



Ndihokubwayo v Alliance for a Green Revolution in Africa & another (Employment and Labour Relations Cause 277 of 2018) [2024] KEELRC 2492 (KLR) (11 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2492 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 277 OF 2018**

**NJ ABUODHA, J
OCTOBER 11, 2024**

BETWEEN

EMIME NDIHOKUBWAYO APPLICANT

AND

ALLIANCE FOR A GREEN REVOLUTION IN AFRICA 1ST RESPONDENT

AGNES KALIBATA 2ND RESPONDENT

RULING

1. The Appellant filed application dated 12th March, 2024 brought under Article 159 of *the Constitution* of Kenya 2010, Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules seeking leave to amend Memorandum of Claim dated 5th March, 2018 and upon leave being granted the Applicant be at liberty to file the amended Memorandum of Claim and the accompanying documents within seven days.
2. The application was supported by the grounds on the face of the Application and the Affidavit of Sharon Ndoigo, Advocate on record for the Claimant/Applicant.
3. Counsel for the Applicant averred that pleadings had closed and hence need for leave. The Applicant commenced this suit via a Memorandum of Claim dated 5th March, 2018.
4. Counsel for the Applicant averred that the Claimant upon perusal of the memorandum of claim realized that the Memorandum of Claim failed to specifically seek for payment of certain allowances and reliefs as captured in the Claimant's Human Resource Policy and other employment documents. That the Memorandum of Claim also failed to capture certain important contractual provisions that are pertinent to the determination of this matter.
5. Counsel for the Applicant averred that the proposed amendments do not alter the cause of action as it only sought to capture additional reliefs sought and was necessary in order to determine the real



issues in controversy as well as enable the court adjudicate the matter justly and conclusively. That no prejudice will be occasioned to the Respondents if this application is allowed.

6. Counsel for the Applicant averred that the proposed amendment ought to be allowed to assist the court to determine effectively the issues surrounding this suit on true substantive merits. That amendment can be allowed at any stage so long as it is done in good faith and does not cause prejudice to the opposing party. That the hearing of the claim had not yet started and the Respondents will have a right to respond if need be. That it is only just and fair that the orders sought be granted.
7. In reply the Respondents filed their Replying Affidavit sworn on 9th May, 2024 by Annette Kahama the General counsel and corporation secretary of the 1st Respondent. The Respondents opposed the Appellant's application and averred that the Application was fatally defective as it was supported by the affidavit of Counsel and contains contentious matters of fact in dispute between the parties.
8. The Respondents averred that paragraph 4 of the supporting affidavit speaks to purported allowances that the Claimant is entitled to under her employment contract and the Human Resource Policy Manual and other unnamed employment documents, which is an issue of contention between the parties.
9. The Respondent averred that the draft amended Memorandum of Claim produced by the deponent Advocate raises contentious matters in the dispute between the Claimant and the Respondents particularly an issue regarding the interpretation of the Employment Contract as the same seeks to amend the Memorandum of Claim to remove the pleading that the employment contract was for a fixed term. That the Claimant intends to introduce new causes of action.
10. The Respondents appreciated that the right to amend pleadings is exercisable at any stage of the proceedings as long as it is in good faith and did not occasion prejudice to the opposing party. That the intended amendments by the Claimant were both in bad faith and prejudicial to the Respondents as they purport to introduce new causes of action outside the limitation period stipulated in section 90 of the *Employment Act* which precluded the bringing of a claim arising out of an employment contract unless the claim is commenced within three (3) years of the default complained of.
11. The Respondents averred that intended amendment to introduce the claim for unfair and unlawful termination was calculated to defeat the Respondents' defence that the Claimant had a fixed term contract.
12. The Respondents averred that the application sought to introduce amendments to the Memorandum of Claim that were statute barred under Section 90 of the *Employment Act* and defeat the Respondent's defence and thus, it was fatally defective and without merit and should therefore be dismissed with costs to the Respondents.
13. The Application was dispensed of by written submissions.

Determination

14. The court has considered the pleadings and submissions filed by the parties herein and notes that rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides:

“(6) A party may amend pleadings before service or before the close of pleadings:
Provided that after the close of pleadings, the party may only amend pleadings with the leave of the Court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”



15. The Applicant averred that it was in the interest of justice for her to make the proposed amendments and that the respondents would not be prejudiced by the amendments. However, the Respondents have averred that there had been an unreasonable delay of 6 years in filing the application, and that the intended amendment was prejudicial to their defence because applicant sought to introduce new causes of action.
16. The court has carefully considered the contentions by both parties and notes that it was clear that the suit was filed on 5th March 2018 and the Claimant now seeks to amend her statement of Claim to include allowances and reliefs captured in the Claimant's Human Resource Policy and employment documents; and contractual provisions that governed the relationship between the Claimant and the 1st Respondent.
17. As regards the allegation that a new cause of action is being introduced, the court has carefully considered the draft Amended Memorandum of Claim and notes that the draft contained cancellation of paragraphs on the contract terms that the Claimant was employed in as well as the prayers to incorporate the alleged terms among others within the same employment relationship. The amendments sought to have the remedies more specific. Having considered the amendments made, the court does not see how this application was made in bad faith or made to bring in new causes of action. The Applicant only pleaded with specificity what she believed she was entitled to since the claim as originally drafted was in a general form.
18. The general rule is that an amendment should not create injustice to the other party which cannot be compensated by way of costs. In the same vein, amendments are necessary so as to enable the court to determine the real question in controversy. In this respect the court is guided by the dictum of A.B. Shah JA in the case of *Joseph Ochieng & 2 Others v First National Bank of Chicago (1995) eKLR*.
 - 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 (including appeals stage);
 - 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 but subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
 - f) that the Court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”
19. The court is therefore of the opinion that an amendment can be done at any time of the proceedings as was held in the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR*, where the Court of Appeal stated as follows:

“ ... Accordingly, all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment ... does not result in prejudice or injustice to the other party which cannot properly be compensated for in costs ... Neither the length of ...



proposed amendments nor mere delay (are) sufficient grounds for declining leave to amend. The overriding consideration (are) whether the amendments (are) necessary for the determination of the suit and whether the delay is likely to prejudice the opposing party compensation in costs.

20. The role of a trial court is to create an even playing ground for parties to ventilate their issues. Article 50 (1) of *the Constitution*, 2010 provides for a fair trial. Each party should be given a chance to present and defend its case fairly. Courts and the rules governing them should not be geared towards impeding fair trial but should be enablers of fair trial.
21. The court agrees with the sentiments made by Apaloo, JA in the case of Philip Chemowolo & Another v Augustine Kubende, (1986) eKLR that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. The broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”
22. The court notes that the Claimant has taken 6 years to amend her claim which is a long time but notes that hearing of the matter has not yet started hence no prejudice will be suffered by the Respondents as the same is sought in good faith to help the court determine the contentious issues with finality. The Respondents have the right to respond to the amendments as provide under rule 14(6) of the Court rules.
23. The court also takes note of the Respondent’s issue with the Application being supported by the affidavit of Counsel for the Applicant because in Counsel’s view they contain contentious matters of fact in dispute between the parties. Having shown that the issues raised in the draft amended Memorandum of Claim do not contain contentious matters but those of fact; this court finds no issue with counsel swearing an affidavit to the same.
24. In the case of Kanyotta Holdings Ltd vs Kenya Pipeline Company Ltd (2005) eKLR, Emukule J determined that an advocate could depone on issues of fact provided that the same were not contentious issues. He reiterated inter alia;

“I cannot see what is contentious in the matters deponed by Andrew Wandabwa, learned counsel for the Defendant. I therefore reject the first ground of opposition in the application.”
25. In the foregoing circumstances and in the interest of justice the court allows the amendments sought by the applicant and hereby grants leave to the applicant to file and serve the amended statement of claim together with the supporting documents within 21 days of this ruling. The respondent shall have the liberty to file and serve an amended response, if necessary, within a similar period after service.
26. Costs shall be in the cause.
27. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024

DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER, 2024



ABUODHA NELSON JORUM
PRESIDING JUDGE-APPEALS DIVISION

