



**Sikuku v AIC Cure International Hospital, Kijabe (Cause
1055 of 2018) [2023] KEELRC 1086 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1086 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1055 OF 2018**

**SC RUTTO, J
APRIL 28, 2023**

BETWEEN

ANNE OSIMBO SIKUKU APPLICANT

AND

AIC CURE INTERNATIONAL HOSPITAL, KIJABE RESPONDENT

RULING

1. What comes up for determination is an Application dated 12th October, 2022 through which the Claimant seeks leave to amend her Statement of Claim. The Application which is supported by the Affidavit of Mr. Anthony Wanyingi is expressed to be brought under Section 3 of the *Employment and Labour Relations Court Act*, Rules 4, 14(6), 17(1) and (3) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 and all enabling provisions of the law.
2. The main grounds upon which the Application is premised is that the Advocates on record took over the matter on behalf of the Claimant. That the former Advocates inadvertently missed to correctly claim for payment in lieu of notice, compensation for unfair termination, leave allowance and other claims provided in law. That the omission still stands and will deny the Claimant some of her terminal dues.
3. The Respondent opposed the Application through the Replying Affidavit sworn by Ms. Ruth Wangui Kariuki on 8th December, 2022, as well as its Grounds of Opposition dated 8th December 2022. Ms. Kariuki depones that the Application has not been filed timeously as it is an afterthought and will occasion prejudice to the Respondent. That the Claimant seeks to introduce new facts that are time barred pursuant to Section 90 of the *Employment Act*. She further avers that the Application as presented has not been brought in good faith and is an abuse of the court process, scandalous, frivolous, vexatious and intended to embarrass the Court and the legal process.



Submissions

4. The Application was canvassed by way of written submissions. It was submitted on behalf of the Claimant that the former advocates did not offer clarity and particularity when drafting the pleadings and mainly made general statements which do not ventilate her case. That further, parties, should not have errors of their advocates preclude them from obtaining justice unless these errors are reasonable and not negligent and an effort has been made to correct them. It was further submitted that Rule 14(6) of this Court's Rules provides that a party can amend its pleadings either without leave before close of pleadings or with leave of court after close of pleadings. To support this position, the Claimant referred to the case of *Mose Nyambenga Ondieki vs Vice Chancellor & Maasai Mara University & 3 others (2018)* eKLR. Citing the case of *Mary Wangechi Kingori vs Riara Group of Schools (2017)* eKLR, it was the Claimant's further submission that the intended amendments are not introducing new facts and therefore not subject to Section 90 of the *Employment Act*.
5. On its part, the Respondent submitted that time is such an important aspect of any application for amendment of pleadings and the Claimant has no excuse at all as to the inordinate delay in filing her Application. It was further submitted by the Respondent that not even a change of advocates suffices as an excuse to justify delay. On this score, the case of *Kassam vs Bank of Baroda (Kenya) Ltd (2002)* eKLR, was cited in support. It was the Respondent's further submission that the amendment if allowed, will be a monumental departure from the original claim. That a claim on the basis of discrimination is by all means a new claim with a totally different legal basis. To this end, reliance was placed on the cases of *Daniel Ngetich & another vs K-Rep Bank Limited (2013)* eKLR and *Beatrice Gikunda vs CFC Life Insurance (2020)* eKLR.

Analysis and determination

6. From the record, it is apparent that the main issue for determination is whether the Claimant should be allowed to amend her Statement of Claim as sought through the instant Application. Rule 14 (6) of the *Employment and Labour Relations Court Rules (2016)* allows for amendments to pleadings before the close of pleadings and where pleadings have closed, a party may amend the same subject to the Court's leave and corresponding leave to the other party to amend its pleadings as well.
7. Amendment of pleadings is further provided for under Order 8 Rules 3 and 5(1) of the *Civil Procedure Rules*.
8. As a general rule, Courts have a wide discretion to allow parties to amend pleadings at any stage subject to certain limitations. For instance, such an amendment should not prejudice or occasion injustice to the other party by divesting an accrued right.
9. In the case of *Joseph Ochieng & 2 others vs First National Bank of Chicago, Civil Appeal No. 149 of 1991*, the Court established the principles governing amendment of pleadings, thus: -
 - a. The power of the court to allow amendment is to determine the true, substantive merits of the case;
 - b. Amendments should be timeously applied for;
 - c. The power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages);
 - d. 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 proposed amendment must not be immaterial or useless or merely technical;
 - f. 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 a substantially different character which could more conveniently be made the subject of a fresh action;
 - g. 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.
10. Further, in *Harrison C. Kariuki vs Blueshield Insurance Company Ltd [2006]* eKLR, the Court referred to the Court of Appeal decision in *Central Kenya Ltd vs Trust Bank Ltd [2000]* EALR 365 and determined that: -

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.”

