



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 191 OF 2020**

**MOSES KAMAU.....1<sup>st</sup> CLAIMANT**

**NAWIRE WEJULI.....2<sup>nd</sup> CLAIMANT**

**SHEM LUCHIRI.....3<sup>rd</sup> CLAIMANT**

**PURITY GITONGA.....4<sup>th</sup> CLAIMANT**

**WILFRED MUGIRA.....5<sup>th</sup> CLAIMANT**

**PAUL MUKONZA.....6<sup>th</sup> CLAIMANT**

**WILSON MOMANYI..... 7<sup>th</sup> CLAIMANT**

**v**

**SIGNATURE HOLDINGS (E A) LTD.....RESPONDENT**

**RULING**

1. The declaration of a public health pandemic as a result of COVID19 by the Cabinet Secretary, Ministry of Health has caused tumult in the employment arena in Kenya.
2. A similar situation applies all over the world.
3. Due to the restriction on movement and public gatherings, many employers have had to massively downscale their operations including sending employees on unpaid indeterminate leave and/or reduction of salaries.
4. Most of the actions taken by employers were not contemplated by the current existing legal framework or individual contracts of employment and therefore would amount to change, alteration or variation of terms of contract(s).
5. Under section 10(5) of the Employment Act, 2007, for such a variation and/or alteration to pass the legal test, the employee should be consulted and agreement secured (the section requires the employer to consult the employee where there are changes to employment particulars such as working hours, form and duration of the contract, remuneration, interval of payment of remuneration and any other prescribed particulars such as nature and type of leave and housing/housing allowance).
6. Where an employer changes, alters and/or varies the terms without consultations with the employee or the employee's trade union where applicable, the Court would not hesitate to find and declare a breach of contract.
7. However, while the primary duty of the Court is to uphold the law and find a breach of contract, the current situation created by COVID19 pandemic makes the task of the Court perilous. The Court may order the employer to meet its obligations under the contract, but the ripple effect would be that the employer may be forced to declare redundancies.
8. In such an unfortunate event, no one would be able to tell whether the employee would secure alternative employment in future.
9. The question for the Court and the parties is really whether the employee and employer would emerge better off if the employment

relationship is technically maintained on less favourable terms until the clearing of the pandemic or the employer is ordered to keep its part of the contract in the short term thus risking redundancies.

10. On 31 March 2020, Signature Holdings East Africa Ltd (Respondent) notified the Claimants that due to COVID19 pandemic, it was suspending all contractual benefits save for health cover and sending them on unpaid leave without salary for an indefinite time (the Respondent is a private members club and was among sectors of the economy closed by the government).

11. The Claimants sought legal advice and on 12 May 2020, they moved the Court under a certificate of urgency seeking orders

1. ...

2. Pending the hearing and determination of this application *interpartes*, a mandatory injunction does issue to compel the Respondent to produce its monthly payroll for the month of April 2020 indicating the names of the employees and the respective salaries paid to each of them.

3. Pending the hearing and determination of this application *interpartes*, the Respondent, its directors, agents and or servants be and are hereby restrained from unilaterally varying the terms of service of the Claimants.

4. Pending the hearing and determination of this application *interpartes*, the Respondents, its directors, agents and or servants be and are hereby restrained from withholding the salaries and other benefits of the Claimants and or effecting any negative changes to their salaries or benefits.

5. Pending the hearing and determination of this application *interpartes*, the Respondent, its directors, agents and or servants be and are hereby restrained from terminating, suspending, victimising, harassing, coercing and/or discriminating and/or taking any adverse actions against the Claimants.

6. Pending the hearing and determination of this suit, a mandatory injunction does issue to compel the Respondent to produce its monthly payroll for the month of April 2020 indicating the names of the employees and the respective salaries paid to each of them.

7. Pending the hearing and determination of this suit, the Respondent, its directors, agents and or servants be and are hereby restrained from unilaterally varying the terms of service of the Claimants.

8. Pending the hearing and determination of this suit, the Respondents, its directors, agents and or servants be and are hereby restrained from withholding the salaries and other benefits of the Claimants and or effecting any negative changes to their salaries or benefits.

9. Pending the hearing and determination of this application *interpartes*, the Respondent, its directors, agents and or servants be and are hereby restrained from terminating, suspending, victimising, harassing, coercing and/or discriminating and/or taking any adverse actions against the Claimants.

10. Costs be provided.

12. The Court declined to grant any *ex parte* orders but directed that the application be served for *interpartes* hearing. Proposed orders 2 to 5 and 9 are therefore spent.

13. The Respondent filed a replying affidavit sworn by its General Manager in opposition to the application on 22 May 2020, the Claimants filed a further affidavit on 27 May 2020 and their submissions on 29 May 2020 while the Respondent's submissions reached the Court on 16 June 2020.

14. The Court has anxiously considered all the material placed before it.

15. As already mentioned, section 10(5) of the Employment Act, 2007 requires an employer to consult with an employee before changing certain terms or particulars of employment. The Claimants here were sent on unpaid leave without salary or house allowance.

16. The Claimants' supporting affidavit deposed that there were no prior consultations before they were sent on unpaid leave. The decision, they contended breached clause 31.4 of the Employee Handbook.

17. The Respondent, on the other hand, asserted that it held meetings with the Claimants who formed part of the management before taking the decisions now under challenge on 26 March 2020 before letters were issued on 31 March 2020.

18. Despite the assertion, the Respondent did not exhibit any notes or minutes of such consultations and the Court can, therefore, conclude that there was a failure to comply with the law.

19. However, it is also common that the government directed the closure of bars and restaurants (and public gatherings) and such type of establishments and that the direction has been relaxed on certain conditions.

20. It may be thus possible that the performance of the contract(s) have been frustrated (see *Notcutt v Universal Equipment Ltd* (1986) IRLR 218) and *Fibrosa Spolka v Fairbairn* (1943) AC 32). But that determination must await a hearing on the merits.

21. Considering the above, and the fact that the Claimants are still employees of the Respondent, and further that there are remedies for breach of contract apart from an order for *part or specific performance*, and further considering that the orders sought may lead to redundancies, a far more perilous action, the Court is of the view that it would not be prudent to give any of the orders sought in the motion.

22. The orders sought are declined.

23. The parties are encouraged to consider settling the dispute in good faith while taking the necessary steps to progress the Cause to a hearing on the merits.

**Delivered through Microsoft teams/email, dated and signed in Nairobi on this 19<sup>th</sup> day of June 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimants	Kimani & Muriithi Associates
For Respondent	Hamilton Harrison & Mathews Advocates
Court Assistant	Judy Maina