REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E450 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

AMALGAMATED UNION OF

KENYA METAL WORKERS.....CLAIMANT

VERSUS

KENYA COACH INDUSTRIES.....RESPONDENT

RULING

The claimant herein is a trade union registered under the Labour Relations Act while the Respondent operates within the Sector under which the Claimant union is empowered by its Constitution to recruit and represent employees.

The Claimant and Respondent have a valid recognition agreement and CBA, setting out the terms of engagement between the parties and terms of employment for the Respondent's unionisable employees.

On 5th August 2020, the parties had a consultative meeting where it was mutually agreed that the unionisable employees' salaries would be reduced by 20% for a period of 2 months as they observe the situation brought about by the COVID-19 pandemic and that in the event of termination, the terminal dues will be computed in accordance with the provisions of the CBA. Despite this agreement, the Claimant was served with a notice on 27th August 2020 intimating the Respondent's intention to declare the grievants redundant hence the application of 28th August 2020 where the Claimant seeks the following orders–

a. Spent.

b. That pending the hearing and determination of this suit the Court do issue an order restraining the Respondent from declaring 35 unionisable employees who are the grievants in the dispute redundant.

c. That pending hearing and determination of this application, the Court be pleased to restrain the Respondent from any acts of victimization, coercion or intimidation of the Claimant members during the pendency of this suit.

d. That the Court be pleased to set down this Application for inter partes hearing on priority basis and further order the Respondent to negotiate with the Claimant in good faith.

e. That the Court be pleased to grant costs of this Application in favour of the Applicant.

The Application is supported by the grounds set out on the face thereof and in the Supporting Affidavit of Rose Auma Omamo the General Secretary of the Applicant Union sworn on 28th August 2020. It is opposed by the Replying Affidavit of Narain Sokhi the Managing Director of the Respondent sworn on 17th September 2020.

The Claimant's Case

The Claimant contended that the grievants will be highly prejudiced and will suffer a substantial loss if the orders sought are not granted as the Respondent may terminate their services upon the lapse of the redundancy notice. On the other hand, the Respondent would not suffer any loss.

It was the Claimant's case that a tripartite agreement signed on 30th April 2020 between the Social Partners, FKE and COTU (K) to help employers, employees and trade unions to resolve challenges during the COVID-19 pandemic period influenced its decision to agree to the

pay cuts.

The Claimant averred that the Respondent's failure to disclose material facts and the reasons for the impending redundancy shows that the redundancy notices were issued in bad faith and were aimed at punishing the grievants for their union activities. The Claimant further averred that the matter was filed in Court after the parties' failed to reach an agreement on 27th August 2020.

It is the Claimant's view that the Respondent ought to adhere to the provisions of the CBA and Section 40 of the Employment Act. Further, the grievants are entitled to payment of benefits based on their salaries before the pay cuts were effected.

The Respondent's Case

The Respondent contended that being in the motor industry, the COVID-19 pandemic affected its business as it experienced low sales. Additionally, the period taken to reach an agreement on the pay cut percentage had a negative impact on its business. This necessitated the impending redundancies after its attempts at cushioning its employees from the effects of the pandemic failed. The Respondent averred that the criteria used was selecting idle labour.

The Respondent attributes the deterioration of its business to the Claimant's refusal to accept a 35% pay cut or sending employees on unpaid leave. That nevertheless, declaring employees redundant during negotiations would not have been a reasonable option.

The Respondent contends that the agreement signed on 11th August 2020 was not sufficient to alleviate its position and neither did it bar the Respondent from taking any other appropriate action to prevent its business from experiencing hardship.

The Respondent contended that the Claimant and the Ministry of Labour were informed of its intention to declare its employees redundant giving the reasons as low sales and cash flow problems, and the extent of the redundancy as required by Section 40(1)(a).

The Respondent admitted to receiving an invitation to discuss the imminent redundancy but due to a prior engagement and impending public holiday it could not attend, but had been open to meeting the claimant at another time. However, the Claimant had not been open to another meeting. The Respondent denied any bad faith on its part or intimidating the Claimant's members.

It was contended that the Respondent stood to suffer a substantial loss if the orders sought are granted because there is a cash flow decline which may result in the closure of the Bus Body Building Workshop, which is its main department, due to lack of business.

The Respondent avers that any employee declared redundant will be paid terminal dues in accordance with the agreement signed on 11th August 2020. They will also be paid salary in lieu of notice, severance pay and service gratuity of 17 days for each completed year of service and payment of untaken leave.

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

Parties' Submissions

The parties' submissions were basically a reiteration of the averments made in their affidavits. The Claimant submitted that the redundancy process is a participatory process hence the Claimant should have been notified at least 30 days before the issuance of the notice, as required by Section 40(1)(a) of the Employment Act and clause 17(a) of the CBA. That the decision to declare the 35 grievants redundant was made without consultation to enable the Claimant ascertain the number of affected employees hence defeating the purpose of the aforementioned provisions.

