



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.124 OF 2017

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

VERSUS

KONGONI RIVER FARM [STAR DIVISION]RESPONDENT

RULING

The ruling herein relates to the respondent's [Kongoni River Farm] application dated 30th October, 2017 filed under the provisions of section 12 of the Employment and Labour Relations Court Act, 2014 [2011], Rule 16 of the Employment and Labour Relations Court (Procedure Rules), Order 8 Rule 13(1) and Order 35 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and seeking for orders that;

- 1. The entire Amended Memorandum of Claim dated 3rd October, 2017 herein be struck out with costs.*
- 2. The costs of this application be provided for.*

The application is supported by the affidavit of Elvis Achola Wara and on the grounds that the entire Amended Memorandum of Claim herein is incurably defective and includes fresh claims for alleged violation of consent orders and unlawful dismissal and termination of the claimant members. The amendments are prejudicial to the respondent as they are meant to deny it a defence contrary to Article 50 of the Constitution and the entire Amended Memorandum of Claim in incompetent discloses a totally new cause and should be dismissed.

In the affidavit of Mr Wara he avers that as advocate for the respondents he is aware that the claimant made application dated 17th march, 2017 and sought leave to amend the claim and which was allowed and complied with the Amended Claim dated 3rd October, 2017. The Amended Claim is defective and in breach of mandatory provisions of the law as this is a new cause of action. The prayers sought in the Amended Claim raise new issues. The claimant has elected to file a new suit. This is in abuse of court process. The amendments are meant to frustrate the hearing by introducing a new cause of action.

Mr Wara also avers that the claimant has not complied with provisions of Order 6 (VIA) Rule 5(1) of the Civil Procedure Rules and the amendments made are a nullity and should be dismissed.

The claimant filed a Replying Affidavit sworn by Thomas Kipkemboi and who avers that he is the Deputy General Secretary of the Claimant union and conversant with matters before court.

Mr Kipkemboi also avers that the claimant is not in breach of the law and the application before court is in abuse of court process as the respondents has been served with the Amend Memorandum of Claim and has not filed a defence. By the court ruling on 17th July, 2017 the claimant had applied to amend the claim and which was allowed. The court also noted that the respondent had not filed a defence to the original claim which the claimant had sought to amend and as such allowed the application to amend the same. The respondent was given a time period to file defence but failed to adhere.

Mr Kipkemboi also avers that the respondent is in abuse of court process when they effected termination of employment of the claimant members while there were orders stopping the same vide consent orders of 20th March, 2017. Such was done during the pendency of this case and contrary to the ruling of the court so as to defeat justice. For the claimant to set out the current status of the dispute, the amendments made are necessary and have been allowed by the court.

The application by the respondent is done with malice to frustrate the hearing and should be dismissed with costs.

The claimant filed the Claim herein on 17th January, 2017. There was also a Notice of Motion filed.

In the court addressing the Notice of Motion, on 20th March, 2017 parties by consent agreed to compromise the same by consent and on the orders that the respondent was restrained from terminating, dismissing and or suspending any employee for demanding printed payslips as a result of the internal memo by the respondent requiring all employees to open email accounts. The court also direct the respondent to file a response, witness statement, documents all before 13th April, 2017.

There is no defence filed.

By application filed on 29th March, 2017 the respondent applied to have the orders issued on 20th March, 2017 set aside. By ruling delivered on 14th July, 2017 the same was dismissed.

Effectively, the orders and directions of 20th March, 2017 were still in force.

On equal date of the subject ruling on 14th July, 2017, the claimant applied to amend the Memorandum of Claim and the court directed that pleadings had not closed and the claimant was at liberty to amend the claim. This was done on 3rd October, 2017 when the claimant filed Amended Memorandum of Claim.

The respondent is served with the Amended Claim but there is no defence.

Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 requires 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.

These were the directions issued by the court to the claimant on 14th July, 2017. The claimant has complied. There is no compliance on the part of the respondent.

Whatever amendments the claimant has addressed in the filed Memorandum of Claim, they are not challenged by the respondent. The application before court seeking to strike out the same is farfetched and made without the respondent complying with court directions of 20th march, 2017. Such conduct is abuse of court process for the purpose of the application now filed by the respondent, the court is well seized of the claimants pleadings and the Amended Memorandum of Claim and reason demanded that a defence be filed setting out such facts and details are opposed as to address factual matters within affidavits in the nature of which should be purely of fact is to use interlocutory application to stall the course of justice and in abuse of court process.

As held in **Alex Aluchili Miloko versus Nakumatt Holdings, Cause No.253 of 2014 (ELRC Nakuru)**, without the respondent filing a defence, the court is denied of useful material record the basis of which should have allowed a wider purview to the matters set out in the application before court. Without the respondent complying with orders of 20th March, 2017 to move the court as done in this application, such I find is attending court with unclean hands.

Accordingly, application dated 30th October, 2017 is found without merit, it is in abuse of court process and is hereby dismissed with costs to the claimant. As there is no defence on record, the claimant shall be issued with hearing directions.

Delivered in open court at Nakuru this 17th day of July, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistants: Nancy & Martin

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