



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 305 OF 2013

TRANSPORT WORKERS UNIONCLAIMANT

VERSUS

CHANGAMWE SERVICE STATIONRESPONDENT

RULING

On 20/9/2013 the claimant brought this suit against the respondent claiming employment terminal benefits and compensation for unfair termination of employment for Mr. Patrick Mbandi (grievant). The respondent filed her defence under protest on 5/12/2013 denying liability and contemporaneously filed a preliminary objection (P.O.) urging the court to strike out the suit for being incompetent and bad in law.

The P.O. is founded on the following 3 grounds

- 1. The claim is filed by unauthorized representative of the claimant contrary to Section 2(a) of the Labour Relations Act.**
- 2. The claim is for terminal dues while the verifying affidavit is for refusal by the respondent to negotiate a CBA hence the suit is defective.**
- 3. The respondent is a limited liability company but has not been sued as such hence the suit is defective and bad in law.**

On 19/2/2014 the respondent attended court for hearing of the P.O. but the claimant defaulted. Instead of arguing the P.O. ex parte, the respondent's counsel requested for direction that the P.O. be disposed of by way of filing written submissions. The respondent filed her submissions on 14/4/2014 while the claimant filed a replying affidavit on 2/4/2014. The court appreciates the fact that the claimant was not represented by counsel and as such the court will treat her replying affidavit as her submissions in opposition to the P.O.

RESPONDENT'S SUBMISSIONS

On the issue of unauthorized representative, the respondent submitted that only the General Secretary of a trade union is authorized to institute suits on behalf of a trade union as provided for under Section 2(a) of the Labour Relations Act. In the present case, the suit was instituted by the Assistant General Secretary who swore the verifying affidavit. Consequently, the respondent submitted that the suit was fatally defective and ought to be struck out.

On the discrepancy between the facts in claim and the verifying affidavit, the respondent submitted that the two documents were in respect of separate and distinct claims which could not be merged. The

claim is in respect of terminal dues while the affidavit deals with refusal to negotiate a CBA. On that defect the court was urged to dismiss the suit.

Lastly, the respondent submitted that although she was a limited liability company, she had been sued as a firm. According to her, her name and the name indicated in the suit represent two distinct entities. She urged the court to dismiss the suit because the defect rendered the suit incurably defective.

CLAIMANT'S REPLY

The claimant relied on the replying affidavit of Nicholus Otieno Ogola, who is also her Assistant General Secretary. She exhibited a letter dated 5/7/2011 which the General Secretary of the claimant appointed and authorized Mr. Nicholus Otieno Ogolla handle all the employment disputes for her members in the coast province.

The claimant further submitted that the dispute in this suit started at the shop floor level and proceed to the Labour Ministry for conciliation where both parties were represented and no objection was raised by the respondent. Consequently the claimant deemed the P.O. as an abuse of court process and prayed for the P.O. to be dismissed. She also urged the court to consider Section 20(1) of the Industrial court Act which relieves the court from the yolk of undue regard to technicalities. She maintained that the reference to CBA negotiation in the verifying affidavit was only a typing error which could be cured by being expunged from the record.

ANALYSIS AND DETERMINATION

Upon reading the pleadings, and the P.O. and upon carefully considering the replying affidavit and written submissions filed, the only issue for determination is whether the P.O. has merits in respect of the 3 grounds raised. On the first ground of incompetence of the suit due to commencement by unauthorized representative, the court opines finds that the respondent has deliberately attempted to mislead the court by ignoring Section 2(e) of the Labour Relations Act which recognizes a person appointed in writing by the authorized union representative as duly authorized representative. In view of the letter of authority dated 5/7/2011, the court finds that the suit was properly instituted by a lawful representative of the claimant.

As regards the discrepancy between the facts pleaded in the claim and the verifying affidavit, the court is of the view that such an error was not an incurable defect. It was just an error caused by either typing error or negligence on the part of the deponent. As earlier observed the deponent was a laymen who was not represented by counsel. The court will deem the error as an excusable mistake which can be cured by filing a fresh verifying affidavit. In any case the affidavit is not the evidence but only serving a formal duty of verifying facts pleaded. It therefore does not affect the merits of the suit.

Lastly, the court is the view that the suit is not incurably defective due to the failure to cite the respondent as 'changamwe service station limited". The said error can be cured by amendment to the claim. The court should always not be quick in sending away litigants from the seat of justice by striking out pleadings on account of formal errors or defects. Instead the court should strive to sustain the suit as much as possible for determination on the merits by entertaining amendments to the pleadings . That obligation should be more enhanced when the litigants are unrepresented by counsel. Such view should be what was intended by Article 48 and 159 of the constitution of Kenya and Section 20 of the Industrial Court Act.

DISPOSITION

Its obvious from the findings above that the P.O. is dismissed save that the verifying affidavit is struck out and leave granted to the claimant to file a fresh affidavit to rectify the facts in the claim within 7 days of today. The claimant is also granted similar leave to amend the claim to reflect the correct name of the respondent. No order as to costs.

Dated, Signed and delivered this 6th June 2014.

O. N. Makau

Judge