



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 926 OF 2010

- 1. JONATHAN KARANJA THUO**
- 2. PATRICK WAMALWA MASUNGO**
- 3. STEPHEN ORIMA OCHIENG**
- 4. ELIUD MUNENE NG'ANG'A**
- 5. EMMANUEL NATO WAKHUNGU**
- 6. GEORGE MAKENZI**
- 7. JOASH MACHOKA.....CLAIMANTS**

VERSUS

BATA SHOE COMPANY LTD..... 1ST RESPONDENT

FAST TRACK COMPANY LTD.....2ND RESPONDENT

RULING

1. The Claimant's counsel Mr. Nyabena at the start of the hearing scheduled for 10.00am applied by way of oral Application before me for one of the Claimant's to testify on behalf of the others in terms of Rule 9 of the Industrial Court (Procedure) Rules. He submits that the Claimants were terminated all on the same day and thus there is no need to call all the Claimants to repeat the very same issues. He stated that it was impossible to have all the Claimants as they had relocated up country and that no prejudice would be occasioned to the Respondents if the case proceeded in the manner he proposed.
2. Miss Bonyo for the 1st Respondent was strongly opposed to that course as first and foremost when the matter was called out earlier, Mr. Nyabena had sought a time allocation on the indication that some of the Claimants were on the way to Court. Secondly, that the 1st Respondent prefers *viva voce* evidence of all the Claimants as the Claim lacks material particulars. Thirdly, a contract of service is specific to each individual and the Memorandum of Claim lacks necessary documents. She submitted that in fact, George Makenzi the 6th Claimant does not have a single document in support of his case. She closed by stating that because of the glaring gaps, there is need to cross-examine all the Claimants in the interests of justice.
3. Mr. Avedi for the 2nd Respondent associated himself with the sentiments expressed by his colleague Miss Bonyo and further submitted that if Mr. Nyabena had intended to have a test suit, he ought to have filed the requisite application and the Respondents would have responded. He stated that on the part of the 2nd Respondent, they were always ready to proceed and the Respondents were not guilty of laches. He thus opposed the application to have Emmanuel

Wakhungu to testify on behalf of all the other Claimants. He submitted that employment is distinct and we cannot have one of them testify on behalf of the others as proposed by Mr. Nyabena.

4. The Industrial Court (Procedure) Rules 2010 provide as follows in Rule 9.

9. (1) In a suit where more than one employee is instituting a claim against one employer in respect of breach of contract, the judge may permit one employee and one statement of claim to be filed by a labour officer or by one of the claimants in the suit on behalf of all other claimants.

(2) The claim filed under paragraph (1) shall be proved by the labour officer or by the claimant authorized by the Court.

(3) The statement of claim shall be accompanied by a schedule of the names of other claimants in the suit, their address and descriptions and the details of wages due to or the particulars of any other breaches and reliefs sought by each claimant.

(4) All claims referred to in paragraph (1) shall rank equally between the claimants, and shall be paid in full, unless the amount recovered from the respondent is less than the total amount of the claims with costs.

(5) After payment of the costs, all the claims shall abate in equal proportions among the claimants and be paid accordingly.

(6) The claimants, or any one of them, shall pay any costs given against them in a proportion as the Court shall direct.

5. Clearly, the law envisages a situation where the Claim can be proved by one Claimant. However, in order to do so, there is a series of events that are critical. The suit contemplated in Rule 9 is a representative suit. In it, the Labour officer or one Claimant is permitted to file a suit on behalf of the others. In such case, a schedule is annexed to the Claim containing crucial particulars of the co-employees of the Claimant and in the case of Labour officer, of the employees or former employees of the employer. I am being invited to accede to a request by the Claimant's Counsel Mr. Nyabena to allow Mr. Emmanuel Wakhungu to testify on behalf of the other Claimants. That is clearly not what Rule 9 envisages. If indeed the other employees are unavailable, there is recourse to Rules of this Court under Rule 24. There is no request to invoke the provisions of Rule 24(4).

6. I would be abdicating the role of arbiter if I permitted the invocation of Rule 9 without proper motion in Court. Should the Claimants in Court opt to testify, I will hear them but I cannot allow them to testify on behalf of the other Claimants as the threshold for representative suit as provided for under Rule 9 has not been met. In the premises, I dismiss the Application by Mr. Nyabena with no order as to costs.

Orders accordingly.

Dated and signed at Nairobi this 17th day of February 2014

NZIOKI WA MAKAU

JUDGE