



REPUBLIC OF KENYA



KENYA LAW
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**Eshiwani v Kenyatta University (Cause 1634 of 2018)
[2023] KEELRC 153 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 153 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1634 OF 2018
K OCHARO, J
JANUARY 31, 2023**

BETWEEN

RACHEL ESHIWANI CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. By a Notice of Motion application dated 18th day of February, 2022, the Claimant/Applicant seeks:
 - a. That this Honourable Court be pleased to grant memorandum of claim dated December 4, 2018 filed in Court on December 21, 2018 in terms of the draft attached Amended Memorandum of claim attached herewith.
 - b. That the draft proposed memorandum of claim be deemed as fully filed on payment of requisite Court fees and the same be served accordingly upon the Respondents.
 - c. That it is the wider interest of justice that orders sought herein be granted.
 - d. That cost of this application be in the cause.
2. The application is anchored on the grounds obtaining on the face of the application, and those in the supporting affidavit of Ms Rachel Eshiwani, the Claimant.
3. The Claimant/Applicant seeks leave to amend the memorandum of claim dated December 4, 2018 and filed in Court on December 21, 2018 to include the pleading claim for maximum compensation since the case has taken more years than what was anticipated.
4. The Claimant/applicant contends that the relief for maximum compensation was erroneously omitted and states that it is imperative that leave be granted to amend the pleadings to allow the Court determine the real issues in controversy between the parties.



5. The Claimant/applicant states that the amendments will not prejudice the Respondent in any way and urges the Court to allow the same.

Respondent's Case.

6. The Respondents despite being granted leave to file a response and submissions to the application filed none, as such the Notice of Motion dated February 18, 2022 stands unopposed.

The Claimant's/applicant's submissions.

7. The Claimant submits that its trite law that a Court may at any stage of the proceedings or on such terms as to costs direct or allow any party to amend his pleadings.
8. The Claimant relies on the holding in *Central Kenya Limited vs Trust Bank Limited and 4 others* Civil Appeal No 222 of 1998.

Analysis and Determination.

9. From the material placed before this Court, I distil one issue to be decided in this application thus:

Whether The Leave Sought Can Be Granted.

10. As indicated hereinabove the application is unopposed following the Respondent's default in filing a response to the application.
11. This Court's authority to allow an amendment of pleadings flows from Rule 14 [6] of the *Employment and Labour Relations Court [Procedure] Rules*, 2016, which provides:

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

12. I am of the view that post closure of pleadings, the Court can at any stage of the proceedings allow either party to amend his or her pleadings.
13. A grant of leave to amend pleadings, is a discretionary power of the Court which must be exercised judiciously and in the interest of justice. In the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies vs First National Bank of Chicago* [1995] eKLR AB Shah JA [as he then was] citing the case of *Kettleman vs Hansel Properties Limited* [1988] 1 ALL ER 35, stated:

“I also agree with what Lord Griffiths said in the Kettleman case [*supra*] at page 62:

“Whether an amendment should be granted is a matter of the discretion of the trial Judge and he should be guided in the exercise of his discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a Judge is entitled to weigh in balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned facing new issues one way or the other. Further to allow an amendment before a trial begins is quite different from allowing it at



the end of the trial to give apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.”

14. Further, on the Court’s power to allow an amendment of pleadings, the Court in the case of *Eastern Bakery vs Castelino* EA [1958] 461, held:

“(ii) 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 side can be compensated by costs.”

15. The application by the Claimant herein has been brought before the hearing of this matter, commences. Inspired by the above cited decision, *Eastern Bakery* it is an application that I should freely allow, and more especially considering that it is not opposed.

16. On the importance and purpose of pleadings, this Court in the case of *Aristide Marage Nyanga vs Lavington Security Limited* [2021] eKLR stated:”

“From the onset, it is important to state that the whole purpose of a pleading, be it a statement of claim, defence or reply, is to define the issues between the parties, to confine the evidence of the trial matters relevant to those issues, and to ensure that the trial proceeds to judgment without either party being taken at a disadvantage by the introduction of matters not fairly.....”

17. I find that the application meets the threshold for granting the leave sought and I do not see any injustice that will be suffered by the Respondents if the amendment is allowed. The Court keeps view of the fact that Rule 14 [6] of this *Court’s Rules of Procedure* allows the Court to grant corresponding allowance to a Respondent to amend its pleadings, following a grant of the orders for amendment in favour of his or her adversary. The amendment shall help attainment of the objective for pleadings in this matter.

18. Flowing from the foregoing premises:

- a. The Claimant’s application is allowed. The Claimant is granted leave to amend the memorandum of claim dated December 4, 2018.
- b. The Respondent is granted a corresponding leave of 14 days of service by the Claimant, to amend the response to the statement of claim, if need be.
- c. Costs of this application be in the cause.
- d. This matter to be mentioned on February 28, 2023 to check on compliance and for picking a hearing date.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY, 2023.

Ocharo Kebira

Judge

In presence of

Jaoko for Claimant/Applicant.

Mwangi 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

