



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. On 17th June 2015 the Claimant filed application through Notice of Motion under the provisions of section 12(3), section 20 of the Employment and Employment Act, Rule 13(4), 16, 27, 24(5) and 36 of the Industrial Court Rules and section 74 of the Labour Relations Act and seeking for orders that;

1. *Spent.*
2. *The Respondent and or its agents desist from violating the Ruling of the Court issued on the 4th of June 2015.*
3. *The notice of intended redundancy dated 10th June 2015 issued by the Respondent herein be stayed pending the hearing and determination of this suit.*

2. The application is supported by the affidavit of Albert Njeru and on the grounds that pursuant to the Ruling of the Court on 4th June 2015; the Respondent has violated the same by proceeding to hold consecutive meetings against these orders. The notice issued on 14th May 2015 and subject of the orders of 4th June 2015 has not been lifted and thus in contempt and the Claimant shall be applying for contempt proceedings. Other grounds are that the claimant's members shall suffer irreparable loss and are bound to lose their jobs following the unjustified, illegal and unsubstantiated reason for the said redundancy and its process.

3. In the affidavit of Albert Njeru he avers that since the Court Ruling on 4th June 2015 herein, the Respondent has not withdrawn the notice issued to the claimant's members and dated 14th May 2015 and the only notice that has been issued is one dated 10th June 2015 withdrawing the notice that had been issued to the members and dated 14th May 2015. The new notice as issued is not a withdrawal of the notice issued to employee and members of the Claimant but issued to the Claimant herein, whereas the Claimant had no such notice. There are now two notices in existence causing confusion as due process has not been followed. Claimant members have not received any notice from the Respondent withdrawing the notice issued on 14th may 2015. The Respondent is in contempt of Court and the Claimant shall institute contempt proceedings as they have commenced consultative meetings which the Court stopped in the Ruling of 4th June 2015.

4. Mr Njeru also avers that the main issue raised in the claimant's suit is that the Respondent has not justified its reasons for terminating the claimants' members' jobs through redundancy process. If the Respondent is allowed to proceed with the illegal process, the suit herein shall be rendered nugatory. The claimant's members shall suffer irreparable loss and are bound to lose their jobs following the unjustified, illegal and unsubstantiated reason for redundancy.

5. In submissions, counsel for the Claimant stated that the 1st notice issued by the Respondent dated 14th May 2016 and subject of the application dated 15th May 2015 was directed at the Respondent employees and not the claimant. There is no withdrawal of this notice to justify the issuance of the second notice now served upon the Claimant union and dated 10th June 2015. There are no substantive reasons given by the Respondent to justify the validity of the redundancy process as held in **Kenya Union of Domestic Hotels Educational Institutions & Hospitals Workers versus Mombasa Sports Club, Cause No.440 of 2013**. It would therefore be unfair to proceed with a redundancy process without valid grounds.

6. The Claimant also submitted that the notice dated 10th June 2015 should be stayed for the substantive issues raised in the Memorandum of Claim herein to be dealt with. The two notices now issued should be withdrawn.

7. In reply, the Respondent filed **Replying Affidavit** sworn by **Judith Oduge-Otieno** on 26th June 2015 and avers that in late 2014 the respondent's management completed an assessment of its operations, processes and cost structures with an objective of increasing access to the communities it serves and the resultant strategic findings being that there was need to redesign departmental processes, reorganise the structure and realign staff. On 14th May 2015 a two months' notice to all employees was issued informing members of staff of possible redundancies. The 1st statutory notice duly served on the Claimant as well as the County Labour Officer on 14th May 2015 and sent to the entire staff comprising approximately 2000 employees and only 543 belong to the claimant. On 15th May 2015 the Claimant moved the Court and following orders obtained the Respondent immediately stopped any consultations or activities planned with regard to the statutory notice. The Respondent also moved the Court on 19th May 2015 seeking to set aside the orders issued on 15th May 2015 and by a Court Ruling on 4th June 2015, the Court at paragraph 26 and 27 held that the primary recipient of the statutory notice is the union, the non-unionised employees and the Labour Officer. Thus, by notice dated 10th June 2015, the Respondent withdrew the 1st statutory notice and served the claimant, non-union members and the local labour officer.

