



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 663 OF 2020

AMALGAMATED UNION OF

KENYA METAL WORKERS.....CLAIMANT/APPLICANT

- VERSUS -

SHANKAR ELECTRONICS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th March, 2022)

RULING

The claimant filed on 01.12.2021 an application by way of a notice of motion under section 12 of the Employment and Labour Relations Court Act, 2011 and rules 14(6) and (7) of the Employment and Labour Relations Court (Procedure) Rules. The application was filed through Khaminwa & Khaminwa Advocates. The applicant prayed for orders:

- 1) (spent)
- 2) That leave be granted to the claimant to amend their statement of claim attached to the supporting affidavit of Rose Omamo be deemed to have been filed and served by leave of Honourable Court.
- 3) That the filed amended statement of claim be deemed as duly filed and served.
- 4) That the costs of the application be provided for.

The application was based on the annexed supporting affidavit of Rose Omamo, the respondent's General Secretary and upon the following grounds:

- a) The amendment is necessary for effective and complete adjudication of the suit and to settle all questions involved in the suit and to determine all real issues in the dispute.
- b) The orders sought are in furtherance of the objectives in section 3 of the Employment and Labour Relations Court Act, 2011.
- c) The parties are in a valid recognition agreement which came into force on 01.08.2009 and a collective agreement effective 30.09.2019 which documents are still are effective wherein parties have negotiated and agreed on wages, housing, allowance, commuter allowance, and overtime for unionisable employees payable on monthly basis.
- d) The Covid 19 situation should not be relied upon by the respondents to unilaterally alter the terms of service in breach of the recognition agreement, collective agreement and rights of the employees per Article 41(1) and 2(a) and (b) of the Constitution and the provisions of the Employment Act, 2007.
- e) The respondent has failed to implement the collective agreement by failing to pay the employees house allowance since January 2020 to date. The salaries for unionisable employees have been reduced by 60% from 01.11.2020 and contrary to the collective agreement.
- f) The amendment shall not prejudice the respondent in any manner.
- g) It is in the interest of justice that the application is granted.

The applicant's case is that the memorandum of claim omitted a claim on issue of pay cut being salary reductions not agreed to by the claimant and unilaterally implemented by the respondent. The amendment is to introduce that claim accordingly.

The respondent filed on 01.03.2022 the replying affidavit of its Manager Shaahid Sheikh and through Kamami Njoroge and company Advocates. The replying affidavit states that the amendment seeks to introduce a new cause of action not earlier envisaged and therefore change the character of the suit. In particular, the original claim was about redundancy and now the applicant seeks to introduce a claim of alleged illegal deduction of salaries and unlawful termination. Further, introduction of a new cause of action will seriously prejudice the respondent.

The applicant filed submissions as was directed but the respondent did not file submissions. Rule 18 of the Employment and Labour Relations Court (Procedure) Rules, 2016 permit amendments at any stage of the proceedings. As submitted for the applicant, amendments may be allowed to avoid multiplicity of suits or to achieve determination of the real issues in dispute. In the instant case the applicant says there were omissions and the amendment should be allowed to correct the omission. The Court has perused the proposed amendment and they appear to flow from the recognition and collective agreements and related further claims and prayers are being urged in the proposed amendment. The Court considers that if the amendment is not allowed, nothing would stop the claimant from filing another suit to pursue the proposed claims and prayers. It will therefore be appropriate for the leave sought to be granted. The Court has considered that the claimant had withdrawn an earlier application to amend. That being the case, the applicant will pay the respondent's costs of the application in any event.

In conclusion the application is hereby allowed with orders:

- 1) The claimant is hereby granted leave to amend the memorandum of claim.
- 2) The claimant to file and serve an amended memorandum of claim in a bundle containing the list and copies of documents and witness statements to be relied upon at the hearing and to so serve by close of 24.03.2022.
- 3) The respondent may file and serve by 01.04.2022 an amended statement of response in a bundle containing the list and copies of documents and witness statements to be relied upon at the hearing.
- 4) The suit be mentioned on 26.04.2022 at 0900 Hours or soon thereafter for pre-trial directions.
- 5) The applicant to pay the respondent's costs of the application in any event.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH MARCH, 2022.

BYRAM ONGAYA, JUDGE