



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 185 OF 2015
DIANA IRUNGU AND 2 OTHERS.....CLAIMANT
VERSUS
NESTLE KENYA LIMITEDRESPONDENT

Mrs Opiyo for respondent/applicant

Mr. Kanyonge for claimants/respondents

RULING

1. Applications serving before court are for leave to amend the memorandum of defence dated 27th July 2015 and filed in court on 28th July 2015 in terms of the annexed Draft Amended Memorandum of Defence.
2. The intended amendment in the consolidated suit is to introduce a counter claim to recover remuneration paid to the claimants from 13th February 2015, to 29th July 2015, while the claimants remained in employment on the strength of an interim order of the court.
3. The applications are opposed vide replying affidavit of the claimants in which they state that the issuance of the interim order which kept the claimants in employment was upon proof of a prima facie case with a probability of success.
4. That the respondent opted to keep the claimants away from work and on paid leave by their letters dated 6th February 2015. That the application is misconceived because claimants cannot be visited liability based on their exercise of a constitutional right of access to justice under Article 48 of the constitution of Kenya 2010.
5. In any event, the court had jurisdiction and therefore lawful authority to issue the interim orders and the action of the court cannot be blamed on the claimants.

Determination

6. The applicants rely on a decision of the High Court in HCC at Mombasa **Civil Case No. 161 of 2012 [2014] eKLR** in which the court relied on the decision of Brett M. R. in **Clarapede –vs– Commercial Union Association (883) WLR 262** where he stated –

“However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be done without injustice to the other side. There is no injustice if the other can be compensated by costs.”

7. The court further relied on the case of **East Bakery –vs– Castelino [1958] E. A 461** as follows;

“Our courts have frequently stated that amendments to pleadings ought to be freely allowed if they can be made without injustice to the opposite side.”

8. The court fully agrees with the principle enunciated above and categorise the intended amendment as one that would occasion to the claimants injustice that cannot be compensated by costs.

9. The applicant intends to punish the claimants for exercising their constitutional right of access to justice under Article 48 of the constitution.

10. The applicant had a right of appeal against the decision of the court which right it did not exercise.

11. The applications are misconceived and dismissed with costs.

Dated and delivered at Nairobi this 5th day of May 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE