



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 3 OF 2019

(Before Hon. Justice Mathews N. Nduma)

DENNIS LEAK OJUOK.....CLAIMANT

VERSUS

POPULATION SERVICES KENYA.....RESPONDENT

RULING

1. The claimant filed a memorandum of claim together with an application on certificate of urgency on 26th March 2018. The applicant sought in the notice of motion, interim orders to restrain the respondent from proceeding with the redundancy process in respect of the claimant commenced by notices dated 30th January 2019 and 15th February 2019 respectively pending the hearing and determination of this application. Interim orders were granted on 26th March 2019 and the application was set for interpartes hearing on priority basis on 25th April 2019.

2. Meanwhile the respondent filed a replying affidavit to the application on 11th April 2019 and a statement of defence to the suit on the even date.

3. The claimant filed supplementary affidavit sworn by the applicant on 18th April 2019.

4. The matter proceeded as scheduled.

Determination

5. The issue for determination in this matter is whether the Applicant has satisfied the requirement for grant of interim injunction pending the hearing and determination of the suit.

6. The Claimant/Applicant relies on the **ELRC Cause No. 1653 of 2015, Kenya Union of Commercial Food and Allied Workers vs Bia Tosha Distributors Ltd (2016) eKLR** in which the court relied on the case of **Giella vs Cassman Brown and Company Ltd (1973) E.A 358** in which the requirements for grant of an interim injunction were set out as follows:

7. The applicant has an obligation to establish a prima facie case with a probability of success; that he would suffer irreparable injury which would not be adequately be compensated by an award of damages if the interim relief is not granted and if the court is in doubt it will decide the application on a balance of convenience.

8. The applicant submitted that grant of a temporary injunction is an exercise of judicial discretion which must be exercised judiciously. **See Sargent vs Pate (1949) E.A.C.A 637.**

9. In the present case, the respondent issued redundancy notices dated 30th January 2019 and 15th February 2019 to take effect on 31st March 2019. The respondents have submitted that the reason for declaration of redundancy was on account of his performance which has declined as shown in his evaluation report of 2018 and respondent's organization is being restructured because of reduced funding and the claimant's position would not fit in the new operating model as resources are limited.

10. That two donors namely AHMC and CIFF were to stop funding the respondent by 31st May 2019 and USAID reduced funding resulting into some members of staff being laid off.

11. That in compliance with Section 40 of the Employment Act, the respondent gave redundancy notices to the claimant and to the labour officer as required by the Act.
12. That the claimant has admitted both the cutting of donor funds and restructuring of the respondent's organization which affected six employees in the claimant's Nyanza region.
13. That one George Mutembula, holds the position of Social Behaviours communication Coordinator and the claimant handed over to Mr. Mutembula for Administrative reasons so that the respondent's office was not left in a limbo.
14. That seven (7) employees have had their funding transferred to USAID since those services are still required and critical to the HCM payment. That six employees in the lake region were released five of whom were declared redundant and one whose contract lapsed out of 41 employees in the lake region.
15. The respondent states that the declaration of redundancy was lawful and fair and an injunction would lead to irreparable harm suffered by the respondent since the meagre funds would not meet the salary demands of the clamant.
16. The Claimant/Applicant joined issues with the respondent and reiterates that he has satisfied the requirements for grant of interim injunction.
17. In determining this matter the court has cautioned itself against predetermining disputes of fact at the interlocutory stage because those must await the determination of the suit on the merits.
18. Whereas the issue whether the declaration of redundancy of the claimant is highly contested and therefore arguable by the claimant/applicant, it is apparent from the statement of claim dated 26th March 2018 that in addition to the prayer for declaration of the redundancy to be unlawful, null and void leaving the applicant still in employment, the applicant has sought alternative remedy of compensation in the sum of Kshs 2,754,576 being the equivalent of 12 months salary in the event the court finds the termination was wrongful and unfair.
19. The Applicant also prays for severance pay for every year worked being 7 years in the sum of Kshs. 1, 095, 70. In addition the Applicant prays for general damages and exemplary damages.
20. It is therefore clear that the claimant/Applicant has alternative remedies in the event that the interim injunction is not granted.
21. In considering the balance of convenience the court has weighed the possibility of lack of funds to pay the salary of the applicant and the harm that would do to the respondent vis avis the hardship to be faced by the applicant in looking for alternative employment.
22. In view of the above, the court finds that the applicant is unlikely to suffer irreparable harm should the interim injunction not be granted and that the balance of convenience is in favour of allowing the respondent to implement its managerial mandate subject to adherence to the legal requirements in doing so.
23. Accordingly, the applicant has failed to satisfy the requirements for grant of interim injunction. The application is dismissed with costs in the cause.

Judgment Dated, Signed and delivered this 23rd day of May, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Maloba for claimant/Applicant

Mr. Ngala Awino for Respondent

Chrispo – Court Clerk