



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1460 of 2012

**KENYA UNION OF PRINTING, PUBLISHING, PAPER MANUFACTURERS AND
ALLIED WORKERS UNION.....CLAIMANT**

VERSUS

ANDIKA INSUTRIES LIMITED.....RESPONDENT

(Before Hon. Lady Justice Maureen Onyango on 14th December, 2012),

AWARD

By a notice of motion dated 21st August 2012 filed under certificate of urgency and simultaneously with the Memorandum of Claim, the Claimant Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers seeks the following orders:

- a) ***THAT*** the Honourable Court be pleased to certify this application as being urgent and the matter to be heard *exparte* in the first instance.
- b) ***THAT*** the Honourable Court does issue orders comeolleing the Respondents to restrain from terminating employees an account of redundancy until this matter is heard and determined by the Honourable Court.
- c) ***THAT*** cost of this application be provided.

The application is supported by the affidavit of MR. RAJABU W. MWONDI MBS sworn on 21st August 2012. The application was certified urgent by Hon. Justice Ongaya on 27th August, 2012 and fixed for hearing interpartes on 19th September, 2012. The Judge directed the Respondent to reply before the hearing date. The reply was filed on 19th September, 2012. The file was missing on 19th September 2012 and the case was mentioned on 1st October, 2012 when only the Claimant attended. The application was again and fixed for interpartes hearing on 8th October, 2012 when both parties attended. After hearing the Claimant the Court decided to fix the main case for hearing as the prayers in the application were substantially similar to those in the main claim. The case was fixed for hearing on 6th November, 2012 when the parties were heard.

CLAIMANT'S CASE

The Claimant submitted that their case is ragged on Section 74 of the Labour Relations Act and Section

40 of the Employment Act. That the parties were in the process of negotiating their first collective bargaining agreement and were about to conclude negotiations after several meetings when the Respondent by letter dated 13th May 2012 issued a redundancy notice. The Claimant sought a meeting on 21st June 2012 to discuss the redundancy which in the Claimants understanding targeted only union members.

On 18th June, 2012 the Respondent called off the meeting on the grounds that 2 of their directors were out of the country. On 31st July the Respondent revoked the earlier redundancy notice and issued a fresh redundancy notice of the same date giving 2 months redundancy notice. It is upon receiving the second redundancy notice that the Claimants filed this case. The Claimants allege the Respondents action is 'fishy'. They could not suddenly decide to declare employees who were union members redundant just before conclusion of the collective bargaining agreement, after giving their proposals and attending meetings to discuss the same and when the collective agreement was just about to be concluded in the redundancy notice the Respondent proposes to pay redundancy benefits according to the law. Ignoring the provisions of the collective bargaining agreement, the selection of employees declared redundant was also not in accordance with Section 40 of the Employment Act. That the Respondent wants to casualise all employees and deny them the benefits of the CBA.

RESPONDENT'S CASE

The Respondent submitted that the redundancy is lawful. The 2 months notice given on 31st July 2012 is more than the statutory requirements of 1 month. The reason for redundancy is the financial constraints being suffered by the Respondent resulting from full time employment of the 9 employees intended to be declared redundant. The financial statements annexed as shows that other than the months of January when the company made profits, it has been incurring losses. This is because the core business of the Respondent is the supply of books to government schools on order.

He reiterated the contents of dthe replying affidavit of KILAN PATEL deponed on 17th September, 2012. It was submitted that there is no legal provision preventing the Respondent from declaring employees redundant, that the Respondent had offered to pay legal dues. That failure to carry out redundantly may lead to the collapse of the company and loss of jobs for all the remaining employees and those who may be employed after restructioning. The Respondent urged the Court to dismiss the claim.

Having heard the parties and considered the issues raised during the hearing and in the pleadings, it is my opinion that the issues to be decided by the Court are the following:

1. Whether the intended redundancy is valid.
2. Whether there is valid reason for the Court to restrain the Respondent from carrying out the redundancy.

