



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 47 OF 2020

(Consolidated with 76 of 2020)

(Before Hon. Justice Hellen S. Wasilwa on 11th November, 2020)

ROSE KOSGEI1ST CLAIMANT

ROSEMARY WAITHERERO.....2ND CLAIMANT

VERSUS

KENYA AIRWAYS PLC.....RESPONDENT

RULING

1. There are two applications before Court by the Claimants, that is the Notice of Motion dated 29th January 2020 and the Notice of Motion dated 6th February 2020.

2. In the Notice of Motion application dated 29th January 2020, the Claimants, Rose Kosgei and Rosemary Waittherero seek at this juncture: -

“THAT this Honourable Court be pleased to grant a temporary injunction restraining the Respondent either by itself, servant and/or agents from proceeding with the intended restructuring and job application process pursuant to the e-mail dated 24th January 2020 or any other e-mail or communication or any other letter or date or in any way or manner intimidating, threatening, terminating, dismissing the Claimants or in any manner interfering with the existing employment structure and employment positions or recruitment for the Claimants’ position or interfering with the Applicants/Claimants’ employment until the hearing and determination of this suit”.

3. The Application is based on the grounds that Rose and Rosemary are duly employed by the Respondent as Commercial Planning Manager and Commercial Warehouse Manager. That by the consent orders of the court issued on 19/12/2019 in the concluded ***ELRC No. 816 of 2019***, a previous e-mail dated 26/11/2019 declaring positions vacant and issuing a new structure was set aside and the Respondent allowed to proceed and commence another restructuring exercise only in accordance with the law but without any reference to the contents and structures shared by the said e-mail of 26/11/2019.

4. That however on 24/01/2020, the Respondent issued another email to an entire department declaring the positions vacant because of an impending restructuring and which structure was similar to the one it had supplied in the e-mail that had been set aside by the Consent Orders of the Court. That the new structure was signed on 22/11/2019 while the consent orders were entered into on 19/12/2019 and that the Applicants are raising similar complaints as those in the concluded ***ELRC No 816 of 2019***.

5. Further, that the Respondent not availing or equally restricting job descriptions for several positions means that the Claimants/Applicants will not have the opportunity to apply for all the positions. That the new email of 24/01/2020 is clear that the re-organization process commenced on 24/01/2020 but there has been no notification of intended redundancy issued to the employees likely to be affected with the redundancy; no notification of the impending restructure and redundancy to the labour office; and no notice issued to the relevant union for the unionisable employees of the Respondent.

6. That the Respondent has taken a legally flawed position that in a restructure, redundancy can only commence after all the available positions are filled through interviews in accordance with an approved structure and further, that it is only where individual staff would not be matched with any specific role after interviews will it notify them of a redundancy. That the consequence of this reasoning is that employees who fail to apply would have 'resigned' and not declared redundant thus forfeiting any redundancy pay or process.

7. That there is no basis to declare the Claimants' positions vacant and require that they apply afresh for their positions as the roles and duties discharged by the current occupants have been retained with no expansion or limitation. That if this Court does not intervene, the recruitment exercise commenced by the Respondent will likely be in violation of the provisions of law and the Constitution. Further, the Claimants stand to suffer irreparably as the Respondent shall proceed to terminate the services of the Claimants which will render the Claim herein nugatory. Further, that the Claimants/Applicants have established that the Respondent has unilaterally and unfairly clawed back all the statutory safeguards governing redundancy through its relevant officer by the e-mail of 24/01/2020. The Claimants give undertaking as regards damages.

8. The Respondent filed a Replying Affidavit dated 5th February 2020 sworn by its the Senior People and Culture Partner, Sallynavia Kamsa who avers that it is public knowledge that the Respondent has for a while faced financial challenges. That the Respondent undertook to restructure its Supply Chain & Facilities Department in 2019 after the results of audits carried out in the first and second quarter of 2019 revealed that the department was operating unsatisfactorily.

9. That the Respondent has the prerogative to change its organizational structure to suit its needs and align it with its strategy and that the Claimants' contention that they ought to be consulted on the restructuring and reorganization is therefore incorrect and without basis. That the Respondent further duly notified the Labour Commissioner that the said restructuring would result to redundancies and it was committed to a lawful exercise and that they further held meetings in consultation with employees.

10. That in the email subject of the Application before Court, the Respondent declared vacancies, new role profiles and invited the employees to apply for the positions they were qualified for and that it has at all times adhered to the terms of the consent recorded on 19/12/2019. That the Respondent has in no way discriminated/ intimidated, threatened, victimized or in any way interfered with the Claimants' employment. That the Respondent in accordance with the consent started the process afresh and as such, it notified the Labour Officer of the reorganization on 17/01/2020 and also notified the Kenya Aviation Worker's Union and all the employees on 24/01/2020. That while the 2019 structure had some roles blocked and restricted, all positions in the 2020 structure are now declared vacant and that the Respondent has always remained open to feedback from its employees. She avers that the Respondent had received a considerable number of applications from employees expressing interest in the vacant positions.

11. Sallynavia further avers that the Respondent will be severely prejudiced if the injunctive orders are not set aside while the Claimants will not suffer any irreparable loss/harm which cannot be compensated through damages if the interim orders are set aside pending the hearing of the Claim. That the parties herein are litigious in nature and should not be allowed to use the Courts to frustrate and hold the Respondent at ransom at the expense of other employees who have written emails distancing themselves from the current Court case with the desire to continue with the restructuring process. That as such it would be in the interests of fairness that the orders are varied to only apply to the Claimants in this case and being that the application is an abuse of the court process, it should be dismissed with costs.

12. In the Notice of Motion application dated 6th February 2020, Kenya Aviation Worker's Union seeks to be heard for Orders: -

“THAT pending inter-partes hearing and determination of this Application, the Honourable Court be pleased to stay or restrain the Respondent, by itself, its officers, agents, servants or any person claiming under it from implementing the emails/letters dated 24th January 2020 by the Respondent's Group CEO to Respondents Employees and the e mail by Respondents Chief Human Resource Officer to the Claimant and the Respondents employees in its Supply Chain Facilities Department of even date respectively and all other consequential processes arising therefrom particularly restructuring, re-organising or, repositioning of the Respondents organisational structure by abolishing current job description or roles of its employees, create new roles, re-advertise and demand current employees to apply, be re-assessed with a view of assessing suitability into the new roles or in any way declared them redundant or in any manner restructure the Respondents organisational structure in violation of the Employment Act, the Fair Administration Actions Act and the Constitution”.

13. The Application is based on similar grounds as those in the Application dated 29th January 2020 and further that the Claim presents a prima facie case with high probability of success. That the restructuring by the Respondent constitutes unfair and wrongful termination of the employees in its Supply Chain Facilities department as the same is without prior notice or pay in lieu of notices. That the said process will render the unsuccessful applicants or non-applicants redundant without the requisite prior notices and or deploy the affected employees to the new roles under fresh contracts which would be contrary to the better terms set in the CBA. In opposing the application dated 6th February 2020, the Respondent filed a Replying Affidavit dated 18th February 2020 sworn by Sallynavia Kamsa.

Claimants/Applicants' Submissions

14. The Claimants/Applicants submit that the terms of the Consent recorded in court were clear and crystal and required the Respondent to entirely withdraw the email of 26/11/2019 including withdrawal of declaration of vacancies, directions to apply for positions of interest, new role profiles and the structure, meaning the Respondent was not to again proceed and utilize the offending role profiles and structure so withdrawn in subsequent restructuring as under **Clause 5 of the Consent**. That the Claimants and all the employees in the affected department had a legitimate expectation that the Respondent would consult them in the issuance of other role profiles or structure.

15. They submit that the Structure as seen at page 7 of the Application dated 29/01/2019 shows that the Respondent proceeded to 'block' or 'restricted' seven positions in the department chain without any credible explanation thereof. That what the Respondent intends to undertake is a redundancy process wherein the selection criteria and process would be done through the 'interview' model which is not clear on how the criteria outlined in **Section 40 of the Employment Act** would be applied. That **Section 40(1) of the Act** prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the conditions thereat including issuing specific notices to employees in writing and which is now trite law. That the Respondent is further in breach of **Sections 10 and 36 of the Employment Act** and **Article 41 of the Constitution** for not consulting the Claimants and the other affected employees.

16. It is the Claimants/Applicants submission that the employees in the affected department who decide not to apply for any role by the

stated date should be considered candidates for redundancy and individual notices of redundancy ordinarily be issued to them as at the date of commencement of restructuring, to allow for broader aspects of consultations on all issues including selection criteria and pay.

17. That their employment contracts are exposed unless protected by grant of the orders herein and have demonstrated that because of raising the issues herein, they have been threatened and victimized including being maliciously called out and identified as a stumbling block to restructuring in the newspapers.

18. The Claimant union further relies on **Giella vs. Cassman Brown & Co. Ltd [1973] E.A. 358** on the elements to be met before a prayer for injunction is granted i.e. an applicant must show a prima facie case with a probability of success; that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages; and if the court is in doubt, it will decide an application on the balance of convenience.

