



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO.228 Of 2018

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

VERSUS

UNILEVER (K) LIMITED.....RESPONDENT

RULING

1. The ruling herein relates to two (2) applications one filed by the claimant and dated 31st July, 2018 and the other filed by the respondent and dated 7th August, 2018.
2. The claimant is seeking for orders that the respondent be restrained from terminating, dismissing, suspending, or declaring any employee redundant and that the voluntary early retirement (VER) exercise and or the separation program vide letter dated 27th July, 2018 be suspended pending the hearing of the suit herein.
3. The application is supported by the affidavit of Henry Omasire and on the grounds that on 27th July, 2018 the respondent during a follow-up meeting to try an out of court settlement in Civil Appeal No 40 of 2017 between the parties made the claimant agree to a consent agreement dated 28th March, 2018 on terms set by the respondent. The claimant declined to consent to the agreement.
4. In protest the respondent issued a memo dated 27th July, 2018 targeting all unionised employees inviting them to apply for a voluntary early retirement effective 27th July, 2018 to 4th August, 2018 with an offer for voluntary separation of employment. Such action is with intent to terminate the employment of unionised employees and members of the claimant. Such termination is on account of redundancy due to loss of employment, occupation by involuntary means through no fault of the employees.
5. The memo and the separation exercise does not comply with the mandatory provisions of section 40 of the Employment Act read together with Cause 25 of the CBA.
6. In his affidavit, Mr Omasire avers that the respondent approached the claimant union with a view to concluding a CBA and compromise Civil Appeal No. 40 of 2017 and various meetings were held. The respondent has however issued memo dated 27th July, 2018 inviting unionised employees to apply for voluntary early retirement and voluntary separation. Such memo shall result in termination of employment due to loss of employment which is defined under section 2 of the Employment Act to be a redundancy and effectively shall be undertaken contrary to the provisions of section 40 and 43 of the Act and clause 25 of the CBA between the parties and unless this is stopped, the claimant and its members shall suffer irreparable loss and damage.
7. In the offer made by the respondent is inferior to the terms of the CBA which provides for;
 - a) *Gratuity pay,*
 - b) *Severance pay of 23 days for each year worked,*
 - c) *Notice pay,*
 - d) *Pay for outstanding leave days, and*
 - e) *One way bus fare.*

8. Mr Omasire also avers that The actions by the respondent are targeted at frustrating the judgement in Civil Appeal No.40 of 2017 where a pay increase was allowed. The separation exercise has been initiated without consultations with the claimant and in the interests of justice such should be stopped to allow unionised employees enjoy their rights under the CBA and the law.

9. On 28th August, 2018 the respondent filed Replying Affidavit sworn by Lydia Musili the legal counsel for the respondent.

10. On 7th August, 2018 the respondent filed application seeking for orders that the interim orders issued by the court on 31st July, 2018 be set aside and the application by the claimant seeking for an injunction be heard.

11. The application is supported by the annexed affidavit of Lydia Musili the legal counsel for the respondent and on the grounds that on 31st July, 2018 the court issued interim orders stopping the voluntary early retirement program when the claimant failed to disclose to the court material facts that they had been informed of the voluntary early retirement program and the offer to employees above the age of

50 years and a voluntary separation for any employee below the retirement age but willing to take the same. The respondent in the memo of 27th July, 2018 had emphasised that the program was purely voluntary and a meeting be held on 1st August, 2018 for the respondent to appraise the claimant on the proposal.

12. The orders issued on 31st July, 2018 are in breach of the respondent's constitutional right to freely contract in the voluntary early retirement and Voluntary separation programs. Such interfered with the managerial prerogative of the respondent. following the notices to the employees on 27th July, 2018, a total of 1002 applied for voluntary early retirement and the voluntary separation programs which the respondent accepted on 28th July, 2017.

13. Other grounds in support of the application are that the respondent is not carrying out a redundancy exercise as alleged by the claimant as this is not the intention in the issued letters of 27th July, 2018.

14. The claimant filed Replying Affidavit sworn by Henry Omasire and who avers that in obtaining the interim orders on 31st July, 2018 there was full disclosure of all material facts as the claimant was totally unaware of the letter and notice issued by the respondent on 27th July, 2017 inviting unionised employees to apply for voluntary early retirement and voluntary separation. such letter was not service upon the claimant.

15. In reply Mr Omasire also avers that the letter dated 27th July, 2018 by the respondent does not make an offer for voluntary early retirement and voluntary separation as set out in the application rather it is an intention to offer employees a voluntary separation with defined benefits package with a final selection at the discretion of the management. The averments that voluntary early retirement related to employee over 50 years and voluntary separation to employees below the retirement age is not correct.

16. The parties have a recognition agreement and a CBA regulating relations and with terms and conditions of employment for unionised employees which the respondent has failed to adhere to. The resulting terminations of employment for claimant members shall be contrary to clauses 2(a) and (d) of the recognition agreement and while the respondent reserves the right to its managerial prerogatives, parties have agreed to consultations and negotiations in the termination of the employment of the claimant members.

17. The claimant is opposed to the voluntary early retirement and the voluntary separation in its current program and the respondent should be restrained from undertaking the same.

18. In a Supplementary affidavit, Ms Musili avers that voluntary early retirement and voluntary separation contracts override all formal or substantial restrictions laid by the parties in CBAs and recognition agreement particularly as unionisable employees have voluntarily applied for the same. The employees not satisfied with the terms and offer for voluntary early retirement and voluntary separation had the option not to apply as it is built on voluntary application.

19. The parties filed written submissions and highlighted the same in court.

The applications set out above, the written submissions and cited authorities have been put into account. The issues with arise are;

Whether the court should issue an order of injunction stopping the respondent from undertaking the voluntary early retirement and voluntary separation programmes, and

Whether the interim orders issued herein on 31st July, 2018 should be vacated.

20. In its nature, a voluntary early retirement or voluntary separation is based on the employees' right, ability and decision to be exercised on a voluntary basis by each individual. Unlike an early retirement from employment as proposed by either party, or which should involve parties in a recognition agreement of CBA, a voluntary early retirement and voluntary separation are purely voluntary to the right-holder, the employee.

21. Whereas early retirement is a condition of service which is governed by a recognition agreement and has to be negotiated with trade unions voluntary early retirement and voluntary separation are purely voluntary. early retirement also requires to be negotiated at a bargaining forum while voluntary early retirement and voluntary separation comprise a voluntary offer. However, both are geared towards the reduction of employees following a management decision. The *voluntary* stage for early retirement serves as a sweetener or inducement and at the stage of the possible retrenchment. Where the possible lay off numbers are not achieved, early retirement is the next step and

ultimately, a retrenchment.

22. In this case, the respondent has invited the employees to volunteer and exit work. As the right holder, the rights can be exercised individually and or collectively. The decision rests with the employee in this case.

23. By taking a voluntary option to exit work and accept a package offered by the employer, the invitation being clear and voluntary, the employees have the option to accept or ignore. Such does not undermine the recognition of the trade union in this regard.

24. The employees have the option to consult with the union upon the offer and as a collective accept it or reject it. As noted above, the employees as the rights-holder shall have the liberty to exercise their free will in this case. Upon the invitation to volunteer and exit employment, the employee wishing to take the same must do so within the terms offered. where there is termination of employment for any other reason out of a redundancy, retrenchment of lay off or for other cause addressed under the Recognition Agreement of Collective Agreement, such having been negotiated on the terms to apply shall not be compromised by the employee opting for the voluntary early retirement offer.

Accordingly, application by the claimant seeking to stay the voluntary early retirement process is found without merit. Other matters with regard to termination of employment addressed in the Collective Agreement apply.

The court having interfered with the initial process of voluntary early retirement, to ensure compliance and completeness the respondent shall issue a fresh notice.

Costs in the cause.

Dated and delivered in open court at Nakuru this 22nd of November, 2018.

M. MBARU JUDGE

In the presence of: