



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS**

**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1653 OF 2015**

**KENYA UNION OF COMMERCIAL,**

**FOOD AND ALLIED WORKERS ..... APPLICANT**

**VERSUS**

**BIA TOSHA DISTRIBUTORS LIMITED ..... RESPONDENT**

Mr. Nyumba for the claimant / applicant

M/S. Gladwell Mumia for the respondent

**RULING**

1. The respondent served the claimant / applicant with a notice of intended redundancy dated 3<sup>rd</sup> August 2015. The intended redundancy was premised on anticipated lapse of a distribution contract between the respondent with East Africa Breweries Limited on who it wholly depended for its business.
2. The distribution contract was set to lapse on 30<sup>th</sup> September 2015.
3. One hundred and eight unionsable employees (108) were to be effected by the intended redundancy.
4. The notice did not state the date on which the intended redundancies would be effected. The same notice was written to the labour officer Industrial area.
5. The claimant / union replied to the notice by a letter dated 7<sup>th</sup> August 2015, in which the claimant requested for documents terminating the distribution contract between the respondent and the East African Breweries Limited.
6. The Union also noted that the notification followed the filing of an economic dispute in Court, and read mischief on the part of the Respondent on the matter.
7. Interim *ex parte* orders were granted on 21<sup>st</sup> September 2015, restraining the respondent from declaring seventy three (73) Unionsable employees redundant pending the hearing and determination of the suit.
8. This followed the filing of this application and claim on 21<sup>st</sup> September 2015 in which seventy three (73) persons were named to be targeted for retrenchment by the respondent.
9. As at the time, the respondent had issued the seventy three (73) employees with notices of intended retrenchment dated 4<sup>th</sup> September 2015, which were to take effect on 30<sup>th</sup> September 2015.
10. The applicant stated that as of that date, the respondent had not provided documentary evidence to show that its contract with East Africa Breweries Limited was about to lapse.

11. That it was customary for the said contract to lapse but same was renewable and the intended redundancies were not justified.
12. That the employees once retrenched would suffer harm not adequately remediable by way of damages since it was difficult to get employment thereafter from the same employer in the event the distribution contract was not terminated.
13. Instead of filing a replying affidavit, the respondent moved another application on a certificate of urgency on 29<sup>th</sup> September 2015, but the duty Judge declined to grant interim orders and referred the matter to me for directions and or further orders.
14. The Court directed the respondent to file a replying affidavit to the initial application to allow the matter to be ventilated *inter partes*.
15. The respondent relies on replying affidavit of Anne Marie Burugu, the General Manager of the respondent Company.
16. From the evidence discerned from the supporting affidavit and the annexures thereto, it is clear that this dispute was reported to the Cabinet Secretary, Ministry of Labour, Social Security and Services on 14<sup>th</sup> September 2015 where it awaits ventilation.
17. The distribution agreement dated 1<sup>st</sup> October 2012 shows that it was to continue up to 30<sup>th</sup> September 2015 subject to early termination set out in Clause 5 or Clause 9.1.
18. That termination was by each party giving the other not less than ninety (90) days written notice given at any time after the expiry of the initial term.
19. That by 1<sup>st</sup> July of each year, the parties had to agree on business plan and performance targets failing which the business plan for the preceding year would apply.
20. The respondent relies on a notice of contract expiry dated 6<sup>th</sup> August 2015. The letter simply reminded the respondent that the current contract would continue up to 30<sup>th</sup> September 2015 and that issuance of a new contract would depend on achievement of key performance indicators (KPIs) listed as;
  - i. outstanding performance;
  - ii. achievement of good standards; and
  - iii. 100% DMI compliance.

21. The letter states that;

*“in the new contract, your performance will be constantly measured and reviewed against the above three (3) business objectives and hence used to advise Trade Terms.*

*Thank you for your continued support in covering the market during the offer period.*

*Please confirm your agreement by signing and returning to us the duplicate of this letters.”*

22. This letter by the Sales Director of Kenya Breweries Limited, clearly indicates an intention to renew the distribution agreement, subject to acceptance of the conditions given by the company to the respondent.

## **Determination**

23. The claimant / application has an obligation to establish a *prima facie* case with a probability of success for the Court to grant the interim orders sought.
24. The applicant has also to show that it would suffer irreparable injury, which would not adequately be compensated by an award of damages if the interim relief is not granted; and that, if the Court is in doubt it will decide the application on a balance of convenience.

**(see *Giella V. Cassman Brown & Company Limited* [1973] E.A. 358.**

25. The grant of a temporary injunction is an exercise of Judicial discretion which must be exercised

judiciously.

**(See *Sergent V. Patel* [1949] 16 E.A.C.A. 63).**

26. In the present case the applicant has demonstrated that the basis for which the retrenchment of seventy three (73) of its members is made is without merit since East Africa Breweries Limited has not in the notice dated 6<sup>th</sup> August 2015 indicated its intention not to renew the distribution agreement on which the respondent's business is premised. To the contrary, the letter evinces a clear intention by the East Africa Breweries Limited to renew the contract on conditions which were not new but were incorporated in the initial contract.
27. The apprehension by the respondent is not reasonable in the circumstances of the case. The Court finds that the applicant has established a *prima facie* case with a probability of success.
28. The loss of employment by seventy three (73) members of the claimant is not likely to be adequately compensated by way of damages. It is very difficult to get employment in the competitive Kenyan market.
29. The Court finds it prudent and convenient on the face of the evidence before Court that the distribution of the products by the respondent continued unhindered up to the time of hearing this application to grant the temporary injunction until this suit is heard and determined. Should the circumstance change to the disadvantage of the respondent, it will be at liberty to apply for equitable relief to the Court.
30. Accordingly the application is granted.
31. Costs in the cause.

**Dated and Delivered at Nairobi this 15<sup>th</sup> day of January 2016.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**