



**Nyaga v Langfields Systems Limited & another (Cause
262 of 2017) [2023] KEELRC 1860 (KLR) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1860 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 262 OF 2017
DN NDERITU, J
JULY 31, 2023**

BETWEEN

TIMOTHY KINYUA NYAGA CLAIMANT

AND

LANGFIELDS SYSTEMS LIMITED 1ST RESPONDENT

KENYA POWER & LIGHTING CO. LTD 2ND RESPONDENT

RULING

I. Introduction

1. In a statement of claim dated June 20, 2017 filed in court on the day that followed the claimant prays for –
 - a. General damages
 - b. Special damages Kshs 22,500,000/=
 - c. Cost of this suit and interest
 - d. Any other cost that the court may award.
2. The cause is defended and both respondents deny liability and pray for dismissal of the cause for want of merits.
3. The cause came up in court for hearing on November 10, 2021 when Dr Abdallah Mwaura (CW1), Philip Wafula (CW2), and Johnson Kamande (CW3) testified. The claimant did not testify on that day as the court ran out of time and the matter was fixed for further hearing of the claimant's case on February 21, 2022.



4. On February 21, 2022 the hearing did not proceed due to technical hitches with the virtual hearing and the hearing was fixed for May 23, 2022. When the hearing resumed on May 23, 2022 Mr Wandaka for the claimant informed the court that he intended to amend the statement of claim. The oral application for amendment was opposed by Mr Kinyanjui for the 1st respondent and Mr Mureithi for the 2nd respondent and hence the court directed that a formal application be filed.
5. Subsequently, on July 28, 2022 the claimant filed a notice of motion (the application) dated June 22, 2022. The application is expressed to be brought under sections 1A, 1B, 3A, and 100 of the Civil Procedure Act, order 8 rule 5, order 51 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It is supported by the affidavit of the claimant (applicant) sworn on June 22, 2022 with one annexure thereto in form of a draft amended statement of claim. The claimant is seeking the following orders –
 1. That leave be granted to amend the statement of claim in terms of draft hereto and it be deemed as filed and served.
 2. That costs be in the cause.
6. In opposition to the application the 1st respondent filed a replying affidavit sworn by Moses M. Kinyanjui, advocate, on August 24, 2022, while the 2nd respondent filed a replying affidavit sworn by Kisilah D. G, Advocate, on September 15, 2022.
7. With the concurrence from counsel for all the parties it was directed that the application be canvassed by way of written submissions. Counsel for the claimant filed his submissions on October 21, 2022, counsel for the 1st respondent on November 7, 2022, and counsel for the 2nd respondent on November 27, 2022.

II. Claimant's Case

8. The claimant's position in this application is expressed in the supporting affidavit to the application and the written submissions by his counsel.
9. After the testimony of his three witnesses, as alluded to above, and it was time for the claimant to testify his counsel indicated that it was necessary for the statement of claim to be amended as highlighted in the draft amended statement of claim annexed to the supporting affidavit.
10. The claimant deposes that the intended amendments are to rectify an arithmetical or mathematical error that shall not prejudice the respondents in any way. The proposed amendments are intended to correct clause 6(c)(b) of the statement of claim to replace the figure of alleged future earnings of Kshs 7,500,000/= with a figure of Kshs 29,640,000/=. This proposed change is said to automatically affect prayer (b) on special damages to make the same change from Kshs 22,500,000/= to Kshs 44,640,000/= and hence the need to rectify that prayer accordingly.
11. In his written submissions counsel for the claimant has argued that the error apparent in the statement of claim is purely arithmetical and no new action is being introduced. He argues that the mistake is so clear and obvious in that if a monthly salary of Kshs 95,000/= is multiplied by 26 years the answer is Kshs 44,640,000/= and that is the only amendment sought through this application.
12. Counsel argues that the claimant has neither testified nor closed his case and as such the respondents shall have an opportunity to interrogate the issue. He submits that the amendment is purely to rectify an arithmetical error and no new action is sought to be introduced through this amendment. Counsel has cited several decisions in support of his arguments, *inter alia*, Moses Wanyama Omondi v Agility



Logistics Limited [2022] eKLR and *James Ikumu Munanga v Teachers Service Commission & another* [2022] eKLR on the principles that are applicable in consideration of an application for amendment of pleadings.

13. It is on the basis of the foregoing that the claimant prays that the application be allowed.

III. The 1st & 2nd Respondents' Case

14. In the replying affidavit the 1st respondent deposes that the application if allowed shall prejudice it greatly. It is stated that the claimant is seeking to sneak in a fresh claim that is time barred.

15. Counsel submits that section 90 of the *Employment Act* disentitles the claimant from filing a claim after expiry of three years from the date on which the cause of action arose. Counsel insists that through the amendments sought the claimant is filing a new action that is time barred. Counsel has cited several authorities in illustrating the obvious position in law that a claim filed out of time is dead on arrival and defective and no amount of first aid or care can resuscitate such a cause.

16. The replying affidavit by the 2nd respondent is a replica of the one filed for the 1st respondent and it is deposed that if the application is allowed it shall prejudice the defence as it is intended to introduce a new action that is time barred.

17. Counsel for the 2nd respondent argues that the application is an afterthought that has come too late in the day after the hearing of the cause has commenced. He has cited *Julius Njiraini Nyamu v Henry Mburu Marungo & 3 others* [2021] eKLR and *Harrison C. Kariuki v Blue Shield Insurance Co Ltd* [2006] eKLR in supporting his proposition that where an amendment prejudices a party to the proceedings an application for such amendment should be denied.

18. It is on the basis of the foregoing that both the respondents are vehemently opposed to the application.

IV. Issues for Determination And Decision

19. There is only one main issue for this court to determine – should the claimant be allowed to amend the statement of claim as sought in the application?

20. A court of law should freely allow applications for amendment of pleadings, if for no any other reason to enable and allow parties to a cause be heard on merits and raise and deal with all the issues that may be in contest between them – See *Eastern Bakery v Castileno* [1958] EA 461. The right to access to justice and to be heard are so fundamental that they shall not be limited – see articles 24, 25, 48, and 50 of the *Constitution*.

21. This court has carefully gone through the application and more so the annexed draft amended statement of claim and noted that the amendment sought is to correct an arithmetical or mathematical error. This does not in any way amount to introduction of a new action, claim, or cause. What the claimant has sought to do is to bring to the court what he considers to have been the correct amount of special damages. To state the obvious, special damages must be specifically pleaded and proved and hence the proposed amendment to the statement of claim amounts to naught if the same is not proved.

22. The claimant is yet to close his case. In fact, the claimant has not yet testified in court. The respondents shall have their day in court for sure. They have the right to apply for recall of the witnesses who have already testified for the claimant and they have the right to apply to amend their respective responses to the claim. I cannot detect any prejudice that the respondents shall suffer if this application is allowed at this juncture.



23. This matter has taken more than its share of time in court and it is about time that the same is disposed of. The application by the claimant to amend his statement of claim shall be allowed as prayed with a corresponding leave to the respondents to amend their respective responses, if need be.

V. Costs

24. The application is allowed with costs in the cause.

VI. Orders

- a. Flowing from the foregoing, the notice of motion by the claimant dated June 22, 2022 is hereby allowed.
- b. The claimant shall file and serve the amended statement of claim as per the draft within seven (7) days of this ruling.
- c. The respondents are granted seven (7) days from the date of service to file and serve amended responses to the claim, if need be.
- d. Costs of the application shall be in the cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF JULY, 2023.

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DAVID NDERITU

JUDGE

