



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 256 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

WALTER EDWIN OGARA ODHIAMBO.....CLAIMANT

VERSUS

SGS KENYA LIMITED.....RESPONDENT

RULING

Before this Court for determination are two applications. The first Application is the Notice of Motion Application dated 22nd June, 2020. The Application is filed by the Claimant/Applicant under Certificate of Urgency seeking the following orders:

1. That this Application be certified urgent and service be dispensed with in the first instance.
2. That an Order of injunction do issue restraining the Respondent whether by itself or its servants or agents or otherwise howsoever, from implementing the notice of intended redundancy dated 17th June 2020 or otherwise terminating the services of the Claimant pending the interpartes hearing of the Application herein.
3. An Order directing the Respondent to provide the Claimant and/or produce before the Court all documents and records pertaining to the implementation of the notices of intended redundancy issued on 17th December, 2019 and 17th June, 2020 including all consultations and decisions made pursuant to the notices.
4. That an Order of injunction do issue restraining the Respondent from further implementing the notice of intended redundancy dated 17th June, 2020 or otherwise occasioning the redundancy of the Claimant pending the hearing of the main suit.

The Application is premised on the grounds as set up on the face of the Notice of Motion Application, in which the Applicant contends that the Respondent has unlawfully and un-procedurally issued a Notice of intended redundancy on 19th June, 2020 with the aim of forcing the Claimant/Applicant out of his lawful employment with the Respondent.

The Applicant further contends that the Respondent's notice comes barely six months after it issued the Claimant/Applicant with yet another notice of intended redundancy on 17th December, 2019 that was similarly used to target his removal from employment.

The Applicant averred that the said notice was superseded by reason that one of the members of staff opted to retire in place of the Claimant/Applicant being declared redundant and further an agreement had been reached between himself and the Respondent on his retention.

He further averred that the notice dated 17th June, 2020 lacks specifics on the roles and positions to be declared redundant making it difficult for any meaningful consultations to be done.

It is on this basis that the Applicant urged this Court to find the Respondent's actions as unlawful and unfair and therefore argued that it was in the interest of justice that this Court allows his Application in terms of the reliefs sought therein.

The Application is further supported by the Affidavit and Further Affidavit of **WALTER EDWIN OGARA**, the Claimant herein sworn on 22nd June, 2020 and 2nd July, 2020 in which he reiterates the grounds on the face of the motion.

In response to the Application the Respondent filed a Replying Affidavit deposed by Mrs. Nelly Indimuli, its Human Resources Manager, on 1st July, 2020 in which she maintains that the redundancy process was above board and that due process has been followed by the Respondent.

She further maintained that the process is not aimed at unfairly terminating the Claimant/Applicant's employment with the Respondent as he alleges.

The Affiant urged this Court to dismiss the Application as filed by the Claimant/Applicant with costs to the Respondent as it is devoid of merit.

The Claimant/Applicant after filing the above application together with his Memorandum of Claim did approach this Court yet again vide another Application dated 2nd July, 2020 in which he prays for the following orders that:

1. Spent
2. Leave be granted to the Claimant to commence contempt of court proceedings
3. Leave be granted to the Claimant to file Further Affidavits upon being served with the Respondent's replying Affidavit (Spent).
4. The Costs of this Application be provided for.

The Application is premised on the grounds that:

- a. On 23rd June, 2020, the Claimant instituted legal proceedings against the Respondent in respect to the issuance of unlawful notice of intended redundancy.
- b. Copies of the suit documents were served upon the Respondent on 24th June, 2020.
- c. Upon being served with the Memorandum of Claim and notice of motion application, the Respondent unlawfully and unprocedurally contacted the Claimant's witness.
- d. The Respondent's conduct is calculated to interfere with or obstruct the administration of justice.

The Application is further supported by the Affidavit of **WALTER EDWIN OGARA ODHIAMBO**, the Claimant herein sworn on 2nd July, 2020 in which he reiterates the averments on the face of the motion.

Parties agreed to dispose of the Applications by way of written submissions.

Submissions by the Parties

The Applicant submitted that he has established a prima facie case for the grant of the orders sought in his Application dated 22nd June, 2020 and therefore urged this Court to allow the Application in terms of the reliefs sought therein.

The Applicant further maintained that this Court is clothed with the necessary jurisdiction to hear and determine the instant Application. The Applicant relied on the case of **Kenya National Private Security Workers Union v G4S Kenya Limited (2017) eKLR** where the Court established that upon proof of contravention of Section 40(1)(a) of the Employment Act, 2007 an injunctive remedy may be issued.

The Applicant further argued that the notice as issued by the

Respondent was procedurally defective and was not done in conformity with substantive Justice as provided under Sections 2 and 40 of the Employment Act, 2007. He further argued that the said notice is incapable of giving birth a legitimate right of redundancy by the Respondent. The Applicant relied on the cases of **Gerrishom Muhutsi Obayo v Dsv Air and Sea Limited (2018) eKLR**, **Ibrahim Haji Ali v Gulf African Bank (K) Limited & Another (2020) eKLR**, **Margaret Mumbi Mwago v Intrahelth International (2017) eKLR** and **Veronica Mkiwa Mwalwala v Faiza Bhanji T/A Villa Kalista Enterprises (2020) eKLR** where the Courts directed that redundancies must be carried out in strict adherence with the law as provided under Section 40 of the Employment Act, 2007.

He submitted that the notice of 17th June, 2020 and 17th December, 2019 are vague and do not meet the requisite threshold contemplated under Section 40(1) of the Employment Act, 2007 to amount to a valid notice.

He maintained that no evidence had been availed by the Respondent to confirm that it indeed served the Labour Officer with the requisite notice as provided under Section 40(1)(a) of the Employment Act, 2007. The Claimant cited the case of **Margaret Mumbi Mwago v Intrahealth International (2017) eKLR** where the Court held that an employer is required to issue two separate notices of at least one month each. The Claimant also relied on the case of **Thomas De La Rue v David Omutelema (2013) eKLR** where the Court of Appeal distinguished between a notification of intended redundancy and a notice of termination on account of redundancy between a union member a non-union member.

Analysis and Determination

I have carefully considered the grounds in support of the applications as set out on the face of the motions and the Supporting Affidavits, the averments in the Replying Affidavit and the submissions made by the parties. The issues for determination are: -

1. Whether the Application dated 22nd July, 2020 is merited
2. Whether the Application dated 2nd July, 2020.

Section 40(1) provides as follows-

40. Termination on account of redundancy

(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.

The opening words of section 40 are explicit, that an employer shall not declare employees redundant until the employer has complied with the provisions in (1)(a) to (g).

From the wording of the email communication from Nelly Indimuli (the Respondent's Human Resource Manager) forwarding the Intended Notice of Redundancy to the applicant, it is clear that the notice was a draft that was sent to the Claimant/Applicant for his input prior to the same being rolled to other members of staff. The Claimant in his response declined to make any input in the intended notice of redundancy as was requested on the account that:

1. He felt that the notice lacked specifics such as office/positions that were to be declared redundant.
2. He was not consulted as the head of department prior to the sharing of the notice
3. A similar exercise was conducted by the Respondent that resulted in one member of staff opting to take early retirement to avert redundancy.

I have further perused all the documents on record in this matter and note that as rightfully pointed out by the Claimant/Applicant there is no evidence of service of any notice of intended redundancy upon the Labour Officer as required under Section 40(a)(a) and (b) of the Employment Act, 2007.

I find that the reason behind this failure is due to the fact that the notice as was given to the Claimant/Applicant was a draft simply meant to elicit views from him as the head of the Laboratory Department.

I therefore find that the Application dated 22nd June, 2020 is speculative as the said notice was yet to be issued to all members of staff for it

to take effect.

In the circumstances I find that the Application dated 22nd June, 2020 is devoid of merit and dismiss the same.

Whether the Application dated 2nd July, 2020 is merited

What constitutes then Contempt

Black's Law Dictionary, 9th Edition at page 360 defines contempt as follows;

Contempt is a disregard of, disobedience to, the rules, or Orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body.

Contempt is necessary for maintenance of law and Order and so that the dignity of the Courts is upheld. It is trite law that every person against whom a Court Order is made is under unqualified obligation to obey the Order however unpalatable the Order may be until or unless the Order is discharged or set aside. See **Econet Wireless Kenya Ltd v Minister for information & Communication of Kenya & Another [2005] 1 KLR 828.**

In order to succeed in civil contempt proceedings, the Applicant is duty bound to prove the following 4 elements; -

- a. the terms of the Order (or injunction or undertaking) were clear and unambiguous and were binding on the Defendant;
- b. the Defendant had knowledge of or proper notice of the terms of the Order;
- c. the Defendant has acted in breach of the terms of the Order; and
- d. the Defendant's conduct was deliberate.

Reference is made to the decision in **Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 Others (2017) eKLR.** For a person to be cited for contempt, there must be evidence of a court order having been served on that person and proof that there was deliberate disobedience of the order. The person to be cited ought to be personally notified so that they can show cause why they should not be cited.

In the instant case there is no Order in place. There can be no contempt of an order that is non-existent.

In the circumstances I find that the instant application is devoid of merit accordingly dismiss the same with no orders as to costs.

The Court however notes that interference with witnesses in the manner stated by the Applicant in his affidavit and in the affidavit of Augustine Owiti sworn on 1st July 2020 is unlawful and the Respondent's Human Resource Manager Mrs. Nelly Indimuli is accordingly notified.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF OCTOBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE