REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

(Before Hon. Lady Justice Maureen Onyango)

CAUSE NO. 491 OF 2019

JULIUS LULLE KAKELLO.....1ST CLAIMANT

CAROLINE ATIENO ONYONGO.....2ND CLAIMANT

COLLINS ONYANGO ODONGO.....3RD CLAIMANT

AMOS SIMIYU WABUYEKHA.....4TH CLAIMANT

JOEL KIIRU WAMBUGU.....5TH CLAIMANT

ERIC WIRE.....6TH CLAIMANT

LILIAN VERONICA BARAZA.....7TH CLAIMANT

GRACE AFANDI MUHADI.....8TH CLAIMANT

FAITH ANYANGO OLUM.....9TH CLAIMANT

SUSAN WARUGURU WAIGANJO.....10TH CLAIMANT

ANJELINE OYUYO OBIERO.....11TH CLAIMANT

GEOFFREY K. SHIGATI.....12TH CLAIMANT

JOSEPH EKWENYI EDEWAIT.....13TH CLAIMANT

JANET VIHENGA SHIPWONI.....14TH CLAIMANT

LUCKY WAMWAYI AKWANYI.....15TH CLAIMANT

EDWARD OCHIENG ANDAYA.....16TH CLAIMANT

EVERLINE ADHIAMBO MUSIKO.....17TH CLAIMANT

PHYLIS MWANGI.....18TH CLAIMANT

JANE CHAVIHA CHEBEDAS.....19TH CLAIMANT

VERSUS

THE MAKINI SCHOOL LIMITED.....RESPONDENT

CONSOLIDATED WITH

CAUSE NO. 527 OF 2019

VINCENT OMONDI OPIYO.....1ST CLAIMANT

EMMANUEL MUKOKI AWORI.....2ND CLAIMANT

FREDRICK KHISA.....3RD CLAIMANT

GEORGE OUMA ODERA.....4TH CLAIMANT

NELSON KISANYA.....5TH CLAIMANT

PAUL ODHIAMBO OWOUR.....6TH CLAIMANT

JANNES KWAMBOKA.....7TH CLAIMANT

EVANS OCHIENG AGORO.....8TH CLAIMANT

NIXON SHIMUNANGA.....9TH CLAIMANT

JOSEPHINE LIKHAKASI.....10TH CLAIMANT

PAMELA ANYANGO OPOT.....11TH CLAIMANT

BLYTON OCHIENG.....12TH CLAIMANT

BETTY OPENDA ONYANGO.....13TH CLAIMANT

ESTHER MIROYO.....14TH CLAIMANT

SYPHROSA TITO ANEKEYA.....15TH CLAIMANT

JUDY WAITHIRA.....16TH CLAIMANT

ALICE TWILI.....17TH CLAIMANT

MICHAEL MUCHERU.....18TH CLAIMANT

SUSAN WARUGURU WAIGANJO.....19TH CLAIMANT

PAMELA MUMIA.....20TH CLAIMANT

HARRISON MUDAVE.....21ST CLAIMANT

TIRUS ODHIAMBO.....22ND CLAIMANT

COLLINS BARASA NDAMWE.....23RD CLAIMANT

VERSUS

THE MAKINI SCHOOL LIMITED.....RESPONDENT

RULING

This matter was consolidated with Cause No. 527 of 2019. Pending for determination before me are two Applications dated 14th August 2019 and 25th July 2019 respectively. Both Applications are similar and are filed by the Claimants' herein under Certificate of Urgency seeking the following orders:

1. That the Court be pleased to certify this Application as urgent and dispense with service in the first instance *(spent).*

2. That the Court be pleased to grant an ex-parte interim injunction restraining the Respondent either by itself, servant and/or agents from proceeding with the intended redundancy vide letters dated 19th July, 2019 as addressed to the Claimants or any other letter or date or in any 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 hearing and determination of this Application.

3. That the Court be pleased to an order of injunction restraining the Respondent either by itself, servant and/or agents from proceeding with the intended redundancy vide letters dated 19th July, 2019 as addressed to the Claimants or any other letter or date or in any 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 hearing and determination of this Claim.

4. That the cost of this Application be provided for.

The Applications are premised on the grounds as set out on the face of the Notice of Motion Application in which the Applicants contend that on 1st May 2018, Advtech Limited and Schole Limited did purchase the Respondent from its original owner and that the Claimants were assured that their employment with the Respondent would not be jeopardised by the change in management.

The Claimants further contended that since the change in management the Respondent has been victimizing and harassing employees on account of union membership contrary to the provisions of Article 41 of the Constitution of Kenya prompting the Claimants' to file the instant Claim. That orders were issued on 9th July, 2019 forbidding the Respondent from victimizing the Claimants on account of union membership or activities.

The Claimants aver that despite the Court Order the Respondent did serve them with individual letters of its intention to declare them redundant within 30 days from 19th July 2019. Further that no letter was issued to the Trade Union in clear contravention of the provisions of Section 40(a) and (b) of the Employment Act.

The Claimants further aver that the intended redundancy is aimed at punishing them for their involvement in union activities contrary to the provisions of Article 41 of the Constitution of Kenya, 2010 and Section 46 of the Employment Act, 2007 which in effect renders the entire redundancy process automatically unfair.

The Claimants contend that if the Orders sought in the instant Application are not granted they stand to suffer irreparable loss as the Claim will be rendered nugatory and shall be reduced to an academic exercise. They further contend that they have established a prima facie case with probability of success and therefore urged the Court in the interest of justice to allow the same as prayed.

The Applications are further supported by the Affidavit of JULIUS

LULLE KAKELLO and VINCENT OMONDI OPIYO both of whom are claimants, sworn on 25th July, 2019 and 14th August, 2019 respectively in which they reiterates the grounds on the face of the motion.

The Applications are filed under Articles 10, 21, 22, 23, 27, 28, 41, 48, 50, 159(2)(a) of the Constitution of Kenya, 2010, Sections 12 and 40 of the Employment Act and Rule 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all enabling other provisions of the law.

The Respondent opposed the Applications by filing a Replying Affidavit deponed by BETH WAITITU, the Human Resource Director of the Respondent herein on 23rd August, 2019 and filed in Court on the same date, in which she contends that the instant Application ought to be dismissed as the Respondent has fully complied with the law both procedurally and substantially in carrying out the redundancy process.

She further contends that the Respondent has not victimised any its employees on account of joining or participating in any union activities as alleged by the Claimants herein.

It is further deponed that in the year 2018 the Respondent was wholly acquired by a consortium of international schools and that the change in management only meant realignment of the Respondent.

She further averred that the decision to declare some of its members of staff redundant was arrived at after careful consideration and there was no victimization as alleged by the Claimants herein. It is further contended that the Court Order of 9th July 2019 did not expressly or impliedly restrain it from carrying out the reorganisation of its staff.

The Respondent contends that it has at all times acted in the best interest of its employees and other stakeholders. It is further the Respondent's contention that the instant Application has been brought in bad faith and is only meant to tarnish the Respondent's name.

In conclusion the Respondent urged the Court to dismiss the instant Application for lack of merit.

The Interested Party filed an Affidavit in support of the Applications dated 14th August, 2019 and 25th July, 2019 sworn by ALBERT NJERU, the Secretary General of the Interested Party Union on 30th September, 2019 in which he urges this Court to proceed and consolidated the two matters that is Cause No. 491 of 2019 and Cause No. 527 of 2019 with Cause No. 414 of 2019 as all matters relate to the same parties and the same subject matter.

He further averred that the Respondent in its letters to the affected members of staff dated 19th August 2019 failed to comply with the provisions of the law on the issue of redundancy as provided under Section 40 of the Employment Act.

The Interested Party contends that the Respondent has failed to recognise the union despite the fact that they have a majority membership which translates to 77.14% of the entire Labour force of the Respondent.

The Interested Party further contends that the Respondent refused to sign a recognition agreement to enable the employees enjoy the benefits of being unionisable and even declined to deduct and remit union dues despite being served with the check off forms.

The Interested Party further contends that these acts by the Respondent amount to victimization of its members and were only meant to intimidate them from exercising their right to join a union of their choice as envisaged under the Constitution of Kenya, 2010.

It is further the Interested Party's contention that the Respondent is undertaking the process of redundancy in order to defeat it despite the fact that it has already attained a simple majority for recognition, which is tantamount to unfair labour practice by the Respondent.

The Interested Party states that the Respondent has failed to comply with the mandatory provisions of Section 40 of the Employment Act, 2007 on redundancy as it has failed to serve the union with a notice in its capacity as the union representing the employees with the said notice thus rendering the process null and void *ab initio*.

He further urges the Court to restrain the Respondent from undertaking a redundancy process for failure to comply with the mandatory provisions of the law. Further he urged this Court proceeds to quash the letters dated 19th July, 2019 to all Applicants herein and that the same be declared null and void.

The Claimants/Applicants further filed a Supplementary Affidavit deponed by JULIUS LULLE KAKELLO, the 1st Claimant in 491 of 2019 on 2nd September 2019, in which he states that he is duly authorised by all the Claimants in Cause 491 of 2019 and that all of them were present when the Authority to act was signed. He further averred that the Respondent failed to comply to the mandatory provisions of Section 40 of the Employment Act, 2007 as the individual notices were issued after the date of intended redundancy which was 30th June 2019 hence the letter was spent.

It is further the Applicants' position that failure by the Respondent to serve the Union (Interested Party) with the notice of intended redundancy was also contrary to the provisions of the Employment

Act and amounted to unfair labour practice.

He contended that the issue of recognition between the Respondent and the Interested Party is the subject of ***ELRC Cause No. 414 of 2019: Kudhehia Workers Vs The Director, Makini Schools*** which is pending for determination.

Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

It is submitted on behalf of the Claimants'/Applicants' that the instant Application ought to be allowed as prayed as the Respondent failed to involve the Interested Party in the redundancy as required under Section 40 (1) of the Employment Act, 2007. It is further submitted that the notice is a mere membership to the trade union and that it does not matter whether the Respondent recognised the union or concluded a CBA with it. To buttress this position the Claimants cited and relied on the Authority of ***Kenya Engineering Workers Union Vs Africa Metal Workers Limited (2019) eKLR*** where it was held:

> *"The section is clear that for members of a trade union, the relevant redundancy notice shall be served upon their trade union and membership in a trade union or lack of it shall not be a basis for discrimination during redundancy. The section does not prescribe conclusion of a recognition agreement as a precondition of involving a trade union in the work place…"*

It is further submitted that the Respondent failed to comply with the mandatory provisions of Section 40 (1) (a) of the Employment Act by failing to issue a notice of intended redundancy to the interested party and handling members of the Interested Party as un unionisable members of staff. The Claimants/Applicants relied on the findings in the case of ***Thomas De La Rue (K) Limited Vs David Opondo Omutelema (2013) eKLR***.

They further relied on the cases of ***Joseph Tama Ndua & 11 Others Vs Jacaranda Hotels (Msa) Limited (2014) eKLR*** and ***Kenya Union of Domestic Hotels Educational Institutions and Hospital Workers (Kudheiha) Vs Aga Khan University Hospital Nairobi (2015) eKLR.***

The Claimants'/Applicants' submitted that by locking out the union denied them meaningful consultation in relation to the process of redundancy. The Claimants'/Applicants' relied on the decision in ***Barclays Bank of Kenya & Another Vs Gladys Muthoni & 20 Others (2018) eKLR.***

The Claimants'/Applicants further contend that the notice as served to the Labour Commander does not fit the description of a notice to the Labour Officer as envisaged under Section 40 (1) (a) of the Employment Act. The claimants further contend the notice as issued is a non-starter as the same was done to the wrong officer. To fortify their argument the Claimants relied on the findings in the case of ***Angela Shiukuru Ilondanga Vs Airtel Networks Kenya Limited (2018) eKLR.***

The Claimants further contended that the Respondent failed to show the criteria used in arriving at the employees to be subjected to the process of redundancy. Further, that the criteria of Last In First Out is not the sole criteria as was decided in the case of ***Kenya Plantation and Agricultural Workers' Union Vs Harvest Limited (2014) eKLR.***

The Claimants/Applicants further submitted that there is a difference between a Labour Commander and a Labour Officer. They further aver that a Labour Commander is appointed pursuant to Section 30(1)(a) of the Labour Institutions Act and on the other hand a Labour Officer is designated by the Minister in accordance with Section 30(2) of the Labour Institutions Act. It is further the Claimants submission that a commander of Labour can delegate his powers and functions to a Labour Officer and not vice versa as provided under Section 32(1) of the Labour Institutions Act. It is on this basis that the Claimants urged the Court to disregard the notice as sent out to the Labour Commander as the same does not fit the description of a notice under Section 40 of the Employment Act, 2007.

The Claimants further submitted that they are likely to suffer irreparable damage should the Orders sought in their Applications are not granted.

In conclusion the Claimants/Applicants urged the Court to allow their Applications as prayed.

Respondent's Submissions.

The Respondent on the other hand submitted that it has complied with the provisions of Section 40 of the Employment Act, 2007 in the redundancy process. The Respondent relied on the Court findings in the cases of ***Africa Nazarene University Vs David Mutemu & 103 Others (2017) eKLR*** and ***Kenya Airways Limited Vs Aviation and Allied Workers Union of Kenya & 3 Others (2014) eKLR***.

The Respondent further submitted that the Commissioner of Labour is a Labour Officer within the meaning of the Employment Act. It further submitted that the Court ought to consider the meaning of a Labour officer as provided under Section 2 of the Employment Act, 2007.

The Respondent contended that the Claimants have failed to meet the threshold for grant of temporary injunctions as set out in the celebrated decision of ***Giella Vs Cassman Brown and Company Limuted (1973) E.A 358*** and further the case of ***Kenya Petroleum Oil Workers Union Vs Kenya Petroleum Refineries Limited & 3 Others (2014) eKLR*** where the Court held:

> *"Even if any employee's right had been violated, no evidence has been adduced to prove that an award of damages would not make adequate compensation. 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?"*

The Respondent further submitted that granting of the orders sought in the Applications pending for determination before this Court would amount to summarily determining this matter at interlocutory stage. It is further submitted that on this basis the balance tilts in favour of the Respondent.

The Respondent further urged this Court to dismiss the instant Application as it stands to suffer irreparable damage should the same be allowed. It further contended that all its employees affected by the redundancy were duly paid their terminal dues the exercise having been concluded in early July 2019.

The Respondent insisted that the Court still retains the right to grant damages for wrongful redundancy if the Court were to find the same. The Respondent's position is that the Claimants would be adequately compensated by way of damages in the event the Court finds in their favour.

In conclusion the Respondent argued that the instant Applications as presented before the Court ought to be dismissed with costs to the Respondent for lack of merit.

Interested Party's Submissions

The Interested Party filed its submissions in support of the Applications herein. It is submitted that the Respondent failed to follow the mandatory provisions of Section 40 by failing to serve the interested party with a notice of intended redundancy as the union representing its members. It is further submitted that the Respondent's acts were malicious and unlawful. To fortify this argument the Interested Party cited and relied on the English case of ***Williams Vs Compare Maxam Litd 11*** where it was held:

"To enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider the solutions and, if necessary, find alternative employment in the undertaking or elsewhere."

It is further submitted that the Respondent's action of failing to recognise it as the union representing the claimants herein was tantamount to unfair labour practice and is contrary to the provisions of Article 41 of the Constitution of Kenya, 2010.

In conclusion the Interested Party urged the Court to allow the Applications are prayed.

Analysis and Determination

Having carefully considered the grounds in support of the applications as set out on the face of the motions and the Supporting Affidavit, the

averments in the Replying Affidavits and the submissions made by the parties. The facts of the case are not disputed. What is in dispute is the interpretation of section 40(1) (a) and (c). The issue for determination is therefore whether the notices of redundancies issued by the Respondent to the employees who are to be declared redundant are in accordance with the law.

Section 40(1) provides as follows-

> **40. Termination on account of redundancy**
>
> **(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—**
>
> **(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;**
>
> **(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**
>
> **(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**
>
> **(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**
>
> **(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**
>
> **(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**
>
> **(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.**

The opening words of section 40 are explicit, that an employer shall not declare employees redundant until the employer has complied with the provisions in (1)(a) to (g). On notification, (1)(a) is material as the employees are members of a union. The provision is that the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy. My understanding is that the employer must give the union notice of one month and that the notice must expire before the employer can commence the process of redundancy. It is only where an employee is not a member of the union that an employer is required to give the notification directly to the employee.

The question that then arises is where the Claimants herein members of the Interested Party (Union). It is submitted by the Claimants that they are members of the Interested Party and that the Respondent has failed to sign a Recognition Agreement with the Interested Party prompting the Interested Party to file Cause Number 414 of 2019 between itself and the Respondent herein seeking to compel the Respondent to sign a recognition agreement with them as their membership translates to about 77.14% of the entire labour force of the Respondent.

The Respondent on the other hand has raised concerns over the authenticity of the documents attached to the check-off citing repetition of entries.

Given that this matter is pending before the Court under Cause No. 414 of 2019. It is however not in dispute that the claimants were members of the Interested Party or that the Interested Party has members among the employees of the respondent. This is confirmed by the fact that the respondent's admission that it has received check off forms from the union and is considering the same to clear some apparent anomalies before it can commence deduction of union dues.

Section 40(1) of the Employment Act is explicit that no employee is to be declared redundant before the employer has complied with the conditions set therein.

The respondent has only demonstrated that is served notice upon the Labour Office. It has not stated that it served notice on the union as required under Section 40(1)(a).

On the issue of whether the notice to the Labour Commissioner is proper as provided under Section 40(1)(b) as the same ought to have been done to the Labour officer. Both the Claimants and the Interested Party submitted that the letter ought to have been specifically served upon the Labour Officer being in charge of the particular region as a labour commander can delegate his functions and not vice versa.

The Respondent on the other hand relied on the definition of a labour Officer as provided under Section 2 which includes a Labour Commissioner and argued that the same was proper service. I would agree with the Respondent herein. A reading of the Act clearly shows that the Commissioner for Labour is the Chief Labour Officer. Under Section 32(1) the Commissioner for Labour may in writing delegate to any labour officer any of his/her powers, functions and duties. Under the Section 33 the Commissioner for Labour shall issue a certificate of

authority to a labour officer. If the Commissioner for Labour can exercise all those powers, how can one then say the Commissioner for Labour cannot do the work of an authorised officer? Can a public officer empowered to delegate certain powers, functions and duties be said to be incapable of executing those powers, functions and duties? One cannot delegate powers that he does not have. I therefore am of the view that the Applicants' argument has no legal basis and hold that the Commissioner for Labour can do that which a labour officer can do. Reference is made to the case of ***Eastleigh Mattress Limited Vs Cabinet Secretary, Ministry of Labour Social Security and Services & Another (2015) eKLR.***

In view of the fact that the union has members among the employees of the respondent and indeed, among the employees who were served with notices of redundancy, I find the notices defective and declare them null and void.

The respondent is directed to issue fresh notices in compliance with the Act. For the avoidance of doubt, the court clarifies that there is provision of notification of intention to carry out redundancy under Section 40(1)(a) and (b) while the provision for termination notice is at Section 40(1)(f).

Since the employees are members of the union, the notification of redundancy will be made to the union as provided under Section 40(1)(a).

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE