



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 507 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 12th May, 2015)

GEORGE MUREITHI & OTHERS.....CLAIMANTS

VERSUS

KENATCO TAXIS LIMITED (IN RECEIVERSHIP).....RESPONDENT

RULING

1. The application before court is the one dated 30/7/2014. The application is brought through a Notice of Motion and filled under the provisions of Section 69, 73 of the Labour Relations Act, Section 12 of the Industrial Court Act 2011, Order 1 Rule 9 and 10 of the Civil Procedure Act (Cap 21), Article 159(2) (d) of the Constitution of Kenya, Legal Notice No. 78 (Labour Relations Act 2007) and all other enabling provisions of law.

The Applicant seeks orders that:

1. This Honourable Court do grant leave to amend Statement of Claim dated 10th April 2013 and filed in court on 12th April, 2013.

2. Costs of this application be in the cause.

2. The application is based on the grounds that:

1. Kenatco Taxis Limited (in Receivership) is run by a Receiver and Manager appointed by Industrial Commercial & Development Corporation (ICDC) who are the Debenture holders hence the need to sue the Receiver & Manager appointed by Industrial Commercial & Development Corporation.

2. In order to clearly and distinctly distinguish the separate roles of legal employer (the Receiver and Manager appointed by ICDC) as the 1st Respondent and Kenatco Taxis Limited (in Receivership) as the 2nd Respondent should the receivership be lifted in course of the hearing, there is need to amend the titles of the Respondents.

3. The Receiver and Manager was erroneously left out as he is the legal employer and who has the capacity to sue and be sued on behalf of the 2nd Respondent and the debenture holder.

4. It is the Receiver and Manager on behalf of Kenatco Taxis Limited (in receivership) who issued fresh letters of conversion of services of the Claimants as drivers on diverse dates between 2005 and 2007. Refer to annexure marked KM-KT. 1(c) in the Statement of claim dated 10th April 2013 and filed in court on 12th April 2013.

5. In actual sense when the Receiver and Manager was appointed by the debenture holder to run the business of the 2nd Respondent he acquired the status of an employer thus creating the employer-employee relationship and was thrust to the duty of paying the Claimants their salaries.

6. The Receiver and Manager being the key person to turn around the business of the 2nd Respondent and the debenture holders could not turn around the business by himself and he needed the services of the Claimants and thus hired them afresh and thus created employer-employee relationship them.

7. It is the Receiver and Manager who was involved in the wrongful termination of services of the Claimants and who was involved in the conciliation process and he actually received the recommendations by the conciliator on behalf of the 2nd Respondent and/or refused to implement the same hence leading to the claim dated 10th April 2013. Refer to annexure marked KM-KT. 6 in the Statement of claim dated 10th April 2013 and filed in court on 12th April 2013.

8. The Receiver and Manager is involved in the day to day running of Kenatco Taxis (in receivership) including hiring and termination of new employees and paying their salaries.

9. Until Kenatco Taxi's receivership is lifted, the Receiver and Manager remains the legal employer of Kenatco Taxis Limited (in receivership) and is obligated to pay the Claimants their dues arising out of any orders of the court issues as he has the legal capacity on behalf of Kenatco Taxis Limited (in receivership) to enforce.

10. That no party will suffer prejudice or injury if the addition of the Respondent is allowed.

3. The application is also supported by the supporting affidavit of one George Mureithi one of the Claimants herein.

4. The Respondent opposed this application. They filed their grounds of opposition on 4th September 2014. They contend that the application is incompetent, bad in law and an abuse of the process of the court. They aver that the Claimant seeks to add a party to the suit yet the cause of action against that party is time barred.

5. Having considered the averments of both parties, the issues for determination is whether there are valid reasons to warrant allowing the orders sought.

Under Order 1 rule 9 and 10 of the Civil Procedure Rules:-

“ (9). No suit shall be defeated by reason of the misjoinder or non-joinder of parties and the court may at any stage of the suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before court.

(10)(1) Where a suit has been instituted in the names of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matters in dispute to do so order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and as such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before that court may be necessary in order to enable the court effectively and settle all questions involved in the suit, be added-----“.

6. It is apparent that addition or deletion of a party to a suit is at the discretion of the court. However, the principle on amendment of pleadings was discussed in ***Kenya Cold Storage (1964) Limited vs Overseas Food Service (Africa) Limited Civil Case No. 414 of 1995*** and Sachdeva Judge held as follows:

“ (1). The general rule is that leave to amend will be granted if it will enable the real question in issue between parties to be raised and where such an amendment will not occasion injury to the opposite party except such as can be sufficiently compensated for by costs.

(2). There is no injustice if the opposite party can be compensated by costs-----“

7. This principle has been restated over and over again in other case. In ***Otieno vs Omoro Civil Suit No. 52 of 1976***, Trainor Judge held:-

“ (1). where an amendment has the effect of adding a new party that new party should not be prejudiced.

(2). Any defence available to the added party will be open to him as if the proceedings had been just instituted at the time of the granting of the amendment in this instance the defence of limitation.

(3). The limitation period is calculated upto when the proceedings are initiated, the case of an added party time continuous to run until the amendment adding him as a defendant is ordered.

(4). The amending order should be treated as if there had been a fresh suit on the date the orders were made. To permit the proceedings to continue, against the new party as if the amendment never took place, would be to allow the amendment to have a retroactive effect to the date the original plaint was filed would be prejudicial to the rights conferred on by the law of limitation---“.

8. In this case, the Respondents have submitted that the application if granted will be bad in law as the matter is time barred. This issue was covered by Trainor Judge in the above matter for which I totally agree with him. The Respondents have not demonstrated how the amendment will prejudice them. The amendment sought will only enable the real question in issue between the parties to be raised and also deal with the real Respondent.

9. The Claimant has demonstrated that they wish to bring in the Receiver and Receiver Manager who in their view are the real employer of the Claimant.

I find that the application has merit and I therefore allow it. The intended amendment be effected within 14 days from the date of this Ruling.

Read in open Court this 12th day of May, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Kubai for Claimants

HHM for Respondents – Absent