



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO E186 OF 2021

BANCY MUTHONI NDUATI.....1ST CLAIMANT
CAREN BENTA A. AYO.....2ND CLAIMANT
CHARLES GITHUKU GITHUATU.....3RD CLAIMANT
CHARLES K. RIBA.....4TH CLAIMANT
DANIEL NJOGU KAMANDE.....5TH CLAIMANT
DANIEL OUMA.....6TH CLAIMANT
DAVID MUTHOKA MASAVU.....7TH CLAIMANT
DUNCAN NDIRANGU MURIITHI.....8TH CLAIMANT
ENOCK OMWENGA.....9TH CLAIMANT
EZRA NYANGWARA.....10TH CLAIMANT
FRANCIS WAWERU NJIRU.....11TH CLAIMANT
FREDRICK CHEGE MACHARIA.....12TH CLAIMANT
GEORGE MACHAU NJOROGE.....13TH CLAIMANT
GRACE OTTICHA.....14TH CLAIMANT
HELINA WACHU MWANGI.....15TH CLAIMANT
JAMES GITHERE MAINA.....16TH CLAIMANT
KAMAMIA LUCY WANJA.....17TH CLAIMANT
KEZIAH A. MABWA.....18TH CLAIMANT
LEAH AIDA OLIECH.....19TH CLAIMANT
MARGARET WAHU KARANJA.....20TH CLAIMANT
PATRICK MANYEKI.....21ST CLAIMANT

PATRICIA WANJIRU MWANGI.....22ND CLAIMANT

PAULINE WAMAITHA NDIBA.....23RD CLAIMANT

PETERSON MWANIKI RIITHO.....24TH CLAIMANT

RUTH AKINYI OTIENO.....25TH CLAIMANT

STEPHEN MUTISO CHARLES.....26TH CLAIMANT

TRUPHOSA K. OMANGI.....27TH CLAIMANT

VERSUS

ERNST & YOUNG LLP.....RESPONDENT

RULING

1. On 26th February 2021, the Claimants filed a claim against the Respondent, seeking relief for unfair termination of employment. In response, the Respondent filed a Memorandum of Response and Counterclaim to which the Claimants responded on 5th August 2021.

2. On the same day, the Claimants amended their claim. They further filed a Notice of Motion of even date, seeking a temporary order of injunction restraining the Respondent, either by itself, its agents, partners, local or international associates, its principals, or any other person or entity acting under its instructions from advertising for recruitment, accepting applications, undertaking interviews, recruiting, posting recruits, accepting such recruits or otherwise taking any step directly, indirectly or through proxy to fill the positions previously held by the Claimants immediately prior to the termination of their employment on account of purported redundancy.

3. The Motion is supported by an affidavit sworn by the 6th Claimant, Daniel Ouma and is based on the following grounds:

a) That the Claimants were employed on various dates and in various capacities until 2nd July 2020, when their respective employment contracts were terminated on account of purported redundancy;

b) That the Claimants have contested the validity of the said redundancy and have consistently contended that the same was not substantively justified and was only done to fulfil a predetermined intention to remove them from employment;

c) That it has been independently pleaded in the Memorandum of Claim that immediately after declaring the Claimants redundant, the Respondent started approaching some of them to accept to work on materially different terms, particularly as independent contractors, as opposed to their more desirable permanent and pensionable terms;

d) That while the suit was still pending and barely one month after the Respondent filed its response, the Claimants learnt from their colleagues still in employment, of the ongoing drive to undertake recruitment to fill the positions held by them;

e) That soon thereafter, the Claimants noticed multiple advertisements for applications being published on various social media pages operated by or related to the Respondent, including the private social media pages of its partners;

f) That the said advertisements were inviting interested applicants to apply for various positions in the Respondent Firm, including graduate recruits to serve in multiple positions in the Assurance, Tax and Strategy Transactions Lines as well as Senior Managers, Senior Associates and Interns in the Consulting Service Line;

g) That the Claimants herein were in either of these Service Lines, with the Consultancy (7) and Assurance (12) having the most Claimants who are sought to be directly replaced by the Respondent in the ongoing recruitment;

