REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1030 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 12th July, 2016)

KENYA PLANTATION &

AGRICULTURAL WORKERS UNION …..……CLAIMANT

VERSUS

OSERIAN DEVELOPMENT COMPANY LIMITED…….RESPONDENT

RULING

1. Before the Court is an amended Notice of Motion dated 20th of June 2012 brought under the enabling provision of Section 12 (1), (2) (3) & (4) of the Industrial Court Act, 2011 read together with Section 16 (3) of the Industrial Court Procedure Rules, 2012 and all enabling provisions of laws where the Claimants are seeking orders:

1. ***That this application be certified urgent and be heard ex-parte in the first instance.***

2. ***That an order be and is hereby issued that the Respondent, its agents, assigns, servants and or representatives are hereby restrained and prohibited from declaring any employee and or 618 employees redundant vide the redundancy notification dated 12th May 2016 and 31st May 2016.***

3. ***That costs of this application be provided for.***

2. Which application is grounded on the facts as hereunder and the sworn affidavit of Thoman Kipkemboi and such other facts to be adduced at the hearing thereof:

1. ***That the Applicant has a Recognition Agreement and a Collective Bargaining Agreement with the Respondent.***

2. ***That the Respondent has issued a notice to declare 618 employees redundant which notice does not comply with the provisions set out in Section 40(1), (a) and (c) of the Employment Act 2007 laws of Kenya.***

3. ***That the Naivasha County Labour Officer in charge of the area where the employees are employed have not been notified the reasons for and the extent of the intended redundancy as set out in Section 40 (1) (a) of the Employment Act 2007 Laws of Kenya.***

4. ***That the Respondent had in selection of the 618 employees to be declared redundant not applied***

fair procedure set out in Section 40 (1) (c) of the Employment Act 2007 Laws of Kenya.

5. ***That the Respondent is estopped by the provision of Section 40(1) to the effect that the redundancy of the 618 employees until the provision of the Law are fully complied with therefore the redundancy exercise is invalid and an exercise nullity in itself.***

6. ***That the Applicant stands to suffer irreparable damage should the Respondent proceed with the Redundancy exercise and it's in the interest of justice and fairness that the orders sought herein be granted.***

3. The Respondents have filed a Replying Affidavit and Further Affidavit dated 17th June 2016 and 24th June 2016 respectively, deponed to by one Mary Wanjiku Kinyua the Head of Human Resources Division of the Respondent.

4. The Respondent states that via a letter dated 12th May 2016 they issued notices to both the Claimant and the Labour Officer Naivasha informing them of their intention to declare 370 employees redundant due to the reasons stated within those notices.

5. That even though the notice referred to 370 employees the actual number of employees earmarked for redundancy is 70 permanent employees, the remainder were seasonal employees engaged in three months contract and whose employments terminate with the lapse of their contract and to date over 200 of seasonal employees out of 300 have exited from employment on different dates since redundancy notice was issued.

6. The Respondent states that the Redundancy Notice was necessitated by the fact that they had to close down several of its greenhouses where the affected employees have been engaged.

7. The closure was necessitated by an increase in annual fee of the geothermal energy sources used to heat the greenhouses by Kengen from Kshs.1 million to Kshs 90 million and 100 millions which translates to between 9000 and 9900% times more than the previous amount.

8. The Respondent states that they brought to the attention of Kengen the implications of the astronomical increase key among them being that the Respondents overall operation will be uneconomical and it would have to close the greenhouses and lay off its employees, and to date there has been no meaningful response by Kengen.

9. They Respondent states that they have conducted experiments testing the prosperity of the plants without the heating source but the plants did not prosper.

10. The Respondents state that they then had no choice but to close the greenhouses and declare the employees redundant.

11. The Respondent submits that they have complied with all statutory requirements, as they notified the Labour Officer of all the intended redundancies and the office confirmed receipt of notice, and they raised no objection to releasing the affected permanent employees on 6th July 2016 as suggested by the Labour Office.

12. The Respondent states that as those who are being released have the same skill, reliability and ability and work in the same station, the issue of seniority does not apply, the Respondents are willing to engage with the Claimant but has yet to be approached on the issue.

13. The Respondent states that the letter attached to the memorandum is yet to be received by them and that the persons copied therein have denied receiving such letters.

14. They pray that the application be dismissed.

Submissions

15. The Claimant made oral submissions in Court where they relied on the Supporting Affidavit of one Thomas Kipkemboi.

16. They submit that the Respondent issued two notices dated 12th May 2016 and 31st of May 2016 where they declared 370 and 248 employees redundant respectively where they stated reasons for redundancy as:

"Farming area has been rendered unviable due to high costs of farm inputs and escalating power tariffs as well as unproductive greenhouses due to lack of affordable energy sources to heat them this precipitating loss of income rendering high number of workforce idle."

17. The reasons given for the further 248 were that:

"There was current restructuring within the company with the aim of refocusing our energies to mitigate emerging challenges".

18. They submit that the Respondent failed to substantiate these reasons and ignored requests to consult with the Claimant. This they submit is going against Section 43(1) and (2) of the Employment Act Laws of Kenya which provides in mandatory terms that must be followed when declaring redundancies. That the Respondent failed to follow the provisions:

"In any claim arising out of termination of a contract the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45".

19. The Claimant further submits that the Respondent has not taken into account the provision of Section 40(1) of the Employment Act which sets out the requirements set out for termination. They state that the Respondent failed to notify the Naivasha Labour Office in charge of the area where the employees are employed of the intended redundancy.

20. They submit that the Respondent has failed and refused to engage in consultation with the Claimant on ways to without prejudice mitigate effects of the purported redundancy and or consult on compliance with the Law applicable in termination of employment on account of redundancy.

21. They submit that the ILO Convention No 158 on termination of employment ratified by Kenya in 1985 requires that the Respondent provide an opportunity for consultation where redundancies and retrenchments are contemplated so as to consider all necessary means to be taken to avert or to minimize the termination and measure to mitigate adverse effects of any terminations on the workers concerned such as finding alternative employment.

22. They submit that the orders herein ought to be granted as the employees are at risk of suffering irreparable damage, they have no water, electricity and medical services have been withdrawn and are being evicted from their staff quarters.

23. The Respondents did make submissions in open Court where they relied on the Replying Affidavit and Further Affidavits of Mary Kinyua. They reiterate the reasons for redundancy as those stated in the Affidavits.

24. They submit that their lease to the geothermal heating plant expired on the 2nd of February 2016 which was at the annual fee of 1 million a year which was reviewed to 100 million a year which the Respondents cannot afford.

25. The Respondents submit that they had to cease growing the flowers and gave the requisite redundancy notices. They submit that they did not receive any letters as to the intention to consult

and the Claimants allegations that such notice had been sent to them is not true. They state that the issue of notification and consultation had been settled in the case of **Kenya Airways v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** which states that a notice should first be issued and then during pendency of notice consultations should continue.

26. Moreover in the case of **Kenya Airways Corporation Ltd vs. Tobias Ogaya Auma & 5 Others [2007] eKLR** where it was stated that you cannot prevent an employer from declaring employees redundant where there were genuine reasons to do so.

27. The Respondent state that the matter could have been resolved through consultation had the Claimant should not have rushed to Court. Redundancy is usually the last resort and asks the Court to declare the Applicants' application is denied.

28. The Claimant in response submitted that the Respondents failed to follow the law, there is no evidence that notice was received by the Labour office and that nothing prevents the parties from engaging in negotiations.

29. They pray that the Court allows their application.

30. Having considered the submissions of both parties, the issues for consideration by this Court are as follows:

1. ***Whether there are valid reasons for the intended redundancy.***
2. ***Whether the Respondents have followed the law in the intended redundancy.***
3. ***What orders to be granted in the circumstances?***

31. On 12th May 2016 the Respondents send a redundancy notice to the Applicants stating as follows:

"12th May, 2016

The Secretary General

Kenya Plantation and Agricultural Workers Union

P.O. Box 1161-2011

NAKURU.

Dear Sir,

RE: REDUNDANCY NOTIFICATION

In the recent past a significant part of our farming area has been rendered unviable due to high cost of farm inputs and escalating power tariffs. Coupled with that a number of our green houses have been rendered unproductive due to lack of affordable energy source to heat them. The net result is that there is a substantial drop in the Company's overall production which in turn has precipitated loss of income and rendered a high number of our workforce idle. There is every indication that the situation is not set to improve in the near future.

Arising from the foregoing the Company is left with no alternative but to lay off its superfluous workforce. This letter therefore serves as the required statutory one month's notice of the Company's intention to declare three hundred and seventy (370) employees redundant. The employees to be declared redundant will be paid their redundancy benefits as required under the law read together with the operational Collective Bargaining Agreement.

Please be informed accordingly.

Yours faithfully,

For: Oserian Development Co. Ltd.

Mary Kinyua

<u>Head of Human Resources Division</u>

Cc: Labour Officer

32.On 31.5.2016 another notice was issued indicating as follows:

"31st May, 2016

The Secretary General

Kenya Plantation and Agricultural Workers Union

P.O. Box 1161-2011

NAKURU.

Dear Sir,

<u>RE: REDUNDANCY NOTIFICATION</u>

Due to the current restructuring within the Company with the aim of refocusing our energies to mitigate emerging challenges, we intend to declare Two Hundred and Forty Eight (248) positions (Attached list) redundant. Accordingly, this letter therefore serves as the required statutory one month's notice of the Company's intention to declare redundant as provided for in the Employment Act 2007 with effect from 31st May 2016.

The employees be informed accordingly.

Yours faithfully,

For: Oserian Development Co. Ltd.

Mary Kinyua

<u>Head of Human Resources Division</u>

Cc: Labour Officer

33.From these notices, the reasons given for the intended redundancy are increased cost of operations due to energy and high cost of farm inputs and intended restructuring. This, the Respondents noted was aimed at refocusing their energies to mitigate emerging challenges.

34.The definition of redundancy under Section 2 of Employment Act in itself envisages such a scenario as:

"…….***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."

35. In essence redundancy is allowed in situations where the office, occupation or job is no longer in existence or sustainable.

36. In this case the Respondents have submitted that they are no longer able to operate as before because of the increase in the energy costs occasioned by expiry of lease between them and Kengen entered into on 12.2.2001 for 10 years and which has now necessitated a renegotiation which is putting the Respondents against Kengen which wishes to increase the lease price upto 96% price rise. There is proof that Kengen has not relaxed on Respondents quest hence the inability of the Respondents to operate normally.

37. This is a valid reason for redundancy which the Applicants have no reason to doubt and neither have they demonstrated otherwise. This resolves issue No. 1.

38. On issue of procedural fairness – Section 40 of Employment Act provides 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.***

39. As to the current position of this matter, it is not clear whether the Respondent complied or would have complied with the above provisions of law. However just a glimpse into the letter written to the Labour Officer, the same being dated 31/5/2016, the notice period was below the requirement of the law.

40. Also in respect of redundancies for 370 staff relating to the redundancy notification dated 12.5.2016 - there was no notice to the Labour Office until 6.6.2016.

41. This application was filed in Court on 2.6.2016 and so this was before the notification of

6.6.2016. The Amended application was filed on 20.6.2016 and so the preposition that the notice was expiring in 30 days with effect from 31.5.2016 could not hold.

42. The Applicants have also alluded to lack of consultation in the entire process. Though not mandatory, the law envisages some form of consultation between Respondent and the Union and this has yet to be done.

43. This issue was discussed in the CA No. 46 of 2013 – **Kenya Airways vs. Aviation and Allied Workers Union Kenya and Others** where the learned JA observed that:

"…It cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision. To impose an absolute requirement of that kind would be inconsistent with the employer's prima facie right to organize and run its business operation as it sees fit. And consultation would often be impracticable, particularly where circumstances are seen to require mass redundancies. However in some circumstances an absence of consultation where consultation would reasonably be expected may cast doubt on the genuineness of the alleged redundancy or its timing. So, too, may a failure to consider any redeployment possibilities".

44. I agree with owever this position and find that indeed consultations have not taken place and the procedural requirements have not been adhered to. I therefore find that the application before me has merit and I confirm the Interim Orders and Order that the Parties give dialogue another chance and in the same vein adhere to the procedural requirements of the law.

45. The intended redundancy is henceforth stayed as Parties engage in the intended negotiations with a view of seeking a solution to the problem since the procedure was flawed, the redundancy can only proceed on a new redundancy notice while following due process.

Read in open Court this 12th day of July, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Oloo holding brief for Obura for Respondent

No appearance for Claimant