8. Ms Otieno also avers that having withdrawn the 1st notice, the Respondent issued fresh notices on 10th June 2015 [the 2nd statutory notice] directed at the claimant, non-union members and the labour officer. There is only one statutory notice now in existence dated 10th June 2015. The Respondent in the notice gave a schedule of meetings and asked the Claimant to nominate its representatives but there was no response. On 16th June 2015 the Respondent asked the Claimant for a confirmation of its attendance at the consultation meeting but the Claimant asked for the meeting to be rescheduled without making any proposed dates. On 18th June 2015 another letter sent to the Claimant requesting for proposed meetings dates but the Claimant replied that they had no intention of participating in consultations.

9. Ms Otieno also avers that on 11th June 2015 the Respondent held a staff forum during which the employees not members of the Claimant was briefed as to the reasons for the re-issue of the statutory notice, the rationale and need for the proposed restructuring, the legal requirements and the areas likely to be affected. From the staff of over 2000, only 543 are Claimant members. Upon the issuance of the notice dated 10th June 2015, the Respondent did put in place arrangements to ensure wide consultations. On 17th June 2015, the Claimant moved Court and obtained *ex parte* orders staying the notice dated 10th June 2015 and upon receipt of the order, the Respondent suspended all activities or actions related to the notice for both the Claimant members and non-union employees. The Respondent has therefore complied with the Court Ruling on 4th June 2015 and the subsequent *ex parte* orders of 17th June 2015. The Claimant has refused and or ignored the notice and invitation for consultation but intends to bring the whole process to an end without any legal basis and contrary to the Collective Bargaining Agreement. The

Claimant has refused to engage in consultations despite the Respondent willingness to carry out the same and thus by obtaining *ex parte orders herein* prejudicing the respondent. There is no violation of the Court orders and the orders sought herein are not warranted.

10. The respondent's counsel also submitted that the notice of motion is seeking two orders to stay the notice dated 10th June 2015 and the Respondent to respect Court orders. That there is a legal process with regard to the enforcement of Court orders which have been violated and what is herein sought the Court cannot grant.

11. On the submission that the 1st notice of 14th May 2015 has not been withdrawn, the Respondent submitted that there is compliance with Court orders of 4th June 2015, a new notice was issued and directed at the Claimant union. there are no two notice as only one exists that has been directly served upon the General Secretary of the Claimant union as held by the Court of Appeal in **Thomas De La Rue versus David Opondo Omutelema [2013] eKLR**. the Respondent has also issued new notices to the non-union employees and to the County Labour Officer. The Respondent has respected the Court orders and gone out of its way to clear all obstacles so as to hold consultations that the Claimant union has declined to attend. The time for seeking the Respondent to justify the redundancy process is not due and to do so is to go against the CBA and contrary to section 40 of the Employment Act as held In **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**.

Determination

There are two issues outlined in the application herein;

That the Respondent has violated the Court Ruling on 4th June 2014; and

That the Respondent has commenced consultative meetings that were stopped by the Court Ruling vide notice dated 10th June 2015.

12. Before delving into the above issues, I wish to revisit the Ruling of 4th June 2014. The Court restrained the Respondent 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 and noting these orders, Court directed the Claimant to take a hearing date for the main suit to be heard on priority basis. Each party had a role to play after the Court Ruling on 4th June 2015. The Respondent was to stop the redundancy process/consultations whereas the Claimant was to take a hearing date for the main suit which hearing date was to be allocated on priority basis.

13. From the submissions with regard to the current application, I take it that the Respondent has now issued a new notice on the redundancy process. I have perused the file and I find no hearing date or any effort by the Claimant to take a hearing date for the main suit. The Respondent does explain its action on the grounds that there is rationale to commence redundancy process, the previously issued notice has been withdrawn and a new notice issued. On their part, the Claimant explains its action on the grounds that the Respondent is yet to file a statement of defence despite being served with summons.

14. In these circumstances, I agree with the respondent's submissions to the extent that where a party has violated a Court order, there are specific legal requirements to follow in addressing such a matter. This I find cannot be addressed by the application of section 13 of the **Employment and Labour Relations Court Act**. A separate procedure and application is contemplated, and where the rules of the Court do not address the same, parties are invited to apply any other written law operational in Kenya such as would apply to a party that has failed to obey Court orders.

15. The second limb of the issues above is however critical. Where the Respondent has opted not to file a defence to a claim filed against them, this is not a bar against the Claimant from moving the Court as appropriate. As directed, the Claimant was to move with haste and ensure the grant of a hearing date to ensure the disposal of the main suit as otherwise to hold on to the stay herein and fail to address the claim

is not what was contemplated in the Court ruling. To fail to move the Court is to invite the Respondent to move outside the Court and commence a new process of redundancy as the process stopped was the one that related to the notice dated 14th May 2015 and not with regard to subsequent notices. Where the Respondent has no desire, does not wish or do not contemplate defending the current suit by filing a statement of defence, they have the absolute right to act as desired. There is however the legal consequences in taking such a position not to defend the suit – the Claimant shall proceed without its claim being opposed. I will only say that much here.

16. By the Court Ruling on 4th June 2015, no notice has been issued to the Claimant union. There is no 1st notice to the Claimant in existence. Such notice shall exist once it is issued to the Claimant union where circumstances contemplated under section 40 of the Employment Act exist. Here concern is noted by the Claimant and not the Labour Officer or the non-unionised employees of the respondent. The process required for the three parties, though intertwined or inter-linked, each has a right that can be singled out and asserted as herein.

17. The notice dated 10th June 2015 now issued by the respondent, whatever name assigned to it, whether it is a second notice, a new notice; going through it and the gist of its contents, it is an invitation and notification of a redundancy process resulting from re-organisation at the respondent's business. The notice is directed at the Claimant union and with reference to a Collective Bargaining Agreement between the parties. I find no reference to previous notices, invitations, meetings or consultations. I therefore take it as it is carefully noting the background of the matter herein and the assessment as above.

18. the notice issued to the Claimant union and dated 10th June 2015 withdrawing the earlier notice dated 14th may 2015, is served not on the claimants members directly but to their union. Can this be said to be a *second notice* and hence the *first notice* has not been withdrawn? Technically, and I say *technically* noting the substantive issues herein, the Claimant moved the Court on the basis that its members have received notification of redundancy *first notice* without a direct communication upon the claimant. The recognition that such notice ought to have gone to the Claimant union has been emphasised by the court. To thus issue a withdrawal of the notice *second notice* to the Claimant members and not to the Claimant directly, I find would not serve any useful legal purpose.

19. The service of notices, now having been directed should go to the Claimant union directly for and on behalf of its members in the employment of the Respondent, to avoid a maze of communications and call the withdrawal notice be to *second notice* is not prudent. By the notification upon the Claimant, being the union representing 543 members in the employ of the Respondent, such a membership is made aware of the withdrawn notice. This I find to be sufficient in the circumstances.

20. I make reference to the Claimant's submissions noting **Kenya Union of Domestic Hotels Educational Institutions & Hospitals Workers versus Mombasa Sports Club, Cause No.440 of 2013**, and the Court holding that;

It is clear from the cited statutory provisions that an employer is required to prove that the reasons given for the redundancy are valid and fair, and that the reasons are based on the operational requirements of the employer. It is within these parameters that the discussion must now turn.

21. As the Respondent moves with haste to address the matters at hand, reason must be given to the ongoing litigation against them that is pending in Court unresolved. To move and frustrate the same in any manner will not receive sanction of the Court especially where the claim herein has foundation and the Claimant has moved the Court to secure rights. To cause termination of employment when a suit challenging anticipated termination and the same is stopped by the Court on good grounds would amount to an unfair labour practice. See section 46(h) of the Employment Act here thus;

The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty —

...

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;

In the penultimate, application dated 17th June 2015 shall not be allowed save that the issues raised in the main suit remain urgent and the Claimant should proceed as directed on 4th June 2015. Costs shall be in the cause.

Delivered, dated and signed in open Court at Nairobi this 16th day of July 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

.....

.....