REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 211 OF 2017

DORIS KAIRUTHI KAARIA.....1ST CLAIMANT

JOSEPHINE MUGURE MOSES.....2ND CLAIMANT

MICHENI ALFRED MUCHAI.....3RD CLAIMANT

MERCY MINOO MULE.....4TH CLAIMANT

FRIDAH NKIROTE MWORIA.....5TH CLAIMANT

PETER MAINA MOSES.....6TH CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 16th June, 2017)

RULING

The claimants filed on 09.06.2017 the notice of motion through Lucy Kaaria, Matumbi & Company Advocates. The notice of motion invoked section 12 (3) of the Employment and Labour Relations Court Act, Cap.234B. The claimants prayed for orders:

1) That the application be certified urgent.

2) That pending the inter-partes hearing of the application an interim preservation order do issue to stay or suspend the operation and effect of the respondent's letters dated 22.05.2017 giving notice to terminate the claimants' employment.

3) That pending the hearing and determination of the application and the main suit, an interim preservation order does issue to stay or suspend the operation and effect of the respondent's letters dated 22.05.2017 giving notice to terminate the claimants' employment.

4) That costs of the application be borne by the respondent.

The application was supported with the affidavit of Doris Kairuthi Kaaria attached to the application and the exhibits thereto.

The respondent employed the 1st claimant by the letter dated 02.02.2012 to the position of Assistant Administrative Officer Job Group MU 9. By the letter dated 01.02.2017 she was promoted or appointed to the position of Human Resource Office Job Group MU10.

The 2nd claimant was appointment to position of Assistant Administrative Officer Job Group MU 9 by the letter dated 07.12.2010. By the letter dated 22.11.2013 her contract of service was renewed at the same position but on permanent and pensionable terms of service. By the letter dated 01.07.2015 she was nominated a marketing representative based at the respondent's Mombasa Campus. Her terms of service remained the same.

The 3rd claimant was appointed Lecturer (Business Admin) per letter dated 25.08.2006. He was promoted to Senior Lecturer by the letter dated 26.03.2008 on permanent and pensionable terms of service.

The 4th claimant was appointed Assistant Student Welfare Officer Job Group MU9 on permanent and pensionable terms of service per letter dated 18.11.2016.

The 5th claimant was appointed Senior Clerical Officer – Accounts Job Group MU 6 per the letter dated 12.03.2007 and to same position effective 01.07.2010 on permanent and pensionable terms. She was appointed Assistant Account, Job Group MU 9 effective 01.11.2012 per letter of 30.11.2012.

The 6th claimant was appointed on permanent and pensionable terms of service as Administrative Officer Job Group MU10 effective 01.05.2012 per letter dated 07.08.2012. He was confirmed in the position of Senior Marketing Officer per letter dated 17.05.2017.

The claimants' case is that the appointments and promotions followed their respective evaluation or appraisal that found them fit to be so appointed or promoted.

The respondent issued an internal memo to all its staff dated 22.05.2017 conveying that the respondent was going through a restructuring in order to improve its services to become more competitive. It further stated that those staff to be affected would get communication by email the following day 23.05.2017 and later through the human resource office or campus directors. Further, for those to be affected one way or the other, the respondent had put in place mechanisms through the offices of the chaplains and university counsellors to provide pastoral and psychological support to help cope and adjust to the changes.

Each of the claimants received the letter dated 22.05.2017 titled, **"Termination of Employment on Account of Redundancy".** The letter conveyed that the employment had been terminated on account of redundancy due to dynamics affecting education sector in the entire Kenyan economy so that the respondent was undertaking restructuring process to enhance effectiveness and competitiveness. Thus notice was being issued per section 40(a) and (b) of the Employment Act being one month effective 23.05.2017 to 23.06.2017. The letter stated that each would be paid in lieu of notice per contract of employment; leave days earned but not taken; and severance pay at 15 days for each year of service. Payments were subject to clearance.

The claimants oppose the redundancy on the ground that the respondent had failed to disclose the criteria used to determine the employees to be rendered redundant. In particular, the claimant's case is that the respondent has not complied with the condition as provided in section 40 (1) (c) of the Employment Act, 2007 thus, **" An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions – (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;"**

The respondent has opposed the application by filing the replying affidavit of Caroline Ndumia on 15.06.2017 through Patricks Law Associates (PLASS Advocates) and Ngunjiri Advocate appeared in that regard. The respondent's case is that the university has complied with the redundancy procedure as prescribed in section 40 of the Employment Act, 2007. That the relevant notices have been served and the

respondent will pay all the redundancy dues as set out in the section. The respondent's case is that all staff were informed of the restructuring process by the memo of 22.04.2016 and the labour officer was informed by the letter dated 10.05.2016. The redundancy was due to financial constraints and 200 employees would be affected by the redundancy. There were delays in implementing the restructuring and by the letter dated 05.05.2017 the labour officer was notified that the redundancy would go on effective 15.05.2017. By the letter dated 23.05.2017 the respondent forwarded to the labour officer copies of letters for the affected 110 employees. Thus, it was urged that the respondent had satisfied the requirements of section 40(1) of the Employment Act, 2007. The redundancy had flowed from the report of the forensic audit and university processes review from 30.09.2014 to 11.11.2014 by a consultant known as Competence Development Center and exhibited on the replying affidavit as KEMU 6.

For the claimants' lamentations about the selection criteria, the respondent's case is that it appointed a comparative review panel comprising of the members of the human resource committee of the respondent's Council to evaluate staff and to make recommendations. The same was reflected in the executive summary on staff retrenchment exhibited on the replying affidavit as KEMU 7. The summary sets out the steps invoked and leading to the redundancy in a general manner and the court observes that it does not set out the specific and material considerations that led to identification of the claimants for redundancy.

On the application of section 40(1) (c) the court follows its opinion in **Kenya Plantation and Agricultural Workers Union –Versus- Harvest Limited [2014]eKLR** thus, **"Section 40(1) (c) of the Act clearly provides that in selecting employees for redundancy, the employer shall have regard to seniority in time and to skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. The court holds that the idea of last in first out satisfies the seniority criterion. As far as skill, ability and reliability are concerned, it is the opinion of the court that the employer must have, prior to the redundancy exercise, instituted objective qualifications for skill, ability and reliability attached to the office held by the workers against which the skills, ability and reliability possessed by the individual workers targeted in the redundancy will be scored or measured against. The employer, in the court's opinion, must demonstrate the objective score sheet and the ranking of the targeted employees against that score sheet with respect to the selection factors set out in section 40(1) (c) of the Act failing which, it is difficult to establish compliance with the section. The court also holds that the selection parameters in section 40(1) (c) are not in alternative so that in a redundancy process, the employer must establish that all the parameters have been taken into account and in an objective manner. It is the opinion of the court that the employer enjoys the discretion to place given weights on each of the parameters but none can be applied in exclusion of the others."**

In the present case, the claimants have showed that the respondent had no score-card or record of the ranking of its employees and in particular about those holding similar positions as those held by the claimants and how the claimants came to be identified as the proper candidates for the redundancy that is underway. The court further finds that the claimants have shown that internally and as by law, all of the kinds of positions or offices in the respondent's establishment as held by the claimants have not been abolished by the respondent. In such circumstances, the court returns that it has been established that the respondent has failed to comply with section 40(1) (c) of the Act in sending the claimants on redundancy.

While making that finding the court has considered the respondent's submission that in **Kenya Airways Limited –Versus- Aviation & Allied Workers Union Kenya & 3 Others [2014]eKLR**, the Court of Appeal held that as long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision of what was reasonable because the court has no supervisory role. The court finds that in the present case, the claimants are not questioning the rationale or grounds by the respondent justifying the redundancy but they are only questioning whether they were genuinely identified as per section 40 (1) (c) of the Act. In that regard, they have showed that the section has not been complied with so that the redundancy is proceeding in contravention of or in oblivion of the section 40(1) (c) of the Act. To that extent, the court returns that the redundancy has been established to be continuing unlawfully.

The final issue for determination is whether the claimants are entitled to the orders as prayed for. In such cases seeking to interfere with employer's powers, the court follows the opinion in the ruling in **Geoffrey Mworia-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, **"The principles are clear.**

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

It is clear that the claimants have shown that the redundancy is not proceeding per the condition is section 40(1) (c) of the Employment Act, 2007. It is also clear that the respondent has not availed or instituted internal procedures such as appeal or review or revision that would enable the claimants to ventilate their grievances and concerns within the respondent's internal systems. Accordingly, the court returns that the claimants are entitled to the remedies as prayed for in the application.

In conclusion, the application filed on 09.06.2017 by way of the notice of motion dated 08.06.2017 is hereby allowed with orders:

1) That pending the hearing and determination of the suit there be stay or suspension of the operation or implementation of the respondent's letters dated 22.05.2017 giving notice of termination of each of the claimant's employment with the respondent on account of redundancy.

2) That the respondent to pay the claimants' costs of the application.

Signed, dated and delivered in court at Nyeri this Friday, 16th June, 2017.

BYRAM ONGAYA

JUDGE