On the other hand, the Respondent submitted that the application is defective and should be struck out as the circumstances outlined in section 74 of the Labour Relations Act, which informed the instant application, do not apply to the current situation for the following reasons–

a. The applicant never reported a Trade Dispute under Section

62(4) of the Labour Relations Act. In the Respondent's view, a certificate of urgency was only viable where a trade dispute had been reported to the Minister for Labour.

b. At the time of filing the Application, the Respondent had not retrenched any employee without giving notice. A notice was issued and was to expire on 24th September 2020.

c. There is no evidence to show that its employees were essential service providers neither was it pleaded in the application.

The Respondent therefore urged this Court to dismiss the application with costs and lift the temporary injunction issued to allow the Respondent to proceed with the redundancy process to cushion it from any hardship. The Respondent is of the view that this Application could prejudice the grievants due to the difficulties that may arise in paying them their terminal dues.

The Respondent urged this Court to dismiss the Applicant's submissions due to the misrepresentations made therein. For instance, the grievants were yet to be declared redundant as only a notice to declare them redundant had been issued pursuant to Section 40(a) of the Employment Act and clause 17 (a) of the CBA. Further, that the fact that there was an agreement to subject the Respondent's employees to a

pay cut did not mean that they could not be declared redundant where the Respondent's financial situation worsened. Lastly, the Claimant's allegation that the redundancy notices were issued in order to punish the grievants for their union activities was a wild accusation not backed by evidence.

Analysis and Determination

I have carefully considered the application, the affidavits filed in support and in opposition thereof, the annexures thereto and submissions by the respective parties. The issue for determination is whether a temporary injunction should be granted in terms of the payers sought by the Claimant Union/Applicant.

The Claimant submitted that it was never consulted before the notice was issued. It is now trite law that parties should consult before redundancies are undertaken. In particular, article 13 of Recommendation No. 166 of the ILO Convention No. 158-Termination of Employment Convention, 1982 requires consultation between employers on the one hand and employees or their representatives on the other before termination of employment on grounds of redundancy.

The Respondent contended that the notice issued served to inform the Claimant of its intention to declare the 35 employees redundant and was in itself an invitation for the Claimant's input. However, from the wording of the notice it communicates something different as the Respondent informed the Claimant that: –

> *"The purpose of this letter therefore is to serve a one month written notice effective immediately to your office of the said intended redundancies.*
>
> *This redundancy will take effect at the expiry of the notice upon which the affected staff will be required to see the undersigned for collection of their dues."*

It is therefore evident that there was no room for consultation or suggestions for a meeting as alleged by the Respondent since the grievants were required to collect their dues upon the expiry of the notice period.

The Respondent submitted that this matter did not require a referral by the Claimant to this Court under section 74 as the circumstances outlined therein did not arise as the matter was never referred to conciliation as required by section 62 (4), neither were the employees retrenched or were essential service providers.

Section 74 of the Labour Relations Act provides for urgent referrals to this court as follows –

> **74. Urgent referrals to Industrial Court**
>
> **A trade union may refer a dispute to the Industrial Court as a matter of urgency if the dispute concerns—**
>
> **(a) the recognition of a trade union in accordance with section 62; or**
>
> **(b) a redundancy where—**
>
> **(i) the trade union has already referred the dispute for conciliation under section 62(4); or**
>
> **(ii) the employer has retrenched employees without giving notice; or**
>
> **(c) employers and employees engaged in an essential service.**

I find that the Claimant was within its rights to refer the issue of redundancy to this court as it did not require to first report the dispute to the Minister as the timelines given in the Respondent's letter would not have permitted any meaningful conciliation. The Claimant has further shown that before moving to this court it sought a meeting with the Respondent to discuss the redundancy notice which the Respondent snubbed. Its only relief thus lay in seeking the orders it sought from this court as the Respondent had already given notice of redundancy and the claimant put on notice that the employees were to be retrenched upon expiry of the notice.

Further in view of the fact that the parties had met and agreed on measures to alleviate the hardships experienced by the Respondent due to COVID-19 pandemic, it was only logical that if such measures were to be escalated to a redundancy, the Respondent required to hold further discussions with the Claimant to agree on the terms of the redundancy. I therefore agree with the Claimant that the unilateral decision of the Respondent to resort to redundancy and its subsequent refusal to meet the claimant to discuss the terms of the redundancy or even the necessity thereof, was an affront to the recognition agreement between the parties.

For the foregoing reasons I find the application herein merited and make the following orders: -

1. **That the Respondent be and is hereby restrained from declaring redundant the 35 grievants named in the claim pending final determination of this suit.**

2. **That the parties are referred to the Labour Commissioner to appoint a Conciliator to reconcile the parties.**

3. **That the Conciliator so appointed is directed to file a report to court within 30 days.**

4. **That the matter will be mentioned on 27th January 2021 with a view to either adopting the report of the Conciliator or making further orders with respect to disposal of this dispute.**

5. **That the Deputy Registrar sends a copy of this ruling to the Labour Commissioner forthwith.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF DECEMBER 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, this 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 this 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