



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 2287 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 8th March, 2016)

COMMUNICATION WORKERS UNION

OF KENYA (COWU).....CLAIMANT/APPLICANT

VERSUS

TELKOM (K) LIMITED RESPONDENT

RULING

1. The application before Court is dated 22nd December 2015 filed the same day seeking the following orders:

1. That this Honourable Court do certify this application as urgent requiring to be heard ex parte during the current vacation and that service of the same be dispensed with in the first instance.

2. That the Honourable Court do grant an injunction restraining the Respondents by themselves, agents and or servants from commencing or continuing any exercise of redundancy affecting the unionisable members of staff of the Respondent who are members of the Claimant pending the hearing and determination of this application inter partes.

3. That the Honourable Court upon hearing inter partes does grant the prayers sought in prayer No.2 above pending the hearing and determination of this suit.

4. That the costs of this application be provided for.

2. The Application is supported by grounds as set out in the Notice of Motion and on the supporting affidavit of Benson Okwaro:

1. Under section 4 (1) of the Industrial Court Act No 10 this Honourable Court is established to settle employment and industrial relations disputes and the furtherance securing of and maintenance of good employment and labour relations in Kenya.

2. It is the sacrosanct and incumbent duty of the honourable court to reign in any persons who threatens to disrupt the maintenance of good industrial relations.

3. Article 4 of the Constitution of Kenya accords everyone with the fundamental right to fair

labour practices and the acts and or omissions of the Respondent complained of are herein in violation of that constitutional right.

- 4. Consultation has been accepted as one of the key components of fair labour practices.**
- 5. The respondent in utter violation thereof has jumped the gun by announcing the commencement of the exercise of redundancy while the consultations are ongoing with the next meeting scheduled for January 2016.**
- 6. The respondent has refused and or ignored to engage in any meaningful consultation of critical issue in gross violation of the existing and binding collective bargaining agreement (CBA) between the parties hereto which requires consultation before the commencement of implementation of the redundancy exercise.**
- 7. The respondent is intent on carrying out the redundancy on its own terms on key and critical issues such as severance pay and golden handshake.**
- 8. The claimant is apprehensive that if this happens then its members will suffer irreparable loss and damage.**
- 9. That will lead to bad industrial relations.**
- 10. If the orders are granted, the Respondent will not suffer any prejudice by resuming consultations.**

Summary of the Applicants Case:

3. The Claimant avers that they entered into a recognition agreement with the Respondent on the 3rd of December 2009 in keeping with Section 54(1) of the Labour Relations Act Cap 233, and executed a Collective Bargaining Agreement (CBA) on the terms and conditions of service of the Unionisable staff of the Respondent.

4. The Claimant states that the Collective Bargaining Agreement (CBA) became effective from the 1st of January 2015 to the 31st of December 2016 where the Claimants expressly agreed that they will discuss on modalities packages and implementation before any staff rationalization within the guidelines of the Employment Act 2007. (Copy has been annexed at page 95 of the Claimant's bundle of documents).

5. On the 30th of November the Respondent wrote to the Claimant with regard to the Respondents proposed Transformation Plan which included a declaration of redundancy of staff where they proposed to pay impacted workers:-

- a) One month's pay for each year completed of service**
- b) Payment of Notice Period**
- c) Payment in lieu of accrued annual leave**
- d) Transport allowance**

The claimant's state that they via a letter dated 4th of December 2015 countered this proposal by offering:

- a) Payment of severance pay of 90 days for each year worked**
- b) 2 months' salary as NOTICE**

c) Payment of Kshs. 100,000.00 as transport allowance

d) Leave days to be paid in cash

e) Leave days earned and not utilized to be paid in cash

f) Payment of outstanding overtime in cash

g) Payment of golden handshake of Kshs. 300,000.00

h) Etc

7. A meeting was scheduled for the 8th of December 2015 for further discussions under the chairmanship of Federation of Kenya Employers (FKE) where the Respondents stated that they would only pay severance pay for 30 days worked for each year and would not provide for a golden handshake. The Claimants position came down to 75 days for each year worked and a payment of Kshs. 200,000.00 in golden handshake.

8. A second meeting took place on the 14th of December where the Claimant again adjusted their position to 2 months pay and a golden handshake of kshs.100,000.00 the position of the Respondent did not change. They agreed to communicate this new position to each of their boards and wait on the chair for word on their next meeting in January of 2014.

9. However, the Respondent via a letter dated 16th of December 2015, stated:

“We trust that this communication brings our consultations to a close and look forward to your support as key stake holder...”

10. They then proceeded to serve a Notice of Intended Redundancies and announced that the said redundancies would start in the first quarter of 2016. This was tantamount to closing the consultations but they continue to state in the same letter that they were willing to engage the Claimants in discussions on the redundancy package which they find peculiar as they had closed consultation.

11. The Claimant avers that consultation has been accepted as a key plank to fair labour practices and Article 41 states that every person is entitled to fair labour practices. They refer to the case of **George Onyango Akuti vs G4S Services LTD [2013] eKLR**.

12. They further refer to the decision of **Kenya Airways LTD vs Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR** where the Court discusses what a consultation is and what it entails. Hon. J. Appeal Maraga lists them as:

(i) That consultations as found in Article 13 of the Recommendation 166 of the ILO convention No. 158 – Termination of Employment Convention 1982 is part of the Kenyan Law by virtue of Article 2(6) of the Constitution.

(ii) Consultation is implicit in section 40(1) under the Principle of fair play.

(iii) Consultation gives an opportunity for other avenues to be considered to avert or to minimize the adverse effects of terminations.

(iv) The consultations are meant for the parties to put their heads together and is an imperative in our law.

(v) Consultations have to be a reality not charade.

(vi) Opportunity must be given for parties to consider.

(vii) Parties must have and keep an open mind to listen to suggestions, consider them properly and then only then decide what is to be done.

(viii) Consultation must not be cosmetic.

13. The Claimants avers that the Respondent has walked out on consultations and has been rigid in its position, they are intent on having their way and their main concern remains the ongoing sale and not these talks.

14. By their own admission the Respondents in their appraisal in November 2014 confirm its phenomenal and exponential growth making it one of the two telcos to record continuous growth in the industry. They categorically say **“we managed for the first time to go past the Kshs. 1 billion mark revenue per month”**.

15. They intend on concluding the redundancy exercise as quickly as possible as it is a condition precedent for the ongoing sale and acquisition of the Respondents shares which deal must be concluded by the 30th of March 2016.

16. They urge the court to grant their prayers.

Response

17. The Respondent categorically denies the claims by the Claimant and has a Replying Affidavit dated 26th of January 2016 sworn by Wangechi Gichuki the Acting Chief Legal and Regulatory Affairs Officer, and a Supplementary Affidavit dated 10th of February 2016 sworn by Robert Irungu the Respondents Legal Advisor.

18. They also filed a memorandum of Reply dated 26th January 2016.

19. They submit that the right to declare redundancies is the prerogative right of the employer and the court would only be entitled to intervene where there is no genuine redundancy. They rely on the case of **Kenya Airways Limited vs Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR** where the court was of the view that as long as the employer believes that there is a genuine redundancy situation, it is not for the Court or the union to substitute their business judgment.

20. The Court further stated that:

“The Court cannot interfere where the employer exercises its discretion fairly and in response to real economic dictates affecting his business. The Court can only intervene where the redundancy law is abused through implementation of redundancy where there is no compelling reasons or circumstances to warrant redundancy or the procedure has not been followed”.

21. Moreover, they relied on the New Zealand case of **Aoraki Corporation Limited vs. Collins Keith McGavin** quoted in the Kenya Airways case where the Court held that:

“Where it is decided as a matter of commercial judgment that there are too many employees in a particular area overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy...”

22. Further, the Respondent relies on the law as stated under Section 40 of the Employment Act which gives the employer the right to declare redundancies. The section states:

(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 officer;

(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 by the redundancy;

(d) Where there is in existence a collective 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 employer 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.

23. They aver that the Claimant has failed to demonstrate how if at all the Respondent has breached the requirements set out in Section 40.

24. The redundancy was a fact that was not initially disputed by the Claimant and they only raised the issue of substantive redundancy in their supplementary affidavit which seems as an afterthought.

25. They aver that they undertook a comprehensive analysis of their processes and functions following a sharp rise in technological developments in the telecommunications industry where PwC noted that their labour costs reflected a lack of efficiency and recommended a reduction in the current workforce in order to achieve this. They also noted technological evolution and modernization of the network as well as a lack of profitability in the past 5 years necessitated the redundancy.

26. The Respondent states that they are still recording losses despite growth in revenue and the Claimant simply lacks and understanding of the true situation.

27. The Respondents submits that there is a real and genuine need for the proposed redundancy exercise and relies on the case of **Mornach Insurance Co. Ltd vs. Industrial Court & Another [2015]eKLR**. The Court stated:

“There comes a time when an enterprise is compelled by adverse economic conditions to resort to redundancy, usually after all other cost saving measures have proved insufficient to meet prevailing realities. The conditions that can precipitate redundancies are legion. They include .. poor profit margins and change in production technologies etc. it is a cardinal rule of business that no enterprise can operate while in a loss making environment. An insolvent business that cannot meet its objective ceases to justify its existence and is usually wound up.. but in practice, nothing prevents even apparently successful enterprises from embarking on staff rationalization or reduction in total number of employees. For example technological changes or innovation

geared toward productivity improvement may render the continued employment of certain cadres of employees untenable. Indeed business must not only live for today but must plan to survive tomorrow through regular staff audits and organizational restructuring.”

28. They further state that it was not Claimant to determine the commercial viability of the Respondents business. They rely on the case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the court observed:

“It is not necessary to consider all the reasons that the learned Judge gave for essentially decided was that redundancy was not commercially necessary and that more consultation was necessary. This was a wrong test. As long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision of what was reasonable. The court has no supervisory role... it was lawful even in apparent successful enterprises to reduce staff as a cost saving measure.

29. The Respondents argue that Clause 25 of the Collective Bargaining Agreement signed by the parties provided that:

“Management and the Union will discuss on modalities, packages and implementation before any staff rationalization with the guidelines of the redundancy law, Employment Act 2007, section 40”.

30. The meetings held were an engagement by the Respondent with the Claimant in good faith and all proposals and counterproposals were considered. There are no rules as to the manner in which a consultation is conducted and the Honourable Court should then determine this on the basis on a ‘reasonable test’.

31. They relied on the South African case of **BMD Knitting Mills (pty) LTD vs. South African Clothing & Textile Workers Union 1998 (19) ILJ 1451 (LAC)** the Court made the following observation regarding consultation namely:

“The function of Court in securitizing the consultation process is not to second guess the commercial or business efficiency of the employer of the employer’s ultimate decision (an issue on which it is not qualified to pronounce itself upon) but to pass judgment whether the ultimate decision arrived at was genuine and not merely a sham.. the manner in which the court adjudicates the latter issue is to inquire whether the legal requirements for proper consultation process has been followed and if so whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds having regard to what emerged from the consultation process.”

32. They had been willing to negotiate on the different terms of the redundancy package and considered various counter proposals but the very last one presented to the board was rejected as it was above budget of Kshs. 710 million and they informed the Claimant.

33. The Respondent was only under obligations to discuss and consider the proposals Clause 25 puts them under no obligation to accept them. The offer of 30 days for each day worked that the Respondent offered to pay was way above the statutory requirement of 15 days for each year worked.

34. They also stated that at the meeting held on the 8th of December 2015, they had indicated that a formal notice of redundancy would be issued which the Claimant did not dispute and therefore cannot object to at this late stage. There is nothing that prevents the Claimant from negotiation after issuance of notice for a period of 30 days after issuance.

35. The right to consult after issuance of redundancy notice has now been recognized as an obligatory requirement in the case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the Court stated that:

“It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable..... I am of the firm view that the requirement of consultations implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the Employment Act, as is also provided for in the said ILO Convention No. 158-Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy.”

36. Similarly it was held in the case of **Transport & Allied Workers Union vs Societe Internationale De Telecommunications Aeronautiques [2011] eKLR** the court held that:

“The law contemplates two notices; one that announces to the employees, the trade union and the labour office the intended declaration of redundancy and the second notice that relates to termination. The first notice communicates the reason for, and the extent of the redundancy. Its purpose is to open the door for the consultation stage. Consultation requires parties to engage with an open mind. There is no decision made; redundancy at this stage is only a proposal”.

37. The Respondents aver that the Claimants right to an injunction should be determined by application of the test to a right to an injunction as set out in the case of **Giella vs Cassman Brown & Company Ltd** which requires the Applicant demonstrate:

a) a prima facie case with a probability of success

b) irreparable damages and

c) that the balance of convenience tilts in the Applicants favour.

38. They argue that they have not broken any law to warrant such an injunction nor have the Claimants demonstrated why the Respondent should not be allowed to proceed with the intended redundancy.

