



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1021 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 14th December, 2015)

DEREK WANGAKI OKOVACLAIMANT

VERSUS

TOTAL KENYA LIMITEDRESPONDENT

RULING

1. The Application before court is the one dated 15.6.2015. The Application was brought by the Applicants herein through a Notice of Motion dated the same day and brought under Section 12(3) of the Industrial Court Act, Chapter 234 of the Laws of Kenya and Rule 16(1), (2), (3), (4) and (5) of the Industrial Court (Procedure) Rules, 2010. The Applicants seeks orders as follows:

1. *For reasons to be recorded and on the grounds set in the Certificate of Urgency, service of this application be dispensed with and the application herein be heard ex-parte in the first instance for purposes of prayer 2, 3, and 4 herein.*
2. *This application be certified urgent and be heard forthwith and/or on priority basis.*
3. *Pending the hearing and determination of this application, a temporary injunction to issue to restrain the Respondent and/or their employees and/or agents and/or assigns and/or anybody whatsoever from declaring the Applicant redundant.*
4. *Pending the hearing and determination of this application, a temporary injunction to issue to restrain the Respondent and/or their employees and/or agents and/or assigns and/or anybody whatsoever from repossessing the Applicant's motor vehicle registration number KBZ 061B.*
5. *Pending the hearing and determination of this suit, an injunction to issue to restrain the Respondent and/or their employees and/or agents and/or assigns and/or anybody whatsoever from declaring the Applicant redundant.*
6. *Pending the hearing and determination of this suit, an injunction to issue to restrain the Respondent and/or their employees and/or agents and/or assigns and/or anybody whatsoever from declaring the Applicant redundant.*
7. *This application be heard inter-partes on a date to be directed by this Honourable Court.*

2. The Application is supported by the annexed affidavit of Derek Wangaki Okova the Applicant herein deponed on 15.6.2015 and on the following grounds:

- A. *The Respondent has issued the Applicant with a notice of intention to declare him redundant which notice takes effect on 30th June 2014.*
- B. *There is no substantive justification for the redundancy as the Applicant's job and responsibilities are neither superfluous nor is his position being abolished.*
- C. *No criteria has been disclosed to the Applicant as to how he was selected as an employee to be declared redundant.*
- D. *No redundancy situation exists as relates to the Applicant's position as a Technical and Engineering manager for the reason that the Respondent continues to execute Capital projects at an increasing scale and the Applicant is responsible for the execution thereof.*
- E. *The procedure adopted to declare the Applicant redundant is inherently unfair.*
- F. *The Applicant cannot possibly meet his current financial obligations from the terminal dues being offered by the Respondent.*
- G. *The Applicant avers that he is the principal bread winner of his household and if the Respondent is allowed to illegally declare him redundant as purported the Applicant and his family stand to be financially embarrassed and rendered destitute.*
- H. *The Applicant has threatened to repossess the Applicant's motor vehicle registration number KBZ 061B purchased under the Respondent's interest free stat car loan as part of the Applicant's employment benefit.*
- I. *There is no conceivable practical difficulty in the Applicant's continued employment.*
- J. *The Applicant:*
 - a. *Is willing and capable to continue being in the service of the Respondent with utmost zeal, dedication and drive;*
 - b. *In no way contributed to the circumstances that led the Respondent to attempt to declare him redundant;*
 - c. *Is only 37 years old and he reasonably expected to remain in the service of the Respondent up to the retirement age of 60 years old.*
 - d. *With his level of skill and experience, will require a considerable amount of time to secure comparable or suitable employment with another employer;*
- K. *The above actions if allowed to continue will cause irreparable damage to the Applicant herein.*
- L. *The Applicant and his family stand to be rendered destitute and suffer irreparable loss and damage unless this Honourable Court intervenes.*

3. The Applicant's case is that he was employed by the Respondent on 15/6/2013 as Technical and Engineering Manager. His job description has been set out at page 6 of the Notice of Motion and it includes to ensure effective execution of capital projects in all Total facilities within agreed specifications time schedule and budget and carry out risk assessments for each project to ensure litigation measures are in place for zero incidents. He was also to participate in all annual budget estimates and ensure all capital expenditure is controlled in line with business policy.

4. The Applicant avers that on 4.6.2015, he was given a redundancy notice to take effect on 30.6.2015, he had previously taken a car loan of 3.5 million to be paid out over time. He avers that there were no

substantive reasons for the redundancy because the Respondent employed other engineers with qualifications as his and he gives the example of Appendix DWO – 20 – which is a memo introducing one Alex Ndalila a Civil Engineer as joining the Respondent’s employment with effect from 6th July 2015. Another memo was in relation to one Mr. Calvin Ochieng who is also an Engineer who joined the Respondent’s employment with effect from July 2015.

5. The Applicant has also contended that he was in-charge of Capital Expenditure of Respondent and he knew that the Respondent had been growing and so the Respondents submissions that their output was declining is not true.

6. Concerning the procedure employed to declare Applicant redundant the Applicant has submitted that he was given less than 1 months notice contrary to the law and criteria used was not disclosed. The Applicant contends that Respondent has been declaring employees redundant and then employing others to fill up the position and even Claimant Applicant’s position has been taken by one Calvin Ochieng who was head hunted from Vivo Energy. The Applicant therefore seeks prayers sought in this application.

7. The Respondent opposed this application. They filed their submissions accordingly on 22/7/2015 and also a replying affidavit dated 1/7/2015. They have submitted that the Applicants have not established that they have a prima facie case.

8. On redundancy, they also state that the Application is not merited because the employer looks at more than commercial issues to declare an employee redundant and this right cannot be taken away from him. They cited **Kenya Airways Limited –vs- Aviation and Allied Workers Union** where the Court of Appeal held that an employer can exercise his right of redundancy for genuine reasons. They referred to the notice (page 7 of replying affidavit) send to all employees signifying reorganization changes for efficiency purposes and not specifically for commercial reasons.

9. They aver that prayers sought will bar the employee –employer relation if granted as sought.

10. Concerning the car loan, they have submitted that the Claimant propose how to pay it off. They also submitted that the Applicant can be compensated in damages other than in prayers sought.

11. In a rejoinder, the Applicants insist that the application is merited and that the Applicant was not given any chance to discuss anything with the Respondent and that a redundancy situation does not exist as Respondent is employing other people to fill the positions of those declared redundant.

12. I have considered the submissions of both sides and the issue for determination is whether the Applicant has established a prima facie case with a probability of success to warrant issuance of the orders sought.

13. In determining whether there is a prima facie case, the principles laid down in various case law as basis for grant of injunction come into play. In the case of **Suleiman vs Amboseli Limited (2004) 2 KLR 589** by Ojwang Ag. J. (as he then was) rendered himself as follows:

“Counsel for the Defendant urged that the shape of the law governing the grant of injunction relief was laid long ago in Giella vs Cassman Brown in 1973 cast in stone and no new element may be added to that position. I am not with respect in agreement with Counsel in that point for the law has always kept growing to greater levels of refinement as it expands to cover new situations no exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of Injunctive relief (1986) 3 ALL ER 772.

“A fundamental principle of ----- that the Court should take whichever course appear to carry the lower risk of injustice if it should turn out to have been wrong-----

Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella vs Cassman Brown the Court has to consider the following questions before granting Injunctive

relief ----- even as these must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court is responding to prayers for Interlocutory Injunctive relief. Should always opt for the lower rather than the higher risk of injustice -----“.

14. In this case then, what is the lower risk of Injustice?. The Applicant has contended that there are no reasons to warrant redundancy. The Applicant also contends that the procedure for redundancy was not followed.

15. Section 40 of Employment Act 2007 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.***

16. Under this Section, subsection (f) notice of redundancy is supposed to be 1 month. The Applicant has averred that he was given less than 1 month as notice. This is true given that the notice was dated 4.6.2015 and was to expire on 30.6.2015. Other provisions under Section 40 of Employment Act whether complied with or not, can only be known after hearing his claim to completion.

17. It is also apparent that other people of same qualification as Claimant have also been employed within the same period that the Claimant was behind declared redundant. The criteria used in dealing with the Applicant need to be explained and in this interim period, this has not been done.

18. On a balance of probabilities and so as to take the lower risk of injustice, I find a prima facie case is established by the Applicant and I grant orders in terms of prayer 5, and 6. The parties to take an early hearing date at the Registry to dispose of the main suit.

Dated and delivered in open court this 14th day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for the Respondent

No appearance for the Claimant