



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 98 OF 2019

TRANSPORT WORKERS UNION.....CLAIMANT

VERSUS

SPEDAG INTERFREIGHT KENYA LTD.....RESPONDENT

RULING

1. On 17th December 2019, the Claimant filed a Notice of Motion under certificate of urgency dated 16th December 2019, seeking orders to restrain the Respondent from declaring its unionisable employees redundant without following the provisions of Section 40 of the Employment Act and Clause 17 of the parties' Collective Bargaining Agreement (CBA).

2. The Claimant sought a second order directing the Respondent to pay the affected employees their full severance benefits inclusive of 8% salary increment arrears occasioned by the Respondent's refusal to implement the second phase of the CBA for period running from April 2018.

3. Thirdly, the Claimant sought an order directing the Respondent to pay agency fees from its own funds.

4. The application is supported by an affidavit sworn by the Claimant's General Secretary, Dan Mihadi and is based on the following grounds:

- a) That the Claimant represents the unionisable employees of the Respondent and has a binding CBA whose second phase remains unimplemented and in dispute in ***Cause No 479 of 2018***;
- b) That there is no communication from the Respondent to the Claimant, a situation occasioned by the wilful default by the Respondent to engage the Claimant in negotiating matters concerning the employees as a requirement where the employees are members of a union;
- c) That some of the Claimant's members are in danger of losing their employment as the Respondent intends to declare them redundant without following the due process laid down in Section 40 of the Employment Act and Clause 17 of the parties' CBA;
- d) That the Respondent has issued a circular dated 3rd December 2019 to the employees informing them of an intended redundancy. This action has been taken prior to notifying the Claimant Union and the Area Labour Office as required by the law and the CBA;
- e) That the purpose of notification under Section 40 of the Employment Act is to enable the parties to engage in consultations to mitigate the effect of the redundancy;
- f) That the Respondent has refused to implement a registered CBA and employees who are to be declared redundant shall be deprived of their rightful and fair compensation and employment benefits due to failure to implement the parties' CBA for the period running from April 2018;

5. The matter went before **Rika J** *ex parte* on 17th December 2019 who gave interim orders in the following terms:

“Implementation of the notification dated 3rd December 2019, is stayed on the ground that the notification does not appear to have been copied to the Claimant Union and the relevant Labour Office.”

6. On 6th January 2020, **Ongaya J** extended the interim orders granted by **Rika J**.

7. In the meantime, the Respondent had, on 19th December 2019, filed its own Notice of Motion under certificate of urgency seeking orders to set aside the interim orders granted by **Rika J** on 17th December 2019.
8. The application by the Respondent is based on the following grounds:
- a) The Claimant obtained the *ex parte* order dated 17th December 2019 without disclosing to the Court the true and correct facts and thereby deliberately misleading the Court;
 - b) The Claimant does not have a viable cause of action against the Respondent as the Claimant is not recognised by the Respondent and does not have a valid enforceable CBA;
 - c) The alleged CBA is in dispute and is the subject of **ELRC Cause No 479 of 2018** and **ELRC Cause No 26 of 2019** (now consolidated) in which the Court has yet to render its determination;
 - d) The Respondent has complied with the statutory provisions by issuing notices of redundancy to its affected employees which notices were copied and acknowledged by the County Labour Officer pursuant to the requirements of Section 40 of the Employment Act;
 - e) The Claimant is abusing the court process and has filed the suit only to frustrate the Respondent.
9. Attached to the Respondent's application is a replying affidavit sworn by the Respondent's Human Resource Manager, James Tawa both in support of the Respondent's application and in opposition to the Claimant's application dated 16th December 2019.
10. Tawa depones that the Claimant is deliberately misleading the Court as the majority of the Respondent's employees are not union members and it is therefore improper for the Claimant to purport to represent their interests.
11. Tawa further depones that out of a total number of 34 employees only 6 are union members. He adds that the alleged CBA between the Claimant and the Respondent has been disputed by the Respondent.
12. Regarding the redundancy, Tawa states that on 3rd December 2019, the Respondent issued a general notice addressed to all its employees of its intention to declare redundancy, a copy of which was sent to the County Labour Officer. Tawa takes the view that it is not a requirement in law to have issued the general notice.
13. It is further deponed that on 16th December 2019, the Respondent issued to each of the affected employees a formal notification of redundancy pursuant to Section 40(1)(b) of the Employment Act. The notices were all copied and acknowledged by the County Labour Officer.
14. Tawa goes on to state that under the circumstances, the Respondent was not obliged to copy the notices to the Claimant as the recognition of the Claimant by the Respondent is questionable and disputed because the Claimant has never had a majority of the Respondent's employees in its membership as required by law.
15. The Respondent went before **Makau J** *ex parte* on 13th January 2020 and obtained the following interim orders:
- “THAT the orders granted by Hon. Justice James Rika and Hon. Justice Byram Ongaya staying the redundancy declared by the Respondent are hereby vacated as the claimant can pursue the claim for unfair redundancy if merited.”***
16. In its response to the Respondent's application filed in court on 9th January 2020, the Claimant accuses the Respondent of going ahead to issue redundancy letters to its employees without first complying with the orders granted on 17th December 2019.
17. The Claimant states that the orders sought by the Respondent are a machination to deny the employees their right to a fair redundancy process.
18. The Claimant denies the allegation made by the Respondent to the effect that there is no Recognition Agreement and CBA between the parties.
19. The Claimant reiterates that in carrying out the redundancy, the Respondent has failed to comply with both the law and the parties' CBA.
20. I have looked at the pleadings filed by the parties in this application. What is clear is that by the time I heard the parties, the impugned redundancy had already taken place. However, the dispute between the parties, which appears to go beyond the employees affected by the redundancy remains unresolved.
21. In light of the fact that the redundancy has taken place, no interlocutory orders can issue at this stage. The only thing to do is to hear the substantive claim on priority basis. In this regard, parties are directed to comply with pre-trial directions within the next fourteen (14) days from the date of this ruling.
22. The costs of this application will be in the cause.

23. Orders accordingly.

DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9TH DAY OF APRIL 2020

LINNET NDOLO

JUDGE

ORDER

In view of the declaration of measures restricting court 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 electronically, with their consent. The parties 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, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. Further, in view of the ensuing disruption of the court diary, this ruling has been delivered during the court recess.

LINNET NDOLO

JUDGE

Appearance:

Mr. Mihadi (union representative) for the Claimant

Mr. Ondego for the Respondent