



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 870 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 9th February 2018)

JOHN M. MIRERI.....1ST CLAIMANT/APPLICANT

BERNARD O. ODUOR.....2ND CLAIMANT/APPLICANT

JOEL K. KAMONDE.....3RD CLAIMANT/APPLICANT

JOHN BOSCO K. MUTUA.....4TH CLAIMANT/APPLICANT

CHARLES MUSYOKA MBITHI.....5TH CLAIMANT/APPLICANT

MARTIN MBASHU NDIGHILA.....6TH CLAIMANT/APPLICANT

JACKSON O. ONYANGO.....7TH CLAIMANT/APPLICANT

FEDELIS RIUNGU MURITHI.....8TH CLAIMANT/APPLICANT

VERSUS

MACED LIMITED.....RESPONDENT

RULING

1. The Application before Court is one dated the 10th May 2017. The Application was filed under Certificate of Urgency and brought through a Notice of Motion filed under under Rule 16 of the Employment and Labour Relations Court (Procedure) Rules 2016 and Section 12(3) of the Employment & Labour Relations Court Act 2011 and all other enabling provisions of the law.

2. The Applicant sought the following orders:-

- 1. THAT this Honourable Court do certify this application as urgent and be heard on priority basis.**
- 2. THAT the service of this application be dispensed with and the application be heard ex-parte in the first instance.**
- 3. THAT the Respondent and his Agents be restrained from selling, transferring, closing or handing over the Respondent Petrol Stations equipment and assets vehicle number plate KAT 510E, pending full hearing and determination of the suit.**
- 4. THAT the Respondent to deposit security of the entire Claim of Kshs.16,956,979/= to a joint interest earning account, pending full hearing and determination of the suit.**
- 5. THAT Cost of the Application be borne by the Respondent.**

3. The Application is premised on the following grounds:-

- 1. Your honour, the Respondent has declared the 1st to the 7th Claimants/Applicants redundant and refused to pay them in violation of Employment Act Section 40 and has also refused to pay terminal dues to the 8th Claimant/Applicant.**

2. Your honour, the Respondent Managing Directors Kenneth Mugane and Michael Musembi Makenzie told the staff that business was low and that once the Respondent had cleared with Oilibya and got their deposit held with Oilibya, the Respondent will be able to pay all the staff their Redundancy dues.

3. Your honour, the Respondent Managing Directors Kenneth Mugane and Michael Musembi Makenzie have gone ahead and closed the Oilibya Juja Road Petrol Station without paying the Claimants their redundancy dues in violation of the laid down procedures as per the Employment Act Section 40.

4. Your honour, the Respondent is also in the process of disposing off the assets of the Respondent Company that were part of the petrol station without finalizing with the 1st to 8th Claimants/Applicants.

5. Your honour, the Respondent failed to give Notice or pay to the Claimants the intended Redundancy in violation of the Employment Act Section 40.

6. Your honour, the Respondent failed to notify the nearest labour officer of the intended Redundancy in violation of the Employment Act Section 40.

7. Your honour, the Respondent failed to notify the employees personally in writing of the intended Redundancy in violation of the Employment Act Section 40.

8. Your honour, the Respondent failed to pay leave and other terminal benefits due in violation of the Employment Act Section 40.

9. Your honour, the 8th Claimant resigned and was promised to be paid all his terminal dues but despite summons by the Ministry of Labour Conciliator Eunice Juma to explain why the Respondent has refused to pay and attend any Conciliation meeting.

10. Your honour, the Respondent failed to pay severance pay to the Claimants for the years worked, in violation of the Employment Act Section 40.

11. Your honour, a strict reading of Section 52 of the Labour Relations Act provides that a member of a trade union may opt to pay any dues, levies, subscriptions or other payments authorized by the constitution of the trade union directly to the trade union.
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12. Your honour, the parties belong to a very sensitive and essential sector of the economy namely the (Oil, Gas and Petroleum) and any interference or disruption in this sector will lead to the crippling of the economy.

13. Your honour, this Honourable has jurisdiction to grant the orders herein.

4. The Applicants were served and they filed their Notice of Appearance of Advocates and another application on 12th June 2017 seeking the discharge or variation of the ex-parte orders granted on 10th May 2017. They contended that the exparte orders were obtained through deceit and failure by the Applicants from disclosing crucial information before Court.

5. The interim orders were however certified by Court on 24th May 2017. The Respondent Applicant seeks variation or discharge of these orders.

6. The Applicants filed a Replying Affidavit in respect of this application on 10th July 2017. The affidavit was sworn by Charles Musyoka Mbithi, the 5th Claimant herein, who deponed that he was present when the Respondents were served with the documents of the application dated 10th May 2017.

7. They also aver that Motor vehicle KAT 510E is owned by the Respondent and is used in transportation of gas cylinders, workers and all activities of the company and so should not be released to the Respondent's Director, as it would be sold in a bid to defeat the claim herein.

8. It is their averment that the Respondents have been selling their assets and the petrol station closed, and so in the event that the Court orders variation of the orders of 10th May 2017, the Court should order the Respondent and/or its Directors to deposit a reasonable sum of the claim herein in order to protect their interest.

9. The Applicant Respondents filed submissions in respect of this application. The Respondents aver that they were never aware of the existence of this suit, as the pleadings were never served upon it.

10. The Claimants had averred that they served the Respondents and had filed an affidavit of service dated 22nd May 2017 indicating that the Respondent was served with the Application and Notice of Motion on 18th May 2017 and he received the documents but refused to sign on the copies.

11. This Court proceeded on this premise and confirmed the ex-parte orders on 24th May 2017. Service is said to have been effected upon one Michael Musembi Mackenzie who is referred to as the Respondent. In an affidavit sworn by the said Michael Mackenzie Musembi on

12th June 2017, he has deponed that he is the Respondent's Director and therefore in tandem with Order 5 rule 3(a) of the Civil Procedure Rules 2010, service upon the Respondents Director was in order.

12. The Court is however mindful of the averments made in the Replying Affidavit which shows that the motor vehicle attached KAT 510E does not belong to the Respondent but to Michael Mackenzie as per the log book attached. In this regard, though the said Michael Mackenzie was served, the averments made that the motor vehicle does not belong to the Respondent are enough to warrant review of the ex-parte orders given on 10th May 2017.

13. This was the finding in **Fredrick Chege Kamenwa vs Aaron K. Kandie (1992) eKLR** where the Court of Appeal opined as follows:-

“...notwithstanding the regularity of an ex parte judgement, a Court may set aside the same if he has reasonable defence on the merits”.

14. In view of the above holding, I allow the application to vary the orders of 10th May 2017 and order that the Respondents herein will instead deposit security in Court to the tune of 2 million within 60 days. In default, execution to issue of the said security.

Read in open Court this 9th day of February, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Parties Absent