



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2566 OF 2016

KENYA UNION OF COMMERCIAL FOOD

AND ALLIED WORKERS.....CLAIMANT

VERSUS

AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

RULING

1. The Claimant's application brought by Notice of Motion under certificate of urgency dated 15th December 2016 seeks the following orders:

- a) That the Respondent be restrained from declaring the targeted employees redundant;
- b) That the Respondent be compelled to release a list of the affected employees;
- c) That the Respondent be compelled to provide an outsourcing agreement between the Respondent and the security services provider including remuneration of each outsourced security personnel.

2. The application which is supported by the affidavit of the Claimant's

Assistant National Organising Secretary, Simon Kimeu is based on the following grounds:

- a) That the parties have a valid Recognition Agreement pursuant to which they have concluded several Collective Bargaining Agreements, the last one having come into effect on 1st January 2014;
- b) That the Collective Bargaining Agreement has a redundancy clause which is anchored on Section 40 of the Employment Act;
- c) That the Respondent has acted in violation of Section 40 of the Act as the reasons for and the extent of the redundancy have not been disclosed;
- d) That the said redundancy targets security services which is a necessary function of the Respondent and that it is intended to aid the Respondent to escape from meeting accrued contractual obligations;

- e) That on 29th November 2016 the Respondent notified the Claimant of the intention to declare all security staff redundant arising from a decision to outsource security services;
- f) That on 30th November 2016 the Claimant wrote to the Respondent asking them to withdraw their letter in order to allow for dialogue;
- g) By 8th December 2016, the Respondent had not responded to the Claimant's letter and a trade dispute was reported on 9th December 2016;
- h) That the affected employees were subsequently served with redundancy notices.

3. The Respondent's response is contained in a replying affidavit sworn by its Chief Executive Officer, Batram Mutinda Muthoka on 12th January 2017. He depones that the Respondent made a decision to outsource its security services and declare its employees falling within the Security Department redundant.

4. Muthoka states that this decision is necessary and justified for the following reasons:

- a) There is an anticipated saving arising from reduced operational and recruitment costs;
- b) There will be increased efficiency in the Respondent's security function since the service will be outsourced to experts with clearly defined key performance indicators;
- c) By engaging experts in security issues, the Respondent will be able address the emerging security threats in a more professional manner;
- d) The Respondent will focus more on its core function that is promoting excellence in agriculture by promoting fora for exchange of agribusiness information;
- e) The new arrangement will enhance risk management in the Respondent's organisation as risk associated with the management of security services will be transferred to an outsourced company;
- f) There will be reduction of time and effort lost in staff welfare and management issues.

5. Muthoka goes on to depone that on 29th November 2016 the Respondent notified the Claimant and the County Labour Offices covering the Respondent's branches of its intention to outsource its security services and declare redundant its security services workforce in all its branches effective 1st January 2017.

6. Subsequently the Respondent issued letters to the affected employees informing them of the declaration of redundancy, payment of their terminal benefits and dates for counselling sessions.

7. It is the Respondent's position that the redundancy was declared in exercise of managerial prerogative and was necessary, justified and lawful.

8. The issue for determination in this application is whether the redundancy declared by the Respondent is lawful. When the Claimant came to Court *ex parte* on 15th December 2016, they submitted that the Respondent had declined to involve the Union in the redundancy exercise. On that basis the Court granted interim orders.

9. At the *inter partes* hearing on 18th January 2017, the Claimant challenged the Respondent's decision to outsource its security services stating that the Respondent had not pleaded inability to pay its security employees nor poor performance by those employees. According to the Union, outsourcing cannot be a valid reason for redundancy. Further, the Union maintains that the jobs held by its members have not been

abolished and are therefore still in existence. It is these jobs that the Respondent seeks to outsource.

10. Section 2 of the Employment Act, 2007 and the corresponding section in 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.”

11. The question before the Court is whether outsourcing of functions would fall under this definition. The Court was referred to a three Judge bench (Nduma, Ndolo and Nzioki wa Makau JJ) decision in ***Wrigley Company (East Africa) Limited v Attorney General & 2 others & another [2013] eKLR*** in which the

Court defined the parameters for a credible outsourcing program as follows:

a) Ordinarily employers are not expected to outsource their core functions;

b) An employer will not be permitted to use outsourcing as a means to escape from meeting accrued contractual obligations to its employees;

c) An employer will not be permitted to transfer the services of its employees to an outsourcing agency without the express acceptance of each affected employee and in all such cases, the employer must settle all outstanding obligations to its employees before any outsourcing arrangement takes effect; and

d) Outsourcing is unlawful if its effect is to introduce discrimination between employees doing equal work in an enterprise.

12. I agree with the submission by Counsel for the Respondent that the ***Wrigley Case*** (supra) did not outlaw outsourcing as a means of separation between an employer and an employee. What the decision did was to lay the parameters for such a program.

13. The real question remains whether a decision by an employer to outsource the functions of an entire department qualifies as a valid reason for declaration of redundancy. Reference was made to the Court of Appeal decision in ***Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR*** where the Court defined a valid reason for redundancy to include operational reorganisation. While submitting a cost benefit analysis to show financial saving arising from the outsourcing arrangement, the Respondent also submitted that it was ill equipped to supervise the security services function.

14. Evidently, provision of security services is not part of the core function of the Agricultural Society of Kenya and an outsourcing arrangement undertaken within the law cannot therefore be faulted.

15. Moreover, the Collective Bargaining Agreement between the parties as well as Section 40 of the Employment Act, 2007 recognise redundancy as a legitimate mode of termination of employment. The only inquiry the Court will make therefore is whether in declaring the subject redundancy, the Respondent complied with the law.

16. The conditions under Section 40 of the Employment Act on declaration of redundancy are as follows:

a) Where the employee is a member of a trade union, the employer notifies the union of 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 the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

g) the employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

17. I have looked at the processes leading to the redundancy and find that the law was complied with at every stage. That being the case, I find no reason to interfere with it.

18. The result is that the Claimant's application fails and is dismissed. The interim orders granted on 15th December 2016 are vacated.

19. Each party will bear its own costs.

20. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI

THIS 10TH DAY OF FEBRUARY 2017

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JUDGE

Appearance:

Mr. Nyumba (Union Representative) for the Claimant Mr. Milimo for the Respondent