



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 25 OF 2016

GLADYS MUTHONI MWANGI & 20 OTHERS PETITIONERS

VERSUS

BARCLAYS BANK OF KENYA LIMITED 1ST RESPONDENT

BARCLAYS AFRICA GROUP LIMITED 2ND RESPONDENT

RULING

1. Through an amended Notice of Motion dated 21st March 2016, the Petitioners are seeking for orders that;

1. ...
2. ...
3. *The Respondents be hereby ordered to publicly disclose the detailed criteria and mechanism used to short-list and identify the employees eligible for redundancy, and to disclose all documents, correspondent, and information, internal or otherwise, generated or obtained in the process of declaration of redundancy of the petitioners;*
4. *The Respondents be hereby ordered to disclose and give access to the Petitioner of all information necessary for the enforcement of the petitioners' fundamental rights, including internal information, touching on the early retirement, redundancy and pay packages offered to other Barclays staff in Kenya and the region within the last ten years of current date;*
5. *A conservatory order be issued to restrain the Respondents ... from closing down, suspending or in any manner ceasing operations of here Africa Regional office in Nairobi, terminating, suspending, declaring or in any other manner relinquishing the services of the Petitioners or transferring any of the job functions currently vested in the Africa Regional office in Nairobi from the said location or proceeding with any transaction or action intended to achieve the aforesaid pending the hearing and determination of this petition.*
6. *The Court do give any other or further orders that will favour the course of justice*
7. *Petitioners' costs be provided for.*

2. The application is supported by the affidavit of Gladys Muthoni Mwangi and on the grounds that the constitutional and legal rights of the Petitioners have been gravely threatened and violated and or are likely to be violated through the unconstitutional acts of the respondents. Unless restrained, the Respondents intend to steal a march on the Petitioners by closing down Barclays Africa Regional office in Nairobi prior to agreeing on a redundancy package with the Petitioner and complying with all other legal and regulatory requirements.

3. Other grounds in support of the application are that the Respondents have purported to conduct

redundancy process involving the Petitioners but have violated their letter and spirit of the constitution and petitioner's legitimate expectations by the manner in which they have conducted the process and by lack of transparency on the criteria for selection and determination of redundancy package.

4. Ms Mwangi in the supporting affidavit avers that they learnt that the 2nd Respondent office would close down on 31st March 2016 without payment of a redundancy package and without obtaining the required legal and regulatory approvals. The requirements for redundancy have not been met and unless the Court restrains the Respondents in their action of closing the 2nd Respondent Nairobi office the Petitioners shall suffer irreparable damage and loss.

5. In her **Supplementary Affidavit filed on 22nd March 2016**, Ms Mwangi also avers that on 14th January 2016, Mr Richard Daniel the Chief Operating Officer of the 2nd Respondent communicated to the 1st Respondent and the Petitioners that they would close their Nairobi Regional Office. The meeting held did not indicate that the Petitioners would be declared redundant. The Petitioners are employees of the Respondents first employed by the 1st Respondent and then seconded to the 2nd Respondent who had the control and integration of Barclays Africa working to support other regions where Barclays Africa has shareholding. The 1st Respondent issued administrative letters to the Petitioners for their hiring with the 2nd Respondent who would recharge all costs they incurred to the 2nd Respondent which was then an integrated employment with both Respondents responsible.

6. Ms Mwangi also avers that the Respondents are trying to make savings by cutting down the employment of the Petitioners without adequate redundancy package and replacing them with residents of South Africa which amounts to discrimination on the basis of nationality. Most petitioners' jobs are not being cut down but are being migrated to South Africa with the example of Rachel Gitau, head of Corporate operations – Rest of Africa, which position is being transferred to South Africa and split into two jobs; the job held by Enoch a supervisor is being transferred and split into four jobs; and various other positions. The restructuring is not driven to enhance efficiency rather it is to deny the Petitioners an appropriate package.

7. The meeting held on 14th January 2016 was for 'meet and greet' and present were Mr Richard Daniel, Paul Miszewski for the 2nd Respondent and Abdi Mohamed for 1st respondent; on 15th January 2016 the Petitioners were all informed in a one-on-one meeting that they would be declared redundant after which each Petitioner was given a redundancy letter dated the 14th of January 2016.

8. In reply, the Respondents filed a **Replying Affidavit sworn by Geneva Musau** the Human Resource Director of Barclays Bank of Kenya Limited, 1st respondent. He avers that the 1st Respondent is registered in Kenya while the 2nd Respondent is a South African subsidiary of Barclays Bank PLC (UK) as the holding company with the 1st Respondent being the main shareholder. The 2nd Respondent is headquartered in South Africa and until recently has operated its regional and management technology office in Nairobi. The Petitioners are employed by the 1st Respondent and seconded to serve the 2nd respondent. The Petitioners cannot therefore file suit against an entity that is not their employer and the Court has no jurisdiction regarding the 2nd Respondent and should not issue a conservatory order against it and the closure of the 2nd Respondent office in Nairobi will not affect the 1st Respondent operations in Kenya and its employment of the petitioners.

