



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1270 of 2010

**CLAIMANT.....KENYA UNION OF DOMESTIC HOTEL EDUCATIONAL
INSTITUTIONAL
HOSPITALS AND ALLIED WORKERS**

RESPONDENT.....MUTHAIGA COUNTRY CLUB

RULING

1. On 15/10/2010, the Kenya Union of Domestic, Hotel, Educational, Institutional, Hospitals and Allied Workers hereinafter 'KUDHEIHA' filed the claim herein respect of 19 persons. The gravamen of the claim was stated as 'wrongful and unfair mass dismissal' of the 19 persons.

2. On 1/11/2012, the Respondent through the law firm of Njuguna & Partners filed a Statement of Response.

3. The claim was set down for hearing severally but the hearings never took off. At some point the parties had indicated that they were negotiating a settlement.

4. On 29/11/2010, the Respondents Advocates on record filed a Notice of Preliminary Objection to the claim citing 5 different grounds seeking to have the claim struck out. I now proceed to examine the 5 grounds relied on.

5. In a nutshell, the Motion sought that the Claim be struck out on the grounds that:

[i] 'the Memorandum of Claim as drawn is fatally defective'

[ii] 'the Memorandum of Claim is incompetent for want of a Verifying affidavit'

[iii] 'the Memorandum of Claim is not accompanied by a report by the Conciliator'

[iv] 'the Memorandum of Claim does not contain list of witnesses'

and lastly

[v] that 'the Memorandum of Claim may prejudice, embarrass or delay the fair trial of the claim.

Parties Submissions: Respondent/Objector

6. The first point taken by Ms. Ogata on behalf of the Respondent was that the Statement of Claim was in breach of rule 5[1] of the Industrial Court [Procedure] Rules 2010 which requires a statement of claim to be accompanied by a Verifying affidavit on the facts relied on. It is not disputed that the statement of claim was not accompanied by a Verifying Affidavit.

7. Ms. Ogata also submitted that rule 6[1] [b] of the same Rules, require that where a dispute has been referred to conciliation, then the report of the conciliator together with the minutes of the process must of necessity accompany a Statement of Claim. Ms. Ogata also made similar submissions in regard to the issue of list of witnesses as required by rule 14[9] of the Industrial Court Rules 2010. The thrust of Ms. Ogata's submissions were that these rules were mandatory and failure to comply with them would make a Statement of Claim incompetent and fatally defective.

Parties Submissions: Claimant/Respondent

8. In response, Mr. Nyabena contends that the rules relied on are merely directory and not mandatory. He further contends that non compliance should not result in the striking out of the statement of claim.

Issues for determination.

9. The issue emerging for determination is whether rules 5[1]; 6[1][b] and 14[9] of the Industrial Court [Procedure] Rules are mandatory or merely directory and in either case what should be the consequence of non-compliance.

Analysis of the issues

10. The parties did not refer the Court to any previous decisions concerning the issues in contention as regards the practice in the Industrial Court.

11. The Industrial Court [Procedure] Rules published vide L.N. No. 78/2010 form part of the Labour Institutions Act No.12 of 2010 and now the Industrial Court Act, 2011 pursuant to Section 32 thereof. An examination of the Act reveals that it was assented to on 22/10/2007 and was to commence on 2/6/2008. The Rules were published on 28/5/2010 in the Kenya Gazette and these rules revoked the Industrial Court [Procedure] Rules and the Trade Unions [Appeals] [Amendment] Rules L. N. No. 186 of 1965 and 117 of 1973 respectively.

12. The rules revoked by the Industrial Court [Procedure] Rules 2010 did not require a claimant to file a verifying affidavit. The new rules made an express provision for a verifying affidavit. Ms. Ogata submits that the requirement for the verifying affidavit is mandatory since the word 'shall' is used.

13. However, rule 14 of the revoked Industrial Court [Procedure] Rules, L.N. 186 of 1965 and 117 of 1973 did require the parties to notify the Court and each other of any witnesses they intended to call.

14. I have not found nor did any of the parties refer my attention to any rule in the revoked rules similar to rule 14[9] of the Industrial Court [Procedure] Rules, 2011.

15. This Court is alive to the principle that the rules of procedure are not meant merely to flower the statute books but have a purpose. The High Court in interpreting similar provisions in regard to the requirement to file a verifying affidavit at the time of filing a plaint have observed that the *rules of procedure are meant to aid the parties as well as the Court to achieve justice and not to block them from doing so.* [\[1\]](#)

16. And with the above observation it is pertinent to ask, what is the purpose of the requirement that a statement of claim be accompanied by a verifying affidavit; a report from the Conciliator and a list of witnesses.

17. In answering the question, it is necessary not to forget the provisions of Article 159[2][b] and [d] of

the Constitution which provides and I quote, '*justice shall not be delayed; and 'justice shall be administered without undue regard to procedural technicalities'*'. The same demand of the Constitution that justice should not be delayed and should administered without undue regard to technicalities is replicated in the Industrial Court [Procedure] Rules 2010 at rule 24[5].

18. According to rule 5[1] of the Industrial Court [Procedure] Rules, the verifying affidavit serves to verify the facts stated in the statement which the claimant seeks to rely. Rule 5[2] even gives the Court power to grant leave for filing of further affidavits in the course of hearing.

19. In the view of this Court, Rules 6[1][b] and 14[9] of the Industrial Court [Procedures] Rules, 2011 are meant to enable the parties to know the case they are meant to meet and to prepare adequately for the hearing. I do hold that the same principles applicable under the Civil Procedure Rules on the verifying affidavit are applicable under the rules of this Court.

20. Flowing from the above, this Court holds that requirement to file a verifying affidavit, file the conciliators report and list of witnesses are procedural and they are meant to allow the parties to know in advance the type of evidence they will be confronted with and to prepare for the same and failure to comply is not fatal.

21. And where there is a failure to adhere to these procedural requirements and the same is brought to the attention of the Court and parties before the commencement of the hearing, the Court is obligated in pursuance of the objective of doing substantive justice to parties to order that leave be granted for the verifying affidavit, list of witnesses to be filed and served.

22. The Court also observes that any prejudice suffered by the Respondent can be compensated for in costs by virtue of Section 12[4] of the Industrial Court Act, 2011, especially in case such as this where the parties are represented.

23. Regarding the report of the Conciliator and the minutes of the conciliation process, the Court is of the view that similar principles apply and that in all the three instances it would be harsh to strike out the statement of claim.

24. The upshot of the above is that the striking out of the statement of claim as sought in the Preliminary Objection is not granted.

Orders

25. The Court therefore orders as follows:

[a] The Claimant is ordered to file a Verifying Affidavit within the next Seven [7] days from the date of delivery of this ruling.

[b] The Claimant is ordered to file a list of Witnesses, if any, it intends to rely on during the hearing within the next Seven [7] days from the date of this ruling.

[c] The Claimant is ordered to secure and file a report from the Conciliator together with the minutes thereof and file the same within the next fourteen day [14] from the date of delivery of this ruling.

[d] The Respondent is granted leave to file and or amend its pleadings within fourteen [14] from date of service by the Claimant of its verifying affidavit, list of witnesses and conciliators report.

[d] The Respondent to have costs of this application.

Dated and delivered at Nairobi this 2nd day of August 2012

Justice Radido Stephen
Judge

[1] Mobil Oil Kenya Ltd v Weldwell Ltd, Milimani HCCC No. 222 of 2001