



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

**CAUSE NO. 317 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**AMALGAMATED UNION OF  
KENYA METAL WORKERS.....CLAIMANT/RESPONDENT**

**VERSUS**

**PELICAN SIGNS LIMITED.....RESPONDENT/APPLICANT**

**RULING**

The suit herein was filed vide memorandum of claim dated 17<sup>th</sup> May 2019, and amended with leave of Court and consent of parties by the amended memorandum of claim dated 24<sup>th</sup> June 2019. The Respondent filed defence to amended memorandum of claim dated 21<sup>st</sup> August 2019.

On 10<sup>th</sup> June 2019, the Court directed that the parties attempt out of court settlement even as directions were given for the filing of amended claim and defence to the amended claim. The parties thereafter approached Mr. L. W. Kariuki, the Manager, Industrial Relations of Federation of Kenya Employers, to act as Conciliator. Two agreements were signed before the Conciliator, the first one undated but signed pursuant to a meeting held on 11<sup>th</sup> September 2019 and the second one dated 5<sup>th</sup> November 2019.

In the first agreement, the parties agreed as THAT: -

*(i) That the Employer shall pay the dismissed employees:*

*(a) Appropriate notice to each employee as per the existing CBA.*

*(b) Any outstanding leave affecting any of the 27 employees.*

*(ii) The parties have further agreed that the issue of service benefits is negotiable and they have allowed Mr. L. W. Kariuki to explore ways and means of getting an acceptable settlement.*

In the second agreement, parties agreed as follows –

*(i) That the dismissal of Pelican employees shall be reduced to normal termination and that the employees should give the Union and the Employer time to negotiate their terminal dues and they shall be informed when the matter is finally concluded.*

On 27<sup>th</sup> February 2020, when parties appeared before the Court for a mention to report progress in the conciliation proceedings, Counsel for the Respondent reported that parties had recorded a partial consent which declared that the termination was unfair. Counsel requested for a further mention in 60 days to finalize the negotiations.

The Representative of the Claimant however disagreed and responded that the Respondent had not been keen on attending conciliation meetings to conclude negotiations and sought orders that parties dispose of the suit by way of written submissions.

The Court directed parties to submit their computation in light of the parties' consents within 30 days. The suit was fixed for mention to confirm compliance on 11<sup>th</sup> June 2020.

When the parties again appeared before the Court on 15<sup>th</sup> June 2020, parties again sought 21 days to record consent. A mention date was fixed for 15<sup>th</sup> July 2020. On that date the parties informed the Court that the Respondent had served a notice of preliminary objection upon the Claimant at 4.30 pm on 14<sup>th</sup> July 2020.

The parties however agreed that the preliminary objection be withdrawn and instead the Respondent to file an application. It is that application, which is dated and 17<sup>th</sup> July 2020, that is before the Court for determination. In the application the Respondent seeks the following order: -

1. The document filed by the Claimant titled "*Further Statement in support of calculations for final dues*" dated the 10<sup>th</sup> day of January 2020 be struck out and expunged from the record with no order as to costs.
2. The Conciliator Mr. L. Kariuki of the Federation of Kenyan Employers be given a further 30 days to complete and file his report.

The application is supported by the affidavit of **SAMUEL NGUGI NDINGURI**, the Chief Executive Officer of the Respondent on the following grounds:

- a. Through consent and consensus of the parties, the matter was referred to an experienced and highly ranked Officer of the Federation of the Kenya Employers (FKE) for conciliation process. The matter is still subject of active and ongoing conciliation proceedings being conducted by the said Officer who is yet to prepare an appropriately constituted Conciliation Report as mandated by rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
- b. In mid-March, 2020 the said Conciliator had held several fruitful mediation meetings with the Employer, with its Advocates and all the workers, the Union its Senior Officers and recorded substantial positive progress towards resolution of this matter.
- c. There have been no complaints voiced about the progress of the conciliation process and thus the union should allow it to take its course to the successful settlement of the matter.
- d. To the benefit of having this dispute settled and instead of seeking to stifle the process of conciliation, the union would rather preferably amend their claim and tender evidence in support of the same to be examined by the duly appointed Conciliator.
- e. The union should choose whether to go through the court process or conclude the conciliation instead of having the matter being heard and handled through both avenues. We are however, open to following through with the conciliation process to its peaceful and successful completion as earlier consented to by parties herein.
- f. The assessment dated 10<sup>th</sup> day of January, 2020 filed by the Complainant has no backing in law. No provision regarding the same exists in the Employment and Labour Relations Court Act or the Employment and Labour Relations Court (Procedure) Rules in support of such a document.
- g. The Respondents will be grossly prejudiced if the assessment is taken into consideration by the Court without following the due process and allowing the out of court settlement efforts to materialize.
- h. The document is unknown in law and violates express provisions of the Employment and Labour Relations Court (Procedure) Rules, 2016 as it is not a pleading or a claim as defined under Rule 2 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
- i. The said Statement of account is neither a Statement of Claim nor a Memorandum of Claim as defined by rule 2 and 4 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
- j. The said document therefore ought to be struck out and expunged from the record as it violates the provisions of Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016.
- k. The said document is illegal and highly prejudicial as it seeks to illegally introduce and rely upon documents signed and agreed upon during Conciliation proceedings without the tabling of a Conciliation Report under the provisions of Rule 5 of the Employment and Labour Relations Court (Procedure) Rules.
- l. The said document was filed without leave of the Court being sought for and/or obtained.

The Respondent avers that on the 16<sup>th</sup> August, 2019 through the consent and consensus of the parties, the matter was referred to an experienced and highly ranked Officer of the Federation of the Kenya Employers (FKE) for conciliation process.

He states that the conciliator; a senior officer of the Federation of Kenya Employers one Mr. L. Kariuki and a man of good standing with long experience on complex labour matters and disputes was appointed by the consent of both parties.

The Applicant avers that both parties had executed a document clearly agreeing on items subject of discussions under the Employment Act. In the absence of well set out reservations on the process being undertaken by the aforesaid Conciliator it was un-procedural for the Union to lodge the document to the Court without consultation and/or approval and/or authorization of the said Conciliator.

He highlights that the Claimant herein has not indicated any dissatisfaction with the efforts of the Conciliator and hence its purported pleadings before the Court are made in bad faith and intended to pre-empt the decision of the impartial Conciliator. He indicates that there has been no complaint of any delay by either the Employer or its Advocates in conduct of this matter and hence the interest of the Union is merely intended to put pressure and steal a match on the Employer.

He avers that the unilateral lodging of the said illegal document by the Union without consultation and/or leave of the Court and that this threatens to derail conciliation proceedings which were nearing conclusion.

That the assessment dated 10<sup>th</sup> January 2020 filed by the Claimant has no backing in law as there is no provision regarding the same exists in the Employment and Labour Relations Court Act or the Employment and Labour Relations Court (Procedure) Rules in support of such a document.

The Applicant states that some of the grievants approached them and they have in turn reached an amicable resolution of the matter. That a settlement deed has been signed between the Applicant and several grievants and most of the grievants have since received their claim against the Applicant thus their matters have since been settled.

That in consideration of the aforesaid payment, the grievants agreed to discharge the Applicant, its related entities, affiliates and subsidiaries, from any and all claims arising out of or in connection with their employment and/or the termination thereof.

The Applicant avers that document titled "*Further Statement in support of calculations for final dues*" is unknown in law and violates express provisions of the Employment and Labour Relations Court (Procedure) Rules, 2016.

### **Claimant's Case**

Vide an affidavit sworn by its General Secretary Rose Omamo, the Claimant avers that the conciliation process did not terminate the Court process but was aiding the Court if possible to shorten the process by way of reaching a consent to be adopted by the Court.

She avers that on 11<sup>th</sup> September 2019 and 5<sup>th</sup> November 2019, the parties signed two respective consents. That the 2<sup>nd</sup> consent in its own words stated that whether it was a lock out or summary dismissal, the midway point for both parties is that it "*shall be reduced to normal termination.*" She contends that from any point of view, the 2<sup>nd</sup> consent was conclusive and terminated the conciliation process. She therefore wonders what the conciliator was to do other than refer the process back to the parties to conclude by tabulating the terminal dues as per the CBA.

She avers that the union initiated the process of tabulating the terminal dues as per the termination clauses of the parties' CBA. That at the point of service of the calculations, the only available option to the Applicant was to cross check the calculations and come up with either endorsement or correction of any mathematical error(s) if any.

In conclusion, she states that the filed tabulations of terminal dues as per the termination clauses of the parties CBA has not pre-empted or prejudiced the Applicant in any way. That the conciliation process cannot go on endlessly and that the law limits the times taken by the conciliator. She therefore prays that the Application be dismissed with costs and the tabulations be adopted as the conciliator has no more role to play.

### **Respondent's Submissions**

The Respondent who is the Applicant submitted that by virtue of Rule 2 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which defines pleadings, the "*Further Statement in support of calculating for final duties*" does not amount to one. It is neither a Statement of Claim nor a Memorandum of Claim as defined by Rule 2 and 4 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The Applicant submitted that being before the conciliator, the matter is active and ongoing and the conciliator is yet to produce an appropriately constituted Conciliation Report as mandated by Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016. That the "*Further Statement in support of calculating for final duties*" was filed without leave of the Court being sought for and/or obtained and the Claimant has not bothered to seek the leave of the Court for the said document to be adopted as having been properly filed.

### **Claimant's Submissions**

In its submissions, the Claimant reiterated the position it held in its response to the Application. It was submitted that as per the CBA, to calculate terminal dues and forward the same to the other party for either verification or endorsement has nothing prejudicial, pre-emptive or premature. It argued that when two parties have agreed and signed a consent that the grievant employees be deemed to have been normally terminated then the only remaining action is calculations of terminal dues. Such calculations can be done by:

- i. The Claimant and forward the same to the Respondent for verification and or endorsement as the Claimant did on 15<sup>th</sup> January, 2019.
- ii. The Respondent (who has the employees records) and forward the same to the Claimant for verification and or endorsement.
- iii. By both parties in a joint sitting.

The Claimant submitted that as far as they were concerned, the conciliation process was deemed to have come to an end via the last agreement signed on 5<sup>th</sup> November, 2019 whose contents were both decisive and conclusive. They claimed that the rationale behind this application is to delay justice to the grievants. That justice delayed is justice denied and amounts to unfair labour practice to the grievants. It confirmed that the Applicant herein was served with the calculations on 15<sup>th</sup> January, 2020 and after more than twelve months it had not bothered to verify or endorse the calculations.

The Claimant submitted that the twenty-seven grievant employees should be compensated for the intentional delay in paying their terminal dues given the long wait. It argued that money today is more than money tomorrow and as such, this delay warranted the compensation claimed.

The Claimant urged the court to adopt its calculations as it is unchallenged and that costs be awarded to them. It prayed that Court do order twelve months compensation for each grievant employee for the manner in which they lost employment and intentional delay to either calculate or endorse the Claimant's calculations and make payment in time. It prayed for the issuance of a certificate of service to the grievants in the cause.

### **Analysis and Determination**

I have considered the prayers in the application and the history of this case. In the first place, the conciliation was a voluntary initiative by the parties. It was intended to facilitate a quick determination of this suit. It has now been almost two years since the parties started the negotiations. Partial agreement has been reached. What was left was to agree on the tabulation of reach grievants' terminal dues. The Claimant submitted its tabulation to the Conciliator on 15<sup>th</sup> January 2020. The same was dated 10<sup>th</sup> January 2020 and was annexed to the application under consideration by the Respondent as Exhibit SN 3. No tabulation by the Respondent has been filed.

The Respondent's application to refer this matter back to the Conciliator can only be granted by consent of both parties, the same having been an initiative by consent of both parties. The Court cannot either on its own, or on the unilateral application of one party, refer the matter back to conciliation as that would imply that the Court is surrendering its authority to a party that is not recognized by law. That would be unconstitutional, as the Claimant has expressly stated that it does not wish to go back to the Conciliator. For that reason, the prayer to refer the parties back to conciliation would fail.

The prayer seeking the striking out of the Claimant's document dated 10<sup>th</sup> January 2020 is expressed to be anchored on Rules 2, 5 and 15 of the Employment and Labour Relations Court (Procedure) Rules 2016. Rule 2 contains definition of terms. It defines a pleading as

**"pleading" includes the statements in writing of the claim or demand of an applicant, petition, judicial review application, and the defence by a respondent thereto, the reply of an applicant to any defence or a counterclaim of a respondent;**

Rule 5 provides that

#### **5. Statement of claim issued pursuant to the Labour Relations Act (No. 14 of 2007)**

**(1) Where a labour dispute is referred to the Court in accordance with the provisions of the Labour Relations Act (No. 14 of 2007)—**

**(a) the statement of claim shall be signed by the authorized representative of the party referring the labour dispute to the Court; or**

**(b) where the labour dispute has been a subject of conciliation, the statement of claim shall be accompanied by—**

**(i) a report by the conciliator on the conciliation process supported by the minutes of the conciliation meeting; and**

**(ii) a certificate of conciliation issued by the conciliator under section 69(a) of the Labour Relations Act.**

**(2) Where the labour dispute has been a subject of conciliation and the conciliator has not issued a certificate, the statement of claim shall be accompanied by an affidavit sworn by the claimant or by the representative of that claimant attesting to the reasons why the conciliator has not issued a certificate of conciliation.**

**(3) Where no conciliation has taken place, the statement of claim shall be accompanied by an affidavit sworn by the claimant or by the representative of that claimant attesting to the reasons why conciliation has not taken place.**

Rule 5 provides that

#### **15. Pre-trial procedure**

**(1) The parties to a suit shall, within fourteen days after the close of pleadings or such other period as the Court on application may direct, move the Court to hold a scheduling conference to ascertain:**

**(a) points of agreement and disagreement;**

- (b) the possibility of alternative dispute resolution or any other form of settlement;
- (c) whether evidence is to be oral or by affidavit;
- (d) whether legal argument shall be written or oral, or both;
- (e) the estimated length of the hearing; and
- (f) any other matters the Court may deem necessary.

(2) Paragraph (1) shall not apply where parties act in person and the subject matter of the suit is, in the opinion of the Court, not complex.

(3) Where no defence or response is filed in Court within the prescribed period, the Court may, upon application by the claimant, direct that the matter proceed for formal proof.

The Respondent argues that the document filed by the Claimant titled “*Further Statement in support of calculation of final dues*” is not a pleading as defined under Rule 2 and was filed without leave of Court. Further, that Rule 15 allows parties to move the Court with regard to points of agreement and disagreement where there are ongoing negotiations. That the impugned document filed by the Claimant violates Rule 5 as the matter is still subject of active and ongoing conciliation proceedings before the Conciliator. That the documents is illegal as it was not filed in compliance with Rule 5 and is prejudicial to the Respondent.

The tabulation of terminal dues was agreed upon by the parties during conciliation and indeed, the tabulation annexed to the supporting affidavit of Samuel Ngugi Ndinguri dated 10<sup>th</sup> January 2020 is addressed to Federation of Kenya Employers. It is not a pleading under Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016, or any other rule as it was not filed in Court but with the Conciliator. There is no letter from the Conciliator or even from the Respondent addressed to the Conciliator objecting to the same. The Respondent has not explained what prejudice it would suffer from the same. It has not filed its own tabulation in response or opposition to the said tabulation by the Claimant. It was submitted to the Conciliator in furtherance of the conciliation process to assist the Conciliator in making a determination in the matter that was placed before him by the consent of the parties.

The Court cannot be called upon to strike out a document that is filed before a Conciliator and which merely contain a tabulation of terminal dues as the Respondent is free to prepare and file its own tabulation to controvert the same. It has indeed filed a settlement of what it deems to be the terminal benefits that the grievants are entitled to in its Schedule of Payments dated 5<sup>th</sup> February 2021.

It is material to note that on 27<sup>th</sup> February 2020, the Court had directed the parties to file tabulation in Court. So indeed, there is an order of the Court that parties file tabulation.

**I find no merit in the application and dismiss it with costs to the Claimant. Parties are directed to file submissions on the terminal benefits due to the grievants based on the consents between the parties during conciliation. The suit will be fixed for mention to take date for judgment at the time of delivery of this ruling.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF MAY 2021**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**