



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2013**

**MUNAYI ISAAC OPONDO ..... 1<sup>ST</sup> CLAIMANT**

**PETER MWANGI ..... 2<sup>ND</sup> CLAIMANT**

**WALTER ONYIMBO ..... 3<sup>RD</sup> CLAIMANT**

**THOMAS GETANGITA..... 4<sup>TH</sup> CLAIMANT**

**DENNIS K. CHERUIYOT..... 5<sup>TH</sup> CLAIMANT**

**JULIUS L. JAIKA..... 6<sup>TH</sup> CLAIMANT**

**MAURICE OLAGO..... 7<sup>TH</sup> CLAIMANT**

***VERSUS***

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**RIFT VALLEY RAILWAYS (K) LIMITED.....INTERESTED PARTY**

Mr. Agwala for respondent/applicant

Mr. Mwihuri for 1<sup>st</sup> interested party

Mr. Munayi for the claimant and 2<sup>nd</sup> interested party

**RULING**

1. The claimant filed an amended memorandum of claim on 15<sup>th</sup> May 2015 in which the issue in dispute is set out as;

*“the respondent’s refusal to pay the claimant members their gratuity and terminal benefits, purporting to have transferred their years and their gratuity and terminal benefits thereon to the interested party.”*

2. the applicant purports to have obtained leave from the High court on 22<sup>nd</sup> April 2007 to subsume the claimant’s interest and those of the 2<sup>nd</sup> interested party’s and consolidate them in an amended claim as

filed on 15<sup>th</sup> May 2015 before this court.

3. the respondent filed an application dated 20<sup>th</sup> August 2015 on 22<sup>nd</sup> August 2015, seeking orders that;

a) the Honourable Court be pleased to strike out the amended memorandum of claim dated 15<sup>th</sup> May 2015 and filed on the even date on grounds *inter alia* that;

a) the amended memorandum of claim is made *malafides* and contrary to law;

b) the amended memorandum of claim is filed for and on behalf of the Rift Valley Railways Workers Union (K), which is not a party in the proceedings.

c) the same introduces fresh claims for alleged unlawful termination at paragraph 11, 12, 13 and 16 of the amended memorandum of claim more than eight (8) years after the fact and are time barred, hence an attempt to circumvent limitation of time provided under section 90 of the Employment Act.

d) the amendments are prejudicial to the respondent as are meant to deny it a defence contrary to Article 50 of the Constitution of Kenya.

4. The application is supported by the affidavit of Prof. Albert Mumma, an advocate of the High court of Kenya sworn on 20<sup>th</sup> August 2015 and all the annexures thereto.

5. Additional grounds of objection contained therein include;

i. That leave to amend the plaint by consent had earlier been granted to the parties and the plaint was amended four times. The union has now elected to file the new claim in the pretext of an amendment without any regard to law and the due process. The amended memorandum of claim by the Right Valley Railways workers Union (K) is an abuse of the due process of the court and ought to be struck out with costs to the respondents.

ii. That the purpose of an amendment is to allow a party who is already before court to properly plead its case and correct any defect to the claim with a view to assisting court to substantively determine the dispute.

iii. That it is also meant to allow parties to address intervening circumstances which materialize during the pendency of the claims and directly affects the claim.

iv. That this is not so, with regard to the intended amendments which the court ought to refuse.

v. That these frequent amendments have frustrated the proceedings and hence abuse of court process.

vi. The leave to amend granted meant to introduce more claimants who had been left out of the proceedings and this has not been addressed in the present amendments. The leave was limited and has been abused by the claimant.

vii. Furthermore, no facts which were hitherto unknown to the claimant have been introduced. The amendment appears to have been done in effect to aid a negligent pleader contrary to the provisions of Order V1A Rule 5 (1) of the Civil Procedure Rules per **James Ochieng Oduol –vs- Richard Kuloba, Civil Appeal No. 20 of 2002 [2008] eKLR.**

6. Applicant prays that the amended memorandum of claim be struck off.

**Response**

7. In its response to the respondent's application, the claimant union submits that the amendment was in accordance with due process and as was directed by the court on 22<sup>nd</sup> April 2015.
8. That no new claim has been introduced in the amended memorandum of claim and the issue in dispute remains the same.
9. That it is not true, that the claim has been amended four times and in fact, this is the only time the claim has been amended and with the leave of court, the claimant having acquired its legal personality to appear on behalf of its members as a legal entity.
10. That the court ought not to be unreasonably constrained by legal technicalities.
11. That the issue in dispute remains the same payment of terminal benefits upon purported transfer of employees from a public parastatal to a private entity which is contrary to law.
12. That section 90 of the employment Act, does not apply to the suit since same has been pending in court for nine (9) years.
13. That the respondent has not demonstrated the prejudice to be suffered by the respondent by reason of substituting the individual claimant with the union nor by other amendments meant to clarify the same issue that has been in dispute all along.
14. That the application be dismissed with costs.

### **Determination**

15. The court has considered the submissions made for the parties and has come to the inevitable conclusion that on 22<sup>nd</sup> April 2015, the court granted leave to the claimants to amend the statement of claim within twenty one (21) days and the respondent and interested party to respond to the amended claim within a corresponding period from date of service.
16. The matter was then set for mention to confirm compliance on 20<sup>th</sup> May 2015.
17. Instead of complying with the court order the respondent filed this application on 22<sup>nd</sup> August 2015.
18. Neither the respondent nor the interested party appealed the orders of the court issued on 22<sup>nd</sup> April 2015 in the presence of Mr. Mwihuri, advocate for the 1<sup>st</sup> interested party, Mr. Agwala, for the respondent and Mr. Munai for the claimant and 2<sup>nd</sup> interested party.
19. The court cannot be called upon to revisit a matter that is *resjudicata* before it and has not been addressed by an appeal court.
20. As to whether the amendment has introduced a new party, the court finds that the union has mandate to represent its individual members and this does not change the substratum of the individual claims by the former claimants.
21. The fact of the matter is that, the issue in dispute remains as it was before, which is, whether or not the employees, the subject of this suit ought to have been paid terminal benefits upon their deployment from the employ of Kenya Railways Corporation, the respondent to the employ of Rift Valley Railways (K) Ltd, the 1<sup>st</sup> interested party and if they were so entitled who between the respondent and the 1<sup>st</sup> interested party ought to shoulder that burden.
22. The amendments in the court's view do not amount to filing of a new suit out of the limitation period.
23. The transfer of the suit from the High court to the employment and Labour relations court provided an

opportunity to amend the suit with leave of court as happened.

24. The suit is now ripe for trial and all pending issues ought to appropriately be addressed during the trial. The application is dismissed. Respondent and interested party are at liberty to file amended responses to the amended statement of claim within twenty one (21) days from date of ruling.

25. Costs in the cause.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of January 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**