



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

COMMERCIAL DIVISION-MILIMANI

Civil Case 343 of 2001

MARGARET WANGARI MAINA PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED DEFENDANT

RULING

This is an application expressed to be brought under the provisions of Order VIA Rules 3,5 and 8 of the Civil Procedure Rules and Sections 3A and 100 of the Civil Procedure Act and other enabling provisions of the Law. The application is brought by the Plaintiff and primarily seeks leave to amend her plaint.

The application is sought on the grounds that:

- (a) *The proposed amendments to the Plaint are for the purposes of determining the real questions in controversy between the parties and or for correcting defects or errors in the proceedings.***
- (b) *The Plaintiff is entitled to amend at any stage of the proceedings.***
- (c) *The proposed amendments will not occasion any prejudice to the Defendant.***
- (d) *The Defendant had initially summarily dismissed the Plaintiff from employment but has now converted the summary dismissal into a termination of employment hence necessitating the amendments sought herein.***

The application is supported by an affidavit sworn by the Plaintiff. The application is opposed and there is a Replying Affidavit sworn by one Janet Wawunda Mwaluma the Defendant's Assistant Legal Officer. In response to the Replying Affidavit the Plaintiff has filed a further affidavit.

The application was canvassed before me on 6.10.2005 by Mr. Mwichihi, Learned Counsel for the plaintiff and Mr. Mutahi, Learned Counsel for the Defendant. Counsel for the Plaintiff relied upon her supporting and further affidavits. In substantiation of the facts in the said affidavits, Counsel submitted that the letters written by the Defendant to the Plaintiff clearly showed that the original termination of the Plaintiff had been changed from summary dismissal to termination of employment. According to Counsel the change had necessitated amendments to the Plaint to reflect other claims due to the Plaintiff.

Anticipating the Defendant's response, Counsel for the Plaintiff argued that it was not true that the claim had been settled because if it had been an agreement to that effect would have been exhibited. In Counsel's view not all claims had been settled.

Counsel for the Defendant in responding to the submissions in support of the application argued that it was still the Defendant's case that the Plaintiff had been summarily dismissed by the Defendant in 1999. Counsel further submitted that as the Plaintiff had served the Defendant for 15 years the parties had directly negotiated a settlement out of Court and payment of sums agreed paid to the Plaintiff directly on a without prejudice basis and not on the basis that the summary dismissal had been converted to termination. Counsel agreed that in any event the sums already paid were pursuant to statutes relating to the Plaintiff's employment which have

been paid in full and the plaintiff has no further claim against the Defendant. In the Defendant's view, the proposed amendment will serve only to increase costs and is an abuse of the process of the Court.

I have considered the Application, the Affidavits the annexures thereto, the pleadings and the submissions of Counsels appearing. I have also read a few relevant cases on this subject. Having done so I take the following view of the matter. It is settled that to grant or not to grant leave to amend pleadings is a matter of discretion. Each application has to be determined according to its special circumstances. In the case at hand the primary reason why leave to amend the plaintiff is sought is that the Defendant had initially summarily dismissed the Plaintiff but had now converted the summary dismissal into termination of employment thereby extending the Plaintiff's claims. This basis of the Plaintiff's application is not entirely honest. The Plaintiff's claim in her plaint dated 27.2.2001 and filed on 7.3.2001 was based on the fact that the Defendant had wrongfully and unlawfully dismissed her from her employment. It was because the dismissal was wrongful that she lodged her claim. Whether the Defendant dismissed her summarily or terminated her employment did not affect her claim. Either way her case was that it was wrongful and unlawful. Indeed on that basis she claimed terminal dues which she particularized in paragraph 5. It was therefore not candid of the Plaintiff to say that it was the conversion of the summary dismissal into a termination of employment that necessitated the lodging of the application for leave to amend the plaintiff. Indeed the Plaintiff was aware that what she proposes to claim in the proposed amendment was always her claim because at paragraph 7 of the supporting affidavit she blames her previous lawyers for failure to include the proposed claims in the plaintiff.

I am alive to the general principle that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs (See EASTERN BAKERY -V- CASTELINO (1958) E.A. 46.

In the case at hand I have perused the documents intended to be relied upon, I am not satisfied that the documents are more consistent with a conversion of the dismissal to termination than a compromise on a negotiated settlement. In any event the documents were without prejudice.

It is also a basic consideration in determining an application for leave to amend that the application be made with promptitude. The application is being made more than 4 years since the suit was filed. The Court of Appeal in KYALO -V- BAYUF BROTHERS LTD(1983) KLR 229 held inter alia that applications for amendment of pleadings should be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the Court process. In that case the application for leave to amend was brought six years late.

In the circumstances of this case I am inclined to hold that 4? years is too late and will obviously prejudice the Defendant who had thought that the matter had been settled out of Court.

In the end for the reasons discussed above, and in the special circumstances of this case, I refuse to exercise my discretion to allow the Plaintiff to amend as prayed. The Plaintiff's application dated and filed on 29.7.2005 is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF NOVEMBER, 2005

F. AZANGALALA

JUDGE