



**REPUBLIC OF KENYA**  
**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**CAUSE NO. 185 OF 2015**  
**(AS CONSOLIDATED WITH 186/2015 & 187/2015)**

**DIANA IRUNGU ..... 1<sup>ST</sup> CLAIMANT**  
**EDWIN NDIRANGU ..... 2<sup>ND</sup> CLAIMANT**  
**JOSEPH KAMAU ..... 3<sup>RD</sup> CLAIMANT**

**VERSUS**

**NESTLE KENYA LIMITED..... RESPONDENT**

**Mr Nyamu for the Claimants/Applicants**

**M/s Opiyo for the Respondent**

**RULING**

1. The Application dated 13<sup>th</sup> February, 2015 seeks issuance of an injunction staying the taking into effect of the redundancy notices on 15<sup>th</sup> February, 2015 pending the hearing and determination of the main suit.
2. Similar orders were sought in Cause No 186 of 2015 and 187 of 2015 between Edwin Ndirangu and Joseph Kamau respectively against the Respondent. Interim orders pending the hearing and determination of this Application were granted by the Court.
3. The Cause of action arose from the same transaction in the three matters now consolidated. The Application is based on the following grounds common to the three applicants;
  - a. The Respondent issued the Claimants/Applicants with a notice of intended redundancy due to take effect on 15<sup>th</sup> February, 2015.
  - b. That the Respondent has not complied with Section 40 of the Employment Act in issuing the notice of the intended redundancy by:
    - i. not using a fair selection criteria.
    - ii. using discrimination on the basis of race and colour in the selection criteria contrary to Article 27 of the Constitution of Kenya 2010 as read with Section 46 (g) of the Employment Act, 2007.
    - iii. failing to take into account the existence of a loan taken by the Claimants in the calculation of the severance package, which loans were to be serviced from the monthly salary and benefits of the Claimants and in so doing the Respondent is guilty of unfair labour practice contrary to Article 41(1) of the Constitution of Kenya 2010.

4. The Application is supported by the Affidavits of the Claimants/Applicants. The Claimants have also made submissions in support of the Application, ostensibly relying on the principles enunciated in the case of **Giella Vs Cassman Brown & Co Limited [1973] E. A 358 .....360**, that the Claimants/Applicants have shown.

- i. a prima facie case with a probability of success
- ii. that the Applicants will suffer irreparable loss if the relief sought is not granted
- iii. the balance of convenience favours the grant of the interim relief.

## **Response**

5. The Application is opposed vide a Replying Affidavit of Mr Ciru Miring'u the country manager of the Respondent. The Respondent states that there was overall deterioration in the growth and profitability of the Respondent's business in the East African region, particularly in Kenya.

6. That despite implementing certain cost cutting measures the Respondent has continued to make substantial losses hence the decision to adopt a leaner structure in order to help the Respondent achieve a sustainable and profitable business for the future.

7. That the Respondent followed the provisions of section 40 of the Employment Act in declaring the redundancies by;

- i. Calling a staff meeting on 15<sup>th</sup> January, 2015 on the matter.
- ii. The Human Resource Manager meeting the Applicants before giving them the letters dated 15<sup>th</sup> January, 2015 in accordance with section 40 (1) (b) of the Employment Act, 2007, in which the Applicants were given a one (1) month notice that the intended redundancy would take effect from 15<sup>th</sup> February, 2015.
- iii. The Labour Office was notified vide a letter dated 8<sup>th</sup> January, 2015 in accordance with section 40(1) (b) of the Act.
- iv. Several consultative meetings were held with the Applicants on dates specified in the replying affidavits.
- v. Selection criteria was discussed with the Applicants in the meetings held prior to the issuance of notices.
- vi. That no discrimination was done by the Respondent in the selection criteria as alleged or at all and in any event the Respondent announced to all staff that the expatriates terms would end the first and second quarter of 2015 and those positions would be filled by Kenyans. That the allegation of discrimination on racial basis is baseless and untrue.

8. The Respondent relied on the case of **David Muteru & 103 others Vs Africa Nazarene University [2014] eKLR** in which Mbaru J noted that in a redundancy situation the employee must issue a first general notice to all staff of the impending redundancy in terms of Section 40(1) (f) of the Employment Act. This must be followed by a specific notice to the individuals selected for retrenchment in terms of section 40(1) (b) of the Act.

9. The Respondent submitted that it had observed all the requirements under section 40 of the Act. The Respondent further relied on the **Industrial Court of Kenya at Nairobi Cause No. 741 of 2014 Churchil Oyelo Vs Kenya Kenya Kazi Security Service Limited** in which I held;

*“the substantive issue as to whether or not the declaration of redundancy by the Respondent is harmful Just and fair is a matter that cannot be determined until the court has heard all the relevant facts placed before it. This matter must therefore await the full hearing and determination of the suit”.*

10. I further stated in that matter as follows

*“In employment matters, the court has always been very slow to descend into the arena and grant interim*

*orders aimed at restraining the hand of the employer in running its own affairs. This is because courts have traditionally considered management of an enterprise as a prerogative of the employer which is essential to ensure that the business remains viable and sustainable”.*

11. This approach remains sound today as it was yesterday in matters of employment and labour relations. In *casu*, counsel for the Claimants/Applicants have made very able submissions faulting the procedure and selection criteria used by the Respondent to declare the Claimant/Applicants redundant.

12. The Court is satisfied that the Applicants have an arguable case but the Applicants have not demonstrated that they stand to suffer irreparable damage/injury in the event the conservatory orders sought are not granted.

13. Indeed a quick look at the statements of claim attached to the specific applications show that all the Claimants/Applicants have not sought to be reinstated to their respective positions but instead pray for grant of terminal benefits, compensation for unfair termination and damages for discrimination.

14. Clearly, failure to grant this interim relief will not occasion the Claimants/Applicants, irreparable harm. To the contrary keeping the Claimants/Applicants in employment when the positions they held have been abolished is most inconvenient to the employer and could negatively impact performance of the enterprise.

15. Accordingly, the Consolidated Application is dismissed. The main suit to take its normal course.

16. Costs in the cause.

**Dated and Delivered at Nairobi this 29<sup>th</sup> day of July, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**