



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 846 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL, FOOD AND ALLIED

WORKERS.....CLAIMANT

VERSUS

TUMAINI SELF SERVICE LIMITED...1ST RESPONDENT

QUICK MART LIMITED..... 2ND RESPONDENT

RULING

Vide its memorandum of claim dated and filed on 17th December 2019, the claimant, a trade union registered under the Labour Relations Act to represent employees in the commercial sector including supermarkets as more specifically set out in the membership clause 5 of its Constitution, filed the claim herein against the respondents, both of whom trade as supermarkets, seeking the following orders –

- i. The 1st Respondent to recognize the Claimant Union as a properly constituted and representative body and the sole labour union representing labour interests **of their employees.**
- ii. The 1st Respondent to deduct and remit union dues from all union members who have signed the Claimant's Check off Sheets and to pay any other outstanding union dues as Gazetted by the Minister from their own funds with interest at court rates.
- iii. The 1st Respondent to engage the Claimant in collective bargaining within thirty (30) days upon signing Recognition Agreement.
- iv. Declare that the 1st and 2nd Respondents herein cannot outsource their key functions and that their intended agreement with the outsourcing firms is unlawful if the same is intended to terminate the services of regular employees and covert them to contract terms under such outsourcing firms.
- v. Declare that there are no compelling reasons to terminate the services of employees of the 1st Respondent as planned where the marriage between the 1st and 2nd Respondents is a merger leading to rebranding and not acquisition or take over.
- vi. Declare that where the 1st Respondent intends to use outsourced labour; they must hire such labour alongside its own employees as to avoid discrimination.
- vii. Declare that union membership is a lawful and a constitutional right and cannot be a reason for termination **of service.**
- viii. Declare that the 2nd Respondent cannot offer themselves to be used to punish regular employees of the 1st Respondent over their Trade Union membership and should not offer themselves to be used to violate the rights of employees of the 1st Respondent.
- ix. Declare that where the 1st Respondent ceases to exist for any other reason other than the merger and rebranding and where they must handover their employees to the 2nd Respondent they be ordered to first sign Recognition Agreement and a Collective Bargaining Agreement and hand over their employees to the 2nd Respondent with their terms and conditions of service.

x. Direct that outsourcing firms cannot outsource employees who are already in employment and on permanent terms of service and where they must take over the said employees, such changes in staff management must also carry with it employees' terms and conditions of service.

xi. Respondents each to meet the cost of this suit in favour of the Claimant.

Simultaneously with the memorandum of claim the claimant filed a notice of motion in which it seeks orders that –

1. Spent

2. Directions be given that this application be heard interpartes on priority basis given its urgency.

3. Pending the hearing and determination of this matter, this Court do and hereby restrains the 1st Respondent from terminating the services of 447 employees on grounds of alleged change in staff management.

4. Pending hearing and determination of this matter, this Court do order the 1st and 2nd Respondents to mix, exchange and integrate their employees on current terms and conditions of service arising from the merger and rebranding without involving any outsourcing firm.

5. The Court do and hereby grants status quo as at the date of this Application with regard to employment status of 447 employees as currently obtaining until further orders of the Court.

6. Pending the hearing and determination of this application, this Court do and hereby restrains the 1st Respondent from victimizing, coercing, intimidating, terminating or disciplining employees on account of their union membership.

7. Pending the hearing and determination of this matter, this Court do and hereby orders the 1st and 2nd Respondents to continue assigning duties to employees of the 1st Respondent and discharge their management role on such employees until further orders of the court, subject only to mixing, exchange and integration of such staff between the Respondents.

8. That this Court do order the 1st Respondent to sign Recognition Agreement and conclude a collective Bargaining Agreement with the Applicant within 30 days of the date of this order.

9. That should it become necessary that the 1st Respondent ceases to exist for any other reason other than the merger and rebranding, they should handover their employees to the 2nd Respondent and not to outsourcing firms.

10. Costs of the application be in the cause.

The notice of motion which was filed under certificate of urgency was heard ex parte on 17th December 2019 and interim orders granted as follows –

1. Spent.

2. That status quo pending now to be maintained pending inter-parties hearing of the application.

3. That the respondents are further restrained from victimizing, intimidating or disciplining or terminating the employees or any employee on account of Union membership.

4. That the application is fixed for inter-parties hearing on 22nd January, 2020.

5. That applicant to serve the respondents forthwith.

On 24th December 2019, the 1st respondent filed a motion dated 23rd December 2019 under certificate of urgency seeking the following prayers –

1. Spent.

2. Spent.

3. An urgent date be set for the inter partes hearing of this application or in any event before 31st December 2019 when the 1st Respondent shall have ceased trading.

4. This application be heard in priority to the Claimant's Notice of Motion dated 17th December 2019.

5. Pending the hearing and determination of this application, the Court be pleased to set aside the Orders issued on 17th December

2019.

6. Without prejudice to prayer (5) above, the Memorandum of Claim dated 17th December 2019 be struck out on the grounds that the Claimant lacks locus standi to bring this suit.

7. The costs of the Application be borne by the Claimant.

The application by the 1st respondent was certified urgent by the duty Judge and fixed for hearing on 22nd January 2020 together with the claimant's application.

Besides the affidavits filed in support of their respective applications the claimant filed a replying affidavit to the application of the 1st respondent and a supplementary affidavit.

The 1st respondent also filed a supplementary affidavit. The 2nd respondent filed a replying affidavit to the claimant's application.

Both respondents also filed list and bundles of authorities.

Both respondents have however not yet filed responses to the memorandum of claim.

The two applications herein were first heard on 22nd January 2020 on priority due to the urgency of the same. On that day, the claimant was represented by Mr. Nyumba. The 1st respondent was represented by Ms. Mwangi instructed by Coulson Harney LLP Advocates while the 2nd respondent was represented by Ms. Babu instructed by Nicholas Gitonga and Associates, Advocates.

Although the application was argued at length, the counsel for the 1st respondent sought and was granted an adjournment and leave to file additional documents that were crucial for the fair determination of the applications.

When parties appeared before the court for further hearing of the applications on 6th February 2020, Counsel for the 1st respondent Mr. Chacha Odera appearing with Ms. Lubano sought a further adjournment on grounds that the firm of Oraro and Company Advocates which had instructed them had just come on record and required time to file the further affidavit which the 1st respondent had been granted leave to file. The adjournment was granted and urged parties by the court to discuss the subject matter with a view to reaching an amicable resolution.

The application was thus again fixed for hearing on 26th February 2020 on which date the two applications were heard as parties did not agree.

Claimant's Case

It is the claimant's case that on 1st November 2019, the 1st respondent announced to its employees that there was going to be an integration/merger between Tumaini Supermarket, the 1st respondent, and Quick Mart Supermarket, the 2nd respondent. That the integration would lead to the branding of Tumaini Supermarket into Quick Mart Supermarket. That by the time the notice was issued the 1st respondent's supermarkets at Eastern Bypass and Kahawa had already been rebranded. The employees were informed that the rebranding would take 3 to 4 months of 2020, ending about May 2020. The notices are exhibited at pages 88 and 89 of the claimant's bundle of documents as appendixes 4 and 5 respectively. Appendix 4 is addressed to all branch employees while appendix 5 is addressed to head office employees.

It is the claimant's case that according to the notices, only about 40 employees of the Head Office were to be declared redundant as a consequence of the merger of the headquarters of the two entities. That at the time of issuing the notices there had already been staff exchanges between the two supermarkets which were referred to as cultural integration.

According to the claimant, it is at about this time that it sent to the 1st respondent check off forms and a draft recognition agreement, having recruited an overwhelming majority of 86% of the 1st respondent's employees. It is the claimant's case that it is the check off forms that prompted the 1st respondent to change its position regarding the transition of its employees to Quick Mart. That by notice dated 29th November 2019, the 1st respondent informed its employees that the store level employees would be offered employment by outsourcing firms contracted by the 2nd respondent. The notice is at page 93 of the claimant's bundle at appendix 8. That it is because of this notice that employees rushed to court as this amounted to unfair labour practice.

It is the claimant's position that the respondents are now trading as one entity with the 1st respondent's CEO heading the merged entity. That the two entities have done operational alignment and system integration of computers and software. That they plan to do a human capital integration during which outsourcing companies will take over the 1st respondent's employees.

It is the claimant's contention that the intended redundancy is unprocedural as neither employees nor the union have been notified as provided under Section 40(1)(a) and (b) of the Employment Act. That the Labour officer has also not been notified as the letters copied to the Labour officers are not addressed to any particular labour office.

It is the claimant's averment that the face behind the merger is the same as both the 1st and 2nd respondents are owned by Sokoni Retail Kenya and Ademia Partners and thus the business ownership is one and the same. That outsourcing firms are not part of the merger and cannot purport to take over the employees. That the 1st respondent promised its employees that a private consultant would do a staff audit to determine staff excesses which has not yet been done. That it is only after the staff audit that the 1st respondent can genuinely carry out redundancies.

The claimant further avers that the changes relating to Communication Authority, Kenya Revenue Authority, lease agreements and suppliers are indicative of the operations of the respondents. The claimant referred the court to the merger programme which states that the operational merger would take a period of 12 months from end of 2019. It further referred the court to the "*Frequently Asked Questions*" issued to employees which does not make any reference to redundancies.

On the authorities filed by the respondent, Mr. Nyumba submitted that the Court of Appeal did not rule out the requirement of notice or compliance with statutory provisions which include giving reasons for redundancies.

1st Respondent's Case

The 1st respondent's case is that the redundancies contested by the claimant were not prompted by the demand for recognition by the claimant as alleged. That the employees of the 1st respondent were made aware of the intended redundancies in November 2019. That the claimant came into the picture after the notice of intended redundancies had been issued.

It is the 1st respondent's case that it issued notices of the intended redundancies to the labour officer who responded to the same as is reflected by the communication at page 46 and 47 of the respondent's bundle of documents filed with its application dated 23rd December 2019.

It was the 1st respondent's averment that this suit was filed in bad faith as the claimant did nothing after issuance of notice of redundancy in November 2019 until a few days to expiry of the notice which was to lapse on 27th December 2019.

It is further the 1st respondent's averment that as a good and conscientious employer, it engaged its employees by carrying out staff exchanges to those that would wish to work with the 2nd respondent through the outsourced companies. That the business model of the 2nd respondent involves the outsourcing of some of its functions.

It submitted that the check off forms submitted by the claimant have been disowned by some of the employees.

It is further submitted that the employees of the 1st respondent who are the subject matter of this suit could not be transited to the 2nd respondent as it would amount to discrimination of the 2nd respondent's employees of similar cadre who are outsourced. That an investor has liberty to make such business decisions as was observed in the case of **Aga Khan Hospital v KUDHEIHA**. That all the investor is required to do is comply with the law being the Companies Act, the Competitions Act, Kenya Revenue Authority requirements with regard to trading and taxation, and the Employment Act with regard to employees. That the substantive justification for the redundancy is contained in the decision to merge.

It was submitted that the 1st respondent had issued notice of intention to declare employees redundant which is the first notice under Section 40 of the Employment Act. That the second notice which is notice of termination had not been issued due to this court's orders stopping the redundancy process.

Counsel submitted that in the event the court found that the 1st respondent had not complied with notices under Section 40, the 1st respondent was prepared to issue the notices afresh. This is also stated in the supplementary affidavit of Wachera Maina sworn on 5th February 2020 at paragraph 10 where she states that she was advised by the 1st Respondent's Advocates, Messrs. Oraro and Company Advocates, that there was merit in withdrawing the notices of intended redundancy dated 1st November 2019, 21st November 2019 and 6th December 2019 and issuing fresh notices to the 1st Respondent's employees.

On the claimant's averments in respect of anchor shareholder, it is the 1st respondent's submission that this is not the right forum to argue the same and that there is a difference between shareholders and the company.

Counsel emphasised that the 1st respondent has stopped trading and it is imperative that this issue is resolved as soon as possible because of the financial implications.

2nd Respondent's Case

Ms. Babu for the 2nd respondent submitted that what the claimant is asking the court to do is interfere with the manner in which the 2nd respondent exercises its managerial prerogatives and in which it has chosen to model its business. She submitted that the 2nd respondent has 318 employees of its own. That services such as till operators, security and general labour are provided by several outsourcing companies. That it was never the intention of the 2nd respondent to employ any of the 1st respondent's store level staff who were to be declared redundant upon the 1st respondent ceasing operations on 31st December 2019. She submitted that the orders sought by the claimant have no basis as the 2nd respondent cannot be compelled to offer employment to persons who were never its employees. She relied on the case of **Kenya Airways Limited v Aviation and Allied Workers Union of Kenya and 3 others [2014] eKLR** where the court stated that—

“The Court cannot interfere where the employer exercises its discretion fairly and in response to real economic dictates affecting his business. The Court can only intervene where the redundancy law is abused through implementation of redundancy where there is no compelling reasons or circumstances to warrant redundancy or the procedure has not been followed”.

The 2nd respondent also relied on the New Zealand case of **Aoraki Corporation Limited v Collins Keith McGavin** quoted in the Kenya Airways case where the Court held that: -

“Where it is decided as a matter of commercial judgment that there are too many employees in a particular area overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy...”

The 2nd respondent further relied on the decision in **Kenya Game Hunting and Safari Workers Union v Lewa Wildlife Conservancy Limited [2014] eKLR** where the court observed–

“This Court agrees entirely with the good Judge brother Paul Kosgei in the interpretation he gave to Article 41 of the Constitution of Kenya and the Limitation under Article 24. Labour Rights are granted to both employers and the employees. ...

The Constitution of Kenya has not opened the door of Industrial Relations to accommodate such esoteric principles as co-determination. The day has not arrived, when trade unionists sit in the boards of Kenyan companies with whom the trade unions have recognition agreements. The participation of trade unions in management of companies cannot extend beyond that which is agreed to between the parties under their recognition agreement and successive CBAs. The managerial prerogative is a fundamental principle in capitalist production. It must be protected and not consumed in the liberal slide into egalitarian anarchy. The Article on reasonable limitations in a Constitutional Democracy is aimed at ensuring there is a healthy balance between the ever increasing needs of social justice and the survival of the wielders of capital. Fair globalization, does not intend that we kill our production systems through a cavalier interpretation of the Constitution. ...”

The 2nd respondent further relied on the decision in **Kenya Building, Construction, Timber and Furniture Industries Employees Union v Timsales Limited [2019] eKLR**, where the court observed that –

“Further in the case of **Alfred Nyungu Kimungui v Bomas of Kenya (Industrial Court Cause No 620 of 2013)** it was held that the courts should not take over and exercise managerial prerogatives at the work place.

The orders the Claimant seeks in essence would amount to interference with managerial prerogative of the respondent.”

She submitted that both respondents are adversely affected by the ex parte orders of this court. That there are no special circumstances to warrant the grant of the orders sought by the claimant.

She prayed that the application be dismissed.

Analysis and Determination

I have carefully considered the pleadings herein and the submissions by the parties. I have further considered the authorities cited. The issues for determination in my opinion are the following –

1. Whether the 1st respondent has complied with the law in relation to the intended redundancy of its employees.
2. Whether the redundancy was actuated by the claimant’s recruitment of the 1st respondent’s employees and demand for recognition.
3. Whether the claimant is entitled to the orders sought.

The law on redundancy is contained in Section 40(1) of the Employment Act which provides for the procedure for redundancy at paragraphs (1), (b), (c) and (d) thereof as follows–

40. Termination on account of redundancy

1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:

a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed 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;

b. Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c. The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d. Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

It is the claimant's position that the respondent did not comply with these provisions as there was no notice of intention to declare the employers redundant. That in fact, there was no intention to declare any branch employee redundant and the only redundancy was to be at the headquarters and to affect only 40 employees.

From the record, the first communication on the merger was by internal memo dated 5th September 2019 which is reproduced below –

“INTERNAL MEMO

DATE: 5TH SEPTEMBER, 2019

FROM: HUMAN CAPITAL DIVISION

TO: ALL STAFF /BRANCH MANAGERS/SECURITY

CC: CEO/DIRECTORS/DIVISION HEADS/SBUS

RE: MERGER ANNOUNCEMENT

TUMAINI SELF SERVICE LTD & QUICK MART LTD

This is to inform all our employees that on 5th September, 2019 Tumaini Self Service Ltd and Quick Mart Limited made a major announcement regarding the merger and business integration of the two companies.

This announcement follows the communication of December, 2018 regarding Tumaini partnership with Sokoni Retail Kenya Limited.

Tumaini and Quick Mart are two highly compatible retailers who hold similar values in business operations and striving towards achieving an excellent customer service for retail customers. Therefore, the merger forges a new entity with enhanced experience and expertise that will translate into better service for our customers and business partners.

This is an exciting moment for both companies and for our employees who are our nicest. By joining forces, the two companies have just made a huge increase in the quality of the human capital with greater opportunities for staff development, advancement and growth.

Any change of policies and procedures shall be communicated through the Human Capital Division as well as addressing all questions and concerns regarding this new development.

Please join us as we look forward to an exciting and prosperous future for our employees and business partners

Thank you.

