



Kenya Shipping Clearing & Warehouses Workers Union v Maya Limited (Employment and Labour Relations Cause 898 of 2018) [2023] KEELRC 2794 (KLR) (3 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2794 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 898 OF 2018
AN MWAURE, J
NOVEMBER 3, 2023**

BETWEEN

**KENYA SHIPPING CLEARING & WAREHOUSES WORKERS
UNION CLAIMANT**

AND

MAYA LIMITED RESPONDENT

RULING

1. The Claimant filed a Notice of Motion dated 6th April 2023 seeking an Order or / leave of court to amend the Memorandum of Claim dated 7th June 2018 amongst other reliefs.
2. The Claimant's amended Memorandum of Claim seeks to introduce the following reliefs:
 - a. A declaration that the grievant's dismissal from employment was unfair, unlawful and a violation of right to employment.
 - b. One month's salary in lieu of notice Kshs 25,455/-.
 - c. Gratuity of Kshs 229,095.
 - d. Full compensation for unfair termination of Kshs 305,460/-
3. In opposition to the application, the Respondent filed a Notice of Preliminary Objection herein dated 26th April 2023.
4. The Respondent raised a preliminary objection that this court lacks jurisdiction to hear and determine the application dated 6th April 2023 as the reliefs sought to be introduced by the amended memorandum of claim are time barred.
5. The Respondent further raised the issue that the application is incurably defective and have been brought under wrong provisions of the law; there is no decision of the Registrar being appealed to



invoke section 30 of the *Labour Relations Act*, 2007 and section 12 of the *Employment and Labour Relations Court Act* as well as Order 8 of the *Civil Procedure Rules* 2010 are not applicable as to leave to amend is sought after expiry of the limitation period.

6. The preliminary objection was canvassed by way of written submissions.
7. The first issue for determination is whether the Claimant's application to amend the memorandum of claim is time barred thereby this court lacks jurisdiction to hear the same.
8. The Respondent submitted that the application for amendment has been brought after the expiry of 3 years since the cause of action arose and that the amendment being sought do not fall under the circumstances provided for by Order 8 Rule 3 of the *Civil Procedure Rules* and as such the same should not be allowed.
9. The Claimant submitted that an amendment to the plaint is a matter entirely determined under the Court's discretion and the court's discretion is not limited as contemplated under section 90 of *Employment Act*, 2007, as long as the discretion is applied judiciously, reasonably and justifiably. It further submitted, Section 90 of *Employment Act* is only concerned with institution of claims emanating from employment contracts, but not amendments to the pending claims / plaints.
10. Amendment of pleadings is provided for under Rule 14(6) of the *Employment and Labour Relations Court (Procedure) Rules* as follows:

“(6) 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.”

11. On the other hand, Order 8 Rule 3 of the *Civil Procedure Rules* provides for amendments with leave of court as follows:

“[Order 8, rule 3.] Amendment of pleading with leave.

- (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
- (2) 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.
- (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the



capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

- (5) An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

12. The Court of Appeal in the case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others* (2014) eKLR set out the principles to be applied while considering an application for amendment as follows–

- i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
- iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
- v. Amendment of a claim or relief barred by time should not be allowed;
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
- viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;
- ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”

13. This is a suit which was filed on 7th June 2018 and having been dismissed on 25th May 2018.

14. The claimant did not attempt to amend his claim from that time until 13th March 2023 when the honourable court informed the parties the suit was overtaken by events. The claimant only then in April 2023 made an application to amend the claim. The amendments sought go to the core of the suit as they encompass all the prayers enumerated in section 49 of the *Employment Act*.

15. The Court of Appeal in the cited case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others* (2014) eKLR set out the principles to grant an application for amendment. The court observed that amendment of a claim or relief barred by time should not be allowed.

16. The court finds there has been an inordinate delay in filing this application to amend the claim. The claimant seems to have filed the same as an afterthought when settlement out of court did not succeed and when court pointed out the claim was overtaken by events as time for reinstatement of the grievant had lapsed.



17. Order 8 rule 3(2) of *Civil Procedure Rules* provide preview under which amendment of claim can be allowed outside the time limitation. The same are:
1. an amendment to correct names of parties.
 2. an amendment to alter the capacity in which a party sues and
 3. an amendment to add or substitute a new cause of action or new cause of action arises out of the same facts in respect of which relief has already been claimed in the suit.
18. The introduction of totally new reliefs do not fall under the above provisions.
19. As observed in the case of *Beatrice Kabai Adagala v Postal Corporation of Kenya* (2015) eKLR much as we sympathise with the applicant we cannot help them as our hands are tied and the prayers for amendments are time barred. The preliminary objection dated 26th April 2023 is merited and is granted. Parties to bear the respective costs of the application.
- Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

