REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1947 OF 2012

TRANSPORT AND ALLIED WORKERS UNION.....CLAIMANT

VS

SOCIETE INTERNATIONALE DE TELECOMMUNICATION AEORONAUTIQUES (SITA).....RESPONDENT

AWARD

Introduction

1. The Claimant in this case is a registered trade union covering the transport sector. The Respondent is a multinational company operating in Kenya. The Claimant brings this claim on behalf of three (3) of its members namely; Henry Nyabuto Nyarango, Wanjira Waira Kamau and Kennedy Nyariba Basweti (hereinafter referred to as the 'Grievants').

2. The Grievants were employed by the Respondent on diverse dates and were variously deployed to perform duties in the Common Use Terminal Equipment (hereinafter referred to as 'CUTE') under a contract between the Respondent and the Kenya Airports Authority (KAA). The Grievants worked for the Respondent until 31st August 2012 when they were declared redundant.

The Claimants' Case

3. In its Statement of Claim dated 27th September 2012, the Claimant claims that the redundancy process under which the Grievants lost their employment was unprocedural and in breach of the obtaining Collective Bargaining Agreement (CBA). The Claimant cites the following particulars of breach:

a. There were no meaningful discussions between the Union and the Respondent Company prior to the declaration of redundancy;

b. The Company did not make meaningful effort at finding alternative employment for the Grievants;
c. The Company treated the Grievants as if they were only employed to and could only perform the CUTE services which was not the case;

d. The Company was high handed and absolute in its correspondence with the Union contrary to the spirit and letter of the CBA.

4. The Claimant contends that in tabulating the redundancy dues payable to the Grievants, the Respondent failed to apply previous company practice on statutory obligations as provided under Clause

24 of the CBA.

5. The Claimant seeks the following remedies:

a) General damages for unlawful redundancy;

b) A declaration that the Respondent Company is contractually and legally bound to maintain its previous practice on statutory obligations arising from redundancy;

c) A declaration that the Respondent Company's previous practice on statutory obligations has been that the redundancy pay of 7 weeks for every completed year of service has been calculated net of tax;

d) An order of mandatory injunction directing the Respondent to compute the Grievants' redundancy benefits in accordance with the Company's previous practice on statutory obligations as contracted under Clause 24.5 of the CBA dated 16th July 2003;

e) Costs of the suit.

The Respondent's Case

6. In its amended reply the Respondent admits having declared the Grievants redundant from 31st August 2012. The Respondent however denies breaching the CBA as alleged by the Claimant. The Respondent states that the redundancy was carried out after due and adequate consultations with the Claimant. Further, the Respondent denies any high handedness on its part. The Respondent goes on to state that following termination of the CUTE contract by the KAA, the particular department was abolished and there was no longer a cost centre for the CUTE contract.

7. According to the Respondent, the Grievants were deployed exclusively within the cost centre for the CUTE contract and the declaration of redundancy was informed by termination of the contract. As a result, the Last In First Out (LIFO) Principle was inapplicable and there were no vacancies within the Respondent to which the Grievants could be absorbed.

8. The Respondent pleads that the issues raised in this case were determined in Cause No 109 of 2010 and are therefore *res judicata*. The Claimant is therefore bound by the decision in Cause No 109 of 2010 and the current claim is an abuse of the court process.

Findings and Determination

9. The issues for determination in this case are as follows:

a) Whether the issues raised are *res judicata* in light of the decision of this Court in Cause No 109 of 2010;

b) Whether the redundancy was lawful;

c) Whether the Claimant is entitled to the remedies sought.

Res Judicata?

10. In the early days in the life of this case, the Respondent raised a preliminary objection on the ground that the issues raised in this case were determined by my brother **Rika J** in Cause No 109 of 2010 and the Claimant's claim was therefore conclusively extinguished.

11. In considering the objection, I formed the opinion that it was not possible at the interlocutory stage, to determine whether the issues raised in this case were *res judicata*. I

therefore overruled the objection paving way for a full hearing of the claim. That did not however mean that the issue had been finally put to rest.

