REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 815 OF 2015

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL

INSTITUTIONS AND HOSPITAL WORKERS (KUDHEIHA) ……CLAIMANT

VERSUS

THE AGA KHAN UNIVERSITY HOSPITAL NAIROBI …….. RESPONDENT

RULING

1. The ruling herein is with regard to two (2) applications one dated 15th May 2015 filed by the Claimant and application dated 19th May 2015 filed by the respondent. both will be considered together as they related to interconnected issues.

2. In the application dated 15th May 2014, brought under the provisions of sections 12(3)(viii), section 20 of the Industrial Court Act, Rule 13(4), 16, 27, 24(5) and 36 of the Industrial Court Rules and section 74 of the Labour Relations Act the Claimant is seeking for orders that;

1. *Spent*
2. *The Respondent and or its agents be restrained from proceeding with the redundancy process that it has commenced unlawfully.*
3. *The Respondent and or its agents desist from violating and/or subverting the provisions of the Collective Bargaining Agreement registered between the Claimant and the respondent.*
4. *Costs of this application be provided for.*

3. This application is supported by the annexed affidavit of Albert Njeru and on the grounds that pursuant to a notice dated 14th May 2015 the Claimant received information that the Respondent has declared redundancies and is proceeding to evaluate the staff without following procedure as provided for by the Collective Bargaining Agreement (CBA). The Respondent has failed and refused and ignored or neglected to have discussions with the Claimant over the declaration of the redundancies which is contrary to the provisions of the Collective Bargaining Agreement and the Claimant members shall suffer loss and lose their jobs following the unjustified, illegal and unsubstantiated reason for the said redundancy an its process.

4. In the affidavit of Albert Njeru, he avers that he is the Secretary General of the Claimant union and on 15th April 2015 he wrote to the Respondent asking them not to proceed with the intended redundancy of Claimant members by outsourcing the services they undertake especially those in housekeeping, laundry, service attendants and outreach/messenger department. The Respondent wrote back and denied the contents of the letter stating it was baseless and speculative. On 21st April 2015 wrote again to the Respondent noting they were in violation of the Collective Bargaining Agreement. On 15th May 2015 it

came to the notice of the Claimant that the Respondent had issued a redundancy notice to its members, the Respondent has not followed the laid down procedures provided in the Collective Bargaining Agreement when they communicated directly to the Claimant members contrary to the Collective Bargaining Agreement requirement that they communicate directly to them. The notice is contrary to the Employment Act and Collective Bargaining Agreement as it is clear the Respondent has commenced redundancy process without following the provisions of the Collective Bargaining Agreement . The Court should therefore give the orders herein as the Claimant members shall lose their jobs unfairly as the process is contrary to the law and Collective Bargaining Agreement that has been blatantly ignored and now being undermined.

5. In reply, the Respondent filed the Replying Affidavit on 27th May 2015 sworn by Judith Oduge-Otieno who avers that the *ex parte* orders obtained by the Claimant on 15th May 2015 were without disclosure of material facts noting that there is no redundancy that has been declared by the respondent. the Respondent has commenced consultations with various groups and held meeting where the Claimant officers were in attendance after an exchange of various letters. The Respondent has already adviced the Claimant that it has the managerial prerogative to administer its resources in a financially efficient and effective manner beneficial to its clients, staff members and the institution as a whole including outsourcing of services where deemed necessary which the Claimant is threatening to prevent.

6. The deponent also avers that she personally served statutory notices upon the Claimant with regard to potential redundancies resulting from reorganisation and copied to the notice is the Labour officer and the Claimant officials. Consultations subsequent involves all staff and there is no outsourcing yet. The orders obtained by the Claimant were obtained without disclosure of the ongoing consultations and should therefore be set aside.

7. In the application dated **19th May 2015**, brought under the provisions of Rule 16 (1) and (2) of the Industrial Court (Procedure), section 12(3)(viii) and 32(1) of the Employment and Labour Relations Court Act, and Article 159 of the Constitution. The Respondent is seeking for orders that;

1. *Spent*
2. *The honourable Court be pleased to set aside order No.1 of the ex parte orders made herein on 15th May 2015 namely "that the application dated 15th May 2015, of the redundancy process commenced by the Respondent be and is hereby stopped pending the inter-parties hearing of the claimant's application"*
3. *In the alternative, this honourable Court be pleased to clarify that as no redundancy has actually been declared, the Respondent is free to continue with:*

a. *The consultation exercise as planned with the employees who wish to participate in it;*
b. *Issue requests for proposal so as [to] evaluate the possibility of outsourcing some of its services and / or activities*

4. *The costs of and occasioned by this application be borne by the claimant*

8. The application is supported by the annexed affidavit of Judith Oduge-Otieno and on the grounds that on 14th May 2015 the Respondent issued a notice to all its employees entitled "OFFICIAL NOTICE TO ALL AKUHN EMPLOYEES OF POTENTIAL REDUNDACIES RESULTING FROM REORGANIZATION" being Statutory Notice informing members of its staff of possible redundancies as a result of restructuring of its operations so as to increase efficiency in tis overall operations for overall quality services. The notice was first issued and served upon the Claimant both at its offices as well as its shop steward and on all employees. On 15th May 2015 the Claimant moved the Court and obtained *ex parte* orders directing the Respondent to stop the redundancy process commenced pending inter parties hearing on 28th May 2015 and the Claimant in now actively using the *ex parte* orders to agitate members of the respondent's staff. The orders obtained on the basis of deliberate suppression of material facts as well as outright misrepresentation including allegations that the Respondent declared redundancy without following the procedure when all the Respondent had done was to give notice for possible redundancy as

notice required that the Claimant alleged to have been violated – the process of engaging the claimants and other employees in consultation.

9. Other grounds are that the Claimant has failed to disclose that the Respondent has issued and served them with statutory notice prior to issuing it to employees and this was not learnt from the employees. The Claimant also failed to disclose that consultations exercise involves the entire complement of the claimant's staff at approximately 2000 out of which only 543 belong to the claimant. the Claimant also failed to disclose that after issuing the notice the Respondent put in place facilities and arrangements to ensure there wide range consultations that were interactive and effective. Meetings were held on 14th and 15th May 2015 where the Respondent officials were involved and no violation of the Collective Bargaining Agreement can be said to have taken place.

10. The Respondent other grounds in support of their application are that the Claimant practiced fraud upon the Court to get the *ex parte* orders herein and to preserve the integrity of the Court and vindicate the rule of law, the misconduct of the Claimant must be addressed. Redundancy has not been commenced or made any employee redundant and what has been stopped by the *ex parte* order is not clear to the Respondent and the application should be granted.

11. In the affidavit of Judith Oduge-Otieno she being the legal Officer of the Respondent avers that the orders obtained by the Claimant herein deliberately suppressed and or concealed material facts and misrepresented the facts that the Respondent has violated the Collective Bargaining Agreement by declaring redundancies without following the laid down procedures in law and in the Collective Bargaining Agreement and that the Claimant was not informed. She served the Claimant with the statutory notice on 14th May 2015 and the Head Human Resource; Agnes Kamau served the officials of the Respondent and only after such service were the other employees served. The Claimant is now using the *ex parte* orders obtained on 15th May 2015 to agitate the employees knowing well such orders were obtained by falsely claiming the Respondent had declared redundancy without following the procedure yet only a notice had been issued. There have been consultations with the involvement of the Claimant officials and other stakeholders to ensure wide and effective responses. The Claimant has not demonstrated as to how the Collective Bargaining Agreement has been violated and to preserve the integrity of the process of the Court and vindicate the rule of law, the Court should vacate the *ex parte* orders herein and address the Claimant misconduct of non-disclosure of material facts.

12. The deponent also avers that the Respondent has not commenced any redundancy process or made employee redundant. The Respondent is undertaking consultations exercise required by law ahead of any possible redundancy and the core of the orders as to what is stopped or not is not clear and require clarification. It is not clear whether the orders stopped the consultation exercise which is required by law and which was concealed by the claimant; the process of seeking for proposals for purposes of establishing whether the Respondent should outsource some of its activities to third parties as part of restructuring; and the fate of over 1700 employees of the Respondent who are not members of the Claimant and who are evinced an intention to participate in the consultation exercise. The Court was therefore denied of material facts in granting the orders on 15th May 2015 and the application by the Claimant should be dismissed with costs.

13. In reply, the Claimant through the Replying Affidavit sworn by Albert Njeru and filed on 26th May 2015 avers that the Respondent has sent out requests to companies seeking to recruit them for services that are currently provided by the claimant's members. Such consultations are in exclusion of the Claimant despite the existing Collective Bargaining Agreement as there is evidence the redundancy process has already commenced. The *ex parte* orders were not obtained fraudulently and it can be confirmed that the Respondent has issued notice of two months by relying on section 40 of the Employment Act and the Collective Bargaining Agreement. The Claimant has therefore moved the Court as appropriate as the Claimant has never been invited to the consultations alleged to be made by the respondent. the application by the Respondent is therefore an abuse of the Court process and should be dismissed and the orders issued to the Claimant confirmed.

Submissions

14. In submissions, the Claimant stated that a redundancy process has been commenced by the Respondent by the issuance of the statutory notice. There is a Collective Bargaining Agreement that has not been followed as the Claimant has not been consulted as agreed. The notice sent to the employees was copied to the Claimant who is not what is envisaged in law or in the Collective Bargaining Agreement. The Labour officer was also copied tot eh notice contrary to section 40 of the Employment Act. The employees have also not been personally notified of the redundancy. The general notice issued is directed at employees and not through their union, the claimant. the Claimant noted the case of **Kenya Airways Ltd versus Aviation & Allied Workers & 3 Others [2014] eKLR** where the Court held that consultations must be real and not cosmetic. In this case the Respondent has commenced a process without consulting with the Claimant and the two months statutory notice alleged to have been issued is in disregard of the Collective Bargaining Agreement and the applicable law.

15. The Respondent submitted that the Respondent issued a letter that was copied to the Labour Officer and the Claimant on the basis that it was analysing its operations over the next two months whereupon it will be determined as to the changes to be made. This is to have all possible ideas into the process. the Claimant was served with the notice and are thus aware of the consultations which was not disclosed to the Court when obtaining *ex parte* orders on 15th May 2015 which amounts to fraud. The employer is allowed to undertake consultations prior to redundancy as recognised by the Court of Appeal in **Kenya Airways Ltd versus Aviation & Allied Workers & 3 Others [2014] eKLR.** that a general notice must go out to all staff and stakeholders who does not have names and these have not been determined yet. There is no format set by section 40 of the Employment Act as to the nature of notice to be issued. The Respondent is only sharing information and has invited questions in an effort to ensure relevant information is received. The effect of the Court orders is to stop the information flow to the prejudice of the employees. The injunction does not stop time running and the two (2) months will keep running despite the orders herein. The departure from form cannot invalidate a notice.

Determination

Whether there is a redundancy commenced by the respondent;

Whether the procedure commenced by the Respondent has implications; and

Costs payable.

16. Both parties recognise that they have a Recognition Agreement and a Collective Bargaining Agreement in force. These two documents bind both parties herein.

17. In the two applications, the Claimant contests that a redundancy process has commence without the consultations set out in law or under the Collective Bargaining Agreement between the parties herein while the Respondent contests that what they have done is part of the respondent's managerial prerogative to administer its resources in a financially efficient and effective manner beneficial to its clients, staff members and the institution as a whole including outsourcing of services where deemed necessary which the Claimant is threatening to prevent. According to the Respondent there is no redundancy yet, the two months statutory notice issued is a general notice inviting information that will be informative in the restructuring process.

18. What then is the purpose of the notice issued by the Respondent on 14th May 2015 now subject of this suit? The notice issued on 15th May 2015 read in part;

May 14, 2015

All AKUHN Employees

RE: OFFICIAL NOTICE TO ALL AKUHN EMPLOYEES OF POTENTIAL REDUNDANCIES

RESULTING FROM RE-ORGANIZATION

As you know, since late 2014, the management teams have been working through a complete assessment of the hospital. As part of this, we completed an assessment of the hospital's operations, processes and cost structures to meet our objective to increase access to the communities we serve with better provision of quality health and related services.

The resulting strategic findings lead us to conclude that to achieve our objectives, we need to:

- *Re-design departmental processes to ensure operations are efficient;*
- *Reorganise the structure*
- *Realign staff to ensure quality patient care, effective decision-making.*

…

This message serves as official notice that some positons may be made redundant to achieve the above named objectives.

Over the next two months management will determine the necessary changes to be implemented. During this period, we will engage in consultations with those employees likely to be affected by any changes. …

When identifying positions and employees that will be affected, we will take the following into account:

- *Seniority,*
- *Skills and competencies*
- *Merit, ability and reliability.*

In addition, the separation package will be administered by

- *Established university policies,*
- *Collective Bargaining Agreement, and*
- *Kenyan Employment Act 20078*

19. The notice is therefore clear. It is a notice of potential redundancies from a re-organisation following management complete assessment of the hospitals operations, processes and cost structures. These reorganizations are meant to make the Respondent achieve its objectives and therefore the need to re-design departments, reorganization of structures and realignment of staff. As a result, the Respondent has given notice to its employees that some of their positions may be made redundant. The decision of such redundancy will take place in two months within which time consultations will be held with those employees likely to be affected by any changes. An opportunity will be given tot eh employees to give views on how to improve operations. A criterion has been set on how the redundancy will be implemented – seniority, skills and competencies, merit, ability and reliability will be put into consideration.

20. In the submissions of the respondent, there was great emphasis that a statutory notice has been issued, the notice shall run for two (2) months and such time does not stop running in law the orders herein notwithstanding. The basis of these submissions is that no redundancy has been declared and the Respondent is engaging in consultations that have a time limit.

21. As of 14th May 2015, the Respondent had engaged in a series of activities, one such being an assessment of its operations, process and cost structures and arrived at a conclusion that in order to meet its objectives and offer quality services it had to redesign its department, reorganise the structures and realigns its staff. Changes were therefore inevitable in the circumstances and hence some positions would become redundant and staff would be affected as a result.

22. By the 14th May 2015, a management decision had been arrived at. That of the need to reorganise. That some positions would be redundant and staff affected. True, that far, the decision to declare redundancy is the prerogative of the employer as at that date they genuinely believed there existed good grounds that had been preceded by a long assessment of operations, processes and structures. This is the gist of ***G N Hale & Son Ltd v Wellington etc Caretakers etc IUW [1991] 1 NZLR 151 (CA),*** the New Zealand Court of Appeal held;

> *… this Court must now make it clear that an employer is entitled to make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall… The personal grievance provisions … should not be treated as derogating from the rights of employers to make management decisions genuinely on such grounds. Nor could it be right for the Labour Court to substitute its own opinion as to the wisdom or the expediency of the employer's decision.*

23. There is nothing wrong with an entity going through reorganization and declaring some positions redundant. Employers, companies, businesses and such entities reorganise periodically. It is a market requirement to reorganise. Once the right is thus exercised, before an employer can move further with regard to implementation of the management decision that is likely to affect employees as recognised herein, the applicable Collective Bargaining Agreement and the legal motions under section 40 comes into force. Whether the envisaged processes are of re-organisation, restructuring or redundancies, these are governed by the CBA, the Employment Act and the Labour Relations Act. The terms of individual contracts are also implicit to refer here. I therefore find, through the Respondent notice of 14th may 2015, the redundancy processes had commenced. There are procedural requirements that should have been adhered to. The Collective Bargaining Agreement in force for the period 1st January 2014 to 31st December 2016 at clause 11 provides in part;

REDUNDANCY

In the event of redundancy the following principles shall apply.

i. *The union shall be informed in writing at least two months before the date of the intended redundancy and the provision of the Employment Act, 2007 Laws of Kenya shall be exhausted.*
ii. *The principle shall be adopted of last in, first out in the particular grade of employment of employees affected, subject to all other factors such as skill, merit, ability and reliability being equal.*
iii. *The redundant employee will be entitled to the following periods of notice or pay in lieu of such notice ….*

24. Therefore, the parties herein have set out the principles to govern redundancies and the criteria to be applied. The Collective Bargaining Agreement also recognises the application of the Employment Act where there is a redundancy. Section 40 of the Employment Act outline the procedures to be followed thus;

> ***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 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.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

24. The procedures applicable in a redundancy are therefore set out in law as above. The conditions precedent require;

a. A notice to the union and the Labour Officer stating the reasons for, and the extent of, the intended redundancy;
b. Non-union employees should receive a personal notice together with the Labour Officer;
c. The selection criteria; and
d. Address the terms of the Collective Bargaining Agreement on redundancy on terminal dues without disadvantaging non-union employees

25.These are requirements are set out in mandatory terms as held by this Court in the case of **Banking Insurance and Finance Union (Kenya) versus Murata Sacco Society Limited**, **Cause No. 616 of 2010** where the Court held;

