



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 16 OF 2014**

**IN THE MATTER OF INDUSTRIAL COURT OF KENYA**

**BETWEEN**

**KENYA PETROLEUM OIL WORKERS UNION.....CLAIMANT**

**VERSUS**

**KENYA PETROLEUM REFINERIES LTD .....1<sup>ST</sup> RESPONDENT**

**ESSAR ENERGY OVERSEAS LTD.....2<sup>ND</sup> RESPONDENT**

**PRINCIPAL SECRETARY MINISTRY OF**

**ENERGY AND PETROLEUM.....3<sup>RD</sup> RESPONDENT**

**HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**R U L I N G**

The claimant filed notice of motion under certificate of urgency on 5.2.2014 seeking the following orders:

- a. **the motion to be certified urgent and heard on priority basis;**
- b. **injunction restraining 1st and 2nd respondents from unlawfully, unfairly, wrongfully implementing, effecting, conducting and or actualizing any redundancy on the claimant's members pending the hearing and determination of the application and the suit;**
- c. **the directors of the 2nd respondent to deposit their Passports in court and be prohibited and restrained from leaving the jurisdiction of this court pending the hearing and determination of the application;**
- d. **the respondents be restrained from employing replacement labour and or employees in the same positions and or to perform the same or similar work as the claimant's members in the employ of the 1st respondent pending the hearing and determination of the application;**
- e. **the respondents to pay the redundancy benefits and terminal dues of kshs22,158,467.00;**
- f. **injunction to restrain and prohibit the respondents from terminating the Kenya petroleum Refinery Ltd shareholding Agreement with the Government of Kenya pending the hearing and determination of the application.**
- g. **any other order or relief as the court may deem just in the circumstances; and**

#### **h. costs of the application.**

The Motion is based on the grounds contained in the body of thereof and the Supporting Affidavit sworn by Gilbert Amolo on 4.2.2014. The summary of the grounds of the motion is that the respondent are about to unfairly, unlawfully and wrongfully declare the Claimant's members redundant without consulting her.

In response the 1<sup>st</sup> respondent filed a replying affidavit denying the alleged redundancy on any of her employees and termed the allegation as far-fetched, speculative and anticipatory. Consequently the 1st respondent contended that the orders sought were untenable because the applicant did not prove any prima facie case with probability of success.

The second respondent also opposed the application by the affidavit sworn by Ashok Kumar Dhar on 18.2.2014. She contended that she did not have any employment relationship with members of the claimant, who were employees of the 1st respondent, and as such the court lacked jurisdiction to entertain the claim against her. She further contended that her joinder as a respondent to the suit contravened the fundamental attribute of corporate personality since as a shareholder she was not liable for acts or omissions of the 1st respondent. In addition she denied that a transfer of shares from her to the 3rd respondent was tantamount to transfer of business from the existing employer to another. According to her the corporate and legal identity of the 1st respondent remained unaffected by the internal transfer of shares between the existing shareholders. She concluded by contending that the motion did not meet the threshold for the grant of interlocutory injunction which includes prove of a prima facie case with probability of success; irreparable harm if the order is denied, or that the balance of convenience favours the applicant.

The 3rd and 4th respondent did not file any reply to the motion but only participated way of oral submissions in the hearing which was done on 28.2.2014.

#### **Applicant's submissions**

Mr. Onyony, learned counsel for the applicant relied on the supporting affidavit by his client and the Judicial precedents filed in support of the motion. He submitted that the 2nd and 3rd respondents were at all material times to this suit holders of 50% shares each in the 1st respondent but were now in a disagreement. As a result of the said disagreement the 2nd respondent opted to transfer all her shares in the 1st respondent to the 3rd respondent. He referred to minutes (exhibit G6) between the parties herein to prove that the rights of the workers were contained in the separation agreement between the shareholders which has not yet been shown to the claimant. It was further submitted that the joinder of the 3rd defendant was necessary because there was information that the 3rd respondent was to bear the liability of workers after the separation of the shareholders.

#### **The 1<sup>st</sup> respondent's submissions**

Mr. Lumatete, learned counsel for the 1st respondent opposed the motion by relying on the defence and the replying affidavit. He submitted that all his employees were still in their respective employment and that all their salaries had been paid fully up to date. He further submitted that the minutes produced as exhibit G6 were not from competent conciliation proceedings. He contended that the suit was premature and took issue with misjoinder of parties. He opposed to the documents filed by the claimant on the day of the hearing as the same were not introduced properly to the proceedings.

#### **The 2<sup>nd</sup> respondent's submissions**

Miss Macharia, learned counsel for the 2nd respondent also opposed the motion by relying on her client's replying affidavit sworn on 18.2.2014. She submitted that the court lacked jurisdiction to entertain the claim against her client for want of an employment relationship between the 2<sup>nd</sup> respondent and the claimants members. She argued that the only reason for her client's joinder to the suit was because she is a shareholder in the 1st respondent which is a contravention of section 2 of the Employment Act.

According to her, the said provision did not include a shareholder in the definition of an employer.

On the other hand, she submitted that in law a shareholder cannot be an agent of his company. She further submitted that a transfer of shares between existing shareholders cannot amount to a takeover as it does not affect the corporate status of the 1st respondent.

She concluded by contending that the motion did not meet the threshold for the grant of injunction. She relied on the case *Giella vs Cassman Brown & Co Ltd [173]EA358* and the case of *Mrao ltd vs First American bank of Kenya Ltd & 2others [2003] KLR125* which laid down the prerequisites for the grant of interlocutory injunction. She further contended that the authorities cited by the applicant were distinguishable from the present case.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondent's submissions**

*Mr. Masila associated himself with the submissions made by the counsel for the 1st and 2nd respondents but added that the suit was filed before the pre-industrial process was completed. He further contended that redundancy did not deal with employees personally but positions of employment.*

### **ANALYSIS AND DETERMINATION**

Upon careful reading of pleadings, the motion and the affidavits filed by the parties and upon considering the submissions made by counsel for the applicant and the respondents, the following issues arose for determination:

1. **Whether the court has got the jurisdiction to entertain the suit before it.**
2. **whether there is misjoinder of parties to the suit.**
3. **whether the application has met the threshold for the grant of interlocutory injunction.**
4. **whether the orders sought ought to issue.**

#### **Jurisdiction**

under section 4 and 12 of the Industrial Court Act (ICA) this court has been established with exclusive jurisdiction to determine all disputes concerning employment and labour relations. The present suit is about redundancy of employees which is a labour relations dispute. Consequently, the dispute is properly before the court and the court has jurisdiction to determine it. In reaching the above finding the court is guided by the consideration of the whole dispute and not a portion thereof. Whether a portion of the claim is frivolous against one of the many respondents, that reality cannot take away the necessary jurisdiction of the court over the entire case.

#### **Misjoinder of Parties**

It is trite law that joinder, misjoinder or nonjoinder of parties cannot be fatal to a suit. However, notwithstanding the foregoing, the court is persuaded by the 2nd respondent's contention that she has been improperly enjoined to the suit because she has no employment relationship with the 1st respondent's employees. The court agrees with her that a shareholder cannot be an agent of company because of the doctrine of independent personality between the entity and its shareholders. In any case no good cause has been shown to warrant the lifting of the corporate veil so as to necessitate the joinder of the shareholders to this suit. The court will however reserve further orders on the matter until it is formally moved.

#### **Threshold for the grant of Interlocutory injunction**

The threshold for the grant of interlocutory injunction remains as settled by the Court of Appeal in the *Giella case, supra* which established three key principles for consideration before the order can issue. The said principles were echoed by the court in the *Mrao case, supra* which are that :

- a. **the applicant must show a *prima facie* case with probability of success;**

- b. **the order will not issue unless the applicant will suffer irreparable injury which cannot be adequately compensated by an award of damages;**
- c. **if the court is in doubt , it will decide on a balance of convenience.**

The court in the said *Mrao case* went on to give the meaning of a *prima facie case* in civil application as including but not limited to a "genuine and arguable case." The court defined *prima facie case* as one where based on the material presented, the court would find that there exists a right which has apparently been infringed by the opposite party and which calls for an explanation or rebuttal from the latter.

In the present case, it is not in dispute that none of the employees represented by the claimant has been declared redundant or received any notice of an intended redundancy . It has also not been disputed that all the 1st respondent's employees have been paid all their salaries up to date. Consequently the court finds that the material before the court does not prove that any rights of the claimant's members has been violated or is about to be violated to warrant the grant of interlocutory injunction. What the court has been treated with is mere speculation that one day the 1st respondent might declare redundancy and fail to pay the claimant's members a total of kshs 22,158467.00.

Even if any such a right had been violated, no evidence has been adduced to prove that an award of damages would not make adequate compensation. The foregoing view is reinforced by the fact that the claimant has already calculated the expected damages at kshs 22,158,467.00. One wonders why then would one seek interlocutory injunction in a simple employment contract where the statutory law guarantees compensation for unfair and wrongful termination? This court finds that judicial time would be saved if employees would first be letting disciplinary or termination processes to end at the work place level and thereafter challenge it in court and seek compensation if the process is deemed wrongful and unfair.

### **Which order to issue**

In view of the courts findings on the joinder of parties above and the threshold for the grant of injunction, the court will not make any orders against the 2nd, 3rd and 4th respondents. The reasons for foregoing finding being that, firstly there is no employment relationship between the said respondents and the employees of the 1st respondent and secondly, that there is no evidence of violation of the employment rights of the said employees by the said three respondents.

As regards the order of injunction sought against the 1st respondent, the court finds that the same cannot issue because there is no violation of right of the employees proved and even if there was to be such violation the same can be adequately compensated by damages. The court will not also order that security be deposited because no evidence has been adduced to show that the 1st respondent will not be able to pay, or pay on due date the decretal sum if the court would enter any judgment for payment of damages at the end of the trial.

Lastly the court will not interfere with the rights of shareholders to internally transfer shares between existing shareholders because that does not amount to any transfer of business or change of corporate identity from the 1st respondent. It is clear from the facts on record that the employees of the 1st respondent are not being transferred to another employer as was in the case of *Elizabeth Washeke and 62 others vs Airtel Networks (K) Ltd and Spanco Raps(K) Ltd* cited by the applicant.

### **DISPOSITION**

The application dated 4.2.2014 is dismissed for the reasons stated above. Each party shall bear his or her own costs.

**Dated, signed and Delivered this 25<sup>th</sup> day of April 2014.**

**ONESMUS N. MAKAU**

**JUDGE**