



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 48 OF 2020**

**KENYA UNION OF SUGAR PLANTATION AND ALLIED WORKERS...CLAIMANT**

**v**

**WEST KENYA SUGAR CO LTD.....RESPONDENT**

**RULING**

1. The Kenya Union of Sugar Plantation & Allied Workers (the Union) sued West Kenya Sugar Co Ltd (the Respondent) on 9 July 2020, alleging that the suspension of Gordon Ogada, Nemiah Muchina, Benson Otieno, Oscar Lundu and Jafred Ronga and ultimate termination of the employment of Gordon Ogada (Grievants) were unfair and unlawful.

2. Filled at the same time was a Motion seeking conservatory orders against the suspension of the Grievants.

3. The Court directed that the Motion be served and that the parties file and exchange affidavits and submissions ahead of Ruling on notice.

4. The directions were not complied with, and on 3 November 2020, the Union indicated that the Motion had been overtaken by events (the Court marked the Motion as withdrawn).

5. The Respondent filed a Response on 16 November 2020 and on 25 November 2020, the Court granted leave to the Union to file and serve an Amended Statement of Claim.

6. The Amended Statement of Claim was filed on 4 December 2020. It was alleged that the Respondent had unfairly terminated the contract of Gordon Ogada (the other Grievants cases were withdrawn).

7. On 26 January 2021, the Respondent filed a Notice of Preliminary Objection contending that:

The Amended Memorandum of Claim dated 4 December 2020 is fundamentally and incurably defective and in contravention of Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Rule 7 of the Civil Procedure Rules, 2010.

8. The Union filed a Response to the Preliminary Objection on 10 February 2021.

9. Pursuant to directions on 9 March 2021, the Respondent filed its submissions on 29 March 2021.

10. The Court has considered the Preliminary Objection, the response by the Union and the submissions.

11. In its submissions, the Respondent cited a passage in *the Cooperative Insurance Company of Kenya Ltd v PAEM Agencies Company Ltd* (2014) eKLR that:

the issue of the underlining of the amended parts in red and the heading of the draft pleadings is not a procedural technicality that could be saved by the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010. Rather it is a fundamental error that goes into the root of the Amended Plaintiff.

12. In opposing the Preliminary Objection, the Union cited *Philip Chemwolo & Ar v Augustine Kubende* (1986) eKLR to contend that the failure to strike out and underline in red the deleted and added words was a blunder which should not warrant a penalty of not having the case heard on the merit.

13. The Union also cited *Transcend Media Group Ltd v Independent Electoral Boundaries Commission* (2015) eKLR to assert that only a hopeless claim should be summarily dismissed.

14. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that a party may amend his pleadings upon grant of leave by the Court while Order 8 Rule 7 of the Civil Procedure Rules require that an amended pleading should be endorsed with the date of the amendment and further that all amendments be shown by striking out in red ink deleted words and underlining in red added words.

15. It is correct that the Union did not strike out in red the deleted words nor underline in red added words.

16. The Respondent did not suggest that it had been prejudiced by the failure of the Union to strike out and underline in red in the deleted and added words in the Amended Memorandum of Claim.

17. In the Court's view and in order to do justice, instead of striking out the Amended Memorandum of Claim, the Union should file and serve an Amended Memorandum of Claim.

18. The Court orders:

(i) The Union to file and serve an Amended Memorandum of Claim in conformity with Order 8 Rule 7 of the Civil Procedure Rules on or before 16 July 2021.

(ii) The Respondent to file and serve an amended Response if need be on or before 30 July 2021.

(iii) If the Union defaults to comply with (i) above, the Amended Memorandum of Claim will stand automatically struck out.

19. The Respondent to have costs of the Objection.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 1ST DAY OF JULY 2021.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

For Union Mr Lincoln instructed by Mr Akhonya, Branch Secretary

For Respondent Mr Andiwo instructed by O & M Law LLP

Court Assistant Chrispo Aura