REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 233 OF 2020

JUDY GAKII NJERU.....CLAIMANT

VERSUS

WANANCHI GROUP (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent vide a Memorandum of Claim dated 3rd June 2020. She averred that the termination of her employment on account of redundancy was wrongful and unfair. She thus sought judgment against the Respondent for:

(a) Kshs. 8,400,000/- being the equivalent of 12 month's salary as compensation for the discrimination and unlawful redundancy of the Claimant.

(b) Interest in (a) above at court rates from the date of filing suit until payment in full.

(c) Costs of this suit.

(d) Any other or further relief as this Honourable Court deems fit and just to grant.

The Claimant avers that she was employed by the Respondent as Legal and Regulatory Officer vide a contract of employment dated 7th February 2012 whose effective date was 1st March 2012 and that her monthly basic salary was Kshs. 170,000/-. The Claimant averred that she received impressive reports for her performance throughout her employment and no disciplinary issue was ever raised about her that could amount to gross misconduct. That her good performance earned her an appointment as the Head of Legal-DTH vide a letter dated 8th September 2016 and that her monthly basic salary consequently increased to Kshs. 700,000/-. She further avers that she took her annual leave in May 2017, which leave was duly communicated to the Group Head of Legal and that it is during the said period that the Respondent issued her with a redundancy notification memo together with a Notice of Intended Redundancy both dated 9th May 2017, through an email sent on the same day. The Claimant averred that the Respondent's Director of Human Resources stated in the said notices that in accordance with the Board's communiqué, the process of reintegrating the cable and DTH business had begun which would consequently lead to some positions being declared redundant, but that the Respondent would attempt to minimize the number of redundancies through redeployment where necessary. She averred that the Notice of Intended Redundancy further stated that in identifying the positions, the Respondent would consider: the tenure of service; individual skills; and seniority and reliability within the various categories. She avers that she resumed work on 3rd May 2017 and on 9th June 2017, was issued with a termination letter stating that her position was no longer required and that the termination was effective on the same 9th June 2017. The Claimant avers that she therefore immediately prepared her handover notes and forwarded the same to the Group Head of Legal in an email dated 13th June 2017.

2. The Claimant avers that there was no justification for the redundancy exercise because the standards employed by the Respondent in arriving at her redundancy were unlawful and that the same was a termination disguised as redundancy, owing to her dysfunctional relationship with the Group Head of Legal. Further, that the Respondent had no fair and valid reason to declare her redundant since it continued to hire staff resulting to increased salary pay and that it even proceeded to recruit a legal officer to fill her previous position and discharge her previous roles. She asserts that no consultations were ever carried out between her and the Respondent to look at an alternative of redeployment and that despite the notice she was only made aware of her respective position being redundant in the termination letter. The Claimant averred that the redundancy also lacked in merit as she had served the Respondent for a period of five years but the Respondent did not declare redundant several staff members who had joined later. She further avers that her right under Article 28 of the Constitution to have her human dignity respected and protected was openly violated by the Respondent, who also failed to uphold and protect her right to fair labour practices guaranteed under Article 41(1). She avers that she suffered mental and psychological harm and is seeking exemplary and malicious damages and that she is also entitled to an order for maximum compensation as a result of the Respondent's action.

3. The Respondent filed a Statement of Response dated 19th August 2020 admitting to have employed the Claimant and averring that the Claimant was promoted to the position of a Regulatory Manager on 1st August 2015 at a salary of Kshs. 400,000/-. It avers that it consists of two business units, Zuku Fiber and DTH and that while the Claimant was Head of Legal for DTH business unit, there was a Group Head of Legal who oversaw legal and regulatory functions for both business units. The Claimant averred that advised by the prevailing conditions in 2017, the Board of Directors of the Respondent made a decision to reintegrate Zuku Fiber and DTH business units which would result to integrating various departments within the two units, including the legal department. The Respondent further avers that the Claimant was made aware of the impending redundancy on 19th February 2017 and on 3rd March 2017, the then Director of the Respondent issued a Notice of Intent to Terminate Employment through Redundancy to the Labour Office as provided by law. The Respondent averred that the Notice of Intended Redundancy dated 9th May 2017 served on the Claimant through an acceptable means of communication, clearly outlined the purpose, extent of the redundancy and the criteria to be used. The Respondent averred that it indeed had consultations at the management and departmental levels to work on the structure of the various departments and to determine the positions to be retained and those to be declared redundant with due regard being given to the criteria spelt out under the Act. The Respondent averred that it also engaged staff in various consultation sessions where they were taken through the integration process, its impact and how the redundancy would be carried out to determine which employees can be redeployed.

