



**Kemboi v Majani Mingi Sisal Estate Limited (Cause E024 of 2021)
[2023] KEELRC 2445 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2445 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E024 OF 2021
DN NDERITU, J
OCTOBER 12, 2023**

BETWEEN

JONATHAN KIBET KEMBOI CLAIMANT

AND

MAJANI MINGI SISAL ESTATE LIMITED RESPONDENT

RULING

I. Introduction

1. In a memorandum of claim dated April 29, 2021 filed in court on June 3, 2021 through Owang & Associates the claimant commenced this cause seeking the following reliefs –
 - a. Damages for wrongful and unfair termination of employment.
 - b. Unpaid salary from May, 2020 to November, 2020
 - c. Illegally Deducted salary from June, 2020 to November, 2020.
 - d. Terminal benefits.
 - e. Refund of Kshs.377,695/= incurred towards the construction of a flash toilet;
 - f. Costs of the claim.
 - g. Interest at court rate on (a), (b), (c) (d), and (e) from the date of filing suit until payment in full.
 - h. Any other or further relief that this Honourable Court may deem fit and just to grant.
2. The respondent entered appearance through Sheth & Wathigo Advocates and filed a response to the memorandum of claim on August 5, 2021 seeking that the cause be dismissed with costs for want of merits.



3. On January 24, 2022, after the pleadings had closed, counsel for both parties fixed the cause for hearing on March 2, 2022. However, the hearing did not proceed on the said date as the court was not sitting and subsequently the cause was fixed for hearing on June 6, 2022. Again, the hearing did not take off as by the said hearing date the claimant had filed a notice of motion dated May 30, 2022 seeking for amendment of the memorandum of claim. This application was subsequently withdrawn for being incompetent as it was supported with an affidavit that was not properly executed.
4. However, the claimant (applicant) filed a similar application dated July 29, 2022. In this application (the application) the claimant is seeking for the following orders –
 1. That this Honourable Court be pleased to grant the claimant leave to amend his memorandum of claim filed on June 3, 2021 in terms of the annexed draft Amended memorandum of Claim marked “JK-A.”
 2. That the costs of the application be provided.
5. The application is expressed to be brought under section 3 of the Employment & Labour Relations Court Act, rules 4(1), 14(6), 17(1) & (3) of the Employment & Labour Relations Court (Procedure) Rules, and Article 159 of the Constitution, and all other enabling provisions of the law.
6. The application is based on the grounds on the face of it and supported with the affidavit of Jonathan Kibet Kemboi, the claimant/applicant, sworn on July 29, 2022 with several annexures thereto, one of them being a draft amended memorandum of claim.
7. Upon service of the application the Respondent filed a replying affidavit sworn by Allen Nengo, a senior human resource manager, sworn on November 7, 2022, alongside written submissions by respondent’s counsel, Miss Oteyo, as it had been agreed and directed by the court on October 25, 2022 that the application be canvassed by way of written submissions.
8. Counsel for the claimant, Mr. Owaga, filed his written submissions on February 8, 2023.

II. Issues For Determination

9. Upon reading the application, the supporting affidavit and the annexed draft amended memorandum of claim, the replying affidavit, and the submissions by counsel for both parties, there is only one issue for determination – Should the claimant be granted leave to amend his memorandum of claim as proposed in the annexed draft?

III. Determination

10. The court notes that the amendments proposed only relate to the body of the memorandum of claim and not the reliefs which are proposed to remain intact. Further, the proposed amendments relate only to matters of fact which are of course subject to proof on a balance of probability.
11. The hearing of the main cause has not commenced and as such no time shall be wasted or costs incurred by either party in recalling of any witness.
12. The court has read the submissions by both counsel and agrees with counsel for the claimant that contrary to the argument advanced by counsel for the respondent, the proposed amendments do not in any way introduce a new cause of action or a different cause from the original. The true nature of a cause should be understood and conceived on the understanding of the reliefs sought. As noted above, the claimant is not seeking to amend or indeed vary the prayers and reliefs in the claim.



13. The principle objective of this court and indeed any other court is to be fair and do justice “to facilitate the just, expeditious, efficient and proportionate resolution of disputes” for all those who approach it in accordance with the law – See section 3(1) of the Employment and Labour Relations Court Act (ELRC Act). Further, rule 14(6) of the rules of this court allows a party to a cause to amend pleadings without leave before close of pleadings and with leave of the court thereafter.
14. Litigation on the principles upon which a party may be allowed to amend pleadings is a well beaten path. The said principles have crystallized into a number of factors. The granting or denying of such leave is fairly discretionary on the part of the court. However, the exercise of that discretion shall not be whimsical, capricious, or by fiat. It has to be judicious based on sound reasons aimed at ensuring fairness and justice to the parties.
15. The court has gone through the submissions by both counsel and the authorities relied on and cited which all affirm the position taken in the foregoing paragraph. For example, in *Kassam v Bank of Baroda Ltd* (2002) eKLR Kuloba J. (as he then was) cited many a decision where the same principles are repeated over and over again. M. Onyango J. took the same position in *Mose Nyambega Ondieki V Vice Chancellor, Maasai Mara University* (2018) eKLR.
16. In the opinion of this court no prejudice has been demonstrated that shall be suffered by the respondent if the application is allowed. I am inclined to allow the application for leave to the claimant to make the proposed amendments to the memorandum of claim with a corresponding leave to the respondent to amend its defence, if it deems it fit.
17. In paragraph 14 of the supporting affidavit the claimant has stated that the documents that support the necessity to amend the memorandum of claim were not in his possession as at the time the claim was filed in court. Whatever those documents may be, it is fair and just that the claimant be allowed to present all his evidence, both oral and documentary, to aid this court in arriving at a fair conclusion of the cause. Likewise, the respondent shall be afforded the same or similar opportunity to respond accordingly.

IV. Orders

18. For all the foregoing reasons, the notice of motion by the claimant dated July 29, 2022 is allowed on the following terms –
 - a. Leave be and is hereby granted to the claimant to file and serve the amended memorandum of claim, a replica of the draft annexed to the application, within seven (7) of the date of this ruling.
 - b. To fast-track the cause and avoid delay in the hearing and disposal of the cause the claimant is also granted leave to file a further list of documents containing the documents annexed to the application, if he deems it fit.
 - c. The respondent is hereby granted a corresponding leave to amend its response to the memorandum of claim, if it so desires, within seven (7) days of service as in (a) above.
 - d. Further, the respondent is also hereby granted leave to file any other documents that it may wish to rely on in response to (c) above.
 - e. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 12TH DAY OF OCTOBER, 2023.



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DAVID NDERITU

JUDGE