11. Flowing from the above case law, it is evident that a party may be allowed to amend his or her pleadings “at any stage of the proceedings”. Further, the party seeking to amend its pleadings, should make the Application timeously and the leave to amend pleadings should be granted freely provided the amendment will not occasion injustice to the other side, and that there is no injustice if the other side can be compensated by way of costs. This is to allow the parties to bring out all the issues that need to be determined and therefore avoid a multiplicity of suits.
12. In the instant case, the Application to amend has been brought close to 5 years after filing of the suit. Obviously, the Claimant has failed the first test as it is apparent that the Application was not brought in a timeous manner. Nonetheless, the Court is mindful of the fact that leave to amend is purely an exercise of discretion and the Court may allow the Application where there is justifiable cause and in order to serve the ends of justice. In any event, the Court is enjoined to serve substantive justice.
13. As to the substance of the amendment, I have perused the draft amended Statement of Claim annexed to the Supporting Affidavit and it is notable that the Claimant seeks to amend paragraphs 2.2 and 2.4 of her Statement of Claim so as to provide better particulars of her averments. In addition, she seeks to amend the figures in respect of some of the reliefs she is seeking and to introduce some reliefs, which are not contained in the initial claim.
14. In my view, the proposed amendments are not new matters seeing that they flow from the initial claim. Being a Claim for unfair termination, the proposed amendments are intertwined with the issues arising in the initial Claim and they substantially arise from the same set of facts. This includes the reliefs sought as they are reliefs that are ordinarily sought in a Claim for unlawful termination as the one herein.
15. With regards to the Respondent’s argument that some of the claims are time barred by dint of Section 90 of the *Employment Act*, it is instructive to note that Order 8 Rule 3(2) of the Civil Procedure Rules provides that where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.



16. My interpretation of the above provision is that amendments are allowed even where the period of limitation has expired. On this issue, I find useful guidance from and apply the determination in the case of *City Clock Limited vs County Clock Kenya Limited & another [2020] eKLR*, where it was held that: -

“I find that the proposed amendment of the plaint will not prejudice the defendant’s case as they will still have the chance to amend their pleadings should they deem it necessary.¹³ I further find that the questions regarding the jurisdiction of this court to entertain the suit, with the proposed amendments, is an issue that the defendants can raise in their defence for the court’s determination at the appropriate time.”

17. Over and above, an Application such as this one must be considered in a holistic manner from the angles of justice and hardship to both sides. In this regard, if the Court is to deny the Application, the Claimant stands to suffer prejudice as she will lose the opportunity to advance her case from her perspective. On the converse, if the Application is allowed and leave to amend granted, the Respondent will have corresponding leave by way of right under this Court’s Rules, to respond to the amended Statement of Claim. Upon balancing the scales of justice, the Claimant will be more prejudiced if the Application is declined.

18. Over and above, amendment of pleadings is permissible at any stage of the proceedings before the final judgement is delivered and, in this case, I note that the hearing is yet to take off, hence the Application has been made within the timeframe allowed by law.

19. It is against this background that I allow the Application dated 12th October, 2022 in the following manner: -

- a. The Claimant is granted leave to amend her Statement of Claim.
- b. The amended Statement of Claim to be filed and served upon the Respondent within 7 days from the date of this Ruling.
- c. The Respondent is granted corresponding leave to amend, file and serve its Amended Response to the Amended Statement of Claim within 14 days from the date of service with the Amended Statement of Claim.
- d. The Claimant shall meet the costs of this Application for having moved the Court too late in the day.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of April, 2023.

STELLA RUTTO

JUDGE

Appearance:

For the Claimant/Applicant Mr. Wanyingi

For the Respondent Mr. Kariuki

Court Assistant Abdimalik Hussein

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 had 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.

