



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1953 OF 2016**

AMOS KIOKO MUSYOKA.....1<sup>ST</sup> CLAIMANT

BASIL KINUTHIA.....2<sup>ND</sup> CLAIMANT

LUCY NGARUIYA.....3<sup>RD</sup> CLAIMANT

MARGARET NDUNGU.....4<sup>TH</sup> CLAIMANT

RACHEL MWILU KALEKYE.....5<sup>TH</sup> CLAIMANT

SAMSON K. MAKAU.....6<sup>TH</sup> CLAIMANT

STEPHEN KIHONGE.....7<sup>TH</sup> CLAIMANT

WILFRED GATEHI GITAU.....8<sup>TH</sup> CLAIMANT

**VERSUS**

**CMC MOTORS GROUP LIMITED.....RESPONDENT**

**RULING**

1. The Claimants filed this suit alleging that they were management staff who were laid off together with unionisable staff but were discriminated by the respondent in relation to the computation of severance pay because they were paid 15 days' pay for every year of service while their counterparts were paid 21 days' pay per years as provided in the Collective Bargaining Agreement (CBA). The suit is premised on Section 40(1) of the Employment Act which provides that where there is a CBA setting out terminal benefits payable upon redundancy, an employee shall not be placed at a disadvantage for being or not being a member of the trade union. They therefore seek to have their severance pay reassessed using the formula in the CBA.

2. On 17.6.2020 the claimants filed the Notice of Motion Application dated 17<sup>th</sup> March 2020 seeking for orders the following orders

(a) **THAT** this Honourable Court do compel by way of an Order directed to the Respondent to produce before this Court the Collective Bargaining Agreement as at the time of retrenchment with unionisable staff and file the same in Court before the Judgement date.

(b) **THAT** costs of the Application be provided for.

3. The grounds upon which the application stands are set out on the body of the motion and the 1<sup>st</sup> Claimant's Supporting Affidavit on 23<sup>rd</sup> March 2020. The Respondent has opposed the application vide the Replying Affidavit sworn on 22<sup>nd</sup> July 2020 by its Group HR Manager, Mr. Ben Sifuna. Thereafter the application was canvassed by written submissions.

**Applicants' case**

4. The Application is based on the grounds that the Respondent employed the applicants as management employees for service durations ranging from 2.8 years to 35.5 years before it declared them redundant on or around 20<sup>th</sup> January, 2016; that the said redundancy affected both the Respondent's unionisable and non-unionisable employees and as such the Respondent was by law obliged to pay the Applicants severance dues as provided under **section 40 (1) of the Employment Act**; that there was a CBA in place under which, the unionisable employees were paid severance pay based on 21 days for each year worked but the claimants were paid severance at the rate of 15 days' pay

per year of service; that although **section 40(1)(g) of the Act** provides for the minimum number of days for assessing severance pay, the said better or improved pay ought to apply to the claimants under the instant case by dint of **section 40 (1) (d) of the Employment Act** so that they are not put at a disadvantage; and finally under Clause 7 of the Respondent's HR Manual also provides that payment of severance pay for non-unionisable staff declared redundant will be based on the same number of days payable to unionisable employees.

### **Respondent's case**

5. The Respondent contends that it filed their Memorandum of Claim and a list of documents which supports its defence; that in its defence it has denied that the redundancy giving rise to this suit affected both unionisable and non-unionisable employees, that the unionisable staff were paid severance at the rate of 21 days' pay for each year served and further stated that it is a stranger to the alleged CBA.

6. The respondent further contend that the Claimants did not have any CBA with it, and since the Claimants are alleging the existence of a CBA and payment of severance pay at 21 days' pay for each completed year of service, they should prove their allegations; that prior to payment of the Claimants' terminal dues, the Respondent gave each of them a letter dated 13.1.2016 informing them how their terminal dues shall be calculated and each of them separately and individually, voluntarily, willingly and without any coercion accepted the terms set out in the said letters and signed a staff clearance certificate confirming receipt of in full and final settlement of all and any monies due to them from the Respondent; and that consequent upon the foregoing, the Claimants are estopped from bringing and or maintaining this action and making any claim of any nature against the Respondent.

7. The respondent prays for the application herein to be dismissed with costs as it lacks merit and is an abuse of the court process for the reasons espoused above and further because:

- a) The Claimants were management and non-unionisable employees of the Respondent and the alleged CBA does not apply to them.
- b) The Claimants are on a fishing expedition, looking for documents that they think can support their unmerited claim.
- c) The Claimants' application is an afterthought meant to delay the expeditious disposal of this case.
- d) The Claimants' application and the order sought are prejudicial to the Respondent because it seeks to compel the Respondent to produce and file a CBA which it denies.

### **Applicants' Submissions**

8. The Claimants/Applicants submit that the Respondent was under a duty to pay them their redundancy package in strict compliance with **Section 40(1) (g) of the Employment Act** unless employment contract provided better or improved number of days as contained in the CBA. That **Clause 7(f) of the Respondent's HR Policy & Procedures Manual, 2014** states that payment of severance pay for non unionisable staff will be based on same number of days payable to unionisable employees, which in this case is 21 days. The Claimants are therefore claiming the difference of six (6) days unpaid by the Respondent.

9. The applicants submit that the CBA applicable at the time of the Claimants/Applicants' employment was terminated was and still is in the custody of the Respondent, and its production will assist the Court in determining the main issue in question. They further submit that the court has jurisdiction, by dint of **Section 22 of the Civil Procedure Act** which donates power to this court to order discovery.

10. That the rules on discovery of documents were intended to be in respect to documents that have not been availed to the court or to the opposing party and that the Claimants/Applicants are justified to seek the discovery of documents they believe to be in the exclusive custody of the Respondent and which are relevant in the determination of the issues before the court.

