



Okinyi v Diamond Trust Bank (Employment and Labour Relations Cause 444 of 2019) [2024] KEELRC 13288 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13288 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 444 OF 2019
NJ ABUODHA, J
NOVEMBER 21, 2024**

BETWEEN

DENIS OURU OKINYI CLAIMANT

AND

DIAMOND TRUST BANK RESPONDENT

RULING

1. The Applicant filed application dated 6th June, 2024 brought under Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules seeking leave to amend Memorandum of reply dated 4th December, 2019 and filed in court on 6th December, 2019 in terms of the draft Amended Memorandum of Reply, Counterclaim and set off annexed to the supporting Affidavit and upon leave being granted the Claimant be granted corresponding leave to file an amended statement of claim & Reply to Amended Memorandum of Reply, Counterclaim and set off.
2. The application was supported by the grounds on the face of the Application and the Affidavit of Yvonne Murichu the Chief Manager, Human Resource of the Respondent/Applicant bank.
3. The Applicant averred that it sought to introduce a counterclaim on the outstanding loan by the Claimant after his termination on 4th July, 2018.
4. The Applicant averred that it was a term of the staff loan agreement that the interest charges on the loan will revert to commercial rates on termination of the Claimant's employment. That at the date of termination the Claimant's loan was outstanding at Kshs 1,009,850.68 which was converted to commercial loan on 5th July, 2018.
5. The Applicant averred that the Claimant filed his memorandum of claim dated 2nd July, 2019 filed on 4th July, 2019 for an action of unlawful/wrongful termination and underpayments against the



- Respondent. That the Respondent in Response filed Memorandum of reply dated 4th December,2019 filed in court on 6th December,2019 disputing the entire claim.
6. The Applicant averred that pleadings have since closed hence the need for leave of the court. That upon perusing the pleadings they discovered that at the time of filing this suit the Claimant had an outstanding loan which he had stopped financing following his termination. That as at 15th May, 2024 the said facility had accrued to Kshs 2,301,990.38 and continues to accrue interest.
 7. The Applicant averred that this was an issue that the court has the jurisdiction to hear and determine together with the Claimant's claim for unlawful and unfair termination. That it was necessary to amend the Memorandum of reply to plead an issue not initially pleaded in the original Memorandum of reply on the issue of the outstanding loan.
 8. The Applicant averred that the proposed amendment was necessary to enable the Respondent recover the outstanding loan amounts and to enable the court effectually and completely adjudicate upon and resolve the real issues in controversy between the parties. That the amendment sought to introduce a counterclaim seeking the recovery of the outstanding loan arising out of employer-employee relationship to ensure timely and efficient disposal of this case thereby promoting optimal use of precious judicial time and resources.
 9. The Applicant averred that it was trite law that amendments to pleadings before hearing ought to be freely allowed with leave where pleadings have closed like in this case. That the amendments will not occasion the Claimant any prejudice as he will be offered an opportunity to file an amended statement of claim if he so wishes. That it would be in the interest of justice that the application be allowed.
 10. In reply the Claimant filed his Replying Affidavit sworn on 18th July, 2024 by the Claimant herein. The Claimant opposed the Respondent's application stating that the cause of action herein arose in 4th July,2018 when he was terminated, the suit filed in July 2019, the Respondent filed response in December, 2019 with one of the witnesses being the deponent of the affidavit Yvonne Murichu and the Respondent now seeks to amend their defence and raise a counterclaim almost six years thereafter.
 11. The Claimant averred that the Respondent seeks to raise new facts that would prejudice the Claimant as these facts of loan were within the knowledge of the Respondent and by purporting to introduce the same at this stage via a counterclaim would offend the time limitations and section 90 of the *Employment Act*.
 12. The Claimant averred that the Respondent did not explain or account for the period of the delay despite the fact and documents they intend to introduce being within the Respondent's knowledge for all the period of close to six 6 years. That filing of counterclaim was subject to statutory limitation just like they do on claims hence the intended counterclaim is statute barred under section 90 of the *Employment Act* because it was over 3 years since the cause of action arose upon his termination.
 13. The Claimant averred that to allow the amendments and counterclaim at this stage would be tantamount to circumventing the clear provisions of the law with regard to the timelines that are prescribed in mandatory terms and to file a claim as a counterclaim is a new suit. That equity only aids the vigilant not the indolent hence the Respondent application was brought in bad faith despite not denying that the facts raised in the intended counterclaim were within the Respondent's knowledge.
 14. The Claimant averred that under Rule 13(2)(g) & (h) of the Employment and Labour Relations Court(Procedure) Rules 2016 a Respondent's statement of response is expected to contain a counterclaim or any relief that might be sought by the Respondent against the Claimant hence the



- Respondent herein cannot deny that it had time to raise the counterclaim as at the time of filing the defence having not denied that the facts it intends to raise were within their knowledge.
15. The Claimant averred that the Respondent was guilty of inordinate delay in seeking to introduce a counterclaim to the present suit which was filed in 2019. That the draft intended counterclaim and setoff was not accompanied by any verifying affidavit hence the application was frivolous, vexatious and an abuse of the court process.
 16. The Claimant averred that under the Staff loan Agreement YM-2 clause 14 it was an agreement of the parties that any legal actions or proceedings arising out of or in connection with the agreement would be brought in the High Court of Kenya, Commercial Division. That allowing the application would be prejudicial to the Claimant due to the period of the delay and considering that it took the Claimant's effort to have the suit reinstated after it was dismissed and the Respondent took no action to file any counterclaim or prosecute it during that period.
 17. The Claimant averred that it would be fair and in the interests of justice if this court exercises its discretion in declining the application and also strike out the Respondent's supplementary list and bundle of documents dated 21st June, 2024 which are filed without leave of the court.
 18. The Respondent filed a further Affidavit sworn on 4th October, 2024 by Yvonne Murichu who averred that the Claimant did not deny having the loan and the loan agreement was governed by section 4 of the Limitation of Actions Act and not section 90 of the Employment Act which gives timelines of 6 years. That the draft did not have a verifying Affidavit and upon leave the Respondent will file the draft with a verifying affidavit.
 19. The Application was dispensed of by written submissions.

Determination

20. The court has considered the pleadings and submissions filed by the parties herein and proceeds to analyse them as follows.
21. Rule 14 (6) of the Employment and Labour Relations Court (Procedure) Rules 2016 provide as follows:
“
“ (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.”
”
22. The Applicant averred that it is in the interest of justice for it to granted leave to amend its reply to introduce a counterclaim on the issue of outstanding loan by the Claimant, and the Claimant will not be prejudiced by the amendment. However, the Claimant has averred that there has been an unreasonable delay of 6 years in filing the application, and that the intended amendment is prejudicial to his claim because applicant seeks to introduce new causes of action. That the same are time barred under section 90 of the Employment Act.
23. The court has carefully considered the contentions by both parties and notes that it is clear that the suit was filed on 4th July, 2019 on a cause of action which arose on 4th July, 2018. The Respondent filed its Reply in December, 2019 and all the facts and documents were within its knowledge all along. In



fact, the deponent in the application Yvonne was an employee and still an employee of the Respondent hence aware of all proceedings herein.

24. As regards the allegation that a new cause of action being introduced, this court has carefully considered the draft Amended Memorandum of Claim and Counterclaim and set off. The court notes that the draft contains addition of a counterclaim in regards to the outstanding loan the Claimant had with the Respondent. Whereas this court notes that the same could be admissible since it arose out of employer-employee relationship the Respondent has taken almost 6 years which is a long period to approach this court.
25. The law as regards amendment of pleadings is well settled. 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.
26. This court is guided by the principles under which the court may grant leave to amend pleadings as was held by 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.”
27. The court is therefore of the opinion that an amendment can be done at any time of the proceedings. In this case proceedings had closed but hearing had not started as the matter had just been reinstated after being dismissed for want of prosecution. That the Respondent needed the leave to file the said Amendment.
28. Whereas this court appreciates that the purpose of a trial court is to create an even playing ground for parties to ventilate their issues as per article 50 (1) of *the Constitution*, 2010 on fair trial; this court notes that what the Respondent seeks to do is to introduce a counterclaim not per se an amendment. The court is of the view that a counterclaim is subject to limitation of time as provided for under section 90 of the *Employment Act* which limits the actions to three years after the cause of action.
29. The Respondent has alleged that the right provision should be *Limitation of Actions Act* section 4 which limits claims based on contracts to six years. The Respondent seeks this court as an Employment Court to allow its application yet the court is subject to section 90 of the *Employment Act*. It important to note that this Court has jurisdiction to entertain “mixed grill” claims where a substantial portion involves employment and labour relations issues, however such jurisdiction is subject to the provisions



of section 90 of the [Employment Act](#) which restricts the filing of claims under the Act the or contract of employment to three years from the accrual of the cause of action.

30. In the case of *Mwaniki v Kenya Wildlife Service* (Employment and Labour Relations Cause 792 of 2017) [2023] KEELRC 3416 (KLR) (20 December 2023) (Ruling) the court had this to say:-

The counterclaim must be of a nature that the Court would have jurisdiction to entertain it as a separate action. Statutory limitation of actions acts as a jurisdictional deprivation factor. Therefore, if the matters raised in a counterclaim cannot be successfully litigated in a separate suit by the initiator of the counterclaim on an account that they are time-barred, then the Court cannot have jurisdiction to entertain the counterclaim.

In my view, filing of counterclaims therefore is affected by statutory limitation of actions just like they do on plaints. There are therefore time limits for filing counterclaims. The time limit is what is prescribed by the law of limitation in relation to the particular counterclaim. If it appears from the material placed before the court that the counterclaim set up is time-barred by the law of limitation, the counterclaim is for rejection”.

32. The court agrees with the sentiments in the above case and the Respondent in seeking to file a counterclaim 6 years after the cause of action on matters which were within their knowledge is time barred under section 90 of the [Employment Act](#) and should be rejected. This court also notes that the Loan Agreement at clause 14 provided that any legal action would be brought under the High Court, Commercial division perhaps the applicant could consider pursuing such option but again subject to law of limitation applicable to that Court.
33. In the upshot the application dated 6th June,2024 is found without merit and is hereby dismissed with costs and further the supplementary list and bundle of documents dated 21st June,2024 which were filed without the leave of the court are hereby struck out.

It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2024 DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER 2024

ABUODHA NELSON JORUM

Presiding Judge-Appeals Division

