



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 60 OF 2018

GIBSON IKUMU MUNANGA.....CLAIMANT

VERSUS

TEACHERS' SERVICE COMMISSION.....1ST DEFENDANT

RAPHAEL TARUS.....2ND DEFENDANT

RULING

1. The Applicant/ Claimant by an application dated 6th October 2021 brought under Section 3 and 3 A of the Civil Procedure Act laws of Kenya and any other enabling provisions seeks the following orders:-

- a. That this application be certified as urgent and be heard on priority basis
- b. That the applicant be granted leave to further amend his plaint
- c. Costs hereof be in the cause.

2. The Application is supported by the affidavit of the Claimant sworn on the 6th October 2021 which simply states that he was in receipt of a letter dated 4th June 2021 dismissing him from service, that he proposes to amend his plaint to reflect the current position and states the Respondent shall not be prejudiced. The Applicant annexes the said letter and the draft further amended plaint.

3. The Respondent filed grounds of opposition to the application dated 23rd November 2021 as follows:-

- a. The grounds upon which the application is premised on are frivolous, lack merit and are misleading to this Honourable Court
- b. The claimant had fully testified and closed his case on the 27th March 2019 hence the proposed amendment greatly offends the rules of procedure as the application seeks to reopen the case allowing the application entails setting aside the proceedings held to date which said proceedings are lawful and there is no reason for nullifying them.
- c. The proposed amendment seeks to alter fundamentally the case pleaded by the parties when the trial began, the case now pleaded is different from the case first pleaded in the lower court and introduces totally new claim.
- d. The application is incompetent, misconceived, bad in law and amounts to an abuse of the court process filed as an afterthought.

4. The application is canvassed by way of written submissions. The Applicant's submissions are dated 3rd December 2021 drawn and filed by Shikule and Co. Advocates. The Respondent's submissions are dated 14th December 2021 drawn and filed by Sylvia Ngere Advocate.

5. Prayer number 1 is spent.

Determination.

6. The law.

Order 8 Rule 3(1) of the Civil Procedure Rules provides as follows:-

‘ (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.

(5) An amendment may be allowed under subrule (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.’

[Order 8, rule 5.] General power to amend. ‘5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.’

7. The Applicant submits that the law as outlined above answers grounds of opposition 2 and 3 as raised by the Respondent. That it is the interdiction of the Applicant that was the subject of this suit that has resulted to the dismissal of the Applicant and therefore the amendment sought falls squarely under the provisions of Order 8 Rule 5 of the Civil Procedure Rules. That the Respondent proceeded to dismiss the Applicant while the proceedings were ongoing and the dismissal was based on the interdiction of the Applicant by the Respondent which interdiction is the subject of this claim. To buttress his point the Applicant relies on the decision in *Eastern Bakery v Castileno (1958) EA 461* where the court stated ‘ the general rule on this subject is that amendments to pleadings should be freely allowed if they can be made without injustice to the other party if they can be compensated by costs.’ The Claimant further relies on the decision in *Sumarian v Johan (1962)EA 336 (K)* where the court approved amendment of a plaint which raised new causes of a different character from or foreign to or inconsistent with the original cause of action if stemmed from the same transaction. The Claimant further relies on the case of *Ochieng and Others v First Bank of Chicago Civil Appeal no. 147 of 1991* where the Court of Appeal set out the principles under which the courts may grant leave to amend pleadings as follows:-

- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case.
- b. The amendments should be timeously applied for
- c. Power to amend should be exercised by the court at any stage of the proceedings
- d. That as a general rule however late the amendments sought to be made should be allowed if made in good faith provided costs can compensate the other side.
- e. The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of court to still allow the amendment.’

The Applicant submits that all the above authorities were cited with approval in *HCC No. 7 of 2017 at Kajiado in St Patricks Hill Ltd v Bank of Africa (2018)e KLR*.

8. The Applicant submits that the Claimant testified but had not closed his case as from the record he had two witnesses to call. That the contention by the Respondent that he has closed his case is not true. The court looked into the record. On the 27th March 2019 the Claimant testified and was cross examined before Justice Nderi Nduma. It is recorded that that the case was adjourned after testimony of the Claimant and for hearing of CW2 and CW3 and defence. The court finds the Claimant’s case has not been closed.

9. The Applicant submits that the application for amendment is not frivolous and or abuse of court process and also not afterthought as the application was made immediately after the Applicant received his dismissal letter dated 4th June 2021 and relies on the definition of abuse under the Black Law Dictionary to wit, ‘everything which contrary to good order established by usage that is a complete departure from reasonable use an abuse when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to natural legal rules for its use.’.

10. The court finds the instant application does not fit to be described as an abuse of court process as defined above.

11. The Respondent in its submissions purports to respond to the proposed amendments under paragraph 9(b)(c)(d) of the draft amendments. The court finds that the submissions are not pleadings and such response should be brought to court by way of affidavit. The Respondent also submits that it has a constitutional mandate to exercise disciplinary control over its employees. The court agrees and further notes that the court has jurisdiction to evaluate the said process of dismissal as to whether it was fair. That can only be done if the amendments sought are allowed to enable the court determine in a conclusive manner the entire dispute on the termination of the employment of the Claimant.

12. The Respondent submits that the proposed amendments do not disclose any new cause of action and urges court to be guided by principles in Court of Appeal decision of *James Ochieng Oduol T/A Ochieng Oduol & Company Advocates v Richard Kuloba(2008)eKLR*. In that case the court noted that the leave to amend was filed after defence of no cause of action lied in the claim and that the facts introduced in the claim were not new. That the Claimant in that case was aware of those facts sought to be brought in by amendment but failed to plead

them. The court finds that the instant case is different as the letter of dismissal is dated 4th June 2021 while the claim is dated 11th March 2019. There are new facts in relation to the dismissal which was a new development in the dispute arising after the filing of the claim.

13. The Respondent has not disclosed any prejudice it may suffer which cannot be compensated by costs if the leave sought to amend the claim is granted as was held in the case cited by the Respondent of *John Mulwa Kang'aatu v Pan African Insurance Co. Ltd (2015)eKLR*. The status of the Claimant changed to ex employee on dismissal while the interdiction case was ongoing. The interdiction and dismissal are interrelated. That is a valid ground to seek amendment of the claim to enable the Claimant access remedies under section 49 of the employment Act if his termination from employment is found to have been wrong or unfair.

14. The law is tilted towards allowing amendments especially if the sought amendments does not seek to defeat defence of limitation of time or cause prejudice to defence which cannot be compensated by costs. That is not the case in the instant application.

In conclusion

15. The court finds merit in the application dated 6th October 2021. The Claimant is granted leave to amend the claim as per the filed draft of further amended plaint dated 6th October 2021 which is deemed as duly filed.

Costs in the cause.

16. The Respondent is granted leave to file amended response in 21 days. The Claimant is at liberty to file any reply to amended response in 7 days. Pretrial directions on 5th April 2022.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 22ND DAY OF FEBRUARY, 2022

J.W. KELI,

JUDGE

IN THE PRESENCE OF:-

COURT ASSISTANT: Brenda Wesonga

Applicant :- In Person. Counsel Absent.

Repondents:- MS Musundi holding brief for Ngere Advocates