



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, JA (IN CHAMBERS)

CIVIL APPEAL (APPLICATION) NO. 201 OF 2016

BETWEEN

JOHN GAKUO.....1ST APPLICANT

DR. TIMOTHY MOKI KINGONDU.....2ND APPLICANT

VERSUS

COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

THE GOVERNOR – NAIROBI CITY COUNTY.....2ND RESPONDENT

(An application to amend the Memorandum of Appeal from the Judgment of the Employment and Labour Relations Court at Nairobi (Nderi Nduma, J) dated 15th January, 2016

in

H.C. E.L.R.C. Petition No. 37 of 2015)

RULING

John Gakuo and Dr. Timothy Moki Kigundu (1st and 2nd applicants) were employees of the County Government of Nairobi (1st respondent) as county executives in charge of water, energy, forestry, environment and natural resources for 1st applicant and county executive in charge of Health services for the 2nd applicant.

For reasons we do not need to delve into for purposes of this application, their services were terminated abruptly on 7th October, 2014. They challenged the termination initially through constitutional petitions taken under **Articles 27(1), (2) and 3, 28 and 41(1) of the Constitution of Kenya, 2010.**

The petitions were however transferred to the Employment and Labour Relations Court (ELRC) which heard the matter and gave judgment in favour of the applicants, with each applicant being awarded an aggregate of Ksh. 904,448.00 with interest at court rates from date of filing suit till payment in full. They were also awarded costs of the suit.

Aggrieved with the judgment, they filed a Notice of Appeal on 27th January, 2016 in which they expressed intention to appeal against the entire judgment. They thereafter, filed the memorandum of appeal dated 22nd August, 2016, in which they proffered three grounds of appeal as hereunder:-

1. That the learned Honourable Judge erred in law for failing to find that the Constitutional rights of the Petitioners/Appellants were grossly breached by the respondents while purporting to exercise their mandate under the law.

2. That the learned Honourable Judge erred in law in failing to find that the County Government Act Cap 2012(sic) and by extension, the respondents are sub-servient to the Constitution and therefore the rights of the Petitioners/Appellants as embodied in the Constitution took precedence.

3. That the learned Honourable Judge erred in law while assessing the compensation payable to the Petitioners /Appellants in failing to find that they were state-officers under Article 260 (h) of the Constitution and therefore neither the Employment Act 2007 nor the Employment and Labour Relations Court Act applied in the circumstances.

They seek the following two prayers in their appeal:-

(a) That the decision of the High Court dated 15th January 2016, in so far as it relates to the amount of compensation payable to the appellants be set aside and substituted with an order allowing the appellant's petition dated 24th April, 2015.

(b) The other prayers is for costs of the appeal.

Before the appeal was listed for Case Management, the applicants moved this Court by way of Notice of Motion dated 15th November, 2016 under **Rule 44 of the Rules of this Court**, seeking this Court's leave to amend the memorandum of appeal in question, on grounds, *inter alia*, that some important material particulars and/or grounds of appeal were not pleaded at the time of filing the memorandum of appeal; that the amendment is necessary for the determination of the real issues in controversy; and that the respondents will not suffer any prejudice if the application is allowed.

The application is supported by the affidavit of the 2nd applicant sworn on 15th November, 2016 to which has annexed the draft amended memorandum of appeal.

The amendment seeks to introduce the following paragraph:-

“that the learned Hon. Judge erred in law by using a sum of Ksh. 66,213.70/= as the appellants' gross monthly salary of Ksh. 304,375.00/= while assessing the amount of compensation payable to the appellants thereby under-assessing the total award payable to the appellants hereby under-assessing the total award payable to the appellants.”

In a replying affidavit filed on 12th January, 2017 the respondents opposed the application saying that the amendment sought would introduce a fresh cause of action which had not been pleaded before the trial court. They have deposed that the proposed amendment if allowed would occasion great prejudice to them. They have also disputed that the applicants gross salary as at the time they were terminated was Kshs. 304,375.00/, and instead reiterated that their salary was Ksh. 64,213.70/.

In rejoinder, the appellants filed a further affidavit on 27th June, 2017. They annexed to the affidavit the 1st appellant's letter of appointment indicating that his start off salary was Ksh. 300,000.00/= without any further increments. The payslip for the month of September has the figure of Ksh.304,375.00/ as the gross salary.

According to the applicants, the payslip for the month of October was for the one week worked in

October before the termination on 7th October, 2014.

At the plenary hearing, Mr. Kamwendwa, learned counsel for the applicants submitted that the appellants are not introducing a new cause of action but are relying on the same facts and only want to correct the figures to reflect the correct figure that is supported by the payslips. He posited that the respondents will not be prejudiced by the amendment as they will have an opportunity to defend the claim at the hearing of the appeal. He submitted further that any inconvenience caused can be addressed by way of costs. He urged us to allow the application.

On her part, Ms. Otieno, learned counsel for the respondents submitted that the claim sought to be introduced is a fresh one. She stated that the learned Judge of the ELRC had used the correct payslip and applied the correct figure, and the figure the appellant seek to introduce by way of amendment is a new claim. She urged the court to dismiss the application.

The applicant filed in this Court several authorities in support of his application. I shall consider the said authorities in the course of determining whether the application before me has merit or not.

It is necessary to rehash the principles pertaining to amendment of pleadings.

To start with, this Court has pronounced itself on whether a memorandum of appeal is amenable to amendment or not. This issue was not taken up in this application and so we shall start from the premise that a memorandum of appeal is a pleading like any other and the rules that apply to amendment of pleadings also apply to a memorandum of appeal. See **Uhuru Highway Development Ltd vs Central Bank of Kenya (2002) 1 EA 314** where this Court held that “*a memorandum of appeal, subject to the interests of justice, is always amenable to amendment*”. The general principle is that amendments should be allowed liberally, particularly where the hearing of a case has not commenced. In the case of **Eastern Bakery –vs– Castelino (1958) E.A. 461**, Sir. Kenneth O’Connor P. stated as follows:-

“Generally speaking this Court will not interfere with the discretion of a Judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle.”

The same authority espouses further some of the principles to be taken into account when considering whether to allow an amendment of any pleadings as herein under:-

“It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.... The court will not refuse leave to allow an amendment simply because it introduces a new case.... But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ.”

[22] The learned authors of ***Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76***, give some insights on the amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.

.... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time

thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

The above text was cited with approval by this Court in **Wareham t/a AF Wareham & 2 others –vs- Kenya Post Office Savings Bank - Civil Appeal Nos. 5 & 48 of 2002**. In this case, the appeal has not been set down for hearing yet and so the respondents cannot say that they are being ambushed. What needs to be addressed is whether this application meets the criteria set in the above decisions.

Before exercising this jurisdiction in favour of the appellants, the court needs to be satisfied that the application is made in good faith; whether the same is material for the proper determination of the issues before court; is it meant to clarify issues or to cloud and confuse issues? will the amendments if allowed be prejudicial to the respondents or can they be compensated by way of costs?

Most important however, which is the issue before us is whether the proposed amendments will introduce a new cause of action. In my view, the amendment sought the applicants is made in good faith. It is conceded that the learned Judge of the ELRC awarded damages to the applicants “*equivalent of twelve (12) months gross salary as compensation for the unlawful dismissal*”.

The gratuity was stated to be calculated at 31% of the monthly basic salary. There is therefore, no doubt in my mind that the learned Judge had in mind a full month’s gross salary. The problem here was that when he looked at the payslip which was for October, what he saw was the figure Ksh. 64,243.70/= as the gross salary. From the record, it is evident that the applicants were sacked/terminated on 7th October, 2014. The salary they were paid in October was therefore, for the seven days they had worked.

We have seen the 1st applicant’s payslip for September, and more importantly, the letter of appointment. The letter of appointment clearly designated his entry point as Ksh. 300,000 per month. That amount tallies well with the September pay slip which gives Ksh. 304,375.00 as the gross salary. It is therefore clear beyond peradventure that the monthly salary the learned Judge referred to in his judgment was not the Ksh. 64,213.70 which was the “*weekly salary*.”

In my view therefore, the applicants are not introducing any new cause of action. They are claiming damages based on their “*monthly salary*” as at the time they were terminated. Any fair and justice minded person will see this. Indeed, this matter ought to have been taken back to the learned Judge for review so that he could have corrected the figure that was cited in error. I must however clarify that the amendment is only meant to pave way for the applicants to urge that point on appeal, and is not a finding on the merits of their case. That determination falls elsewhere for determination after the parties are heard on the issue. In my view therefore, the amendment sought in this matter is made in good faith and meant to correct a genuine mistake/oversight on the part of the learned Judge of the ELRC.

The justice of the case will not be met if this appeal proceeds with the memorandum of appeal as drawn.

I have said enough to demonstrate that the applicants are not seeking to introduce a fresh cause of action but are merely intending to place the matter in its proper perspective to facilitate a just determination of the appeal before this Court once it comes for the hearing of the appeal.

In the circumstances, this application is hereby allowed with no order as to costs.

Dated and delivered at Nairobi this 29th day of September, 2017.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR