REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.111 OF 2018

KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

JAMES FINLAYS (K) LIMITED (FINLAY FLOWERS).....REPONDENT

RULING

1. The ruling herein relates to the claimant's application dated 30th April, 2018 and Notice of Preliminary Objections by the respondent filed on 8th May, 2018. Both were addressed simultaneously.

2. The objections filed are that;

> *The application herein is incurably defective, incompetent, misconceived, frivolous, vexatious and therefore an abuse of the court process.*
>
> *The application herein does not meet the laid down threshold for grant of injunctive orders of stay.*

3. The claimant filed Response to the Preliminary Objections.

4. The grounds are that the objections made fail to meet the threshold set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors (1969) EA**; the issues raised are matters of fact and not based on any law; the facts pleaded in the application have since been replied to by the respondent in the Replying Affidavit; and the objections should be dismissed. The claimant also relied on the case if **Giella versus Cassman Brown (1973) EA** and on the grounds that the application before court has met the threshold of establishing a *prima facie* case and there is demonstration of the irreparable loss and damage to be suffered if the orders sought are not issue dint he favour of the claimant and that the balance of convenience tilts in the favour of the claimant.

5. The application by the claimant on the other hand is seeking for orders that;

> *in the interim order be and is hereby issued restraining the respondent by themselves, their agents, assigns, servants and or representatives from terminating, dismissing, suspending, declaring redundant and or laying off any unionisable employee in line with the notice of terminating on account of redundancy dated 25th April, 2018 pending the hearing and determination of the suit.*
>
> *An interim order be and is hereby issued setting aside the redundancy notice dated 25th April, 2018 pending hearing and determination of this suit.*
>
> *Costs of this application.*

6. The application is supported by the annexed affidavit of Henry Omasire the National Organising Secretary of the claimant union and on the grounds that on 25th January, 2018 the respondent wrote to the claimant announcing closure of its flower farm operations in Chemirei and Tarakwet Farms located in Kericho starting on 1st May, 2018 within a two years period up to the 31st December, 2010 allegedly as a result of difficult business environment in Kericho due to high labour costs and frequent industrial action against the company. The notice stated that the closure would lead to termination of employment of 1667 unionisable employees on account of redundancy which notice does not comply with the mandatory provisions of section 40 of the Employment Act, 2007. The notice purports that the Recognition Agreement between the parties will automatically terminate on 31st December, 2020 which is in contravention of section 54 of the Labour Relations Act, 2007.

7. Mr Omasire also avers in his affidavit that the respondent has circulated and announced widely that the closure of its farms starts on 1st May, 2018 and will take a period of two years. The notice thus issued contravenes clause 22 of the Collective Bargaining Agreement (CBA)

which provide for the procedural requirements to effect a redundancy with a notice of at least two months or 60 days' notice. Such CBA terms are binding in accordance with section 59 of the LRA.

8. The purported reason for closure of the two farms by the respondent is denied as being valid as the same is not substantiated or proved as required under section 43 of the Employment Act, 2007. As the respondent plans to close down the two farms at Chemirei and Tarakwet, they are expanding operations in Lemotit Farm in Londiani so as to supply flowers to the UK, Europe and the rest of the world and such contradicts the reasons given for the closure and notice to terminate employment.

9. The procedural requirements to terminate and or rescind the Recognition Agreement are provided for under clause 4 and section 54 of the LRA have not been met and the claimant union continues to enjoy recognition with the respondent. This is part of the rights enjoyed under Articles 36 and 41 of the constitution, 2010.

10. Mr Omasire also avers that unless the respondent is hereby restrained by the order of the court, grave damage and loss shall occur to the claimant and its members.

11. As noted above, the respondent filed Notice of preliminary Objections and a Replying Affidavit sworn by Daniel Kirui the Human Resource Director of the respondent and who avers that the respondent has held extensive discussions and resolved that the flower farm operations at Chemirei and Tarakwet farms be closed down due to difficult business environment in Kericho actuated by the high labour costs and frequent industrial actions which have made the Finlay's Flower operations both uneconomic and uncompetitive. As a result, the respondent held meetings with its employees informing them of the plan and also informed the closure would take phases spread over two and a half (2 ½) years.

12. Mr Kirui also aver that in compliance with the law and the CBA a notice was issued vide letter dated 25th April, 2018 and copied to the Kericho Labour Office and which letter laid out the procedures that the redundancy process would take. This was an intention notice to terminate employment on account of redundancy that issued one month prior to commencement of the process of declaring employees redundant. No employee is therefore declared redundant before the required notice of redundancy was issued or payment in lieu as provided for under the CBA.

13. The process has just begun and the respondent has fully complied with section 40 of the Employment Act, 2007 by issuing the notice of 30 days. Operations at Lemotit Farm are governed under a different Recognition Agreement and CBA under the Agricultural Employer's Association which the claimant is fully aware of.

14. In a bid to obtain interlocutory orders the claimant misrepresented facts to the court that the respondent was to lay off employees on 1st May, 2018 which was not correct. The intention notices issued do not in any way offend the provisions of section 54 of the LRA and in this regard the claimant is in violation of section 54(6), 62 and 74 of the LRA.

15. Information of the respondent's closure is not shared by the respondent and was precipitated by the claimant. It is clear the Notice of intention would take effect from 31st May, 2018 one month after its issuance on 1st May, 2018. The entire process is contemplated to take place in phases spreading a period of over 2 ½ years. This will minimise the impact on employees and their families.

16. Mr Kirui also avers that clause 22 of the CBA has not been violated and any averments in this regard are with malice. The reasons for termination of employment have been well set out under the notice of intent in compliance with section 43(2) and 40 of the Employment Act, 2007. Due to frequent industrial actions the respondent has in the recent past lost over Kshs.30 million.

17. Before filing suit the claimant failed to exhaust the procedures under clause 3(c) of the Recognition Agreement or section 62 and 74 LRA and the application filed is in abuse of court process and should be dismissed.

18. Both parties made oral submissions in court.

19. On the objections raised by the respondent and the Replying Affidavit sworn by Mr Kirui, all the objections are therein addressed and by addressing the same in reply to the claimant's application, all substantive matters raised are canvassed. The application shall therefore be addressed in the contest of the Replying Affidavit of Mr Kirui and the oral submissions by the parties.

20. The issues which emerge herein are;

Whether the court should order and restrain the respondent from proceeding with the notice issued on 25th April, 2018 terminating employment on account of redundancy; and

Whether the court should issue an order setting aside the redundancy notice dated 25th April, 2018 pending hearing and determination of the suit.

21. The Memorandum of Claim filed by the claimant together with the Notice of Motion subject of this ruling raise the issue in dispute as the *wrongful termination of 1667 unionisable employees on account of redundancy.* The final orders sought by the claimant are in the nature that *a declaration be issued that the redundancy of 1667 unionisable employee employed at Chemirei and Tarakwet be and hereby restrained and prohibited.*

22. The notice subject of the Notice of Motion and Memorandum of Claim is the one dated 25th April, 2018 and which states as follows;

NOTICE OF TERMINATION OF SERVICE ON ACCOUNT OF REDUNDNACY

This is to notify you that Finlay Flowers is announcing the closure of its flower operations in Kericho excluding Hilverda & Lemotit Farm in Londiani. The closure of both Chemirei and Tarakwet farms within James Finlay Kenya Limited will take place over a two and a half year period starting 01 May 2018, with final closure expected at the end of December 2020. … the decision will therefore lead to termination of 1667 unionisable employee on account of redundancy in phases starting 31st May 2018 with the last group leaving at end of the closure of business on 31st December 2020 or thereabout. We will be sending you a list of employees affected as the closure progresses. …

We affirm that we shall conduct the process in full compliance with the CBA and labour laws, terms and conditions of employment and employees will receive their full terminal dues. …

23. In this regard, the respondent as the employer by notice dated 25th April, 2018 notified the claimant union that they were closing operations in two sites running over two years starting 1st May, 2018 and ending by the closure of business on 31st December, 2020 of thereabout.

24. Section 40(1) (a) and (b) of the Employment Act, 2007 provides that; *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;

[emphasis and underline added].

25. In addressing the provisions of section 40(1) of the Employment Act, 2007 the court of Appeal in the case of **Thomas De La Rue (K) Ltd versus David Opondo Omutelema [2013] eKLR** had occasion to consider the construction of subsections **(a)** and **(b)** to the effect that both required different kinds of notices. The court held that;

It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.

26. Similarly The Court of Appeal in addressing a similar matter as regards the application of section 40(a) and (b) of the Employment Act, 2007 in the case of **Barclays Bank of Kenya Ltd & another versus Gladys Muthoni & 20 others [2018] eKLR** put into account their earlier findings in the Kenya Airways Limited versus Aviation and Allied Workers union & others [2015] eKLR and held that;

in the ***Kenya Airways case*** ***(supra)*** also opined:

My understanding of this provision [section 40(1) of the Employment Act, 2007] is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees … It does not have to be a calendar months' notice … The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.

27. The justification to the process of redundancy is placed on the definition what

a 'redundancy' is. section *2* of the Employment Act, 2007 and section 2 of the Labour Relations Act, 2007 define redundancy as:

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.

28. The above definition under section 2 of the Employment Act and Labour Relations Act are in tandem with Article 13 of Recommendation No. 166 of the ILO Convention No. 158 - Termination of Employment Convention, 1982 **–** and which provides that;

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

29. Where there is loss of employment due to involuntary means and at the instance of an employer, where the services of the employees is found superfluous, the law recognises that this is 'redundancy' and where the procedures of section 40 of the Employment Act, 2007 are followed, then the termination of employment is justified.

30. At this stage however, the interrogation of the rationale and justification of the process undertaken may not be possible through affidavit evidence, all what the employer requires to establish is that the requisite notices contemplated under section 40(1) of the Employment Act, 2007 and as set out in the case of **Kenya Airways** and **Barclays Bank of Kenya Ltd & others** as set out above are demonstrated. Despite the notice sent out being a *notice of termination of service on account of redundancy* being framed as a given, the substance of the content is in the nature that this is a *notice of intent* to close two farms of Chemirei and Tarakwet in phases and over a period of two and half years commencing 31st May, 2018 to 31 st December, 2020 or thereabout.

31. At this instance, a general notice of intent to terminate employment on account of redundancy has issued to the claimant union what is contemplated next is the individuals to be affected by the same. The reason(s) for the issuance of the notice of intent have been set out and the period within which the terminations will follow addressed.

32. I find there is a legitimate process initiated pursuant to the provisions of section 40 of the Employment Act, 2007 and the court should not interfere at this stage.

33. With regard to the submissions by the respondent that the claimant has failed to abide the provisions of sections 54(6), 62 and 74 of the LRA, the termination of a Recognition Agreement is a substantive issue that cannot be addressed in the context of matters set out in this Notice of Motion. Recognition of the claimant union by the respondent as the employer is regulated in law and the implications of this being set out under the same notice as the notice or notices contemplated under section 40 of the Employment Act, 2007 would be to call the court to go to the record of the Recognition Agreement document and appreciate the intentions of the parties and the import of the same coming to an end. These are weighty matters which should not be used to conflate the notices now sent out and dated 25th April, 2018.

34. The application of sections 62 and 74 of the LRA are good measures contemplated in the law. However do not remove from the court its original jurisdiction conferred under the constitution to address all matters employment and labour relations.

Accordingly, application dated 30th April, 2018 is declined. The notice issued and dated 25th April, 2018 shall run its course noting the interim orders issued are vacated. Costs in the cause.

Delivered in open court at Nakuru this 4th day of June, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistants:.....

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