4. The Respondent further avers that after issuing the Claimant and all the affected employees with notices of termination, it promptly paid the Claimant an exit package of Kshs. 7,763,287/- being terminal dues and gratuity payment. Further, that the Claimant did not request for any clarifications during the entire period considering she acknowledged receipt of the notice on email and was aware of the redundancy process being on course. It maintains that it has the managerial prerogative to reorganize its operations or restructure the business from time to time and that the termination of the Claimant's employment was based on a fair reason and on the operational requirements of the Respondent. The Respondent averred that no official complaint was ever lodged with the HR Department on any misunderstanding between the Claimant and the then Group Head of Legal and that the redundancy process affected 70 employees regardless of whether a staff was on leave or not. It denies employing someone to fill the position previously held by the Claimant and asserts that the Claimant could not be redeployed since when the two business units were merged, the Respondent only had a requirement for one Head of Legal and it considered the then Group Head of Legal who was more skilled with close to 20 years of experience. The Respondent avers that this Court has no jurisdiction to entertain and hear this suit because the same was filed in violation of a Separation Agreement voluntarily accepted and executed by the Claimant on 14th July 2017 in the presence of her witness. The Respondent averred that the Claimant being bound by the said discharge and release cannot be allowed to backtrack on the same to prejudice the Respondent and it thus prays that the suit against it be dismissed with costs to the Respondent.

5. In a Reply to the Statement of Response dated 4th September 2020, the Claimant averred that from the Notice of Intended Redundancy, she was not informed that her position would be affected nor does it specify the positions to be affected and that the same was wholly generalised. She denies having voluntarily accepted and executed a Separation Agreement as alleged and maintains that this Court has jurisdiction to hear and determine this matter.

6. The Claimant and Respondent's witness testified and subsequent to the hearing the parties were to file written submissions. In her submissions, the Claimant submits that the Respondent is in breach of pertinent provisions of law on preconditions for redundancy provided for under Section 40(1) the Employment Act No. 11 of 2007. She relies on the authority of **Hesbon Ngaruiya Waisi *v* Equitorial Commercial Bank Limited [2013] eKLR** where the Court held that where the procedure set out under Section 40 is not followed, the resultant termination will be deemed unprocedural and unfair and further stated that if the grounds used to identify the affected employees are not as per the law the same becomes unfair. She submits that the Respondent failed to avail the simple computation of the seniority in time of the persons holding various positions in her department, which was also confirmed by the Respondent's witness and that she was declared redundant despite being the senior most within her department. To this end she relies on the authorities of **Kenya Plantation and Agricultural Workers Union *v* Harvest Limited [2014] eKLR; Doris Kairuthi Kaaria *&* 59 Others *v* Kenya Methodist University [2017] eKLR;** and **Kenya Airways Limited *v* Aviation and Allied Workers Union Kenya *&* 3 Others [2014] eKLR** where the Courts asserted that the employer must demonstrate there was an objective criteria in uniformly applying the parameters envisaged in Section 40(1)(c) of the Act to all the targeted employees, failure to which it would be difficult to establish compliance with the section. She further submits that the Respondent also failed to avail an organogram showing the organisational structure under the newly formed outfit and to explain how and why the Claimant's roles were superfluous following the reintegration as reiterated by Githinji JA in his dissenting opinion in the **Kenya Airways** case *(supra)*. It is submitted by the Claimant that the notice of intended redundancy was not a proper notice as it was drafted in such manner that she could not possibly have concluded that her position was to be declared redundant. The Claimant submits that in light of the ambiguity of the said notice, she was effectively informed of her redundancy on the same day it took effect and not one month before as required under Section 40(1)(f) of the Act. She relies on the case of **KUDHEIHA *v* the Aga Khan University Hospital Nairobi, Cause No. 815 of 2015** (unreported) as cited in **Bernard Misawo Obora *v* Coca Cola Juices Kenya Limited [2015] eKLR**, where the court stated that the notices envisaged under Section 40 are not mechanical and should be carefully crafted prior to being issued as they affect the employees behind the redundancy process. She further relies on the case of **Gerrishom Mukhutsi Obayo *v* Dsv Air and Sea Limited [2018] eKLR** where the court observed that for a redundancy to be valid, the employer must prove that both the Labour Officer and the employee or the employee's union, have been notified at least one month before the redundancy takes place. The Claimant further submits that her alleged redundancy was unlawful as the Respondent did not issue to the Director of Employment a notification of filling or abolition of post as anticipated under Section 77 of the Employment Act No. 11 of 2007 thus: "*When a post, which has been notified to the Director as vacant, has been filled or has been abolished before being filled, the employer shall notify the employment service office of this in writing within two weeks of the filling of the post or of its abolition, as the case may be.*" The Claimant submits that the Court in the case of **Patrick Njuguna Kariuki *v* Del Monte (K) Limited [2012] eKLR** opined that failure to prove the notification under Section 77 of the Act will lead the court to a finding that the employer has not exercised the entitlement with respect to any of the functions (creation of office, abolition of office, appointment and termination of employment) for otherwise, the exercise would be arbitrary and outside the express statutory regulation. It is the Claimant's submission that from the foregoing, the procedure employed by the Respondent in declaring her redundant was unlawful.

7. The Claimant submits that whether she signed the termination letter or did not accept the terms of the Separation Agreement cannot cure the fact that the redundancy was unlawful and that the Respondent cannot escape its obligations by stating that she signed away her right to further claims. She relies on the authority of **Thomas De La Rue (K) Ltd *v* David Opondo Omutelema [2013] eKLR** by the Court of Appeal that a discharge voucher cannot absolve an employer from statutory obligation and cannot also preclude the Industrial Court from enquiring into the fairness of a termination and that the court is to determine whether the employee freely and willingly executed the same

while seized of all the relevant information and knowledge. It is the Claimant's submission that the said Separation Agreement is therefore null and void having been signed under duress as a pre-condition for payment of her terminal dues. The Claimant submitted that the said Separation Agreement further offends the provision of Section 3(6) of the Employment Act in that reliance on the same is tantamount to varying or amending the law on unfair termination of employment. It is the Claimant's submission that she is entitled to the reliefs she is seeking having extensively demonstrated disregard for the law on the part of the Respondent. She relies on the case of **Faiza Mayabi *v* First Community Bank Limited [2019] eKLR** where the Court found the termination unfair and unjustified as the whole process was irregularly undertaken and awarded the claimant 12 months' salary as compensation for the unlawful redundancy.

8. The Respondent submits that it complied with the requirement under Section 40(1) (a) of the Employment Act providing that the employee must be personally notified of the reasons for and the extent of the intended redundancy. The Respondent submitted that if the said notice informed the Claimant that her position as Head of Legal services DTH was being abolished moving forward it would have amounted to termination on the spot which is unfair. It further submits that it complied with Section 40(1)(c). The Respondent submitted that it produced Curriculum Vitae of both the Claimant and Jocelyn Muthoka showing that Jocelyn was more skilled in the ICT industry, legal and regulatory environment and that therefore in terms of professional experience Jocelyn was senior to the Claimant. It submits that the Claimant did not plead contravention of Section 77 of the Act in the Memorandum of Claim so as to give the Respondent an opportunity to adequately prepare and defend itself and that in any case, the said provision is inapplicable to the circumstances of this case. The Respondent submitted that the Claimant has also submitted having signed the separation agreement under duress and coercion so that she could access her terminal benefits, but did not plead the same in the Memorandum of Claim. The Respondent submitted that it is trite that submissions cannot take the place of pleadings and the Court should find that the Claimant is bound by her pleadings and cannot be allowed to introduce new issues at the submissions stage. The Respondent further submits that the Claimant has not exhibited any correspondence from her to the Respondent showing she had an issue with the terms of the Separation Agreement. It refers the Court to the case of **Felix Mutie Musango *v* Tin Can Manufacturers Limited [2020] eKLR** where the Court held that a settlement agreement like the Discharge Certificate is binding contract between the parties involved and that the court cannot interfere with it unless it is vitiated by any relevant factors that vitiates an ordinary contract at Common Law. The Respondent submitted that in the **Felix Mutie** case *(supra)*, the Court declined to award any damages despite a clear finding that termination was unfair because the claimant bound himself not to make any further claims against the respondent in the Discharge he signed. The Respondent also asserts that as the Claimant was paid pursuant to the separation agreement, it is a settled principle of equity that a party cannot approbate and reprobate at the same time.

