REPUBLIC OF KENYA

IN THE EMPLOYMENTAND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 394OF 2020

KENYA AIRLINE PILOTS ASSOCIATION......................................PETITIONER

VERSUS

KENYA AIRWAYS PUBLIC LIMITED... RESPONDENT

CENTRAL ORGANIZATION OF

TRADE UNIONS...INTERESTED PARTY

RULING

Introduction

1. The application before the Court is the Claimant's Notice of Motion dated 17.8.2020. It is brought under Article 41 of the Constitution of Kenya,Rule 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules 2016 and the inherent power of the court. The application basically seeks the following Orders:

a) Spent.

b) That due to the Covid-19 pandemic, service of any order made in respect of this application and the substantive pleadings herein be served on the respondent by electronic means to the official email address of the respondent's Group Managing director/Chief Executive Officer and the respondent's Chief Human Resource Officer.

c) Spent.

d) spent

e) **THAT**Pending the hearing and determination of this suit an interlocutory injunction be issued restraining the Respondent from effecting, continuing and/or implementing in any manner whatsoever, anything incidental to or related to the Redundancy notice dated 7th August, 2020 that it issued to the Claimant members. In particular, and for greater certainty, the Respondent be restrained from effecting and/or implementing in any manner whatsoever, any of its intentions contained in its communication dated 7th August 2020 to the Claimant on intended redundancypending hearing and determination of this suit.

f) **THAT** Pending the hearing and determination of this suit, an interlocutory injunction be issued restraining the Respondent from bypassing the Claimant and directly engaging the Claimant's members regarding any of the issues contained in its redundancy notice dated 7th August, 2020.

g) **THAT** the Honourable Court be pleased to grant the Applicant costs of the Application.

2. The Application is premised on the grounds as set out on the body of the Motion and Affidavits sworn by Capt. Dzochera Warrakah on 17.8.2020 and20.8.2020. In brief the applicant's case is that she is an association of pilots whose membership is drawn from pilots employed by the respondent (hereinafter called grievants); that she has a Collective Bargaining Agreement (CBA) with the respondent; that due to the Covid-19 pandemic, the two have signed Memoranda of Agreements (MoA) from March to July 2020 which led to salary deferments and the grievants are ready to take salary cut of 81%; that despite the said measures, the respondent wrote the letter dated 3.8.2020 indicating *inter alia* planned retrenchment; that the claimant respondent by the letter dated 6.8.2020 stating that the planned retrenchment was not justified but by the redundancy notice dated 7.8.2020, the respondent informed the claimant of her decision to declare redundancies across the

company; that the claimant was aggrieved by the said notice and tried to engage the respondent to stop the intended redundanciesin vain and consequently, she brought this suit to impugn the redundancy notice on ground that it is unjustified and it violates the mandatory statutory procedure set out by section 40 of the Employment Act.

3. The Respondenthas opposed the application by the Replying Affidavit sworn by her Head of Employee Relations Ms Grace Wamiti on 20.8.2020. In brief the respondent's case is that she is an Airline operating domestic, regional and international destinations and she has over 4000 employees; that on 5.5.1978 she accorded the claimant recognition and there is current CBA in place; that due to increased competition and financial difficulties in the last decade, she has recorded significant losses in revenue and since 2017, she has only been able to survive through a restructuring loan from the Government of Kenya; and that thesaid position has been worsened by the outbreak of the Covid-19 pandemic which brought her operations to a halt since March 2020.

4. The respondent further contended that 85% of her revenue come from passenger traffic and cargo which has plummeted from US$20M per week to US$3M per week due to the said grounding of the entire fleet followed by restricted operations; that her current weekly revenue of UD$ 3M cannot cover the operating costs of US$ 7M per week; that she also has loans standing at US$777M plus debts to suppliers of US$ 211M which has forced her to defer the payment of staff salaries and non-essential costs; that she projects her losses to hit US$322M (Kshs.35B) by the end of December 2020 and that according to IATA, global passenger traffic will not return to pre-covid levels until 2024.

5. The respondent further contended that she has proposed for nationalization of the airline and the National Aviation Management Bill 2020 is pending in parliament; that in the meanwhile due to the effects of covid-19 pandemic, it has become necessary to do staff rationalization in order to maintain the airline as a viable commercial undertaking; that the monthly cost of maintaining her 4660 employees on payroll under the CBA terms is Ksh.1.2 billion which she intends to reduce by laying off 43% of her employees through the restructuring.

6. According to the respondent, what she is doing is not unique but a common trend among other airlines including British Airways, Air France, Lufthansa, Emirates, Qatar,Qantas and KLM who have announced thousands of job losses and unpaid leave programmes to weather the effects of covid-19; that she has 414 pilots who accounts 45% of the payrollyet only 140 perform flight duties; that her proposal to send 274 pilots on leave has been rejected by the claimant; that even if countries lifted their travel flight restrictions, she will require 258 pilots only and as such, the intended redundancies are justified and the redundancy notice dated 7.8.2020 accords with section 40 of the Employment Act.

7. She further averred that she invited the claimant to consultation meetings on 13.8.2020 and 18.8 2020 and set out the timelines for the intended redundancy but the claimant refused to participate in the consultations and moved to the Transport Cabinet Secretary and later to this Court. Consequently, the respondent averred that the application does not satisfy the conditions for granting interlocutory injunction and prayed for the same to be dismissed with costs.

8. The interested party supported the application vide the Replying Affidavit sworn by her Secretary General Mr. Francis Atwoli on 20.8.2020. In brief the interested party's case is that her constitution mandates her to assist in settling disputes between members of trade unions and their employers among others; that on 30.4.2020 she signed a tripartite Memorandum of Understanding with the other social partners, Government of Kenya and Federation of Employers of Kenya (FKE) aimed at addressing the effects of Covid-19 pandemic on the labour market in order to avoid economic and jobs losses; that the MoU is binding on all the employers including the respondent.

9. Regarding the intended redundancies by the respondent, the notice dated 7. 8.2020 is fatally defective and incapable of founding any redundancy because it violates section 40 of the employment Act in that the notice period is insufficient and it lacks mandatory information; that no consultations have been held between the claimant and the respondent in relation to the intended redundancies; and finally, the impugned notice constitutes unfair labour practices and unfair administrative action contrary to Article 41 and 47 of the Constitution.

Applicant's Submissions

10. Mrs Irene Kashindi, learned counsel for the Claimant was lead in urging the application by Mr. Nelson Havi, President of the Law Society of Kenya. In brief they relied on the facts set out in the said affidavits sworn in support of the Motion and submitted that the application has met the threshold for granting interlocutory injunction as enunciated by **Giella v Cassman brown [1973] EA 358.** According to them the facts of case are not substantially in dispute and the law involved is trite.

11. The counsel submitted that the applicant has established a prima facie case with probability of success. They contended that theclaimant's suit is asking thecourt to declare the redundancy notice dated 7.8.2020 null and void because it is not justified and it violates procedure set out under section 40 of the Employment Act. They contended that the purported notice does not show the extent of the intended redundancy and it shorter than the 30 days required under section 40 of the Employment Act; that the process is being done without involving the claimant union and the selection criteria is unknownto the claimant; that no meaningful consultations have been held as required by the law and that the meeting of 13.8.2020 did not constitute anymeaningful consultative meeting.

12. They further submittedthat the letter dated 14.8.2020 purporting to indicate the extent of the redundancy and to set out backdated timelines for the intended redundancy, fundamentally infringes on the requirements of 30 days' notice under the Act; that that the intended redundancy is not justified because measures have already been taken to mitigate economic and job losses through MoAs whereby the grievants have accepted deferment of a portion of their salary and they are now agreeable to salary cut of 81%; and finally, there is hope that the respondent's financial problems will end soon after the parliament passes the National Aviation Management bill 2020 to nationalize the airline.

13. As regards the issue of irreparable harm, the counsel submitted that the pilots will suffer irreparable harm because it will not be easy for them to secure alternative jobs especially during the prevailing Covid-19 pandemic. In their view an award of damages will not be adequate remedy for the pilots if they are laid off and covid-19 pandemic should not be a reason to deny the grievants their infallible labour rights as provided in the constitution, Employment Act and their contract of service.

14. With respect to the issue of balance of convenience, the Counsel argued that it tilts in favour of the claimant whose constitutional rights are being violated through the impugned redundancy process. They contended that section 40 of the Employment Act provides for a redundancy notice of 30 days but in this case the notice given is for 14 days. They reiterated that Covid-19 impact on businesses alone does not constitute a good reason for violating employees' rights to fair labour practices as guaranteed under Article 41 of the Constitution and the Employment. The counsel heavily relied on the Court of Appeal decision in **Kenya Airways limited v Aviation & Allied Workers Union Kenya &3 Others[2014] eKLR** among other precedents to fortify their submissions.

Interested Party's Submissions

15. Mr. Aduda learned Counsel for the interested Party supported the application by the applicant and relied entirely on the said replying Affidavit sworn by Mr. Francis Atwoli. He contended that on 30.4.2020, the social partners signed an MoU to address the ravaging effects of covid-19 to the labour market and formulated a policy that employers and employees are supposed to dialogue in good faith on their terms of employment with a view to preserving employment.

16. The counsel, contended that the respondent has not demonstrated compliance with the said MoU and instead has issued an incompetent redundancy notice dated 7.8.2020 to the claimant; that the said notice indicated that the selection criteria among other redundancy requirements would be provided later; that the respondent did not serve the redundancy notice on the labour officer as required by the law and no consultations have been held in good faith with the claimant on the redundancy. He further argued that the meeting scheduled for 13.8.2020 did not constitute consultative meeting because the claimant was not provided with sufficient information to enable her participate in the meeting sufficiently.In conclusion he contended that the application has established a prima facie case as defined in **Mrao limited case** because section 40 of the Employment Act and Article 41 of the Constitution have been violated by the redundancy notice.

Respondent's submissions

17. Mr. John Ohangaand Ms Leila Mohammed, learned counsel for the respondent opposed the application and relied on the said Replying Affidavit by Ms Grace wamiti. They submitted that the respondent did not have any pleasure in laying off any of her staff and contended that she is now left with no choice after all her efforts and measures to retain the grievants failed. They contended that the respondent has suffered financial difficulties over the recent past due to business competition and the position has now been worsened by the Covid-19 pandemic.

18. They contended that the respondent has in the recent months signed MoAs with the claimant for deferment of salaries but there has been disagreement in some issues which are now the subject of a pending suit. They urged that, despite the said alternative measure, the time came when the respondent had to make a commercial decision on whether it was viable in the context of covid-19 to continue employee the grievants. They relied on the said **Kenya Airways case** to urge that it is the responsibility of the employers to make a commercial decision on whether or not to lay off employees and the court has no supervisory role on employers.

19. They further submitted that the redundancy herein is justified by pointing out at the particulars of losses, debts and operational costs set out in their clients replying affidavit. They urged the court to find that the respondent has made a bona fide commercial decision to restructure and reduce staff and fleets. They observed that, what the respondent is doing is not unique to her but a trend even among established airlines world over.

20. As regards procedural fairness, the counsel admitted that section 40 of the Employment Act sets out the procedural requirements for redundancy. They contended that the redundancy notice dated 7.8.2020 is a general notice which informed the claimant of the commercial decision that redundancy will be done. They relied on the said **Kenya Airways case** to urge that section 40 of the Act requires the employer to give a general notice which elicits consultations between the parties.

21. The counsel argued that the respondent invited the claimant to a consultative meeting on 13.8.2020 but she refused to engage in the consultations; that again the respondent invited the claimant to another consultative meeting on 18.8.2020 but she refused and moved to this Court; that having refused to participate in consultations and moved to court, the claimant cannot now rightly say that they were never invited for consultations.

22. On the other hand, the defence counsel submitted that under section 40 of the Act, employees who are laid off are entitled to payment in lieu of notice and as such damages in this case will be adequate remedy. They relied on the holding by Murgo JA in the **Kenya Airways case**where the court held that the employer is only supposed to serve the employee and the labour officer with a notice citing the reasons for the redundancy. They contended that in terms of **Giella v Cassman Brown**, the applicant has failed to demonstrate that the redundancy notice is for no genuine reason or that it is illegal.

23. In the alternative and on without prejudice to the foregoing, the counsel submitted that should the court find the redundancy notice to be insufficient, then the respondent's commercial viability must be considered and the respondent be directed to serve a better notice. They argued thatstopping the redundancy process in favour of the claimant would be discriminatory because there are other employees who are non-members of the claimant unionwho are also subject of the intended redundancy.

24. As regards the intended nationalization of the airline, the counsel submitted that the National Aviation management Bill has not been passed into law and as such the issue of nationalization of the respondent is not a relevant consideration this time. They further submitted that the intended nationalization is not a magic to turn the respondent into a viable entity. Further, they urged the Tri-partite agreement referred to by the Interested Party, signed between the social partners does not have any force of law and as such it remains a social contract.

25. On the issue of the balance of convenience, the counsel submitted that the same tilts in favour of withholding the injunction because no one knows when the covid-19 pandemic will end and as such the respondent is entitled to make a commercial decision to preserve some jobs and remain afloat. They contended that the airline cannot be forced to retain a workforce which she cannot support and urged that the respondent has made commercial decision to reduce staff and fleet in order to meet her financial obligations including loans, leases and salaries. They concluded by urging me to carefully consider the court of Appeal Decision in the said **Kenya Airways Case** and find that the

applicant has not established a prima facie case, and that the damages is adequate remedy to the claimant herein.

26. In a brief rejoinder the counsel for the applicant submitted that the dissenting decision by Githinji JA in the **Kenya Airways Case** was a not the judgment but the majority decision by Maraga JA and Murgo JA. The counsel urged me to consider the legal frame work and the prevailing circumstances. They maintained that the redundancy notice dated 7.8.2020 is defective and the redundancy process is proceeding without involving the claimant. They argued that it is not proper for the court to allow a flawed process to go on just because an award of damages is adequate remedy. They contended that the issue of discrimination does not arise because the notice applies to pilots only and no other workers. They further urged that respondent has not explored other methods like deferred salaries in line with the court decision in the **Kenya Airways case** where it was stated that the employer should consider alternative methods as opposed to redundancy. They concluded by urging that the balance of convenience favours granting of the injunction sought.

Issues for determination and analysis

27. After careful consideration of the application, affidavits, Memorandum of Claimand the submissions by the parties, the main issue for determination is whether the applicant has met thelegal threshold for this Court to grant interlocutory injunction pending trial. In Kenya threshold for granting interlocutory injunction has not changed since the celebrated decision in **Giella v Cassman brown [1973] EA 358** where the following principles were set out:

a) That the applicant must establish a prima facie case with probability of success.

b) That the applicant must demonstrate that he stands to suffer irreparable harm if the order is withheld.

c) If the court is in doubt, it should determine the application on a balance of convenience.

Preamble

28. Before proceeding to determine the main set out above, it is prudent to observe that the jurisprudence emerging from this court is to the effect that as a general rule, courts should not intervene in termination proceeding at the shop floor before they are concludedunless it is demonstrated that the intended action is illegal and/or the employee's legal rights under the Constitution, legislation, or the contract of service, are being violated by the manner in which the employer is unfairly or illegally conducting the process.

29. In **Mulwa Msanifu Kombo v Kenya Airways [2013] eKLR** Mbaru J held that: -

> ***"… this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in appropriate cases it is established that the disciplinary process has been commenced or is continuing unfairly. The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result in unfair imposition of a punishment against the employee. The court will intervene … if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rule of natural justice or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable or policy standards, or if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case."***

30. In **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, Ndolo J held as follows regarding court's intervention in disciplinary process at the shop floor: -

> ***"… the Court will intervene not stop the process altogether but to put things right."***

31. Again in**Geoffrey Mworia v Water Resources Management Authority [2015] eKLR** Ongaya J expressed himself as follows: -

> ***"The court will sparingly interfere in the employer's entitlement to perform any human resource functions such as … disciplinary control … To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the constitution or legislation; or in breach of the agreement between the parties; or in manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."***

Prima facie case

32. Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American of Kenya limited & 2 others [2003] e KLR** as follows: -

> ***"…in civil cases is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

33. Applying the foregoing definition to the facts of this case, the applicant is required to establish on a balance of probability that intended redundancy is not founded on substantive justification and the procedure adopted is unfair and contrary to the law. Substantive justification refers to validity of the reason for the intended termination on account of redundancy while procedural fairness refers to the fairness of the procedure adopted and whether it complies with the law and the terms of the contract of service.