h) That the Respondent has not formally offered the Claimants their positions back for it to competitively seek to recruit from the market, contrary to the Claimants' legitimate expectation;

i) That by undertaking the current recruitment, the Respondent is directly seeking to fill the positions held by some of the Claimants, while indirectly seeking to fill the positions of the rest of the Claimants, by promoting internal staff to these positions, and recruiting entry level graduates to fill the lower positions, at a fraction of the cost;

j) That unless the reliefs sought herein are granted, the Respondent will proceed and fill the said positions, hence occasioning permanent loss and damage to the Claimants as they will inherently lose the right to be reinstated to the said positions;

k) That unless the reliefs sought are granted, the Claimants' right to fair labour practices will be infringed as they will be denied an opportunity of continuing their career growth with one of only four globally acclaimed Audit Firms;

l) That the Claimants will suffer irreparably if the reliefs sought are not granted because they are not in a position to set up their own Firms with the stature of the Respondent Firm and the chances of joining another big Firm are slim;

m) That the mere fact that one can be compensated by damages does not mean that the wealthy should be allowed to trample upon the weak parties' rights. It is therefore imperative for the Court to protect the rights of the Claimants to fair labour practices by preserving their positions until such a time when this suit will have been disposed of on merit;

n) That the Respondent will not suffer any prejudice because if the impugned redundancy was valid, there would be no need for new employees at the moment.

4. The Respondent opposes the Claimants' Notice of Motion by a replying affidavit sworn by its Chief Executive Officer, Nancy Muhoya on 25th October 2021.

5. Muhoya denies that the Respondent is in the process recruiting new employees to take up positions held by the Claimants.

6. She deposes that the Respondent is in the process recruiting graduate trainees and adds that none of the Claimants were graduate trainees as at the date of termination of their employment on account of redundancy.

7. Muhoya further deposes that the graduate trainee program is open to graduates who graduated not more than three years ago. She avers that the primary purpose of the graduate trainee program is to fulfil the Respondent's 'Building a Better Working World' strategy by providing graduates with valuable experience, knowledge and skills.

8. The Respondent maintains that the positions formerly occupied by the Claimants no longer exist in its structure and there has been no recruitment to replace the Claimants.

9. Muhoya points out that the Claimants' employment ceased on 10th July 2020 and adds that the Respondent is a going concern whose operational requirements per time determine its staff complement.

10. The Claimants' plea in this application falls within the purview of interlocutory injunctions. The conditions under which such an order may be granted were set in *Giella v Cassman Brown & Company Limited [1973] E.A 358*, as follows:

"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 the application on the balance of convenience."

11. As to what constitutes a *prima facie* case, the parties relied on the Court of Appeal decision in *Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] KLR 125* where a *prima facie* case was defined as:

".....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."

12. From the evidence on record, the Claimants held a wide range of positions from senior managers to support staff. The Respondent denies that the subject advertisements were aimed at replacing the Claimants.

13. On their part, the Claimants did not provide any evidence linking the advertised positions to the specific positions held by them at the time of termination on account of redundancy. What is more, from the time the Claimants were issued with termination notices on account of redundancy to the time they moved the Court seeking to stop the recruitment process, a period of close to a year had lapsed.

14. Flowing from the foregoing, the Court did not find a *prima facie* case upon which to grant an order of interlocutory injunction against the Respondent.

15. Regarding the question whether damages would not be an appropriate remedy, the Claimants' conduct provides an answer in the affirmative. I say so because in their original claim, the Claimants had sought compensatory damages, which prayer was retained as an alternative even after the amendment of 5th August 2021.

16. At any rate, reinstatement is a remedy to be granted in exceptional circumstances, which are yet to be established in this case.

17. On the whole, I find and hold that the Claimants have not met the threshold for grant of the order sought. Their Motion dated 5th August 2021 is therefore declined with costs in the cause.

18. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF DECEMBER 2021

LINNET NDOLO

JUDGE

Appearance:

Mr. Eredi for the Claimants

Miss Babu for the Respondent