REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO.313 OF 2017

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 29TH JUNE, 2017)

FLORENCE A. ODHIAMBO ….……..……...CLAIMANT

VERSUS

WANANCHI TELCOM LIMITED …...1ST RESPONDENT

WANANCHI GROUP LIMITED ……2ND RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 14th of February 2017 brought under Section 12(1) (a), (2), (3) (I) & (vii) of the Employment and Labor Relations Court Act, Rule 16(1) (2) (3) & (4) of the Employment and Labor Relations Court (Procedure) Rules 2010, Articles 41 (1), 47 and 50 (1) of the Constitution of Kenya 2010 for orders:

1. That this application be certified urgent, service be dispensed with and the same be heard ex parte in the first instance.

2. That this Honourable Court be pleased to grant an order of stay of redundancy termination notice letter dated 23rd December 2016 issued by the 1st Respondent pending the inter parties hearing.

3. That pending the hearing and determination of the claim inter parties the Court issues an injunction prohibiting/restraining the Respondents either by themselves, employees, servants and or agents from terminating the Applicant from her employment. Upon inter parties hearing

4. That this honorable Court be pleased to grant an order of stay of the redundancy notice letter dated 23rd December 2016 issued by the 1st Respondent until the final determination of this claim.

5. That pending the hearing and determination of the application the court issues an injunction prohibiting /restraining the Respondent either by itself, employees. Servants and/or agents from terminating the Applicant from her employment

6. Costs of the Application be provided for.

2. The application is grounded on the matters set out in the supporting affidavit of Florence A. Odhiambo filed in Court and upon further grounds and reasons to be adduced at the hearing thereof.

3. That the intended action of the Respondent is malicious, biased, oppressive, an abuse of office and discriminative against the Applicant therefore *void ab initio*, unlawful and inoperative.

4. That the intended termination of the Applicant and the procedure applied has been undignified, traumatizing, irresponsible and shocking, the notice of termination would occasion irreparable injury and wanton damage to the livelihood of the Applicant.

5. That the intended termination of the Applicants employment is a fragrant violation of the constitutionally guaranteed rights such as the right to fair labour practice, fair administrative action and fair hearing.

6. That the constitution binds all organs of the state and parties and therefore the Honorable Court is to uphold, protect and defend the Constitution and other Statutes and further that:

> ***i. "No prejudice is likely to be suffered by the Respondents if the orders sought herein are granted.***
>
> ***ii. The Applicant has a right of access to the Court to safeguard the articles of the Constitution and Statutes which have been or are in danger of further infringement".***

7. That Articles 10, 41, 47 and 50 of the Constitution, Section 40 of the Employment Act 2007 will be violated if the Employment and Labor Relations Court does not uphold the supremacy of the Constitution.

8. That orders sought are pursuant to the Employment and Labour Relations Courts duty to promote and safeguard constitutionalism and the rule of law.

9. That it is only fair and just for the Court to issue the orders as prayed and that the Court has a right to interpose by way of injunction to restrain the Respondent from carrying out any intended acts which infringe on the rights of the Applicant and the Applicant has established a prima facie case.

10. The Respondents have filed a Replying Affidavit dated 21st February 2017 deponed to by Caroline Julio the Legal & Regulatory Manager of the 1st Respondent.

11. She avers that the Application is bad in law, un-maintainable and an abuse of the Court process as the Applicant has intentionally withheld pertinent information.

12. She avers that there is no legal entity known as Wanainchi Group Limited the second Respondent herein and demand clarification as to their inclusion in this suit. The Wanainchi Group (Kenya) Limited is the retail arm of the business for Wanainchi Group Holdings Limited (Mauritius). The corporate arm comprises amongst others and more relevant to this suit, the 1st Respondent and Simba Net Com limited Kenya. The two arms are distinct and the Applicant was an employee of the 1st Respondent.

13. She avers that the Applicant was an employee of the SimbaNET Com Limited from the 29th of May 2014 and her employment was later transferred to the first respondent on the 18th of June 2014.

14. That in ongoing changes in the company structure, the Applicant's position of Human Resource Business Partner was declared redundant and the applicant was aware of the restructuring and declaration of redundancy of various staff including the Chief Finance Officer whose process she participated in.

15. That an email dated 7th October 2016 was sent to all staff informing them of the restructuring of the

Human Resource department whereby they were informed that the Human Resource Department would be merged with the operations department for growth and efficiency.

16. That the restructuring has also affected regional offices leading to the closure of the Eldoret, Nakuru, Nyeri and Mombasa Stations and changes were made to the infrastructure section of the Service delivery department which Section was not to be under Operations Departments.

17. That the Respondents tried on several occasions to discuss the issue of redundancy but the Applicants refused, and an attempt was made to serve the notice of redundancy but the Applicant declined stating that she was on leave.

18. That a notice was sent to the Ministry of Labour on the 19th of January 2017.

19. That there is no signed agreement that provides that there will be no termination of Senior Managers further the Applicant has failed to disclose any illegality to the actions of the 1st Respondent.

20. That the Applicant has failed to disclose how she would suffer irreparable damage in the event that the orders sought are not granted.

21. That the documents in the Applicants bundle do contain from page 19 – 40 confidential information property of the 1st Respondent that have no relevance to the current suit and now form part of public record and could have drastic repercussions to the business.

22. The relationship between the applicant and the 1st Respondent has irretrievably broken down and cannot exist without friction which is unhealthy for the business environment.

24. That the issue of the legality of the Notice of Redundancy can only be addressed at the full hearing of the suit while the Applicant can be compensated with costs in the unlikely event that she is declared successful in her claim but on the contrary, the 1st Respondent cannot be compensated in any shape or form by damages in the event that the orders prayed for herein are granted.

24. The parties submitted orally in Court.

25. The Applicant relied on his pleadings and stated that on the 17th of January 2017 she wrote a letter to the Managing Director where she raised concerns being the date the letter was issued, effective date, clarity on time or redundancy and the process.

26. They rely on the matter of **Kenya Airways Limited vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the definition of Redundancy was discussed and at paragraph 18 it was stated that:

> ***"There are two broad aspects of this definition. The first one is that the loss of employment in redundancy cases has to be involuntary means and at the initiative of the employer. It should not be a contrived situation. It has to be non-violation. I understand this to refer to a situation, in most cases an economic downturn, brought about by other factors beyond the control of the employer, which leaves the employer with on other option but to take an initiative the consequences of which will be inevitable loss of employment."***

27. They submit that they have a prima facie case with the probability of success. The Court has to examine the nature of notice whether there was consultation, what was the selection criteria and what were the reasons of restructuring and how ready the employees were to exit.

28. They submit the Applicant has failed to properly address the above concerns and that there is a general notice to be given in particular notices to individuals affected. No reasons were given and no justification for the redundancy.

29. They submit that the court also has to examine procedural justification and to this end they rely on the Kenya Airways Case(supra) at paragraph 52 where Maraga J states that:

> *"As I have said, besides this convention, the requirement of consultation is implicit in the principle of fair play under Section 40 (1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VII of the Labour Relations Act 2007 which provides for reference to the Minister for Labour of trade disputes including those related to redundancy. (See Section 62(4) for conciliation. I am of the firm view that the requirement of consultation is implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act as is also provided for in the said ILO Convention No 158 -Termination of Employment Convention 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimize the termination and measures to mitigate the adverse effects of any termination on the workers concerned such as finding alterative employment. "*
>
> *The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible or the best way of implementing if its unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the termination and measures to mitigate the adverse effects of any termination on the workers concerned such as finding alternative employment. The consultations are therefore meant to cause the parties to discuss a way out of the intended redundancy, if possible or the best way implementing it if it is unavoidable.*
>
> *This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st Respondent that consultation is an imperative requirement under our law. Mr. Oraro's criticism of the learned trial judge's reliance on the UK Employment Appeals Tribunal decision in Mugford vs. Midland Bank, UK Employment Tribunal Appeal 10 and the treatise by Rycroft and Jordan – A guide to the South Africa Labour Law both of which dealt with the requirement of consultation was therefore unfair. Those were authorities on comparative jurisprudence which the learned judge was perfectly entitled to make reference to and where appropriate rely on."*

30. They submit that the notice was not personally served in terms of Section 40(i) and she was sent for an email when she was on leave. On whether process was fair or not they refer the Court to the Kenya Airways Authority at page 45 paragraph 57 which states that:

> **"the other important aspect of procedural fairness in redundancies is the criteria employed to determine the employees to be laid off. This requirement is expressly provided for in Section 40 (1) (c) of the Employment Act which places the burden on proving its compliance on the employer, in addition Article 14 of the Supplementary Provisions to the ILO Recommendation No 119 Termination of Employment Recommendation 1963 concerning reduction of the work force also provides that:**
>
> ***"(1) the selection of workers to be affected by a reduction of work force should be made according to precise criteria, which it is desirable should be established wherever possible in advance and which give dues weight in both to the interest of the undertaking, establishment or service and to the interest of the workers.***

Sub article (2) of that Article enumerates the criteria to be employed as including the:

(a) The need for the efficient operation of the undertaking, establishment or service (b) ability, experience, skill, and occupational qualifications of individual workers; (c) length of service (d) age (e) family situation or (f) such other criteria as may be appropriate under national conditions, the order and relative weight of the above criteria being left to national customs and

practice."

31. They submit that the process was unfair, unreasonable, unnecessary and on that basis it should not have taken place. They also refer to **Amir Suleiman vs. Amboseli Resort Limited [2004] eKLR** where it was stated:

> ***"A fundamental principle is that the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been wrong…"***
>
> ***Traditionally on the basis of the well accepted principles set out by the Court of Appeal in Giella v Cassman Brown the court has had to consider the following questions before granting injunctive relief:***
>
> > ***i. Is there a prima facie case with a probability of success.***
> >
> > ***ii. Does the applicant stand to suffer irreparable harm if relief is denied.***
> >
> > ***iii. On which side does the balance of convenience lie even.***
>
> ***As those must remain the basic tests its worth adopting a further albeit rather special and more intrinsic test which is now in the nature of general principle.***
>
> ***The Court, in responding to prayers for interlocutory injunctive relief should always opt for the lower rather than the higher risk of injustice."***

32. The Applicant submits that the effect of not granting the injunction is that they would be prejudiced and suffer irreparable harm. The Applicant will lose her job and reputation.

33. They submit that the Respondents are in violation of Article No 47 and 50 of the Constitution and refer to the matter of **Olympic Sports House Limited vs. School Equipment Center Limited [2012] eKLR** at paragraph 57 where the Court stated that:

> ***"did the Respondent act in a responsible manner and in good faith? I did not find evidence indicating a fair process was employed in the process of re-organization by the Respondent. No records were shared to convince this court that indeed there were consultations within the respondent's business to ascertain the purpose and the need for re-organization resulting in some positions being unnecessary this the termination of the claimant as the only persons affected.***
>
> ***A redundancy, a restructuring or reorganizing commenced with the sole purpose of laying off specific employees is a sham. Such is not justified and cannot be sanctioned by the court. There must be a rationale, justification and participation of the employees upon the employer or setting out a clear criteria to be followed. Where there are available jobs positions, the employer must demonstrate that the available employee cannot be redeployed or engaged in such and that a layoff is the last option available."***

34. They submit that the Respondent has financial muscle and he cannot always use that and damages is not an answer to violation of a right.

35. They submit that the principle of proportionality is in favour of Claimant even a minor violation of a right and is enough for Court to grant the order sought, the redundancy was prematurely and whimsically done and didn't comply with the legal prerequisites.

36. They pray that their application is allowed.

37. In response, the Respondents submit that they rely on their affidavit sworn by Caroline Julia.

38. They submit that the applicant is seeking an equitable relief but she comes with unclean hands. She had been informed of the intention to declare her redundant on the 23rd December 2016. She was on leave then, and was then handed the hard copy notice and period extended to 16th February 2017. This is per Section 40 of the Employment Act what was to follow was consultation.

39. They submit that the Applicant had no intention of consulting. As early as 23rd January 2017 she was plotting to scuttle the redundancy process and was forwarding emails from the office to her email on the 30th of January 2017. They submit that she discusses office matters which were confidential in her claim exposing the same fact that she cannot be trusted and this equitable relief should not be accorded to her.

40. They rely on the Kenya Airways case at page 32, paragraph 64 where its states that:

> ***"……..reinstatement is ordered in exceptional circumstances to avoid subjecting the parties, particularly the employers to servitude. In this case, if the appellant redundancy programme amounted to unlawful termination of employment as the Judge erroneously found counsel submitted, then the affected employees remedy lay in damages as provided by Section 49 of Employment Act."***

41. They submit that notice was done in the proper manner and that they application should be dismissed.

42. Having considered submissions of both parties the issue for consideration is whether the Applicant has established a prima facie case with a likelihood of success to warrant issuance of orders sought. In determining whether a prima facie case is established, the Court has recourse in the principles established in **Giella vs. Casman Brown** which state that the Court must consider:

> ***1. If there is a prima facie case with a probability of success.***
>
> ***2. Whether the Applicant will suffer irreparable harm if the injunction is denied.***
>
> ***3. The balance of convenience.***

43. The Courts have gone further now (see Films Rover International (1986) 3 ALL ER 722 at page 780 – 780) where Justice Hoffman added another consideration to this being …."A fundamental principle is ---- that the Court should take whichever course appears to carry the lower risk of Injustice if it would turn out to have been "wrong" ".

44. The Principle was expounded in **Suleiman vs. Amboseli Resort Limited (2004) 2 KLR 589** Ojwang J (as he then was) who rendered himself as follows:

> ***"It is the business of the Court so far as possible to ensure that any transitional motions before the Court do not render nugatory the ultimate end of justice ---- the argument that the law governing the grant of Injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of retirement as it expands, to cover new situations not exactly foreseen before. Traditionally on the well-accepted principle, the Court has had to consider the following question before granting Injunctive relied (i) is there a prima facie case with a probability of success (ii) does the Applicant stand to suffer irreparable harm if relief is denied (iii) on which side does the balance of convenience lie" Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers of Interlocutory Injunctive relief, should always opt for the lower rather than the higher risk of injustice. Although the Court is unable at this stage that the Applicant has a prima facie case with a probability o*f *success, the Court is quite convinced that it will cause the Applicant irreparable harm if his prayers for injunctive relief are not granted …. and in those circumstances the balance of convenience lies in favour of the Applicant rather than the Respondent. There would be a much larger risk of injustice if the Court found favour of the defendant, than if it determined this application in favour of the***

***Applicant*".**

45. It is apparent that at this stage this Court would not with certainty make conclusive findings of fact or law in this matter.

46. This would be tantamount to disposing of the entire claim at this Interlocutory stage. The Court is however minded to consider affidavits presented to Court plus the attachments thereto and make a finding that will be able to preserve the substratum of the entire claim in a justifiable manner.

47. In this regard, it is my view that the balance of convenience lies in granting the injunctive relief sought. There would be a large risk of injustice if this Court denied the Applicant the relief sought.

48. I therefore confirm the exparte orders granted on 16/2/2017 to remain in force pending hearing and determination of this claim.

49. Costs in the cause.

50. I further direct that parties proceed to take a hearing date on priority basis.

Read in open Court this **29th day of June, 2017.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Okweh Achiando for Claimant – Present

Stephen Kimathi for Respondent