



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 21 OF 2017**

*(Before D. K. N. Marete)*

JULIUS KIBET KOGO.....1ST CLAIMANT  
JOHN K. MAIYO.....2ND CLAIMANT  
MICHAEL K. MARU.....3RD CLAIMANT  
LYDIA JEBOTIBIN.....4TH CLAIMANT  
ROBERT KIPKOSGEI.....5TH CLAIMANT  
MUSAT OTIPA MAJENGO.....6TH CLAIMANT  
ASMAN ALI KANENJE.....7TH CLAIMANT  
WYCLIFFEE NYAIBURI OSITU.....8TH CLAIMANT  
NOAH BITOK.....9TH CLAIMANT  
ZACHARIA W. KUNDU.....10TH CLAIMANT  
ROBERT ZIMBO NYONGESA.....11TH CLAIMANT  
NELSON BIWOTT.....12TH CLAIMANT  
SAIDI KIPLANGAT ROP.....13TH CLAIMANT  
PETER KIRUI.....14TH CLAIMANT

VERSUS

ELDORET MATTRESSES LIMITED.....RESPONDENT

**RULING**

This is an application by way of Notice of Motion dated 3rd April, 2017 it seeks the following orders of court:

1. *THAT this application be certified as urgent and be heard ex-parte in the first instance.*
2. *THAT the 1st claimant Mr. Julius Kibet Kogo be granted leave to sign all the documents and/or affidavits for and on behalf of the Claimants.*
3. *THAT Respondent, Eldoret Mattresses Limited and/or its Directors be restrained from closing down the Eldoret Mattresses Limited, Kapsabet Branch pending the hearing and determination of this application and the claim as a whole.*
4. *THAT pending the hearing and determination of the application and the claim herein, the Respondent be ordered to pay the Claimants salaries for the months of March and April, 2017, severance pay and pay in lieu of notice pending the hearing and determination of the main cause herein.*
5. *THAT the Respondent be compelled to deposit security in court with a value equivalent to the claims of the Claimants herein OR in the alternative this Honourable Court do issue order for attachment of the properties of the Respondent equivalent to the total claim of the Claimant's herein.*
6. *THAT pending the hearing and determination of the claim herein the Respondents be ordered to issue the Claimants with Certificate of Service.*
7. *THAT the Officer Commanding Station, Kapsabet Police Station to supervise compliance of the orders above.*

This is grounded as follows;

- a. *The Claimants have challenged their oral unlawful dismissal from employment by the Respondent without notice or any explanation.*
- b. *The action of the Respondent in declining to pay the Claimants their salaries, notice pay, leave dues, severance pay among others violates the Claimant's rights to fair employment terms and practices contrary to*

*Article 41 of the Constitution and Sections 18 and 19 of the Employment Act.*

- c. *That the said termination on grounds of redundancy is invalid as it does not satisfy the requirements of the Employment Act and the International Labour Organization Recommendation, (ILO) 1982 (No.166).*
- d. *That the Claimants risk unemployment despite having had a valid employment contract with the Respondent.*
- e. *That breach of contract of employment by the Respondent violates the Claimants' Constitutional Rights.*
- f. *The Claimants will suffer irreparable damages if the orders sought in the application and the claim herein are not granted promptly.*
- g. *The Respondent has sold and/or is closing the business and transferring some of the goods to unknown place hence the redundancy of its employees (the Claimants) herein without consultation with the Claimant's thus rendering the Claimants' unemployed necessitating this suit.*

The respondent in a Respondent's Replying Affidavit sworn on 8th May, 2017 opposes the application and prays that it be dismissed with costs.

When the matter came for hearing on 22nd May, 2017 the claimants/applicants opened by submitting that the application was based on Articles 30 and 41 of the Constitution and also section 12 and 40 of the Employment and Labour Relations Act, 2014 and the Employment Act, 2007 respectively.

It is an application by the claimant employees of the respondent and is grounded in the fact that the respondent appears to have set out a motion of closing down her operations at the Kapsabet Branch thereby rendering the claimant redundant. And this is happening without following the due process of the law on redundancy. The circumstances of the case also betray a situation where the respondent intends to evade the payment of the claimant's dues in law.

The claimant further submits that the respondent orally terminated the employment contracts of the claimants without any written notices or explanation. This also an open display of non compliance with section 40 of the Employment Act, 2007 on redundancy which provisions of the law ought to be followed to the letter in such circumstances. It dictates a months notice to the union, labour officer and employee.

The claimant/applicant further submits on the respondent's intention to close operations and relocate, especially to another country. This is while all this time, she has failed to pay salary, leave dues and severance pay to the claimants.

The claimants, in support of the application have annexed the following documents;

1. Demand letters dated 30th March, 2017 and attached to the Memorandum of Claim.
2. Copies of Union Membership Cards for the claimants.
3. Copies of grievance forms signed by the complainant claimants and the union.
4. Individual claims for each of the claimants.

The claimant/applicant faults the Replying Affidavit of the respondent sworn on 8th May, 2017 for being a falsification of facts and data. It is their submission that the annexed notices to the County Labour Officer on the intention to close the Kapsabet Branch are an afterthought and manufactured for purposes of resisting this claim. They were made after service of the claim to the respondent and failed to display evidence of receipt by the Labour Officer. Again, the letter is dated 1st March, 2015 and narrates the predicament of the respondent.

There is also no evidence of notification to the union. There is only a letter copied to W.Saina union who is not a party to this dispute. In any event, there is no evidence of service of the letter to him.

The claimant also faults the purported notices of termination to the claimant referred to on paragraphs 4 and 5 of the Replying Affidavit. They submit that these are also a fabrication with intent to defeat justice. If they had been served, there would be evidence of receipt.

The entire case of the respondent is a display of contradictions, particularly on the date of termination indicated as 31st March, 2017 whereas the Certificate of Service coming thereafter indicates a termination date of 10th April, 2017. No evidence of service of the Certificate of Service is available either.

It is the claimant/applicant's penultimate case that they have set out a *prima facie* case entitling them to the orders sought. In the absence of granting orders as sought would occasion harm as totality of the claim is Kshs.11,897,302.05. The balance of convenience is also in their favour and therefore the prayers as set out and prayed.

The respondent opposes the application and relies on her affidavit sworn on 8th May, 2017. It is her submission that the application is based on material falsehood, misplaced and without any standing.

The respondent further submits that the applicants would not have come to court without prompting and

this prompting was through the notices by the respondent. Further, the Kapsabet Branch ceased trading on 31st March, 2017 and closed on 4th April, 2017 and therefore the futility of this application. Again, the claimants were paid in March and did not work in April and May thereby being not deserving of pay.

The respondent further denies the involvement of the Labour Officer and union on grounds that the claimant came to court in person. It is her other submission that there is no authority on the fact that notices must be served and in any event the claimants are only to blame for not showing up to collect their dues and benefits.

Lastly, the respondent submits that this application and suit are a front by the claimants to portray her in bad faith and ought to be dismissed with costs.

This application is a display of talented presentation and lack of it on the part of the parties. The applicants display a case worthy of note for a botched up redundancy and or termination which the respondent grapples through in a mere denial. The applicants' case overwhelms that of the respondent in more ways than one. It stands out on a preponderance of evidence.

I am therefore inclined to allow this application and order relief as follows;

- i. That the Respondent and or her Directors be and are hereby restrained from closing down the Eldoret Mattresses Limited, Kapsabet Branch pending hearing and determination of this claim.
- ii. That pending hearing and determination of this claim, the Respondent be and is hereby ordered to pay the claimants' salaries for March, April and May 2017.
- iii. That the Respondent be and is hereby ordered to deposit an amount of Kshs.11,897,302.05 being security for the claimant within seven (7) days of these orders of court.
- iv. In the alternative to (iii) above, an order of attachment of the respondent's properties to the extent of the claim be and is hereby issued.
- v. That the Officer Commanding Station, Kapsabet Police Station be and is hereby ordered to supervise compliance with these orders of court.

Delivered, dated and signed this 23rd day of May, 2017.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Nyairo instructed by Nyairo & Company Advocates for the Claimant/Applicant.
2. Mr. Simiyu instructed by Mathai Maina & Company Advocates for the Respondent.