REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 502 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

COMMUNICATIONS WORKERS UNION.....CLAIMANT

VERSUS

CAMUSAT KENYA LIMITED.....RESPONDENT

RULING

The Claimant filed the application dated 31st July 2019 as it was apprehensive that the Respondent would terminate the employment of six employees on account of redundancy without the issuance of a notice or payment of severance pay. The Applicant therefore sought the following reliefs–

1. Spent.

2. That the Court be pleased to issue a conservatory order stopping immediately the ongoing redundancy process of six of the members of the Claimant namely Stephen Muiruri, Simon Ngwamba, Antony Kiari Chege, Collins Otieno Ouma and Maurice Otieno pending the hearing *inter partes* of this application.

3. That prayer number 2 above upon hearing inter partes be granted pending hearing and determination of the cause.

4. Costs of the application be provided for.

The Application is supported by the grounds set out therein, the Supporting Affidavit of Benson Okwaro sworn on 31st July 2019 and his Further Affidavit sworn on 6th September 2019. The Respondent has opposed the Application vide the Replying Affidavit of Nancy Barongo sworn on 2nd September 2019 and her Supplementary Affidavit sworn on 13th September 2019.

Applicant's Case

The Applicant contends that the redundancy process as commenced by the Respondent was illegal and aimed at frustrating its union activities. The Applicant avers that on 26th July 2019, the Respondent served redundancy notices on some of its members namely: Stephen Muiruri, Simon Ngwamba, Anthony Kiari Chege, Collins Otieno Ouma and Maurice Otieno.

It is the Applicant's case that despite informing the Respondent that Simon Ngwamba was its member, the Respondent still failed to issue the Applicant with his redundancy notice. Instead, the Respondent relied on an altered and unclear notice issued to the State Department of Labour, as the basis for its action.

It is averred that the altered notices contained tabulations of the Applicant's members' dues, including severance pay. However, the termination notices did not contain payment of severance pay hence contrary to Sections 40, 41, 44 and 45 of the Employment Act. In addition, the Respondent failed to consult the Applicant before commencing the process.

The Applicant avers that unless the redundancy process is halted, the Respondent will occasion untold irreparable loss and damage to the affected employees.

Respondent's Case

The Respondent contends that the company had been experiencing financial constraints due to the decline in monthly fiber telecommunication connections from 6000 to 4500. As such, restructuring became necessary in the following ways–

a. The project coordinator position was replaced by the project manager.

b. The billing section was declared redundant since the service and delivery managers would be doing their own invoicing.

The Respondent avers that in June 2019, the employees were informed of an impending redundancy process. The Respondent contends that at the time of verification of the Applicant's members, the Respondent had already had meetings with its employees and informed them of the impending redundancy. Further, that the verification of the Applicant's members had not been concluded by 2nd July 2019 when the Respondent issued a redundancy notice to the State Department of Labour.

The Respondent further avers that it held another meeting with all its employees where they were informed that there would be a reduction in the number of positions in the company due to the prevailing economic circumstances. Access and Sales Department was one of the departments that was abolished. Consequently, the employees were issued with redundancy notices containing tabulations of their final dues which was inclusive of severance pay.

The Respondent contends that the termination notice of the employees in question was 26th July 2019 and that they were paid their final dues being severance pay and one months' wage in lieu of notice. According to the Respondent, Anthony Kimani Chege and Maurice Otieno Akelo were cleared from the Respondent's employment while Simon Ngwaba voluntarily cleared from the Respondent's employment. As such, they are estopped from challenging the redundancy process.

The Respondent avers that the Applicant failed to inform this Court that by the time the interim orders were issued, its members had received their dues and cleared with the Respondent. Further, that none of the affected employees were members of the Applicant.

The Respondent urges this Court to vacate the interim orders issued contending that since the membership applications were withdrawn by most of its employees, the orders were issued on the basis of forgeries, lies and material non-disclosure.

The Respondent contends that the balance of convenience tilts in its favour as keeping the six employees in its payroll would be enriching them at the Respondent's expense and sufferance.

Applicant's Rejoinder

The Applicant contends that the Respondent is not undergoing any economic crisis and if that were the case, then it would have proved by adducing evidence. The Applicant further contends that the meeting held between the Respondent and its employees was to discuss the new medical scheme and not an impending redundancy.

It is averred that the Respondent's employees told the Applicant that the notice of a meeting with the Human Resource on 26th July 2019, was issued the day before the actual meeting. The Applicant gave the example of Esther who was issued with her redundancy letter dated the same day as the meeting. It is the Applicant's position that the notice did not amount to a notice as envisaged by Section 40 of the Employment Act.

The Applicant contends that upon serving the Respondent with the interim orders, it circumvented the orders by paying Stephen Muiruri and Anthony Chege Kimani their final dues that 2nd August 2019. Further, the affected employees were sent on compulsory leave. The Applicant maintains that the redundancy process was ongoing at the time the interim orders were issued.

Respondent's Rejoinder

The Respondent clarified that one of the reasons for the decline in business was because the number of contracts from Zuku relating to access, acquisition and installation related activities reduced. As such, the access and acquisition team and part of the construction team and installation teams were declared redundant. It is the Respondent's case that Simon Ngwaba being an access and acquisition agent, knew that the access and survey work was going down.

The Respondent maintains that it held meetings with its employees and that the meeting concerning the new medical scheme was held in April 2019.

The Respondent avers that the contents of paragraph 7 of the Applicant's Further Affidavit are hearsay as the sources of that information have not been disclosed. Further, Esther Choru, upon whose information the Claimant based the averments on paragraphs 9 to 12; is not a member of the union or a unionisable employee being in a managerial position, neither was she amongst the employees whose names are particularized in the letter dated 25th July 2019.

As such, the Applicant cannot rely on the information obtained from her hence the same should be disregarded and expunged. The Respondent contends that Esther has never been paid her terminal dues as the same was halted by the interim orders.

The Respondent avers that annexure "BO6" does not indicate the details of the payments hence it is mischievous of the Applicant to claim that the same are redundancy dues made by the Respondent.

It is the Respondent's position that payment of the 11 employees was effected on the morning of 2nd August 2019, which payment included notice pay. The Respondent avers that Stephen Muiruri, Anthony Chege and Collins Otieno were amongst them. The Respondent contends that the interim orders were issued after the payments had been made hence it was impractical to recall the same. The Respondent further contends that the three grievants should not continue to draw salaries as it would amount to unjust enrichment.

The Respondent avers that no other terminal dues were paid once it was served with the interim orders and no further actions were taken in furtherance of the redundancy process.

It is the Respondent's case that Simon Ngwaba has approached this Court with unclean hands as he filled Geoffrey Ochieng's union membership application without authority hence not deserving of any orders. It is averred that paying Simon Ngwaba and Maurice Otieno their salaries every month will stretch the Respondent's resources thereby occasioning further restructuring thus prejudicing the remaining employees.

Finally, the Respondent contends that its employees took their leave days voluntarily and Stephen Muiruri's letter was written two weeks after he had taken his leave hence an afterthought.

The Application was disposed of by way of written submissions with both parties filing their submissions.

Parties' Submissions

The Applicant's submissions were a reiteration of the averments made in its affidavits. The Applicant submits that the redundancy was void *ab initio* hence cannot be completed.

The Applicant submits that it has met the threshold enunciated in the case of **Giella v Cassman Brown and Company Limited [1973] E. A. 358** hence entitled to the reliefs sought. The Applicant relies on the case of **Kungu George Kairu & 35 Others v KK Security Limited [2016] eKLR** to fortify its position.

