



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 279 OF 2003**

**LAWRENCE NDUTU & 156 OTHERS.....PLAINTIFFS**

**VERSUS**

**KENYA BREWERIES LIMITED..... RESPONDENT**

**JUDGEMENT**

1. By a ruling delivered on 30<sup>th</sup> November 2015, Hon. Makungu, learned Deputy Registrar of this court granted the Plaintiffs (Respondents) leave to amend the plaint with a corresponding leave to the Defendant (Appellant) to amend its defence. The Defendant (Appellant) was aggrieved by the decision of the Deputy Registrar hence this appeal.
2. On appeal, the Defendant/Appellant put forward the following grounds in its memorandum:
  1. ***THAT the learned Deputy Registrar erred in law and fact in failing to appreciate that the application for amendment is being made 21 years after the alleged matters arose.***
  2. ***THAT there is no evidence exhibited to the supporting affidavit of the allegations sought to be introduced at this late stage by the Respondents.***
  3. ***THAT the Appellant/Defendant will be seriously prejudiced if it is called upon to defend the suit on fresh claims being made at this stage.***
  4. ***THAT the learned Deputy Registrar erred in law in failing to find that the application was unmerited and is a gross abuse of the court process.***
3. It is the submission of Miss Gachu Kimani, learned advocate holding brief for Mr. Gachuhi for the Appellant that the learned Deputy Registrar should not have allowed the amendment because the same introduced a new cause of action which accrued 21 years before the date of the amendments hence time-barred. The learned advocate further argued that the amendment prejudiced the Appellant in that it took away the Defendant's defence which was to the effect that the Plaintiffs' was time-bared. Miss Kimani, also pointed out that some of the issues raised related to tax under Section 79 of the Income Tax Act whose records were destroyed at the expiry of seven (7) years. The Defendant stated that the claim is based on a memorandum allegedly executed in 1996, thus it will be extremely difficult to obtain documents. The Defendant accused the Plaintiff for largely delaying the expeditious conclusion of this case.
4. Mr. Namada, learned advocate for the Plaintiffs/Respondents urged this court to dismiss the appeal because the amendment introduced will assist the court to determine the real issues in controversy. The learned advocate denied the accusation that the Plaintiffs are guilty of laches. Mr. Namada narrated the journey this matter has taken from this court to the court of appeal, then to the supreme court and back to the High Court. Mr. Namada further pointed out that the amendments were meant to clarify the existing claims and that there are no substantive

amendments which departed completely from the substrata of the suit. The Plaintiffs advocate stated that the Defendant will not suffer any prejudice because the defence of the action being time-barred has already been raised in the defence and is in fact one of the issues to go for trial.

5. I have carefully considered the rival oral submissions together with the material placed before me. There is no dispute that at the time of hearing this appeal parties had already complied with the terms of the order. In other words both the plaint and the defence had been filed and exchanged. There is also no dispute that some issues similar to those presented to this court were also argued before the Deputy Registrar. It is argued that the learned Deputy Registrar failed to appreciate the fact that the application seeking to amend the plaint sought to introduce a cause of action which arose 21 years ago. The Plaintiffs' argument is that the amendment sought did not change the character of their claim hence there was no total departure from the initial pleadings. The learned Deputy Registrar came to the conclusion that the amendments appear to be the Plaintiffs effort to elaborate in detail the issues as to what led to their dismissal from the employment by Defendant. I have on my part re-evaluated the application that was before the learned Deputy Registrar. The record shows that the Plaintiffs successfully managed to introduce the following prayers by way of amendment:
  - i. ***A declaration that the Defendant's action to cause early retirement of the Plaintiffs was unlawful and unfair and amounted to breach of the Plaintiffs' contracts of employment.***
  - ii. ***A declaration that the Defendant's calculation of the Plaintiffs' terminal benefits were wrong, arbitrary and they helped the Defendant to withhold huge sums due to the Plaintiffs.***
  - iii. ***An order that the Defendant should pay to all the Plaintiffs' all the outstanding dues and salaries until their retirement age at sixty year.***
6. I have compared the aforesaid prayers to the original claims in the Amended plaint dated 26<sup>th</sup> march 2003 and I am convinced that the Plaintiffs did not introduce a total new cause of action. The learned Deputy Registrar correctly ruled that the amendments introduced merely elaborated the Plaintiffs claim. The learned Deputy Registrar cannot therefore be faulted. She clearly appreciated the import of those amendments.
7. The other ground which was ably argued is whether or not the amendment took away the Defendant's defence. I have considered the rival submissions. It is now settled law that an amendment should not be allowed if it will cause injustice to the opposite party. In this matter I have already pointed out that the order granting leave to both sides to amend their pleadings has already been implemented. The Defendant has complained that the amendment took away its defence based on effluxion of time. I have examined the Appellant's re-amended defence dated 6<sup>th</sup> January 2016 and it is clear that in paragraph 18A of the aforesaid defence the Appellant/Defendant is contended that the Plaintiff/Respondent's action is time-barred. It is therefore not true that the amendment took away the Defendant's defence. I therefore find that the Defendant/Appellant will not suffer any prejudice due to the amendment.
8. The question as who is to blame for the delay in concluding this matter was raised before the Deputy Registrar. There were accusations and counter-accusations. However the learned Deputy Registrar clearly noted that the delay to determine the dispute could not possibly be attributed to either side. I have also carefully perused the record and I am unable to assign blame on any side for the delay to conclude the matter. The learned Deputy Registrar therefore came to the correct conclusion.
9. In the end and for the above reasons, I find no merit in the appeal against the Deputy Registrar's decision delivered on 30.11.2015. The same is dismissed with costs to the Respondents.

Dated, Signed and Delivered in open court this 15<sup>th</sup> day of March, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent