



Rotich v Chemartin Tea Company Limited (Employment and Labour Relations Cause E023 of 2022) [2024] KEELRC 1346 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1346 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE E023 OF 2022
MA ONYANGO, J
MAY 24, 2024**

BETWEEN

ALFRED KIPLAGAT ROTICH CLAIMANT

AND

CHEMARTIN TEA COMPANY LIMITED RESPONDENT

RULING

1. This is a ruling on the Notice of Motion dated 9th October 2023 brought under Order 8 Rule 3(1) and 5 of the *Civil Procedure Rules*, section 3A of the *Civil Procedure Act* and enabling provisions of the laws. It seeks for orders: -
 - i. That this Honorable court be pleased to grant leave to the Respondent to amend its Response to Statement of Claim dated 6th December 2022 as per the draft Amended Response to Statement of Claim attached herewith.
 - ii. That the costs of this application be in the cause.
2. The grounds in support of the application are on the face of the application and are set out as follows:
 - a. The Respondent filed its response to the Claimant's Statement of Claim on 18th January 2023.
 - b. It has now become necessary to amend the said response to the Claimant's statement of Claim to raise a counter claim for the sum of Kshs 4,976,097.00 which were losses incurred by the Respondent a result of the Claimant's gross incompetence, breach of trust, fraud and misappropriation of company assets during the course of his employment.
 - c. The proposed amendment is necessary to enable this court to effectually and conclusively determine all the issues in controversy in this suit.



- d. Pleadings have already closed in accordance with the provisions of Order 2 Rule 13 of the [Civil Procedure Rules](#) hence the need for leave of court before the said proposed amendment can be effected.
 - e. It is proper and in the interest of justice that this application be allowed, and the Claimant does not stand any risk of prejudice to his interest in the event that this application is allowed as they will have an opportunity to file such other amended pleadings if need be, and interrogate the documents to be filed by the Respondent in support of the Counterclaim before the matter is fixed for hearing.
3. The application is supported by the affidavit of Moses Chepkwony, the Respondent's Estate Manager, sworn on 9th October 2023.
 4. The Claimant opposed the application vide his Replying Affidavit sworn on 3rd November 2023. The essence of the affidavit is that the application is an abuse of the court process since pleadings have already closed. That the instant application and the counterclaim is an afterthought meant to mislead the court into believing that the Applicant has a case against the Claimant. The Claimant further avers that the draft amended response to the Statement of Claim is based on mere allegations and the counterclaim amount of Kshs 4,976,097 has not been proved. The Claimant avers that the instant application has been brought with intentions of delaying the final hearing and determination of the main suit. He therefore urged the court to dismiss it.
 5. The Application was canvassed by way of written submissions. The applicant's submissions were filed on 21st December 2023 while the Respondent's submissions were filed on 5th February 2024.

Analysis And Determination

6. Upon careful consideration of the application, the rival affidavits as well as the submissions on record, the issues that arise for determination are:
 - a. Whether the application has merit and should be allowed.
 - b. Whether allowing the Amended Response to the Statement of Claim will cause injustice to the Claimant.
7. Generally, parties to a suit have a right to amend their pleadings at any stage of the proceedings, as long as the same will enable the court to determine real issues in question. Order 8 Rule 3(1) of [Civil Procedure Rules](#) provides for amendments of pleadings as follows:
 - a. "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 stage 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."
8. Order 8 Rule 3(5) of the [Civil Procedure Rules](#) provides:-
 - a. "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 on the suit by the party applying for leave to make the amendments."
9. In the case of [Daniel Ngetich & Anor v K-Rep Bank Limited](#) [2013] eKLR, the court stated:
 - a. "...Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause



injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice”.

10. In the instant case, the Applicant has submitted that it is necessary to amend its Response to the Statement of Claim to raise a counter claim for the sum of Kshs. 4,976,097.00 which were losses incurred by the Applicant/Respondent as a result of the Claimant’s gross incompetence, breach of trust, fraud and misappropriation of the company’s assets during the course of his employment.
11. The proposed amendment in my view raises a fundamental triable issue on the alleged incompetence, fraud and misappropriation by the Claimant, which question can only be answered if it is pleaded in the Response to the Statement of Claim.
12. The amendment in my view will not prejudice the Claimant as he alleges and will in fact enable this court to conclusively determine all the issues in controversy in this suit. The Claimant will have the opportunity to defend the counterclaim and the Applicant will have to prove the same at the hearing.
13. Consequently, I allow the application dated 9th October 2023 and direct that the Applicant files and serves the Amended Response to the Statement of Claim and Counterclaim within seven (14) days of this order. The costs of this application will be borne by the Applicant in any event.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF MAY, 2024

MAUREEN ONYANGO

JUDGE

ELD NO E023 OF 2022 RULING

