



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 12 OF 2019**

**JANE KIRIGO GIKUHI.....CLAIMANT/APPLICANT**

**VERSUS**

**MOUNT KENYA ACADEMY FOUNDATION.....RESPONDENT**

**RULING**

1. The Claimant/Applicant's Notice of Motion before me is the one dated 18<sup>th</sup> April 2019 and filed the same day. It seeks injunctive relief against the Respondent for the redundancy that was due on 1<sup>st</sup> May 2019. It was argued by Mr. Mokuu for the Claimant/Applicant that Article 47 of the Constitution provides a right to fair administrative action and that Parliament had enacted the Fair Administrative Actions Act. He submitted that the Court in determining whether the Claimant was procedurally terminated for redundancy, should consider Section 4(3) of the Fair Administrative Actions Act. He stated that when any action is to be taken in administrative action a party should be heard and that this rule of natural justice has statutory underpinning under Section 4(3)(b) of Fair Administrative Actions Act. He posed the question as to whether the Respondent is to be enjoined from continuing with the action purportedly on account of redundancy and stated that in determining whether there is procedural termination on this score, Section 40(1) of the Employment Act provides 7 prerequisites or conditions to be met. He asserts that it is imperative that there has to be at least one month notice to Labour Officer and to the employee and submitted that in the instant case the letter issued by Respondent was received by the labour Officer on 4<sup>th</sup> April and the termination was to take effect as of 1<sup>st</sup> May which is not at least one month. He submitted that on that score alone the Respondent did not meet the statutory requirement as the days in the notice are fewer. He argues that a decision to terminate was made without regard to the law. He asserts that prior to termination on account of redundancy there ought to be consultations between employer and employee and not cosmetic consultations. He submitted that there is a heavy burden placed on Respondent to prove valid and genuine reasons for the termination. He stated that there is an assertion by the Respondent that there is low enrollment and he submitted that the Claimant's employment is not pegged on any enrollment. He thus urged the court to grant the prayers sought by the Claimant.

2. The Respondent filed a replying affidavit sworn by Ben Yebai the Deputy Director Finance, Planning and Administration which extensively responded to the application. He deposed that the Respondent had a low student enrollment and the restructuring process had been going on, a fact well known to the Claimant. He deposed further that the Respondent in January 2019 merged two offices being that of head pastoral and deputy principal and the Claimant was assigned the merged position and after the failure of improvement in enrollment the Respondent decided to restructure further and abolish the office held by the Claimant. He deposed that the Director of the Respondent wrote an email to the Claimant requesting for a meeting to discuss redundancy. He asserts the Claimant has refused to clear with the Respondent and collect her terminal dues of Kshs. 890,879/-. The Respondent also filed a notice of motion application seeking to vacate the interim orders granted to the Claimant arguing that the continued stay of the Claimant in office will greatly prejudice the Respondent as the expectation of the Claimant is that she will continue to be remunerated yet the Respondent is in financial hardship.

3. Miss Mwai for the Respondent argued that the court has to consider whether a reasonable prima facie case is set out as stated in the case of **Giella v Cassman Brown and Company Limited [1973] E.A. 358**. She asserts that in the claim there no prayer for reinstatement and because that is not one of the reliefs sought there is no case for reinstatement with probability of success and the injury the Claimant may suffer can be compensated by damages. She submitted that the balance of convenience favours rejection of the application and discharge of the orders and because the Claimant is receiving full pay and the fringe benefit of housing and until the Court raises the order the Respondent is bound to do this which is constraining financially. She asserts that the Claimant received an email on 30<sup>th</sup> March to meet on 1<sup>st</sup> April 2019 to discuss the termination. She argued that because the Respondent had issued the Claimant with 3 months payment in lieu of notice, the Respondent therefore had over performed per Section 40 of the Employment Act. She argued that when an employee is not a member of the Union one notice is adequate per the decision of the Court of Appeal in **African Nazarene University v David Mutebu & 103 Others [2017] eKLR** where the Court of Appeal citing the case of **Thomas De La Rue v David Opondo [2013] eKLR** stated that *the only applicable redundancy notices are those provided for under Sections 40(1)(a) and (b) of the Act. It also held that the employer was not required to hold direct consultations with the employee and that a notice given to the Trade Union discharged the duty of an employer under the Act*. She submitted that the issue of notice is duly sorted out in this case. She asserts that the reasons were genuine and valid because in January, the Claimant agrees there was need to consolidate 2 offices since due to poor enrollment, the number of students necessitated to restructuring the offices. She submitted that the restructure is an economic issue and it is unfortunate it affected Claimant and from day 1 the Respondent is willing to have a conversation with Claimant and the Respondent had attached computation of the dues to the Claimant inclusive of a cheque for Kshs. 890,879/= due to the Claimant. She submitted that the Respondent is an institution of learners and it is imperative that the Court considers this on balance of convenience as the interaction with Claimant may be detrimental and thus the Respondent prayed the order be suspended prior to determination of the dispute. The Respondent urged the Court to find procedure was followed and accordingly dismiss application with costs.

4. The Claimant/Applicant seeks injunctive relief for her attempted ouster from the Respondent's employ. She was the deputy principal and the Respondent in response asserts that the Claimant/Applicant's position is now redundant. Section 2 of the Employment Act 2007 defines

redundancy to mean the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment. Section 40(1)(c) of the Act provides that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. Prior to declaring an employee redundant, the employer must give at least one month's notice of the intention to do so and if the employee is a member of a trade union the employee's union must be notified as well. The notice is to be copied to the Labour Officer to enable the office know the extent of the redundancy and the reasons for the same.

5. In this case, the law in respect to redundancy was not followed as the Respondent merely issued what it termed as a notice at the time the Claimant/Applicant was being dismissed. It was not even the one month notice contemplated in the Act. She was not accorded the due process in declaration of the redundancy alleged by the Respondent. Whereas the Respondent has the right to determine how it will structure its operations and the positions that would ensure the proper running of the school to ensure commercial viability, the process of cutting back on staffing requirements must be in accordance with the law. As the Claimant/Applicant has demonstrated there was an error in the process which breached her rights substantially she is entitled to the relief sought to the extent that the declaration of redundancy by the Respondent is suspended pending hearing and determination of the suit. As the matter relates to a sensitive area of the Respondent's operations hearing will be on 12<sup>th</sup> July 2019 at 9.00am whereat the Claimant and Respondent must come ready to proceed so that there is a resolution of the matter before the end of the school holidays in September. The costs of the application will be in the cause.

It is so ordered.

**Dated and delivered at Nyeri this 20<sup>th</sup> day of June 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**