



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 651 OF 2013

GODFREY MUCHANGI ASSOCIATES LIMITED CLAIMANT

VERSUS

ABDUL MULLICK ASSOCIATES LIMITED RESPONDENT

RULING

1. Application dated 8th June 2016 and filed on 14th June 2016 seeks the court to grant the applicant leave to amend the memorandum of claim dated 8th April 2013 to include a claim for service pay.
2. This claim was partly settled out of court and a consent recorded on 30th May 2016. If the application is granted this would be the only outstanding claim.
3. The application is opposed by a replying affidavit filed on 4th July 2016. The nub of the opposition has two limbs as follows;

- i. That the relief of service pay intended to be introduced is not available to the claimant by dint of section 35 of the Employment Act, No 11 of 2007 in that the claimant was a registered member of the National social Security Fund (NSSF) and the respondent remitted all NSSF deductions to the fund.

That the claim is not based on alleged redundancy and therefore no service pay is payable.

- ii. Only the issues of costs and interest are outstanding in this matter pursuant to the consent by the party which virtually settled this claim.

Determination

4. In **HCC at Nairobi Civil Division Civil case no. 408 of 2005 Stephen Wachira Vs. Crown Rock Shield Limited and another** the court held;

“The guiding principle in applications for amendment is that the court should liberally allow such applications so that the real question in controversy between the parties can be determined.”

5. The caveat is that the intended amendment should not be prejudicial to the other party in a manner not remediable by way of costs.

6. I will add another requirement, with regard to this matter, this is to say, the court ought not allow an amendment which on the face of it proposes to introduce a new matter or claim which is contrary to the law.

7. It is not in dispute in this case, that the claimant was registered with NSSF and the statutory dues were remitted by the employer on his behalf.

8. Section 35(5) of the Employment Act, No. 11 of 2007 provides for payment of service pay except in terms of section 35 (6) with regard to an employee who is a member of;

a)

b)

c)

d) National Social Security Fund

9. The intended amendment clearly purposes to introduce a relief for payment of ‘service pay’ contrary to statutory law.

10. This matter having been partly settled by the parties in good faith safe for the issue of payment of costs and interest, the court does not consider it in the interest of justice and fair play to allow introduction of a fresh matter that is unlikely to succeed and has the effect of elongating conclusion of this case.

11. The court therefore does not exercise its discretion in favour of the claimant/applicant and the application is dismissed.

12. Costs to follow the outcome.

Dated and delivered at Nairobi this 7th day of October, 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE