



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1066 OF 2015

KENYA UNION OF COMMERCIAL,

FOOD AND ALLIED WORKERS CLAIMANT

VERSUS

LONDON DISTILLERS (K) LIMITED RESPONDENT

(Before Hon. Justice Hellen S. Wasilwa on 30th July, 2015)

RULING

1. The application before court is the one dated 18th June 2015 and filed in court on 19/6/2015 under Certificate of Urgency. The Applicants brought the application through a Notice of Motion filed under Section 12 of the Employment and Labour Relations Court Act, 2011, the Employment Act, 2007, the Labour Relations Act, 2007, the Constitution of Kenya and all enabling provisions of the law.
2. The Applicants filed this application seeking orders that:
 1. ***This application be certified urgent and be heard ex parte in the first instance.***
 2. ***Service of this Application upon the Respondent be dispensed with.***
 3. ***Pending the hearing and determination of this matter, this Honourable Court be pleased to issue an order restraining the Respondent from declaring SIXTEEN (16) employees in the gardening department redundant.***
 4. ***This Honourable Court be pleased to set down this Application for inter-partes hearing on priority basis.***
 5. ***Costs of this Application in favour of the Claimant/Applicant be in the cause.***
3. The application is supported by the annexed affidavit of Simon Kimeu attached herewith and on the following grounds:
 - i. ***That the parties have a valid agreement relative to Recognition and negotiating procedure setting out the terms of engagement between the parties on behalf of the Respondent's employees.***
 - ii. ***That pursuant to the said Recognition Agreement, the parties have concluded several Collective Bargaining Agreements, the last of which came into effect on 1st May, 2013 for a two year duration expiring on 30th April 2015 setting out the terms of service for unionisable employees.***

- iii. ***That the Claimant/applicant has already declared its intention to review the said Collective Bargaining Agreement for the period 1st May 2015 to 30th April 2017 and that the Respondent has declined to engage the Applicant/Claimant in negotiations.***
 - iv. ***That the Respondent intends to frustrate Trade Union representation by engaging in what is referred to as restructuring, a plan which is meant to do away altogether with the employees with whom they have a direct contract of employment.***
 - v. ***That according to the Respondent's General Manager Administration, the Respondent has targeted sixteen (16) established employees in gardening department for replacement with outsourced labour who are perceived to be cheaper and who may not be members of a Trade Union, all in the name of restructuring.***
 - vi. ***That Section 55(2) of the Labour Institution Act, 2007 as amended by Gazettee Supplement No. 72 of 12.7.2012 (Miscellaneous Amendments) and the International Labour Organizations; Private Employment Agencies convention 1997, Convention No. 181 of 1997 do not envisage the replacement of employees with direct employment with outsourced labour.***
 - vii. ***That the employees will be highly prejudiced and substantive loss may occur if orders sought herein are not granted.***
 - viii. ***That by granting the orders sought herein, the Respondent will not suffer any loss, damage or prejudice, as jobs exist and are available for the targeted employees.***
 - ix. ***That restructuring does not portend loss of jobs only. On the contrary, it may also enhance company performance and more jobs where there is good will without malice.***
 - x. ***That the dispute regarding the "staff redundancy affecting sixteen (16) employees" has already been referred to the Ministry of Labour under Section 62 of the Labour Relations Act, 2007 and as required under Section 74 of the said Act on urgent referrals to court.***
4. The Applicants contend that the Respondents are not acting in good faith by declaring their members redundant in the name of restructuring and that this is aimed at preventing the Applicants from training their members in order to defeat the purpose of negotiations.
 5. The Respondents opposed this application. They filed their replying affidavit sworn by Mr. P. S Mann on 30th June 2015. The Respondents contend that they are an alcohol distiller and none of its objects is providing gardening and/or cleaning services.
 6. They contend that gardening/cleaning is auxiliary to their core businesses and therefore they do not consider a whole department of gardening/cleaning to be necessary at this stage.
 7. They also aver that the Applicants will not suffer any irreparable loss and damage and Claimants can be compensated in damage. The Respondents have also submitted that they are exercising their right and freedom to re-organize their business and their strategy by laying off by way of redundancy is not amicable to the Claimants dictate except to the extent of due procedure followed.
 8. The Respondents further submit that the redundancy is in no way meant to frustrate the Applicants in the Collective Agreements they are negotiating and that the current negotiations and proposals have only taken 2 months as per their Appendix 'PSM 2'.
 9. The Respondents aver that the Applicants have not established that they have a prima facie case with probability of success and they want this application dismissed and interim orders vacated.
 10. Upon considering the submissions by both parties, it is the view of this court that the law on

redundancy is clear as enumerated under Section 40 of Employment Act which 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.***

11. The Applicants have not submitted that this law was flouted. Their contention is that restructuring should not be the excuse to declare their members redundant as the gardening and cleaning function will still be handled by the Respondents in their premises.

12. I have looked at the orders the Claimants seek. In the final analysis and it is my view that if the orders currently sought are not granted, the entire claim will be rendered annulity. I therefore allow the application as sought. The redundancy is put on hold until this case is heard and determined.

Read in open Court this 30th day of July, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Nyumba for Applicant – present

Odiwour for Respondent – Present