



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 140 OF 2017

BANKING INSURANCE AND

FINANCE UNION (KENYA).....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

RULING

1. What is before the Court is a Notice of Motion Application dated and filed on 11th October 2017 seeking interim relief. The application was urged by Mr. Kubai for the Claimant/Applicant. He submitted that the motion was predicated on the grounds on the face of it and that the grounds and specifically relied on was that the Respondent has violated with impunity the Collective Bargaining Agreement and that the redundancy stated to be declared does not meet the grounds for redundancy. He stated that the motion is further supported by the supporting affidavit of Mr. Ole Tipape the 1st Deputy Secretary of the Applicant. He submitted that the two Grievants were issued notices of termination on grounds of redundancy. He stated that the two employees are in the clerical category and that in the further supporting affidavit of 18th October, 2017 the letters of appointment as well as the payments of union dues of clerical staff indicate that the law on redundancy is as set out in Section 41.(c) of the Employment Act, 2007 was not followed. He submitted that the selection criteria for staff to be declared redundant is based on who came last, seniority and time. He argued that this is repeated by Regulation of Wages and Conditions of Service under Cap 229 which was saved by Labour Institutions Act per Section 63 of Labour Institutions Act. He cited Section 15(6) of Labour Institutions Act which provides that regard has to be had to the seniority, skill etc. of the employee being declared redundant. He stated that the parties Collective Bargaining Agreement states the principle of redundancy is "last in first out" in any particular cadre of employees affected. He stated that the employees pay code shows when the employee was employed with the larger series showing the employee is the latest while lower numbers indicate the employee is older in service. He submitted that if the law was followed, the Respondent would have picked those who came later and that there are more than 45 clerical staff who joined the Respondent later and that these 45 staff could have supplied the two the Respondent wished to declare redundant. He submitted that the picking of the two Grievants is contrary to what is provided in law. He stated that the Respondent should follow the law strictly in consultation with Union as none of the two is eligible for redundancy for whatever reason. He thus prayed that the selection be declared null and void. He sought costs and that the interim orders be extended till the date of the ruling.

2. The Respondent was opposed and filed a Replying Affidavit which was sworn by Laban Sogomo the Head Employee Relations at the Respondent. He deposed that he has comprehended the application by the Claimant on behalf of the two members and that the Respondent had complied with the law and the terms of the Collective Bargaining Agreements entered between the Claimant and the Respondent. He asserted that the orders sought were not fit for grant as the notice of motion was not predicated on a suit as no claim had been filed. He thus urged the court not to grant the orders sought. The Respondent filed a list of authorities and placed reliance on the Constitution, the Employment Act, the Labour Relations Act, the Employment and Labour Relations Court (Procedure) Rules 2016 as well as the cases of **Peter Mwema Kahoro v Benson Maina Githethuki [2005] eKLR**, **Joseph Kibowen Chemjor v William C. Kiseru [2013] eKLR** and **David Kimathi Wachira v Director of Public Prosecution & Another [2017] eKLR**. The decisions all have a common thread which is that the mode and manner of moving a court must be in accord with the rules and where the procedure adopted in moving the court the court would be obliged to dismiss the action as it was not properly instituted. In the case of **Peter Kahoro v Benson Githethuki**, Azangalala J. (as he then was) upheld the provision in the Civil Procedure Rules that states that every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed. I am persuaded that this is the correct position as there must be something that initiates a court action. The Employment and Labour Relations Court (Procedure) Rules 2016 under Rule 4 prescribes the following:-

4.(1) A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out –

(a) the name, physical and mailing address and full particulars of the claimant;

(b) the name, physical and mailing address and full particulars of the respondent;

(c) the name, physical and mailing address and full particulars of any other party involved in the dispute;

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3. The application in the main is one that seeks to reverse the course of the redundancy apparently declared in the Respondent. From the submission of the Claimant/Applicant, it would seem that there is objection to the selection criteria used by the Respondent in selecting the persons to be declared redundant. Redundancy is provided for under the law. Section 40(1) of the Employment Act provides as follows:-

40(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 each 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 the skill, ability and reliability of each particular class of employees affected by the redundancy

4. The law thus provides the principle of last in first out or first in last out. Seniority is to be considered alongside the other factors set out under the statute. In this case it is alleged that the redundancy is not in keeping with the law as cited. In light of the consequences of an order such as the one the court is being invited to make, it is apparent that the only proper avenue for ventilation of the issues in dispute is a full hearing on merits. The matters raised cannot be determined on an interlocutory application. In addition to the foregoing and more critical to the application presented, there is no claim before the court and therefore the substratum of the 'suit' is absent. The application is incompetent, incurably defective and not fit for grant. It is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 16th day of November 2017

Nzioki wa Makau

JUDGE