



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 60 OF 2020

(Before Hon. Justice Dr. Jacob Gakeri)

KATHERINE AMA MUSEE.....CLAIMANT

VERSUS

INTERNATIONAL SCHOOL OF KENYA LIMITED.....RESPONDENT

RULING

1. By a notice of motion application dated 22nd June 2021, the Claimant/Applicant filed the instant application for orders:

(i) THAT the Honourable Court be pleased to grant the Claimant leave to amend the Statement of Claim.

(ii) THAT the annexed draft of the Amended Statement of Claim be deemed as duly filed upon payment of the requisite fees.

(iii) THAT pursuant to the foregoing, the Claimant be granted leave to file a supplementary/replacement witness statements and any necessary additional document within such time as the court may allow.

(iv) THAT costs of this Application be in the cause.

2. The application is expressed under Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules 2016, Article 159 of the Constitution of Kenya (2010) and all other enabling provisions of the law and grounded on the affidavit of the Claimant and grounds that: -

a) THAT it is necessary to amend the Statement of Claim to correctly address the issue in dispute of discriminatory disparity of Salary and Benefit between the Foreign Nationals Teachers and the Kenyan Nationals Locally Hired Teachers.

b) THAT an amendment to the Statement of Claim is also necessary to include a claim for Statutory House Allowance which was not provided to the Claimant by the Respondent, notwithstanding benefit to the foreign national teachers.

c) THAT the claim for Statutory House Allowance is not only a benefit provided for in law, but the same is also premised on the Respondent's unlawful and unequal treatment between the Kenyan National Locally hired teachers and Foreign National teachers.

d) THAT for the purpose of determining all questions in controversy between the parties herein, this application for leave to amend the Statement of Claim is necessary.

e) THAT the present application has been filed on bonafide grounds and no prejudice will be caused to the Respondent's rights if the application is allowed.

f) THAT if this application is not allowed, the Claimant will be occasioned substantial loss and hardship thereby suffering grave injustice.

g) THAT it is in the interests of justice to have this Application allowed.

3. The deponent of the affidavit dated 22nd June 2021 depones that –

i) THAT she was an employee of the Respondent from the year 1996 to the year 2019 when she retired.

ii) THAT the dispute in the main suit herein arises from unlawful discriminatory treatment by the Respondent between two categories of the Respondent's staff namely the foreign national teachers and the Kenyan National Teachers.

iii) THAT the prayers sought are declaratory and compensatory in nature and include the difference between the salary paid by the Respondent and the salary the Respondent ought to have paid but the alleged discriminatory treatment hence the need to

amend the Statement of Claim.

iv) THAT it is necessary to amend the Statement of Claim to include a prayer for House Allowance not paid.

v) THAT the Respondent stands to suffer no prejudice and may seek leave to amend the Memorandum of Reply.

4. On 16th December 2021, when the application came up for hearing, Counsel for the Respondent stated that his client was opposed to the application and had filed grounds of opposition and proposed that the application be disposed of by way of written submissions and it was so agreed.

5. Both parties had filed submissions by 7th February 2022 as confirmed during the mention to confirm compliance.

Claimant/Applicant's Submissions

6. The Claimant isolates one issue for determination namely whether or not the Court should exercise its discretion to grant the Claimant leave to amend. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 is relied upon to urge that a party may amend its pleadings without leave, at any time before close of pleadings and with leave of the Court after close of pleadings as is the case in the instant application. It is submitted that the Court has the necessary discretion and should exercise it in the interests of justice.

7. That the Respondent has only objected to the amendment relating to house allowance thus the application is unopposed in relation to other proposed amendments.

8. It is submitted that it is settled law that amendment of pleadings before hearing should be freely allowed if it does not prejudice the other party to the suit and the law gives such party leave to amend its reply and costs may also come in hardy.

9. That the Respondent's contention that the amendment proposes to introduce statute barred actions is not supported by material evidence. Moreover, the Respondent is free to amend its reply and invoke the provisions of limitation of actions.

10. The decision in **Bosire Ogero v Royal Media Services [2015] eKLR** is cited to demonstrate the circumstances in which a Court may grant leave to a party to amend pleadings.

11. It is further contended that granting of leave to amend is not tantamount to granting the claim. The decision in **Delphis Bank Limited (Under Statutory Management) v Flystar Limited [2016] eKLR** is relied upon to buttress the submission that leave to amend is not a validation of the claim nor is the Court ruling out any defence the Defendant/Respondent may have.

12. It is further submitted that leave should be granted so as to meet the ends of justice. The Court of Appeal decisions in **Harrison C. Kariuki v Blue Shield Insurance Co. Ltd. [2006] eKLR** and **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR** are relied upon to reinforce the submission. It is urged that the Respondent has not demonstrated that granting of leave to amend will occasions injustice on its part.

13. In addition, no evidence has been led to show that the amendment will introduce statute barred claims. That the statute of limitation denies the party remedies but does not extinguish the claim.

14. It is also submitted that the house allowance claimed was not provided in the contract of employment nor paid as part of terminal dues yet foreign hired teachers had a house allowance. That if leave to amend is granted, the Respondent is entitled to amend its memorandum of reply and raise the defence of limitation as it wishes.

15. Finally, it is the Claimant's case that the proposed amendment will enable the Claimant present her case in consonance with the constitutional requirements germane to fair hearing as envisioned by the Constitution of Kenya 2010. The decision in **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** is relied upon in support of the submission.

Respondent's Submissions

16. The Respondent identifies two issues for determination, namely whether:

a) The amendments sought to be made by the Claimant consists of claims that are outside the limitation period under the provisions of the Employment Act.

b) The Court has jurisdiction to allow such amendments of claims that are statute barred.

17. On the first issue, the Respondent posits that the suit herein was filed in 2020 and the proposed amendments accrued in 2014 and the Claimant is claiming Kshs.9,833,277/- arising from alleged discrimination from 2014 to 2019, hence the proposed amendments are outside the limitation period under Section 90 of the Employment Act. Emphasis is laid on the words “*next after the act neglect or default complained ...*” in Section 90 of the Act. Reliance is made on the decision in **Margaret Wanjiku Kimani v Kenya Deposit Insurance Corporation [2021] eKLR** and **Kassam v Bank of Baroda [2002] eKLR** to emphasise that amendments intended to defeat the defence of limitation of time should not be allowed.

18. Similarly, the decision in **G4S Security Services (K) Limited v Joseph Kamau & 408 others [2018] eKLR** is relied upon to highlight the applicability of the proviso on “*continuing injury*” under Section 90 of the Employment Act.

19. It is the Respondent’s submission that the application before the Court is an abuse of Court process having been made after a considerable delay. Reliance is made on the decision in **Kenya Wine Agencies v Yobesh Amoro [2018] eKLR** to underline the issue of delay.

20. It is urged that the Claimant has not demonstrated any exceptional and peculiar circumstances to warrant the granting of leave to amend as was explained in **Kenneth**

Kariuki Githii v Royal Media Services [2009] eKLR.

21. As regards the jurisdiction of the Court to allow the amendment to include statute barred claims, the Respondent cites the decision in **David Agongo Kugo v Teachers Service Commission [2017] eKLR** to urge that the Court has no jurisdiction to entertain an application to bring on board claims that are time barred under the provisions of the Employment Act.

Analysis and Determination

22. I have carefully considered the application, the affidavit tendered in support, submissions by Counsel as well as the law on amendment of pleadings. The singular issue for determination is whether the Court should exercise its discretion in favour of the Claimant/Applicant and grant leave to amend the statement of claim.

23. Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules 2016 provides 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.

24. This Rule is explicit that the Court has discretion to allow or decline an application for leave to amend pleadings after the close of pleadings whether the application is oral or formally made to the Court.

25. In **St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR**, the Court of Appeal formulated the guiding principles on amendment of 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 can be exercised by the court at any stage of the proceedings;

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;

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 the court to still allow and amendment notwithstanding the expiry of current period of limitation.

26. As submitted by the Claimant/Applicant in **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR**, the Court of Appeal stated as follows:

“... Accordingly, all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment ... does not result in prejudice or injustice to the other party which cannot properly be compensated for in costs ... Neither the length of ... proposed amendments nor mere delay (are) sufficient grounds for declining leave to amend. The overriding consideration (are) whether the amendments (are) necessary for the determination of the suit and whether the delay is likely to prejudice the opposing party compensation in costs.”

27. The Court is in agreement and is bound by these sentiments.

28. On the effect of granting of leave to amend its statement of claim, the Claimant relies on the sentiments of the Court in **Delphis Bank**

Limited (Under Statutory Management) v Flystar Limited (supra) as follows:

“By allowing the defendant to amend the Plaintiff, the court is not validating the claim, nor is the court ruling out any defence which is available to the defendant. Therefore, I hold that by granting leave to the plaintiff to amend the plaintiff, the defendant would not be prejudiced.”

29. Applying the foregoing provisions and propositions of law to the facts of the instant case the Respondent’s main contention is that the proposed amendment seeks to introduce a statute barred claim of house allowance for the period 2014 to 2019. The Claimant/Applicant submits that no material has been produced to show that the claim is statute barred and relatedly, the Respondent will still be free to raise the defence of limitation, should leave to amend be granted.

30. The Respondent has not submitted that the leave to amend will occasion prejudice or injustice on its part or deny it the legitimate defence of time bar.

31. The Court is in agreement with the Respondent’s submission that the limitation is not a mere technicality but a fundamental principle of law that runs to the core of a claim.

32. The Court however takes the view that whether or not the amendment enables the Claimant/Applicant to introduce as statute barred claim is a matter for the trial Court during the hearing and determination of the main suit.

33. The Court is guided by the sentiments of the Court of Appeal in **Central Kenya Ltd v Trust Bank Ltd & 5 others (supra)**.

34. As to whether the Court has jurisdiction to allow the proposed amendments to introduce claims the ae statute barred, it would be injudicious for the Court to decline leave to amend statement of claim at this stage since the question whether the proposed claims are statute barred or not is yet to be determined with finality as a contested issue.

35. Similarly, the claim for house allowance though belatedly sought to be introduced will be one of the claims in the main suit.

36. In **David Agongo Kugo v Teachers Service Commission [2017] eKLR**, the entire suit was statute barred and the Court had no jurisdiction to entertain it and consequently upheld the preliminary objection.

37. The decision is distinguishable from the instant case where the issue is one of leave to amend the statement of claim.

38. Finally, should the Court exercise its discretion in favour of the Claimant/Applicant, the Respondent shall have corresponding right to amend its pleadings as Rule 14(6) of the Employment and Labour Relations Court (Procedure) Rules, 2016 ordain.

39. For the foregoing reasons, the Court is satisfied that the interests of justice will be better served by granting the Claimant/Applicant leave to amend for the suit to proceed to hearing on merits. It is not disputed that the application herein was made bona fide and no material evidence has been furnished to demonstrate that leave will cause prejudice or injustice to the Respondent. The Court is satisfied that on a preponderance of the circumstances, the Claimant/ Applicant’s case outweighs that of the Respondent.

Orders

a) The notice of motion application dated 22nd June 2022 is hereby allowed in terms of prayers no. 1 and 3.

b) The Claimant/Applicant has leave to:

(i) Amend the statement of claim; and

(ii) File supplementary/replacement witness statements and other necessary additional documents and serve within 30 days from the date of this ruling and the Respondent has a similar number of days to file response, if any.

c) Parties to take a hearing date of the main suit at the Registry.

d) Costs of the application shall be in the cause.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF MARCH 2022

DR. JACOB GAKERI

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 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.

DR. JACOB GAKERI

JUDGE