9. The Respondent further submits that in the **Thomas De La Rue** case *(supra)* cited by the Claimant, the Court of Appeal set aside and dismissed the compensation for redundancy awarded to the claimant by the trial court after the Appellant successfully showed that the Discharge Voucher was a contract that was binding on the employee. It urges this Court to follow the said precedent and further note that the test set by the Court of Appeal has not been met by the Claimant herein i.e. leading evidence to support or disprove the validity of a discharge voucher where its validity is an issue, but that the Claimant failed to lead evidence of the same in her testimony and only raised it in her re-examination. It also submits that the effect of the binding nature of a contract/agreement executed by the employee and employer was considered in the case of **Ephraim Gaitho Githongori *v* Timaflor Limited [2018] eKLR** where the Court noted that whereas the claimant alleged he was forced to sign the discharge, he did not plead this assertion at all as required in such a scenario in order to dislodge the discharge and that therefore the respondent was fully discharged and did not need to answer the claim. The Respondent also relies on the case of **Gilbert Mugambi *v* Michimikuru Tea Factory Limited [2018] eKLR** where the Court found the suit to be misplaced in light of the waiver after holding that: *"…I do not buy the argument that upon receiving some payment a party who is dismissed thanks God and takes the sum given so as to move on suggesting that there is a remedy beyond the waiver given."* On general estoppel, the Respondent relies on Section 120 of the Evidence Act which provides that: *When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.* The Respondent submitted that it followed the law as provided for under Section 40 of the Act and no case has been made for unfair termination of employment on account of redundancy. The Respondent submitted that it further disapproved the allegations that the redundancy was commenced to discriminate and target the exit of the Claimant by exhibiting a list of 70 positions that were affected by the process. Further, the Claimant has not provided evidence to support her submissions that her position continued to exist after redundancy.

10. The issue of jurisdiction was asserted by the Respondent albeit in passing but must be disposed of prior to the Court determining the claim. Where a court is bereft of jurisdiction it must down it tools and take no more steps. The *locus classicus* is the case of **Motor Vessel 'Lillian S' *v* Caltex Oil (K) Limited [1985] KLR 1** where the Court of Appeal per Nyarangi JA stated thus:

> *I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.*

11. The Court herein would be remiss if it did not determine the issue as there is no basis to continue with proceedings if the Court has no jurisdiction. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given. In this case the separation agreement is taken as the basis for the assertion that this Court lacks jurisdiction. Having regard to the **Motor Vessel 'Lillian S' *v* Caltex Oil (K) Limited** *(supra)* this Court's jurisdiction is not ousted as it has the authority to consider whether the separation agreement is valid and whether the Respondent applied the law or not in declaring the redundancy. The Respondent was correct in the surmise that the Claimant is bound by her pleadings. Through submissions, a party cannot amend their pleadings or seek reliefs not pleaded. Submissions cannot take the place of pleadings and the Court finds that the Claimant is bound by her pleadings and cannot be allowed to introduce new issues at the submissions stage. As such her allegations in relation to Section 77 of the Employment Act do not have any foundation and as such are disregarded.

12. In the **Thomas De La Rue *v* David Opondo Omutelema** *(supra)*, the Court of Appeal held:-

> *We would agree with the trial court that a discharge voucher* per se *cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was*

freely and willingly executed when the employee was seized of all the relevant information and knowledge.

The separation agreement of itself did not dislodge the Respondent's obligation to determine the employment legally. The declaration of redundancies by many an employer is replete with errors and missteps. Section 40(1) of the Employment Act sets out seven conditions which the employer must comply with before declaring an employee redundant. These are:

a. *if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;*

b. *if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;*

c. *in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;*

d. *where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;*

e. *the employer must pay the employee any leave due in cash;*

f. *the employer must pay the employee at least one month's notice or one month's wages in lieu of notice; and*

g. *the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.*

13. The Claimant was therefore entitled to the safeguard under Sections 40(1)(b) and (c) of the Act. The Respondent showed disregard for the law as did not notify the employee personally in writing together with the labour officer that there was to be a redundancy in respect of the Claimant within a month. There is nothing in Section 40(1)(b) to suggest the Claimant was not entitled to the one month notice given to employees who are in a union as provided for under Section 40(1)(a). There is also the criteria to be applied in determining the employees to be declared redundant where the employer must consider seniority in time, skill, ability, reliability of the employees before picking which employee to declare redundant. There is nothing in the curriculum vitae of the Claimant's replacement that she had seniority in time, skill, ability and reliability as the employee who took over from the Claimant had no experience to do the job the Claimant had been doing as she had joined the department a short while before the Claimant was declared redundant, there was no demonstration of skill as a qualification is not the same as skill since it is in execution of tasks that the skills get developed. The foregoing is ample to indicate the Claimant's redundancy did not accord with the law and she is entitled to recover compensation for the unlawful declaration of redundancy. In the final analysis the Court finds in favour of the Claimant whose redundancy was meted out and served as cold as it could get. She is entitled to the following reliefs:

(i) Two month's salary compensation for the unlawful redundancy;

(ii) Costs of the suit;

(iii) Interest at court rates on the sum in (i) above at Court rates from the date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER 2021

NZIOKI WA MAKAU

JUDGE