39. They rely on the case of **Churchill Ongalo vs Kenya Kazi Security Services [2014] eKLR**, which concerned an application for injunction orders to prevent the carrying out of a redundancy exercise the Court observed that:

“In employment matters the court has always been very slow to descend to the arena and grant interim orders aimed at restraining the employer in running of its affairs. This is because the courts have traditionally considered the management of an enterprise as a prerogative of an employer which is essential to tenure the business remains viable and substantive, it is not sufficient to just demonstrate a prima facie case with a probability of success, but an applicant employee must demonstrate that the conduct by the employer complained of is so gross and definitive to the rights of the employee in a manner incapable of being remedied in final judgment.”

40. They further submit that the claim is premature as the Respondent is yet to conclude the redundancy exercise. In the alternative and without prejudice to the forgoing the Claimants remedies lie in damages.

41. They rely on the case of **Oil Workers Union vs Kenya Petroleum Refineries Ltd & Others [2014] eKLR** where the claimant sought an injunction to prevent the Respondent from carrying out a redundancy exercise. In dismissing the application, the court observed as follows:

“the court finds that the material before it does not prove that any rights of the claimants’ members had been violated or is about to be violated to warrant the grant of an interlocutory injunction.. even if any such right had been violated, no evidence has been adduced to prove that

an award of damages would not make adequate compensation... one wonders why then would one see interlocutory injunction in a simple contract where statutory law guarantees compensation for unfair and wrongful termination? The court finds that judicial time would be saved if employees would first be letting disciplinary or termination processes to end at the workplace level and thereafter challenge it in court and seek compensation if the process is deemed wrongful and unfair.”

42. The Respondent therefore submits that it stands to suffer irreparable damage if it is restrained from commencing and continuing with the redundancy exercise and the balance of convenience tilts in their favour disallowing the Application.

43. The continuing uncertainty of the redundancy exercise is likely to jeopardize the share sale transaction and may prompt the investor to pull out. This will leave the respondent with no option but to wind up which will result in the loss of most or all of the Respondents 1,641 job positions.

44. Having considered submissions of both parties, it is this Courts' duty to determine:

(1) Whether there have been adequate consultations on this matter of redundancy.

(2) Whether the Respondents are acting within the law in their intention to declare staff redundant.

45. In terms of consultations as defined by the law and as discussed in case law cited above, there have been various meetings between Applicant and Respondent where each party is seen to have ceded their ground in an attempt to reach a solution in the matter. It is clear that the parties discussed the matter in 3 different meetings.

46. The Respondents were able to point out the difficulties the firm was facing hence the need for the redundancy exercise. It is also apparent that the last consultation between Applicant and Respondent was in December 2015 and on 16.12.2015, the Respondent informed the Applicant that they were unable to pay the members a higher package than what had been suggested upon and therefore closed consultations.

47. In a previous meeting on 8.12.2015 the parties had agreed that the employees would be paid as follows:

(1) Certificate of service.

(2) Tax waiver

(3) Long service award

(4) Remittance of statutory and other deductions.

(5) Payment of outstanding overtime.

(6) Leave days earned and not utilized.

(7) Outstanding medical claims and allowance.

(8) One months salary in lieu of notice.

(9) Payment of 70,000/= transport allowance.

48. The issue that remained outstanding was payment of severance pay and golden handshake where the parties agreed they would consult with their respective boards on outcome of meeting.

49. On 16.12.2015, the board of Respondent agreed at severance pay at 30 days for each completed year of service plus other figures agreed upon in the meeting of 8.12.2015. Nothing was agreed upon as golden handshake.

50. The Applicants were informed of this position and this is when they now came to Court seeking orders now sought.

51. The position of this Court is that consultations did occur and the fact that the Parties did not fully agree with each other's proposals, the parties met and discussed the issues at hand and therefore consultation was given a chance.

52. On issue of the law, the proposal by the Respondents met the requirements of Section 40 of Employment Act which states as follows:

(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 officer;

(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 by the redundancy;

(d) Where there is in existence a collective 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 employer 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.

53. It is therefore this Court's finding that the orders the Applicants seek cannot be granted at this point unless the Respondents are going against the law.

54. The Court therefore makes a ruling that the redundancy exercise should continue so long as the law is being observed. The Applicants may proceed and seek an early date for the hearing of the main case.

Read in open Court this 8th day of March, 2016

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Applicants - Absent

Miss Lubalo for Respondent- Present