REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NUMBER 90 OF 2015

BETWEEN

KENYA PLANTATION & AGRICULTURAL WORKERS UNION ..…….. CLAIMANT

VERSUS

1. BAMBURI CEMENT LIMITED

2. LAFARGE ECO SYSTEMS …...……..RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Mr. M. Khisa Industrial Relations Officer for the Claimant

Mr. D. Oyatsi Advocate instructed by Sharpley Barret & Co Advocates for the Respondents

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RULING

1. The Claimant Union filed its Statement of Claim at the Labour Court in Nakuru, on the 19th February 2015. The issue in dispute is stated by the Claimant to be 'Unfair redundancy of Employees.' Contemporaneously the Claimant filed an Interlocutory Application, supported by the Affidavit of its Officer Thomas Kipkemboi, sworn on the 19th February 2015. The Claimant seeks in the Claim, among other orders, the following:-

a. The exercise to compel Employees to Voluntary Early Retirement [VER] on account of redundancy is un-procedural, unfair and therefore wrongful.
b. The reasons leading to the exercise to compel Employees to Voluntary Early Retirement on account of redundancy is not valid and is unjustified.
c. The 1st and 2nd Respondents by themselves, their agents, assigns, servants and or representatives or any other person claiming through them or otherwise be and are hereby restrained from terminating, dismissing, suspending, outsourcing, effecting Voluntary Early Retirement and or declaring Employees redundant.

2. The Application seeks among others, the following provisional measures:-

a. The Respondents are restrained by themselves, their agents, assigns, servants and or

representatives or any other person claiming through them or otherwise from terminating, dismissing, suspending, outsourcing, effecting Voluntary Early Retirement, and or declaring any Employee redundant pending hearing and determination of the application i*nter partes.*

b. The Central Planning and Monitoring Unit of the Ministry of Labour Social Services and Security to conduct an analysis on the validity of the 1st Respondent reasons of business consideration on the 2nd Respondent and file a report within 30 days from the date of the order.

3. The Application was presented under certificate of urgency before Hon. Judge Radido of the Labour Court Nakuru on 19th February 2015, who certified the same urgent; gave orders for retention of the status quo; and transmitted the file for i*nter partes* hearing to the Labour Court in Mombasa. The 1st Respondent's General Counsel, Betty Kanyagia, who also doubles up as the Company Secretary of the 2nd Respondent, filed two separate Replying Affidavits on behalf of the respective Respondents, which were sworn on the 26th February 2015.

4. The Application was heard *inter partes* at the Labour Court in Mombasa, on the 2nd March 2015.

5. Mr. Khisa adopts the Supporting Affidavit sworn by Mr. Kipkemboi. He also cites *the Court of Appeal at Nairobi Civil Appeal Number 46 of 2013 between Kenya Airways Limited v. Aviation & Allied Workers Union of Kenya & 3 others [2014] e-KLR*, in urging the Court to grant the provisional measures. He submits the Parties have a Recognition Agreement. They have concluded several Collective Bargaining Agreements.

6. The 2nd Respondent is a subsidiary of the 1st Respondent. The Claimant is recognized by the Respondents as the sole representative of the Unionisable Employees. Matters relating to redundancy must be negotiated between the Claimant and the Respondents. There are 58 Unionisable Employees working for the 2nd Respondent.

7. The Claimant submits it was approached by the 1st Respondent on 13th January 2015 for an informal meeting. Another meeting followed on 20th January 2015, and on 23rd January 2015, the Claimant received the Business Review 2015 document from the 1st Respondent.

8. According to the Claimant the Business Review seeks to have the Respondents restructure their business through Voluntary Early Retirement and Outsourcing. All the 58 Employees would be affected and their labour outsourced. The Claimant requested the 1st Respondent to have consultation on the Business Review. The 1st Respondent declined. The 1st Respondent has gone ahead to implement its proposal. It offered Employees VER. A notice dated 18th January 2015 was issued to all staff, advising:

'' The sustainability of LES [Lafarge Eco System Limited] has been severely affected by various factors in its operating environment resulting in significant reduction in revenues over the years and disproportionate increase in operating costs. Consequently we have decided to review the LES mission and strategy to ensure its existence for years to come.

As a result of these, LES suffers the risk of not being able to provide work for all its Employees and that redundancies may follow. Management is committed to considering all possible options to avoid or minimize redundancies, including Employee requests for early retirement. With effect from today, LES will offer its Employees the opportunity to apply for VER.''

9. The letter is, the Claimant submits, contrary to the Recognition Agreement. The Recognition Agreement binds the Parties to have consultations. The termination, whether through VER or redundancy, must conform to Section 40 of the Employment Act 2007. The reasons for the proposed Business Review are not valid. The 2nd Respondent is paid a monthly fee by the 1st Respondent for services rendered. It is not true that the 2nd Respondent cannot be economically sustained. CPMU should be allowed to audit the Business Review. There are no audited financial records to support the proposed restructuring. The Kenya

Airways Appeal decision established that Parties must consult in event of redundancy. ILO Convention 158 demands they do so. There is no genuine redundancy situation. Positions have not ceased to exist.

10. It is not true as argued by the Respondents that no breach of obligations has been made by the Respondents. The notice issued by the Respondents to the Employees, and communication from the Respondents to the Claimant, confirm the Employer has initiated the process. Employees have been warned of impending redundancy. The Managing Director of the 1st Respondent is clear redundancies may have to follow. Nothing has been availed to the Court by the Respondents, to show that the 2nd Respondent is an independent entity from the 1st Respondent, and not bound by the terms of engagement between the 1st Respondent and the Claimant. There is no evidence showing the 2nd Respondent is faced with insolvency in terms of Section 67 of the Employment Act 2007. Validity of the reasons cited in justifying restructuring is questionable, hence the need to call in the Economists from the CPMU. The Claimant urges the Court to allow the Application.

11. The Respondents agree the Court has the power to protect Employees, where there is breach; where no breach is demonstrable there would be no need for the Court to exercise its power of protection. There is a CBA between the Claimant Union and the 2nd Respondent. The 2nd Respondent is a Limited Liability Company. The CBA is signed by the Parties and registered.

12. It is not captured in this CBA that the 1st Respondent financially supports the 2nd Respondent. There is no contract shown by the Claimant for such an arrangement. The Claim arises out of the Employment Act 2007 and the CBA between the Claimant and the 2nd Respondent. The 1st Respondent is not a Party to the CBA concluded between the Claimant and the 2nd Respondent.

13. The VER is an offer. It does not create rights and obligations until accepted. It only becomes a contract giving rights and obligations, on being accepted. There is no breach. Employees have the right to accept or refuse the VER. The Respondents have not coerced the Employees to accept VER. There is no punishment reserved for Employees who do not take up the offer. It is only if there are no takers that the Respondent will go to the second level of consultations. The 2nd Respondent has not taken any action to breach the contract.

14. VER is not termination at the initiative of the Employer. It is voluntary. Employees, who take up the offer, initiate the termination. The 1st Respondent provides the 2nd Respondent with business, which the 2nd Respondent discharges independently. The 2 operate at an arm's length. There is no obligation on the part of the 1st Respondent to pour money into the coffers of the 2nd Respondent. The 1st Respondent is a Public Listed Company, with various shareholders including the N.S.S.F, to which the Claimant are members. It has to account for its funds. The Report by Ernst & Young confirms the 2nd Respondent is insolvent. A Company is not allowed under Company Law to operate if it is insolvent. The Court is being asked to sanction an illegality. The 2nd Respondent should not be put in a position where it is operating illegally. The Employer has not initiated termination. The Application should be dismissed.

The Court Finds:-

15. The Certificate of Urgency, and the Supporting Affidavit of Thomas Kipkemboi assert that the 1st Respondent *'' has effected an un-procedural redundancy on all its Employees in the 2nd Respondent which is its division.''*

16. There is clearly no material availed to the Court to support this conclusion. Throughout the submissions and pleadings of the Claimant, there is only evidence of VER and potential redundancy. There is no redundancy shown to have been declared or effectuated.

17. The Business Review 2015 was communicated to the Claimant Union by the Respondents, by way of consultations. It does not say that the Respondents have determined Employees' positions shall be rendered redundant; it merely communicates an intention to restructure through a host of mechanisms,

including VER and outsourcing of non-core activities.

18. The Court is not able to agree with the Claimant that VER must, like redundancy, follow Section 40 of the Employment Act 2007. Redundancy is involuntary, while VER is voluntary. The Employees have the leeway to take it or leave it. It is not termination initiated by the Employer; it is a consensual termination, proposed by the Employer. In redundancy, the Employee has no choice. Termination is involuntary. The terms of VER are entirely contractual terms, which are not subject to the redundancy law under Section 40. The term VER does not appear in the Employment Act 2007, this being a consensual form of termination, regulated through the terms agreed upon by the offeror and offeree.

19. All the Respondents are shown to have done, is float an offer for VER to its Employees, as part of its restructuring plan. VER, and not redundancy exercise, was to start in the week of 16th February 2015 when the Claimant initiated this action.

20. The offer did not create a contract between the Respondents and the Employees. The Respondents have not imposed any decision on the Claimant's Members with regard to the VER. The notice issued to staff dated 18th January 2015, states redundancies may follow. The VER is offered as one of the ways to avoid, or minimize redundancies. No conclusion has been made by the Respondents that redundancies are going to be declared. VER has been floated, to avoid altogether the redundancy eventuality, and if unavoidable, at least minimize the extent of the redundancy. This is the Court's understanding of the notice to staff, dated 18th January 2015.

21. It would be inimical to the stated objective of avoiding redundancies, if the Court granted the Claimant an order stopping the VER process. It would also infringe the Employee's inherent right to terminate their contracts voluntarily, through acceptance of the VER. As for stopping the redundancy, the Court would have to be persuaded first that there is a decision made by the Respondents to declare redundancies. No such decision has been shown to have been made.

