



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO. 9 OF 2019

CHRISTONE CHARO MATSESHO.....CLAIMANT/RESPONDENT

VERSUS

DR. CHARLES RICHARD NEWTON.....RESPONDENT/APPLICANT

RULING

1. The application before me is dated 15th February 2022. By it, the Respondent in the claim (hereafter referred to as the Applicant) proposes to amend the statement of defense in order to introduce a counter-claim for Ksh. 665,690/= being the amount he allegedly entrusted the Claimant with during the currency of the employer-employee relationship between the parties but which the Claimant allegedly misappropriated. The application is opposed on principally two grounds: limitation of actions; and unreasonable and unexplained delay in seeking the orders now sought.

2. According to the Applicant, he engaged the Claimant as a manager at the Applicant's farm at Bofa, Kilifi. Because of the nature of his engagement, the Applicant was not always available at the farm. Therefore, he entrusted the Claimant with overseeing the day to day activities at the farm. These activities included: paying bills; paying workers' salaries; and undertaking repairs on and in the building on the farm.

3. Because of these activities, the Applicant says he would from time to time send the Claimant money to run the farm. At the same time, the Applicant states that he granted the Claimant rights of access to the Applicant's bank account by making the Claimant a co-signatory to the account.

4. Over time, the Applicant asserts that he realized that the Claimant was embezzling the funds entrusted to him. That at the time of his termination in August 2014, the Claimant had allegedly misappropriated some Ksh. 665,690/=. That as a matter of fact, it is this unexplained loss of funds by the Claimant that forced the Applicant to summarily terminate him. The termination triggered the suit that is now pending in court.

5. For some reason, when the Applicant filed his defense to the Claimant's action, he omitted to lodge a counter-claim to seek recovery of the funds allegedly misappropriated by the Claimant. By the current application, the Applicant now seeks to address this omission by bringing on board a counter-claim for the amount. The single question that I must address is whether the application is merited having in mind the two pronged objection by the Claimant.

6. The power to order amendment of pleadings is often said to be freely exercisable so long as it does not result in injustice to the adversary that cannot be remedied by an award for costs. Addressing this issue the court in *Institute for Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR* stated as follows: -

“...as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs.”

7. The court went further to observe that amendments are generally permitted if to do so will ensure that the real issues in controversy are brought on board. Further such requests are permitted in order to minimize the possibility of parties filing a multiplicity of suits.

8. Indeed and as pointed out by the Applicant in his submissions, the court will generally allow a motion to amend if it is brought in good faith however late. However, this is not to say that all such applications must be allowed.

9. The court should decline the application if: it is brought after **undue and unexplained delay; it seeks to introduce a completely new or**

inconsistent cause of action; or the effect of the amendment will be to take away a vested interest or accrued legal right to a party to the action.

10. The question in this case is whether the amendment sought meets the general guidelines aforesaid. One of the key rights that may accrue to a party in a court dispute is the defense of limitation. If the effect of an amendment to pleadings will compromise this right, it is generally undesirable to allow it. This is particularly so because once the defense is lost, it cannot be compensated by way of an order for costs. This point is made in *Kenneth Kariuki Githii v Royal Media Services Ltd [2009] eKLR* where the court observed as follows: -

“Amendments that seek to defeat an accrued defense are only allowed in exceptional and peculiar circumstances. There are no exceptional and peculiar circumstances in this case to warrant the granting of leave to amend.”

11. In order to obtain orders for amendments that have the potential of taking away the defense of limitation, the applicant must demonstrate that he has compelling grounds to justify the grant of the orders. He must be able to plead exceptional circumstances that entitle him to the request despite the fact of limitation of actions having caught up with his claim.

12. In law, a counter claim is considered as a standalone suit. Therefore, the law on limitation applies to it in much the same way as an ordinary claim. An application to amend a defense to introduce a counter-claim is considered on the same principles as a request to amend any other pleading.

13. In *Kenya Wine Agencies v Yobesh Amoro [2018] eKLR*, the court expressed itself as follows on the matter: -

“A counterclaim is by definition a suit that can be filed independently and therefore subject to the law of limitation.”

14. Section 90 of the Employment Act provides as follows of limitation of actions: -

“Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

15. In the Court of Appeal case of *G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR*, it is suggested that claims arising from an employment relation (other than those that result in a continuing injury or damage) must be filed within three years of accrual of the cause of action. The court suggested that a cause of action premised on dismissal must be filed within three years of an employee's dismissal.

16. The Applicant states that the money he seeks to recover through the counter-claim was lost in or before 2014. The Claimant was terminated in August 2014. Therefore, causes of action arising from this termination became time barred three years after the Claimant's dismissal: August 2017.

17. The Applicant has not indicated what prevented him from presenting the request for inclusion of the counter claim within the limitation period aforesaid. There is therefore no compelling reason why the request should be entertained this late. In the words of the learned Judge in *Kenya Wine Agencies v Yobesh Amoro [2018] eKLR*, the proposed amendment seeks to introduce a new cause of action that is time barred. It cannot be allowed at this late stage.

18. The Applicant argues that the court should overlook the objection by the Claimant that the proposed amendment seeks to introduce a claim that is time barred. The Applicant's view is that if such objection were to be considered, the court will be going into the merits of the case even before trial. In support of this contention, the Applicant relies on the decision in *Ramco Investment Limited v Nairobi City Water and Sewerage Company Limited (2017) eKLR*.

19. I respectfully hold a contrary view to that expressed in the foregoing decision. In my view, the very essence of attaching to the application to amend the draft document evidencing the proposed amendments is to enable the court determine the merits of the proposed amendments. Where the cause of action giving rise to the proposed amendment is evidently outside the limitation of actions laws, it is in my view improper for the court to turn a blind eye to this.

20. The Applicant's request to amend the defense to introduce a counter claim outside time is further compounded by the fact that he may not even get extension of time to litigate the claim outside time even if he is permitted to bring it on board through the proposed amendment. Consequently, to grant him the orders sought would in the circumstances be a futile exercise (see *Denis Ksang Ripko v Kenya Commercial Bank Limited [2016] eKLR*).

21. Finally, it is the Claimant's position that the application to introduce the counter-claim is presented close to seven years after the alleged cause of action accrued. Yet, no explanation is offered to explain the delay. I have looked at the application and the supporting affidavit. Indeed, the Applicant offers no explanation why it took him up to February 2022 to move the court to amend pleadings filed in 2018. The only time an attempt at this is made is through the Applicant's written submissions on the application.

22. I have considered the Court of Appeal decision in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Ltd (2013) eKLR* in which the court observed that applications to amend can be made at any stage of the proceedings and should generally be permitted if made in good faith. However, I note that the court was at the same time clear that an amendment whose effect will be to take away accrued rights under the law on limitation of actions ought to be declined.

23. The upshot of the foregoing is that the application is unmerited. It is declined. Costs are granted to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 28TH DAY OF APRIL, 2022

B.O. M. MANANI

JUDGE

In the presence of:

No appearance for the Claimant/Respondent

No appearance for the Respondent/Applicant

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 April 2020, this Ruling 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

JUDGE