19. The Claimant union submits that it is noteworthy that **Section 26(2) of the Employment Act** provides that where a CBA provides better terms than those provided by Statute, then the CBA terms shall apply and that the Respondent is further in breach of **Clauses 4, 42 and 49 of the CBA**. That the letters referred to by the Respondent as being notices were invalid and inadequate and that there is further no evidence of minutes or record of the alleged meetings held by the Respondent and the affected employees, which in any case the Claimant union ought to have been invited to participate. That they have thus shown how the Respondent has offended Section 40 of the employment Act in its entirety and that this Court has previously considered in **David Ithau Wambua v Liberty Kenya Holdings Limited [2019] eKLR** that the notices were irregular for being short notice.

20. It is the Claimant/Applicant union's submission that the Respondent's actions were an arrogant show of impunity and intended to maximize on profits at the expense of violation of the law and engagement in unfair labour practices. That the Respondent also violated **Article 47 of the Constitution** and **Sections 4 and 6 of the Fair Administrative Action Act** by sending communication that were inefficient, unlawful unreasonable and procedurally unfair. It urges this Court to find that the harm the employees will suffer cannot be adequately compensated by an award of damages, especially where the Respondent has deliberately breached the law. Further, that the Respondent deliberately breaching Section 36 of the Employment Act tilts the balance of convenience in favour of the Claimants/Applicants.

Respondent's Submissions

21. The Respondent submits that in **Aoraki Corporations Limited v. Collin Keith McGavin; CA 2 of 1997 [1998] 2 NZLR 278** as quoted with approval in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**, the Court of Appeal of New Zealand held that it is for the employer to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business. The Court of Appeal of New Zealand further held that to impose an absolute requirement that an employer must consult with all potentially affected employees in making a redundancy decision would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. The Court of Appeal in the **Kenya Airways Limited (supra)** went on to uphold a similar view that the decision to declare redundancy has to be that of the employer.

22. It is the Respondent's submission that it has demonstrated that it indeed informed the Labour Commissioner, KAWU and finally all the staff that it was repositioning the company and therefore the allegation that there was no notification of the impending restructure is misleading this Honourable Court. It reproduces the relevant part of the email dated 24th January, 2020 from the CEO as hereunder: -

“Aligning our structures through reviewing capabilities streamlining operations and strengthening functions will result in better organisational stability. Some roles will change or be expanded. Some may be enriched, while others may also emerge, I also want to be clear that as difficult as it may be, some roles will disappear altogether, resulting in redundancy. I want to reiterate that any changes will be guided by any inclusive and fair process and engagement of stakeholders, as necessary”.

23. It submits that it intended to undertake a restructure process at first and then issue the appropriate notices as under section 40 of the Employment Act in the event that the process would have led to redundancy and contends that restructuring and redundancy are two separate and distinct processes.

24. The Respondent further submits that the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** held that all the three conditions required for grant of interlocutory injunction are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. That the Claimant union in the instant case has not put forward a prima facie case that the notices issued by the Respondent were in breach of statute and the CBA and that the court of appeal in **Nguruman (supra)** held:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion...”

25. That a prima facie case having not been established by the Claimants, then irreparable injury and balance of convenience need no consideration by this Court and that this Court has jurisdiction to grant damages under **Section 49 of the Employment Act** in the event the Applicants suffer any damages at all by the refusal to grant the injunction. It further submits that the applications are premature and misconceived and ought to be dismissed with costs to the Respondent.

26. I have examined the averments of the Parties herein. From the Applicant's averments the orders sought emanate from a consent entered by the Parties in Cause No. 816 of 2019. The Applicants contend that the Respondents are flouting the conditions set in the said consent where the email in contention was withdrawn by consent.

27. If indeed the issue relates to a consent agreed upon in Cause No. 817 of 2019, then the right forum to address the non-adherence to the terms of the consent is in Cause No. 816 of 2019.

28. As concerns the 2nd application, the issue of redundancies concerning the Respondent's employees herein is a matter which this Court has adjudicated upon in other Causes with the Court making a finding that there should be caution and Parties should consult before the redundancies are affected. The Applicants seem to be saying that in this case there has been no consultation and as such the process being employed by the Respondents is flawed and disadvantages them.

29. Due to this contention, the best way to handle this issue is to have the Parties consult on way forward on the restructuring with the help of a Conciliator. In the circumstances, I will refer this issue to the Labour Commissioner for conciliation and the same be conducted within 30 days. In the meantime, the status quo be maintained.

30. Costs in the cause.

Dated and delivered in Chambers via zoom this 11th day of November, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ogotu holding brief Ohaga for Respondent – Present

Mukunya holding brief Litoro for Claimant – Present