



**Mwangi v Happy Go Limited & 2 others (Civil Case 11 of 2019)
[2024] KEHC 12183 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12183 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 11 OF 2019
HI ONG'UDI, J
OCTOBER 9, 2024**

BETWEEN

GEORGE MWANGI PLAINTIFF

AND

HAPPY GO LIMITED 1ST DEFENDANT

ASHISH SHAH 2ND DEFENDANT

PKF AUDITORS 3RD DEFENDANT

RULING

1. By the Notice of Motion dated 24th March, 2024 the Applicant prays for the following orders;
 - i. That the honourable Court be pleased to give an order granting leave to the plaintiff/applicant to amend his plaint dated the 4th April 2019 in terms of the draft amended plaint herein.
 - ii. That the honourable Court be pleased to give an order granting leave to the plaintiff/applicant to substitute the plaintiff's witness statement filed herein with a new plaintiff's witness statement in conformity with the amended Plaint.
 - iii. That the honourable Court be pleased to give an order granting leave to the plaintiff /applicant to file a supplementary list of documents and bundle of documents thereto.
 - iv. That the honourable Court be pleased to give an order granting corresponding leave to the defendants/respondents to amend their pleadings, and/or file further documents if need be.
 - v. That costs be provided for.
2. The application is premised on the grounds on its face as well as the affidavit of the plaintiff/applicant herein. He deponed that the cause of action against the defendant/respondents was of a commercial and/or civil nature.



3. He further deponed that the pleadings as drawn by his former advocates are a mixture of a commercial and/or civil cause of action and an employment and labour relations cause of action. He added that from the prayers sought in the Plaintiff dated 4th April 2019, it is clear that the court will face a legal quagmire in adjudicating the matter given the nature of the reliefs sought.
4. The applicant further averred that he seeks to amend his pleadings so that they can reflect his grievances against the respondents and to also seek proper reliefs from the court. He added that the said amendments will enable the court to adjudicate the real issues in controversy between the parties.
5. He stated that he wished to substitute his witness statement and supply the court with further documents in support of the intended amendments.
6. He deposed that the defendant/respondents would not suffer any prejudice as they will be granted corresponding leave to amend their pleadings and file any documents if need be.
7. The defendant/respondents in response filed a replying affidavit sworn on 16th October, 2023 by Ashish Shah who averred that the proposed amendments were meant to delay the determination of this matter and to defeat their defence. He added that the said amendments seek to introduce a new cause of action as the applicant intends to have the cause of action in the realm of commercial proceedings instead of an employment matter.
8. He averred that the introduction of a new cause of action at this stage of the proceedings militates against cogent dictates on procedural and substantive justice. He added that the 1st defendant will be blind sided and driven from the seat of justice.
9. He went on to depose that the applicant had sufficient time to amend his pleadings after the cause of action arose and did not give any reason for the delay. He added that if the proposed amendments are allowed, the 1st defendant will suffer prejudice incapable of compensation by an award of damages.
10. He stated that the applicant was guilty of material non-disclosure of facts as he failed to disclose to the court of an already decided employment dispute between himself and 1st defendant/respondent where the issues raised herein were addressed. Further that the said employment dispute was serialized as Nakuru ELRC Cause No. 229 of 2018 and that the Applicant filed the present application after the employment dispute had been determined. He sought for the dismissal of the plaintiff.
11. The applicant filed a further affidavit sworn on 15th October, 2023. He deponed that the 2nd respondent did not annex any authority from the 1st and 3rd respondents authorizing him to act on their behalf. He reiterated the averments in his supporting affidavit and deponed that pleadings were filed by Mongeri & Co. Advocates who were his previous advocates on record and contained mistakes that should not be visited on him. He added that he had instructed the said firm to amend the pleadings but they failed to do so, hence the delay.
12. He further deponed that the suit had not been heard on merit and denied that a new cause of action was being introduced. He stated that the pleadings raised two causes of action and that the proposed amendments sought to drop one cause of action, and it was in the interest of Justice for the application to be allowed.
13. The application was canvassed by way of written submissions.

Applicant's submissions

14. These were filed by Okwiri and Company Advocates and are dated 14th November, 2023. Counsel reiterated the contents of the applicant's supporting and further affidavits and while relying on Order



8 Rule 3 & 5 of the Civil Procedure Rules submitted that the applicant did not intend to introduce any new cause of action in the proposed amendments.

15. Counsel submitted that Order 8 Rule 5 of the Civil procedure Rules gives the court powers to allow for amendments of pleadings as far as there is need to determine the real questions in controversy.
16. He placed reliance on the decisions in *City Clock Limited versus County Clock Kenya Limited & another* HCC No. 6 of 2016 [2020] eKLR, *Central Kenya Ltd v Trust Bank Ltd* [2000] EALR 365 as was cited in *Harrison C. Kariuki v Blueshield Insurance Company Ltd* [2006] eKLR and urged the court to allow the applicant to amend his pleadings as the respondents will not suffer any prejudice. He prayed that the costs of the application abide the outcome of the suit. In response to the respondent's submissions counsel reiterated the contents of the applicant's further affidavit.

Respondent's submissions

17. The respondents submissions were filed by Sheth & Wathigo Advocates and are dated 22nd November, 2023. Counsel reiterated the contents of the defendant/respondents' replying affidavit and submitted that the plaintiff/applicant's claim arises out of a contract which arose more than six years ago and that the present application was an afterthought meant to circumvent the limitation period.
18. Counsel placed reliance on the decisions in *Harrison C. Kariuki v Blue Shield Insurance Co. Ltd* [2006] eKLR, *Eunice Chepkorir Soi v Bomet Water Company Ltd* [2017] eKLR and *Central Kenya Limited v Trust Bank Limited* [2000] EALR 365. He urged the Court to dismiss the Applicant's application.

Analysis and determination

19. I have considered the application, the affidavits, both submissions and the law and find the issue falling for determination to be whether the application dated 24th March 2023 is merited.
20. The general power of the court to amend pleadings is drawn from Section 100 of the [Civil Procedure Act](#). The said Section as well as Order 8 Rule 3 of the Civil Procedure Rules provide a broad criteria meant to guide the courts in the exercise of their discretion to allow or to disallow proposed amendments to pleadings. The above provisions of the law expressly provide that the court has discretionary power to amend pleadings at any stage before Judgment for purposes of determining the real question or issue which has been raised by parties. That discretionary power is exercised so as to do justice to the case and must therefore be exercised judiciously and not whimsically.
21. Order 8, Rule 3 provides as follows:
 - (1) Subject to Order 1, Rules 9 and 10, Order 24, rules 3, 4, 5, and 6 and the following provisions of this rule, the court may at any state of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
 - (2) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3)(4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.
 - (3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be



to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

Order 8 Rule 5 further reads:

- (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
- (2) This rule shall not have effect in relation to a judgement or order.”

And Order 8 Rule 8 states;

“The court may hear and determine an oral application made under this Order.”

22. In the case of *City Clock Limited v County Clock Kenya Limited & Another* [2020] eKLR the court referred to a Court of Appeal decision in the case of *Ochieng and Others v First National Bank of Chicago Civil Appeal Number 149 of 1991* [1995] eKLR which was cited with approval in *St. Patrick’s Hill School v Bank of Africa LTD* [2018] eKLR where the Court of Appeal set out the principles under which courts may grant leave to amend pleadings. They were enunciated as follows:
 - a) The power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b) The amendments should be timeously applied for;
 - c) Power to amend can be exercised by the court at any stage of the proceedings;
 - d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
 - e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
23. From the above, I find that leave to amend pleadings should be granted freely as long as the amendment will not occasion injustice to the other side, and that there is no injustice if the party can be compensated by way of costs. Further, the party moving the court should make the application without undue delay.



24. As regards filing this application timeously, there is no doubt that the plaintiff/applicant has failed the test. This suit was filed on 4th April 2019 and the present application for amendment is dated 24th March 2023, which is approximately 4 years down the line. The applicant has blamed his former advocates for drafting the pleadings incorrectly.
25. As earlier stated, the power to allow amendment of pleadings is within the discretion of the court and where a court is convinced that there exists a justifiable cause to amend, may nevertheless allow the amendment notwithstanding that the application was not filed timeously. In that regard, the court must address itself to the need for the proposed amendment. The plaintiff /applicant seeks to amend his plaint since it raises a mixture of a commercial/civil case and an employment and labour relations causes of action.
26. The respondents have not demonstrated what injustice, if any, they will suffer if the applicant is granted leave to amend his plaint. Further, the matter has not yet been set down for hearing and it is indeed clear that if such leave is granted, the respondents would also benefit from the leave to amend their defence to challenge the new facts.
27. The right to be accorded a hearing and a fair one is embedded in Article 50(1) of *the Constitution* and I find it proper and just that the plaintiff/applicant be allowed to ventilate his claim against the defendants/respondents in the best way that he understands, for purposes of clarity before the court.
28. The upshot of the above is that the application dated 24th March, 2024 has merit and is allowed in terms of prayers (i) – (iii), which should be complied with within fourteen (14) days.
 - (2) The defendants/respondents are granted leave to amend their defence within fourteen (14) days upon service by the plaintiff/applicant. They are also granted leave to file any other documents/witness statements within the same period.
 - (3) Mention on 12/11/2024 to confirm compliance and directions on the hearing
 - (4) Costs in cause.
29. Orders accordingly.

Delivered, virtually dated and signed this 9th day of October, 2024 in open court at Nakuru.

H. I. ONG’UDI

JUDGE

