



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 98 OF 2012

KENYA HOTELS & ALLIED WORKERS UNION.....CLAIMANT

VERSUS

OFFICE RESTAURANT LTD.....RESPONDENT

R U L I N G

INTRODUCTION

1. The claimant has filed a Notice of Motion dated 26/9/2014 seeking leave to enjoin Office Restaurant Limited, Joshua Makiya Aroni and Penina Chepkemoi Aroni as Respondents to the main suit. In addition the claimant seeks leave to amend the claim in terms of the draft annexed to the Motion. The Motion is supported by the affidavit of Mr. Douglas Konga sworn on 26/9/2014. The gist of the application is that the intended joinder and amended claim is necessary in order to enable the court to effectively determine the dispute. The claimant has pleaded for leniency because he was not represented by counsel when he filed the suit and also when he later amended the claim on 8/8/2013 and 17/3/2014.

2. The respondent (The Office Restaurant) has opposed the Motion and has filed a Preliminary Objection (P.O) to the said Motion and praying for it to be struck out with costs. The gist of the P.O is that the Motion is frivolous, bad in law and lacking in merits.

BACKGROUND

3. The claimant is a trade union and brought this suit on 26/3/2013 on behalf of Mr. Douglas Konga (herein after called the grievant) and as against M/s The Office Restaurant . The basis of the suit was a claim for separation dues on redundancy. On 4/4/2013, the respondent filed her defence denying liability for the dues sought and raising a Preliminary Objection that the suit was time barred. The P.O on Limitation was heard and the court dismissed it on 26/7/2013. In the same ruling on the P.O, the court gave the leave to both parties to amend their respective pleadings to conform with the Trade Disputes Act Cap 234 Laws of Kenya (now repealed). The respondent was dissatisfied and appealed but the court of Appeal upheld the ruling on 18/7/2014.

4. In the meanwhile, the claimant amended her claim on 8/8/2013 based on the leave granted by the court to the parties by which she introduced two new respondents. The amendment was challenged by the defence by a fresh P.O. On 24/2/2014, the claimant appointed counsel to represent her in this suit.

The counsel sought leave to further amend the claim and the respondent consented on 26/2/2014. As a result of the said consent leave the claimant filed amended claim on 21/3/2014 by which she dropped the respondents in the earlier amended claim and introduced a new one, M/s The office Restaurant Ltd. The said amendment prompted objection from the defence and the court directed the claimant to move the court formally towards remedying the said amendment. Hence the present Notice of Motion being challenged by the present P.O which were disposed by written submissions.

ANALYSIS & DETERMINATION

5. There is no dispute that leave was granted to the claimant to amend her claim on 26/7/2013 and 26/2/2014. There is also no dispute that the said amendments substituted the original respondent to the suit with a new one. The issues for determination are whether claimant's Notice of Motion is proper in law and whether it has merits.

PROCEDURE AND FORM OF THE NOTICE OF MOTION

6. Under Rule 14(6) of the Industrial Court (procedure) Rules, a party can amend any pleadings with the leave of the court. The procedure for seeking such leave is by way of Notice of Motion as per rule 16(1) of the ICPRs, which require all interlocutory application to be brought by way of Motion. The Motion must set out the grounds upon which it stands and be supported by an affidavit. There is no limitation period provided within which to seek such leave. There is also no limitation on the number of times a party may amend his or her pleadings. Consequently the court is of the opinion that the claimants' Motion is properly before the court and in the right form.

MERITS

7. The Motion seeks for leave to join new parties to the suit and also to amend the claim in terms of the draft claim annexed to the Motion. It is trite law that so far as possible a litigant should plead the whole of his claim and also enjoin all the necessary defendants against whom a decree may be passed. It is also trite that leave for amendment of pleadings and joinder of parties should freely be allowed and at any stage of the proceedings, provided that such amendment or joinder will not result in prejudice or injustice to the other party which cannot be compensated for in costs. It is also trite law that such amendment or joinder should be done for the purpose of bringing on board all the necessary parties and for correcting any defect or error in the proceedings for the purpose of determining the real question or issues raised by or depending on the proceedings. There is no doubt that the present Motion is intended to correct a defect or error in the pleadings and to enjoin a necessary party without whom any ensuing decree herein may not be enforced.

8. The question to ponder about is whether the respondent will suffer any prejudice as a result of the leave to amend and enjoin the intended defendants. The answer is no. No such prejudice has been shown by evidence. The respondent never filed any affidavit in response to the Motion. The P.O raised is not evidence. Consequently, leave to amend the claim and enjoin the new parties is granted. That shall not however be done as per the draft claim annexed to the Motion. The amendment should be done according to the well settled legal principles of amending pleadings in Kenya. Once the new defendants are brought on board they will have their moment in court to raise any defence to the claim.

DISPOSITION

9. For reasons stated above the Motion is allowed subject to the conditions stated above. The leave granted is for 14 days to file and serve the amended claimant. Similar leave is given to the respondent

to amend response. In that respect the P.O is dismissed. Each party to bear his or her own costs.

Dated, signed and delivered this 19th December 2014.

O. N. Makau

Judge



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