



Omari v Sendwave Limited (Employment and Labour Relations Cause E495 of 2022) [2024] KEELRC 13540 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13540 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E495 OF 2022
MN NDUMA, J
DECEMBER 19, 2024**

BETWEEN

LYDIA OMARI CLAIMANT

AND

SENDWAVE LIMITED RESPONDENT

RULING

1. By a notice of motion application dated 10/6/2024, the respondent/applicant seeks leave to amend its response to memorandum of claim dated 14/7/2023 in terms of the annexed draft and be allowed to file supplementary list of documents and a supplementary list of witnesses.
2. The application is based on grounds that due to internal integration of the respondent and world remit, sometimes in the year 2022, up to 2023, the respondent overlooked filing crucial documents including show cause letter and minutes of disciplinary hearing. That it had come to the attention of the respondent that the claimant was overpaid erroneously in lieu of leave. This has made it necessary to supply the said documents and amend the response to the memorandum of claim dated 14/7/2023.
3. The crucial amendment sought includes a counter claim for alleged overpayment in lieu of leave in the sum of Kshs. 309,065.54 and averments with regards to the notice to show cause and disciplinary hearing that preceded termination of employment of the claimant.
4. The application is opposed vide grounds of opposition dated 12/7/2024 to wit: -
 1. That the application is incurably defective, misconceived and hinged on the wrong principles of law and procedure.
 2. The application as presented is a wanton abuse of the court process, scandalous, frivolous, vexatious and intended to embarrass the court and legal process.
 3. That the application does not meet the evidentiary threshold of the orders sought.



4. The application as presented is not legally tenable
5. The application should be dismissed with costs.
6. That the application as drawn is incurably defective, frivolous, vexatious and scandalous and ought to be dismissed in limine with costs to the claimant/respondent.
6. The issue for determination is whether the intended amendment of the response to the statement of claim and filing of additional documents is justified.
7. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows: -

A party may amend pleadings before service or before close of pleadings provided that after close of pleadings, the party must only amend pleadings with leave of the court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”
8. From the above provision, the court has discretion therefore to allow amendment of pleadings after close of pleadings for good cause shown. This discretion is guided by the overriding objective set out under section 3(1) of the *Employment and Labour Relations Court Act*, 2014 which is to “facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.”
9. Further, the court is guided by the constitutional imperative under Article 159(2) which provides: -

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles: -

 - (d) Justice shall be administered without undue regard to procedural technicalities;

and the bill of rights under Article 50(1) which provides: -

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body.”
10. In the court’s considered view, the guide to this court in allowing or not allowing intended amendment should include: -
 - i. Whether there has been inordinate delay in bringing the application.
 - ii. Whether there is sound justification for the intended amendment.
 - iii. Whether there is demonstrated prejudice to the other party to be suffered if the amendment is allowed.
11. In the present matter, the memorandum of claim is dated 14/7/2022 and was responded to by a response to the memorandum of claim dated 14/7/2023. The delay in filing of the response was precipitated by conduct of an interlocutory application by the respondent dated 14/9/2022 in which the respondent sought to enforce an arbitration clause in the contract of employment which provided for the dispute between the parties to be referred to arbitration in the first instance.
12. The court considered that application and delivered a ruling in favour of the claimant dated 8th June 2023.



13. Subsequently, the respondent brought the present application to amend the statement of response dated 10/6/2024, two days after the ruling by the court that the suit was to proceed for hearing before court. It is clear therefore that the application is not visited by any inordinate delay.
14. The explanation by the applicant for the error not to file disciplinary record and include a counterclaim in the statement of response is a reasonable explanation. The claimant/respondent will have opportunity to file a response to the amended reply and counterclaim and the respondent to file a reply to the response to the counterclaim only, to close the pleadings.
15. Indeed order 8 Rule 3 of the *Civil Procedure Rules* provides that: -

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.”
16. It is apparent that not only the rules of this court, but also the Civil Procedure Rules grant this court wide discretion in determining an application to amend pleading by any party during the pendency of a suit and before judgment unless there is clear impediment to the application being granted due to prejudice that may be visited other party(s) to the suit by the amendment sought.
17. In the present matter the court is not aware of any prejudice that may be suffered by the claimant in this matter that cannot be remedied by way of costs with regard to the additional pleadings to be filed by both parties pursuant to this application.
18. The case of *Elijah Kipng'eno Arap Bii Kenya Commercial Bank Limited* [2013] eKLR is a further, perfect guide on considerations by the court on an application for amendment of pleadings as follows:

The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, where amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of the substantially different character which could more conveniently be made the subject of a fresh action; that 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 limitation Acts.”
19. Accordingly, the application has merit and is granted and the following directions given: -
 - a. The draft amended response and counterclaim dated 10/6/2024 is deemed as filed subject to payment of requisite fees.
 - b. The claimant to file a reply to the amended response and counterclaim within 14 days of service
 - c. The respondent to file a reply to the counterclaim only, within 7 days of service.
 - d. Leave is granted to the respondent to file a supplementary list of documents and a supplementary list of witnesses within 7 days of this ruling. The claimant is at liberty to file further documents upon receipt of the additional documents within 7 days of service.



e. Costs in the cause.

DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

MATHEWS NDUMA

JUDGE

Appearance:

M/s. Ombayo for claimant/respondent

M/s. Murage for respondent/applicant

Mr. Kemboi – Court Assistant

