



**Kithunzi v Formax Insurance Brokers Limited (Cause 201 of 2016)
[2022] KEELRC 1546 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1546 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 201 OF 2016
MN NDUMA, J
JUNE 30, 2022**

BETWEEN

THOMAS MUTUNGA KITHUNZI CLAIMANT

AND

FORMAX INSURANCE BROKERS LIMITED RESPONDENT

RULING

1. In the notice of motion application dated 19th July, 2021 the applicant prays for orders: -
 - (1) Spent
 - (2) That this Honourable Court be pleased to grant an urgent hearing date for this application.
 - (3) That this Honourable Court be pleased to grant leave to the claimant to amend his Memorandum of Claim in terms of the Draft Amended Memorandum of Claim annexed hereto and marked "TMK - 1"
 - (4) That this Honourable Court be pleased to give directions as to the filing and service of the said Amended Memorandum of Claim.
 - (5) That costs of this application be provided for.
2. The application is premised on grounds set out in paragraphs 1 to 7 of the Notice of Motion the nub of which is that there is a Draft Amended Memorandum of Claim attached to the application and the amendments sought are necessary for determination of the real questions in controversy in the dispute.
3. That the respondent shall suffer no prejudice if the amendments are allowed.
4. The application is buttressed by a supporting affidavit of the applicant sworn to on 21st July, 2021.



5. The changes sought in the Draft Amended Memorandum of Claim include the address of service of the claimant.
6. Typographical errors are also deleted and a new paragraph 6 introduced which reads as follows: -
 6. The claimant avers that on 4th February, 2013, the Respondent allowed the claimant to proceed on annual leave with effect from 11th February, 2013 however upon Claimant informing the Respondent that he was running for elective office and that he wanted to be allowed to proceed on his annual leave pending the election exercise on 4th March, 2013 the Respondent cancelled the Claimant's leave and told him to either resign or be sacked but the claimant stayed put and refused to resign.
7. The claimant also introduces particulars of malice, bad faith and breach of statutory duty by the respondent, set out under paragraph 10 in the Draft Amended Memorandum of Claim as follows: -
 - (a) Creating false and pretentious reasons in order to legitimize the termination of the Claimant's employment.
 - (b) Terminating the claimant's employment yet there had been no formal complaint or any other formal record of dissatisfaction with the claimant's performance.
 - (c) Terminating the claimant's employment without a hearing by the Board of Directors as required.
 - (d) Terminating the Claimant's employment in blatant breach of statutory and implied own disciplinary procedures which governed the claimant's contractual relationship with the Respondent.
 - (e) Failure to give the claimant an opportunity to defend himself.
 - (f) Failure to pay the Claimant the salaries, allowances and benefits due to him up to date of his dismissal.
 - (g) Failing to accord the Claimant an opportunity and facilities to defend himself.
8. The claimant deletes particulars of damages under previous paragraph 9 and replaces that with particulars of claim under a new paragraph 12 and finally, the applicant deletes the remedies earlier sought in paragraphs (a) to (f) and replaces the remedies in new paragraphs (a) to (f) as follows: -
 - (a) A declaration that the termination of the Claimant's employment was in breach of the Claimant's contract of employment.
 - (b) A declaration that the termination of the Claimant's employment was in violation of Sections 41, 45 and 46(a) of the [Employment Act](#), 2007 and was therefore unlawful and unfair.
 - (c) An Order that the Respondent do immediately pay the Claimant his entitlements in the sum of Kshs 10,673,825/= as particularized in paragraphs 12 hereinabove.
 - (d) Punitive and exemplary damages for unlawful termination.
 - (e) Costs of this suit.
 - (f) Interest on the amount to be awarded at Court rates.



Replying Affidavit

9. The respondent filed a replying affidavit sworn to on 4th October, 2021 by one Asad Malik, the General Manager of the respondent who states that upon a cursory look of the proposed amendments, the claimant is raising new causes of action in form of particulars of malice, bad faith and breach of statutory duty by the respondents.
10. Further, the particulars of loss and damage are mischievously being replaced with a new allegation of medical cover benefits for 14 years (Kshs 1,400,000) and loss of company's National Social Security Fund contributions for 14 years and 2 months in the sum of Kshs 34,000. That also new proposed Amended Clause 12 raises new causes of action as follows: -
 - (a) Unpaid house allowance from 1st March, 2007 to 13th December, 2013 – Kshs 559,125.
 - (b) 12 months compensation under Section 49(1) (c) Kshs 637,200. The lost earnings for 14 years and 2 months in the sum of Kshs 9,477,500 had already been pleaded in the original memorandum of claim and therefore it is not a new claim.
11. That total claim under this new proposed cause is Kshs 10,673,825 as opposed to 10,911,500 as previously prayed.
12. That this claim arose on 13th February, 2013 when the employment of claimant was terminated and any new claims being introduced after expiry of 3 years from this date are time barred by dint of Section 90 of the *Employment Act*, 2007.
13. That the Court be pleased to dismiss the application with costs.
14. The claimant filed further affidavit in which he joins issue with the respondent on matters raised in the replying affidavit and reiterates her application and grounds in support of it stating that no new cause of action is being raised in the amendments.
15. The parties filed written submissions and list of authorities which the Court has considered together with the depositions and determines the application as set out below: -
16. It is without hesitation that Court finds firstly that the application for amendment brought more than five (5) years from the date the suit was filed is visited with inordinate delay which delay is prejudicial to the respondent.
17. Secondly, the Court is satisfied that the proposed amendments looked at specifically and collectively amount to bringing a new cause of action outside the limitation period of 3 years provided under Section 90 of the *Employment Act*, 2007, the cause of action having arisen on 13th February, 2013, when the employment of the claimant was terminated by the respondent.
18. The initial cause of action was filed on 12th February, 2016, one day to the expiry of three (3) years limitation period and in the Court's view set out adequately, the cause of action by the claimant against the respondent and the amendments sought are time barred and wholly underserved on a proper consideration of the matter.
19. Accordingly, the application is dismissed with costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 30TH DAY OF JUNE, 2022.

MATHEWS N. NDUMA

JUDGE



Appearance

Mr. Kipng'eno for the claimant

Ali & Company for the Respondent

Ekale – Court Assistant

