REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 426 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ABSALOM OMUSULA ..... 1ST CLAIMANT

PHYLLIS NJERI KAMAU ..... 2ND CLAIMANT

PAUL SANG ..... 3RD CLAIMANT

- Versus -

MUMIAS SUGAR COMPANY LIMITED ..... RESPONDENT

JUDGMENT

The Respondent is a limited liability company incorporated under the Companies Act, Chapter 486 Laws of Kenya, and carrying on the business of milling sugar, molasses and power generation and having its headquarters at Mumias in Kakamega County.

The 1st Claimant was the Respondent's employee working in the capacity of Area Trade Development Manager-Sugar, Commercial Department earning a gross salary of Kshs. 224,113.86. He had been in the employ of the Respondent for a period of 21 years.

The 2nd Claimant was the Respondent's employee working in the capacity of Area Trade Development Manager-Water Commercial Department a gross salary of Kshs. 240,198.76. She had been in the employ of the Respondent for a period of about 6 years.

The 3rd Claimant was the Respondent's employee working in the capacity of Commercial Sales Sugar, Mumias earning a gross salary of Kshs. 215,842.48. He had been in the employ of the Respondent for a period of about 11 years.

By their Statement of Claim dated 10th December and filed on 11th December 2015 the Claimants aver that they were illegally declared redundant by the Respondent by identical letters dated 9th November 2015. They aver that the letters were served upon them on the very date on which the redundancy took effect contrary to the provisions of section 40 of the Employment Act. The Claimants pray for judgment against the Respondent as follows:

a. A declaration that the Claimant termination and or redundancy was illegal, unfair and against the provisions of the Employment Act, 2007.

b. To reinstate the Claimants in their initial positions.

c. To deal with Claimants, as employees, properly and in accordance with the law and the Constitution of Kenya, 2010.

d. To pay the Claimants damages for breach of contract of employment and violation of the right to dignity, fair administrative action and fair labour practices under the constitution and for wrongful suspension.

e. To pay the Claimants 12 months gross pay.

f. Payment in lieu of accumulated leave.

g. If, upon dealing with the Claimants according to law the Claimants' are to be put under redundancy, to pay the Claimants according to the terms states in EXHIBIT X in the Claimants bundle of documents and all emoluments stated in paragraph 29 herein and to issue certificates of service.

h. Costs of the claim.

i. Interest on all payments and costs.

j. Such other relief as to the Court seems just in the circumstances of the case.

The Respondent filed a defence on 1st November 2016 the date when the suit was scheduled for hearing. The Statement of Defence was admitted out of time with the consent of counsel for the Claimants. In the Statement of Defence the Respondent admits declaring the Claimants redundant but denies that the redundancy was illegal as alleged. The Respondent contends that the redundancy was in compliance with section 40 of the Employment Act.

In view of the fact that the Respondent admitted declaring the Claimants redundant and the only issue for determination was whether the redundancy was in compliance with the law or not which is a matter of law, the court directed that the case be disposed of by way of written submissions. Counsel for the Claimants filed their submissions on 9th December 2016. The Respondent was on 26th January 2017 granted leave to file submissions within 14 days after having defaulted to file earlier as directed by the Court but again failed to do so. Counsel for the Respondent was again granted further leave to file on 20th February, 22nd March and finally informed the court that they had filed on 30th March 2017. There is however no copy of the submissions on record.

Determination

Redundancy is provided for under section 40(1) of the Employment Act as follows:

40. Termination on account of redundancy

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to 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 an 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 to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

In the present case the Respondent has admitted that it notified the Claimants of the redundancy by letters dated 6th November 2015 and the redundancies were effected on 9th November 2015. The Claimants were in effect sent home without the notification period provided for in Section 40(1) of the Employment Act.

The Claimants have submitted that the notification to staff was made on 17th November 2015 after they had been declared redundant. I have looked at the said notification at page 25 of Claim. The notification clearly states at paragraph 3 that redundancies had already been carried out with respect to the roles of Executive Directors and other senior management positions at the start of financial year 2015/2016. This means that the notification recognised that some employees had already been declared redundant, among them presumably the Claimants. It is therefore the court's finding that the notification of 17th November 2015 did not refer to the Claimants who had been declared redundant before the date of the notification.

It is further the contention of the Claimants that the Respondent did not comply with section 40(1) (c) which provides for selection of employees to be declared redundant. According to the Claimants the selection should have been done after notification. I do not agree with the Claimants as the notification is supposed to be made to the employee to be declared redundant and that employee can only be identified through a selection process prior to the notification of intended redundancy for purposes of the notification before the redundancy as provided in section 40(1) (a) and (b). It is the court's understanding that the selection is done and then the employee selected is notified. This is what was done in the case of the Claimants.

It is further the Claimants' position that the redundancy package offered to them was meagre. They submit that they should have been offered a more attractive package as they were in management and had been upwardly mobile with promotions and wage increases, that they were not involved in any disciplinary matters and were not expected to join a union as they were in management. They have made reference to supplementary documents they filed (without leave of court) which refer to a Mutual Agreement Between KUSPAW Mumias Branch on Staff Rationalisation Program of 2004 and Voluntary Early Retirement Scheme of 1997 in which staff were offered payments of much more attractive terms. The Claimants submit that they were denied the opportunity to negotiate and the Respondent pushed the redundancy down their throats.

The Claimants urge the court to find the redundancy illegal and reinstate them or in the alternative make a finding of unfair termination under section 45 and entitled to the remedies under section 49(c).

The fact that redundancy is provided for in the Employment Act means that the law recognises that there are circumstances when it is necessary for employers to declare employees redundant. The law has therefore set the procedure in section 40 of the Employment Act to ensure that employees are cushioned as much as possible from this unpleasant exercise by setting the conditions in section 40. As was stated in the case of **Kenya union of Domestic Hotels Educational institutions and Hospital workers**

(KUDHEIHA) v Aga Khan university Hospital Nairobi, Cause No. 815 of 2015;

> *"There is nothing wrong with an entity going through reorganization and declaring some positions redundant. Employers, companies, businesses and such entities reorganise periodically. It is a market requirement to reorganise. Once the right is thus exercised, before an employer can move further with regard to implementation of the management decision that is likely to affect employees as recognised herein, the applicable Collective Bargaining Agreement and the legal motions under section 40 comes into force."*

The House of Lords in ***Polkey v. A.E. Dayton Services Limited, 1988 ICR 142 [HL]*** examined the duty of employers to act reasonably in all termination decisions. *Lord Bridge* expressed himself as follows:

> *"…in the case of redundancy, the employer will normally not act reasonably unless he warns or consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy, and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organization."*

The court cannot fault an employer for failing to comply with the law unless there is differential treatment to employees. The court can however not fault the Respondent when carrying out redundancies in 2015 for not applying the criteria used in voluntary retirements in 1997 and 2004 as urged by the Claimants. The circumstances in the redundancies of 2015 are not the same as voluntary retirements in 1997 and 2004. The Claimants have also not shown that they were given differential treatment that was less favourable than any other employee declared redundant at the same time as them in 2015.

The court will however not treat a redundancy as an unfair termination merely because the notice was not in accordance with the provisions of the Employment Act as urged by the Claimants as this can be remedies by the Claimant's being paid the salary they would have earned during the notification period. What would make a redundancy amount to unfair termination are more serious breaches such as discrimination in terms, selection or intention of an employer where the redundancy is used to cover up an otherwise unfair termination.

In the present case the Claimants have not contested the reasons for redundancy. In fact the documents filed by the Claimants point to widespread redundancies by the Respondent based on genuine profitability concerns. As was pointed in **Kenya Airways Limited v Tobias Ogaya Auma & 5 Others [2007] eKLR** an employer cannot be stopped from declaring employees redundant where there are genuine reasons to do so.

For the foregoing reasons I find that the redundancies carried out by the Respondent was genuine. I however find that the Respondent failed to comply with section 40(1)(a) and (b) by failing to notify the Claimants and the local labour officer of the redundancy at least one month prior to the date of redundancy. In the case of **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] eKLR** the court held that the notification period of one month referred to in section 40 (1) (a) for employees who are union members applied to non-union members under section 40 (1) (c). The Claimants were therefore entitled to notification of intended redundancy at least one month to the redundancies being effected.

Remedies

Having found that the redundancy was without notice as provided under section 40(1) (b) of the Act, the same was unlawful and I declare accordingly.

The Claimants prayed for reinstatement. Under section 49(4) reinstatement is only available in exceptional circumstances. The Claimants have not established the existence of any special or exceptional circumstances to warrant being granted that remedy. The Claimants did not contest the Respondent's averment that the positions they occupied have been abolished. They further did not contest the reasons for redundancy, their only complaint being the notice and the redundancy package. I therefore decline to grant the same as it is not appropriate in the circumstances in which the claimants left employment.

The Claimants further prayed for payment according to their exhibit X. As the court has already pointed out the Exhibit refers to voluntary early retirement. The same is not provided for by law or the terms of service of the Claimants and was on a one-off basis. The court has no reason to impose those terms on a redundancy which is provided for by law unless an employer fails to comply with the terms in the law in which case the court can only enforce the law.

The Claimants are however entitled to compensation on the basis that the redundancy was unlawful to the extent of want of notice in terms of section 40(1) (a) and (b). For this, I award them 2 months' gross salary each.

Conclusion

In conclusion, I find the redundancy of the Claimants unlawful for failure to comply with section 40(1) (a) and (b) and award each of them the following-

ABSALOM OMUSULA **Kshs. 436,195.92**

PHYLLIS NJERI KAMAU **Kshs. 396,871.86**

PAUL SANG **Kshs. 420,314**

The Claimants are in addition entitled to all the benefits set out in their separation letters including certificate of service if not already paid/issued.

The Respondent will pay Claimants' costs of the suit.

Dated, signed and delivered in Kisumu this 29th Day of September 2017.

MAUREEN ONYANGO

JUDGE