9. Mr Musau also avers that noting the impact of the 2nd Respondent closure of its office in Nairobi, on 14th January 2016 they held a meeting with the Petitioners and an agreement on the modalities and terms of exit between the Petitioners and the 1st Respondent was reached. A further meeting on 19th January 2016 informed the Petitioners that they would formally be released on 1st April 2016. Subsequent meetings have failed to yield an agreement as the Petitioners are seeking for an enhanced package than had been agreed upon on 14th January 2016. The Respondents have continued to offer the Petitioners support in terms of outplacement and redeployment.

10. Mr Musau also avers that the Petitioners have not established a *prima facie* case to warrant the orders sought, the dispute relates to the Petitioners and the 1st Respondent whose operations in Kenya have not ceased. The orders sought should not be granted as any loss suffered can be adequately compensated for by way of damages.

11. Both parties made their oral submissions in court, the Court has looked at the pleadings and the cited cases in analysing the issues herein and the findings thereof. I have considered all these submissions herein.

12. The matter herein revolves around a meeting held by the 2nd Respondent and the notice issued on 14th January 2016. These relate to the closure of the Barclays Africa Regional office in Nairobi, the business of the 2nd respondent. Subsequent to this meeting and notice, the 1st Respondent issued notices to the Petitioners dated 19th January 2016 on the grounds that due to restructuring and closure of the 2nd Respondent office in Kenya, they would be released from their employment with effect from 1st April 2016.

13. Where a redundancy has been declared, section 40 of the Employment Act is implicated as held in the case of **Kenya union of Commercial Food & Allied Workers versus Corn Products (K) Limited, Cause No.1302 of 2012**. Section 40 sets the minimum statutory redundancy procedures applicable in a redundancy or restructuring of a business. These are procedures approved by this Court in various cases and now reaffirmed by the Court of Appeal in the case of **Kenya Airways Ltd versus Aviation 7 allied Workers Union Kenya & Others, Civil Appeal No.46 of 2013**. There must exist a valid and fair reason based on a company operational requirements and the termination of services/employment on account of redundancy so as to find justification. The job or career loss is due to involuntary means through no fault of an employee. The termination of employment is at the initiative of the employer, where the services of an employee are no longer required due to the restructuring or reorganisation of business and abortion of office leading to the loss of employment.

14. As such, the regulation of redundancy in Kenya is not only by law but also through government policy. Any loss of employment through involuntary means affect public policy on employment and productivity and as such, even where the employer has reasons for, and the extent of, the intended redundancy or restructuring of its business, a notice must issue to the employees and to the labour office responsible to the area *not less than a month prior to the date of the intended date of termination on account of redundancy*. The notice in general is meant to alert all employees of the business reorganisation and restructuring whereas the notice to the Labour officer is meant to involve a representative of the Minister responsible for Labour. The time set of *not less than one month* is to ensure that all the agencies responsible are engaged appropriately and particularly the Minister Representative is able to advise the employer on all requirements that go with a redundancy and how best to implement the requirements set out under section 40 of the Employment Act. Such requirements are not at the option of an employer. The requirements are mandatory. Where not followed, any notice issued by the employer negate the entire purpose of redundancy.

15. Parties in a redundancy situation are required to be open, transparent and candid so as to effectively address the emerging issues especially where a redundancy package is under negotiations. The averments by Mr Musau for the Respondents that the 1st Respondent is the employer of the Petitioners and that the closure of the 2nd Respondent office in Nairobi will not affect the employment of the Petitioners is not candid. The Petitioners have already been issued with termination letters and a redundancy package is under negotiation. As such, the employment of the Petitioners with the 1st Respondent has been affected with their deployment to the 2nd Respondent and the eventual termination notice by the 1st Respondent taking effect on 31st March 2016.

16. The agreement and terms of exit agreed upon on 14th January 2016 is not set out or submitted for the Court assessment as of its provisions. The question of outplacement and redeployment is a legal requirement. Such should be demonstrated by the employer and be in compliance with the mandatory

provisions of section 40 of the Employment Act. The law gives emphasis thus;

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

17. The *employer* must issue notice of redundancy to its *employees*. The contest here by the Respondents is that the Petitioners are the employees of the 1st Respondent and the 2nd Respondent has nothing to do with the orders sought in court. That the Petitioners were employed by the 1st Respondent and seconded to the 2nd Respondent that now wishes to close its Nairobi office. However, where the 1st Respondent is the employer, the notice dated 14th January 2016 is issued by the 2nd Respondent and though not copied to the Labour Officer as required, the 1st Respondent has relied on this notice to issue termination letters to the petitioners.

