



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 1174 OF 2015**

**AMALGAMATED UNION OF KENYA METAL WORKERS.....CLAIMANT**

**VERSUS**

**GENERAL MOTORS EAST AFRICA LIMITED.....RESPONDENT**

**RULING**

1. The Court is called upon to rule if it would be appropriate to grant an interlocutory injunction pending the hearing and determination of the claim herein. In the Notice of Motion dated 27<sup>th</sup> July, 2015 the claimant sought the following orders among others:-

a. That this Honourable Court do issue an order of temporary injunction restraining the respondent from retiring the claimant's members aged 55 years contrary with the respondent's Retirement Benefit Schemes policy and government policy pending the inter-parties hearing and determination of this application.

b. That this Honourable Court do issue an order of temporary injunction restraining the respondent from retiring the claimant's members aged 55 years contrary to with the Respondent's Retirement Benefit Scheme policy and government policy pending the inter-partes hearing and determination of this cause.

2. The application was supported by the affidavit of Justus Maina Otakwa who deponed on the main that:-

a. That he was the General Secretary of the claimant conversant with the facts therein with full authority and thus competent to swear that affidavit.

b. That on 1<sup>st</sup> January, 2013 the claimant and the respondent entered into Collective Bargaining Agreement (hereinafter "CBA" Agreement") for a term of twenty four (24) months with 1<sup>st</sup> January, 2015.

c. That upon expiry of the Collective Bargaining Agreement the claimant forwarded to the respondent a list of proposals to be included in the new Collective Bargaining Agreement.

d. That both parties held meetings on 16<sup>th</sup> December 2014 and 12<sup>th</sup> February 2015 with a view of finding an amicable solution to the proposals when the following issues were discussed. Retirement age.

- i. Retirement age.
- ii. Notice of termination
- iii. Maternity clause
- iv. End year Bonus
- v. Baggage allowance
- vi. Leave travelling allowance

e. That parties disagreed on all the issues when the claimant referred the trade dispute on 20<sup>th</sup> February 2015 to the Cabinet Secretary, Ministry of Labour, Social Security Services for appointment of a conciliator.

f. That the vide a letter dated 18<sup>th</sup> March 2015 the Cabinet Secretary appointed Chief Industrial Relations Officer Mr. R. Litaba as a conciliator.

g. That after the various conciliation meetings, the conciliator issued a Certificate of Disagreement on 22<sup>nd</sup> May 2015 confirming that the parties had disagreed on all issues stated in paragraph 7 (1) to 7 (ix) herein.

3. The respondent in opposition to the application filed a Replying Affidavit through one Fred Wasike who deponed among other things as follows:-

(a) That in answer to the contents of paragraph 3 of the Supporting Affidavit, he wished to state that upon receipt of the applicant's proposals, the respondent similarly made its counter proposals which formed the basis subsequent engagements both at the negotiations stage as well as the conciliation stage.

(b) That further to the contents of paragraph 4, 5, 6 and 7 of the Supporting Affidavit, I wish to state that upon reporting a Trae Dispute, the Respondent was asked to make its submissions, which it did in terms of its letter of 7<sup>th</sup> April 2015, being such proposals as well as supporting documentation.

(c) That after several conciliation meetings, the respondent was not prepared to cede ground thus effectively frustrating the spirit of social dialogue which is central in negotiations and agreement in a Collective Bargaining Agreement. The Conciliator in frustration issued a Certificate of Disagreement as alluded to by the applicant.

(d) That the applicant has made reference to the Respondent's Staff Retirement Benefits Scheme marked JM07 at page 30 in the Supporting Affidavit; he wished to respond thereto for the benefit of the applicant as follows;

(i) The General Motors East Africa Limited Staff Retirement Benefit Scheme was a document developed, conceptualized and given effect to by the Trustees of the Scheme managing it independent of the Respondent.

(ii) The scheme handbook was independent of the respondent herein.

(iii) The terms of the scheme did not constitute the terms and conditions of employment of the respondent's employees.

(iv) The scheme was registered under RBA Act and for all intents and purposes was an

irrevocable trust.

(v) The handbook was not the respondent's document, it was not a policy document for the respondent and ipso facto does not donate a contractual relationship between the respondent and its employees.

(vi) Afortiori, the benefit statement was captured at page 38 to 41 did not constitute contractual terms that could be enforced or alluded to between the respondent and its employees.

