



**REPUBLIC OF KENYA**

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

**CAUSE NO. E550 OF 2020**

**(Before Hon. Justice Hellen S. Wasilwa on 11<sup>th</sup> November, 2020)**

**KENYA ENGINEERING WORKERS UNION.....CLAIMANT**

**VERSUS**

**DUNHILL AUTOMOBILES LIMITED.....RESPONDENT**

**RULING**

1. Before this Court is the Claimant's undated Notice of Motion Application filed on 22/9/2020 seeking the following reliefs:-

**a. THAT this matter be heard ex parte in the first instance, certified as urgent and heard on priority basis. [Spent]**

**b. THAT, the Honourable Court do deem fit and grant an interim Order against the Respondent herein restraining her from terminating the Applicant/Claimant members herein and or maintain status quo pending the hearing and determination of this suit.**

**c. THAT the Honourable Court issue an interim order against the Respondent from victimizing the Claimant/Applicant members by way of termination, redundancy and or dismissal on ground of trade union activities/affiliation.**

2. The Application is supported by the grounds set out therein and the undated Supporting Affidavit of Wycliffe A. Nyamwata. The Respondent has opposed the Application vide the Replying Affidavit of Lalji Dhanji Vekariya sworn on 30/9/2020.

**The Applicant's Case**

3. The Applicant avers that the redundancy notices issued by the Respondent do not meet the threshold set out in Section 40 of the Employment Act. In particular, two of the Grievants are yet to receive their termination notices and only have copies of notices given to the County Labour Office and the Applicant. The other two Grievants have termination notices but the Applicant is yet to receive their notices, as required by law.

4. It is the Applicant's case that the Respondent's ill intentions only begun after the Grievants joined the Applicant union and refused to sign backdated pay slips and master roll by dividing their basic salaries to include house allowance that has never been paid.

5. It is also the Applicant's case that the Respondent engaged 4 employees after issuing the 4 Grievants with termination notices. According to the Applicant, the Respondent commenced the redundancy process to victimize the Grievants for participating in union activities.

6. The Applicant urged this Court to grant the orders sought or its members would suffer irreparable damages.

**The Respondent's Case**

7. The Respondent contends that the Applicant is guilty of non-disclosure and is not deserving of the injunctive reliefs sought. The Respondent avers that its business has been affected by the COVID-19 pandemic forcing it to downsize from the months of June and July 2020. In particular, Godfrey Atsango and David Amuhanda were the first to be declared redundant with the union participating in the process in both instances.

8. To avoid laying off more employees, the Respondent resorted to reduce the working days. However, the Applicant sought to be involved in the process, there were deliberations on the way forward and the parties came to an agreement that the Respondent could not sustain the number of employees it had. As such, the Respondent avers that the Applicant was part of the process.

9. The Respondent contends that there is no material evidence before this Court to show that the Grievants' redundancy is pegged on their union activities. Further, it is averred that the process begun before recognition of the Applicant by the Respondent.
10. It is the Respondent's position that since the Applicant issued it with a backdated list of members, the Applicant's officials have harassed and intimidated its management officials into acceding to their demands.
11. The Respondent avers that Brian Magak's notice already took effect hence he is no longer the Respondent's employee, as such, the injunction orders sought cannot assist him.
12. It is the Respondent's contention that the balance of convenience tilts in its favour as the Grievants stand to gain nothing by continuing to be its employees as there will be no work to allocate them or money to pay them. Contrarily, granting the said orders will lead to a collapse of the company and job loss.
13. The Application was disposed of by way of written submissions with both parties filing their submissions.

#### **The Applicant's Submissions**

14. The Applicant submits that the Respondent has breached the provisions of section 40 of the Employment Act. For instance, the Respondent did not issue proper notices as required. The Respondent issued termination notices to Brian Magak and James Otieno without informing the Applicant. On the other hand, the Respondent notified the Applicant with respect to Paul Oloo and James Wangari but they were yet to be issued with termination notices.
15. It is the Applicant's submissions that the Respondent did not explain to the grievants the reason it was declaring them redundant and contends that the allegations that there is no work cannot hold water as the Respondent still has piece work employees.
16. Finally, it is submitted that the Respondent is in breach of article 41 and 47 of the Constitution. The Applicant also contends that the Respondent will not suffer any prejudice if the orders sought are not granted. The Applicant urged that this Court has issued similar orders in **Kisumu Cause 18 of 2017; Kenya Engineering Workers Union vs. Jokali Handling Service** and **Nairobi Cause 174 of 2020; Kenya Engineering Workers Union vs. Orbit Engineering Limited.**

#### **The Respondent's Submissions**

17. The Respondent submits that the Applicant has failed to establish a *prima facie* case by admitting that the Respondent was justified in declaring the grievants redundant and by its failure to show the Respondent's unfairness in selecting the Grievants. Further, the Grievants were issued with notices of the intended termination notice.
18. It is the Respondent's submissions that it has the right to commence redundancy proceedings where it is experiencing economic constraints. And in doing so, the Respondent submits that it complied with the provisions of Section 40 of the Employment Act.
19. The Respondent submits that Section 40 (1) (a) only requires an employer to notify the union at least 30 days before the commencement of the redundancy. The Respondent contends that it is not mandatory for an employee to be issued with 30 days' notice as failure to do so would be cured by Section 40 (1) (f) of the Employment Act through payment in lieu of notice.
20. The Respondent urged this Court to find that the notices issued to Paul Oloo and James Karanja were proper and in the event this Court finds otherwise, then they would only be entitled to one month's salary in lieu of notice. The Respondent further urges this Court to find that the notices issued to all the Grievants are sufficient as they were issued to the Applicant as well as the Grievant.
21. The Respondent submits that the Applicant has not proved that the Grievants will suffer a loss that cannot be compensated by way of damages as the Grievants will be paid one months' salary in lieu of notice by dint of Section 40 (1) (f) of the Employment Act, if the Court finds that the notices issued were improper. Further, that Section 45 of the Employment Act stipulates the damages payable where a redundancy is deemed unfair.
22. On the other hand, the Respondent submits that it will suffer irreparable damage if the orders sought are granted as it will be forced to take on the Grievants as its employees whereas it lacks work to allocate them and the resources to pay their wages. This will eventually result in a financial crisis and a shutdown, from which the Grievants will lose their livelihoods.
23. Consequently, the Respondent submits that the balance of convenience tilts in its favour and relies on the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factory Company Limited & 2 Others [2016] eKLR** where the Court held that in granting an injunction, a Court should make a determination as to which party will suffer the greater harm with the outcome of the motion.
24. Finally, the Respondent submits that this Court should exercise its discretion and award it costs of this Application as the same is based on distortion of facts and non-disclosure of material facts and evidence, and relies on the case of **Council of Governors vs. Senate and Others [2014] eKLR** to support this position.
25. I have examined the averments of the Parties herein. The main contention by the Applicants is that there was actually no redundancy situation as the Respondents went ahead and hired four more staff after declaring the Grievants redundant.
26. The Applicants also contend that the Respondents failed to adhere to the law and particular Section 40 of the Employment Act. The

Applicants aver that the Grievants are being victimised due to trade union membership.

27. Despite these allegations, the Applicants have not produced any evidence that the Respondent hired new staff after terminating the Grievants. There is also no evidence that the selected Grievants were the Applicant's members as compared to those not terminated.

28. It is trite law that an employer has a right to downsize or reorganise their operations. The employer in this regard must adhere to the law. Where it is actually proved that the law was not followed then the employee can be compensated in monetary terms.

29. For the above reasons and bearing in mind that there is actually no proof that the Grievants have been singled out for victimization, I find the application to stop the redundancy cannot stand.

30. In any case the Grievants can be compensated in damages in case breach is proved. I therefore decline to grant orders sought and order that the Parties proceed with the Main Claim.

31. Costs in the cause.

**Dated and delivered in Chambers via zoom this 11<sup>th</sup> day of November, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Aguko for Respondent – Present

Union