Redundancy is provided for under Section 40 of the Employment Act. The collective agreement between the Claimant and the Kisumu Printers Group of the Federation of Kenya Employers for the period 1st January 2009 to 31st December 2011 which the Respondent is a party to and which is annexed as Appendix 13 of the Claimant's memorandum of claim provides for redundancy at Clause 16 in the following terms.

"16. REDUNDANCY

COLLECTIVE AGREEMENT Between

**KISUMU PRINTERS' GROUP OF THE FEDERATION OF KENYA EMPLOYERS
(HEREINAFTER REFERRED TO AS THE "EMPLOYER")**

And

KENYA UNION OF PRINTING, PUBLISHING, PAPER MANUFACTURERS & ALLIED WORKERS' (HEREINAFTER REFERRED TO AS THE "UNION")

FOR THE PERIOD

1ST JANUARY, 2009 TO 31ST DECEMBER, 2011

DATED THISDAY OF JULY, 2010.

Clause 29 of the Collective Agreement provides that the agreement becomes effective on 1st January 2009 and "shall remain in force for a period of 3 years. Thereafter the Agreement shall continue remain in force until it is amended by mutual agreement"

Section 59 subsection (2) and (3) provide as follows:

From the provisions of the law and the collective agreement quoted above, it is obvious that the Respondent is still bound by the provisions of the collective agreement until those provisions are replaced by another agreement and that the terms of employment of the employees who were covered by the agreement remain as amended until changed by a subsequent agreement.

For these reasons the Respondent is bound to give the Claimant 2 months' notice before issuing notices of redundancy to the employees. The Respondent is also bound to hold negotiations over the redundancies with the Claimant, to apply the principle of "last in first out" and to pay severance pay at the rate provided for in the collective bargaining agreement.

For these reasons the redundancy notice issued by the Respondent on 31st July, 2012 is invalid for failure to comply with the provisions of the collective bargaining agreement. The second issue to consider is whether the Claimant has valid reason to object to the intended redundancy.

As I have established herein above the Respondent has not complied with the provisions of the collective agreement and this is a valid reason for the Claimant to object.

The Claimant has also indicated in the notice and submitted that payments will be according to the law and not the collective agreement. This would be unlawful in new of section 59 (2) and (3) of Labour Relations Act.

The Claimant has further submitted that the timing of the redundancy the intention to use only seasonal or contract employees is unfair labour practice.

I would agree with the Claimant that the timing is suspect. The parties were in the process of negotiating a first collective agreement which was about to be concluded when the redundancy notice was issued. No consultations were held with the Claimant. If the Respondent was sincere it would have concluded the agreement before the redundancy so that the redundancy package is based on the new terms which have not been reviewed since 31st December 2012 when the last agreement with the Printing Group expired. They could also have offered to negotiate the redundancy package with the Claimant as a sign of good faith. This they did not do.

The Claimant has also raised suspicion over the financial statements annexed to the Affidavit of **KHILAN PATEL**. The financial statements are not audited and their authenticity is therefore doubtful. From a casual glance of a non-financial expert like myself, it is apparent that the financial statement is not authentic. There are certain expenses that are not recurrent on a monthly basis such as audit fees, amortition, depreciation, insurance, licenses, legal fees, subscriptions and work permit which appear in the financial statements on a monthly basis. Unless there is an explanation, these are not expenses that should be recurrent on a monthly basis. I therefore agree with the Claimant in doubting the authenticising of the financial statements which have been given by the Respondent as the reason for the redundancy.

The other reasons given by the Claimant are not compelling conclusions. For the foregoing reasons I find that the redundancy notice issued by the Respondent on 31st July 2012 is unlawful and declares the notice of redundancy null and void. I give judgment to the Claimant and restrain the Respondent from declaring the employees redundant pursuant to the notice issued on 31st July, 2012.

Orders accordingly.

DATED AND DELIVERED IN NAIROBI AT THIS 14TH DAY OF DECEMBER, 2012.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.