



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 147 OF 2013
(Formerly Cause No. 1233 of 2010 at Nairobi)

JARED MASINDE OKUTOTO.....CLAIMANT

- VERSUS -

YUSUF DAWOOD BHAI.....1ST RESPONDENT

ZOHER DAWOOD BHAI.....2ND RESPONDENT

(DIRECTORS, HAKIMI GLAZIERS AND SUPER BURGAIN)

(Before Hon. Justice Byram Ongaya on Friday 9th May, 2014)

RULING

The claimant filed a notice of motion on 27.03.2014 brought under **Rule 14(6) of the Industrial Court (Procedure) Rules, 2010**. The claimant prayed for orders that the claimant be granted leave to amend the claim in terms of the draft amended claim annexed to the application. The grounds to support the application included:

- a. **That the amendment of the claim is necessary for the just and proper determination of the suit.**
- b. **That the amendment is necessitated by the fact that the subject company was dissolved after the filing of the instant claim.**
- c. **That no prejudice will be occasioned upon the respondents if the amendment is allowed.**

The application was further supported by the claimant's affidavit annexed to the application. The claimant has stated as follows in his affidavit:

- a. **He was employed by Hakimi Glass Mart Ltd in 1992.**

- b. **In 2002, the respondents opened Amatula Glaziers and Hardware Limited. In the same year, 2002, Hakimi Glass Mart Limited changed to Hakimi Glaziers Limited.**
- c. **Hakimi Glaziers Limited traded at Carnation Building in Nakuru town till 2010 when they relocated to Super Burgain Building owned by Burgains Glass & Hardware (NKR) Limited in the same town.**
- d. **The claimant left Hakimi Glaziers Limited on 13.01.2010 following unlawful termination.**
- e. **The claimant believed that Hakimi Glaziers Limited changed its name to Super Burgain Glass & Hardware Limited because in June 2010, the former company's staff and stock was transferred to the latter company. The directors of the two companies are also the same.**
- f. **The claimant worked for Hakimi Glaziers Limited from 2002 to 2010 at termination of his employment.**
- g. **After filing the suit on, the respondents filed a response and the claimant learned that Hakimi Glaziers Limited had been dissolved under section 339(5) of the Companies Act as defunct per the gazette notice filed in court for the respondents. The respondents must have instigated the situation to escape liability like in the present case so that the corporate veil could be lifted. The directors should therefore be held liable.**
- h. **At time of filing of the suit in October 2010, Hakimi Glaziers Limited was still in existence and was dissolved sometimes in 2012. It is that dissolution that has necessitated the amendment.**

The court has perused the proposed amended claim and finds that the effect of the amendment is to delete **“DIRECTORS, HAKIMI GLAZIERS AND SUPER BURGAIN”** and to substitute **“FORMER DIRECTORS (HAKIMI GLAZIERS LTD)”**.

The respondents have opposed the application on the basis of the replying affidavit of Zoher Dawood Bhai filed on 24.04.2014. The affidavit states that it is not disputed that the claimant was an employee of Hakimi Glaziers Limited as per the letter of appointment. It further states that the respondents as directors resolved to dissolve Hakimi Glaziers Limited in 2010 because it was uneconomical to continue running the company. The redundant employees were paid their dues and the claimant was paid Kshs.60,600.00 being for severance pay for 8 years Kshs.43,000.00, pay in lieu of one month notice Kshs.12,000.00, 14 days worked in January Kshs.5,600.00. The claimant acknowledged the pay. Subsequently, Hakimi Glaziers Limited stopped operations in June, 2010. The change of name and takeover as alleged by the claimant is denied for the respondents.

The court has considered the submissions made for the parties together with the nature of the amendment. It is not in dispute that the claimant worked for Hakimi Glaziers Limited whose directors are the named respondents. All that the amendment seeks to do is to state the undisputed fact that the respondents were the directors of Hakimi Glaziers Limited, which company as between the parties, is not disputed has since ceased to exist. The court has noted that consequential to the amendment, the parties to the suit will not change at all.

In the opinion of the court, the amendment sets out to properly describe the respondents as parties to the suit. In the opinion of the court, the amendment is within the established principles of pleading that the pleadings enable the court to determine the real issues in controversy. When allowed, the amendment will contribute towards the just and proper determination of the suit. In the circumstances, the court finds that the claimant is entitled to leave to amend as prayed for.

The court has considered the substantive issues raised for the respondents including whether the claimant was fully paid the terminal dues free from any further employer's liabilities; and whether the corporate veil could be validly lifted in this suit. Those issues are better left for the full hearing and determination.

In conclusion, the application for leave for the claimant to amend the statement of claim is allowed with orders:

- a. **The claimant to file and serve, by 16.05.2014, the amended statement of claim in terms of the draft amended statement of claim on record.**
- b. **The respondents at liberty to file and serve the defence to the amended statement of claim by 23.05.2014.**
- c. **Parties to agree upon a convenient mention date for directions on the hearing of the suit.**
- d. **The costs of the application shall be in the cause.**

Signed, dated and delivered in court at Nakuru this Friday 9th May, 2014.

BYRAM ONGAYA

JUDGE