



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 637 (N) OF 2009**

**BAKERY CONFECTIONERY FOOD MANUFACTURING &  
ALLIED**

**WORKERS UNION (K).....CLAIMANT**

**VERSUS**

**SPIN KNIT DAIRY LIMITED.....1<sup>ST</sup> RESPONDENT**

**BROOKSIDE DAIRY LIMITED.....2<sup>ND</sup> RESPONDENT**

Mr Amalemba for the Claimant

Mr Moleje for the Respondent

**JUDGEMENT**

1. The suit was commenced vide a memorandum of claim dated the 29<sup>th</sup> October 2009. The suit was filed by the Claimant Union on behalf of all unionisable employees of the 1<sup>st</sup> Respondent.
2. The Claimant alleges unlawful, malicious and wrongful redundancy of all employees of Spin Knit Dairy limited on 6<sup>th</sup> October 2009 leading to an unlawful and irregular absorption of the employees into the employment of Brookside Dairy Limited which adversely affected the said employees.
3. The Claimant seeks;
  - i. A declaratory order that the notice of redundancy dated 15<sup>th</sup> October 2009 issued to Unionisable employees of the 1<sup>st</sup> Respondent as illegal and unlawful
  - ii. A declaratory order that all the unionisable employees in the employment of the 1<sup>st</sup> Respondent as on 15<sup>th</sup> October 2009 so far purportedly declared redundant have been unlawfully declared redundant.
  - iii. A permanent injunctive order to restrain the 1<sup>st</sup> Respondent from declaring redundant any of its unionisable employees save as provided for in the collective agreement.

- iv. A permanent injunctive order to restrain the 1<sup>st</sup> Respondent from forcing its unionisable employees to be contracted through the 2<sup>nd</sup> Respondent herein.
- v. A declaratory order that the purported absorption of the unionisable employees of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent is unlawful.
- vi. A restraining order halting the 2<sup>nd</sup> Respondent from issuing fresh contracts of employment to the unionisable employees of the 1<sup>st</sup> Respondent outside the registered collective agreement.
- vii. An order for the immediate reinstatement by the 1<sup>st</sup> Respondent of all the grievants herein unlawfully and improperly declared redundant into their former employment without any loss of pay, benefits and/or seniority.
- viii. An order compelling the 1<sup>st</sup> Respondent to pay to its unionisable employees their full entitlements under clause 8 of the Registered Collective Bargaining Agreement No 273 of 2008 inclusive of gratuity/retirement benefits under clause 25 of the said Agreement of the employees upon being purposely declared redundant.

4. The Claimant relies on annexure A – W attached to the memorandum of claim; Notice to produce filed on 3<sup>rd</sup> February 2010, list of legal authorities duly filed and written submissions filed on 22<sup>nd</sup> September 2015.

5. The Respondent filed a memorandum of reply on 1<sup>st</sup> November 2009 in which they admit having declared all the employees of the 1<sup>st</sup> Respondent redundant, paid all their terminal dues pursuant to the declaration of redundancy and all employees subsequently absorbed by the 2<sup>nd</sup> Respondent to fresh employment.

6. The Respondents in particular deny having violated the Collective Bargaining Agreement between the Claimant and the 1<sup>st</sup> Respondent at section 40 of the Employment Act, 2007 which governs declaration of redundancies for lawful reasons.

7. The Respondent rely on annexures 1 – 10 of the memorandum of reply which clearly show the sequence of events arising from the take over of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent pursuant to which the staff of the 1<sup>st</sup> Respondent were declared redundant by fact of take over of business by the 2<sup>nd</sup> Respondent with effect from 6<sup>th</sup> October 2009.

### **The Agreement.**

8. The Merger Agreement between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was submitted to the court under seal vide a letter dated 17<sup>th</sup> September 2010 for reasons of confidentiality and the following are the pertinent matters noted by the court in the document:-

- i. The Agreement dated 30<sup>th</sup> October 2009 between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent is for the sale of the business (as a going concern) and assets of Spin Knit Dairy Limited.
- ii. In terms of clause 2.4 of the Agreement, save for the elections made under clause six (6) of the Agreement, the 2<sup>nd</sup> Respondent did not take over any liabilities of the 1<sup>st</sup> Respondent and same continued to vest in the 1<sup>st</sup> Respondent.
- iii. Clause six (6) deals with payment of value added tax.
- iv. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not constitute a partnership or agency and either of the parties has no authority to bind the other.
- v. The Agreement is to be governed by and construed in all respects in accordance with the laws of Kenya.
- vi. The properties, trademarks and motor vehicles subject of the agreement are found in the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> schedule respectively and were all taken over by the 2<sup>nd</sup> respondent.

### **Determination**

9. The issues for determination in this matter are as follows;

- i. Whether there was an acquisition of the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent or was it a merger?
- ii. Whether the decision by the 1<sup>st</sup> Respondent to declare the employees of the 1<sup>st</sup> Respondent redundant was lawful and whether it was implemented in compliance with section 40 of the Employment Act, 2007 and clause 7 & 8 of the CBA and therefore lawful and fair.
- iii. Whether the Claimant is entitled to the reliefs sought.

#### **Issue i**

10. Upon a careful study of the agreement between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent it is clear that the 2<sup>nd</sup> respondent acquired the entire business and assets of the 1<sup>st</sup> Respondent with effect from 6<sup>th</sup> October, 2009. The operation of the 1<sup>st</sup> Respondent ceased as a matter of fact. In the acquisition agreement, the fate of the employees of the 1<sup>st</sup> Respondent was not spelt out. However, the 1<sup>st</sup> Respondent was responsible for all its liabilities which would include paying the terminal benefits of the employees of the Claimant.

11. It is common cause however that the 2<sup>nd</sup> Respondent agreed and as a matter of fact absorb all the employees of the 1<sup>st</sup> Respondent. It is also clear that the operations of the 1<sup>st</sup> Respondent came to an end. Therefore the 1<sup>st</sup> Respondent did not merge with the 2<sup>nd</sup> Respondent but the 2<sup>nd</sup> Respondent acquired the business and assets of the 1<sup>st</sup> Respondent.

#### **Issue ii**

12. It is not in dispute that the 1<sup>st</sup> Respondent declared its employees redundant in anticipation of its acquisition by the 2<sup>nd</sup> Respondent. What is in issue is whether the decision to declare the employees redundancy was lawful and whether the procedure followed in effecting the same complied with the CBA and section 40 of the Employment Act, 2007.

13. Section 2 of the Employment Act No 11 of 2007 defines redundancy thus;

*“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an 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”.*

14. The 1<sup>st</sup> Respondent having sold its business to the 2<sup>nd</sup> Respondent had no office to be occupied or job to be done by its employees. The 1<sup>st</sup> Respondent called the claimant union to a meeting held on 5<sup>th</sup> October 2009 to explain to them the details of the acquisition.

15. After the meeting between the 1<sup>st</sup> Respondent and the Union on 5<sup>th</sup> October 2009, the 1<sup>st</sup> Respondent wrote to the union and the Labour Office vide letters dated 6<sup>th</sup> October 2009 of its intention to declare its workers redundant and the extent of the redundancy to involve all the employees in view of the acquisition. The notice was produced before court and marked ‘BS6’. Individual employees were subsequently served with letter of redundancy giving the reasons thereof and the package to each one of them which included;

- i. Salary and allowances for the days worked upto 31<sup>st</sup> October 2009
- ii. Accrued leave days outstanding as at 31<sup>st</sup> October 2009
- iii. Termination notice applicable to the employee
- iv. Gratuity payment where applicable
- v. Severance pay
- vi. Less any money owed to the 1<sup>st</sup> Respondent

16. It is not in dispute that the termination for the aforesaid reasons occurred and the requisite terminal packages were paid to each of the affected employees. As a matter of fact, all the employees were thereafter taken up by the 2<sup>nd</sup> Respondent and employed afresh. The court notes that the union protested in a letter dated 6<sup>th</sup> October 2009 stating that it was taken by surprise by the Agenda of the meeting and called for setting up of an agenda for future meetings. No subsequent meetings took place before the declaration of redundancy on 6<sup>th</sup> October 2009.

17. On 16<sup>th</sup> October 2009 the union reported a dispute to the Ministry of Labour and letter was acknowledged on 16<sup>th</sup> October 2009 by the Chief Industrial Officer in which parties were requested to submit in writing their respective proposals to Mr. P. N. Macharia the appointed conciliator.

18. A meeting arranged for between the parties scheduled for 15<sup>th</sup> October 2009 did not take place. A joint conciliation meeting was set for 22<sup>nd</sup> October 2009. The 1<sup>st</sup> Respondent expressed its reservation on the intended meeting of October 22<sup>nd</sup> 2009 and insisted on the Union to respond to the 1<sup>st</sup> Respondents letter dated 16<sup>th</sup> October 2009. On 23<sup>rd</sup> October 2009, the Conciliator declared the dispute as unresolved due to the managements failure to co-operate in the settlement of the dispute out of court.

19. Section 40 of the Employment Act, 2007 provides;

*“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 the employee personally in writing and the labour officers;*
- c. The employer has in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected the redundancy;*
- d. Where there is in existence a collective bargaining agreement between an employer and a trade union setting out terminal benefits payable upon redundancy, the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*
- e. The employer has where leave is due to an employee who is declared redundant paid off the leave in cash;*
- f. The employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and*
- g. The employee has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service”.*

20. As stated earlier, the Claimant Union and the 1<sup>st</sup> Respondent have a recognition agreement and a CBA in place Clause 7 thereof is titled Redundancy and provides;

*“(a) should it become necessary for the company to terminate the service of an employee or employees on grounds of redundancy, consideration of either membership or non membership of the union shall not be taken into account. Selection for such termination will be determined by the company on consideration of merit and ability, but when these factors are equal as between employees, the “last in” “first out” principle shall apply.*

*(b) When redundancies appear inevitable the company shall inform and discuss with the union before any redundancies are implemented, the reasons for and the extent of the intended redundancy prior to the issue of notice to the employee(s)” .*

21. Clause 8 provides the package applicable to employees declared redundant and it is not in dispute that

the employees were paid in full compliance with this clause. It is the procedure set out under Section 40 of the Employment Act and clause 7 which is the subject of the dispute. From the outset, the court notes that all employees of the 1<sup>st</sup> Respondent including management and unionisable staff were declared redundant.

22. It is without a doubt that the 1<sup>st</sup> Respondent on 6<sup>th</sup> October 2009 notified the Union and the District Labour Officer of the intended redundancy to take place with effect from 1<sup>st</sup> November 2009.

23. The evidence before court also clearly show that there was no need for a selection criteria to be applied because all employees were declared redundant. The Court is also satisfied that all the terminal dues including leave, not less than one month's salary in lieu of notice and severance pay in terms of the CBA were duly paid to the employees declared redundant. No evidence of discrimination whatever has been adduced nor was alleged discrimination pleaded.

24. The only issue noted by the court is with respect to the notices issued in terms of section 40(1) (a) and (b) because they fell short of one month in that the same are dated 6<sup>th</sup> October 2009 and redundancy was to take place effective 1<sup>st</sup> November 2009. The notice was therefore short by one week. There is however no evidence adduced before court to how this defect by the 1<sup>st</sup> Respondent prejudiced the Claimant or the affected employees.

25. As a matter of fact all employees declared redundant were absorbed by the 2<sup>nd</sup> Respondent and none of the employees affected has placed evidence of prejudice before court in the way they were treated by the 1<sup>st</sup> & 2<sup>nd</sup> Respondent before, during and after the declaration of the redundancy.

26. The Court however notes that the manner of engagement between the 1<sup>st</sup> Respondent and the Claimant and between the 1<sup>st</sup> Respondent and the appointed Conciliator fell far short of expectation. There was intragigence on the part of the union and the management of the 1<sup>st</sup> Respondent which to a large extent contributed to the escalation of a dispute which ought to have been resolved at the earliest opportunity.

27. The court commends the manner the takeover was carried out especially in that all terminal benefits were paid and all employee taken up in new employment by the 2<sup>nd</sup> Respondent. This is a practice to be encouraged rather than be censored.

28. To this extent, the court finds that the suit by the Claimant Union lacks merit. The reliefs sought are not warranted and the suit is dismissed with no order as to costs as against the Claimant Union.

29. There is no award for costs because the respondent by its failure to attend conciliation meetings contributed to the unnecessary filing of this suit.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of March 2016**

**MATHEWS N. NDUMA**

**JUDGE**