



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1302 of 2012

KENYA UNION OF COMMERCIAL

FOOD AND ALLIED WORKERS.....CLAIMANT

VERSUS

CORN PRODUCTS KENYA LIMITED.....RESPONDENT

AND

OKWANY CHARLES AND 17 OTHERS..... INTENDED INTERESTED PARTIES

Rika J

CC. Elizabeth Anyango

Mr. Charles Egesa for the Claimant

M/S Kiriimi instructed by Hamilton Harrison & Mathews Advocates for the Respondent

Mr. Osoro instructed by Osoro Omwoyo & Company Advocates for the Intended Interested Parties

RULING

1. The Claimant Union presented a Statement of Claim in Court on 1st August 2012, under certificate of urgency. The issue in dispute is redundancy. The Claim is brought on behalf of 105 members of the Claimant Union, whose contracts of employment are alleged to have been unfairly and lawfully terminated, by declaration of their jobs at the Respondent as redundant. The Respondent subsequently filed its Statement of Response, and on 13th August 2012, the two parties were referred by the Court to Eldoret County Labour Officer Mr. Joseph Nyaga for Conciliation.
2. The Conciliation meeting was held on 24th August 2012, and Conciliation Report filed in Court on 29th October 2012. There were a number of issues in which parties were able to reach consensus on, while they could not find common ground on the formula used in computing the redundancy package.
3. On the same date the Conciliator filed his Report, 18 former employees, who are not members of the Claimant Union, and whose contracts were similarly terminated, filed an application under certificate of urgency, seeking to be added to the Claim as Interested Parties. This application, which was canvassed by the Parties' Representatives on 29th January 2013, is the subject of today's ruling.

4. The application is not opposed by the Claimant Union. The Respondent is opposed to the application. Mr. Osoro prays that the Intended Interested Parties be granted leave to join the proceedings. He seeks leave for the 18 former employees to file their Statements of Interest. He relies on the affidavit of one of these employees Mr. Charles Okwany, sworn on 26th October 2012. The 18 say they were paid some dues on termination, but what was paid was not based on any law. The issues they intend to raise are similar to the issues raised by the Claimant Union. The Claimant Union represents part of the employees; it did not represent the 18 former employees. Their addition to the proceedings would avoid multiplication and duplication of Claims. It is important the matter be adjudicated once and for all. The Claimant and the Respondent would not suffer any prejudice if the Intended Interested Parties join the proceedings. Some of the 18 employees were in management. The Respondent has not shown that the 18 employees were not members of the Claimant Union. The Claimant Union is not opposed to the application. The Respondent agrees the 18 were its employees, and that their contracts of employment were terminated. The pursuit for joinder should not be defeated on technicalities raised by the Respondent. The Constitution of Kenya demands that Courts should determine disputes on their merits.

5. M/S Kirimi points out that the application is not backed by a draft Statement of Claim. The Court has no way of knowing what are the issues raised by the Intended Interested Parties. The applicants submit some of the 18 employees were in management and others were Claimant Union's members. There is no affidavit clarifying this issue. The Claim is predicated upon a Collective Bargaining Agreement concluded between the Trade Union and the Respondent Employer. The Applicants have not shown they were parties to the CBA. If they were, they would fall under the CBA. If they were not, they would be governed by their individual contracts of employment. In the absence of a specific term on severance pay under the individual contract, they would be regulated by Section 40 of the Employment Act 2007. The Respondent had offered non-union employees severance pay at the rate of 24 days' salary for every year completed in service. It was not under any obligation to do so. Except for two employees, others executed discharge after they were paid by the Respondent their redundancy benefits. The Claim was resolved in full, by the agreement. There is no similarity in the issues. The Intended Interested Parties would be free to file their own Claims. The Respondent urges the Court to reject the application. Mr. Egesa as stated above is not opposed to the addition of the 18 employees. He argues that under Section 40 of the Employment Act 2007, an employee shall not be disadvantaged by reason of not being a member of a trade union. The 18 employees should be joined so that the Court makes a single determination.

The Court Finds and Orders:-

6. The Intended Interested Parties have not supplied the Court with sufficient information as to merit the order for joinder. There is no draft Statement of Interest. The information in the affidavit of Charles Okwany is sketchy. It refers to the 18 employees having the same interest as the Claimant Union, but does not contain any employment records showing the nature of this interest.

7. The submissions by the Applicants that some of the employees were members of the trade union, while others were in management, reinforces the case for non-joinder. If there are some among the 18 employees who were members of the trade union, then they would have come to Court together with the existing Grievants, through their trade union. Management employees do not have any reason to join a claim filed by the Claimant Union. They have no stake in the CBA subject matter of the dispute. They have individual contracts with the Respondent, and can pursue individual claims, without entering the collective claim filed by the trade union. Their entry would muddy, rather than crystallize issues.

8. The Claimant and the Respondent have already been through conciliation under the Labour Relations Act. Some issues have been settled, while others have not, as borne out in the Conciliation Report. The Applicants were not involved with conciliation. Any issues they may have, have not been laid down before the conciliator, and certified as ripe for the Court's intervention. If they intended to participate in the proceedings filed by the Claimant, they should have done so before conciliation, so that the issues come before this Court in an orderly and structured manner. The Court is taking over from where conciliation fell apart.

9. The 18 employees, it must be reiterated, have completely failed to show what relationship, there is

between them and the CBA subject matter of the dispute. They claim some of them were trade union members; they have not said why they were left out by the Claimant in filing this Claim. They have not even argued that they were unionisable employees who were remitting agency fees to the Claimant, and therefore entitled to seek shelter under the CBA. Some argue they were in management. What is the thread that joins these Applicants to the CBA?

10. The Court has the discretion to join parties and consolidate claims to avoid the possibility of conflict in jurisprudence from Judges of coordinate jurisdiction, on similar issues of law. There should be no multiple Claims, over similar issues filed in different Courts. Filing of such multiple Claims is legally and administratively unhealthy, and would herald judicial chaos in the corridors of justice. The Court must however be shown that there are similar issues of law, and that the parties are similarly placed at the workplace, as to fit in a collective claim. The trade union has brought a collective claim in which in the view of the Court, the 18 employees cannot squeeze themselves in. There may be some similar questions of fact and law that may arise in the grievances stated by the two categories of employees. This however is insufficient to warrant joinder. The Court does not think it would be appropriate and practical to proceed in one Claim. The Claimant and the Respondent have already covered some distance in their litigation history.

11. The provision under Section 40, that states a non-union member should not be prejudiced, in settlement of redundancy claims, merely by reason of not being in the trade union, was argued by the Claimant and the Intended Interested Parties out of context. Non-joinder does not place any employee at a disadvantage. They have not been barred from filing their own claims against the Respondent. There is nothing which the Respondent has done, which can be said to have discriminated against the 18 employees because they do not belong to the Claimant Union. Severance pay was offered at 24 days' pay, above the statutory minimum. The rejection of their application by the Court cannot be said to place them at any disadvantage. The doors of the Court are open to them. The fear about conflict of decisions and jurisprudence is something the Court can handle. The Judges are collegial, and understand judicial co-operation and comity are strong antidotes for the unwelcome forms of judicial divergence. It is ordered:-

[a] Application dated 26th October 2012 is refused;

[b] Applicants are at liberty to file their own separate claims;

[c] The Claimant and the Respondent will move the Court on the next course of action; and

[d] No order on the costs.

Dated and delivered at Nairobi this 9th day of May 2013

James Rika

Judge