti Kituku, Leakey Okeyo Warwa, Michael Omollo Masiro, Roselyne Anindo Otiato, Elphas Mbayi Savara, Florence Kamene Mbuti, Brian Nyakwaka Odhiambo and Lilian Ooyi Onyango.

The work performed by the grievants is not superfluous and in fact new recruitments are being carried out to fill their positions. The respondent has been experiencing shortage of beds for admissions of patients due to rise in the number of patients for the last 8 months due to COVID-19 pandemic yet falsely claims that they are experiencing a shrink in business due to the pandemic and are now using it as an excuse to lay off certain targeted employees and bring in certain persons of their choice contrary to the law and without following the due process.

The respondent ill-intended and wrong actions are that despite the grievants undergoing annual performance appraisals, none has been found incompetent. The productivity of the employees has not been found wanting or below average.

Other grounds in support of the application are that the selection criteria used by the respondent is not objective but purely based on improper application of section 40 of the Employment Act based on bad faith and employed unfair labour practices and should be stopped by the court.

The claimant was not consulted by the respondent before declaring the redundancy and the grievants were not given a hearing contrary to section 41 of the Employment Act.

In his affidavit, Mr Njeru avers that through letters dated 30th April, 2021 the respondent declared redundancy and affected the grievants being Ian Noah Omeno, Benson Chelimo Tuitoek, Jeremiah Muteti Kituku, Leakey Okeyo Warwa, Michael Omollo Masiro, Roselyne Anindo Otiato, Elphas Mbayi Savara, Florence Kamene Mbuti, Brian Nyakwaka Odhiambo and Lilian Ooyi Onyango. The work they were

performing is not superfluous and the respondent is recruiting new persons to replace them under the guise of COVID-19 pandemic which action is illegal and without justification in law or in fact.

Through two notices dated 24th and 10th March, 2021 the respondent indicated that they were implementing an unplanned lay off of employees who are members of the claimant but disguised s restructuring. The claimant filed **ELRC No.E273 of 2021** and the respondent denied that there was intention to lay off the employees who are members of the claimant.

The respondent has employed unfair labour practices and should be stopped by the court as such actions are in total violation of the law and unacceptable in a civilised society. The grievants have suffered shock, anguish, eroded self-esteem as a result of loss of source of income and shall be greatly prejudiced by the miscarriage of justice if the orders sought are not granted.

In reply, the respondent filed the Replying Affidavit of Maxwell Maina the acting company secretary of the respondent and avers that the suit is filed in violation of the law and is contrary to the *sub judice* principle pursuant to section 6 of the Civil Procedure Act. The claimant filed **Nairobi ELRC No.E273 of 2021 – KUDHEIHA v The Nairobi Hospital** between the same parties and over the same matter and which is pending before this court. The subject matter is the same and relating to alleged restructuring process.

The claimant was enjoined to amend the claimant in **Nairobi E273 of 2021** to plead any new developments but could not properly and legally file a separate suit as done herein.

Mr Maina also avers that the reliefs sought in the application cannot be granted because the grievants are seeking reinstatement at an interlocutory state contrary to the principles outlined in **Kenya Tea Growers & another v Kenya Plantation and Agricultural Workers Union [2018] eKLR** and in the case of **Richard Muimo Parsitau v Kajiado County Government & 2 others [2014] eKLR**.

The prayers seeking to stop the rationalisation exercise/redundancy pursuant to notice dated 28th April, 2021 has already taken effect and cannot be stopped. The process has already concluded as held in **Eric V.J Makokha & 4 others v Lawrence Sagini & 2 others Civil Application No.20 of 1994** and **Kayla Soi Farmers' Cooperative Society v Paul Kirui & others [2013] eKLR**.

The staff rationalisation and declaration of redundancy were undertaken in strict compliance of the law and CBA with the claimant. There was notification of redundancy and the redundancy was necessary to augment optimal operations of the respondent. The respondent is not hiring as alleged and the attached email in the affidavit of Mr Njeru was written long before the rationalisation and redundancy and the grievants are not employed in the positions advertised.

Ian Noah Omeno was in catering – food production,

Benson Chelimo Tuitoek was in catering-food production,

Jeremiah Muteti Kituku was in catering-food production,

Leakey Okeyo Warwa was in Warwick catering – food production,

Michael Omollo Masiro was in catering – St. Luke's,

Roselyne Anindo Otiato was in catering - ICU,

Elphas Mbayi Savara was in Savara Catering - Pioneer,

Florence Kamene Mbuti was in catering- St. George's,

Brian Nyakwaka Odhiambo was in catering and Lilian Ooyi Onyango was in catering.

The alleged violations to the right to fair labour practices and provisions of section 40 of the Employment Act doe not arise. The claimant has no *prima facie* case to justify the injunctions sought and the suit being *res judicta* should be dismissed with costs.

Both parties attended and made oral submissions.

The court has considered the application, the affidavit and the submissions.

At the core of the claimant's application is the redundancy process undertaken by the respondent. the claimant is seeking for a *temporary order staying the on-going process of staff rationalisation exercise/redundancy* against the grievants and *claimant* union members; Ian Noah Omeno, Benson Chelimo Tuitoek, Jeremiah Muteti Kituku, Leakey Okeyo Warwa, Michael Omollo Masiro, Roselyne Anindo Otiato, Elphas Mbayi Savara, Florence Kamene Mbuti, Brian Nyakwaka Odhiambo and Lilian Ooyi Onyango as communicated in the letters dated 28th April, 2021.

The respondent's case is that the suit is *sub judice* on the grounds that there exists **ELRC Cause No.E273 of 2021 – KUDHEIHA v The Nairobi Hospital** over the same matter of staff rationalisation.

As suit is *Sub Judice* if filed contrary to section 6 of the Civil Procedure Act that;

no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

The basic purpose and the underlying object of *sub judice* is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to prevent multiplicity of proceedings. See **Republic v Paul Kithara Karuk, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR** that;

... the key words in applying sub judice rule is that "the matter in issue is directly and substantially in issue in the previously instituted suit." The test for applicability of the sub judice rule is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. As concluded earlier, the answer to this question is a resounding yes. However, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit or suits.

The claimant has not denied that they filed ELRC Cause No.E273 of 2021 save that such matter relates to different grievants and the issue in dispute is the intended staff reduction/lay-off employees and members of the claimant through what is described as *restructuring by the respondent Nairobi Hospital*.

Whereas the grievants herein through notice dated 28th April, 2021 have their employment terminated, the members represented by the claimant union under **ELRC Cause No.E273 of 2021** were/are disputing the intended restructuring. On the face of it, through the parties are the same and the claimant is representing its members, it is clear the cause of action is different. One relates to a rationalisation that has already taken effect while the earlier suit related to the intention to undertake the rationalisation.

It is not apparent that the grievants subject under **ELRC Cause No.E273 of 2021** is the same who have lost employment in the instant suit or there are still in the service of the respondent. this can only be addressed at a full hearing.

There is no matter of *sub judice*.

Save, to ensure the court has a holistic approach to the subject of rationalisation/redundancy and lay off of employees within the respondent; both files in **ELRC No.E273 of 2021** and the file herein should be placed together and heard before the same Judge.

With regard to whether an injunction should issue staying the on-going process of staff rationalisation/ redundancy process at this instance, the claimant attached Notices issued to the grievants dated 28th April, 2021 and taking effect on 30th April, 2021 a period of one (1) day.

The effect of the notice was that;

Regrettably, your position is among those restructured and has therefore been declared redundant. Therefore in accordance with section 40 of the Employment Act, 2007 we give you notice of redundancy on your positions effective 30th April, 2021.

Termination of employment has taken effect.

The lawfulness of the process and decision leading to termination of employment must be addressed and gone into the merits at a full hearing as to stay the process at this instance would be to direct for specific performance and order reinstatement of the grievants contrary to the section 12(3) of the Employment and Labour Relations Court Act, 2011 read together with section 49(4) of the Employment Act, 2007 and Rule 16(10) of the Employment and Labour Relations Court (procedure) Rules, 2016. An order of reinstatement being a final order, the court must be satisfied that the threshold of section 40 of the Employment Act, 2007 has been breached and that the employer has failed to comply with the mandatory provisions of the law so as to order for specific performance the claimant case is further that the respondent is hiring/recruiting new employees to replace them. Mr Njeru in his Supporting Affidavit dated 13th May, 2021 has attached annexure "B1" a notice *Advert for Employment* which is not dated. It relates to the positions of Front Office Assistants. The grievants are in various positions largely relating to catering, food production and unrelated to the position advertised, which closed applications on 30th April, 2021.

Taking into account the notice issued to the claimants was only for a day, the provisions of section 40 of the Employment Act, 2007 which requires notice be issued for a period of not less than one (1) month. in the case of **KUDHEIHA v Aga Khan University Hospital Nairobi [2015] eKLR** the court held that;

The procedures applicable in a redundancy are therefore set out in law as above. The conditions precedent requires;

a. A notice to the union and the Labour Officer stating the reasons for, and the extent of, the intended redundancy;

b. Non-union employees should receive a personal notice together with the Labour Officer;

c. The selection criteria; and

d. Address the terms of the Collective Bargaining Agreement on redundancy on terminal dues without disadvantaging non-union employees without going into the merits of the main suit at this stage, it will aid the course of justice to hear the main claim expeditiously and on priority basis and taking into account the provisions of section 12 of the Employment and Labour Relations Court Act, 2011 and section 40 and 49 of the Employment Act, 2007.

Accordingly, the orders sought shall not issue at this instance save the following orders are hereby issued;

- (a) file shall be placed together with ELRC Cause No.E273 of 2021 for hearing on priority basis;**
- (b) The respondent shall file defence within the next 14 days and serve the claimant;**
- (c) The claimant shall have a right of reply within 7 days upon service;**
- (d) Pleadings shall close within 21 days from the date hereof;**
- (e) Parties shall attend before the Deputy Registrar on 12th July, 2021 for allocation of a hearing date on priority basis.**
- (f) Costs shall be in the cause.**

Delivered in court at Nairobi this 21st day of June, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

..... and