34. I have carefully considered all the material presented to me by all the parties. The applicant and the interested party contended that the intended redundancy is unjustified because the clarion by the social partners in their tri-partite agreement is that employers and employees should dialogue in good faith with the aim sustaining rather than terminating employment. They further argued that the applicant hasnegotiated for a salary cut of up to 81% in order to preserve the airline and employment. According to the counsel, the respondent has not demonstrated interest in the said alternative methods and instead decided to reduce staff.

35. The respondent has, on the other hand, narrated her financial crisis over the recent past which has made her to survive through loans, and the situation has become worse due to the covid-19 pandemic. She went ahead to set out in details her loans, suppliers debts, and operations costs including salary burden as opposed to the meagre revenue she is generating from the restricted operations. She further contended that her effort to retain the grievants through salary deferments and cutting down on non-essential matters has not helped her and as such she has made a commercial decision to reduce her staff.

36. In **Kenya Airways limited v Aviation & Allied Workers Union Kenya &3 Others[2014] eKLR**the Court of Appeal held: -

> ***"… redundancy is a legitimate ground for terminating of a contract of employment provided there is a valid reason based on operational requirements of the employer and the termination is in accordance with a fair procedure."***

37. In this case, it is clear that the applicant has acknowledged vide the supporting affidavit by Capt. Warrakah that the respondent is undergoing financial crisis. The applicant acknowledges that the respondent had to defer a percentage of the grievants' salaries and they are agreeable to 81% salary cut in order to preserve the airline and employment. The said acknowledgmentcorroborates the respondent's case that she is at the centre of a financial quagmire and is therefore entitle to make a commercial judgment on the best action to take in order to remain commercially viable including reduction of her workforce and fleet.Therefore,I find that the applicant has not established that the intended redundancy is not grounded on a valid reason.

38. As regards procedural fairness, Section 40 of the Employment Act provides that:-

> ***"(1) an employer shall not terminate a contract of employment of service on account 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 reason 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) …;***
> >
> > ***(c) The employer has, in the selection of the employee 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) …"***

39. The applicant and the interested party argued that the redundancy notice dated 7.8.2020 is fatally defective and incompetent because it does not comply with the requirements set out under the foregoing provision. They contended that the notice did not state the reason and the extent of the intended redundancy and it was not served on the area labour officer. They further contended that going by the subsequent letter dated 14.8.2020, the selection process of the employees to be declared redundant will end on 21.8.2020 and the list given to the union on 25.8.2020. The respondent argued that the letter was a general notice of the intended redundancy and was therefore in accordance with the provisions of section 40 of the Act. She further urged that should the court find the same to be insufficient, then direction should be made for a sufficient notice to be given.

40. I have carefully considered the material presented on this point. It clear that by way of a background in the said letter the respondent has set out the reason for the intended redundancies across its network. However, the notice does not indicate the extent of the intended redundancy and there is no evidence that it was served on the area labour officer. In deed the respondent did not deny that the notice was never served on the area labour officer. On the said grounds, I find that the impugned redundancy notice is not compliant with the mandatory requirements set out under section 40 (1) (a) of the Act. In addition, going by the timelines set out by the respondent in her letter dated 14.8.2020, the respondent is determined to conclude the selection process within 14 days from 7.8.2020 without involving the claimant except by forwarding the list of the selected employees to her on 25.8.2020. Thenotice further indicates that the respondent intends to meet the selected staff on 26.8.2020 for issuance of individual letters followed by issuance of letters of computation of exit packages between 1.9.2020 and 7.9.2020.

41. In the said **Kenya Airways case** the Court of Appeal held that the rationale for giving reasonable redundancy notice is to facilitate consultations with a view to avert the intended redundancy or mitigate the negative economic effects to the employees to be declared redundant. The court held: -

> ***"In addition to providing the parties with an opportunity to try and avert or minimize terminations resulting from redundancy and mitigate the adverse effects of such terminations, the other objective of a reasonable notice as was stated in the English case of <u>William v Compare Maxam Ltd</u> is:***
>
> ***'to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere."***

42. In this case the applicant contended that the respondent did not give sufficient notice and material information to enable her participate in meaningful consultations with the respondent. However, the respondent contended that she invited the claimant to consultative meetings on 13.8.2020 and 18.8.2020 but the claimant declined and instead approached this court. In thesaid**Kenya Airways case,** the Court of Appeal held that consultations ought to be real and not cosmetic and cited with approval the decision of the Court of Appeal of New Zeeland in **Commish v Parliamentary Service**where it was held that: -

> ***"Consultations has to be a reality, not a Charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done."***

43. In this case I agree with the applicant that the consultation meeting scheduled for 13.8.2020 was without reasonable notice to enable them participate meaningfully in bargaining for the best interest of her members. It would appear that the respondent did not value consultation and that is explained by the failure to serve the redundancy notice on the area labour officerto also participate in the consultative meetings.

44. Having considered all the facts of this case and the submissions by their counsel, I am satisfied that the applicant has proved that the redundancy notice dated 7.8.2020 is not in compliant with the mandatory requirements of section 40(1) of the Employment Act and that the respondent is proceeding unfairly without involving and holding any consultations with the claimant and the labour officer. It follows therefore that the applicant has established a prima facie case with probability of success upon trial.

Irreparable harm

45. The term irreparable harm basically refers toharm or injury that cannot be adequately compensated by any amount of monetary award or one which cannot be reversed to the state before the damage. In legal parlance, irreparable harm has been defined as follow: -

> ***"A legal concept that argues that the type of harm threatened cannot be corrected through monetary compensation or conditions that cannot be put back to the way they were."[1]***

46. The concept of irreparable harm seeks to protect the prima facie case established by the applicant from being rendered nugatory. In my view the concept advocates for the preservation of the substratum of the case from destruction so that the court does not proceed with the trial in vain. The foregoing view is founded on the rationale that if the substance of the suit is destroyed, the suit becomes moot.

47. The applicant argued that the grievants are highly skilled professionals and their lay off constitutes an irreparable harm because they are not likely to secure alternative employment especially during the covid-19 pandemic. The respondent was of a contrary view and relying of the **Kenya Airways case**, she contended that any injury caused by the impugned redundancy notice can adequately be compensated by damages. Whereas it is true that, in the said case, the appellate courtawarded compensatory damages to the laid off employees under section 49 of Employment Act, after finding that the redundancy notice offended the mandatory provision of section 40 of the Act,the Courtdid not state that compensation of damages is adequate remedy for violation of employees through unfair redundancy.

48. In my view, the concept of irreparable harm in employment relations should not only relate to monetary compensation. It should relate more to the employment relationship itself and the parties' rights as provided in the law and their contract of service. It is trite that once employment relationship is terminated, it may not easily be restored. Likewise, once employee's right to protection from unfair and unlawful termination is lost, it cannot be reversed.

49. Even if the court will award damages under section 49 of the Employment Act after trial, the same is only a penalty inflicted on the employer to appease the employee and it cannot reverse the violation. That is the basis of the emerging jurisprudence sated above that the court will intervene in internal separation proceedings if they may result to an illegality or if the procedure adopted is manifestly unfair and contrary to the procedure set out by the law or parties contract of service.

50. Applying the foregoing view to the facts of this, I find that allowing the redundancy process to continues even after finding that the employer is adopting an unfair and illegal process, would mean that the selected employee for the redundancy will permanently lose their employment through an unfair and illegal process. They will also permanently lose their right to fair labour practices and protection of the law from unfair termination. In the circumstances, no amount monetary award can reverse that violation and restore the lost employment relationship and violated rights. Consequently, I return that the applicant has established on a balance of probability, that if the injunction sought is withheld, irreparable harm will be occasioned on her members who will be selected for the intended redundancy, and pending suit will be rendered moot.

Balance of convenience

51. It is trite law that the court decides the application on a balance of convenience if it is in doubt as to whether damages will be adequate remedy if the applicant's case succeeds after the interlocutory injunction is withheld. It follows that the court should granted the order to facilitated trial if it is in doubt whether damages will adequately compensate the applicant in the event his suit succeeds after the interlocutory injunction is denied. Otherwise, denial of the order means the applicant's case is determined before trial in favour of the respondent.

52. It is clear from the foregoing, that the concept of balance of convenience plays the balancing act between sustaining the prima facie case established by the applicant for trial on hand, and preventing trial in favour of the respondent by denial of the order and thereby failing to preserve the substance of the suit pending trial.

53. In this case, the dispute concerns the justification of the intended redundancy and the unlawful and unfair procedure adopted by the respondent through the impugned redundancy notice. In my view, if the order is denied, the respondent will conclude the impugned redundancy process and as such the substratum of the pending suit will be destroyed before trial. The corollary to the foregoing is that the by granting the injunction sought, the substance of the suit will be preserved and the suit sustained to go through full trial for determination of the issues raised on the merits.

54. Having said that, I must quicken to add that as a matter of principle, unless it makes no sense for a matter to go to full trial either due to some admissions or some other good cause, the court should endeavour to give effect to the right to hearing as espoused by Article 47 and 50 of the Constitution, and the rules of natural justice by sustaining the suit to trial though granting of an interlocutory injunction. In this case I return that the balance of convenience tilts in favour of sustaining the suit to full hearing by granting the injunction pending trial.

Conclusion and disposition

55. I have found that the applicant has proved the three essential requirement for granting interlocutory injunction, namely a prima facie case with probability of success, the likelihood of suffering irreparable harm if the injunction is denied, and that the balance of convenience tilts in her favour. In particular, the applicant has satisfied the court that the case she seeks to preservepending trial is not frivolous because theimpugned redundancy is proceeding contrary to the mandatory procedure laid down under section 40 of the Employment Act. I have further found that the court can intervene in a separation process at the shop floor if it is demonstrated that it may result in an illegality, and/or that it is proceeding in a manner that is manifestly unfair or in violation of the procedure provided by the law or the contract between the parties. Finally, I have found that as a general principle, the court should sustain and preserve a suit for trial by granting interlocutory injunction to ensure that the substance of the suit is not destroyed.

56. In the end, I allow the application for interlocutory injunction in in the following terms: -

> a) **THAT** Pending the hearing and determination of this suit an interlocutory injunction is issued restraining the Respondent from effecting, continuing and/or implementing in any manner whatsoever, anything incidental to or related to the Redundancy notice dated 7th August, 2020 that it issued to the Claimant members. In particular, and for greater certainty, the Respondent be restrained from effecting and/or implementing in any manner whatsoever, any of its intentions contained in its communication dated 7th August 2020 to the Claimant on intended redundancypending hearing and determination of this suit.
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> b) **THAT** Pending the hearing and determination of this suit, an interlocutory injunction is issued restraining the Respondent from bypassing the Claimant and directly engaging the Claimant's members regarding any of the issues contained in its redundancy notice dated 7th August, 2020.
>
> c) That due to the Covid-19 pandemic, service of this order and the substantive pleadings herein shall be served on the respondent by electronic means to the official email address of the respondent's Group Managing director/Chief Executive Officer and the respondent's Chief Human Resource Officer.
>
> d) Costsof the Application shall be in the cause.
>
> e) For avoidance of any, and in order to maintain industrial peace and mitigate the respondent's financial problems from deteriorating further pending hearing and determination of the suit, the court gives her the liberty to withdraw the offending redundancy notice and give a propernotice afresh.

Dated, signed and delivered at Nairobi this 25st day of August 2020.

ONESMUS N, MAKAU

JUDGE

<u>ORDER</u>

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

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[1]https://definitions.uslegal.com/i/irreparable-harm