



Njunge v Safaricom PLC (Employment and Labour Relations Cause E103 of 2022) [2024] KEELRC 1808 (KLR) (28 June 2024) (Ruling)

Neutral citation: [2024] KEELRC 1808 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E103 OF 2022**

**K OCHARO, J
JUNE 28, 2024**

BETWEEN

ESTHER WAGIO NJUNGE CLAIMANT

AND

SAFARICOM PLC RESPONDENT

RULING

Background

1. The Claimant/Applicant filed a Notice of Motion dated 13th February 2024 seeking the following orders: -
 - a. That the Honourable Court do grant the Claimant/Applicant leave to amend her statement of claim.
 - b. That upon the grant of prayer 1 hereinabove, the Claimant/Applicant be given seven (7) days to file and serve her amended statement of claim and the Respondent be granted a corresponding seven (7) days leave to file and serve its amended response upon service of the Claimant/Applicant's amended statement of claim.
 - c. That costs of this application do abide in the suit.
2. The application is expressed to be predicated the provisions of Order 8 Rule 3 (1), (2) and (5) of the [Civil Procedure Rules](#) 2010; Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) 2010; and Section 20 (i) of the Employment and [Labour Relations Act](#). It is supported by the Claimant/Applicant's affidavit sworn on 13th February 2024.
3. The Respondent resisted the Application on the basis of the Grounds of Opposition dated 21st February 2024.



4. Following the direction of the Court to the effect that the Application be canvassed by way of written submissions, the Claimant/Applicant filed the submissions dated 1st March 2024; while the Respondent did theirs dated 8th April 2024.
5. The grounds upon which the application is premised are that the Claimant/Applicant seeks to amend her statement of claim to only include a prayer for reinstatement to her previous position. Once the amendment is effected, the matter, which had already been certified ready for hearing, can be allocated a hearing date. The Claimant/Applicant argues that permitting the amendment will not cause the Respondent any prejudice as the cause of action and the grounds relied on in the suit remain the same, save for introduction of the new prayer. It shall be in the interest of justice to allow the amendment sought so that the Claimant is enabled to wholesomely bring forth her case for determination.
6. It is the Respondent's position that the present application is a delaying tactic. It is brought in bad faith. It is now over two years since the instant matter was filed, an inordinate delay. The Court should note that the Applicant hasn't explained the delay.
7. The Respondent argues that the remedy sought to be onboarded by the Applicant shall be at the end of the day not be appropriate for grant in the circumstances of this matter. More specifically considering the reasons for the termination of her employment, and the recent developments where a significant portion of her funds and assets were held to be proceeds of crime and an order made for forfeiture to the Government in Anti-Corruption and Economic Crimes Court Case Number Civil Application E028 of 2021.

Analysis and Determination

8. I have considered the Notice of Motion dated 13th February 2024, the Grounds thereof, the Supporting Affidavit sworn on the same day, the Respondent's Grounds of Opposition dated 21st February 2024, the parties' respective submissions and authorities relied on. The sole issue for determination is as follows:
 - a. Whether the prayers sought in the Notice of Motion Application should be granted.

Whether the prayers sought in the Notice of Motion should be granted.

9. The guiding principles in an application for leave to amend pleadings were summarized in *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR as follows:

“ 17. The issue for determination as far as this application is concerned is whether the Applicant's Notice of Motion for amendment has merit and ought to be entertained. The law as regards the grant of leave to amend are well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See *Eastern Bakery v Castelino* (1958) EA 461). The main principle is that an amendment should not be allowed if it causes injustice to the other side (see “Chitale, P.BB”). On the same subject, in the case of *Abdul Karim Khan v Mohamed Roshan* (1965) EA.289 (C.A), the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint. The principles upon which a court acts in an application to amend a pleading before/during



trial are also well settled and succinctly stated in *Eastern Bakery v. Castelino*, (1958) E.A.461 (U.) at p.462:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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.

18. The same was later buttressed by Bramwell, LJ in *Tildesley v Harper* (1878), 10 Ch.D. at p.296 stated as under:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”

.....

21. A wider footage on the same issue was given in a more recent case of *Ochieng and Others v First National Bank of Chicago* Civil Appeal Number 147 of 1991 the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

- 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;
- 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;
- e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.”

10. In the *Peter Bogonko Onchonga v National Bank of Kenya Limited & another* [2021] eKLR an application for leave to amend made one and a half years after filing of the Plaint was found to have been made timeously, and not to be prejudicial to the Defendant.

11. In the present case, the matter is yet to be fixed for hearing of the main suit by the parties.

12. I have perused the draft Amended Statement of Claim put forth by the Claimant/Applicant, and I am satisfied that the proposed amendment is only limited to addition of a prayer for reinstatement, a relief that the law recognizes under Section 49 (3) of the *Employment Act* 2007. The Court notes the Respondent’s allegation that there exist circumstances that shall at the end of the day militate against the grant of the relief. I will strategically defer commenting on this point raise, to avoid embarrassing the Court that shall hear this suit. Further, the point sounds good stuff for the main hearing.



13. I am further persuaded that the Respondent will not be prejudiced if the order sought for leave to amend the Statement of Claim is granted, as they shall have an opportunity to file their amended Reply to the Amended Statement of Claim, and to challenge the Claimant's case, including the remedies sought, through cross-examination.
14. As a result, I allow the Notice of Motion dated 13th February 2024. The Claimant/Applicant is granted seven [7] days to file her Amended Statement of Claim, and the Respondent is granted a corresponding leave of seven [7] days after service, to file their Amended Response to Statement of Claim, if need be.
15. Costs of the application shall be in the cause.

READ, DELIVERED AND SIGNED THIS 28th DAY OF JUNE, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Mr. Sumba for the Claimant

Mr. Chemos for the Respondent

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

