



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 14 OF 2017**

**KENYA UNION OF COMMERCIAL FOOD**

**& ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**BLOW PLASTS LTD.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent on behalf of the Grievant Mr. Gregory Nzioka Mulwa for his alleged unlawful and unfair redundancy. In the suit, the Claimant averred that the Grievant was employed by the Respondent on 27<sup>th</sup> August 2009 as a store assistant earning a basic salary of Kshs. 6,336/- without house allowance. The Claimant averred that the Grievant served diligently without a warning letter until when he was unfairly declared redundant. The Claimant averred that the Grievant was issued with a letter dated 1<sup>st</sup> March 2016 indicating that his services were not required. The Claimant averred that the Grievant visited the Branch Secretary of the Claimant at Athi River who wrote to the Respondent and that on 17<sup>th</sup> March 2016 the Secretary General reported the existence of a trade dispute between the Grievant and the Respondent. The Claimant averred that on 8<sup>th</sup> April 2016 the Cabinet Secretary Ministry of Labour appointed Mr. G. Mwereza as conciliator. The Claimant averred that the conciliator invited the parties for conciliation meetings in vain and on 25<sup>th</sup> August 2016 issued the parties with a referral certificate for arbitration before this court. The Claimant averred that the Respondent's actions in declaring the Grievant redundant contravened the provisions of Section 40 of the Employment Act. It averred that the Grievant was not notified of the intention by the Respondent to declare him redundant thus contravening Section 40(a), (b) and (c) of the Employment Act. The Claimant sought one month's salary in lieu of notice – Kshs. 7,286.40, house allowance arrears for 3 years – Kshs. 34,214/-, annual leave – Kshs. 6,336/-, severance pay – Kshs. 47,520/-, overtime plus days worked Kshs. 8,167/-. It also sought the costs of the suit.

2. The Respondent's defence was that the Claimant lacks *locus standi* to institute this suit as the Claimant was not recognized. The Respondent averred that it issued the Grievant with a notice of redundancy through a letter dated 10<sup>th</sup> March 2016 which informed him of the merger of its two branches which resulted in duplication of responsibilities. The Respondent averred that the Grievant acknowledged receipt of his final dues amounting to Kshs. 46,070/- vide a letter dated 4<sup>th</sup> March 2016 and signed confirming that the calculation was done correctly and that he had no further claim against the Respondent. The Respondent averred that it followed the provisions of Section 40 of the Employment Act and that in any event the Grievant was paid Kshs. 6,336/- in lieu of notice. The Respondent averred that the Grievant is not entitled to service pay as he was a member of NSSF and his claims for service pay thus not merited. The Respondent denied that the Claimant is entitled to any of the reliefs sought and prayed that the suit be dismissed with costs.

3. The Grievant testified as did the Respondent's witness Ms. Elizabeth Mwendwa. The Grievant relied on his statement and testified that he was employed from 27<sup>th</sup> August 2009 as an assistant store keeper and was paid Kshs. 528/- per day until the 29<sup>th</sup> February 2016 when he was dismissed. He stated that he was not issued with any letter, was not informed of the reason for dismissal and was not paid any money. He testified that after reporting the matter to the Union, he attended a few meetings in the company of a union representative but the Respondent did not attend. The Grievant said that the Respondent instead asked him to go for a cheque of Kshs. 40,780/- in March without explaining the purpose of the payment. He testified that he did not receive any notice but he was informed by his manager that there was no work. He testified that he used to go for leave and was paid for leave except from 2015. He stated that he was underpaid as the amount on the Gazette was Kshs. 630/- and not Kshs. 528/- a day. In cross-examination the Grievant stated that he joined the Union in 2014 and that he was a member and had receipts of Union dues. He testified that the dismissal was because he joined the Union. He stated that he was paid terminal benefits but they were not properly calculated. He confirmed that he was paid service pay, notice pay and overtime but he denied that he was paid his benefits. He also stated that he was unlawfully terminated.

4. The Respondent called Ms. Elizabeth Mwendwa its HR clerk. She adopted her statement and relied on the list of exhibits and stated that the Respondent combined its two branches which led to reduction of work resulting in the Grievant's termination of service. She testified that the Grievant was notified of the termination and was paid his dues amounting to Kshs. 46,070/- which he acknowledged by signing the letter showing receipt of the money. She testified that the Respondent was not aware that the matter was reported to the Minister or that it

was before the labour officer as they did not receive the letter inviting them to attend the meeting. The parties were to file submissions after the conclusion of the trial.

5. The Claimant filed submissions in which it submitted that in respect to the Grievant, the Respondent totally violated the provisions of Section 40 of the Employment Act which lays down the procedure to be followed when an employee is declared redundant. The Claimant submitted that the Grievant was not issued with any notice but was only called verbally three days after termination of his contract to go and collect his cheque. The Claimant submitted that the notice of redundancy ought to have been issued one month prior to the date of the intended redundancy. The Claimant submitted that the Respondent did not inform the Union and the Labour Officer of the intended redundancy contrary to the Act. The Claimant submitted that the fact that the provisions of the Employment Act was not followed is enough proof that the redundancy was unlawful. The Claimant submitted that the Respondent not only violated the Employment but also violated the Grievant's rights and subjected him to physiological torture. The Claimant submitted that after the Respondent declared the Grievant redundant on 29<sup>th</sup> February 2016, he was not paid until June 2016 when he was called to collect a cheque of Kshs. 46,070/- which was backdated to 4<sup>th</sup> March 2016. The Claimant submitted that the letter signed by the Grievant was also backdated to 4<sup>th</sup> March 2016 which was evidence of the Respondent's intentions to hide its misdeeds. The Claimant submitted that the Grievant was being underpaid contrary to the General Order of 2015. The Claimant thus urged the court to find that the redundancy was unfair and/or unlawful and order the Respondent to pay the following in accordance with the General Wages order 2015 – notice – Kshs. 16,380/-, annual leave for 2015 – Kshs. 13,230/-, overtime and days worked Kshs. 16,380/-, underpayment of wages – Kshs. 190,944/-, maximum compensation for unfair and unlawful redundancy of Kshs. 444,124/- as well as the costs of the suit.

6. The Respondent on its part submitted that the Claimant is a stranger to these proceedings as the parties do not have any recognition agreement and neither do they have a CBA agreement that has been concluded and registered. The Respondent urged the court to strike out the claim with costs. It cited the case of **Communication Workers Union v Safaricom Ltd [2014] eKLR**. The Respondent submitted that the Grievant had admitted to having received the sum of Kshs. 46,070/- and that he did not have any other claim whatsoever against the Respondent. The Respondent submitted that the Claimant is therefore estopped from claiming the reliefs sought as the Grievant was already paid his benefits which he acknowledged and signed a discharge voucher. It submitted that the Grievant having accepted the sum of Kshs. 46,070/- he cannot now turn around and allege that his contract was unlawfully terminated as that will be unconscionable and unfair. The Respondent cited the cases of **David Makori Orare v Gladys Bonareri Michira alias Gladys Keengwe Mong'are [2019] eKLR** and **Bamburi Special Products Ltd v Remax Construction Limited [2018] eKLR** where the court cited with approval the case of **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR** where it was held that

*“the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person”.*

The Respondent urged the court to hold that the discharge dated 4<sup>th</sup> March 2016 fully discharged the Respondent from any liabilities and that the present suit has no merit and ought to be dismissed with costs.

7. From the pleadings, evidence and the foregoing submissions of the parties, the issues for determination can be distilled as:-

1. Whether the claimant has *locus standi* to institute suit on behalf of the grievant
2. Whether the redundancy was procedurally unlawful and unfair
3. Whether claimant is entitled to the remedies sought

As to whether the Claimant has *locus standi* to institute suit on behalf of the Grievant, the Respondent submitted that the Claimant lacks *locus standi* to bring the suit as there is no recognition agreement or CBA between it and the Union. *Locus standi* in law is simply the position that the party suing has and the test to be met is that a party must have a sufficiency of interest to sustain its standing to sue for relief in a court of law. In this particular case, there is no sufficiency of interest as there is no recognition agreement or a registered Collective Bargaining Agreement between the Respondent and the Claimant herein. Though the Grievant produced a membership card before court, that alone is not sufficient to confer jurisdiction upon the Claimant to sue on his behalf. As such, the Claimant lacked the capacity to sue on the Grievant's behalf. Under the Labour Relations Act, recognition of a trade union precedes any action it may undertake in respect of its members.

8. As to whether the redundancy was procedurally unlawful and unfair, Section 40 of the Employment Act is couched in mandatory terms and provides that an employer who wishes to declare an employee redundant must adhere to the provisions of the Section. The Respondent was required to issue a notice of redundancy to the employee and ought to have notified the grievant and the Labour officer in writing 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 as provided for by Section 40(1)(b) of the Employment Act. The Grievant testified that he did not receive any notice of redundancy and that he was verbally informed by his manager that there was no work. The redundancy letter produced in evidence by the Respondent declaring the Grievant redundant is dated 1<sup>st</sup> March 2016 with the redundancy taking effect from 29<sup>th</sup> February 2016. It is clear that the Grievant never received the termination notice as prescribed in section 40(1)(a) and (b) of the Act. In the suit, the Respondent asserted that the decision to terminate the services of the Grievant was arrived at after the company combined two branches under one roof leading to duplication of responsibilities among employees. If some of the employees were retained, the Grievant ought to have been informed of the selection criteria with regard to seniority in time, skill, performance, ability and reliability as against his fellow employees holding similar position as envisaged under section 40(1)(c) of the Employment Act. This was not done in the present suit. The employer must demonstrate the selection criteria set out in section 40(1)(c) of the Act has been complied with failing which there would be no compliance with the section. As the provisions of Section 40 were not complied with, I would return that the declaration of the Grievant's redundancy was not in conformity with the provisions of Section 40 of the Employment Act.

9. As to whether Grievant is entitled to the remedies sought, he signed a discharge upon receipt of his terminal dues and declared that he did

not have any further claims against the Respondent. To make matters worse he chose to pursue the claim through a union that does not have any *locus standi* thus compounding an already tenuous position. His claim is entirely devoid of merit and is only fit for dismissal. Suit is dismissed with no order as to costs.

10. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16<sup>th</sup> March 2020 and the Kenya Gazette Notice 2357 of 20<sup>th</sup> March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

**Dated and delivered at Nyeri this 30<sup>th</sup> day of March 2020**

**Nzioki wa Makau**

**JUDGE**