



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 434 OF 2015**

**KENYA UNION OF COMMERCIAL FOOD & ALLIED WORKERS  
UNION.....CLAIMANT/APPLICANT**

**VERSUS**

**TUSKER MATTRESSES LIMITED.....  
.....RESPONDENT**

**RULING**

1. The Claimant/Applicant's Notice of Motion dated 19<sup>th</sup> March 2015 is due for determination. In the motion, the Claimant union sought to restrain the Respondent from declaring 25 employees redundant. The Claimant also sought orders restraining the Respondent from outsourcing core functions within its business presently performed by unionisable employees. The Claimant also sought a consolidation of the two disputes and appoint a conciliator to hear the parties and file a conciliation report within 30 days of the order. The application was supported by the affidavit Mike O. Oranga and upon the grounds on the face of the notice of motion application. The grounds and affidavit asserted that the Respondent had commenced engagement in outsourcing contracts from Artemis African Limited a commercial employment agency with the intention of doing away with the employees with whom they have a direct contract of employment. The Claimant asserted that whereas it was alleged that the Respondent's Eastleigh Branch along General Waruinge Street was closed because of eviction by the landlord, all the staff ought to have been transferred to other branches where the outsourced labour currently serve. The Claimant also asserted that the 2 employees from the distribution center earmarked for redundancy did not deserve to lose their jobs while outsourced labour continue to serve the Respondent.

2. The Respondent was opposed to the application and filed a Replying Affidavit on 2<sup>nd</sup> April 2015. The affidavit was sworn on 1<sup>st</sup> April 2015 by Evelyn Maina the Legal Officer of the Respondent. In it she deposed that she had read and understood the motion dated 19<sup>th</sup> March 2015 and the affidavit (with annexures) of Mike O. Oranga sworn in support. She deposed that the two issues raised in the application namely the redundancy and outsourcing were totally distinct and unrelated and should not be lumped together in the suit. Regarding the redundancy she deposed that she was aware that the Respondent was forced to suddenly close down its Tusky's Supermarket Eastleigh Branch following a rent dispute with its landlord Madina Hypermart Ltd and in spite of obtaining orders in Business Premises Rent Tribunal cause 127 of 2015, the Respondent was unable to recover the attached items. She deposed that the disruption and subsequent loss and damage together with deterioration of relations had made it impossible to continue operating the branch. She deposed that due to lack of capacity to absorb the employees into

other branches the Respondent had no option but to terminate the employment of the 23 employees on account of the redundancy. The Respondent had written on 9<sup>th</sup> and 11<sup>th</sup> March 2015 to the Claimant, the Labour Office and the employees providing the reasons for and the extent of the intended redundancy. She deposed that the Respondent stood to suffer great loss, damage and prejudice if the orders sought were granted as the Respondent had complied with the law.

3. The application was argued by Mr. Nyumba for the Claimant and Mr. Kanchorry for the Respondent. Mr. Nyumba submitted that the parties have in place a Collective Bargaining Agreement which came into effect on 1<sup>st</sup> March 2013. He submitted that redundancies were declared between January and February. For purposes of the redundancy the Respondent did not just consider the employees at the Daima Branch and Warehouse but all staff of the Respondent and a selection of staff was carried out in all the branches. The principle of first-in-last-out was applied in the redundancies effected. The Claimant argued that when the Eastleigh Branch was closed, the same principle was not considered and all the employees were told to go. He submitted that the employees came to Court seeking redress and the Court granted interim relief for 30 days pending the hearing and determination of the application. He stated that the Respondent sent the employees on unpaid leave after service of the order was effected. He submitted that the Respondent was using outsourced employees to discriminate against the labour that was unionisable employees. He thus sought orders stopping the redundancy pending the hearing and determination of the suit as well as an order stopping the use of outsourced labour as it is discriminatory and disadvantageous. He submitted that if the Court grants the orders sought it should order a recall of the employees who are on unpaid leave and have their salaries and pay reinstated.

4. Mr. Kanchorry on behalf of the Respondent submitted that the Respondent was opposed to the application. He submitted that the Respondent had stated the reasons why the Respondent intended to declare the 23 employees of the Eastleigh Branch and 2 employees of the distribution centre redundant. He submitted that the Respondent had given the requisite notice in which the reason and the extent of the redundancy was indicated and that the Respondent intended to comply with the requirements as to redundancy. He stated that the reason for the declaration of redundancy for the 23 employees of Eastleigh Branch was the eviction of the Respondent from the premises in Eastleigh. He submitted that in spite of the Respondent obtaining relief from the Business Premises Rent Tribunal, the business of the Respondent at the Branch could not continue and the branch had to be closed hence the redundancy. In respect of the 2 employees from the distribution centre he stated that the positions had been abolished. He submitted that a contract of service like any other contract can be legally terminated and that the unforeseen closure of the Eastleigh Branch was a supervening circumstance that affected the employment contract of the 23 employees. He submitted that the Respondent has no capacity to reabsorb the 23 employees in its other branches. He stated that the Claimant had not stated which provision of the law as to redundancy the Respondent had failed to comply with. The Claimant had alluded to the first-in-last-out which is contained in the CBA and he submitted that there was substantial difference between the employees of the Eastleigh Branch as opposed to Daima and Mombasa Branch as the closure of Eastleigh Branch was unforeseen and unexpected. He submitted that the reasons for the redundancy was fair and lawful and that there is sufficient remedy available to the Claimants for unfair termination should the court find in their favour. He submitted that the converse is not true. In the event the Court found the redundancy was indeed fair, there is no remedy available to the Respondent who would have been forced to retain labour that it did not require with the attendant financial implications. He posed a question – would the employees be in a position to refund the salaries paid during the pendency of the case to the Respondent? He submitted that on balance of convenience the Respondent stands to suffer more prejudice through grant of such order. He urged the Court to be guided by Section 49(4)(d) and the common law principle that there should be no order for specific performance in a contract of employment except in very exceptional circumstance. He submitted that granting the order sought would be tantamount to granting an order for specific performance at interlocutory stage. He stated the outsourcing and the redundancy are two entirely distinct issues and are not in any way related. He submitted that the Claimant had not shown anywhere how the outsourcing caused the closure of the Eastleigh branch. He thus urged the Court to disallow the application with costs to the Respondent.

5. Mr. Nyumba in a brief reply submitted that employment is property guarded by employees. He submitted the 2 employees in the warehouse could have been absorbed. He stated that the reasons for

closure of the Daima branch and Warehouse were one and the same as closure of Eastleigh branch. He submitted there was no reason why first-in-last-out was not applied. He submitted that this was the first time he was hearing a request for deposit from employees and that if they are retained they would be paid for services rendered. He thus urged the Court to grant the orders as prayed.

6. The Claimant's position is that the Respondent's retrenchment was not in keeping with the provisions of the CBA and thus was unfair and oppressive to the Claimant's members. The Respondent on its part took the position that the retrenchment was lawful and fair as the circumstances differed from the prior retrenchment. The facts that are uncontroverted are that the Respondent's Eastleigh branch was closed after a dispute occurred between the Respondent and the landlord. The Respondent thus could not continue with operations at Eastleigh. The Respondent declared redundancy and this was the bone of contention. The Claimant was of the view that the 23 employees could have been absorbed in other branches and the principle of first-in-last-out applied. The Claimant also held the view that the Claimant's members retrenched from the warehouse branch could be absorbed elsewhere in the Respondent.

7. Retrenchment is provided for under the law. In declaring retrenchment, an employer must adhere to the provisions of the law. Section 40 of the Employment Act makes provision for termination of contracts on account of redundancy as follows:-

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 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;

(e) upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(f) the employer has where leave is due to an employee who is declared redundant , paid off the leave in cash;

(g) 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

(h) 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.

8. The redundancy declared was in compliance with Section 40(1)(a) notified to the labour officer for the area and the Claimant. The circumstances obtaining are somewhat not what ordinarily brings forth a declaration of redundancy. The declaration lacks proof of payment of notice and severance as required under Section 40(1)(g) and (h). That to my mind is the only deficiency in the notice. In the premises I will decline the invitation to hold the redundancy to have complied fully with the law. I am however convinced that reasons exist for the redundancy to be declared. I will therefore disallow the Application

but make no orders as to costs. The Respondent is ordered to file in Court the requisite workings of the payments due on account of the redundancy in respect of the 25 employees within 14 days of today.

Orders accordingly.

Dated and delivered at Nairobi this 12<sup>th</sup> day of May 2015

Nzioki wa Makau

**Judge**