



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.714 OF 2018

KENYA ENGINEERING WORKERS UNION.....CLAIMANT

VERSUS

ASHUT ENGINEERS LIMITED (PLASTIC DIVISION)RESPONDENT

RULING

The ruling herein relates to two (2) applications, the first application is filed by the respondent is dated 8th December, 2020 and seeking for orders that;

- a) *A temporary injunction do issue restraining the respond from interfering with the parties CBA and Recognition Agreements in any way whatsoever pending the hearing and determination of this application and the suit.*
- b) *In the alternative, the respondent be and is hereby ordered to deposit Ksh.50, 000,000 ... plus 15% of the total redundancy benefits recommended for payment to the applicant's 801 members in the Central Planning and Monitoring unit report dated 21st September 2020; as security for the compensation which may ultimately be ordered by this court to be paid by the respondent to the applicant's 801 members.*
- c) *This court be pleased to grant any other order it may deem fit and just to grant.*
- d) *Costs of the application be borne by the respondent.*

The application is supported by the affidavit of Wycliffe A Nyamwata and on the grounds that the respondent has issued notice of intended redundancy affecting 801 employees and members of the claimant union and which is meant to avoid the financial obligation addressed in the report off the CPMU dated 21st September, 2020. The notice issued is unprocedural and the respondent issued it to the Minister and not the claimant union as required under the provisions of section 40 of the Employment Act. the same is in violation of the CBA terms.

In his affidavit, Mr Nyamwata avers that the claimant is opposed to the restructuring of the respondent's business and if this has to be done it must comply with the legal procedures under section 40 of the Employment Act. the respondent has declined to review the existing CBA which took effect on 1st August, 2017 and which is the subject of these proceedings. The cited financial challenges are without evidence and the respondent has failed to produce its audited financial statements for the year 2017 and 2018 leading to the court to direct the CPMU to prepare an independent report and which was filed on 2st September, 2020 with proposals that there be an increment to the house allowance, leave travelling allowance and 85 general wage increase for the year 2017 and 2018 at 7%. Such will result in arrears of Ksh.50 million which the respondent is aboding to pay and should therefore be deposited as security.

The second application is dated 15th March, 2021 filed by the respondent and seeking orders that the court do review, vary and/or set aside the orders granted on 8th December, 2020 suspending the redundancy of the respondent's 801 employees an members of the claimant.

The application is supported by the affidavit of Amit Shah and on the grounds that the respondent admits that is sent a defective intended redundancy notice that is not compliant to section 40 of the Employment Act as it was addressed to the Minister and not the claimant. The claimants are not keen to prosecute their application dated 8th December, 2020 since they are enjoying interim orders to the effect that the intended redundancy of 801 employees be suspended.

In his Affidavit, Amit Shah avers that Shut Plastics Limited was registered to take up the plastic business of the respondent as it is no longer viable for the respondent and there will be no job losses as Ashut Plastics Limited will be carrying on with the plastic business and the respondent is ready and willing to pay the 801 employees their terminal benefits.

In reply, the claimant filed the Replying Affidavit of Patrick Mukongolo Makale the Industrial Relations Officer and who avers that the

respondent has conceded that the notice of intended redundancy dated 30th November, 2011 is defective and what should be done is to formally withdraw such notice and re-issue another one which is compliant to section 40(1) (a) of the Employment Act.

Mr Makale also avers that the reassurance by the respondent that there will be no job losses, the contemplated redundancy is unnecessary and the notice issued defective. That If the respondent is sincere that no employee will be affected, there is no need to re-issue a redundancy notice. redundancy means job loss and payment of terminal benefits.

There is a CPMU report dated 21st September, 2020 and the respondent is guided by the Minister to issue fresh contracts to affected employees on similar terms to those in their current contracts.

Mr Amit filed his Further Affidavit and avers that the respondent has formerly taken a decision to separate the plastics division from the business of furniture/fabrication and the decision to create another separate legal entity is inevitable that unionised employees will be declared redundant.

The respondent is alive to the fact that it has to comply with the provisions of section 40 of the Employment Act, pay the terminal benefits before employees are engaged in Ashut Plastics Limited which is a separate entity. There thus exists good grounds for review and variation of the orders issued on 8th December, 2020.

Both parties filed written submissions which have been put into account and the single issue for determination is whether the court should review, vary or set aside the orders issued on 8th December, 2020.

What is clear to the court is that the parties herein stand out. Each has come with clean hands, disclosed all relevant material and had this been addressed earlier, the delayed ruling and the necessity for the respondent to file various applications seeking audience with the court should have been arrested earlier.

This is more so because the respondent has admitted to having issued a defective redundancy notices to 801 employees and members of the claimant and that a decision has since been taken to separate the plastics division from the furniture/fabrication department and place it with a separate legal entity, Ashut Plastics Limited and are willing to abide the provisions of Section 40(1) (a) of the Employment Act, 2007.

On the other part, the claimant admits that the CPMU through its report dated 21st September, 2020 that the parties are guided on the matter with regard to review of the CBA. That the intended redundancy notice is defective and should be re-issued in compliance with section 40 of the Employment Act. the only variance for the claimant is that on the confirmation that there exists a separate company, there should be no employee affected by any redundancy and the simple thing to do is issue fresh contracts on similar terms as currently existing to avoid any of its members losing employment.

the suit herein was filed on 15th May, 2018 and the issue in dispute was registered as the *refusal by the respondent to review the parties CBA on the following clauses*;

12 issues were outlined.

Issue number 12 relates to payment of severance pay.

The respondent filed a response dated 5th December, 2018. The claimant filed a response thereto.

On 5th December, 2019 the claimant filed application seeking for orders that *the court be please to issue Orders that the claim in this matter being an economic dispute be heard on priority basis by either giving a hearing date or directing the office of the Deputy Registrar of this court to do so.*

The claimant has appreciated the issue in dispute herein is an economic matter and relating to terms of the CBA.

On 18th December, 2019 the court issued orders directing the Deputy Registrar to issue a hearing date and that the CPMU to file a report and such report has since been filed with the court and dated 21st September, 2020. The report relates to the cause of action herein, the *review of the CBA terms.*

The CPMU report has not yet been addressed by the court visa-a-vies orders dated 18th December, 2019. This is pending.

On 8th December, 2020 the claimant filed the impugned application and orders therefrom and seeking for orders among others that;

a) *Pending the hearing and determination of this application, a temporary injunction do issue restraining the respondent from terminating the employment of the applicant's [claimant's] 801 members under its employment on account of redundancy.*

b) This application was certified urgent, service upon the respondent and who was directed to file a response and pending hearing, the court directed that;

c) *Pending hearing inter parties, termination of employment on account of redundancy, affecting 801 members of the claimant union scheduled to take effect on 3rd December 2020 is suspended.*

As outlined above, the cause of action has remained the review of the CBA terms.

Whereas the claimant is correct with regard to the court being invited to address the CPMU report dated 21st September, 2020 to complete the process directed on 18th December 2019, The matter of redundancy in my view, which is likely to affect 801 employees and members of the claimant union and taking effect on 3rd December, 2020 vide notice admitted by the respondent to have issued in error is a new cause of action well taking into account the subsisting suit. such should form a new and separate suit as the issue is foundationally different and separate from the cause of action herein.

Going back on the subject application, where the court finds new discovery, a mistake on the record, need for clarification of its orders and where there is good cause such can be well addressed pursuant to the provisions of section 16 of the Employment and Labour Relations Court Act, 2011 read together with Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

As outlined above, there is now a new cause of action relating to a redundancy and which is different and separate and new to the subsisting suit. such matter is relevant and important to consider in the context of the applications before court.

The orders issued on 8th December, 2020 thus clarified, the applications by the respondent are found with merit and such orders are hereby set aside in their entirety.

On the pending adoption of the CPMU report dated 21st September, 2020 the court shall mention the matter and address the report accordingly

Before conclusion, the claimant is seeking that the redundancy notice be re-issued in accordance with section 40 of the Employment Act and that in the alternative, new contracts be issued on similar terms as currently subsisting.

A redundancy is a lawful matter leading to termination of employment. where the employer has issued notice pursuant to the provisions of section 40 of the Employment Act, the court's roles should stop at that point unless the notice is issued erroneously as the case is here. The court has no mandate to direct an employer and particularly a separate and different legal person and third party like Ashut Plastics Limited to issue the 801 employees of the respondent and members of the claimant new contract on similar terms as currently issued with the respondent. to do so would be a serious negation of fair labour practices and the court cannot sanction such matter.

Parties remain free to contract and where there is a redundancy, the respondent has demonstrated that there is knowledge of the provisions of section 40 of the Employment Act, 2007 and should abide. Such can be well addressed at the shop floor.

Application dated 15th March, 2021 is hereby allowed and orders issued on 8th December, 2020 hereby set aside. Application dated 8th December, 2020 and the pending CPMU report shall be mentioned on a date allocated at the registry. Each party shall bear own costs.

DELIVERED AT NAIROBI IN OPEN COURT THIS 18TH DAY OF NOVEMBER, 2021.

M. MBARU

JUDGE