18. This cannot be! To allow such a practice would be to render article 41 of the Constitution on fair labour practice impotent.

19. Even where there is evidence that the employment contract is between the 1st Respondent and the Petitioners, such employment is linked to the 2nd Respondent through deployment. The Respondents cannot disengage from the other for one to declare a redundancy and for the other to issue termination. Such would defeat the very essence of a legal framework that regulate employment in Kenya and the purpose for which a redundancy is regulated. I find both Respondents have a responsibility to the Petitioners herein that cannot be delinked for the Court to effectively address all the issues raised in the petition without the other. Both Respondents are necessary parties herein. One offered employment and the other benefited from the labours of the petitioners. One has declared a redundancy while the other has issued termination letters. To remove one would create a lacuna and render the Court adjudication of the matter largely academic. Such is not the purpose of this court.

20. On matters of who the employer was the implications of any secondment, such can only be unravelled at a full hearing. To address the issues in the interim would be to ignore the intentions of parties, the nature of employment and the purpose of secondment.

21. The notice thus commencing the redundancy and issued by the 2nd Respondent is of no legal value. It has failed the legal test set out under section 40(1) (a). The government officer, Labour Officer and the Minister were not seized of the matter as required. Such is mandatory.

22. The Petitioners are also seeking orders against the Respondents to disclose the criteria used for shortlisting eligible employees for redundancy and that they give Petitioners access to all documents and records relevant to the redundancy. Where the notice contemplated under section 40(1)(a) of the Employment Act is procedurally issued, such are matters that can legally and as a matter of course be accessible within the consultations contemplated under section 40 once the initial notice declaring a redundancy is issued. These are procedures relevant and necessary particularly for employees who are not unionised. Each employee must be brought on board to appreciate and understand *the reasons for, and the extent of, the intended redundancy*. Such is the essence of section 40(1) (a) of the Employment Act. It is not just sufficient for an employer to issue notice, such notice must be accompanied with *the reasons for, and the extent of, the intended redundancy*. Where an entire office is affected, that does not remove the employer from giving the reason(s) for the redundancy or the extent to which the same would be carried out. As submitted by the Petitioners that their job/positions are being migrated to South Africa, such would be addressed in the context of the reasons for the redundancy and its extent. Only after such procedures are complied with can the *employer* proceed to issue the next notice on termination of employment.

23. The attendance of the Labour Officer in these procedures cannot be overemphasised. This is the government representative in addressing factors and matter for consideration by an employer in addressing a redundancy in Kenya. See **David Matovu & 103 Others versus Africa Nazarene University, Cause No.2286 of 2012** at paragraph 44;

... Employment is very personal and the loss of it can be traumatic if not handled well. Since a redundancy is not due to the fault of any of the parties to the employment relationship, parties are required to engage in consultations and thus the need to involve the Labour Officer not as a point of sharing information but as a source or reference to guide on the entire process. This is a public officer, well acquainted with the necessary provisions in labour relations and employers should gladly utilise the Labour Officers expertise to avoid missing out on the practical details that go with the redundancy process.

24. Without delving into the merits of the petition at this stage, noting matters set out above, I find sufficient grounds for the grant of the orders applied for by the Petitioners. The Court shall grant conservatory orders in the interim and pending hearing of the main Petition. The Petitioners' employment shall be secured pending hearing of the Petition.

25. The Petitioners have raised the matter of discrimination against them on the grounds of nationality. Such is a serious matter, when pleaded, this Court is bound to stop everything else and delve into the subject as discrimination at the work place is outlawed under section 5 of the Employment Act read together with article 27 and 41 of the constitution. However, such require the Court to take evidence as such cannot be addressed within the current application for interim orders.

26. Noting the matters now before court, the orders with regard to conservation of the employment of the Petitioners, the petition should be heard on priority basis and within the next 30 days for the Court to render judgement on all matters addressed conclusively. Parties shall therefore exchange their responses, submissions on the petition and be allocated an appropriate date at the registry on priority.

In conclusion, application dated 15th March 2016 and Amended on 21st March 2016 is allowed and the following orders made;

- a. **The Respondents are hereby restrained by themselves or through their agents or representatives or any persons claiming through them from closing down or ceasing operations of their Africa Regional office in Nairobi; terminating, declaring redundant or in any manner relinquishing the services of the Petitioners, transferring any of the job functions currently vested in such office to any other location other than Nairobi pending hearing of the Petition;**
- b. **The notice dated 14th January 2016 issued at the instance of the 2nd Respondent is hereby lifted;**
- c. **Noting the orders above, parties shall exchange their responses and submissions and be allocated an appropriate date within the next 30 days for hearing and disposal of the Petition;**
- d. **Costs herein to the Petitioners.**

Orders accordingly.

DELIVERED IN OPEN COURT AND SIGNED THIS 31ST DAY OF MARCH 2016.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Lilian Njenga

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