



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 206 OF 2017**

**DORCAS WAIRIMU.....CLAIMANT**

**VERSUS**

**EASTERN PRODUCE KENYA**

**LIMITED (SIRET ESTATE).....RESPONDENT/APPLICANT**

**RULING**

1. Before Court is the Respondent's application dated 28<sup>th</sup> April, 2021 and filed on even date, seeking leave to amend its Memorandum of Defence dated 28<sup>th</sup> July, 2017 and filed in court on 2<sup>nd</sup> August, 2017.
2. The application is expressed to be brought pursuant to Section 12(3) of the Employment and Labour Relations Act, Rule 14(6) and 17 of the Employment and Labour Relations Court (Procedure) Rules, Order 8 Rules 3(1), 5(1) and 7(1) of the Civil Procedure Rules.
3. The basis of the application is that the defence as drawn refers to the Respondent's action against members of the Kenya Plantation & Agricultural Workers union who took part in an illegal strike on the 6<sup>th</sup> and 7<sup>th</sup> December, 2017.
4. It is the Respondent's case that there were non-unionized staff who took part in the strike including the Claimant, and thus need leave to refer to this category of staff. It is the Respondent's position that the leave sought will enable it plead all material facts that led to the disciplinary action taken against the Claimant herein.
5. The Respondent avers that the Defence as it currently is, was drawn as if the Claimant was represented by the Union, and hence requires leave to accurately reflect the issues in dispute between the parties and to ensure a proper defence hearing. It is the Respondent's case that the instant application was filed without undue delay and the Claimant will not on a balance suffer undue prejudice.
6. The application is further supported by the affidavit of **Denis Gitaka**, the Legal Manager of the Respondent herein.
7. The application is opposed vide the Claimant's Replying affidavit dated 28<sup>th</sup> July, 2021.
8. The application was canvassed by way of written submissions. Both parties filed their submissions and which have been duly considered.

**Determination**

9. I have considered the application, the grounds on the face of the motion, the supporting affidavit and the replying affidavit in opposition, together with the Parties' submissions. The issue for determination is whether the Respondent is entitled to leave to amend its Statement of Defence.
10. The Respondent filed its statement of Defence on 2<sup>nd</sup> August, 2017. It later sought to transfer the suit to the Employment Court at Kericho premised on there being another suit lodged by the Kenya Plantations and Agricultural Workers Union touching on the Claimant's termination. The motion to transfer was dismissed on 14<sup>th</sup> April, 2021 on the grounds that the Claimant herein is not a member of the Kenya Plantations and Agricultural Workers Union.
11. The Respondent/Applicant states that the instant application is premised on the decision of 14<sup>th</sup> April, 2021, wherein the court determined that the Claimant is not a member of the Union and could therefore not be represented by the union, and hence the need to amend the Statement of Defence to refer to the Claimant as a non-member of the union.

12. Order 8 Rule 3(1) of the Civil Procedure Rules, provides as follows in regard to amendment of pleadings:

***“....., 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.”***

13. The above provision allows the court discretion to allow a party to amend its pleadings at any stage of the proceedings subject to costs. In the case of ***Central Kenya Ltd v Trust Bank Ltd & 5 Others (2000) eKLR*** the court stated:

***“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them, the opposite side will be prejudiced or suffer injustice which cannot properly be compensated for in costs.”***

14. The questions for this Court then become whether the Respondent’s intended amendments will facilitate a just determination of this suit, and whether the Claimant will be prejudiced beyond monetary compensation if the application is allowed. The Claimant has told this court that she will suffer injustice should this application be allowed. She has not however, demonstrated the nature of the injustice, and more importantly, that the injustice is beyond monetary compensation. In the case of ***Patel v. Joshi (1952) 19 E.A.C.A 42***, the court held that applications for leave to amend even if necessitated by negligence or carelessness, will be granted so as to enable the right question to go to trial, unless the party applying was acting *mala fide* or by his blunder, had done some injury that could not be compensated by costs.

15. The Respondent/Applicant submitted that the amendments are intended to conclusively determine the issue of termination of the Claimant herein. Further, nothing shows that the instant application was made in bad faith or merely to delay the cause.

16. To facilitate the just determination of the dispute between the parties herein, the application for leave to amend is hereby granted as prayed.

17. Accordingly, I find the application for leave to amend merited and is hereby allowed.

18. The Respondent/Applicant is further directed to file its amended Statement of Response within 7 days of this ruling.

19. The costs of the application shall abide the cause.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Mr. Kirwa present for the Claimant/Respondent

Ms. Onyango present for the Respondent/Applicant

Christine Omollo – C/A