



**Shine IT Limited v Mwero (Appeal E033 of 2021)
[2024] KEELRC 1401 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1401 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E033 OF 2021**

**M MBARÚ, J
MAY 23, 2024**

BETWEEN

SHINE IT LIMITED APPELLANT

AND

KOMBO PIRU MWERO RESPONDENT

*(Being appeal from the ruling and order of Hon. S. Lesootia
delivered on 12 May 2021 in Mombasa CMELRC No.366 of 2019)*

JUDGMENT

1. This appeal arises from the ruling delivered on 12 May 2021 in Mombasa CMELRC No. 366 of 2019. The appellant is seeking that the ruling of the trial court be set aside with costs.
2. The ruling dated 12 May 2021 the subject of this appeal related to the appellant’s application dated 9 April 2021 where the applicant respondent herein] was seeking leave to amend the claim dated 18 April 2021 and that the suit be re-opened and he be allowed to call witnesses to testify and the draft amended memorandum of claim be deemed as filed.
3. In response, the appellant filed Grounds of Opposition dated 6 May 2021.
The learned magistrate considered the application and held that;

The Grounds of opposition have been filed out off time and no reason is advanced as to why the same were filed in not seven one months following the courts directions of 1/4/2021. The same are expunged from the court record and the application dated 9/4/2021 is deemed unopposed and granted as prayed no orders as to costs.
4. The appellant was aggrieved by the ruling of the court on the grounds that, the trial court allowed the subject application in error and based on a technicality rather than on merits. Allowing the respondent

to re-open the case, amend the pleadings and introduce a 2nd respondent after the close of pleadings was an error. Expunging the appellant's Grounds of opposition and hence declining to grant Counsel the opportunity to argue out the motion while both parties were in court was erroneous and hence this appeal. The effect of the trial court expunging the Grounds of Opposition left the appellant without representation and the right to a hearing on the merits. The appellant did not have a fair chance to consider that the amendment sought amounted to the institution of a fresh suit against another respondent which is statute-barred by dint of Section 90 of the *Employment Act*, 2007.

5. Parties attended court on 11 March 2023 and hearing directions were allocated. The respondent was absent and the appellant was directed to serve.
6. On 15 April 2024 parties attended court to confirm filed submissions. The respondent had not filed submissions on the grounds that the instructed counsel was not served in good time. The court allowed 14 more days to file submissions and mention on 30 April 2024.
7. On the due date, the respondent had not complied on the grounds that the instructed counsel had been bereaved. The court allowed until close of day on 10 May 2024 to comply.

There is no compliance.

8. The appellant submitted that following an application dated 18 April 2021 by the respondent who was seeking to amend his memorandum of claim, the appellant filed Grounds of Opposition on 6 May 2021 but the trial court in its ruling expunged the same and allowed the application. The effect was to allow the respondent to introduce a 2nd respondent whose claim was statute-barred contrary to Section 90 of the *Employment Act*. This denied the appellant a fair hearing.
9. The appellant submits that by the trial court allowing the respondent to make amendments to the claim, it failed to consider the subject amendments and the fact that the respondent had been employed as a cleaner from 2 January 1999 to 1st January 2015 at a wage of Ksh.9, 781. He retired and filed his claim dated 18 April 2019 seeking terminal dues. The appellant filed a response on 28 October 2019 and the matter was set for hearing on 23 February 2021 when the respondent testified and closed his case the respondent was allowed a hearing date on 1st April 2021 and its witness Bakari Mwakulanya Kuhulea attended court and testified and closed its defence. While the matter was pending determination, the claimant applied to amend pleadings and enjoin the 2nd respondent which the trial court allowed taking the parties back.
10. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 allows parties to amend pleadings before the close of pleading provided that after such closure, the court may allow the reopening of pleadings upon application and to allow the other party a chance to allow amend its pleadings. The appellant filed Grounds of Opposition which were dismissed on a technicality. The appellant had arguable matters on the basis that the cause of action had accrued on 1st January 2015 and to allow amendments of the claim on 12 May 2021 6 years later would make it difficult for the appellant and is in contravention of Section 89 of the *Employment Act*.
11. Allowing the amendment is tantamount to instituting a fresh suit against a new party to which the 2nd respondent on a suit that is statute-barred as held in *Isaac Kamitha Mwangi v Rift Valleys (K) Limited & Another* [2021] eKLR that the joinder of the 2nd respondent was brought out of time it is time-barred by dint of Section 90 of the *Employment Act*. Having found that the suit against the 2nd respondent is time-barred, the court found no need to answer the remaining issues for determination. The appeal should be allowed with costs.
12. As outlined above, the respondent did not file written submissions as directed.

Determination

13. This is a first appeal and the court is required to reassess and reevaluate the record and make a conclusion.
14. As outlined by the appellant, the application dated 9 April 2021 the subject of the ruling delivered on 12 May 2021 giving rise to this appeal allowed for the amendment of the Memorandum of Claim filed on 23 April 2019. The claim related to facts that the respondent was employed by the appellant, Shine It Limited on 2nd January 1999 until 1st January 2015 when he retired.
15. In response, the appellant at paragraph (7) of the Memorandum of Response pleaded that;

The respondent denies the claimant's entire claim herein and shall aver that the same is misconceived and filed contrary to mandatory provisions of the *Employment Act, 2007*."
16. Parties attended court for hearing directions on various dates and on 13 March 2023 applied to consolidate the matter with ELRC Cause No.365/2019, 366/2019 and 368/2019.
17. The matter proceeded for a hearing on 23 February 2021 and the Hamisi Komo was called in evidence. He testified that he was employed in the year 2014 and terminated in the year 2018.
18. Mesaidi Nitengure testified that she worked for the appellant until December 2016.
19. Mohamed Hemed testified that he worked for the appellant from the year 1997.
20. The respondent testified as the 4th claimant that he was terminated in his employment on 25 March 2015.

The case was closed.

21. The appellant was allowed to call its evidence on 1st April 2021 and called Bakari Mwakulanya Kuhulea who testified that employment was under Shine Limited Africa which closed in the year 2016 and he was employed by the appellant, Shine It Africa. The respondent retired and was paid his terminal dues of Ksh.63, 576.

The defence was closed.

22. At the end of the proceedings, the respondent applied to amend the claim and introduce Shine It Africa into the suit. Despite objections by the appellant, the trial court granted the respondent leave to apply to amend its claim to be done within 7 days and mentioned on 12 May 2021.
23. The effect of the directions issued by the trial court on 1st April 2021 was to give the respondent 7 days to file an application seeking amendment of pleadings. Placing the matter for mention on 12 May 2021 denied the appellant a fair chance to be served and time to respond to the subject application.
24. From 1st April 2021, the respondent filed their application on 9 April 2021.
25. It is not indicated when the application dated 9 April 2021 was served upon the appellant to allow them a fair chance to file a reply before the hearing date on 12 May 2021.
26. Within this time, the appellant filed Grounds of Opposition dated 6 May 2021 objecting to the amendments. This was done before the mention date on 12 May 2021.
27. It is settled law that during a mention date, no substantive orders should be issued. The 12 May 2021 was not a scheduled hearing date but a mention to file sub on the 12/5/2021.

28. In the case of Republic v Anti-Counterfeit Agency & 2 others Ex-Parte Surgippharm Limited [2014] eKLR the court gave emphasis to the purpose of a mention date that on such a date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties cannot be issued by the court. This is to protect the rules of procedure and to allow parties a fair chance for a hearing.
29. The case of Central Bank of Kenya v Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998; AG v Simon Ogila Civil Appeal No. 242 of 2000, and Peter Nzioki & Another vs. Aron Kuvuva Kitusa Civil Appeal No. 54 of 1982; [1984] KLR 487 the courts have consistently held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly, that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. See Court of Appeal in Kenya Commercial Bank v N J B Hawala Civil Application No. 240 of 1997.
30. The emphasis here is that the learned magistrate did not set the 12 May 2021 as a hearing date but for mention to ascertain where the respondent had filed application seeking leave to amend the Memorandum of Claim and on this basis allocate a hearing date.
31. Whereas Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 allows a party to move the court through application to seek leave to amend pleadings, a respondent thereof has a right to be served with the subject application to be able to file a response thereof. This is the gist of Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 that upon service of an application, a respondent should be allowed time to file Grounds of Opposition accompanied by a Replying Affidavit.
32. The application for amendment of the claim involved the exercise of judicial discretion by the learned magistrate and, generally, amendments to pleadings should be freely allowed if they can be made without injustice to the other side as held in Eastern Bakery v Castelino [1958] EA 461 and Central Kenya Limited v Trust Bank Limited [2006] 2 EA 365.
33. The power to allow amendments can be exercised at any stage of the proceedings but before judgment is delivered as held in Printing Industries Limited & another v Bank of Baroda [2017] eKLR that amendments of pleadings are freely allowed and can be entertained at any stage of the proceedings, but the amendment(s) should not constitute a new cause of action as contended by the appellant. See William Muinde Kilundo v Peter K. Wambua & 3 others [2018] eKLR.
34. On these principles, the learned magistrate should and ought to have allowed the appellant time to ventilate its response on the application seeking to amend the Memorandum of Claim after hearing had closed. This was a reasonable and fair thing to plead to be heard. To expunge the Grounds of Opposition was punitive and not justified.
35. Since these orders issued, the proceedings are marred. Parties going back and forth. Judicial officers changed further stalling progress.
36. Fundamentally, there is a question of law outlined under paragraph (7) of the Response that should be addressed before any further proceedings.
37. With the consolidation of suits, this appeal only relates to one respondent [claimant] out of the consolidation, the file shall revert to the trial court for the files to be unconsolidated and this question of law addressed first. Without going into the issue at this point, for orderliness in the trial court proceedings, this appeal is found with merit.

38. On costs, parties are still addressing preliminary issues and the costs due to be determined upon the conclusion of the hearing based on the principles and reasons therefore under Section 12(4) of the Employment and Labour Relations Court Act, 2011.
39. Accordingly, the appeal is hereby allowed and the following orders are issued;
- 40.
- a. Ruling delivered on 12 May 2021 in Mombasa CMELRC No.366 of 2019 is hereby set aside;
 - b. The appellant's Grounds of Opposition expunged from the record herein adopted as properly filed.
 - c. The Appellant is further allowed 14 days to file a Replying Affidavit in reply to the application dated 9 May 2021 from the date hereof;
 - d. The Order of consolidation of suits is hereby set aside and each file is to be heard separately and on the merits;
 - e. the file shall revert to the trial court and the first issue for determination shall be paragraph (7) of the Memorandum of Response dated 28 October 2019;
 - f. For these proceedings, the costs to abide by the outcome of the main suit.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 23 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... **and**