



**REPUBLIC OF KENYA**

**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO.2 OF 2015**

***(BEFORE D. K. N. MARETE)***

**KENYA PLANTATION & AGRICULTURAL WORKERS UNION.....CLAIMANT**

**VERSUS**

**UNILEVER TEA (K) LIMITED.....RESPONDENT**

**RULING**

This is an application by way of Notice of Motion dated 16th February, 2016. It seeks the following orders of court;

1. *That this Honourable Court be pleased to grant leave to the Respondent to amend its Memorandum of Defence dated 5<sup>th</sup> March, 2015 in terms of the draft Amended Defence and Counterclaim annexed to the Affidavit in support of this Application.*
2. *That the Honourable Court be pleased to make such other or further Orders as the Court deems fit and just.*
3. *That the costs of this application be costs in the cause.*

It is grounded on the following;

- a. *The respondent filed its Memorandum of Defence on 5<sup>th</sup> March 2015.*
- b. *The respondent has since filing its Defence computed its claim for mesne profits against the claimants herein who continue to reside on its premises despite having been lawfully dismissed from employment which is contrary to the provisions of the CBA between the claimant and respondent.*
- c. *The respondent is entitled to claim for Kshs. 2,149,149 as mesne profits which is inclusive of the costs it has incurred for providing electricity, water, cleaning, security and garbage collection services to the dismissed employees.*
- d. *It is the interest of justice that the respondent is given an opportunity to include all the amounts it claims from the claimant, to enable this Honourable Court to arrive at an accurate determination of the issues in dispute between the parties with all the relevant facts.*

- e. *The claims sought to be pleased by the respondent in the draft Amended Defence and Counterclaim arise from the same transaction and/or set of facts as the claimant's unions claim and as such it will be just, expeditious and cost effective to have the claimant's claim and the respondent's counterclaim heard together.*
- f. *There will be no prejudice suffered by the claimant should this application be allowed.*

The claimant/respondent does not file a response/reply to the application but chooses to file and highlight written submissions in defence.

At the highlighting of the parties written submissions on 18th May, 2016, Mr. Khisa for the claimant/respondent opposed the application in that it is the grievant's and not the claimant union that is in occupation of the premises alluded in the application. It is the claimant/respondent's further submission that the applicant has not proven that the claimant is liable to mesne profits and therefore the fallacy of the application. Again, this is not a commercial transaction and the grievant's occupy the premises by virtue of the Collective Bargaining Agreement (CBA) in operation at the moment. The application should therefore be disallowed for targeting the wrong party.

The respondent/applicant submission is that the proposed amendments to the claim are properly before court and target the claimant as the right party to this suit. It is her further submission that the arguments raised against the application are suited for the claim and therefore should be ignored and the application allowed.

This is a straight forward matter and application. The respondent/applicant wishes to be allowed to pursue an amendment of her defence to include the relief of mesne profits. The claimant/respondent belabors to oppose the application but is strangled by the dictates of justice and fair play. The defence fails to come out clear on this. Would it be proper and ordinate for this court to shut out the respondent in a case for amendment or pleadings? My answer is in the negative. Courts should be the last frontier for closing out parties from a presentation of their respective cases.

I am therefore inclined to allow the application with an order that each party bears its own costs of the application.

**Delivered, dated and signed this 16<sup>th</sup> day of June 2016.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mrs. Opiyo for the respondent/applicant.
2. Mr. Khisa for the claimant union.