



Kagwamba v Biozeq Kenya Limited (Employment and Labour Relations Cause E195 of 2023) [2025] KEELRC 65 (KLR) (17 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 65 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E195 OF 2023
SC RUTTO, J
JANUARY 17, 2025**

BETWEEN

MARTIN MURIGI KAGWAMBA CLAIMANT

AND

BIOZEQ KENYA LIMITED RESPONDENT

RULING

1. On 28th February 2024, when the Respondent's Application dated 30th May 2023, came up for hearing, the Claimant's Advocate was not present in Court and had not filed a response to the said Application. In the circumstances, the Court allowed the said Respondents' Application in which they had sought an order to have the Claimant's suit against the 2nd, 3rd and 4th Respondents struck out.
2. In allowing the Application by the Respondents, the Court observed that there were no orders sought against the 2nd, 3rd and 4th Respondents in the main suit hence found that they were not necessary parties to the proceedings herein. The Court further noted that the Claimant's main contention is against the 1st Respondent who he avers was his employer.
3. It is that order that has given rise to the instant Application dated 18th September 2024 in which the Claimant seeks the following orders:
 1. That the ruling entered herein on 28th February, 2024 by Hon. Lady Justice Stella Chemtai Ruto be set aside.
 2. That there be a stay of proceedings herein pending the hearing and determination of this application.
 3. That the Claimant/Applicant be granted leave to defend and or respond the respondents'/ applicants' Chamber Summons dated 30th May, 2023.
 4. That the Claimant/Applicant be granted leave to file an amended claim.



5. That the Claimant/Applicant's amended claim annexed herewith be deemed as having been duly filed and served upon payment of the requisite fees.
6. That the Respondents be at liberty to file an Amended Defence if they so wish.
7. That the cost of this application be in the cause.
4. The Application is premised on the grounds set out on the face thereof and the annexed Affidavit dated 18th September 2024 by Martin Murigi Kagwamba, the Claimant herein.
5. Grounds in support of the Application are that the Honourable judge gave an ex-parte order on 28th February 2024 that the 2nd, 3rd and 4th Respondents be struck out of the claim.
6. That the Claimant only discovered that the 2nd, 3rd and 4th Respondents were struck out when he enquired from his previous advocates Nyoike & Associates Advocates how his matter was proceeding and discovered that the above mentioned advocates had not been diligent in his matter, had failed to attend court and or file any responses in court regarding the suit as the advocate in charge of his matter was seriously ill and hospitalized.
7. The Claimant further avers that he went to the registry and inquired on the position of his suit and was informed of the orders to strike out the 2nd, 3rd and 4th Respondents and that the matter had already been set for hearing. He immediately sought counsel from Karagathu Kiongi & Co. Advocates and requested them to represent him in the matter as it was scheduled for hearing on the 2nd of July, 2024.
8. On 2nd July 2024, Karagathu, Kiongi & Co. Advocates were given leave to file for change of advocates.
9. The Claimant avers that he should not be punished for the negligence of his previous counsel and should be given a fair and just trial.
10. He further avers that it has come to his attention and or knowledge that the 1st Respondent is on the verge of financial collapse and as such, the directors of the company are trying to run away from their responsibilities thus the 2nd, 3rd and 4th Respondent being directors of the 1st Respondent should not be struck out of the suit.
11. According to the Claimant, it is fair and in the interest of justice that he be granted an opportunity to respond to the Respondent's Chamber Summons dated 30th May 2023 and vindicate his claim in this suit.
12. The Claimant further avers that the proposed amendments to the claim are intended to bring before this Honourable Court the real matters in controversy between the parties herein so that the same are determined on their true and substantive merits.
13. That the proposed amendments will not occasion any prejudice to the Respondents.
14. He further avers that the proposed amendments arise out of the same facts or substantially the same facts in respect of which relief he has claimed in this suit and are merely intended to bring before this Honourable Court, the real issues in dispute between the parties and in particular, the actual reliefs he has claimed herein.
15. That it is therefore in the interest of justice that he should be granted leave to amend his claim filed herein.
16. The Application is opposed through the Replying Affidavit sworn on 10th October 2024 by Mahmoud Ng'ang'a, who has described himself as the Managing Director of the Respondent. He avers that the



nature of this suit involves purported wrongful termination of the Claimant's employment under the Employment Contract dated the 7th of January, 2019 between the Claimant and the Respondent Bio-Zeq Kenya Limited.

17. That the Claimant had included the directors of the Respondent as parties in this suit from its inception, which directors have never been his employers at any moment.
18. That they filed the Application dated the 30th of May, 2023 seeking to have all the other parties that had been included in the suit other than the current Respondent to be struck off the suit as the same were not necessary parties to the suit.
19. Mr. Ng'ang'a deposes that the said Application was served upon the Claimant and/or his then Counsel on record and the Claimant was fully aware of the proceedings of the Court as he even attended court physically in person. That in spite of the foregoing, the Claimant chose not to oppose the said Application and vide the Ruling of the 28th of February, 2024, the Honourable court allowed their Application to have the unnecessary parties to the suit struck off from the suit.
20. That the matter is way past the pre-trial stage as the same had already been set down for hearing and the Claimant ought not be heard to seek to set aside the Court's ruling that was made in February and to be allowed to amend its Claim at this stage.
21. That in any case, the position remains the same being that the rest of the parties that the Claimant seeks to have enjoined in the suit are unnecessary parties as pertains the subject of this suit.
22. Mr. Ng'ang'a further states that a labour issue is determined between the employer and employee which in this case, is the Claimant and the Respondent, as reflected in the employment contract and no other parties entered into any employment contract or were parties of the subject employment contract.
23. He contends that the Respondent herein is a separate and distinct entity with a distinct legal personality from its directors with a capacity to be sued on its own, which position remains the same to date. That the Claimant has not demonstrated any grounds for involving the directors of the Respondent in the instant employment issue.
24. In his view, the Claimant's allegations of the Respondent herein being on the verge of financial collapse are unfounded, baseless and town gossip at best and no proof of such allegations have been provided by the Claimant. That in any case, the instant suit is a labour relations matter and not a bankruptcy and/or insolvency matter to which the liquidity or lack thereof of the Respondent could be in issue.
25. Mr. Ng'ang'a further states that the Claimant is well aware of the legal recourse to be followed in instances of bankruptcy of an individual, which is not the case herein as the Respondent is a going concern and financially stable.
26. It is Mr. Ng'ang'a's deposition that the Claimant is going ahead of himself in purporting to determine the financial situation of the Respondent, which is a non-issue in the instant suit and of no concern to him.
27. Mr. Ng'ang'a avers that the directorship of the Respondent is prone to change from time to time the same being a limited liability company and the Claimant has not provided any proof of who are currently the directors of the Respondent.
28. Mr. Ng'ang'a has termed the instant Application as premature, preposterous and baseless in so far as it seeks to deal with issues that are not of an employment nature and the same should be dismissed with costs to the Respondent.



Submissions

29. Pursuant to the directions issued by the Court on 15th October 2024, the Application was canvassed by way of written submissions. All parties complied and I have considered their respective submissions.
30. The Claimant has submitted that he should not be penalized for his previous counsel's negligence and should be given a fair chance to defend his case.
31. It is the Claimant's submission that he will show that the 2nd, 3rd and 4th Respondents misled him and their misconduct and failure to follow the company rules led to his unlawful termination.
32. The Claimant has further submitted that there is need to show why the directors of the 1st Respondent need to be joined to the suit as he will show the responsibility the role brings with it.
33. He further contends that the directors of the 1st Respondent acted arbitrarily to the interest and regulations of its company and should be held personally responsible for the same.
34. With respect to the application for amendment of his Statement of Claim, the Claimant has submitted that the amended Claim will provide more clarity to the facts and points of law that the Claim failed to show. In support of his position, the Claimant has sought to rely on the case of the Institute for Social Accountability & another vs Parliament of Kenya & 3 others (2014) eKLR.
35. It is the Claimant's position that the amendment made to the Claim is to show clarity to the issues that led to the unlawful termination and show the breach of the employment contract by the Respondents.
36. The Claimant has further submitted that the present application has been filed on bonafide grounds and no prejudice will be caused to the Respondents' right if the application is allowed. That the amendments do not introduce a new cause of action but merely clarify the substantive issues to be determined by this Honourable Court. It is his further submission that this Court has the power and authority to allow the amendment of the Claim.
37. On its part, the Respondent has submitted that it is a separate and distinct legal personality from its directors with a capacity to be sued on its own, which position remains the same to date.
38. The Respondent has further submitted that the Claimant has not demonstrated any grounds for involving its directors in the instant employment issue. That in any case, this Honourable Court is not seized with the jurisdiction to determine matters concerning the financial status of the Respondent.
39. The Respondent further posits that the Claimant has not in any way demonstrated who the current directors of the Respondent are, whom he seeks to bring on board as the directorship of a company is prone to change from time to time.
40. According to the Respondent, the amended Claim outlines the normal allegations pertaining to unfair termination between the employer and employee with nothing peculiar as to warrant enjoining the directors of the Respondent in the instant suit. To buttress this position, the Respondent placed reliance on the case of Ukwala Supermarket vs Jaideep Shah & Kamal Shah (2023) eKLR.
41. The Respondent has further submitted that the Claimant's Chamber Summons seeking to lift its corporate is not only unmerited but also unwarranted since the application fails to provide evidence. It is the Respondent's position that enjoining its directors in person would highly prejudice them as they are not the employers of the Claimant.



Analysis and Determination

42. Flowing from the Application, the response and the rival submissions, it is evident that the issues falling for the Court's determination are:
- a. Whether the Court should set aside its orders of February 28, 2024, allowing the Respondent's Application dated May 30, 2024;
 - b. Whether the Claimant should be allowed to amend his Statement of Claim.

Whether the Court should set aside its orders of February 28, 2024

43. The crux of the Claimant's Application is that his previous Advocates were not diligent with his matter and failed to attend court and or file responses as the Advocate in charge of the matter was seriously ill and hospitalized.
44. The Claimant further avers that it has come to his knowledge that the 1st Respondent is on the verge of financial collapse and as such, the directors are trying to run away from their responsibilities hence the 2nd, 3rd and 4th Respondents should not be struck off the suit.
45. On its part, the Respondent maintains that the position remains the same and that the rest of the parties the Claimant intends to have enjoined in the suit are unnecessary parties. The Respondent further avers that a labour issue is determined between the employer and the employee which in this case is the Respondent and the Claimant as reflected in the employment contract. According to the Respondent, the Claimant has not demonstrated any grounds involving the directors of the Respondent.
46. This is a matter that calls for the exercise of the Court's discretion. The guiding principles with respect to exercise of the Court's discretion were established in the celebrated case of *Shah vs Mbogo* [1967] E A 116 and 123B, where it was held that:-
- “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
47. Applying the principles set out in the case of *Shah vs Mbogo* (supra), the Court finds that there are no plausible reasons advanced by the Claimant for setting aside the orders of 28th February 2024. I say so for the reason that, in allowing the Respondent's Application dated 30th May 2023, the Court considered that there were no orders sought against the 2nd, 3rd and 4th Respondents and that the issue in contention was between the Claimant and the Respondent herein.
48. I must also say that the Claimant's contention that the directors of the Respondent are attempting to run away from their responsibilities is immaterial in light of the principle enunciated in the case of *Salomon v Salomon & Co. Ltd.* [1897] AC. Flowing from that decision, it is trite that a company is a separate legal entity and thus a juristic "person" in the eyes of the law.



49. This position was amplified in the case of *Victor Mabachi & Anor vs Nurturn Bates Ltd* NRB CA Civil Appeal No. 247 of 2005 [2013] eKLR, where the Court of Appeal reiterated the principles set out in the *Salomon* case as follows;

“A company as a body corporate, is a *persona juridica*, with a separate independent identity in law, distinct from its shareholders, directors and agents unless there are factors warranting a lifting of the veil.”

50. Further to the foregoing, in the event the Claimant's case succeeds and it is established that the Respondent's directors have acted in a manner to frustrate the execution of any decree that may be passed against the Respondent or to defeat the end of justice, there are legal mechanisms under the law to hold the said directors liable.

51. In view of the foregoing reasons, the Court is not persuaded that it should set aside the orders made on 28th February 2024 striking out the 2nd, 3rd and 4th Respondents from the suit.

52. That said, I now turn to consider whether the Claimant should be granted leave to amend his Statement of Claim.

Leave to amend the Statement of Claim.

53. Rule 34 of the Employment and Labour Relations Court (Procedure) Rules 2024, allows for amendments to pleadings before the close of pleadings and where pleadings have closed, a party may amend the same subject to the court's leave and corresponding leave to the other party to amend its pleadings as well.

54. The law governing amendment of pleadings is now settled and can be drawn from the principles established by the Court of Appeal in the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies vs First National Bank of Chicago* [1995] eKLR, thus;

- 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; and
- 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.

55. It is worth noting that the above principles are not exhaustive as the Court is given wide discretion in deciding whether or not to grant the leave to amend.

56. In this case, the Claimant has submitted that the proposed amendments will enable the Court to adjudicate the real issues in controversy between the parties.

57. As can be discerned from the record herein, the issue in dispute relates to unfair termination. I have perused the annexed amended Statement of Claim and find the proposed amendments as being relevant to the determination of the core issues in dispute.

58. In addition to the foregoing, it is trite that amendments are permissible at any stage of the proceedings before the final judgment is delivered and, in this case, it is notable that the matter is yet to proceed for hearing, hence the Application has been made within the timeframe allowed by law.



59. In view of the foregoing, I will allow the Application partly in the following terms: -
- a. The Claimant/Applicant is granted leave to amend his Statement of Claim with necessary modifications referencing the 2nd 3rd and 4th Respondents.
 - b. The amended Statement of Claim to be filed and served upon the Respondent within 7 days from the date of this Ruling.
 - c. The Respondent is granted corresponding leave to amend, file and serve its Response to the amended Statement of Claim within 14 days from the date of service with the amended Statement of Claim.
 - d. The costs of the Application shall abide the outcome of the main suit

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2025.

STELLA RUTTO

JUDGE

In the presence of:

For the Claimant/Applicant Ms. Kiongi

For the Respondent Mr. Obuya instructed by Ms. Kiage

Court Assistant Millicent

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

