



**Makau v I & M Bank Limited (Cause E575 of 2020)  
[2022] KEELRC 1179 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1179 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E575 OF 2020  
NZIOKI WA MAKAU, J  
JULY 12, 2022**

**BETWEEN**

**ELIAS MAUNDU MAKAU ..... CLAIMANT**

**AND**

**I & M BANK LIMITED ..... RESPONDENT**

**RULING**

1. The Respondent/Applicant's Notice of Motion Application seeks to be heard for orders that it be granted leave to file further amended pleadings and additional documents out of time and the same be deemed to be properly filed upon payment of the requisite court filing fees. Furthermore, that this Honourable Court be pleased to give further directions on the hearing of the main suit upon granting the Claimant corresponding leave to file a response to the amendments, and that the costs of the application be in the cause.
2. The Application is premised on the grounds that a major component of the Applicant/Respondent's Counter-Claim was not pleaded and it is important that the Court deals with it conclusively. That is that when the Claimant resigned from employment, he offered to serve his notice period and not pay the employer (Respondent) in lieu of such notice but since he disappeared and failed to work during the said notice period, he did not serve notice. That the Respondent/Applicant did not know the Claimant's whereabouts as he did not respond to emails nor pick calls from his colleagues and supervisors. That since the Claimant simply took off after submitting his resignation letter, the Respondent/Applicant is entitled to claim for payment in lieu of notice as his resignation was with immediate effect. It is the Applicant's assertion that the aforementioned facts emerged after the period for filing of responses had lapsed and thus necessitated the filing of the Application herein. That it is only fair and proper that the Respondent/Applicant be granted leave to lay bare its response and case against the Claimant who has also laid bare what he considers his full claim.



3. The Applicant states that the Claimant will not suffer any prejudice when the leave to amend is granted since he will have an opportunity to respond to all issues before this Court determines them conclusively. That the Applicant on the other hand would suffer prejudice if leave is not granted and the proposed amendments not included in the case. That this application has been made timeously upon realization that the real questions in dispute will not be before the Court for complete determination without the proposed amendments. Furthermore, the main dispute is yet to be settled down for hearing and this Court has the power to allow the amendment at any stage of the case.
4. The Application is supported by the Affidavit of Mr. John Nyamaiko who avers that the facts about the Claimant's resignation without notice emerged when it became clear that he had not worked from 2<sup>nd</sup> February 2020 despite having offered to serve notice. That collection of the additional documents took longer than expected as some of the handlers had been working from home due to the COVID-19 protocols and that it was a challenge tracing all the requisite documents within the timelines allowed for filing of responses. That some custodians of the additional documents had also fallen sick owing to the pandemic and the Respondent/Applicant could thus not confirm whether the Claimant had served his notice period. He further avers that having discovered that the Claimant did not serve notice and ought to therefore pay the Respondent for such notice, the Court should allow the amendments as sought and any inconveniences that may be suffered by the Claimant may be remedied through costs.
5. The Claimant/Respondent filed a Replying Affidavit sworn on 15<sup>th</sup> December 2021 by Mr. Elias Maundu Makau who avers that the application is geared at wasting the Court's time as the issues therein have been heard and determined by this Honourable Court vide a Ruling delivered on 21<sup>st</sup> September 2021. That the Respondent having lost the said application, cannot bring a new application on the same facts and issues and this Court should thus not be hoodwinked to believing that this is a new application. That the Court should find that the Application dated 12<sup>th</sup> October 2021 is res judicata and dismiss the same with costs.
6. The Claimant/Respondent nevertheless denies that he never served his notice period as he continued to work from home due to the corona pandemic protocols and in any event, the Respondent's claim for notice period had already been included in the amended response to claim dated 2<sup>nd</sup> March 2021. That the alleged crucial documents are not new and have been in the custody of the Respondent and thus ought to have been availed at the time the Respondent filed its amended response on 10<sup>th</sup> February 2021. The Claimant further avers that he will suffer great prejudice if the orders sought are granted as he will be forced to go back to pretrial and respond to new issues that are likely to alter his claim. That the Applicant on the other hand will not suffer any prejudice if this Court disallows the application owing to the fact that the alleged documents have always been in the possession of the Respondent. That the Applicant is also not being clear as to whether the custodians of the said documents had fallen sick or simply working from home owing to the pandemic as it has instead averred both. He also avers that the matter herein had already been set down for hearing on 9<sup>th</sup> March 2021 by consent of both Counsel before this Honourable Court contrary to assertions by the Applicant and seeks for the orders sought herein to be dismissed with costs.
7. Respondent/Applicant's Submissions  
The Respondent/Applicant submits that its application is grounded on the provisions of Section 3(1) of the *Employment and Labour Relations Court Act*, Sections 1A, 1B and 3A of the Civil Procedure Rules, and Article 25 of *the Constitution* of Kenya. That the said provisions demonstrate that this application has a legal basis and the annexed amendments are merited and can be brought at any time in the proceedings. The Respondent submits that this position was pronounced by Lessit JA in *Charo v Municipal Council of Mombasa & 2 Others* (Civil Application 56 of 2019) [2022] KECA 137



(KLR) (18 February 2022) (Ruling) that the general principle is that amendments should be allowed liberally, particularly where the hearing of a case has not commenced. It submits that in this regard, these amendments are in order and have been made in a timely manner. The Respondent/Applicant submits that the principles of amendment of pleadings have been asserted by Courts and cites the case of *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR, where the Court approvingly cited the case of *Budding v Murdoch* (1875) 1 Ch.D at p.42 wherein it was stated that the court will not refuse to allow an amendment simply because it introduces a new issue or case. It thus urges the Court to find that the Applicant's further amendment to the Counter-Claim is permissible as sought since, while it is not introducing a new case altogether, which would have been permissible, it does in fact verge close to it. The Respondent submits that the amendment still does not alter the character of the subject matter herein nor the cause of action, which still remains to be an employment dispute and that this Court should find the same permissible in the overarching interest of justice to both parties. It relies on the case of *Juliet Wamiri v James R. Njenga & Another* [2021] eKLR where Mbaru J. while allowing an amendment, cited with approval the case of *Rupa Cotton Mills (EPZ) Limited & 2 Others v Bank of Baroda (K) Limited* [2014] eKLR where it was held that a court should only deny a party leave to amend its pleadings as a last resort and with good or sufficient cause, that is when the other party will suffer great prejudice which cannot be compensated by way of costs or otherwise as may be just.

8. Claimant/ Respondent's Submissions

The Claimant/ Respondent submits that the application herein is res judicata as pleaded. He submits that this Court substantively determined the earlier application on its merits and dismissed it in its ruling of 21<sup>st</sup> September 2021 and no appeal nor an application for review has been lodged against the said ruling. That the Applicant has also notably not made any submissions regarding the issue of res-judicata raised in the Replying Affidavit of the Claimant and neither did the Applicant file a further Affidavit to rebut the said issue. That the issues raised in the Application have already been determined and should not be re-litigated. As regards the merits of the Application herein, the Claimant/Respondent submits that principles applicable in the grant of an order for amendment of pleadings are well settled in law. In the case of *Jared Edwin Kawimbi v Modern Coast Building and Construction Ltd* [2021] eKLR, the Court stated that the object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. That in the instant case, the matter that the Applicant purportedly seeks to introduce in its amended pleadings are not new as demonstrated at paragraphs 10 and 11 of the Respondent/Applicant's Counterclaim dated February 15, 2021. The Claimant/ Respondent relies on the decision in the case of *Juliet Wamiri v James R. Njenga & Another* [2021] eKLR which the Applicant also relies on and urges the dismissal of the Respondent's motion.

9. The guiding principles for granting leave to amend pleadings were set out by the Court of Appeal in the case of *Central Kenya Limited v Trust Bank Limited* [2000] 2 EA 365 as follows:

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy so as to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side”

10. The amendment of pleadings as noted by the parties is something a court can grant on merit. In the matter before the Court, the Respondent/Applicant had made an amendment without leave and



after the purging of the documents by the Court has now sought leave to effect amendments. The doctrine of res judicata is applicable where a determination is made on an issue. The prior decision issued by the Court in September 2021 related to amendment without leave. That issue was dealt with and conclusively determined. What the court is faced with now is a motion for the grant of leave to file amended pleadings. This is new. As such, having satisfied the Court that there is need to amend pleadings, the Respondent/Applicant is granted leave to file the amended pleadings within the next 14 days and serve the Claimant/Respondent. The Claimant/Respondent shall have 14 days upon service to file and serve his replies. Costs of the motion shall be in the cause.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY 2022**

**Nzioki wa Makau**

**JUDGE**