(vii) It followed that the person alluded to in the Scheme's Statement would have sworn affidavit to state their terms of employment both outside the provision of the CBA and as alluded to in the CBA. The Statements were working documents by the Trustees for its specific functions.

(viii) The foregoing notwithstanding, it was ironical to make reference to the scheme handbook when the very fact of the retirement age as well as how it played out I the employee's terms and conditions of service was itself an item that was under negotiation during the collapsed meetings between the applicant and the respondent.

4. Mr. Mugoya for the claimants submitted that the parties were before the Court for reprieve given that the negotiations and conciliation between them failed. There was therefore needed to restrain the respondent from terminating the services of its employee who have attained 55 years of age pending the determination of the claim.

5. Counsel further submitted that the parties are governed by a Collective Bargaining Agreement and Staff Retirement Benefits Scheme. The Collective Bargaining Agreement has lapsed and one is respect of which the parties have been unable to agree. Rule 12 of the Scheme fixes the retirement age at 60 years. According to Counsel, the respondent has attempted to divorce itself from the said Retirement Benefit Scheme which was monical given that it had been deducting the claimants dues in tandem with provisions of the Retirement Benefits Act.

6. Mr. Mugoye further submitted it would be unjust for the claimants services to be terminated when the dispute on retirement age has not been resolved by the Court. It was therefore prudent that in order to prevent the said prayer from being rendered nugatory the interim orders granted ex parte remains in force pending the determination of the claim.

7. Mr. Ouma for the respondent on his part submitted that the retirement age has always been 55 years in the post Collective Bargaining Agreements. It was however subject of negotiations in the proposed Collective Bargaining Agreement shish have collapsed. It therefore could not be enforceable and hence cannot be subject to an injunctive order by the Court.

8. Counsel further submitted that the terms of the scheme do not constitute the terms and conditions of employment of the respondent's employees. According to Mr. Ouma the scheme is registered under the RBA Act and for all intents and purposes is an irrevocable trust. It was not the respondent's document to donate a contractual relationship between the respondent and its employees.

9. This is an interlocutory injunction and the role of the Court in such a case is to briefly review the claim and persuade itself that of the injunction is not granted the applicant would suffer irreparable loss not compensate by an award of damages. The applicant must also demonstrate that it has a prima facie case with probability of success.

10. The claim herein is brought about as a result of failure by the parties herein to agree on the terms of the new Collective Bargaining Agreement. The dispute has been submitted to the Court to decide. Both sides have their positions and the rationale for those positions.

11. Clause 27 of the Collective Bargaining Agreement on effective date provides that in the event a new agreement has not been concluded between the parties, the terms of service shall continue in force in all respects until the date on which any such new agreement is signed. It is not disputed that clause 22 of the current Collective Bargaining Agreement sets retirement age at 55 years. It is the operating Collective Bargaining Agreement until a new one is signed. The enhancement of retirement age from current 55 years to 60 years is one of the proposals put forward by the claimant. It has not been agreed upon. Being a proposal it cannot confer any right capable of being injured hence be protected by an order of injunction.

12. The parties are bound by the terms of current Collective Bargaining Agreement until a new one is signed either voluntarily or through an order of this Court upon hearing the parties.

13. Changes have always occurred in employment such as salary increment, enhancement of retirement age and improvement in general terms and conditions of employment. Not all employees get to benefit from these changes. Some will always retire or leave employment without benefitting from them. That is what the applicant is there for. To continuously negotiate for better terms and conditions of service for its members. It would not be right to interdict an employer from enforcing the terms of an existing Collective Bargaining Agreement simply because there is hope that the Court could order in favour of the applicant in the new one. The operational Collective Bargaining Agreement is the one signed on 1<sup>st</sup> January, 2013 and which sets retirement age at 55 years.

14. In the circumstances the Court is not persuaded that this is a proper case for granting an interlocutory injunction. The orders sought by the applicant if granted in the main claim would benefit its members who could be in respondent's employment by the time they are granted.

15. In conclusion the application is found without merit and the same is hereby dismissed with costs.

16. It is so ordered.

Dated at Nairobi this 23<sup>rd</sup> day of September 2016

**Abuodha Jorum Nelson**

**Judge**

Delivered this 23<sup>rd</sup> day of September 2016

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha Jorum Nelson**

**Judge**