



**Aluodo v Cisco Systems Management B. V (Cause 1382 of 2018)
[2023] KEELRC 825 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 825 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1382 OF 2018
BOM MANANI, J
APRIL 13, 2023**

BETWEEN

MOSES OMONDI ALUODO CLAIMANT

AND

CISCO SYSTEMS MANAGEMENT B. V RESPONDENT

RULING

1. The application before the court is dated November 1, 2022. Through it, the claimant has moved the court for an order to amend his Memorandum of Claim and as well file an additional list and bundle of documents.
2. The proposed amendments are contained in the attached draft amended Memorandum of Claim. The claimant has also supplied the court with copies of the documents that he wishes to introduce through the additional list of documents.
3. The application is opposed on a number of grounds as shall be indicated later in the ruling.

Claimant's Case

4. The claimant's case is that the proposed amendments are necessary for purposes of clarifying the issues that are in controversy between the parties so that they are addressed at once. In the claimant's view, it is fair and just to approach the matter from this viewpoint.
5. The claimant also argues that the documents he seeks to introduce are connected to the issue in controversy and they constitute vital evidence that will aid the court to reach a just determination in the cause. He avers that there is no prejudice that will be occasioned to the respondent if the application is permitted.
6. The claimant indicates that as the application has been presented before the commencement of the trial, any issues that will be raised through the proposed amendment and which will require a response



from the respondent may be addressed through appropriate responses to the amended Memorandum of Claim. Further, any inconvenience occasioned to the Respondent as a result of the proposed changes can be redressed through an award of costs.

7. The claimant has indicated that the delay in filing the motion was occasioned by the fact that the matter was first taken through mediation thereby deflecting his attention from the need to review the pleadings in anticipation of a court trial in the event that the mediation failed. He indicates that it only dawned on him that the pleadings required some adjustments during the pretrial session with his advocates. This is after the mediation process had failed.

Respondent's Case

8. The Respondent's objection to the application is multipronged. It is indicated that: the application has come too late after pleadings had closed; there was indolence on the part of the claimant in seeking to amend his pleadings; the application seeks to delay the expeditious disposal of the suit; the documents sought to be introduced are unauthenticated, uncertified and some have originated from individuals who are not parties to the action; the proposed amendments are premised on speculative information; and that the electronic evidence is in any event not accompanied by a certificate in respect of electronic evidence as required by law.
9. The respondent has made extensive submissions on these issues. The totality of the respondent's position is that to permit the request by the claimant in the face of these objections will greatly prejudice its case.

Analysis

10. In this section, I will make general observations on what I understand to be the general principles that undergird requests to amend pleadings and file additional records and or evidence after the close of the pretrial conference but before trial of the cause. Thereafter, I will consider the merits of the application.

Overview of the Applicable Legal Principles

11. The power to entertain applications of this nature is donated to the court by rule 14 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016. Rule 14 (6) of the rules deals with the question of amendment to pleadings. It provides as follows:-

“A party may amend pleadings before service or before the close of pleadings: Provided that after the close of pleadings, the party may only amend pleadings with the leave of the court on oral or formal application, and the other party shall have a corresponding right to amend its pleadings.”
12. On the other hand, rule 14 (10) of the rules addresses the question of filing of supplementary documents. It provides as follows:-

“Where a party intends to rely on a document that has not been filed as part of its pleadings, the party shall make sufficient copies of each document for the court, file and serve the other party with a copy at least fourteen days before the case is set down for hearing or such shorter period as the court may order: Provided that after the close of pleadings, the court may allow the filing of a supplementary bundle of documents.”
13. From these provisions, it is clear to me that the court has jurisdiction to entertain the current application. Further, it is clear to me that the parties have the liberty to seek to amend their pleadings and introduce additional sets of documents both before and after the close of pleadings.



14. The power to allow amendment of pleadings and introduction of additional documents is discretionary. However, it must be exercised judiciously. It is not to be exercised whimsically or in a manner that is arbitrary. In other words, the court should have regard for the generally settled guidelines in adjudicating on such requests.
15. The general position on pre-trial amendments is as espoused in the case of *Eastern Bakery v Castelino* [1958] EA quoted by the Applicant. In the matter, the court expressed the position as follows:-
 “Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs.”
16. The purpose of the power to amend pleadings is to provide parties to an action the opportunity to properly frame their case. This position is aptly expressed in *Institute for Social Accountability & another v Parliament of Kenya and 3 others* (2014) KLR when the court observed as follows:-
 “the object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings.”
17. Indeed amendment of pleadings may be allowed to merely correct errors that are manifest in them. (See *Eunice Chepkorir Soi v Bomet Water Company Ltd* [2017] eKLR).
18. The forgoing notwithstanding, the court should decline an application to amend pleadings if the effect of the amendment is to change the character of the action, deprive the opponent of an accrued right or defense such as a plea for limitation or if it is otherwise tainted with malafides. Restating this position, the court in *Eastern Bakery v Castelino* [1958] EA expressed itself as follows:-
 “The court will not refuse to allow an amendment simply because it introduces a new case..... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defense of limitation accrued since the issue of the writ”
19. Just like other case management procedures, the principles that undergird the filing of additional documents after close of the pre-trial conference aim at securing fairness of the trial process. In deciding whether to grant a request to introduce and or produce additional records after the pretrial conference, the court has to consider: the reasons for not filing the records before the pretrial conference; the nexus and or relevance of the records to the matters in dispute; and the prejudice that the Respondent is likely to suffer as a result of granting the request and whether such prejudice can be remedied in some way. These principles are espoused in a number of decisions.
20. In *Kennedy Nyamwaya Bundi v Insta Products (EPZ) Limited* [2017] eKLR, the court made the following observations:-
 “It would appear therefore that after the pre-trial conference is held, no more documents are expected to be filed. However, the litigation chain does not always operate smoothly and in some cases, a party may seek to file additional documents on the day of trial. If the trial has not commenced, the Court may exercise its discretion and admit new documents, if it is in the interest of justice.”



21. In *Johana Kipkemei Too v Hellen Tum* [2014] eKLR, the court observed as follows:-
“Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules.”
22. In *Preview Property Agency & another v Terrie Wanjiku Miano* [2021] eKLR, the court observed as follows on the matter:-
“.....it is evident that the court may consider and allow an application for additional evidence to be adduced even after the lapse of the requisite period laid out in legislation so as to allow such party the opportunity to present his case in full. However, such consideration must not cause undue prejudice to the other party and this varies depending on the circumstances of each case. The court should however address its mind to questions such as reasons for late availability of the witness, the discovery of a new document, and importantly the stage of the proceedings at which the additional evidence is sought to be introduced.”
23. In *ABN Amro Bank N.V v Kenya Pipeline Company Limited*[2019] eKLR the court, whilst handling an appeal from a decision on an application for discovery made the following comments which are, in my humble view, material in determining the relevance of documents sought to be filed and or exchanged and or produced in preparation for a trial:-
“To determine the issues raised in the plaint, particularly under the head of negligence, the response by the respondent who has sought a set off would be by examining these documents to determine which of the parties’ assertions will hold sway. We are therefore satisfied that the respondent demonstrated a nexus between the documents sought and the suit before the court, and agree with the sentiments of the trial court that these documents are necessary for the determination of the suit.”

Merits of the Application

24. On the request to amend the Memorandum of Claim, the draft amended Memorandum of Claim that is exhibited indicates that all that the claimant seeks to do is to change the details of the Law Firm that is representing him in the action and step down the amount claimed on account of differences in earnings from Ksh. 9,600,000.00 to Ksh. 6,144,455.02. No other information is sought to be introduced.
25. I have considered the proposed amendment against the general principles that govern amendments to pleadings. I do not understand the proposal as introducing a new and inconsistent cause of action. Neither does it take away any right that has vested in the Respondent.
26. The application has been presented before hearing of the case commences. The amendment seeks to rectify details relating to the Firm name of the team that represents the claimant. Further, it seeks to plead the correct figure of what the applicant alleges to be the amount that he lost on account of difference in earnings.
27. In my view, the request to amend is, in the circumstances, merited. There is little inconvenience that the proposed amendments will occasion to the respondent. Whatever inconvenience that may arise can



