



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.136 OF 2018

STEPHEN WEKATI MAYUKUVA.....CLAIMANT

VERSUS

KENOLKOBIL LIMITED.....RESPONDENT

RULING

The ruling herein relates to the claimant's application and Notice of Motion dated 22nd January, 2019 and seeking for leave to amend the claim and the draft attached to be deemed as the duly filed amended claim.

The application is supported by the affidavit of David Nyamweya Mongeri and on the grounds that the claim herein was filed on 9th May, 2018 and the respondent filed defence on 25th June, 2018. There shall be no prejudice to the respondent where the claim is amended and a draft amended claim has been attached to the application.

In the affidavit the claimant's advocate avers that the application is filed without delay should be allowed.

The respondent opposed the application through the Replying Affidavit of David Ohana the group director of the respondent company and avers that the leave to amend claim to introduce claims in respect of Kenya Oil Company Group Employee Share Ownership (ESOP) shares which is a trust created by the respondent for facilitating the holding of shares in the company for the benefit of its employees and its subsidiary companies should not be allowed. ESOP is regulated by its own regulations and which regulations provide that where there is a dispute it should be referred to arbitration. Clause 20 of the Group Employee Share Ownership Plan Trust Deed and its regulations provides for negotiations where there is a dispute.

Mr Ohana also avers that this court lacks jurisdiction in the circumstances to hear and determine the matter with regard to ESOP shares. The proposed amendments are made in bad faith and in abuse of court process and should not be allowed.

Parties addressed the application by way of written submissions.

The court has considered the written submissions of both parties and the two issues which emerge for determination is whether the court has jurisdiction to hear and determine this matter and whether the claimant should be granted leave to amend the claim.

The respondent has challenged the jurisdiction of the court with regard to handling the matter proposed by the claimant in the proposed amended claim, that is, the inclusion of claims with regard to ESOP shares. The proposed amended claim remains proposed. It is not filed for consideration by the court. To go on its merits or demerits will be pre-empting a very serious and eminent matter and prejudice the claimant. It is however pre-emptive and as the claimant forges ahead with the issue of his claim with regard to ESOP shares it will be necessary and important to address this fact. Otherwise at this stage, the court retains its jurisdiction over the matter as the issue in dispute remains that of *unfair dismissal* of the claimant by the respondent which is a matter for the court to address and not any other court in the land.

Until the amendment is effected, the objection to jurisdiction on the grounds that the issue(s) with regard to ESOP shares are outside of this court remains mute. Upon the formal acceptance of amendment, this issue will come alive.

In principle amendment to pleadings should be freely allowed.

Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Court Rules) provides that;

(6) A party may amend pleadings before service or before the close of pleadings:

Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal

application, and the other party shall have a corresponding right to amend its pleadings

The claim was filed on 9th May, 2018 and defence filed on 25th June, 2018.

On 26th November, 2018 parties attended court and agreed to address the main claim on its merits on 21st January, 2019 and on the due date the claimant submitted that there were on-going negotiations. This application was then filed.

As pleadings are still alive and hearing has not commenced, Rule 14 of the Court Rules come into force and the proposed amendment should be allowed.

Accordingly, application dated 22nd January, 2019 is hereby allowed. The claimant shall file the Amended Claim and serve the respondent within 14 days, upon service the respondent shall be at liberty to reply to the Amended Claim. A mention date for hearing directions shall be taken at the registry.

Where the claimant does not file and serve Amended Claim as directed, the respondent shall be free to move the court as appropriate.

Each party shall bear own costs.

Delivered at Nakuru this 25th day of April, 2019.

M. MBARU JUDGE

In the presence of:

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