12. Having now considered the evidence adduced by the parties some of which was produced by an order of this Court, I must revisit the question whether the issues raised by the Claimant in this case are the same as those determined by **Rika J** in Cause No 109 of 2010 and whether these issues are therefore *res judicata*.

13. Cause No 109 of 2010 was between the Claimant and the Respondent with one Mike Odero as the Grievant. In the first case which is referred to as the ***Mike Odero Case*** in this award, the Claimant sued the Respondent for *'wrongful termination of Mr. Mike Odero on grounds of redundancy.'* In its Memorandum of Claim filed in Court on 11th February 2010, the Claimant took issue with the Respondent's decision to make Mike Odero's benefits tax deductible in spite of past company practice and Clause 24.5 of the CBA.

14. I have had occasion to read the award delivered by **Rika J** on 6th May 2011 as well as the ruling on application for review delivered on 7th December 2011. It seems to me that both in the award and in the ruling, my brother Judge dealt extensively with the question of whether the benefits payable to Mike Odero were to be subjected to tax. The basis of the argument on this issue was a clause in the CBA that made reference to previous company practice. The question then is whether this is the same issue now before the Court.

15. In its Memorandum of Claim in the case now before me, the Claimant made reference to irregularities in the declaration of redundancies. However, as the trial progressed, it became apparent that the main issue why the Claimant was in Court had to do with the money deducted from the Grievants' benefits on account of statutory tax.

16. The Claimant was at pains to draw a distinction between tax exemption which was addressed in Cause No 109 of 2010 and grossing up of the benefits before tax deduction. The question I must answer is whether this distinction is substantive or cosmetic.

17. The principle of *res judicata* is well grounded in law. Its aim is to prevent multiple litigation of issues. The Court was referred to the Court of Appeal decision in ***Hon. Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi [2014] eKLR*** where it was held that the essence of the principle of *res judicata* is to bring litigation to closure so that the same issues and parties do not keep showing up in court. Section 7 of the Civil Procedure Act bars a court from trying a suit whose subject matter has been substantially litigated upon by the same parties and finally determined by a court of competent jurisdiction.

18. It was submitted on behalf of the Respondent that the decision by **Rika J** in the ***Mike Odero Case*** on the interpretation of Clause 24.5 of the CBA bring the current dispute under the principles of *res judicata* and *issue estoppel*. In defining issue estoppel, the House of Lords in the case of ***Arnold & Others v National Westminister Bank PLC (1991) 2 A.C*** rendered itself as follows:

> "***Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."***

19. The ingredients of the twin principles of *res judicata* and issue estoppel are; same parties, same issues and a final determination of the issues by a court of competent jurisdiction.

20. In regular civil litigation, the parties in a particular suit are pretty obvious; a plaintiff and a defendant and sometimes an interested party. However, in labour matters, this rather obvious phenomenon acquires a uniquely complex character. This is especially so in a suit brought by a trade union on behalf of its members such as the instant case as well as the ***Mike Odero Case***.

21. To answer the question as to who the parties in a labour dispute are, one must examine the subject matter of each particular case. In my view, when the subject matter is easily assignable to a particular member who is the Grievant in a suit, then the parties to the suit are that member and the employer who is the Respondent. It would follow therefore that only the Grievant and the Respondent are bound by the decision arising from such a suit. Consequently, the Trade Union is not barred from bringing a similar suit against the same Respondent but on behalf of other Grievants.

22. On the other hand, where the subject matter casts its applicability net wider than a specific employee or group of employees, then parameters change. This is particularly so on matters touching on interpretation of a CBA. There is now firm jurisprudence from this Court to the effect that CBAs bind not only the trade union and the employer but also all unionisable employees of the employer (see ***Kenya Union of Journalists and Allied Workers Vs Nation Media Group and Another (Cause No 799 of 2010)*** and ***Union of Kenya Civil Servants v Kenya County Government Workers Union & Another [2014]eKLR)***.

23. The effect of this position is that once a matter touching on the interpretation of a CBA is determined by a court of competent jurisdiction, that determination binds the trade union, the employer and all unionisable employees of the employer covered under the CBA either presently or in the future. The trade union cannot therefore bring multiple suits on the same issue under the guise of varying Grievants.

24. With the foregoing in mind, what is the real dispute now before the Court? In my view, it is the interpretation of Clause 24.5 of the CBA which states as follows:

> *"the previous company practice on statutory obligations arising from 24 to be maintained."*

25. The Claimant presented comprehensive evidence on what they considered to be the previous company practice on statutory obligations. In my understanding, this was a practice where redundancy dues payable to employees were grossed up by 30% after which the resultant figure would be subjected to tax at 30%. This practice was applied to past redundancies of Joshua K'Odiawo and Peter Muhanda. In my understanding, both in the ***Mike Odero Case*** and the current case, the Claimant's complaint is that the Respondent failed to apply a well established company practice whereby the Respondent provided a tax cushion to employees leaving employment on account of redundancy.

26. According to the Respondent, the payments made to Joshua K'Odiawo and Peter Muhanda were discretionary and could not be applied as a basis for a company practice. The more fundamental question is whether this Court has the capacity to examine the fairness and reasonableness of the Respondent in denying the Grievants a tax cushion which had been extended to past employees.

27. My reading of the pleadings, submissions and award in the ***Mike Odero Case*** reveals that the issue of past company practice on statutory obligations was well ventilated and determined. Barring use of different terminologies and perhaps better presentation of the Claimant's case, this is the same issue now before me and I must therefore bow to the doctrine of *res judicata* as far as the issue of grossing up of the Grievant's benefits is concerned. The result is that this Court lacks jurisdiction to entertain the Claimant's claim for grossing up of redundancy dues payable to the Grievants in this case.

Legality of the Redundancy

28. Apart from the issue of past company practice on statutory obligations, the Claimant questioned the legality of the redundancy. The law recognises redundancy as a lawful means of termination of employment subject to well established safeguards. The Claimant Union states that

there were no meaningful discussions between itself and the Respondent Company prior to the declaration of redundancy.

29. Section 40(a) of the Employment Act, 2007 provides that whenever a unionised employee is to be declared redundant, the relevant trade union must be notified of the reasons and extent of the intended redundancy not less than one month prior to the effective date of the redundancy. The Claimant's 3rd witness, Dan Mihadi told the Court that there was written communication and a tele conference between the Claimant and the Respondent on the redundancy in issue. He however maintained that there was no meaningful engagement. Nevertheless there were no details on what was missing in the communication between the Claimant and the Respondent. Overall, the Court finds there was adequate notification of both the reasons and extent of the redundancy.

30. The other complaint made by the Claimant was that the Respondent did not make meaningful effort to find alternative employment for the Grievants. In this regard, the Claimant took the position that the Grievants were not employed solely in the CUTE contract and could therefore be deployed elsewhere in the Respondent Company once the CUTE contract came to an end. Related to this, is the Claimant's assertion that in effecting the redundancy, the Respondent failed to observe the LIFO principle set out under Section 40(c) of the Employment Act, 2007.

31. From the evidence on record, the Grievants were employed before commencement of the CUTE contract to which they were later deployed. In determining the legality of a redundancy, the Court will examine the *bona fides* and integrity of the process. It is not in dispute that the CUTE contract where the Grievants were deployed was terminated effective 31st August 2012 and all the employees working in this cost centre were declared redundant.

32. As held by **Murgor JA** in ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR*** the LIFO principle is not the sole criterion to be applied in declaration of redundancies. LIFO must always be combined with skill, ability and reliability together with the labour needs of the employer. This becomes even more critical where owing to the dictates of business and industry a redundancy targets a particular department or division in an organisation.

33. In the instant case, the Respondent was forced to shut down an entire cost centre whose lifeline was the CUTE contract. The Claimant maintained that the Grievants could have been deployed elsewhere. The Court did not however find any evidence of the existence of suitable vacancies to which the Respondent failed to deploy the Grievants.

34. The Claimant's claim that the redundancy was unlawful must therefore also fail. The result is that the Claimant's entire is dismissed.

35. Each party will bear its own costs.

36. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS

22ND DAY OF JANUARY 2016

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JUDGE

<u>Appearance</u>:

Mr. Mungla for the Claimant

Mrs. Opiyo for the Respondent