- be appropriately redressed by an award of costs and leave to the respondent to file an amended answer to the proposed pleadings by the claimant.
28. With regard to the request to file additional documents, I have looked at the records proposed to be filed and note that they fall into four categories. These are records relating to: alleged claimant's pay slips; email correspondence on computation of alleged commissions; alleged student statement of accounts from Strathmore University; and alleged forfeited earnings by the claimant.
 29. I have considered the relevance of the proposed records to the trial in the context of their nexus with the issues under consideration as distinct from their evidential or probative value. For the avoidance of doubt, the question of their probative or evidential value is not a matter that the court is concerned with at this stage of the case.
 30. I have noted the claimant's assertion that he did not take up a job offer with another employer after the respondent promised to match his remuneration with the competitor's. The claimant asserts that this promise was not actualized. He seeks to rely on the alleged pay slips and schedule of alleged forfeited earnings to address this issue. In this context, there is a nexus between these records and one of the issues that is for consideration in the cause. Whether the records will ultimately be admissible and whether they are of probative value in establishing the alleged lost earnings is a different matter altogether.
 31. In respect of the emails, it is the claimant's case that they are critical to his efforts to prove that the respondent owes him unpaid commissions. Again, I have taken note of the fact that the Memorandum of Claim alludes to unpaid commissions. On the other hand the exhibited email correspondences speak to the issue of computation of commissions.
 32. A cursory look at the emails shows that some of them appear to be from the claimant to what appears as email addresses that bear the phrase "cisco" in them. Besides, the name "Cisco Systems Inc." is mentioned a couple of times in the emails. Whether the emails relate to the respondent or indeed whether they establish the claim for alleged commissions or whether they are between third parties is not for the court to consider at this moment. These are matters that are left for the full trial. However, to the extent that the emails speak to the question of computation of commissions for the claimant, they appear to have a nexus with the issue of commissions that is raised in the pleadings filed by the parties.
 33. The claimant has also pleaded failure by the respondent to reimburse fees that the claimant allegedly paid to Strathmore University. In its pleadings, the respondent disputes this fact.
 34. The Strathmore Student Statement that is sought to be introduced in the case contains debits and credits to the claimant's student account for the period between 2012 and 2019. This period falls within the period that the claimant was serving the respondent. The probative value of the evidence aside, the document has a nexus with the dispute before court in so far as it speaks to the question of payments of funds by the claimant to Strathmore University.
 35. I have considered the question of failure by the claimant to file the contested records before the pretrial procedures closed. Much as it is desirable that parties observe the timelines fixed by statute, the failure to strictly observe these timelines should not be the sole reason to decline a request that is intended to grant a party his day in court particularly where it is clear that by granting the request, the Respondent suffers little or no prejudice.
 36. I have considered the constitutional demand that justice must be served without undue regard for technicalities. In this respect, I share the views expressed by Baari J in *University Academic Staff Union, Maseno Chapter v Maseno University* [2022] eKLR when she observed that pretrial directions should do not tie the hands of the court for the life of the case. This is particularly if the clog that arises unduly



blocks a party who thinks that an opportunity to file additional documents will help him ventilate his case.

37. The respondent has also challenged the application on account of the failure by the claimant to present the certificate for electronic evidence. In my view, this is not a basis to reject the application at this stage. It is an issue that will affect the admissibility of the records during the trial of the case.

Determination

38. The upshot is that I find that the request by the claimant to amend the Memorandum of Claim and file a supplemental list and bundle of documents is merited. Accordingly, I allow the application.
39. The claimant is granted 14 days from the date of this order to file and serve the amended Memorandum of Claim and supplemental list and bundle of documents limited to what was prayed for in the current application.
40. The respondent is granted corresponding leave to file an amended Reply to the amended Memorandum of Claim and to file a supplemental list and bundle of documents (if need be) in reaction to the documents filed by the claimant pursuant to this order within 14 days from the date of service of the amended Memorandum of Claim and supplemental list of documents.
41. Costs of the application are granted to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF APRIL, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th* July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