SIGNED

PETER KANG'IRI

CHIEF EXECUTIVE OFFICER”

The second correspondence on the merger was by internal memo dated 23rd September 2019 reproduced below –

“INTERNAL MEMO

DATE: 23RD SEPTEMBER, 2019

FROM: HUMAN CAPITAL DIVISION

TO: ALL STAFF /BRANCH MANAGERS/SECURITY

CC: CEO/DIRECTORS/DIVISION HEADS/SBUS

RE: MERGER ANNOUNCEMENT

TUMAINI SELF SERVICE LTD & OUICKMART LTD

Team,

Further to the communication of 5th September, 2019, we hereby take another opportunity to update all our staff on the progress of the merger process as follows: -

Firstly, and as earlier communicated, the Board of Directors and the management of both Tumaini and Quick Mart highly value our staff. This is therefore to affirm all our staff that human capital remains as one of the key drivers and will play an important role in the success of this merger process.

It is in in this regard and in consideration that the business is still expanding, that we assure all our staff of their job security and opportunities for growth and career development as we mix the synergies from both teams.

Secondly, this is to inform you that we have now come to the next phase which is Implementation of the merger process, focusing *on the following key areas of the business:* -

- 1.Operational alignment;
2. System integration and;
3. Human Capital (policies, process and culture alignment)

In this regard, we are going to have regular joint meetings between the Tumaini and Quick Mart for purposes of handling the 3 areas. This exercise will involve exchange of management ideas including branch visits by die teams on both sides among other operational activities.

We shall continue to update all our staff on every stage of this merger as we also plan for branch meetings to address any arising issues. Therefore, this is to inform you that this remains the official communication platform for all Issues pertaining the merger.

My office remains open for any confirmation or clarification regarding the merger.

Thank you for your understanding and co-operation as we look forward to an exciting and prosperous future for our employees.

SIGNED

PETER KANG'IRI

CHIEF EXECUTIVE OFFICER”

The 3rd communication on the merger was by internal memo dated 1st November 2019 as reproduced below –

“INTERNAL MEMO

TO: ALL BRANCH EMPLOYEES

Team,

Further to the communication on 23rd September, 2019, we hereby take another opportunity to update all our store staff on the progress of the merger in relation to staff integration at store level.

The integration between Tumaini Supermarket and Quick Mart is on course and this integration process is a new exciting chapter during which we aim to build a best in class, high growth, and profitable Tier one supermarket. We truly appreciate your hard work and contribution to this process.

As a part of the integration, we are in the process of rebranding existing Tumaini stores to Quick Mart stores. So far, we successfully rebranded our Thika branch and we are rebranding 2 more stores in November (Eastern Bypass and Kahawa West). Furthermore, we plan to rebrand all the other stores in Nairobi into Quick Mart during the first 3-4 months of 2020.

We believe that our staff and human capital is critical to our success and does play a vital role in the success of this merger. As part of our staff training and cultural integration, we are exchanging some staff between two companies. During this process, please

refer to the store's employee policies (e.g. working hours, uniforms) until further notice.

We will have additional communication in the upcoming months regarding harmonization of policies, benefits, and procedures between two companies.

If you may have any questions, my office remains open. Additionally, you can escalate questions through your *branch leadership or HR department on any questions.*

Thank you for your understanding and co-operation.

SIGNED

PETER KANG'IRI

CHIEF EXECUTIVE OFFICER"

There was thus no communication of redundancy up to 1st November 2019 when the third notice on merger was issued to employees of the 1st respondent. The first notice on redundancy dated 1st November 2019 was addressed to head office employees and is reproduced below –

“INTERNAL MEMO

NOTICE OF INTENDED REDUNDANCY

TO: HEAD OFFICE EMPLOYEES

Team,

Further to the communication on 23rd September, 2019, we hereby take another opportunity update all our headquarters staff on the progress of the merger in relation to human capital.

The integration between Tumaini and Quick Mart is on course and the integration process is new exciting chapter during which we aim to build a best in class, high growth and profitable tier one supermarket. We truly appreciate your hard work and contribution to this process.

In order to build a best in class organization and to maximize the synergies of integration, we will need to combine existing two head offices into a single office. This will render some roles redundant within the new headquarters and will result in job losses for some of the current head office personnel as well as transitioning Tumaini employees to Quick Mart.

We believe that our staff and human capital is critical to our success and does play a vital role in the success of this merger. Both leadership from Tumaini and Quick Mart have had number of joint meetings to discuss and agree on the optimal head office organization, addition, we have brought third party consultants to ensure the objectivity of the process.

The planned redundancies are expected to commence on 1st December 2019 and shall impf approximately 40 employees across Tumaini and Quick Mart. In accordance with the provision of Section 40 of Employment Act 2007, the company hereby gives a one (1) month notice Intended redundancies. During the next month, we will develop objective criteria to determine staffing decisions through facilitation by external consultants. We will notify you of how you will participate in the process.

Redundant employees will receive all their due entitlements in accordance with the provision section 40 of Employment Act 2007 and their employment contracts.

We understand this may be a difficult time. We may not have answers to all of your questions at this moment; however, we shall try as much as possible to seek other alternatives, where possible, to minimize the number of staff impacts by redeploying some head office employer to other roles in lines with the new business strategy and plan. We will provide consultation and training for everyone in the coming months. Additionally, if you may have any question my office remains open.

Thank you for your understanding and co-operation.

SIGNED

PETER KANG'IRI

CHIEF EXECUTIVE OFFICER

CC: Country Labour Office"

The first notice on redundancy to branch employees is dated 21st November 2019 and is reproduced below –

“21 November 2019

NOTICE

To all branch employees,

As you are aware, Tumaini Self Service Limited (Tumaini) and Quick Mart Limited (Quick Mart) are in the process of merging their businesses. The integration between Tumaini and Quick Mart is on course and we truly appreciate your hard work and contribution to this process.

Upon the successful merger, Tumaini will cease to be in a position to maintain employment relationship with its employees, and by virtue of applicable law, will have to declare all its employee positions irredundant. Pursuant to applicable law, Tumaini hereby gives one (1) month notice of the intended redundancy. Upon declaring the redundancies, Tumaini will comply with all requirements of Kenyan law, bluff contracts and the Tumaini staff policies in relation to payment of redundancy dues.

We believe that our staff and human capital is critical to our success. Therefore, to mitigate the effects of the redundancy. Tumaini has negotiated and agreed with Quick Mart that (other than for certain management level employees), the store level employees shall be offered employment by outsourcing in firms. Quick Mart has agreements with these outsourcing firms whereby these outsourcing firms provide services to Quick Mart at its various branches at competitive terms. If all store level employees take up the employment offers, it is anticipated that there will effectively be NIL JOB LOSSES for this category of employees.

Further details about the redundancy dues will be communicated to each employee before the end of December 2019. Similarly, further information about the employment options with the outsourcing company shall be provided to all employees in the coming weeks.

Both leadership from Tumaini and Quick Mart have been conducting a number of joint meetings to make the transition as smooth as possible. We understand that this may not be an easy transition for all of you. My office remains open for any concerns and questions you may have. Additionally, you can escalate questions through your branch leadership or HR department who will be

able to assist you.

Thank you for your understanding and co-operation.

SIGNED

Peter Kang'iri

Chief Executive Officer

CC: Country Labour Officer

Employee Notice Board”

This was followed by the notice dated 29th November 2019 which is reproduced below –

“November 29, 2019

NOTICE

Team,

Further to the communication on 21st November 2019, we hereby take another opportunity to update all of our store staff on the progress of the merger in relation to human capital.

We will start communications on the outcome to all of you from 27th of December. Until then your current employment status will remain the same.

Please remember, we have agreed with Quick Mart that (other than for certain management level employees), the store level employees shall be offered employment by outsourcing firms. If all store level employees take up the employment offers, it is anticipated that there will effectively be NIL JOB LOSSES for this category of employees.

We truly appreciate your hard work as we prepare for the festive season. Please let me or your HR representative know if you have any questions.

Thank you for your continuous co-operation.

SIGNED

Peter Kang'iri

Chief Executive Officer”

Thereafter another notice was issued on 6th December 2019 as reproduced below –

“December 06, 2019

NOTICE

ALL HEAD QUARTER EMPLOYEES,

Further to communications on 2nd and 29th November, we hereby take another opportunity to update all of our store staff on the progress of the merger in relation to human capital.

As previously communicated, we will communicate *the outcome of the staffing decision at the end of December. Regardless of the decision, since Tumaini will cease to be in a position to maintain employment relationship with its employees, all employees will be eligible to receive payment of redundancy dues. Additionally, those receiving offers to remain in the new organization will receive Offer letters from Quick Mart.*

In compliance with the labour laws governing the redundancy process, you shall be paid your redundancy dues, which shall comprise of the following: -

1. One month's pay in lieu of Notice
2. Leave balance/accrued and not taken
3. Severance pay at the rate of 15 days of each complete year of service
4. Days worked after the December payroll cycle.
5. Less any moneys owed to the company
6. Certificate of Service

Please note that the final amount will be subject to taxation under the applicable law. We plan to give an individual notice for the above-mentioned redundancy payment at the end of December when we communicate the outcome of the staffing decision.

We truly appreciate your hard work as we prepare for the festive season. Please let me or your HR representative *know if you have any questions.*

Thank you for your patience continuous co-operation.

SIGNED

PETER KANG'IRI

CHIEF EXECUTIVE OFFICER”

The final notice was issued on 24th December 2019 after the filing of this suit and is reproduced below –

“24th December 2019

NOTICE

TO ALL STAFF

Further to previous communications, we hereby take another opportunity to update all our staff.

We regret to inform you that due to unforeseen circumstances beyond our control, we will delay communication on staffing decisions. Tumaini is considering all its options at present, while we formulate our strategic plan for the upcoming year.

In the meantime, we want to confirm to you that your employment status will remain the same until further notice.

If you have any questions, please reach out to your HR representative or me.

Thank you in advance for your co-operation and understanding.

Merry Christmas and Happy New Year.

SIGNED

PETER KANG'IRI

CHIEF EXECUTIVE OFFICER"

As was submitted by the claimant, there is no evidence that any of the employees was personally informed of the intention to declare any of them redundant. The notices reproduced above were communicated through emails whose addresses are reflected therein. They are managers at branches. There is no evidence that the notices were communicated to any of the employees by the managers to whom the notices were addressed.

The 1st respondent also submitted a list of names signed by person who are stated to have attended meetings at the branches on 23rd and 24th November 2019. As pointed out by the claimant, there are no minutes or agenda of the said meetings. There is further no evidence of invitation of employees to attend such meetings.

I thus agree with the claimant that there is no proof of valid notice of intended redundancy having been issued to the employees of the 1st respondent as required under Section 40(1)(b) of the Employment Act.

Section 40(1)(a) requires that where an employee is a member of a trade union, such notice is to be issued to the union. No such notice was issued to the claimant. I have however noted from the check off forms that they are dated 29th November 2019 and were sent to the respondent the same day. The substantive notification of redundancy to branch employees which were sent to the branch managers is dated 21st November 2019. As submitted by the union, it is upon learning of this letter that the employees approached the claimant union to file the present suit.

All notices issued before 29th November 2019 were thus not expected to be addressed or copied to the union as the 1st respondent had no notice of its employees having joined membership of the union. However, notices issued after the date of receipt of the check off forms were expected to be addressed to or copied to the claimant union. The fact that there were impending redundancies would not bar the employees of the 1st respondent from rushing to join membership of a union in order to have the union represent them in the process leading to the redundancy. The law does not put a cap on the time when an employee can join the membership of a union. An employee is thus free to join membership of a union for purposes of representation any time before an employment relationship terminates.

Related to this issue is whether the redundancy was actuated by malice. The union alleges that all along the 1st respondent's communication with employees only referred to redundancy of 40 headquarters staff and that it is only after receiving check off forms and demand for recognition that the 1st respondent changed its mind and decided to declare all its staff referred to in the notice of 21st November 2019 redundant. This is denied by the 1st respondent.

From the correspondence on record, I would agree with the claimant only to the extent that before 21st November 2019, the 1st respondent had not made any disclosure of the intention to declare branch employees redundant. All the notices reassured the employees of the security of their jobs.

In the notice dated 23rd September 2019, the respondent stated–

“Firstly, and as earlier communicated, the Board of Directors and the management of both Tumaini and Quick Mart highly value our staff. This is therefore to affirm to all our staff that human capital remains as one of the key drivers and will play an important role in the success of this merger process.

It is in in this regard and in consideration that the business is still expanding, that we assure all our staff of their job security and opportunities for growth and career development as we mix the synergies from both teams.”

[Emphasis added]

In the notice dated 1st November 2019, the same was again alluded to at paragraph 4 where it is stated –

“We believe that our staff and human capital is critical to our success and does play a vital role in the success of this merger. As part of our staff training and cultural integration, we are exchanging some staff between two companies. During this process, please refer to the store’s employee policies (e.g. working hours, uniforms) until further notice.”

It was thus a major shift of expectation for employees when they were informed in the notice of 21st November 2019, after being assured of no job losses, that they would be declared redundant as a consequence of the merger.

The claimant has however not proved that this change of position was actuated by its recruitments and demand for recognition. Having first communicated with the 1st respondent on 29th November 2019, there is no evidence that the 1st respondent was aware that the claimant had recruited its employees as at the date of issue of the notification of redundancy on 21st November 2019.

