



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1209 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**BAKERY CONFECTIONERY FOOD MANUFACTURING**  
**AND ALLIED WORKERS UNION (K).....CLAIMANT**  
  
*VERSUS*  
  
**KENAFRIC INDUSTRIES LIMITED.....RESPONDENT**

**RULING**

By Notice of Motion filed under Certificate of Urgency dated 16<sup>th</sup> July 2018 the applicant Bakery Confectionery Food Manufacturing and Allied Workers Union (K) who is the Claimant in the main suit seeks the following orders:-

1. That the application herewith be certified as urgency, service of the same be dispensed with and the same be heard as a matter of urgency on priority basis.
2. That this honourable court be pleased to issue an order of injunction restraining the respondent herein from effecting termination of any employee/union members by way of redundancy pursuant to the notice of redundancy dated the 18<sup>th</sup> June 2018 pending the hearing and determination of the application herewith inter-parties.
3. That this honourable court be pleased to issue an order of injunction restraining the respondent herein from effecting termination of any employee/union members by way of redundancy pursuant to the notice of redundancy dated the 18<sup>th</sup> June 2018 pending the hearing and determination of the suit.
4. That the cost of the suit be provided for.

This application is premised on the grounds that:-

1. The applicant and the respondent have in place a recognition agreement in force which guides industrial relations between the parties.
2. The applicant and the respondent have equally negotiated and registered successive collective agreements which have been registered with this Honourable court and which set out the terms and conditions of employment of unionizable workers at the Respondent's enterprise.
3. Vide a letter dated 18<sup>th</sup> of June 2018 titled "*Notification of redundancy- engineering and dispatch loading staff*" the respondent declared its intentions to declare 15 union members redundant with effect from the 18<sup>th</sup> of July 2018.
4. The applicant contends that the intended redundancy as is fundamentally flawed in both substance and procedure as enshrined in law and the collective agreement in force.
5. Vide the said letter the respondent stated that it was experienced rapid changes in the business sector that would call for a strategic approach and actions for future growth and stated that it would outsource the engineering workshop activities as this was not part of the core business and the new business model.

6. The applicant contends that for the foregoing reasons aforesated, there is no valid and legitimate reason to effect redundancy of union members as the respondent intends to outsource the same functions to an outsourcing agency which prima facie demonstrates that there is work to be performed by the current holders of the said positions.

7. The applicant contends that the said redundancy is targeted at unionizable paid up members of the claimant who have been singled out for termination by way of redundancy and who are meant to be replaced by outsourced labour.

8. The applicant contends that the mere fact that the respondent intends to replace unionizable members with outsourced labour in respect of the same position is an indication that there is work to be performed by the said employees and as such there can be no valid reason to effect termination of unionizable employees of the claimant by way of redundancy.

9. The applicant contends that the aforesaid notice of redundancy is not only illegal but void as the same has not been copied to the Labour Officer falling within the jurisdiction of where the respondent carries out its business as is provided for by the provisions of section 40(1)(a) of the Employment act, 2007 and is therefore null and void to the extent of that illegality.

10. The said redundancy notice is fundamentally mischievous illegal and procedurally flawed as it fails to disclose the names and positions of the employees to be affected by the intended redundancy as contemplated by the provisions of section 40(1) (a) of the Employment Act, 2007 as read together with clause 6 (b) of the collective agreement in force so as to gauge compliance thereof.

11. The applicant contends that the respondent continues to engage over 400 of its employees through outsourcing agencies who are contracted to serve in core functions of the respondent which constitute unionizable positions and as much the intended redundancy is a scheme tailored to perpetrate the same illegality and vice in replacing union members with outsourced labour at its enterprise.

12. The respondent is keen to reduce union strength at its enterprise by replacing union members with outsourced labour who are deployed to undertake core functions of the respondent and as much the claimant is apprehensive that its right to organize, and undertake union activities as enshrined in law stand to be severely prejudiced as a consequence of the respondent's actions.

13. Despite a meeting having been held between the applicant and the respondent on the 5<sup>th</sup> of July 2016 to discuss the matter, the respondent insisted that I would proceed with the intended redundancy despite the applicant's protestations to the same hence the suit and the application herewith.

14. During the meeting held on the stated date, the respondent additionally confirmed and indicated that it would give priority to the employees declared redundant of an opportunity of being engaged as outsourced employees to the same positions which further demonstrates that there is available work to be performed and that the sole intention is to get rid of trade union affiliated employees.

15. Unless restrained by the orders sought in the accompanying application herewith the respondent will persist with its unlawful actions which shall visit unforetold harm and prejudice to the targeted employees who shall be rendered jobless and without a source of livelihood in violation of the law.

16. It is in the interest of justice that the orders sought herein are granted to safeguard the industrial interest of the said employees.

The Application is supported by the Affidavit of **DANCHAELE MWANGURE** sworn on 16<sup>th</sup> July, 2018 and on the grounds on the face of the motion.

The Respondent opposed the Application and filed a Replying Affidavit sworn on 17<sup>th</sup> October 2018 by **HANNAH KARURU**, the Executive Director of the Respondent Company.

She avers that parties entered into Agreement Relative to Recognition and Negotiating procedure to govern matters of wages, terms and general working conditions and that parties have in force a collective bargaining Agreement executed on 15<sup>th</sup> December, 2015. Both documents are annexed to the Replying Affidavit and marked "HK1" and "HK2" respectively.

She further avers that pursuant to clause 6 and 7 of the collective Bargaining Agreement and Section 40 of the Employment Act, the Respondent declared on fifteen (15) employees redundant due to rapid changes in its business sector, the current economic situation and the volatile nature of its business.

She avers that on 29<sup>th</sup> May 2018, the Respondent wrote a first letter of notification of redundancy to the General Secretary of the Claimant/Applicant who responded by a letter opposing the redundancy on grounds that it was unlawful and did not follow procedural guidelines and parameters.

The Respondent subsequently temporarily halted the exercise and issued a letter of withdrawal of notification of the redundancy dated 5<sup>th</sup> June 2018 to the Claimant/ Applicant. Further that on 18<sup>th</sup> June 2018 the Respondent issued a notification of redundancy under section 40 of the Employment Act to the Engineering workshop and dispatch loading staff which was similarly opposed by the Claimant/Applicant.

She states that the Respondent wrote individual letters to the affected employees informing them that in line with the CBA they would be paid their terminal dues and that they would be issued with certificates of service at the conclusion of the exercise.

She further states that the Respondent was in the process of issuing a fresh notice before redundancy when the Claimant/Applicant rushed to Court under certificate of urgency seeking orders as prayed.

The Respondent avers that it does not intend to replace unionizable members but rather outsource when the services are needed.

The Claimant/Applicant filed a Further Affidavit sworn by **DANCHAE M. MWANGURE** on 25<sup>th</sup> October 2018.

The parties agreed to dispose of the application by way of written submissions.

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### **Claimant/Applicant's Submissions**

It is submitted on behalf of the Claimant/Applicant that the Applicant's Application demonstrates a prima facie case to warrant grant of the orders sought.

It is further submitted that the Respondent has flouted both the procedural and substantive provisions for redundancy as set out in the law. Particularly the Respondents have flouted sections 40 and 43 of the Employment Act, 2007 as well as clause 6 of the Collective Bargaining Agreement signed between the Claimant union and the Respondent. The claimant/Applicant relied on the case of **Javan Were Mbangi Versus H. Young Company (E.A) Limited**, where it was held that:

*“Positions and not employees become redundant. When positions become redundant, the employees can be re-deployed, which means the employee is given another job or the employee is retrenched, meaning the employee loses the job altogether. The affected employee has done no wrong; neither conduct nor capacity is in issue. It is only that the circumstance, the employer feels the employee is not needed for the purposes of the business. Employers have the prerogative to determine the needs for their business and therefore make the positions redundant. Positions may become redundant because there is a necessity to re-organize, to enhance operations and prevent closure. The employer had the prerogative to change the job descriptions, duties and responsibilities. There may be situations where positions become redundant for technical reasons, such as the sale of a business, or relocation to a different geographical space.”*

It is submitted that the Applicant was notified of the redundancy vide the letter dated 18<sup>th</sup> June 2018. The said notice is not copied to the labour office as required by the provisions of Section 40(1) (a) of the Employment Act, 2007. The Claimant/Applicant further relied on the authorities of **Fredrick Mulwa Mutiso Versus Kenya Commercial Bank Limited (2017) eKLR** and **Bernard Misawo Obora Versus Coca Cola Juices Kenya Limited (2015) eKLR**.

It is further submitted that the Respondent's selection criteria has flouted the provisions of Section 40(1)(c) of the Employment Act, 2007 as read with Clause 6(c) of the Collective Bargaining Agreement. For this the claimant/Applicant has referred the Court to the case of **Kenya Plantation & Allied Workers Union (K) Versus Harvest Limited**.

It is the Claimant/Applicant's submission that some of the affected employees have been in continuous employment of up-to 20 years with the Respondent thus declaring such employees redundant would affect their social economic well-being causing them irreparable damage that cannot be compensated by way of damages.

Further the Claimant submitted that the balance of convenience tilts in favour of the Applicant and urges the Court to allow the application with costs.

### **Respondent's Submissions**

The Respondent submitted that it has complied with the procedure of redundancy as set out in Section 40 of the Employment Act as read with provisions of the Collective Bargaining Agreement.

On the issue of notice copied to the labour officer the Respondent submitted that it did comply as it attached a copy of the letter to the County Labour Officer in the supplementary Affidavit sworn on 5<sup>th</sup> November 2018.

It is further submitted that the Respondent is ready to settle the final dues as stipulated in the Collective Bargaining Agreement.

It is submitted that the principle of LAST in First Out is not applicable in the instant application as all employees in the central workshop (entire department) would be declared redundant therefore no selection was necessary. The Respondent relies on the case of **National Union of Cinema & Places of Amusement Workers Versus Shaw Computer & Management Service Sdn. Bhd (Award No: 22 of 1975)**.

The Respondent urges the Court to make a finding that it is entitled to declare the 15 employees redundant and to dismiss this application with costs.

### **Determination**

Clause 6 of the Collective Bargaining Agreement signed by the parties hereto that provides that:-

*“6 (b) Should it become necessary for the company to terminate the services of an employee or employees on grounds of redundancy, consideration of either membership or non- membership of the union shall not be taken into account. Selection for such termination will be determined by the company on consideration of merit and ability but when this*

factors are equal between employees, the “last in” “first out” principle shall apply;

(c) When redundancies appear inevitable the company shall inform and discuss with the union before any redundancies are implemented the reasons for and the extent of the intended redundancy prior to the issue of notice to the employee (s).”

Section 40 of the Employment Act permits the employer to declare employees redundant provided the employer complies with the requirements thereof.

This dispute was referred for conciliation and the findings of the Conciliator are as follows –

“Investigations confirmed that the parties have valid Recognition Agreement and a current Collective Bargaining Agreement. The issue at hand could therefore be comprehensively handled within the provisions of parties CBA as read together with section 40 (i) of Employment Act 2007.

Investigations revealed that both the union and the Ministry of Labour were duly notified of this intended redundancy thus no procedure was violated.

Investigations further revealed that the targeted Engineering workshop and Dispatch Loading Staff are actually superfluous and not core to the functions of the business. Investigation therefore confirmed that the strategic approach adopted by the management to remain competitive is actually their right and is within the law and the parties CBA.

Investigations finally revealed that what the company offered to pay the affected workers was actually in line with the provisions of the parties CBA and therefore quite sufficient.”

The Conciliator recommended as follows –

“Having listened to both parties and going through their written submissions coupled with my findings I recommend that the company be allowed to proceed with the redundancy and be further allowed to pay the affected workers as per the parties CBA clause 7.”

The only grounds advanced by the applicant in support of the application are that the redundancy is flawed both in substance and procedure provided in the law and in the CBA, that there is no valid and legitimate reason for the redundancy and that the intention of the respondent is to replace the workers declared redundant with outsourced staff and that the respondent targeted unionisable employees.

These averments are not supported by the facts. It has not been contested that all the engineering workshop staff are subject of the redundancy. The averments that the respondent did not comply with the law or procedure are controverted by the findings of the Conciliator.

The respondent’s averments that it met with the applicant are confirmed in the supporting affidavit of DANCHAEL MWANGURE who deposed that there was a meeting between the respondent and the claimant on 5<sup>th</sup> July 2018.

I find no valid reason to stop the respondent from going ahead with the redundancy as the respondent has complied with the law and the collective agreement. For this reason the application is without merit and is dismissed. There shall be no orders for costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**