



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.417 OF 2016

JOSPHAT COSMAS ONYANGO.....CLAIMANT

VERSUS

TRIBE HOTEL LIMITED.....RESPONDENT

RULING

The claimant by application dated 14th July, 2016 is seeking for orders that;

1. *Pending hearing and determination of this application this court do issue an interim Preservatory Orders to stay/or stop the operation and effect of the Respondent's letter dated 30th June 2016 giving notice to terminate the claimants' employment with itself on account of redundancy.*
2. *Pending the hearing and determination of this application this court do issue an order to prohibit the respondent from declaring the claimant redundant.*
3. *Pending the hearing and determination of the main suit herein this court do issue an order to prohibit the respondent from declaring the claimant redundant.*
4. *Any other relief that this court may grant in the interests of justice*
5. ...

The application is supported by the affidavit of the claimant and on the grounds that vide a ruling of the court on 5th May, 2016 the respondent was restrained from terminating the services of the claimant pending hearing of the claim herein. Upon delivery of the ruling the respondent under the guise of leave days forced the clamant to go on leave citing that the claimant had 90 days due. On the lapse of the leave days the respondent called the claimant to collect a letter dated 30th June, 2016 declaring him redundant with effect from 1st August, 2016.

The respondent is clearly trying to circumvent the ruling of the court by unprocedurally declaring the claimant redundant which action is geared toward unfair termination of employment. The intended termination of employment on account of redundancy is false, without legal basis and completely without due process and fairness. This is a mere afterthought the respondent having made various attempts to terminate the claimant from his employment. This effort is meant to victimise the claimant for instituting the current claim against the respondent.

There is no cause of redundancy within the respondent establishment to warrant the notice issued to the

claimant. The claimant has undertaken various duties since his employment with the respondent and this and the decision to terminate his employment on account of redundancy is only meant to frustrate his case. The orders sought are justified.

In reply the respondent filed Replying Affidavit sworn by Eyorusalem Mukulu the Human Resource Manager with the respondent and who avers that the ruling of the court on 5th May, 2016 restrained the respondent from terminating the claimant's employment unless otherwise lawfully terminated. This was not to allow indefinite employment of the claimant. Mukulu also avers that the claimant's redundancy was commenced procedurally and within due process. The claimant was not victimised through his redundancy. The respondent has sought to exercise its prerogative to restructure operations of a vast majority of the administrative departments including the Food and Beverage Controller. This restructuring covered the consolidation of the Human Resources, Finances, Purchasing, IT and Sales and Marketing Departments through the abolition of the positions of the Assistants in Food and Beverage Controller, Human Resources and Head Housekeeper positions.

The claimant was issued with notice together with the Labour Officer on 30th June, 2016 and taking effect on 1st August, 2016. Final dues were set out being July salary; two months' notice pay; severance pay; and less statutory deductions. The claimant rushed to court to pre-empt a legally founded administrative procedure and putting the respondent to immense costs.

The respondent prepared final dues to the claimant at Ksh.262, 001.00 and cheque drawn in favour of NIC Bank and sent to the claimant through his advocates. The claimant is thus not entitled to orders sought.

Both parties made their oral submissions in court.

Determination

The common ground is the ruling of 5th May, 2016. The court restrained the respondent from termination the employment of the claimant based on application filed by the claimant and dated 16th March, 2016. Thus the claimant was to remain in the employment of the respondent pending the hearing and determination of the main suit herein unless otherwise lawfully terminated.

The claimant has now moved the court to stop the respondent from declaring him redundant. The grounds are that there is no reason in law or in fact to justify his termination on account of redundancy and that he is being victimised for filing this claim against the respondent. The respondent has made all effort to terminate the claimant from his employment by sending terminating his contract of employment and which was stopped by the court; the respondent sent him on annual leave and when the leave of 75 days ended, the new reason of termination on account of redundancy has arisen.

The respondent on their part assert that they have reorganised the business and found it necessary to merge departments and following this restructuring, the position of the claimant was declared redundant thus his termination on this account. The respondent has the right to lay off employee found superfluous to the business.

An employer is in law allowed to terminate employment where there is a redundancy. Redundancy is defined in law at section 2 of the Employment Act, 2007 and the Labour Relations Act, 2007 as follows;

The loss of employment, occupation, job or career by involuntarily means through no fault of the 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.

Save for the definition of what redundancy is the procedural requirements are outlined under section 40 of the Employment Act, 2007. Where there is a valid reason that justify the termination of the claimant

following a redundancy within the respondent business and procedural threshold is met, the law thus allows the same.

The Court of Appeal in the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR** held that;

Section 43(1) of the EA provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

“43. (2) the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

Therefore, even where there exists a lawful reason leading to the termination of employment, the same must be fair and in accordance with section 45 of the Employment Act, 2007. The reason leading to the specific identification of the claimant as the individual employee to be terminated from his employment must be genuine, valid and fair. Such must be interrogated in each case.

The court will therefore not stop an employer from undertaking a redundancy where it is justified. The court shall also not stop an employee from challenging the validity and fairness of such termination. In **Jane I Khalachi versus Oxford University Press E. A Ltd, Cause no.924 of 2010** held that;

Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions and not employees, become redundant. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether. ‘Reorganisation’ is not defined in our law books. Dictionary describe ‘reorganization’ to include “significant modification made to legal,ownership, or operational structures of a company to make it more profitable.” Although not expressly defined under the Employment Act 2007, ‘reorganization’ is contemplated by section 45 [2] as a fair termination reason. The provision refers to Operational requirements of the employer. ... 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 a re-organisation resulting in some positions being unnecessary thus the termination of the Claimant as the only persons affected. [Underline added].

In the case of **Agnes Ongadi v Kenya Electricity Transmission Company Limited**

[2016] eKLR the court held;

A redundancy, a restructuring or reorganisation 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 setting out 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.

As such even where the respondent seek to lay off the claimant on account of a redundancy, the decision is subject to challenge. However, at this stage, the right exists where justified and the ruling of 5th May, 2016 does not stop the respondent where there is a justifiable cause to terminate the employment of the claimant save for being stopped from using the reasons now set out in the Memorandum of Claim.

The application 14th July, 2016 shall not be allowed. The claimant has remained lawfully at work vide interim orders of the court when he moved the court and his application found to merit the grant of interim orders which have subsisted to date. I refer both parties to the provisions of section

46(h) of the Employment Act, 2007. Costs shall be in the cause.

Delivered in open court at Nairobi this 19th day of October, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

.....

.....