



**Wachira v Laikipia University (Formerly a Constituent College of Egerton University)
(Cause 284 of 2015) [2023] KEELRC 2309 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2309 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 284 OF 2015
DN NDERITU, J
SEPTEMBER 28, 2023**

BETWEEN

DAVID MWANGI WACHIRA CLAIMANT

AND

**LAIKIPIA UNIVERSITY (FORMERLY A CONSTITUENT COLLEGE OF
EGERTON UNIVERSITY) RESPONDENT**

RULING

I. Introduction & Background

1. In a memorandum of claim filed in court on September 28, 2015 through Ndeda & Associates Advocates, the claimant herein, David Wachira Mwangi, alongside two other claimants, Kennedy Simiyu Murunga And Peter Njiri Mukunya, filed this cause seeking various reliefs.
2. The respondent filed a response to the claim through Mwangi Mukira & CO Advocates, denying liability and seeking that the cause be dismissed with costs for want of merits. The matter was subsequently certified ready for hearing.
3. However, when the matter came for directions on February 4, 2016, Mrs. Ndeda for the Claimants informed the court (Radido J) that the claimants wished to separate their respective claims and each to prosecute his own claim separately. The court accordingly directed that separate memorandum of claims be filed by the last two claimants before February 19, 2016.
4. The record shows that from that point onwards this matter proceeded with the claimant herein as the only claimant as the other two filed separate claims. Kennedy Simiyu Murunga filed Cause No. 119 of 2016 while Peter Njiri Mukunya filed Cause No. 120 of 2016. It is not in dispute that these two causes were subsequently dismissed on diverse dates for having been filed out of time and hence were statutorily time barred, as it shall be discussed in a moment.



5. On November 1, 2021 this matter came up for hearing before this court and the claimant (CW1) started his testimony but he was stood down as counsel for the claimant, Miss Awuor, insisted that the other two claimants were also proceeding with their claims under this cause while counsel for the respondent, Mr. Ndichu, was categorical that this cause had only one claimant as per the header above. On December 1, 2021 this court directed that there was only one claimant in this cause as the other two had left and filed separate causes as stated above.
6. When this cause came up for further hearing on September 26, 2022 counsel for the claimant informed the court that Kennedy Simiyu Murunga was desirous of “rejoining” this cause. The court directed that a formal application be filed in that regard to enable the respondent respond thereto as counsel for the respondent had indicated that the respondent was vehemently opposed to such an application.
7. Pursuant to the foregoing directions Kennedy Simiyu Murunga filed a notice of motion dated October 31, 2022 (the application) seeking the following orders –
 1. That this application be certified as urgent and the same be dispensed with in the 1st instance.
 2. That the honourable court be pleased to grant leave to the claimants/ applicants to amend their memorandum of claim dated September 28, 2015 as per the annexed draft amended Memorandum of claim.
 3. That this honourable court be pleased to make all such further orders and or directions as it may deem fit.
 4. That costs of this application be provided for.
8. The application is expressed to be brought under article 159(2)(d) of the Constitution, Order 8 Rule 3 and 5, Order 51 Rule 1 of the Civil Procedure Rules, and sections 1A, 1B, and 3A of the Civil Procedure Act. The application is based on the grounds on the face of it and supported with the joint affidavit of David Mwangi Wachira, the claimant, and Kennedy Simiyu Murunga, the applicant, sworn on October 31, 2022 with several annexures thereto.
9. Upon receipt of the said application the respondent filed a replying affidavit sworn by Imelda Wanjau, the legal officer of the respondent, on November 23, 2022 with two annexures thereto.
10. On November 8, 2022 the court with the consent of the counsel for the parties directed that the application be heard by way of written submissions. Miss Awuor for the applicant filed her submissions on December 13, 2022 while Mr. Ndichu for the respondent filed on February 7, 2023.

II. The Applicant’s Case

11. Based on the supporting affidavit and the written submissions by his counsel, the applicant is seeking that this “court be pleased to grant leave to the claimants/ applicants to amend their memorandum of claim dated September 28, 2015” in line with an annexed draft amended memorandum of claim.
12. The applicant states that after the direction by Radido J on February 4, 2016, pursuant to an application by counsel for the applicant, he filed Cause No. 119 of 2016. However, the said cause was dismissed for being time barred in a ruling by Wasilwa J on March 29, 2022.
13. The applicant is now seeking that the memorandum of claim in this cause be amended to re-admit and include him as a claimant. It is the applicant’s argument that the amendments sought shall not prejudice the respondent in any way.



14. It is stated by the applicant that in paragraph 12 of the ruling by Wasilwa J the Judge opined that “The claimant is free to pursue his claim under Cause 284 of 2015” and as such the applicant argues that this gave him the “right” to rejoin this cause. It is stated that the respondent applied for review of this part of the ruling without success as the application for review was dismissed on March 29, 2022.
15. Counsel for the applicant has spent a great deal of space in the written submissions emphasizing on the right of a “party” to amend pleadings but has said nothing on the legal principles upon which a party may be allowed to join or rejoin a cause that is pending in court.

III. The Respondent’s Case

16. In the replying affidavit the respondent states that the applicant voluntarily removed himself from this cause and filed Cause 119 of 2016 which was subsequently dismissed as the same was filed out of time. It is deposed that by his own actions the applicant was no longer a party in this cause whether the memorandum of claim was formally amended or not.
17. It is deposed that the dicta by Wasilwa J alluded to above, to the effect that the applicant was free to pursue his claim under this cause, did not in any way give or confer to the applicant a legal right to join or rejoin this cause. It is further stated that while the applicant was directed by this court to file an application to join or rejoin this cause, what he has filed is an application for amendment of the memorandum of claim which is clearly misplaced.
18. It is deposed that if the applicant is allowed to pursue his claim under this cause, the court shall in essence be allowing him to file a claim out of time and this, among other factors, shall highly prejudice the respondent.
19. Counsel for the respondent has submitted that the application herein was filed on November 1, 2022, over one year since the striking out of Cause No. 119 of 2016, yet no explanation has been offered for this delay which according to the respondent is unreasonable and inordinate.
20. It is submitted that once the applicant filed a separate cause over the same subject matter he effectively excluded himself from this cause and he is not a party to the same and cannot apply to amend pleadings in a cause wherein he is not a party.
21. It is submitted that the application is in total abuse of the court process and the court is urged to dismiss the same with costs.

IV. Issues For Determination

22. The court has carefully gone through the application and there is only one main issue for determination – Should the application to amend the memorandum of claim by the applicant be allowed?
23. Going by the analysis above it should not be in dispute that the applicant is not a party to this cause. This is why on September 26, 2022 the court ordered and directed that a formal application be filed by the applicant so that he may join or rejoin the cause. It is only after obtaining leave or an order to join the cause that the applicant may apply to amend the pleadings and more so the memorandum of claim. It is an elementary position in law that a person who is not a party to a cause cannot apply to amend the pleadings. Logically, the first prayer for such an applicant is to apply to join the cause and the second for appropriate amendment(s) of the pleadings to accommodate and include his claim.
24. What this court expected the applicant to file and what it directed to be filed is an application for the applicant to join the cause. In a complete twist and departure from that direction, the claimant and the applicant have filed a joint application to amend the memorandum of claim to, among other things,



include the claim by the applicant. In the first place, the applicant is not a party in this cause and the proceedings having voluntarily abandoned his claim in this cause and filed another cause over the same subject matter. Clearly, this application is in violation of the orders and directions of the court wherein the applicant was directed to file an application to join the cause in the first place.

25. The applicant is riding on the back of the claimant pretending that it is the claimant who wishes to amend the memorandum of claim so as to include and accommodate the applicant's claim.
26. The applicant is not a party to this claim having walked away from it and filed a separate cause as noted above. He has no locus standi in applying to amend the memorandum of claim. The applicant has in total disregard of his own request and the directions from the court decided to file a different application, to amend the memorandum of claim, rather than filing an application to join the cause in the first place and then seek to amend the pleadings, even if within the same application.
27. Further, even if the application was for the applicant to join this cause, it would still be legally wrong for this court to allow the same as it would amount to allowing the applicant to file his claim way outside of the limitation period. The applicant has categorically stated that his employment was terminated in 2012 meaning that the three years within which he was to file his claim expired sometimes in 2015. Section 90 of the *Employment Act* (the Act) does not make provision for this court to extend or expand the time within which a claim may be filed.
28. When Radido J directed the applicant, on applicant's own application, to separate his cause from that of the claimant and the other co-claimant, what the applicant ought to have done was to ensure that his claim was filed within time. By 4th February, 2016 when the directions on separation of the actions were made, the limitation had kicked in and counsel for the applicant ought to have advised him well ahead and restrained in making the application for separation or sought leave and or directions on how the separate cause was to be filed with the limitation period in mind.
29. In my considered view, the separate cause ought to have been labelled 284 "B" of 2015 to ensure that it was within the limitation. That did not happen and by the time the applicant filed his Cause No. 119 of 2016 the same was out of time and was accordingly struck out as alluded to above. The same fit befell Cause No. 120 of 2016 which had been filed by Peter Njiri Mukunya as the same was struck out by Mbaru J in a ruling of September 23, 2020.
30. The applicant's cause was struck out on October 5, 2021 yet this application was filed in court on November 1, 2022, well over a year thereafter. This delay has not been explained at all. In my considered view, the delay in filing the application was unreasonable and inordinate and it goes to demonstrate the indolence on the part of the applicant.
31. This cause has been pending in court since 2015 and any further delay in hearing and determination of the same shall cause further prejudice to the claimant and more so to the respondent. Litigation ought to come to an end and this cause is not a good record in the portfolio of this court. The application herein has been filed in bad faith and lacks merits. It has only served in causing further delay in the conclusion of the matter.

V. Determination

32. For all the foregoing reasons this court finds that the notice of motion by the applicant dated October 31, 2022 is devoid of merits and the same is dismissed accordingly with no orders as to costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 28TH DAY OF SEPTEMBER, 2023



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DAVID NDERITU
JUDGE