On the other hand, the Respondent submits that it is now trite law that every employer has the prerogative to determine the structures of its business and redesign its organizational structures to suit the requirements of profit making. The Respondent further submits that the Court can only intervene where there is no genuine reason for declaring employees redundant. It is contended that the Respondent had genuine reasons to declare employees redundant there being a decrease in business as evidenced in the annexures marked "NB 29a" and "NB 29b".

To support its position, the Respondent relies on the cases of **Africa Nazarene University v David Mutevu & 103 Others [2017] eKLR** and **Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR**.

It is the Respondent's submissions that since the grievants were not members of the Applicant at the time the redundancy process was commenced, the correct notice to be issued was the one stipulated in section 40 (1) (b) of the Employment Act, which was issued.

The Respondent submits that it is not a requirement that every employee must be consulted in making a redundancy decision as was held in the case of **Nicholas Wachira Koigia v NCR Kenya Limited [2013] eKLR** and the case of **Aoraki Corporations Limited v Collin Keith McGavin CA 2 of 1997 [1998] 2 NZLR 278** as cited by the Court of Appeal in **Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 Others [Supra]**.

It is submitted that the grievants were declared redundant because Zuku reduced its contracts with the Respondent which in turn affected the Access & Acquisition team and part of the construction and installation team.

The Respondent submits that the grievants were paid all their dues as required by section 40(1)(e), (f) and (g). The Respondent contends that the grievants have not disputed receiving letters that indicated the payment due to them, or receiving severance pay.

The Respondent further submits the Applicant has not met the threshold set out in the case of **Giella v Cassman Brown and Company Limited [Supra]** since the Applicant has not demonstrated the irreparable loss and damage the five grievants would suffer if the Application is not allowed. Additionally, if the application is dismissed, the Applicants can be awarded compensation where the claim succeeds having sought compensation for unlawful termination.

On the other hand, the Respondent submits that it will be forced to take back employees who had already been declared redundant and paid their dues yet it does not have work to allocate them or resources to pay their salaries. Finally, the Respondent submits that the Application lacks merit and should be dismissed with costs.

Analysis and Determination

I have carefully considered the application, the affidavits filed in

support or opposition thereof, the evidence annexed to the respective affidavits as well as the parties' submissions. The issues for determination are: –

a. Whether the Application as currently before this Court is proper.

b. Whether the Applicant has met the threshold to warrant the grant of injunctive orders.

The Application

The Respondent has submitted that the Applicant's failure to cite any legal provisions upon which the application is based, is an incurable impropriety that invalidates the application as it is trite law that a court ought to be moved under the correct provisions of law. The Respondent has further submitted that the application should be dismissed as the Applicant lacked the *locus standi* to institute this claim because by the time the redundancy process began, the grievants were not its members.

Order 51 rule 10 of the Civil Procedure Rules provides as follows–

> **1. Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.**
>
> **2. No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.**

The Court in **Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd [2018] eKLR** observed as follows, when it was faced with similar circumstances–

> *"7. That however, is not to say that an applicant citing the wrong provision the court or totally failing to cite any law would divest the court of the jurisdiction to answer to the calls of its very existence, look at a party's complaint and determine it according to the law whether that law be cited or misquoted. I think this to me is the natural and irrefutable character of the institution called the court of law. A court expects parties to guide it on the applicable law they seek to rely upon but the dereliction of that duty by the party takes no bit of the courts duty to apply the applicable law…*
>
> *8. Over and above the Rules, the character and duty of the court is that it must find where the law lies and apply it to the letter. It can never be confined to what the parties cite or avail to it. It is deemed and expected to know the law…*

In light of the foregoing, it is my view that the Applicant's failure to cite the provisions upon which the application was based is not fatal as to warrant a dismissal of the application.

On the issue of whether the Applicant had the *locus standi* to institute these proceedings on behalf of the grievants yet they had not been its members, there is a letter dated 25th July 2019 annexed to the Applicant's supporting affidavit at page 14 marked "CO6"; from the Respondent to the Applicant which reads as follows–

> *"REF CHR – COWU – 0719*
>
> *To,*
>
> *General Secretary*
>
> *Communication Workers Union of Kenya*
>
> *Hermes House, Tom Mboya Street*
>
> *P.O. Box 48155-00100*
>
> *Nairobi, Kenya*
>
> *Dear Sir,*
>
> *RE; MEMBERSHIP APPLICATION FORMS*
>
> *We make reference to letter dated 31st May 2019 REF No. COWU-CMST-05-005-2019 and acknowledge receipt of application forms for the attached list of individuals.*
>
> *The forms have all the required information; we therefore acknowledge their application to be members of COWU…*
>
> *STEPHEN MUIRURI*
>
> *ANTHONY CHEGE*
>
> *COLLINS OTIENO*
>
> *SIMON NGWABA…"*

The letter is not clear, as such, this Court was not able to make out whether Maurice Otieno was amongst those in the list. This notwithstanding, the letter together with the correspondences between the Applicant and the Respondent show that the Applicant had registered the Respondent's employees long before filing the application. This is a clear indication that the grievants were the Applicant's members before the filing of this cause. The contentious issues between the parties at the time was the issue of recognition as the Respondent had disputed some of the names as presented by the Applicant.

Articles 258(2)(d) and 22(2)(d) of the Constitution allows for the institution of court proceedings by an association acting in the interest of one or more of its members where they are claiming the Constitution and/or the Bill of Rights has been infringed or is threatened with contravention which was the case in this claim. Further, the Labour Institutions Act at Section 62 as well as the Employment and Labour Relations Court Act recognise representation of parties in court by a trade union. As such, the Applicant had the *locus standi* to institute this claim.

Grant of Injunctive Orders

The threshold to be met when granting injunctive orders was set out in the case of **Giella v Cassman Brown and Company Limited [Supra]** as follows–

> *"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience."*

The Applicant has raised weighty issues regarding the Respondent's failure to follow the procedure set out in Section 40 of the Employment Act. However, I note that some of the grievants had already been paid their dues and had cleared with the Respondent by the time this claim was instituted. This evidence was not controverted by the Applicant.

As such, the Applicant has not established a *prima facie* case as the orders sought would be granted in vain. Further, a grant of the orders sought would be tantamount to reinstating the grievants back to work yet it is trite law that reinstatement orders are only granted at interlocutory stage under special circumstances.

I note that one of the remedies sought by the Applicant is compensation for unlawful termination of the grievants' employment and payment of terminal benefits. As such, the injury the grievants are likely to suffer may be remedied by an award of damages as sought by the Applicant. In the case of **Kenya Petroleum Oil Workers Union v Kenya Petroleum Refineries Limited & 3 Others [2014] eKLR** the Court observed as follows–

> *"Even if any such a right had been violated, no evidence has been adduced to prove that an award of damages would not make adequate compensation. The foregoing view is reinforced by the fact that the claimant has already calculated the expected damages at Kshs.22,158,467.00. One wonders why then would one seek interlocutory injunction in a simple employment contract where the statutory law guarantees compensation for unfair and wrongful termination? This court finds that judicial time would be saved if employees would first be letting disciplinary or termination processes to end at the work place level and thereafter challenge it in court and seek compensation if the process is deemed wrongful and unfair.*

I have further taken into account that this is a case of redundancy and that an employer has a right to carry out redundancy provided it complies with the law in the process and has valid reason for doing so. The issues of procedure and valid reasons are matters that are subject to evidence at the hearing.

Taking this into consideration, the balance of convenience would tilt in favour of allowing the Respondent to carry out the redundancy and dealing with the propriety of the redundancy during the hearing of the main suit.

For these reasons, I find the application does not meet the principles for grant of the orders sought and accordingly dismiss the same. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate

just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE