



Nthenga v Rafiki Micofinance Bank Ltd (Employment and Labour Relations Cause 620 of 2019) [2023] KEELRC 2743 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2743 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 620 OF 2019
BOM MANANI, J
NOVEMBER 2, 2023**

BETWEEN

VIRGINIA NTHENGA CLAIMANT

AND

RAFIKI MICOFINANCE BANK LTD RESPONDENT

RULING

1. The application before the court is dated 13th April 2023. By it, the Claimant seeks leave of the court to amend her Statement of Claim to introduce the various changes that are set out in the draft Amended Statement of Claim attached to the application.
2. The application is opposed by the Respondent. According to the Respondent, the proposed amendments are incomplete. Further, the application to amend has been filed after inordinate delay without explanation for the delay.
3. The Respondent further avers that some of the proposed amendments will introduce new causes of action that are time barred. It is further contended that some matters that are sought to be introduced may be *res-judicata*. Consequently, the Respondent argues that to allow the motion will prejudice its interest.

Analysis

4. The law on amendment of pleadings is now fairly well settled. Whilst the court ought to freely allow requests to amend pleadings, such requests may be declined if they: seek to introduce a new and inconsistent cause of action; will infringe on an accrued right or defense such as the defense on limitation of actions; and will occasion injustice to the adverse party which cannot be compensated by an award of costs (*Trustland Developers Limited v Kenya Agricultural Research Institute & 3 others* [2022] eKLR, *Kassam v Bank of Baroda (Kenya) Ltd* [2002] eKLR and *Inter Tropical Timber Trading Limited v Kenya Power And Lighting Company Ltd* [2021] eKLR).



5. It is true that when determining an application to amend pleadings one of the issues that the court ought to consider is whether the application has been presented within reasonable timelines. Whilst it is important to apply for amendments without unreasonable delay, the reality of the matter is that litigants are entitled to apply for amendment of pleadings at any time including at the stage of appeal (*Peter Odede Okwombo v South Nyanza Sugar Company* [2021] eKLR).
6. The record shows that this case was instituted on 17th September 2019. The application to amend the Statement of Claim was filed in April 2023 more than three years down the line. It is therefore correct as the Respondent contends that the application has been presented after the lapse of a considerable amount of time.
7. It would have been desirable for the Claimant to account for this delay in presenting the motion. However, this alone cannot be the reason to decline the request to amend unless the Respondent is able to demonstrate that to allow the application will occasion it prejudice that is incapable of reparation through an order for costs in its favour (*Peter Odede Okwombo v South Nyanza Sugar Company* [2021] eKLR).
8. The Respondent has not demonstrated that whatever inconvenience that will flow from an order permitting the proposed amendment cannot be redressed by an award of costs in its favour. In the premises, I decline to dismiss the request to amend the Statement of Claim on the ground of delay in presenting the motion to amend.
9. The next question to consider is whether the proposed amendment seeks to introduce a new and inconsistent cause of action. I have studied the original Statement of Claim against the proposed amendments. I note that some of the proposed amendments only seek to clarify matters which had already been pleaded in the original Statement of Claim. Thus, they do not amount to introduction of new causes of action. However, there are proposals which may amount to introduction of a new cause of action.
10. To be specific, under paragraph 11 in the proposed amendment, the Claimant proposes to introduce a claim for violation of the right to access to justice. This is then followed with a specific prayer for damages for violation of the Claimant's constitutional rights.
11. On the face of it, this proposal may appear as an attempt to introduce a new cause of action. However, it is not. At paragraph 6 of the original Statement of Claim, the Claimant had already alluded to the alleged violation of her constitutional rights. Therefore, reference to the specific right of access to justice under the proposed amendment to paragraph 11 is really an elaboration of what had been pleaded earlier. The request to amend paragraph 11 of the original Statement of Claim is therefore allowed in terms of the proposed amendment.
12. There is however the proposed addition of paragraph 13A which appears to introduce a house allowance claim. In the original Statement of Claim, there was no claim for unpaid house allowance. Therefore, to allow this proposed amendment will in effect be permitting the Claimant to introduce an entirely new cause of action which is already time barred in terms of section 90 of the *Employment Act*. As a result, the request to include a claim for house allowance is declined.
13. The amendments proposed under paragraphs 5A, 5B and 5 C in the draft Amended Statement of Claim do not introduce a new cause of action. They allude to alleged underpayments to the Claimant. This matter had already been alluded to at paragraph 15 (ii) in the original Statement of Claim. Therefore, the details appearing in the proposed paragraphs 5A, 5B and 5C of the proposed amendment are mere elaborations of the plea in paragraph 15 (ii) in the original Statement of Claim. Consequently, these specific amendments are allowed.



14. I do not see the proposed amendments set out in paragraphs 1, 3, 4, 4A, 5, 6A, 6B, 6C, 6D and 6E of the draft Amended Statement of Claim as introducing new causes of action. In particular, the matters that are alluded to under the proposed paragraphs 6A to 6E in the draft are alluded to in paragraph 6 of the original Statement of Claim. The proposed new paragraphs are a mere elaboration of the original paragraph 6. Therefore, the aforesaid changes are allowed.
15. The amendments at the proposed paragraphs 7A, 7B, 7C and 7D of the draft are an elaboration of paragraph 7 in the original Statement of Claim. They seek to give the specifics of the claim for unfair termination of the Claimant's contract that is alluded to in paragraph 7 in the original Statement of Claim. Therefore, these paragraphs do not introduce a new cause of action. The proposed changes in this respect are permitted.
16. In similar manner, the proposed additions through paragraphs 11A, 11B and 11C of the draft do not introduce a new cause of action. They are mere details to supplement averments in the original Statement of Claim.
17. The Respondent has asserted that the claim for violation of Claimant's constitutional rights is res-judicata. However, this matter was not raised in the replying affidavit in response to the Claimant's application under consideration. The Respondent has only raised the matter in its final submissions on the application.
18. In my view, this is a matter that ought to be addressed through a formal application to strike out the claim. This is particularly in view of the fact that the Respondent did not raise the issue in its replying affidavit in response to the application to amend the Statement of Claim. The Claimant is entitled to a chance to respond to the assertion after it is properly raised through a formal application.
19. The Respondent has also taken issue with some paragraphs in the proposed amended Statement of Claim as being blank. I note from the application on record that the Claimant filed an initial draft of the proposed amended Statement of Claim that had gaps. However, after service of the Replying Affidavit, the Claimant filed a further affidavit introducing a draft that is complete.
20. The document that the Respondent alludes to in the Replying Affidavit had the gaps that are mentioned. However, this anomaly was subsequently addressed through the fresh filing aforesaid.

Determination

21. The upshot is that save for amendment that proposes to introduce the claim for house allowance, the application to amend the Statement of Claim is allowed.
22. Accordingly, all paragraphs alluding to the element of house allowance in the proposed amendment are to be expunged before the Amended Statement of Claim is filed and served.
23. The Amended Statement of Claim to be filed and served within 10 days of this order.
24. The Respondent is granted 10 days from the date of service of the Amended Statement of Claim to file and serve its Amended Statement of Reply.
25. Costs of the application are granted to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 2ND DAY OF NOVEMBER, 2023.

B. O. M. MANANI

JUDGE



In the presence of:

..... for the Applicant

.....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

