REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 48 OF 2014

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

- VERSUS -

MIGOTIYO PLANTATIONS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 30th May, 2014)

RULING

The claimant filed a notice of motion on 28.02.2014, brought under section 12 (3) of the Industrial Court Act, 2011, section 40 of the Employment Act 2007 and all other enabling laws. The claimant prayed that the court do issue an order restraining the respondents from declaring the employees redundant as per the notices dated 14.11.2013 and 23.10.2013 pending the hearing and determination of the suit. The application was supported by the affidavit of Thomas Kipkemboi and the grounds set out in the application.

The respondent opposed the application by filing on 12.03.2014, the replying affidavit of Muhia James.

The main issue for determination as stated for the applicant, the claimant, is whether the reason for redundancy is valid.

It has been submitted for both parties that section 40 of the Employment Act, 2007 applies and reasons for termination on account of redundancy are founded in the meaning of redundancy. **Section 2 of the Act** defines redundancy to mean the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, **"where the services of an employee are superfluous"** and the practices commonly known as abolition of office, job or occupation and loss of employment. Thus, the main reason for termination on account of redundancy is that the employees' services are superfluous, that is, not required or is unnecessary.

It is the claimant's case that the reason for the redundancy was conveyed by the respondent in the redundancy notice dated 23.10.2013. The reason given by that letter is that the claimant union was then in court and pushing for speedy implementation of issues which the parties had agreed upon so that the respondent had no other option but to downsize in order to affect the union's demands. The letter conveyed that the respondent therefore issued a notice to declare 30 employees redundant within six months effective from the date of expiry of the notice. The letter further stated that the employees to be declared redundant would be from the non core business of the company.

By the letter dated 14.11.2013, the respondent referred to the redundancy notice of 23.10.2013 and attached a list of 30 employees to be declared redundant. The letter further stated that the respondent was experiencing low production of sisal resulting in financial difficulties. Thus, 15 employees would be

declared redundant in the first 3 months and the remaining 15 in the following 3 months after expiry of the notice.

The claimant's case is that the redundancy is malicious and aimed at undermining and frustrating the claimant's activities by declaring employees redundant due to the pending Industrial Cause No. 307 of 2013 in which the claimant is seeking relief from the court that the respondent complies with the collective bargain agreement **(CBA)**. The claimant's case is that were it not for the court case, the original redundancy notice would not have issued together with the subsequent redundancy steps undertaken by the respondent.

The claimant urges that the main reason for redundancy is diminishing work due to declining sisal production.

The court has considered the reason for redundancy as advanced for parties respectively. There is no doubt that in the initial redundancy notice, the respondent invoked the pending suit as the reason for the intended redundancy and declining production is a reason that was highlighted in the second redundancy notice. In the circumstances, the court finds that the primary reason advanced for the intended redundancy is the pressure arising from the pending court case and declining sisal production is a mere afterthought that does not override the primary reason.

In view of the primary reason, first, the court finds that the reason does not render the worker's services unnecessary or to use the statutory word, superfluous. Secondly, section 46 of the Employment Act, 2007 is elaborated that an employee's initiation or proposed initiation of a complaint or other legal proceedings against the employer is not a valid reason for termination except where the complaint is shown to be irresponsible and without foundation. It has not been stated that the pending suit Industrial Cause No. 307 of 2013 is irresponsible and without foundation.

In the circumstances, the court holds that the respondent's primary declared reason does not constitute a reason for redundancy. The court finds that the claimant has established a *prima facie* case with a high likelihood of success and is therefore entitled to the orders as prayed for.

In making the finding, the court has noted the declining or fluctuating sisal production but the relevant financial implications and attribution to workforce or wage bill has not been analysed to establish the veracity of the declining production as the secondary reason for the respondent's desired redundancy.

In conclusion, the application is allowed with orders:

a. **That the respondent is restrained from declaring the employees redundant as per the notices dated 14.11.2013 and 23.10.2013 pending the hearing and determination of the suit.**

b. **That the costs of the application shall abide the outcome of the suit.**

c. **That the parties are invited to take directions on the hearing of the suit.**

Signed, dated and **delivered** in court at **Nakuru** this **Friday 30th May, 2014.**

BYRAM ONGAYA

JUDGE