22. The Court does not think the Respondents have concealed information on their intended restructuring, or declined to consult as alleged by the Claimant. The 1st Respondent requested to meet the Claimant's top leadership on 13th January 2015. The letter from the Respondent calling for the meeting mentioned the Parties would discuss the performance of the 2nd Respondent and consider intended actions aimed at ensuring the 2nd Respondent's long term sustainability. A meeting took place on 20th January 2015. The challenges facing the 2nd Respondent were discussed. The 1st Respondent requested for a further meeting on 27th January 2015. The Claimant Union was not able to attend this meeting ''*owing to prior official engagements.*'' The Claimant also informed the Respondents that it had instructed its Economists and Statisticians to look into the Business Review 2015, and would revert to the Respondents shortly. The Claimant does not seem to have reverted to the Respondents any date after 3rd February 2015, and on 16th February 2015, the Respondents communicated their intention to roll out the VER exercise later in the week. It was 3 days later on 19th February 2015 when the Claimant Union filed this Claim.

23. This history strongly shows the Respondents engaged the Claimant in consultations. The Claimants may in fact have closed the door to consultations on both the VER and redundancy, by its call for judicial intervention. The prayer to the Court to stop VER, and stop a redundancy process which has not started, is rejection by the Claimant Union of the requirement for consultation and exhaustion of that process. It does not appear to this Court that the Respondents have acted contrary to the requirement for consultation under the Recognition Agreement; it is the Claimant Union which has not given consultation a chance.

24. The case of Kenya Airways referred to by the Claimant in its submissions is irrelevant in a VER process. It would perhaps be relevant if the Parties come to redundancy. Even in such a situation, this decision has merely re-emphasized the sanctity of the managerial prerogative. It would in the view of this Court aid the actions proposed by the Respondents. A portion of the decision states Kenyan law does not

require Parties to consult before the redundancy, but only provides for post-redundancy dispute resolution. The ILO Convention on redundancy consultation the Court of Appeal stated, is not ratified by Kenya, and is not part of the Kenyan Law. It is in the view of this Labour Court, difficult to meet the requirements of Section 40 [1] [a] to [g] of the Employment Act without consultation. How is this decision supportive of the Claimant's position? The Claimant should have made the Court understand the application of the Kenya Airways decision to the present dispute. The Claimant Union did not show how the decision applies to the issues in the dispute herein.

25. Although the 2nd Respondent has a CBA with the Claimant, independent from the relationship between the 1st Respondent and the Claimant, the proposed restructuring is being undertaken by the 1st Respondent, as the parent Company to the 2nd Respondent. The 1st Respondent is therefore a necessary Party. The suggestion by the Claimant that the 2nd Respondent is financially supported by the 1st Respondent is not apparent from the record. If there is a redundancy situation at the 2nd Respondent, it should be assessed from the 2nd Respondent's own financial position, not the suspected financial aid said to flow from the 1st Respondent. From the Reports filed by Ernst & Young, the Court has formed a preliminary view that the actions proposed by the Respondents could be justifiable.

26. The Court has no reason to question the reasons justifying the Business Review 2015, such review being an aspect of the managerial prerogative. The Kenya Airways decision loudly endorses outsourcing, and is categorical that as long as the Employer believes there is a redundancy situation, it is not for the Court or the Union to substitute their business judgment. The Court of Appeal also held it is not for the Court to question the strategic intent of an Employer's business. These conclusions from the higher Court bind the lower Court. It will be an uphill task for the Claimant to persuade any Court to interrogate or halt the Business Review 2015, or even have the CPMU intervene, following the binding nature of this judge-made-law. No prima facie case has been shown that the Business Review 2015 is a veneer for some unfair labour practices.

27. The Claimant rushed to Court; did not give consultation adequate chance; and is seeking orders which would result in complete derailment of the Respondent's Business Review. No redundancy has been announced. Only an offer for VER has been floated and not considered in light of the initiation of these proceedings. The Claimant should wait until there is an actual redundancy process unfurled, which process breaches the law or the CBA governing the Parties. At this point in time, the Claim is in the realm of conjecture. No breach has taken place. The VER has not been imposed on the Employees, unlike was alleged to have been the case, in the initial case involving the Kenya Airways, where Employees were said to have been invited to apply for VER, and thanked for making their applications and accepting VER, even when they had not made such applications. If there are any faults in the implementation of the VER or the apprehended redundancy, If the proposed Business Review 2015 is a colourable exercise, the Claimant Union will have the opportunity to restate its case. The Claimant informed the Respondents it would revert to the Respondents once the Claimant had consulted its Economists and Statisticians; no communication ensued on the advice received by the Claimant from its internal experts. Consultation has not been exhausted. For now, the Court makes the following orders:-

[a] The Application filed by the Claimant on 19th February 2015 is rejected;

[b] Parties to resume their consultation from where they left off;

[c] The Respondents are otherwise at liberty to offer VER to the concerned Employees; and,

[d] Costs in the Cause.

Dated and delivered at Mombasa this 23rd day of March 2015

James Rika

Judge