



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 178 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 7th April, 2015)

DAVID GACHAU NGANGA & 85 OTHERSCLAIMANTS

VERSUS

CMC HOLDINGS LIMITEDRESPONDENT

RULING

1. The application before court is the one dated 3/12/2014. The Applicants seeks orders for:

a. Leave to amend the Memorandum of Claim dated 13/2/2014.

b. That costs of this application be borne by the Respondents.

c. That this court make such orders or further orders as may be just and in the interest of justice.

2. This application was brought through a Notice of Motion dated 3/12/2014 and brought under Section 20 of the Industrial Court Act Cap 234 Laws of Kenya, Rule 14(6) of the Industrial Court (Procedures) Rules 2010, Article 159 of the Constitution of Kenya 2010 and all other enabling provisions of law.

The application is based on the following grounds:

- 1. That the Claimants herein are all management employees and have hence not signed any collective bargaining agreement with the Respondent making it necessary for them to seek the intervention of this Honourable Court.***
- 2. That the Claimants/Applicants in their Memorandum of Claim dated 13th February 2014 sought amongst others an award stopping for suspending the takeover of the 1st Respondent by the 2nd Respondent until security for salaries, retirement benefits of the Claimants was secured in an interest earning account. Since then the 2nd Respondent has taken over the majority shareholder in the 1st Respondent and it is necessary to make adjustment to the orders and prayers for determination of real issues in the matter.***
- 3. That the Claimants (in prayer B of the Memorandum of Claim) sought an order for 1st and 2nd Respondents to execute an exit or re-engagement agreement to secure and or protect their salaries and retirement benefits. It has emerged that the standstill agreement executed between the 1st and the 2nd Respondent, effectively froze all the salary increment and all benefits for the period of the negotiations (2011 to 2014) between the said parties.***

4. *That unionisable employees have been receiving their salary increments pursuant to the Collective Bargaining Agreement signed by the Respondent and it is discriminatory for the Claimants not to be awarded an increment.*
5. *That the said agreement was not revealed by the Claimants/Applicants though it substantially affected the increment and subsequently the retirement benefits.*
6. *That it is meet and just, that the breach of Contract of Employment in so far as it relates to the standstill agreement is adjudicated by this Honourable Court.*
7. *That the claim for a liquidated amount in the sum of Kshs.26,359,100.17 for the withheld increment and the Kshs.4,562,450.80, the shortfall not remitted to the scheme has now been identified and computed and it is in the interest of justice that the two parties to the standstill Agreement are ordered by this Honourable Court to pay the same either severally and or jointly.*
8. *That the Amended Claim discloses triable issues.*
9. *That the amendment will not occasion any injustice to the Respondents who have not filed any response to the Memorandum of Claim.*

3. The application is also supported by the Supporting Affidavit sworn by David Gachau Nganga deponed on 3/12/2014 and filed in this court on 4/12/2014. The Applicants aver that their application is based on a standstill agreement dated 6/9/2013 which is at page 8 of their application.

This agreement was made between the Respondents and it's now majority shareholder Al Futtaim Auto & Machinery Company. Page 12, clause (v) & (w) of the said agreement, the Applicants aver basically stopped any increment in salaries for management employees and also caps any increment to only 5%.

4. The Applicants contend that they are not introducing any new cause of action but they wait by the amendment to have the court determine why a section of employees are being awarded salary raise – yet another section – the management are not. They aver that the application is brought without undue delay and it will not prejudice the Respondents.

5. In response to the replying affidavit filed by the Respondents the Applicants aver that the HR Manual attached does not Respondent to the issues raised in the application the same being dated December 2014 and having been given to the Claimants in January 2015.

6. The Respondents opposed this application. They filed a replying affidavit which is deponed to on 2/5/2015 by one Ben Sifuna, the Group HRM of the Respondent and filed in court on 3/2/2015. The Respondents contend that this application is an afterthought and brought in bad faith. They aver that the amendment sought to be introduced seek to introduce a new cause of action which was not in the original claim. They also aver that this application is not brought without undue delay.

7. The Respondents have submitted to this court that his applications is an afterthought because it was brought after Respondents application to strike out the entire claim brought on 16/10/2014 dated 10/10/2014. The basis of the claim was that there was a takeover going on which was sought to be stopped. By the time the claim was being brought, the process of takeover had been completed. Initially, there was a 2nd Respondent – Al Futtaim Auto & Machinery Company and the claim was withdrawn against him. 2nd Respondent is no longer part of this claim. The Respondents therefore contend that the application is meant to patch up a claim that has no standing.

8. The Respondents cited **Ramasalt Agencies Limited vs Airtel Networks Kenya Limited (2013) eKLR & Barclays Bank of Kenya Limited vs Maitha Kawira** and submitted that the Applicants are seeking to clutch on a straw to salvage their case and this should not be allowed.

9. Having considered issues raised by the parties this court will determined whether the criteria set to determine whether an amendment of a claim has been met and make its determination. Under Rule 14(6) of the Industrial Court (Procedure Rules) 2010:

“A party may, with the leave of the court amend pleadings: provided that where leave is granted

to a party to amend any pleading, a responding party shall have a corresponding right to amend that party's pleadings".

10. In a three Judge bench in the case of **Institute for Social Accountability Centre for Enhancing Democracy & Good Governance vs the AG & others – Pet No. 71 of 2013** the learned Judges stated this:

“Rule 18 of Rules clearly stipulated that the court may permit an amendment at any stage of the proceedings. The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of actions is introduced and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice on the other side”.

11. Rule 18 of the Criminal Procedure Rules is couched in similar terms as those of Rule 14(b) of the Industrial Court (Procedure Rules) 2010. In the current application, the Respondents contend that the Applicants seek to introduce a new cause of action which was not in the original claim. I have looked at the original Memorandum of Claim vis a vis the intended amendments. It is apparent that initial reliefs of an Injunction could not be sustained as the taken-over which was intended to be stopped went on. That would ordinarily have necessitated an amendment in the pleadings.

The amendments sought now seek to bring in the aftermath of the takeover which in my view is not a new cause of action all together.

12. As stated in the case of Institute for Social Accountability (supra) and restated in **Pet No. 96 of 2014 Rodgers Mogaka Mogusu vs George Onyango Oloo & 2 others: -**

“the object of amendments is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded on the relief or remedy already claimed but rather on the basis of the true state of facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings”.

13. It is my view that an amendment to the pleadings sought would achieve the above objective instead of handling this case piece meal and therefore necessitating future causes of action and therefore elongating the issues further.

I therefore find that the application sought has merit and meets the criteria set in the law for granting leave to amend pleadings. I therefore allow this application. The intended amendment is therefore allowed as per the draft amended statement of claim. The Respondent has 30 days to respond to the same.

Costs in the cause.

Dated and delivered in open court this 7th day of April, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent