



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 544 of 2017**

**THOMAS NYAKUNDI & 22 OTHERS.....CLAIMANTS/RESPONDENTS**

**VERSUS**

**KENYATTA UNIVERSITY.....RESPONDENT/APPLICANT**

**RULING**

1. By way of an Application dated 30<sup>th</sup> November, 2021, and which is supported by the Affidavit of Prof. Paul Okemo, the Respondent/Applicant seeks leave to amend its Statement of Response in order to plead its case more accurately and completely.
2. The Applicant seeks to bring the Application pursuant to Articles 50 and 159 of the Constitution, Rule 14(6) of the Employment and Labour Relations Court Procedure Rules (2016), the inherent jurisdiction of the Court and all enabling provisions of the law.
3. The main grounds upon which the Application is premised is that the proposed amendments are necessary in order to set out the Respondent's defence clearly and with completeness and to enable the Court determine the suit on the basis of the facts as they are and not on the basis of the presumed facts. The Applicant further states that the Claimants will not be prejudiced if the Application is allowed as they can be compensated by way of costs.
4. The Claimants opposed the Application through the Replying Affidavit of Thomas Nyakundi Masioka, who is the 1<sup>st</sup> Claimant. Mr. Nyakundi averred that the Application has been brought in bad faith and termed the same as a delaying tactic and which if allowed, will occasion prejudice to the Claimants. That the Applicant had previously been granted leave on 9<sup>th</sup> February, 2021, to file its documents but had failed to do so. He asked the Court to dismiss the Application with costs.

**Submissions**

5. The Application was disposed off by way of written submissions. On its part, the Applicant submitted that the amendment will enable the Court adjudicate on the real issues in controversy. On this score, it cited the **Halsbury's Laws of England, 4<sup>th</sup> Edition (re issue) Vol. 36 (1) at Paragraph 76**. It further submitted that Rule 14(6) of this Court's Rules grants the Court free reign to allow amendments. To buttress this position, several authorities were cited including **Eastern Bakery vs Castelino (1958) EA 461** and **Central Kenya Ltd vs Trust Bank & 4 others Civil Appeal No. 222 of 1998**. The Applicant further urged that the Court has power to allow amendments at any stage of the proceedings before delivery of Judgement. The case of **Gladys N. Muchena vs Agakhan Education Services Kenya (2010) eKLR** was cited to support this position.
6. The Claimant on the other hand submitted that the Application is malafide and had been brought after an unreasonable delay of 4 years and which delay was inexcusable. That the proposed amendments do not constitute new facts that were not in the knowledge of the Applicants. The Claimant placed reliance on the case of **Ochieng & others vs First National Bank of Chicago Civil Appeal No. 147 of 1991**, **Mwakio vs Kenya Commercial Bank Ltd (1987) eKLR**, **Daniel Ngetich & another vs K-Rep Bank Limited (2013) eKLR** and **Kassam vs Bank of Baroda (Kenya) Ltd (2002) eKLR**.

**Analysis and determination**

7. Evidently, the main issue for determination is whether the Application is merited. Rule 14 (6) of this Court's Rules allows for amendments to pleadings before the close of pleadings and where pleadings have closed, a party may amend the same subject to the Court's leave and corresponding leave to the other party to amend its pleadings as well.
8. The law governing amendment of pleadings is now settled and can be drawn from the principles established by the Court of Appeal in the case of **Joseph Ochieng & 2 others Trading as Aquiline Agencies vs First National Bank of Chicago [1995] eKLR**, 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 can be exercised by the Court at any stage of the proceedings; and*
- d) that as a general rule however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.*

9. The above principles are not exhaustive as the Court is given a wide discretion in deciding whether or not to grant leave to amend.

10. The Applicant has submitted that the amendment will enable the Court adjudicate the real issues in controversy between the parties.

11. The issue in dispute herein relates to unfair termination. The Claimants have sought several reliefs ranging from compensation for unfair termination, unpaid house allowance, unpaid public holidays and rest days, service gratuity and notice pay. The respondent averred in its defence that the claimants were not its employees and that they were employed on a monthly basis.

12. I have perused the proposed amended Statement of Response and note that the same sets out in an extensive the nature of employment relationship between the parties, from the Applicant’s perspective. It is evident from the look of the pleadings on record, that at the heart of the dispute, is the nature of the employment relationship between the parties.

13. I find the proposed amendments as being relevant to the determination of the core issues in dispute, hence if granted, will allow the Court determine the true substantive merits of the case.

14. The claimants have contended that allowing the Application will be prejudicial to them. This argument must be considered from the angles of justice and hardship to both sides, were the Court to deny or allow the Application.

15. If the Application is denied, the Applicant stands to suffer prejudice as it will loose the opportunity to advance its case from its factual perspective. On the other hand, if the Application is allowed and the Applicant granted leave to amend, the Claimant has corresponding leave by way of right under the Court’s Rules, to respond to the amended Statement of Response. In the circumstances, it is apparent that the Applicant will be more prejudiced if the Application is denied.

16. Over and above, amendments are permissible at any stage of the proceedings before the final judgement is delivered and, in this case, I note that the hearing is yet to take off, hence the Application has been made within the timeframe allowed by law.

17. In view of the foregoing, I will allow the Application in the following terms:-

- a) The Respondent/Applicant is granted leave to amend its Statement of Response.**
- b) The amended Statement of Response to be filed and served upon the Claimants within 7 days from the date of this Ruling.**
- c) The Claimants are granted corresponding leave to amend, file and serve their reply to the amended Statement of Response within 14 days from the date of service with the amended Statement of Response.**
- d) The costs of the Application shall abide the outcome of the main suit**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

**FOR THE APPLICANT/RESPONDENT MS. NJAGI**

**FOR THE RESPONDENT/CLAIMANT MR. THUO**

**COURT ASSISTANT BARILLE SORA**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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 Civil 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.

**STELLA RUTTO**

**JUDGE**