



REPUBLIC OF KENYA



KENYA LAW
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Mutua v Butt & another (Cause 105 of 2018)
[2023] KEELRC 461 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 461 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 105 OF 2018
JK GAKERI, J
FEBRUARY 23, 2023

BETWEEN

ALPHONCE MUTUKU MUTUA CLAIMANT

AND

HAROON BUTT 1ST RESPONDENT

MODERN COAST EXPRESS LTD 2ND RESPONDENT

RULING

1. Before the court for determination is a Notice of Motion by the Respondents dated July 28, 2022 seeking Orders That;
 1. The Claimant's amended Statement of Claim dated June 21, 2022 be struck out for being time barred and filed contrary to Section 90 of the *Employment Act*.
 2. The 1st Respondent herein be struck from the suit as no reasonable cause of action has been raised against him since the inception of this suit.
 3. Costs of this application be provided for.
2. The Notice of Motion is expressed under Order 2 Rule 15 of the *Civil Procedure Rules, 2010*, Order 51, Section 90 of the *Employment Act* and all enabling provisions of law and is based on the grounds set out on its face and Affidavit of Christine Mufutu sworn on July 28, 2022.
3. The affiant deposes that amended statement of claim dated June 21, 2022 introduces fresh prayers more than 5 years after the fact.
4. That the amended statement introduces a new cause of action and new facts of a different character which cannot be extended as it was statute barred and no extension could be granted under Section 27 of the *Limitation of Actions Act*.



5. It is the affiant's case that the Claimant was introducing stale claim under the guise of an amendment which violated the provisions of Section 90 of the [Employment Act, 2007](#).
6. That the amendment denies the Respondent the right to rely on the provisions of the [Limitation of Actions Act](#) as the documents and witnesses to rebut the claims do not exist.
7. That the claims for unpaid leave and transfers were prejudicial to the Respondents.
8. That the amendment was a tactic to obtain what the Claimant did not deserve, was made in bad faith and more than 5 years after the suit was instituted and ought to be struck out with costs.
9. In his Replying Affidavit sworn on October 31, 2022, the Claimant states that the Notice of Motion Application herein was an afterthought to forestall or prolong the hearing of the suit. That the claim had not been amended or introduced a new cause of action as leave to amend was granted and the Respondents were estopped from raising any objection on the amendment or the claim generally.
10. That Section 90 of the [Employment Act](#) was inapplicable to the instant suit.
11. That the tabulations were the provision of particulars of the original claim.
12. That the leave days and transfers were pleaded and the orders sought were draconian and the 1st Respondent was a necessary party to the proceedings.
13. That courts were enjoined to sustain not to terminate suits unless hopeless and beyond redemption and the application was unmerited.
14. The affiant urges the court to dismiss the application.

Applicant's submissions

15. As to whether the amendments were statute barred, the applicant relied on Section 90 of the [Employment Act](#) to urge that amendment was intended to bring on board additional reliefs on accrued annual leave and unpaid transfer allowance from 2013 – 2017 outside the limitation period. The decision in [Edward Ochieng v Dan Okumu](#) (2022) eKLR was cited in support of the submission in relation to non-recovery of accrued annual leave 2003 – 2016 outside the mandatory 3 years from the date of filing.
16. As to whether the 1st Respondent was a necessary party to the suit, the decision in [Salomon v Salomon & Co. Ltd](#) (1897) A.C 22 was cited to urge that a company was a legal entity distinct and separate from its directors and shareholders.
17. Similarly, the decisions in [Werrot & Company Ltd & others V Andreas Douglas Gregory & others and Gachoka Kingori V Inter Management Group \(K\) Ltd](#) (2018) eKLR were relied upon to submit that since the 1st Respondent was not the employer of the Claimant and the reliefs sought relate to the 2nd Respondent, the Claimant had no claim against the 1st Respondent.
18. The court was urged to allow the application.

Claimant/Respondent's submissions

19. The Claimant's counsel urged that the amendment related to unpaid leave and transfer allowances matters within the Respondent's knowledge. That the decisions relied upon by the applicant was distinguishable.



20. Counsel submitted that the amendment brought no new cause of action and did not offend Section 90 of the [Employment Act](#).
21. As regards the 1st Respondent, it was submitted that he made all decisions and could not escape liability.
22. The court was urged to dismiss the application.

Determination

23. The issues for determination are;
 - i. Whether the amended claim violates Section 90 of the [Employment Act](#).
 - ii. Whether the 1st Respondent's name should be struck out of the proceedings.
24. As regards the 1st issue, the starting point are the provisions of Section 90 of the [Employment Act](#) that;

Notwithstanding the provisions of Section 4(1) of the [Limitation of Actions Act](#), no civil action or proceedings based or arising out of this Act, or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.
25. The foregoing provision is unambiguous that other than instances of continuing injury or damage which are enforceable within twelve (12) months after cessation of the injury or damage, all other claims or actions must be commenced within three years of accrual of the cause of action.
26. In this case, the claim was filed on 5th February, 2018 and the prayers for leave and transfer are included for purposes of compensation.
27. In [Lewar Ventures Ltd V Equity Bank \(Kenya\) Ltd](#) (2022) eKLR, Wendoh J. held as follows;

“The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and should not prejudice or cause injustice to the other party.”
28. See [Central Bank of Kenya Ltd v Trust Bank Ltd](#) (2002) EA 365.
29. While the applicant urges that the amendments introduce new facts and cause of action after the 5 year limitation period, the Respondent submitted that the amendment merely provided particulars of items already pleaded in the statement of claim dated January 29, 2018 and thus no new cause of action was introduced.
30. Contrary to the applicant's submission that the amendments introduced a new and statute barred cause of action, the court is satisfied that the Claimant's case has not fundamentally changed as the issue of leave and transfers had already been raised though particulars were not averred.
31. As to whether the claims are statute barred, the same will be determined when the question of reliefs will be determined.
32. It is trite law that parties are at liberty to amend their pleadings at any stage of the proceedings as directed by the court and courts are enjoined to retain as opposed to terminating suits before parties ventilate their claims and defences as urged by the Claimant/Respondent's counsel.



33. From the foregoing, it is the finding of the court that amendments to the statement of claim did not introduce a new cause of action. See *Institute for Social Accountability & another v Parliament of Kenya & 3 others* (2014) eKLR, *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Ltd* (2013) eKLR and *Harrison C. Kariuki v Blueshield Insurance Co. Ltd* (2006) EALR 365.
34. As to whether the 1st Respondent is a necessary party to the proceedings, the starting point are the applicable principles of law.
35. In *Crescent Distribution Services Ltd V Egnite Technologies Ltd & another* (2013) eKLR, Kamau J. stated as follows;
- “They relied on the case of *Laisa Mboye & 2 others V Kajiado Central Milk Project “The Board & 5 others* (2012) eKLR where Odunga J. cited the case of *Kingori V Chege & 3 others* (2002) eKLR in which Nambuye J. (as she then was) stated that the relevant tests of determining whether or not to join a party in proceedings were as follows:-
- i. He must be a necessary party.
 - ii. He must be a proper party.
 - iii. In the case of the defendant, there must be a relief flowing from that defendant to the plaintiff.
 - iv. The ultimate order or decree cannot be enforced without his presence in the matter.
 - v. His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.”
36. See also *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* (1991) 1 EA 55, *Kennedy Mwita & another V Board of Trustees NSSF & 2 others* (2012) eKLR and *Joseph Njau v Robert Maina Chege and another* (2002) eKLR.
37. In this case, while Claimant urges that the 1st Respondent was a necessary party to the suit since he was the 2nd Respondent’s Managing Director and made all decisions, the Respondent’s counsel urged that since the Claimant was an employee of the 2nd Respondent as the written contract on record demonstrates, and the 2nd Respondent had a distinct legal personality, the 1st Respondent was not a necessary party in the suit.
38. Puzzlingly, the Claimant/Respondent’s Replying Affidavit made no reference to the place or role of the 1st Respondent in the instant suit.
39. Needless to emphasize, it has not been shown that indeed the 1st Respondent was the Managing Director or made all decisions affecting the Claimant as alleged and is not identified as a witness.
40. It requires no gainsaying that a registered company is a legal entity distinct and separate from its directors and shareholders and it is not an agent or trustee for them. See *Salomon V Salomon & Co. Ltd* (Supra).
41. Similarly, even if the 1st Respondent was the Managing Director of the 2nd Respondent, he is personally not liable for debts and other liabilities of the 2nd Respondent and had no employment relationship with the Claimant.



42. In the end, the court is satisfied and finds that the Claimant has failed to demonstrate that any of the reliefs claimed flow from the 1st Respondent or that the ultimate order or final decree cannot be enforced against the 2nd Respondent without participation of the 1st Respondent in the proceedings.
43. For the foregoing reasons, it is the finding of the court that the Notice of Motion Application dated July 28, 2022 is partially successful as follows;
- a. The 1st Respondent's name is hereby struck out from the suit herein.
 - b. In light of the partial success of the application, parties shall bear own costs.
 - c. The 2nd Respondent has leave to respond to the amended statement of claim within 14 days of the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

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 *Civil 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.

DR. JACOB GAKERI

JUDGE