11. The Applicants further submit that the relevance and admissibility of the document sought in the discovery together with the documents already submitted by the parties in their respective list of documents will be tested in accordance with and based on the rules of evidence and the pleadings. They rely on the case of **Oracle Productions Ltd vs Decapture Limited & 3 others [2014] eKLR** where the court held that the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial.

12. They also submit that the purpose of discovery is to enable parties prepare adequately for the trial and provide a basis for fair disposal of the proceedings before or at the trial.

13. The Applicants further submit that the court is under an obligation to dispense substantive justice to all the parties before it in line with **Article 159 of the Constitution** as read with **sections 1A and IB of the Civil Procedure Act** and consequently, the Court ought to compel the Respondent to file before this Court the CBA that was in force as at the time of their retrenchment because it is relevant and will assist the Court in appreciating the issues between the parties as raised in the pleadings.

### **Respondent's Submissions**

14. The Respondent submits that the applicants have admitted that they were management employees and not unionisable staff and contended that they were excluded from the benefits under the CBA. It cites the case of **Charles Kambo Wamai -vs- Bamburi Cement Ltd [2013] eKLR** wherein the claimant who was holding a management office was declared redundant and claimed severance pay as provided in the CBA for unionisable staff but the court held that the terms of redundancy for him were provided under Section 40 of the employment Act 2007.

15. The respondent further relied on the case of **Fredrick Ngari Muchira, Howard Kipkoech Korir & 98 Others -vs- Pvrethrum Board of Kenya [2013] eKLR**, where the court while faced with a similar issue as in the instant case considered section 40 (1) (d) of the Employment Act and held that the subsection does not apply to the management employees who essentially are not eligible to be union members but they are catered for under subsection(1)(g) of the Act.

16. The respondent reiterates that a CBA with unionisable staff does not apply to the Claimants because by their own admission, they were management staff. Therefore, it urged this Court to find that **Section 40 (1) (d) of the Employment Act** does not apply to the Claimants. It further urged since the Claimants have admitted that they were paid severance pay at the rate of fifteen (15) days' pay for each completed year of service as provided by Section 40 (1)(g) of the Employment Act No. 11 of 2007, and further discharged it from any further claim, the suit is without merits.

17. For emphasis, it relies on the case of **Coastal Bottlers Ltd -vs- Kimathi Mithika [2018] eKLR** where the Court of Appeal stated that whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. The appellate court further stated that a court faced with such an issue should address its mind firstly, on the impact of such a discharge/agreement and secondly, whether the same was voluntarily executed by the concerned parties.

18. In view of the foregoing matters, the Respondent submits that the alleged CBA is not necessary for the court to effectually determine this case because the Claimants received payment of their redundancy dues including severance pay as provided in Section 40 (1) of the Employment Act No. 11 of 2007.

#### **Issues for determination and analysis**

19. I have carefully perused and considered the pleadings, application, affidavits and submissions filed herein and more particularly, the respondent's HR Policy and Procedures Manual 2014 and noted the following provision under Chapter 5 Clause 7 (f): -

##### ***“7 Redundancy***

***When redundancies become necessary, they will be conducted in accordance with the Labour Laws.***

***The company may declare redundancies on but not limited to the following ground.***

***a. Closure of business operation...***

***f. Payment of severance pay for non-unionisable staff will be based on the same number of days as payable to unionisable employee.”***

20. In view of the foregoing, the main issues for determination in the suit herein will be whether there was a CBA providing for severance pay at the rate of 21 days' pay for each year of service for the unionisable staff, and whether the claimants being management staff were entitled to the same rate in computing their severance pay upon declaration of redundancy. To answer that question, the claimants will be required to produce documentary evidence to support their case including the said HR Policy and Procedures Manual and the applicable CBA.

21. The issue for determination herein is therefore whether the order sought by the instant application should be granted and not whether the claimants will after the trial be granted the damages sought in the suit.

22. Having considered the said Clause 7(f) of the HR Manual, it is my considered view that the provisions of the CBA in relation to payment of severance pay upon redundancy formed part of the claimants' contract of service. The court will be bound to refer to and enforce the relevant CBA stipulations in determining the Claimants rightful severance pay by dint of Clause 7(f) of the HR Manual. Under section 74 of the Employment Act, the employer is the custodian of employment records and under section 10(7) of the Act, the employer has the legal burden to produce the same in court in any legal proceedings to disprove any terms of service alleged by the employee.

23. In view of the foregoing I find that the applicants have made out a good case to warrant granting the order sought in the application. In granting the said application, I am guided by Rule 25 (7) of the ELRC Procedure Rules, 2016 which provides that:

***“The Court may, either on its own motion or at the request of a party to a suit, be provided with visual demonstration facilities for the display of any maps, photographs, charts, diagrams and demonstrations or illustrations of texts and any other documents that are to be used for the purposes of making a finding in the matter for determination before it.”***

24. Again I rely on **Section 22 of the Civil Procedure Act** which provides for the court to order discovery in the following terms:

***“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—***

***(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;***

*(b) ...”*

25. In conclusion, I find merits in the application dated 17.3.2020 and allow it in the following terms:

(a) **THAT** the Respondent is hereby directed to produce, by way of filing before this Court within 14 days of this ruling, the Collective Bargaining Agreement in force between it and its unionisable employees as at the time the claimants were retrenched/declared redundant.

(b) **THAT** the respondent is directed to serve the claimants with a copy of the CBA immediately after filing in court to pave the way for trial of the main suit on priority basis.

(c) **THAT** the respondent shall meet the costs of the Application.

**Dated and delivered at Nairobi this 27<sup>th</sup> November, 2020.**

**ONESMUS N MAKAU**

**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 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(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**