Thus reading the applicable law together with jurisprudence on how a redundancy should be undertaken, conducted and or processed; it involves the existence of genuine business reasons that require consultations, development of a pre-set criteria looking at seniority of affected staff; skill, ability, reliability and the class of each employee before arriving at the decision to terminate. Such a process must involve the Union without disadvantaging employees not Unionised and as of importance, the Labour Officer responsible for the area where the Respondent employer is situate must be informed and involved. The Labour Officer is the government representative, neutral in the redundancy process to advice both the employer and employees on the applicable law and adherence to best practice especially as regards the set criteria. The inclusion of the Union where applicable and the Labour Officer is not optional; the law is framed in mandatory terms. Any resultant redundancy process without compliance with the law is unprocedural and a breach to the employment contract. Such breach where pleaded is curable by payment of damages.

26.The notices envisaged under section 40 of the Employment Act are not mechanical. Issued for the sake of going through a process. These processes affect employees and their jobs. such notices should be carefully crafted prior to being issued. Such notices affect the employees behind the redundancy process. this being an issue already contemplated by the parties in the Collective Bargaining Agreement., the motions set out should be adhered to as a matter of course. Even where there is no Collective Bargaining Agreement, the applicable law comes into force once an employer finds good reasons for reorganisation, restructuring or redundancy. The notice issued to the union, though not defined in terms of content as noted by the Court of Appeal in **Kenya Airways Limited Versus Aviation Workers union Kenya & 3 Others [2014] eKLR,** the primary recipients of such a notice is the union such as the claimant and the

employee who is not unionised and in both cases the Labour Officer must receive direct communication. The notice is not meant for information purposes, it is a direct communication to the subject recipients envisaged under section 40(1)(a) and (b) noting the clear message content in the notice is to give reasons for, and the extent of the intended redundancy.

27. The contest here thus being set, the Respondent in the 'statutory notice' so issued and dated 14th May 2015 is directed to its employees. Whether called a general notice, a statutory notice or any other name, the message, purpose and content is clear. This is a notice of intended redundancy arising out of the need to re-organise and such a notice should as a procedural requirement be sent to the Claimant who enjoys recognition and has a Collective Bargaining Agreement with the respondent. the notice due to the Claimant cannot be circumvented through any other means that the Respondent is keen to consult as widely as possible to be able to source information from communities and other stakeholder so as to improve its service delivery and ensure quality. The notice to issue is a legal requirement forming the basis of, the reasons for, and the extent of the intended redundancy.

28. The Claimant upon discovery of the legal and procedural flaw moved the Court immediately and obtained the orders as herein. I find good foundational basis in such move as without such engagement and issuance of the required notice in law, the Respondent is keen to move irrespective of the same noting the nature of application seeking to set aside the interim orders herein. To move a step forward as notified by the Respondent would be to defeat the very purpose of the Collective Bargaining and the resultant Collective Bargaining Agreement as herein, which is firmly entrenched in stature, the Labour Relations Act. The sanctity of the Collective Bargaining Agreement between the parties herein will be lost if the orders sought by the Respondent are granted. These are declined.

29. The Collective Bargaining Agreement contemplate a notice of two (2) months prior to the redundancy motions taking effect. It is not late for such notice to issue and for the time to start running in that regard. To proceed as commenced by the Respondent with the notice dated 14th May 2015 is a misapplication of the law as under section 40 of the Employment Act. I find merit in the application by the claimant; the same is made in good faith without any fraud as any aggrieved party in a matter such as this one where the law is not adhered to has recourse before this court. There will be no prejudice suffered by the Respondent by issuing the appropriate notices as under section 40 of the Employment Act and in pursuance with the applicable Collective Bargaining Agreement.

30. Where correct procedure was followed, the application and suit herein would have been avoided. Costs are therefore due to the claimant.

In conclusion,

a. **The Respondent is hereby restrained from proceeding with the redundancy process/consultative meetings commenced with the notice dated 14th May 2015 pending the hearing and determination of the suit herein;**
b. **On the Notice issued on 14th May 2015, time stopped running with the interim orders herein and such time shall not run as (a) above;**
c. **noting the nature of the claim and orders above, the same shall be heard on priority basis; and**
d. **costs awarded to the claimant**

Delivered in open Court, dated and signed in Nairobi on this 4th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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