



**Mwaniki v Kenya Wildlife Service (Cause 792 of 2017)
[2022] KEELRC 1110 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1110 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 792 OF 2017
K OCHARO, J
APRIL 28, 2022**

BETWEEN

ABEDNEGO MUSAVI MWANIKI CLAIMANT

AND

KENYA WILDLIFE SERVICE RESPONDENT

RULING

1. Through its Notice of Motion Application herein, dated 12th October 2021, the Respondent/Applicant sought
 - a. The Respondent be granted leave to further amend the memorandum of reply in the manner shown in blue in the draft annexed hereto.
 - b. Leave be granted to the Respondent to file additional documents by way of a supplementary bundle of documents and witness statement in support of the counterclaim.
 - c. The costs of this Application be provided for.
2. The Application is anchored on the grounds put forth in the face of the Application and the supporting affidavit sworn by the legal officer of the Respondent/Applicant on the 12th October 2021.
3. The Applicant contended that on or about December 2013 the Claimant's wife fell ill and needed medical attention. She was treated at M.P. Shah Hospital Nairobi and thereafter required further treatment in India. The Claimant / Respondent would not afford the costs of treatment as it exceeded the medical cover limit. The Claimant got constrained to approach the Respondent for help to pay his wife's medical bills, and the Respondent agreed to advance him Kshs. 1,194,001.70 to offset the medical bills.
4. The sum of Kshs. 1,194,001.70 was to be recovered from the Claimant's / Applicant's monthly salary, however he left the employment of the Respondent without having refunded the sum.



5. The Respondent wants to recover this money, hence the need for the institution of a counter claim. The Respondent contends that the Claimant won't be prejudiced in any manner, if the orders sought in the application are granted. The Claimant will have an opportunity to respond to and adduce evidence against the counter-claim.
6. The Claimant / Respondent opposes the Application upon the premises brought out in the replying affidavit that was sworn by his Counsel on the 19th November 2021.
7. The Claimant/ Respondent contends that the Application herein lacks merit, as the Applicant has not demonstrated, the reasons for the delay in filing the supplementary bundle of documents together with their pleadings.
8. It is contended further that the intention to introduce the counter-claim long after the matter was certified ready for hearing is an after-thought. The supplementary bundle of documents ought to have been available at the time of filing a reply to the memorandum of claim. All through the Respondent being a Government institution had the documents.
9. The cause of action in relation to the counter-claim arose in the year 2014. The Applicant's claim is therefore time barred.
10. The Notice of Motion Application lacks merit.

The Respondent's / Applicant's Submissions

11. Counsel for the Respondent / Applicant submitted that the only issue for determination in the Application is whether or not the Respondent can be granted leave to further amend the memorandum of reply.
12. Citing the Court of Appeal decision in *Central Kenya Limited vs. Trust Bank Kenya Limited* [2000] eKLR, Counsel submitted that the guiding principle in Applications for amendment of pleadings is that the amendments should be freely allowed and at any stage of the proceedings provided that the amendment will not result in prejudice or injustice to the other party which cannot be properly compensated in costs. Further that the overriding consideration in Applications for leave is whether the amendments are necessary for the determination of the controversy between the parties.
13. Counsel further submitted that the intended cause of action arose from the contract of employment between the Claimant and the Respondent. the intended counter-claim is not intended to being up matters that are extraneous to the contract of employment. The sum intended to be claimed by the Respondent ought to have been fully paid upon cessation of the Claimant's employment but it was not done by him.
14. It was argued that an application for amendment of pleadings can be brought at any stage before Judgment. To buttress this, counsel cited the holding in *Printing Industries Limited & another vs. Bank of Baroda* [2017] eKLR, thus;

“The learned Judge considered that although the suit had been pending for four years the law does not bar a party from applying for an amendment, at any stage before the final decision was rendered, so long as it is done in good faith and if the proposed amendment is substantially related to the pending action, I also considered that both time and finance would be saved by allowing the amendment, and that the Appellants would be compensated by an award of costs for the delay and inconvenience.”



15. Counsel further submitted that the Claimant / Respondent has not demonstrated that he will suffer any prejudice if the orders sought were to be granted. Reliance was put in the holding in *Printing Industries Limited vs. Bank of Baroda* [2017] eKLR, where the Court of Appeal held:

“Although there was obviously some delay before the last amendment was sought, with respect, we agree that the Appellants did not demonstrate the prejudice they would suffer as the amendment was sought in the course of a trial and before Judgment.”

16. Lastly, Counsel submitted that this Court has the discretion to allow the amendments in the interest of justice, so that all the matters in controversy can be placed before court. He sought reliance in the case of *Sammy Nganga Ndungu vs. Kenya Commercial Bank* [2021] eKLR.

The Claimant’s submissions

17. The Claimant did not file any submissions in opposition to the Application. This ruling is without consideration of the same.

Determination

18. I have carefully considered the material placed before me by the parties, and my take on the Respondent’s Application is as hereunder:

a) The Claimant / Respondent opposes a grant of the leave sought for filing of the supplementary bundle of documents, as there is no reason that has been adduced for the failure in filing the same when the reply to the memorandum of claim was being filed. With due respect this argument is in ignorance of the fact that the documents that the Applicant seeks to bring on board, are those that it intends to place reliance on in support of the intended counter-claim. Before the intention to file counter-claim was conceived the documents were unnecessary. Therefore, it was not necessary they be filed at a time when there was no counter-claim.

b) The intended amendment will enable all matters in controversy as between the parties be resolved under one suit, avoiding a multiplicity of suits and consequently saving time and finances.

c) The Claimant / Applicant did not assert that he will suffer a particular prejudice or any at all if the orders sought were to be granted and an amendment effected pursuant thereto. I see none that shall be suffered.

d) The law allows an amendment of pleadings to be done at any time before Judgment. I am not persuaded that there has been demonstrated any reason or circumstances that can constrain me to run away from this rule.

e) The Claimant / Respondent contends that the intended counter-claim is time barred by operation of the law. I am of the view that the matter of limitation of time can only be adequately canvassed in the course of the main hearing as a preliminary objection.

19. By reason of the foregoing premises, I am persuaded that the Application herein has merit and hereby allow the same in the following terms:

a) That the Respondent is granted leave of 14 days to further amend the memorandum of reply to incorporate a counter-claim, and file additional documents by way of a supplementary bundle of documents, and witness statement in support of the counter-claim.



b) The Claimant is allowed corresponding leave to file any further documents and/or witness statements, if need be, within 14 days of service of the Respondent's documents mentioned in [a] above.

c) Costs of the Application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
NAIROBI THIS 28TH DAY OF APRIL, 2022.**

OCHARO KEBIRA

JUDGE

Delivered in presence of:

Mr. Mwenzi for the Claimant.

Mr. Ochieng' for the Respondent.

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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

