



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 823 OF 2019

(Before Hon. Lady Justice Hellen S. Wasilwa on 12th March, 2020)

KENYA TERTIARY & SCHOOLS

WORKERS' UNION "KETASWU".....CLAIMANT

VERSUS

ROCKY DRIVING SCHOOL LIMITED....RESPONDENT

RULING

1.The Claimant is a registered union under the Labour Relations Act and has recruited the Respondent's unionisable employees. The Respondent is a limited liability company incorporated in Kenya and licensed to carry out the business of issuing driving lessons and driving instructor training, and has employed the Claimant's members.

2. The application before this Court was filed by the Claimant on 6/12/2019 seeking for injunctive orders against the Respondent, restraining it or its agents from declaring 25 employees redundant, threatening its employees, terminating or interfering with employment of its driving instructors or any other employees. The Claimant also seeks to have the costs of this application provided for.

3. The Application is supported by the grounds set out therein and the Supporting Affidavit of Japheth Anyira Agura sworn on 5/12/2019. The Respondent has opposed the application vide the Replying Affidavit of Hellen Anyiso, sworn on 10/12/2019.

The Claimant's Case

4. The Claimant avers that the Respondent has victimized and harassed its employees who joined its union, contrary to articles 36 and 41 of the Constitution, section 4 (1) of the Labour Relations Act and the ruling issued on 3/12/2018 in ELRC Cause 1330 of 2018, restraining the Respondent from harassing and intimidating the Claimant's members.

5. It is averred that the Respondent issued a redundancy notice to the Sub-County Labour Officer. This notice did not indicate the names of the employees intended for redundancy. As such, it is only just and fair that the Court orders on record should remain in force.

6. The Claimant avers that if the orders sought are not granted, the targeted employees will suffer irreparable loss and damage to the detriment of their families.

7. The Affiant has averred that the redundancy is being used as a scapegoat to terminate the services of the permanent employees who are members of the Claimant. He further avers that the Claimant has closed its branches in Eastleigh, Westlands, Donholm, Githurai and Tom Mboya Street and opened branches in Kakamega, Bungoma, Kapsabet, Meru, Machakos without considering re-engaging its former employees who were declared redundant.

8. The Affiant states that the Respondent has never provided a platform for its employees to air their concerns and discuss any possible alternatives to minimize the redundancy.

The Respondent's Case

9. The Affiant avers that the Respondent has been experiencing financial constraints due to the prevailing economic circumstances that has affected a number of sectors. As such, declaring some of its employees redundant is one of the ways of saving costs. It is the Respondent's case that the driving instructors were identified as the employees who were to be declared redundant.

10. The affiant confirms that a notice was issued to the labour office but contends that the purpose of a redundancy notice is to inform the parties about the impending redundancy and is not a redundancy declaration of any employees.

11. Further, that under Section 40 of the Employment Act, an employer is only required to identify a pool of employees at the notification stage and not necessarily indicate their names. She is of the view that the Respondent has no obligation to issue the notice to its employees.

12. It is the Respondent's case that there is a dispute pending before the labour office which has not been adjudicated upon. As such, this application has been filed prematurely.

13. The affiant is also of the view that the orders issued on 27/8/2018 do not restrain the Respondent from declaring its employees redundant so long as due process is followed. Further, that the orders referred to by the Claimant are not applicable to this case because the redundancy is not as a result of the involvement of its employees in the Claimants' activities and that the reasons have been well explained to this Court.

14. Finally, the affiant avers that the application is premature, fatally defective, has been brought in bad faith and that the Claimant has approached this Court with unclean hands hence is undeserving of the orders sought.

The Claimant's Rejoinder

15. The Claimant filed its rejoinder to the Respondent's Replying Affidavit vide a Further Affidavit of Japheth Anyira Agura sworn on 13/12/2019. The affiant contends that the Respondent is not experiencing financial constraints as it has expanded its operational branches in other localities outside Nairobi.

16. In response to paragraphs 5, 6, 8 and 9 of the Replying Affidavit, he contends that the notice of 13/11/2019 was unprocedural, unlawful and unfair hence void for failing to meet the requirements envisioned in Section 40 (1) (a), (b) and (c) of the Employment Act.

17. The affiant further contends the Claimant's application is not premature or an abuse of the Court process because pursuant to Sections 62 (4) and 74 (b) (i) of the Labour Relations Act, a union can report a trade dispute at any stage provided an employer has issued a redundancy notice.

18. The affiant deposes that the averments in paragraphs 10 and 11 are untrue as driving instructors are the majority employees and who have declined to withdraw their union membership.

19. The application was disposed of by way of written submissions with the Respondent filing its submissions on 21/1/2020. There is no record of the Claimant's submissions in the Court file.

The Respondent's Submissions

20. The Respondent's submits that the Employment Act only requires an employer to identify the pool of employees who will be affected by the redundancy and not the individual employees, as such, the relevant provisions were complied with.

21. It is submitted that the application is premature and unnecessary as the redundancy process is in the initial stages, no decision has been made and that the notice only served as a way of inviting the relevant stakeholders to discuss the impending redundancy.

22. Further, the Claimant has reported the dispute to the labour office, which dispute, is yet to be arbitrated to its logical conclusion. The Respondent urges this Court to allow the dispute to be adjudicated upon by the ministry as an ADR mechanism envisioned in article 159 (2) (c) of the Constitution. Further, by filing this application, the Claimant is in breach of the fundamental provisions of the law.

23. In light of the above, the Respondent urges this Court to dismiss the application because the redundancy process has been commenced as a cost saving measure and not in an attempt to punish its employees. Additionally, the Claimant has not adduced evidence to prove that the redundancy process is discriminative against union employees.

24. I have examined all the averments of both Parties. The Applicants sought orders to restrain the Respondents from declaring 25 of its members redundant who are employed as driving instructors.

25. The Respondents opposed this application deponing that the same is premature.

26. From the onset, I state that restructuring is a prerogative of an employer for good cause and organization of their business. This process should not unnecessarily be stopped by the Court unless it can be proved that the process is flawed.

27. In this case, the Respondent avers that the process is ongoing and a notice has been sent to the County Labour Officer. The gist of the notice is to allow Parties to negotiate and find out how best to handle the process without hurting anyone unnecessarily.

28. The Claimant herein should in the circumstances try and reach out to the Respondent to ensure that the process progresses seamlessly.

29. I agree with the Respondent that this application was premature and the Parties should instead try conciliation with a view of reaching an amicable solution.

30. I find the application not merited at the moment. I refer the Parties to conciliation before the County Labour Officer before further direction of this Court.

31. Costs in the cause.

Dated and delivered in open Court this **12th day of March, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Parties