REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 64/2014

(Before Hon. Justice Hellen Wasilwa on 17th June, 2014)

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS & HOSPITAL WORKERS UNION..... CLAIMANTS

-VERSUS-

AGORO SARE HIGH SCHOOL ..... RESPONDENT

R U L I N G

The application before court is the one dated 26.3.2014. The applicants came under certificate of urgency through a Notice of Motion brought under S. 12(1) of Industrial Court Act, Section 40, 45 and 46 of Employment Act 2007, Article 27, 28, 41, 47, 48 and 50 of the Constitution of Kenya and Rules 16 and 27 of the Industrial Court (Procedure) Rules and all enabling provisions.

They sought orders to restrain the respondent from executing the intended termination on account of redundancy of the employees working at the respondent's security department and to maintain the ***status quo*** until this matter is heard and determined.

They also sought interim orders restraining the respondent from intimidating, harassing, declaring redundant or otherwise disadvantaging the rest of the claimant members in course of discharging their duties until this matter is heard and determined.

The application is supported on the grounds that:-

(i) On or around 28th February 2014 the respondent served 5 of the claimant members working in security department with a letter dated 28th February 2014 notifying their intention to declare them redundant and terminate their services by 1st April 2014 to pave way for outsourced security firm by the name M/s Bedrock Holdings Limited.

(ii) The respondent purported that the decision to terminate the said employees on account of redundancy was a resolution by the board of governors during their meeting of 1st November 2013.

(iii) According to the letter dated 28th February the respondent is neither giving any reasons why the said employees' services have to be terminated apart from purporting that it was resolution of the board.

(iv) The said employees have been diligently and competently working for many years as security for the respondent and have been awarded certificates of excellence for their

exemplary work.

(v) The claimant upon receipt of the respondent redundancy intention responded vide their letter dated 28th February 2014 booking for a joint meeting with the respondent on 5th March 2014 which meeting the respondent represented by the principal attended but was non committal on reversing their intention instead he promised that he would convene emergency board to discuss on how to transfer the grievants' to other departments and communicate to the claimant.

(vi) To date the respondent is yet to communicate on cancellation of termination of the grievant as their effective date is fast approaching and it is the contention of the claimant that the respondent is only keen on unlawfully terminating the services of the grievant to defeat the claimant as the grievants are only targeted due to their involvement with matters of the union.

(vii) The principal to the respondent is on record having declared to frustrate the employees who are members of the claimant and it's evidently clear that his intention is to wipe out all the claimant within the respondent and since he was transferred to the respondent in January 2011, he has terminated services of 9 members of the claimant and to date he is yet to pay their terminal benefits.

(viii) This pending disputes are the unfair termination of;

1. **Naaman Odhiambo Mosi – a grounds man terminated in October 2011.**
2. **Kennedy Opecho – a cook was terminated in October 2011.**
3. **Gordon Ouma – a driver was terminated in October 2011.**
4. **Jackson Oganga – a security guard was terminated in October 2011.**
5. **Ezakiel Onunga – a carpenter was terminated in December 2011**
6. **Tom Oloo - a security guard was terminated in December 2012.**
7. **Elliance Ogal – a security guard terminated in December 2012.**
8. **Edwin Omondi Oloo – a librarian terminated in December 2012.**

And now the entire security to be terminated by 1st April 2014. On all the termination the respondent is unable to substantiate the reason for termination.

(ix) The claimant is therefore left with no option but to turn to this Honourable court as a matter of urgency with prayers that the stay orders maintaining status quo be issued restraining the respondent from executing its intention of unlawful termination until this application is heard and determined.

(x)As the respondent is by far and large not sincere on the reasons for the supposed intended termination on account of redundancy which is merely a plot to deny employees their Constitutional right of being part of the claimant and further being represented in matters of employment.

(xi) The principal who dubs as the secretary to Board of Management and who has authored the redundancy notice is by high chance of probability a member of head-teachers union, the question begs why would he wants to be represented by workers union in negotiating terms with Teachers Service Commission whileconspiring with other members of

the board to deny non-teaching staff representation by their union.

(xii) It is therefore the contention of the claimant that these actions of the respondent is a serious contravention of Article 41 of the Constitution of Kenya 2010, Clause 5, 40, 43, 45 and S. 46 of Employment Act 2007 and therefore unfair and a labour malpractice of the highest degree.

The application is also supported by the supporting affidavit of **Albert Njeru**, the secretary general of the claimant herein.

It is the applicants submission that the respondent in attempting to declare their members redundant, never complied with the requirements of S. 40 of Employment Act 2007. That the respondent further started to terminate services of claimant members and to-date 9 members have been terminated and only 1 paid terminal benefits. In applicants view, the respondent's action is meant to defeat provisions of Article 41 of Constitution on a right to join a Union and therefore close out the claimants from recognition by reducing their numbers.

The respondents opposed the application. They filed their replying affidavit sworn by Maurice Ogutu dated 3.4.2014. They argued that the application is incompetent and lacks merit and is premised on the wrong idea that an employer cannot terminate services of an employee without reference to the labour office, union or court. It is their submission that an employer has a right to hire and fire after giving due notice. They argue that there is no recognition agreement between themselves and the union and so could not have served the notice on any union.

Having considered submissions of both parties, the issue for consideration is whether in the attempt to declare the claimant union's members, redundant, the respondent adhered to the law.

Section 40(1) of the Employment Act 2007 states 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.

These conditions must be observed before redundancy can be effected. In the current case the intended redundancy was communicated to the employees but not to their union or the labour officer as envisaged by law. The respondent had submitted that there is no recognition agreement between the union and respondents but that is not true as there is evidence ***KW – 4*** communication between union and respondent asking for deduction of union dues of it's members dated 4.5.2011 which respondent have not denied. There was also an earlier attempt to solve a trade dispute involving respondent and claimants with a conciliator being appointed on 14.10.2011. The respondents were well aware that their employees were members of a trade union but ignored this aspect. The employer has a right to hire and and fire but the parameters of the law must be adhered to.

From my analysis, I find that the application by the applicant has merit and I therefore order that:-

(a) Pending hearing and determination of this case, the respondents be and are hereby restrained from declaring the applicants redundant and without following the due process as envisaged under S. 40 of Employment Act.

(b) The respondents are also restrained from victimizing intimidating, harassing or otherwise declaring the claimant members redundant until this case is heard and determined.

(c) The respondent to pay costs of the application.

HELLEN WASILWA

JUDGE

17/6/2014

Appearances:-

Tonge Yoya for claimants present

Olel for respondent

CC. Wamache