



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1239 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 19th December, 2016)

HAMISI MWINYI NYERERE & 18 OTHERS CLAIMANT

VERSUS

UCHUMI SUPERMARKET RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 22nd June 2014 and filed on the 24th of June 2016. In it, the Applicant seeks orders for:

1. That the Application be certified as urgent and the same be heard ex-parte in the first instance.

2. That pending the hearing and determination of this application the Respondent be ordered to reinstate the Claimants to payroll and pay the Claimants their salaries for the months of April, May and June respectively.

3. That redundancy notice issued to the Claimants and dated 20th March 2016, 29th March 2016 and 7th April 2016 be withdrawn.

4. That employees sent on leave be recalled and allocated duties.

5. That the Respondent through itself, its agents, servants, employees and officers be reinstated from closing down, offering for sale or changing ownership of the business before payment in full the Claimants terminal benefits.

6. That the Honourable Court do issue such orders and give such directions as it may deem fit and just to meet the ends of justice.

7. The Claimant be condemned to pay the costs of this application.

2. The application is based on the following grounds and on the Supporting Affidavit of John Wangai Nderitu and Francis Musyoki Mutwiwa the 2nd and 3rd Claimants of this cause that.

1. The Respondent has issued letters declaring the Claimants redundant with effect from 20th

March 2016, 29th March 2016 and 7th April 2016 respectively.

2. The Respondents also forced the Claimant to apply for 30 days leave commencing on the dates the redundancy letters were issued.

3. The Respondent struck the Claimant off its payroll rendering them incapable of meeting their financial obligation including paying for basic needs such as rent, food, clothing, medical bills and school fees for the Claimants' dependents and as a result occasioning them untold suffering, difficulty and embarrassment.

4. The Respondent has not paid the Claimant their salaries for the month of April, May and June. The Respondent has also not paid the Claimant their terminal benefits.

5. The Claimants have been in continuous employment of the Respondent for periods totaling up to 25 years and they have no other source of income.

6. The Claimants have been in continuous employment of Respondent for period totaling up to 25 years and they have no any other sources of income.

7. The Respondent has also not served the Claimant with any redundancy notices as mandatorily required by the provisions of Section 40 of Employment Act 2007.

8. That unless the Honourable Court urgently intervenes and issues the orders sought the Claimant will suffer irreparable loss and damage.

3. The Respondents have filed a Replying Affidavit deponed to by one Eunice K. Embeywa the Legal Manager at Uchumi Supermarkets, dated 26th July 2016 where they aver as follows:

1. They aver that the company did issue the Claimants with letters declaring them redundant on divergent dates, but while doing so, they complied with Section 40 of the Employment Act as the same notices gave the Claimants one month's notice and clearly provided the benefits and conditions applicable to them which include applicable salary as at the last date of work.

2. They aver that the Claimants have been struck off the Respondents payroll, as the Respondents has continued to make losses and has serious cash flow issues but intends to pay them all the dues owing to them as at the last date of work which information was stated in the notice.

3. They aver that it is because of the financial crisis that the Claimants have not been paid, as well as few other suppliers leading one to Petition the High Court in Cause Number 3 of 2016 to wind up the Respondent.

4. They aver that there are several other suits pending against them including one where an application for an appointment of a liquidator has been made and the same is coming up for inter parties hearing on the 12 of August 2016.

5. They aver that through their advocates M/s Onyoya & Wambola Advocates requested the Claimants to engage with the management of the Respondent with the aim of coming to an agreement on the manner in which their dues might be settled but the Claimants have not done so.

6. They aver that the matter of Uchumi's financial woes is one to public notoriety and the Court should not issue orders in vain.

7. They aver that the orders sought can only be granted upon hearing and determination of the main claim, and the Court should not withdraw the redundancy notices as they issued according

to the law.

8. They aver the positions previously occupied by the Claimants have been declared redundant and the respondent has no vacancy in the remaining branches or positions as such that they would be recalled to.

9. They aver that they will follow the law and pay all affected employees the owed sums.

Submissions

4. In their submissions the Claimant Applicants rely on their pleadings and add that they comprise of non-unionisable former employees and have been struck out of the pay roll while the unionisable ones are still on the pay roll, they submit that there was discrimination on the part of the Respondents.

5. They submit that the mere fact that the Respondent is currently facing many Court cases does not exonerate them from liability since it has not been declared bankrupt. Further they submit that there is no genuine redundancy or cash flow problems with the Respondent as new members of staff were employed over the last year while still servicing the bank loans that they have pointed out.

6. They submit that the seniority, reliability and abilities of the Claimants were not considered in declaring them redundant nor was the act conducted in good faith. They submit that the Respondent has no intention to pay them their dues nor has any formal settlement offer been received as intimated by the Respondents.

7. They submit that the fact that the positions previously occupied no longer exist does not shield them for liability as the same can be compensated in monetary terms in accordance with the Employment Act and applicable law.

8. They submit that the Claimants have sought the Respondent to discuss the possibility of being absorbed by them or possible payment of terminal dues and compensation of loss of employment without success, and state that if the Honorable Court does not urgently intervene and order for payment of salary arrears and reinstate them to its payroll, the Claimants and their families shall continue to suffer great financial humiliation as they are unable to meet their obligations.

9. In their submissions the Respondent's rely on their pleadings.

10. They submit that it is not in dispute that the Respondent issued out letters declaring the Claimant redundant, however, they reiterate that the notices were given procedurally. They submit that it is only after sufficient evidence of redundancy has been availed to Court and both parties heard on merit of the same, that this Honourable Court can go ahead and issue orders of a declaratory nature after considering various factors including whether the said reasons for redundancy were genuine and whether the procedure followed by the Respondent was flawed.

11. They submit that as stated in the affidavit, the Respondent is unable to pay the dues due to financial constraints.

12. They submit that the orders sought are not conservatory in nature and cannot issue at this stage.

13. They finally submit that this Court is empowered under Section 49 of the Employment Act to grant various remedies for unfair dismissal including reinstatement and/or re-engagement of the employee which can be remedied after the final determination of the claim.

14. They pray that the Court should dismiss this application.

15. Upon considering the submissions of both parties, I have looked at the redundancy notices dated March 20th 2016. The said letters gave 1 month notice of the intended redundancy to take effect from

20th April 2016. The letters also indicated that the benefits to apply to the condition that the Applicants would also receive 1 months' salary in lieu of notice all salary to the last day of work, accrued leave to date, accrued off days to date, accrued overtime to date, 20 days and severance pay for each completed year of service, pension contributions as per the Retirement Benefits Authority Regulations, Certificate of Service and any other payments covered as at the last date of work.

16. This notice conforms to the provisions of Section 40(1) of Employment Act 2007 which 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.

17. It is however not apparent whether the Respondents adhered to the provisions of Section 40(1) (c) and (d) here were complied with.

18. The Claimant Applicants moved to Court on 22.6.2016 seeking orders in this application seeking withdrawal of the redundancy notices. They stated that they had not been paid their terminal dues as at that point.

19. It is a matter of public notoriety that the Respondent is currently under financial crisis and has closed down some of its branches. However, their obligation to the Applicants to pay them their terminal benefits cannot be ignored.

20. However, this Court cannot make orders in vain. I will therefore direct that no interim orders will be made at this point. I will direct the parties to take a date for hearing of the main claim on priority basis so that the main issue in the claim can be adjudicated upon.

Read in open Court this 19th day of December, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Magua for Respondent

Nduva for Claimants – Present