I thus find no proof of the allegation of the claimant that the notice was malicious and intended to prevent it from representing the employees of the 1st respondent.

Is the claimant entitled to the prayers sought?

The claimant prayed for the following orders in the application:

1. Spent.
2. Spent.
3. Spent.
4. Pending hearing and determination of this matter, this Court do order the 1st and 2nd Respondents to mix, exchange and integrate their employees on current terms and conditions of service arising from the merger and rebranding without involving any outsourcing firm.
5. The Court do and hereby grants status quo as at the date of this Application with regard to employment status of 447 employees as currently obtaining until further orders of the Court.
6. Pending the hearing and determination of this application, this Court do and hereby restrains the 1st Respondent from victimizing, coercing, intimidating, terminating or disciplining employees on account of their union membership.
7. Pending the hearing and determination of this matter, this Court do and hereby orders the 1st and 2nd Respondents to continue assigning duties to employees of the 1st Respondent and discharge their management role on such employees until further orders of the court, subject only to mixing, exchange and integration of such staff between the Respondents.
8. That this Court do order the 1st Responded to sign Recognition Agreement and conclude a collective Bargaining Agreement with the Applicant within 30 days of the date of this order.
9. That should it become necessary that the 1st Respondent ceases to exist for any other reason other than the merger and rebranding, they should handover their employees to the 2nd Respondent and not to outsourcing firms.
10. Costs of the application be in the cause.

As I have already determined, no proper notification of intended redundancy was issued to the employees or to the claimant union. Further, no valid notification was issued to the Labour Officer. As is stated in the pleadings, the 1st respondent had at the material time, branches in Nairobi, Machakos, Kiambu, Kajiado and Kisumu with a total of 13 outlets. This is as stated in the communication on CAK decision on proposed acquisition of Quick Mart by Sokoni Retail – at paragraph 2 thereof. The notification to Labour Officer is not addressed to any specific labour officer. The response from the Ministry of Labour dated 23rd November 2019 referred to by the 1st respondent does not refer to any specific notice having been received by the Labour Office. It states –

“We confirm that we received your notification for the intended redundancy for your employees in line with the requirements of Section 40 of the Employment Act.”

No date of notice is mentioned. No copy of the said notice has been availed to the court. As this was one of the major contested issues the court would have expected the notice to the Labour Officer to be produced. In its absence and with the vague reference to the same in the supposed response by the Labour Officer, we can only assume that there was none, and that the vague letter from the labour office was obtained irregularly, probably to be sued as evidence in this suit.

Section 40(1)(a) is clear that the notice should be addressed to the local labour officer. In a situation like the 1st respondent’s where the branches are in different locations under different labour offices, it would have been expected that the notice would be sent to all the local labour officers or to the headquarters, with copies to the local labour officers. No such notices have been shown to **the court**.

Section 40(1)(a) further specifies the information to be communicated in the notice being the reasons for, and the extent of, the intended redundancy as well as the selection criteria, and the benefits payable as set out in subsections 40(1)(c) to (g). There is no such notice on record.

I thus find that there was no valid notice to the relevant Labour Officers of the intended redundancy in the manner anticipated in Section 40(1) of the Employment Act.

The prayers sought by the claimant in respect of assigning duties to employees are managerial prerogatives which are outside the jurisdiction of this court. The prayers for recognition are matters to be determined after adducing evidence at full hearing. Suffice to mention that in view of the fact that the 1st respondent has ceased trading, this may be an issue that the claimant may wish to pursue afresh with the 2nd respondent, in view of the merger.

The issue of victimisation has not been proved. Indeed, the claimant has not made any substantive arguments or adduced evidence in respect thereof. I will thus not make any determination in respect thereto.

On the issue of notification of redundancy to both the employees and the labour officer, as I have already found no valid notice was issued. The 1st respondent has already conceded to this and offered to issue fresh notices.

The application thus succeeds to the extent that the court finds that no valid redundancy notification has been issued in terms of Sections 40(1)(a) and (b) of the Employment Act. The 1st respondent's is thus restrained from declaring any of its employees redundant until it has complied with the requirements of Section 40(1) of the Act.

In view of the fact that this ruling has addressed all the substantive issues in the Memorandum of Claim, the parties may wish to treat it as a final determination of the suit, in which event they are to advise the Deputy Registrar accordingly so that the file may be marked as concluded and closed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE