



**Kenol Kobil Limited v Mayukuva (Civil Appeal 324 of 2019)  
[2023] KECA 1169 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1169 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL 324 OF 2019  
F SICHALE, FA OCHIENG & LA ACHODE, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**KENOL KOBIL LIMITED ..... APPELLANT**

**AND**

**STEPHEN WEKATI MAYUKUVA ..... RESPONDENT**

*(An appeal against a Ruling and Order of the High Court  
at Nakuru, (Mbaru. J), delivered on 25th April 2019)*

**JUDGMENT**

1. This is the first appeal of Kenol Kobil Limited the appellant, against the ruling and order delivered on 25<sup>th</sup> April 2019 in the Employment and Labour Relations Court (ELRC), at Nakuru by M. Mbaru J. The respondent is Stephen Wekati Mayukuva.
2. The backdrop of this appeal is that the respondent was an employee of the appellant, and he was summarily dismissed by the appellant through a letter dated 10<sup>th</sup> April 2018. Consequently, he filed a Memorandum of Claim dated 8<sup>th</sup> of May 2018 seeking compensation for unfair dismissal. In rebuttal, the appellant filed a Memorandum of Defence dated 22<sup>nd</sup> June 2018 refuting the allegation in the Memorandum of Claim by the respondent.
3. The respondent further filed an application dated 22<sup>nd</sup> January, 2019 supported by an affidavit of David Nyamweya Mongeri, the respondent's advocate. In this application he sought leave to amend the Memorandum of Claim, and to deem the draft amended Memorandum of Claim attached to the application as duly filed. The application was based on the grounds that the application was made without undue delay and that no prejudice would be suffered by the respondents if the claim was amended. Further, it was deposed that instructions from the respondent necessitated the amendment of the Memorandum of Claim filed.



4. The application was opposed by the appellant through a replying affidavit sworn by David Ohana, the Group Managing Director of the appellant's company, on 11<sup>th</sup> February 2019. It was averred that the leave to amend the claim to introduce a claim in respect of Kenya Oil Company Group Employee Share Ownership (hereinafter ESOP) shares should not be allowed. ESOP is a trust created by the appellant to facilitate the holding of shares in the company for the benefit of its employees and its subsidiary companies. ESOP is regulated by its own regulations which provide that, where a dispute arises it should be referred to arbitration.
5. Upon considering the application before her, the learned judge allowed the application.
6. Dissatisfied and aggrieved by the above decision the appellant filed the instant appeal in which he contends that the learned judge erred in law and fact on the following seven grounds:
  - a. By failing to appreciate that the relationship between the appellant and the respondent in the Kenya Oil Company Group Employee Share Ownership Plan (ESOP) shares, is governed by the Group Employee Share Ownership Plan Trust Deed and not the respondent's contract of employment.
  - b. By failing to appreciate that the dispute in respect of ESOP shares was between the respondent and the Trustees of the Kenya Oil Company Group, and not the appellant herein.
  - c. By failing to uphold the dispute resolution mechanism elected by the parties in respect of the ESOP shares, as stipulated under the Group Employee Share Ownership Plan Trust Deed.
  - d. By allowing an amendment which purported to arrogate jurisdiction to the Employment and Labour Relations Court to hear and determine claims in respect of a commercial dispute.
  - e. By allowing an amendment that created an avenue for the appellant to be pursued on matters over which it has no exercise or control.
  - f. By failing to exercise her discretion to disallow an amendment that was bound to occasion great prejudice on the appellant on grounds that the intended introduction of ESOP claims was a mere proposal at the time.
  - g. By allowing the amendment to include ESOP shares without considering the appellant's submissions in respect thereof.
7. The firm of M/S Kaplan & Stratton Advocates filed submissions dated 26<sup>th</sup> of January 2022 on behalf of the appellant. They submit that the judge erred in law and fact on two issues. First, by allowing an amendment which purported to arrogate jurisdiction to the ELRC and second, by failing to exercise her discretion to disallow an amendment that would occasion great prejudice to the appellant, and which was founded on matters beyond the appellant's exercise or control.
8. On the first issue, the appellant contends that the trial court failed to appreciate that the relationship between the appellant and the respondent on the ESOP shares, is governed by the Group Employee Share Ownership Plan Trust Deed (Trust Deed) and not the parties' contract of employment. Further, that clause 20 of the Trust Deed provides that all disputes in respect of ESOP shares must be determined through arbitration. It is urged that by allowing the respondent's application and subsequent amendments, the court created a medium for introduction of matters to which it clearly and admittedly lacks jurisdiction to entertain. They cited the Supreme Court decision *in the matter of Interim Independent Electoral Commission* (2011) eKLR, to buttress the fact that jurisdiction is critical to any dispute placed before a court and a court of law cannot take any step without jurisdiction.



9. It is also urged that by allowing the amendments related to ESOP shares, the court provided leeway for determination of a commercial dispute by an employment court. That the claim for ESOP shares emanates from the terms of the Trust Deed between the Trustees of the Kenya Oil Company Group ESOP and the purported Unit Holder, and does not arise from an employer- employee relationship between the appellant and respondent.
10. On the second issue it is contended that the judge failed to consider and appreciate the injustice that would be meted against the appellant, because of the intended introduction of the new facts which the court has no jurisdiction to entertain. That the court created an avenue for the appellant to be pursued on matters over which it has no exercise or control. It is asserted that the introduction of the amendments in respect of ESOP shares, will in no way facilitate the determination of the real question the subject of the controversy between the parties.
11. In rebuttal, the firm of M/S Mongeri & Company filed submissions dated 22<sup>nd</sup> November 2022 on behalf of the respondent. They submit that this appeal is premature as the ELRC has not determined whether or not the respondent is entitled to the ESOP shares and that the ground raised by the appellant should have been raised as a preliminary objection in the ERLC court and not through an appeal.
12. They argue that Rule 14 (6) of the *Employment and Labour Relations Court (Procedures) rules* 2016 allows a party to amend their pleadings and the question as to whether the respondent is entitled to ESOP shares is an issue to be determined by the ELRC court.
13. The respondent is relying on the decision in *Institute for Social Accountability & another v Parliament of Kenya & 3 Others* (2014) eKLR where the court observed that the object of amendments of pleadings is to ensure that litigation is conducted on the true stated facts which the parties intended to rely on. Therefore, it makes the court's function more effective in determining the merits of the case.
14. This being the first appeal as stated above, our duty is well elaborated in the decisions of this Court. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, this Court stated that:
 

*“ [A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”*
15. We have examined the record of appeal, the submissions of the parties, the authorities relied on and the law applicable. In our view, the only issue for determination is whether the court erred in allowing the application for amendment.
16. Amendment of pleadings in the ELRC is dealt with under section 14(6) of the *Employment and Labour Relations Court (Procedure) Rules* 2016 which provides as follows:
 

*“ A party may amend pleadings before service or before the close of pleadings; provided that after the close of pleadings, the party may only amend pleadings with leave of the court on oral or formal application, and other party have corresponding right to amend its pleadings.”*
17. The learned judge in exercising her jurisdiction to allow the contentious application, held as follows:
 

*“ The proposed amended claim remains proposed. It is not filed for consideration by the court. To go on its merit or demerits will be pre-empting a very serious and eminent matter and*



*prejudice the claimant. It is however pre-emptive and as the claimant forges ahead with the issue of his claim with regard to ESOP shares it will be necessary and important to address this fact. Otherwise at this stage, the court retains its jurisdiction over the matter as the issue in dispute remains that of unfair dismissal of the claimant by the respondent which is a matter for the court to address and not any other court in the land.*

*Until the amendment is effected, the objection to jurisdiction on the grounds that the issue(s) with regard to ESOP shares are outside of this court remains mute (sic). Upon the formal acceptance of amendment, this issue will come alive.”*

18. In Central Kenya Limited v Trust Bank limited (2000) 2 EA 365 this Court held that:

*“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”*

19. Further, on the discretion of the trial court, we are guided by the leading decision in Mbogo vs Shah (1968) EA 94 where the Court observed thus:

*“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it would not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion thereby occasioning an injustice”*

20. From the foregoing, we find no basis to depart from the conclusion of the learned judge, that the opposed amendments can only be dealt with, once they come alive and this would be through allowing the amendments. In the premise, this appeal is dismissed.

21. Concerning the costs, we apply the general principle that costs follow the event and therefore, award costs to the respondent.

**DATED AND DELIVERED IN NAKURU THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**F. SICHALE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

