



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 693 OF 2019

ERIC KAMAU.....1ST CLAIMANT

DANSON NJOROGE.....2ND CLAIMANT

FREDRICK OTIENO.....3RD CLAIMANT

AGNES KARIUKI.....4TH CLAIMANT

-VERSUS-

DOT.COM BAKERY LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 8th November, 2019)

RULING

The claimants filed a notice of motion on 17.10.2019 through Ogembo & Associates Advocates. The application was under Articles 10, 41, 48, 50, 159(2) (a) of the Constitution of Kenya 2010, section 12 and 40 of the Employment and Labour Relations Court Act and Rule 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other enabling laws. The prayer is for the Honourable Court to be pleased to grant an order of injunction restraining the respondent either by itself, servant or agents from proceeding with the intended redundancy vide letters dated 07.10.2019, 03.10.2019, 08.10.2019 as addressed to the claimants or any other letter or date or in any way or manner intimidating, threatening, terminating, dismissing, the claimants or in any manner interfering with the existing employment structure and employment positions or recruitment for the claimant's position or interfering with the applicants' employment until the hearing and determination of the claim; and costs of the application be provided for.

The application is supported with the affidavit of the 1st claimant and the supplementary affidavit of the 1st claimant and is based upon the following grounds:

- a) The claimants are employees of the respondent who until the present dispute held positions of Group Chief Accountant; Inventory Controller; Assistant Human Resource Manager; and Human Resource Manager respectively. They were employed by the respondent on diverse dates between January and November 2018.
- b) Each claimant was summoned by the respondent's Managing Director on 07.10.2019 and given a letter titled "Notice of Redundancy" to the effect that they had been declared redundant owing to financial difficulties the respondent had been experiencing in the last few months; the notice was to last 07.10.2019 to 07.11.2019; all the amount due to them would be paid within 90 days thereafter; they would serve terminal leave during the period of the notice; and they were thanked for services rendered.
- c) The imposed terminal leave was illegal as it was not contractual.
- d) The claimants have already been rendered redundant by reason of the forced leave. The letter dated 07.10.2019 was in fact an immediate termination of the contract of employment.
- e) The actual reasons and extent of the redundancy have not been disclosed.
- f) The officers have been unfairly targeted as there are officers working under them who are still in employment. The selection criteria applied was unknown or never disclosed as there were no consultations.
- g) The redundancy law requires payment of full redundancy package and terminal dues prior to redundancy taking effect so that it was unfair to promise to pay unknown terminal dues after 90 days.

h) The claimants have established a prima facie case with probability of success.

i) There have been no consultations prior to the redundancy decision.

The respondent opposed the application by filing the grounds of opposition on 24.10.2019 through J.A. Guserwa & Company Advocates upon the grounds:

- 1) The application is misconceived as the orders sought are incapable of being implemented.
- 2) The application does not lie as it lacks merits.
- 3) The application seeks to vex the Honourable Court to issue orders that are incapable of enforcement at the present stage.
- 4) The services rendered by the claimants have been outsourced to Janta Kenya Ltd due to financial constraints.
- 5) The claimants are not the only affected employees because the employees at Mombasa Branch have also been affected.
- 6) The unionisable workers are still working as the respondent concludes negotiations with their trade union.

The respondent also filed on 01.11.2019 the replying affidavit of Seif Mohammed Seif, the respondent's Managing Director.

The Court has considered the material on record including the submissions made for the parties. The Court makes findings as follows.

First, in cases seeking to interfere with the employer's human resource powers, the court follows its opinion in the ruling in Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, **"The principles are clear.**

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the present case the applicants have established that the respondent has imposed a terminal leave outside the contract of service between the parties and without a lawful justification. The respondent has so far not established the basis of the terminal leave. Further, the applicants have established that the respondent has designed to have the redundancy take effect without having paid the claimants their due amounts as per section 40 of the Employment Act, 2007 and instead the respondent is planning to pay unknown amount of money after 90 days. The Court finds that the redundancy is proceeding unfairly and unlawfully. There is no evidence that there exist the respondent's internal mechanism available to the claimants to address their grievances or to resolve the matter one way or the other.

In the circumstances the Court finds that the applicants have established a prima facie case with a high probability of success. Further, unless the orders sought are granted, the applicants will suffer irreparable harm flowing from the sudden loss of employment in circumstances that are clearly in gross breach of the contract of service and section 40 of the Act. The Court has weighed the balance of convenience and finds that it favours the applicants because if the orders are granted, the respondent will have all the lawful discretion and authority to proceed in strict compliance with the law and the contract of service.

In conclusion, the application filed for the claimants on 17.10.2019 is hereby determined with orders:

- 1) Pending the hearing and determination of the main suit, the respondent either by itself, directors, servants or agents is hereby restrained from proceeding with the intended redundancy vide letters dated 07.10.2019, 03.10.2019, 08.10.2019 as addressed to the claimants or any other letter in any way or manner intimidating, threatening, terminating, dismissing, the claimants or in any manner interfering with the existing employment structure and employment positions or recruitment for the claimant's position or interfering with the applicants' employment, except in strict compliance with the applicable law and the contract of service between the parties.
- 2) Pending the hearing of the main suit or further orders by the Court, the parties are encouraged to compromise the dispute in terms of order (1) above towards amicable retention or termination of the contract of service.
- 3) The respondent to pay costs of the application.
- 4) Parties to take steps for the expeditious hearing or compromise of the main suit.

Signed, dated and delivered in court at Nairobi this Friday, 8th November, 2019.

BYRAM ONGAYA

JUDGE