



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO E011 of 2020**

**KENYA PLANTATION**

**AGRICULTURAL WORKERS UNION.....APPLICANT**

**VERSUS**

**PRIMAROSA FLOWERS LIMITED.....RESPONDENT**

***(Before Hon. Lady Justice Stella Rutto)***

**RULING**

1. The Applicant moved this Court vide a Notice of Motion application dated 28<sup>th</sup> July, 2021 under a Certificate of Urgency. The motion application is supported by the Affidavit of Kenneth Musumba Mbakhila who describes himself as the Branch Secretary of the Applicant.

2. The application seeks the following main orders;

*1. THAT a temporary injunction do issue against the Respondent, its servants and/or agents restraining it from effecting termination of the Claimant's members by way of redundancy pending the hearing and determination of the application and main suit.*

*2. THAT an order be issued declaring the redundancy notice dated 21<sup>st</sup> June, 2021 null and void on account of violating the procedures set out under section 40 of the Employment Act.*

*3. THAT the Respondent be compelled to provide the applicant with names of the 318 employees whose services are intended to be declared redundant on or about 31<sup>st</sup> July, 2021.*

*4. THAT the Respondent be compelled to provide the Applicant union with a tabulation of the terminal dues of the 318 employees for the approval by the Applicant union.*

3. The main grounds in support of the Application is that despite the Respondent having 1,000 employees in its employment, it has not provided the names of the employees whose services will be declared redundant and further, that the Respondent has failed to comply with the terms set out in the Memorandum of Understanding (MoU) it entered with the Applicant on 16<sup>th</sup> July, 2021.

4. The Application was certified urgent on 30<sup>th</sup> July, 2021 and the Applicant directed to serve the Application upon the Respondent within 7 days thereof. The application was fixed for interpartes hearing on 10<sup>th</sup> August, 2021.

5. The Applicant's Counsel Ms. Ateko swore an Affidavit of Service on 5<sup>th</sup> August, 2021 wherein she deposed that she had effected service via email, upon the "Agricultural Employers Association" who were on record for the Respondent in the matter.

6. The Respondent did not file any response to the Application and were absent in Court when the Application came up for hearing. Being satisfied with the return of service filed by the Applicant, the Application proceed for hearing in absence of the Respondent.

7. The Applicant union through its counsel Ms. Ateko urged this Court to allow the Application by temporarily stopping the Respondent from proceeding to effect the redundancy notice as the same was not in compliance with the law and with the MoU by the parties. Counsel further urged court to declare the redundancy notice as null and void on account that the same was in violation of the procedure set out under section 40 of the Employment Act.

8. It is clear to me that the Applicant Union is not challenging the redundancy exercise but rather the manner and procedure in which the Respondent has proceeded to undertake the same.

9. Annexed to the Supporting Affidavit to the Application, is a Memorandum of Understanding executed between the Operations Manager of the Respondent (Mr. Paul Njagi), the General Secretary of COTU (Dr. Francis Atwoli) and the Deputy General Secretary of the Applicant Union (Mr. Thomas Kipkemboi). The MoU was witnessed by Mr. Wesley Siele, the Chief Executive Officer of the Respondent.

10. The MoU provides in part as follows;

**i. That the redundancies shall take effect from 31<sup>st</sup> July, 2021;**

**ii. That the process shall be conducted in full compliance with the law pursuant to section 40 of the Employment Act and the applicable CBA.**

**iii. That depending on their years of service, the company shall pay all employees notices and all their redundancy benefits shall be paid in full.**

**iv. That the company shall share the list and payment schedule with the union branch to confirm computation of terminal dues.**

**v. That all dues shall be paid not later than 10<sup>th</sup> August, 2021....”**

11. Section 40 of the Employment Act provides for termination on account of redundancy. It provides the following preconditions which an employer ought to comply with before effecting a redundancy;

**a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;**

**b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**

**c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**

**d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**

**e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**

**f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**

**g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.**

12. It is noteworthy that section 40 of the Employment Act sets the minimum legal requirements in the event of a redundancy and parties are at liberty to develop their own terms of engagement. In this case, the parties entered into the MoU executed on 16<sup>th</sup> July, 2021.

13. The MoU clearly shows the intention of the parties. Part of the key terms in the MoU is that the Respondent was to share with it the list and payment schedule to confirm computation of terminal dues of the employees to be affected by the redundancy. According to the Applicant, the "list" referred to is the list of the employees who were to be affected by the redundancy. It was the Applicant's submissions that these terms have not been complied with by the Respondent.

14. The Respondent did not respond to the Application hence there was no contrary assertion to the Applicant's claims as regards the noncompliance on the part of the Respondent.

15. The redundancy notice made mention of 318 employees who had been on unpaid leave since 1<sup>st</sup> April, 2020. It cannot be assumed that these employees are known. The fact that the MoU expressly provided that the list of the employees affected by the redundancy be shared, is without doubt that this issue was not settled. Moreover, section 40(a) of the Employment Act requires that the Union to which such an employee is a member of, ought to be notified of the redundancy. It is only through the sharing of the list of names, that the said employees would have been formally notified through their union, of the intended redundancy.

16. It was therefore incumbent upon the Respondent to avail the list containing the names of the employees who were to be declared redundant as agreed by the parties. Similarly, the schedule of payment of the terminal dues of the affected employees ought to have been

shared as agreed by the parties.

17. The function of this Court is limited to interpreting and enforcing only those obligations which the parties to an employment relationship have agreed to assume. In this case, my role is limited to interpretation of the MoU between the parties as read together with the relevant law.

18. As indicated hereinbefore, the Respondent did not controvert the assertions by the Applicant to the effect that it had complied with the law and the terms of the MoU. In the circumstances, I am inclined to find that the Respondent has not strictly complied with the terms of the MoU executed on 16<sup>th</sup> July, 2021.

19. The orders sought through the instant Application is in the nature of a temporary injunction and I note that the redundancy exercise that is sought to be stopped took effect from 31<sup>st</sup> July, 2021 which is now past.

20. In view of the foregoing, and to balance the interests of both parties and further noting that consultations were and are still ongoing between the Applicant and the Respondent, I hereby issue an order temporarily suspending further implementation of the redundancy notice issued on 21<sup>st</sup> June, 2021 pending compliance by the Respondent. That is to say, the suspension shall only operate pending compliance with section 40 of the Employment Act and the terms of the MoU executed by the parties on 16<sup>th</sup> July, 2021.

21. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED at NAIROBI this 13<sup>th</sup> day of August 2021.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

Ms. Ateko for the Applicant

No appearance by the Respondents

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**STELLA RUTTO**

**JUDGE**