



**Idha v Modern Coast Builders & Contractors Ltd (Cause
470 of 2018) [2023] KEELRC 324 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 324 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 470 OF 2018
AK NZEI, J
FEBRUARY 9, 2023**

BETWEEN

KHALID MBARAK IDHA CLAIMANT

AND

MODERN COAST BUILDERS & CONTRACTORS LTD RESPONDENT

RULING

1. The application before me is the Respondent's Notice of Motion dated 29th September 2022. The Respondent/Applicant seeks the following orders:-
 - a) that the Court be pleased to grant the Respondent/Applicant leave to amend its Memorandum of Response dated 19th September 2018.
 - b) that the annexed Amended Memorandum of Response dated 29th September 2022 be deemed as duly filed upon payment of the requisite fees.
2. The application, which is expressed to be brought under Section 1A, 1B& 3A of the [Civil Procedure Act](#), Order 8 Rule 3 and Rule 5(1) of the Civil Procedure Rules, is supported by the affidavit of one Chritine Mfutu, sworn on 29th September 2022. The affidavit basically replicates the grounds set out on the face of the application. It is deponed:-
 - a) that there are pertinent issues which have not been included in the Memorandum of Response and failure to include those issues would result in a miscarriage of justice.
 - b) that it is necessary for the amendments to be made to enable the Court to effectively adjudicate and determine the issues in dispute.
 - c) that the Respondent/Applicant stands to suffer irreparable harm and prejudice should the matter proceed with the Memorandum of Response on record.



3. The application is opposed by the claimant vide a replying affidavit sworn on 11th October 2022 and filed herein. It is deponed in the said affidavit:-
 - a) that the application is dishonest, defective, bad in law, an abuse of the Court's process and is meant to delay the matter.
 - b) that the application is brought under Order 8 Rule 3 and Rule 5(1) of the Civil Procedure Rules instead of the Employment and Labour Relations Court (Procedure) Rules 2016 as required by law.
 - c) that the Respondent/Applicant seeks to amend its pleadings five years after closure of pleadings and certification of the suit as being ready for hearing.
 - d) that the Respondent/Applicant has always had knowledge of the facts of the case, and that no explanation has been brought forth as to why the averments had not been indicated in the initial memorandum of response.
 - e) that the proposed amendment need not be part of the memorandum of response as they can be clarified by witness statements or by witnesses during hearing of the suit.
 - f) that the Respondent/Applicant has been out and about to delay the proceedings herein without justification.
4. This Court's Rules, the Employment and Labour Relations Court (Procedure) Rules 2016 (the Court's Rules), are silent on amendment of pleadings, and possibly several other procedural matters. This situation does not, however, leave the Court stranded in matters procedure. Rule 38 of the Court's Rules empowers the Court to regulate its own procedure. The Rule states:-

“subject to these Rules, the Court may regulate its own procedures.”
5. Rule 38 of the Court's Rules notwithstanding, the Court has, over the years, looked outside its Rules in situations where the Rules are silent on any particular procedural issue, and has, over the years, proceeded under the Civil Procedure Rules under such circumstances. This scenario is, in my view, very much within the parameters of the law as the Employment and Labour Relations Court (Procedure) Rules 2016 do not oust the applicability of the Civil Procedure Rules in proceedings before this Court.
6. Further, although procedure and Rules of procedure are an integral part of the whole system of administration of justice, procedural faults that do not either go to the substance or merits of a matter before Court or prejudice the opposing party may be overlooked by the Court in favour of substantive justice.
7. Having said that, I will proceed to determine the application as presented. The Civil Procedure Rules apply to civil proceedings before the High Court, and this Court is a Court of equal status with the High Court by dint of Article 162(2) (a) of *the Constitution* of Kenya 2010.
8. Order 8 Rule 3(1) of the *Civil Procedure Rules* provides as follows:-
 - “(1) Subject to Order 1, rules 9 and 10, Order 4 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.”



9. Order 8 Rule 5(1) of the Civil Procedure Rules on the other hand provides:-

“(1) for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

10. The Respondent/Applicant referred this Court to the case of *Florence Achieng Aseto -vs- Faulu Microfinance Bank Kenya Limited*[2021] eKLR, where the Court relied on the cases of *St Partrick’s Hill School Limited v Bank of Africa Kenya Limited*[2018] eKLR and *Central Kenya Limited v Trust Bank Limited* [2000] E.A.365 where the Court of Appeal held that:

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

11. In the present suit, the claimant has pleaded unfair termination of employment by the Respondent, and has sought reliefs based on the pleaded unfair termination. The claimant’s claim is denied by the Respondent vide a memorandum of response dated 10th September 2018 and filed in Court on 14th September 2018, in which fair termination of employment is pleaded. The amendment sought to be introduced by the Respondent/Applicant alludes to subsequent discussions between the Respondent and the claimant, leading to alleged reinstatement of the claimant.

12. In my view, the amendment sought will place the real question or questions in controversy before this Court for adjudication. No prejudice will be occasioned to the Claimant as he will have an opportunity to file Reply to the Respondent’s Amended Response, and to file further witness statements and/or witness affidavits, if need be.

13. It is my finding that the Respondent’s Notice of Motion dated 29th September 2022 is merited, and is hereby allowed in the following terms:-

- a) the Amended Memorandum of Response dated 29th September 2022 is hereby deemed as duly filed and served, on condition that the applicable Court filing fees is paid within fourteen days from the date of this Ruling.
- b) the claimant may file Reply to the Amended Response within fourteen days of service.
- c) costs of the application will be in the main suit.

14. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9THFEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER



In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Claimant/Respondent

..... for Respondent/Applicant

